PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9447

ADMINISTRATIVE LAW JUDGE: **JAY L. HIMES**

IN THE MATTER OF:

CRAIG A. LEWIS **APPELLANT**

SUPPLEMENTAL BOOK OF AUTHORITIES

May 4, 2026

Respectfully submitted,

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TAB 1

WORLD ANTI-DOPING AGENCY
play true

WORLD ANTI-DOPING CODE

2021

World Anti-Doping *Code*

The World Anti-Doping *Code* was first adopted in 2003 and took effect in 2004. It was subsequently amended four times, the first time effective 1 January 2009, the second time effective 1 January 2015, the third time effective 1 April 2018 (compliance amendments) and the fourth time effective 1 June 2019 (reporting of certain endogenous substances as *Atypical Findings*). The revised 2021 World Anti-Doping *Code* is effective as of 1 January 2021.

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PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE *CODE*

The purposes of the World Anti-Doping *Code* and the World Anti-Doping Program which supports it are:

- To protect the *Athletes'* fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide, and
- To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to the prevention of doping, including:

Education — to raise awareness, inform, communicate, to instill values, develop life skills and decision-making capability to prevent intentional and unintentional anti-doping rule violations.

Deterrence — to divert potential dopers, through ensuring that robust rules and sanctions are in place and salient for all stakeholders.

Detection — an effective *Testing* and investigations system not only enhances a deterrent effect, but also is effective in protecting clean *Athletes* and the spirit of sport by catching those committing anti-doping rule violations, while also helping to disrupt anyone engaged in doping behavior.

Enforcement — to adjudicate and sanction those found to have committed an anti-doping rule violation.

Rule of law — to ensure that all relevant stakeholders have agreed to submit to the *Code* and the *International Standards*, and that all measures taken in application of their anti-doping programs respect the *Code*, the *International Standards*, and the principles of proportionality and human rights.

The *Code*

The *Code* is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues

where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving consideration to the principles of proportionality and human rights.[1]

The World Anti-Doping Program

The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs. The main elements are:

Level 1: The *Code*

Level 2: *International Standards* and *Technical Documents*

Level 3: Models of Best Practice and Guidelines

International Standards

International Standards for different technical and operational areas within the anti-doping program have been and will be developed in consultation with the *Signatories* and governments and approved by *WADA*. The purpose of the *International Standards* is harmonization among *Anti-Doping Organizations* responsible for specific technical and operational parts of anti-doping programs. Adherence to the *International Standards* is mandatory for compliance with the *Code*. The *International Standards* may be revised from time to time by the *WADA* Executive Committee after reasonable consultation with *Signatories*, governments and other relevant stakeholders.

1 [Comment: The Olympic Charter and the International Convention against Doping in Sport 2005 adopted in Paris on 19 October 2005 ("UNESCO Convention"), both recognize the prevention of and the fight against doping in sport as a critical part of the mission of the International Olympic Committee and UNESCO, and also recognize the fundamental role of the Code.]

International Standards and all revisions will be published on the *WADA* website and shall become effective on the date specified in the *International Standard* or revision.[2]

Technical Documents

Technical Documents relating to mandatory technical requirements for the implementation of an *International Standard* may be approved and published from time to time by the *WADA* Executive Committee. Adherence to *Technical Documents* is mandatory for compliance with the *Code*. Where the implementation of a new or revised *Technical Document* is not time sensitive, the *WADA* Executive Committee shall allow for reasonable consultation with *Signatories*, governments and other relevant stakeholders. *Technical Documents* shall become effective immediately upon publication on the *WADA* website unless a later date is specified.[3]

2 [Comment: The International Standards contain much of the technical detail necessary for implementing the Code. International Standards will, in consultation with Signatories, governments and other relevant stakeholders, be developed by experts and set forth in separate documents. It is important that the WADA Executive Committee be able to make timely changes to the International Standards without requiring any amendment of the Code.]

3 [Comment: For example, where an additional analytical procedure is required before reporting a Sample as an Adverse Analytical Finding, that procedure would be mandated in a Technical Document issued immediately by the WADA Executive Committee.]

Models of Best Practice and Guidelines

Models of best practice and guidelines based on the *Code* and *International Standards* have been and will be developed to provide solutions in different areas of anti-doping. The models and guidelines will be recommended by *WADA* and made available to *Signatories* and other relevant stakeholders, but will not be mandatory. In addition to providing models of anti-doping documentation, *WADA* will also make some training assistance available to *Signatories*.[4]

4 [Comment: These model documents may provide alternatives from which stakeholders may select. Some stakeholders may choose to adopt the model rules and other models of best practices verbatim. Others may decide to adopt the models with modifications. Still other stakeholders may choose to develop their own rules consistent with the general principles and specific requirements set forth in the Code.

Model documents or guidelines for specific parts of anti-doping work have been developed and may continue to be developed based on generally recognized stakeholder needs and expectations.]

FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING *CODE*

Anti-doping programs are founded on the intrinsic value of sport. This intrinsic value is often referred to as "the spirit of sport": the ethical pursuit of human excellence through the dedicated perfection of each *Athlete's* natural talents.

Anti-doping programs seek to protect the health of *Athletes* and to provide the opportunity for *Athletes* to pursue human excellence without the *Use* of *Prohibited Substances* and *Prohibited Methods*.

Anti-doping programs seek to maintain the integrity of sport in terms of respect for rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world.

The spirit of sport is the celebration of the human spirit, body and mind. It is the essence of Olympism and is reflected in the values we find in and through sport, including:

- Health
- Ethics, fair play and honesty
- *Athletes'* rights as set forth in the *Code*
- Excellence in performance
- Character and *Education*
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other *Participants*
- Courage
- Community and solidarity

The spirit of sport is expressed in how we play true.

Doping is fundamentally contrary to the spirit of sport.

PART ONE
DOPING CONTROL

INTRODUCTION

Part One of the *Code* sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority, e.g., the International Olympic Committee, International Paralympic Committee, International Federations, *National Olympic Committees* and Paralympic Committees, *Major Event Organizations*, and *National Anti-Doping Organizations*. All such organizations are collectively referred to as *Anti-Doping Organizations*.

All provisions of the *Code* are mandatory in substance and must be followed as applicable by each *Anti-Doping Organization* and *Athlete* or other *Person*. The *Code* does not, however, replace or eliminate the need for comprehensive anti-doping rules to be adopted by each *Anti-Doping Organization*. While some provisions of the *Code* must be incorporated without substantive change by each *Anti-Doping Organization* in its own anti-doping rules, other provisions of the *Code* establish mandatory guiding principles that allow flexibility in the formulation of rules by each *Anti-Doping Organization* or establish requirements that must be followed by each *Anti-Doping Organization* but need not be repeated in its own anti-doping rules.[5]

5 [Comment: Those Articles of the Code which must be incorporated into each Anti-Doping Organization's rules without substantive change are set forth in Article 23.2.2. For example, it is critical for purposes of harmonization that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations. These rules must be the same whether a hearing takes place before an International Federation, at the national level or before the Court of Arbitration for Sport. Code provisions not listed in Article 23.2.2 are still mandatory in substance even though an Anti-Doping Organization is not required to incorporate them verbatim. Those provisions generally fall into two categories. First, some provisions direct Anti-Doping Organizations to take certain actions but there is no need to restate the provision in the Anti-Doping Organization's own anti-doping rules. For example, each Anti-Doping Organization must plan and conduct Testing as required by Article 5, but these directives to the Anti-Doping Organization need not be repeated in the Anti-Doping Organization's own rules. Second, some provisions are mandatory in substance but give

Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. *Athletes*, *Athlete Support Personnel* or other *Persons* (including board members, directors, officers, and specified employees and *Delegated Third Parties* and their employees) accept these rules as a condition of participation or involvement in sport and shall be bound by these rules.[6] Each *Signatory* shall establish rules and procedures to ensure that all *Athletes*, *Athlete Support Personnel* or other *Persons* under the authority of the *Signatory* and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant *Anti-Doping Organizations*.

Each *Signatory* shall establish rules and procedures to ensure that all *Athletes*, *Athlete Support Personnel* or other *Persons* under the authority of the *Signatory* and its member organizations are informed of the dissemination of their private data as required or authorized by the *Code*, and are bound by and compliant with the anti-doping rules found in the *Code*, and that the appropriate *Consequences* are imposed on those *Athletes* or other *Persons* who breach those rules. These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and

each Anti-Doping Organization some flexibility in the implementation of the principles stated in the provision. As an example, it is not necessary for effective harmonization to force all Signatories to use one single Results Management process as long as the process utilized satisfies the requirements stated in the Code and the International Standard for Results Management.]

6 [Comment: Where the Code requires a Person other than an Athlete or Athlete Support Person to be bound by the Code, such Person would of course not be subject to Sample collection or Testing, and would not be charged with an anti-doping rule violation under the Code for Use or Possession of a Prohibited Substance or Prohibited Method. Rather, such Person would only be subject to discipline for a violation of Code Articles 2.5 (Tampering), 2.7 (Trafficking), 2.8 (Administration), 2.9 (Complicity), 2.10 (Prohibited Association) and 2.11 (Retaliation). Furthermore, such Person would be subject to the additional roles and responsibilities according to Article 21.3. Also, the obligation to require an employee to be bound by the Code is subject to applicable law.]

human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the *Code* and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.

As provided in the *Code*, each *Anti-Doping Organization* shall be responsible for conducting all aspects of *Doping Control*. Any aspect of *Doping Control* or anti-doping *Education* may be delegated by an *Anti-Doping Organization* to a *Delegated Third Party*, however, the delegating *Anti-Doping Organization* shall require the *Delegated Third Party* to perform such aspects in compliance with the *Code* and *International Standards*, and the *Anti-Doping Organization* shall remain fully responsible for ensuring that any delegated aspects are performed in compliance with the *Code*.

ARTICLE 1 DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.11 of the *Code*.

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the *Prohibited List*.

The following constitute anti-doping rule violations:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete*'s *Sample*

2.1.1 It is the *Athletes*' personal duty to ensure that no *Prohibited Substance* enters their bodies. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, *Negligence* or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.[7]

7 [Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed; or, where the *Athlete's* B *Sample* is analyzed and the analysis of the *Athlete's* B *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's* A *Sample*; or where the *Athlete's* A or B *Sample* is split into two parts and the analysis of the confirmation part of the split *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first part of the split *Sample* or the *Athlete* waives analysis of the confirmation part of the split *Sample*.[8]

2.1.3 Excepting those substances for which a *Decision Limit* is specifically identified in the *Prohibited List* or a *Technical Document*, the presence of any reported quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the *Prohibited List*, *International Standards*, or *Technical Documents* may establish special criteria for reporting or the evaluation of certain *Prohibited Substances*.

8 [Comment to Article 2.1.2: The Anti-Doping Organization with Results Management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.]

2.2 *Use* or *Attempted Use* by an *Athlete* of a *Prohibited Substance* or a *Prohibited Method*[9]

2.2.1 It is the *Athletes'* personal duty to ensure that no *Prohibited Substance* enters their bodies and that no *Prohibited Method* is *Used*. Accordingly, it is not necessary that intent, *Fault*, *Negligence* or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation for *Use* of a *Prohibited Substance* or a *Prohibited Method*.

2.2.2 The success or failure of the *Use* or *Attempted Use* of a *Prohibited Substance* or *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or *Prohibited Method* was *Used* or *Attempted* to be *Used* for an anti-doping rule violation to be committed.[10]

9 [Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1.

For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

10 [Comment to Article 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance or a Prohibited Method requires proof of intent on the Athlete's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method. An Athlete's Use of a Prohibited Substance constitutes an anti-doping rule violation unless such Substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of Article 2.1 regardless of when that Substance might have been administered.)]

2.3 Evading, Refusing or Failing to Submit to *Sample* Collection by an *Athlete*

Evading *Sample* collection; or refusing or failing to submit to *Sample* collection without compelling justification after notification by a duly authorized *Person*.[11]

2.4 Whereabouts Failures by an *Athlete*

Any combination of three missed tests and/or filing failures, as defined in the *International Standard* for *Results Management*, within a twelve-month period by an *Athlete* in a *Registered Testing Pool*.

2.5 *Tampering* or *Attempted Tampering* with any Part of *Doping Control* by an *Athlete* or Other *Person*

2.6 *Possession* of a *Prohibited Substance* or a *Prohibited Method* by an *Athlete* or *Athlete Support Person*

2.6.1 *Possession* by an *Athlete In-Competition* of any *Prohibited Substance* or any *Prohibited Method*, or *Possession* by an *Athlete Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *Out-of-Competition* unless the *Athlete* establishes that the *Possession* is consistent with a *Therapeutic Use Exemption ("TUE")* granted in accordance with Article 4.4 or other acceptable justification.[12]

11 [Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]

12 [Comment to Articles 2.6.1 and 2.6.2: Acceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child.]

2.6.2 *Possession* by an *Athlete Support Person In-Competition* of any *Prohibited Substance* or any *Prohibited Method*, or *Possession* by an *Athlete Support Person Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *Out-of-Competition* in connection with an *Athlete*, *Competition* or training, unless the *Athlete Support Person* establishes that the *Possession* is consistent with a *TUE* granted to an *Athlete* in accordance with Article 4.4 or other acceptable justification.[13]

2.7 *Trafficking* or *Attempted Trafficking* in any *Prohibited Substance* or *Prohibited Method* by an *Athlete* or Other *Person*

2.8 *Administration* or *Attempted Administration* by an *Athlete* or Other *Person* to any *Athlete In-Competition* of any *Prohibited Substance* or *Prohibited Method*, or *Administration* or *Attempted Administration* to any *Athlete Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* that is Prohibited *Out-of-Competition*

2.9 Complicity or *Attempted* Complicity by an *Athlete* or Other *Person*

Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity or *Attempted* complicity involving an anti-doping rule violation, *Attempted* anti-doping rule violation or violation of Article 10.14.1 by another *Person*.[14]

13 [Comment to Articles 2.6.1 and 2.6.2: Acceptable justification may include, for example, (a) an Athlete or a team doctor carrying Prohibited Substances or Prohibited Methods for dealing with acute and emergency situations (e.g., an epinephrine auto-injector), or (b) an Athlete Possessing a Prohibited Substance or Prohibited Method for therapeutic reasons shortly prior to applying for and receiving a determination on a TUE.]

14 [Comment to Article 2.9: Complicity or Attempted Complicity may include either physical or psychological assistance.]

2.10 Prohibited Association by an *Athlete* or Other *Person*

2.10.1 Association by an *Athlete* or other *Person* subject to the authority of an *Anti-Doping Organization* in a professional or sport-related capacity with any *Athlete Support Person* who:

2.10.1.1 If subject to the authority of an *Anti-Doping Organization*, is serving a period of *Ineligibility*; or

2.10.1.2 If not subject to the authority of an *Anti-Doping Organization*, and where *Ineligibility* has not been addressed in a *Results Management* process pursuant to the *Code*, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*. The disqualifying status of such *Person* shall be in force for the longer of six (6) years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed; or

2.10.1.3 Is serving as a front or intermediary for an individual described in Article 2.10.1.1 or 2.10.1.2.

2.10.2 To establish a violation of Article 2.10, an *Anti-Doping Organization* must establish that the *Athlete* or other *Person* knew of the *Athlete Support Person's* disqualifying status.

The burden shall be on the *Athlete* or other *Person* to establish that any association with an *Athlete Support Person* described in Article 2.10.1.1 or 2.10.1.2 is not in a professional or sport-related capacity and/or that such association could not have been reasonably avoided.

Anti-Doping Organizations that are aware of *Athlete Support Personnel* who meet the criteria described in Article 2.10.1.1, 2.10.1.2, or 2.10.1.3 shall submit that information to *WADA*.[15]

2.11 Acts by an *Athlete* or Other *Person* to Discourage or Retaliate Against Reporting to Authorities

Where such conduct does not otherwise constitute a violation of Article 2.5:

2.11.1 Any act which threatens or seeks to intimidate another *Person* with the intent of discouraging the *Person* from the good-faith reporting of information that relates to an alleged anti-doping rule violation or alleged non-compliance with the *Code* to *WADA*, an *Anti-Doping Organization*, law enforcement, regulatory or professional disciplinary body, hearing body or *Person* conducting an investigation for *WADA* or an *Anti-Doping Organization*.

2.11.2 Retaliation against a *Person* who, in good faith, has provided evidence or information that relates to an alleged anti-doping rule violation or alleged non-compliance with the *Code* to *WADA*, an *Anti-Doping Organization*, law enforcement, regulatory or professional disciplinary

15 [Comment to Article 2.10: Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. This also prohibits association with any other Athlete who is acting as a coach or Athlete Support Person while serving a period of Ineligibility. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Person to serve as an agent or representative. Prohibited association need not involve any form of compensation.

While Article 2.10 does not require the Anti-Doping Organization to notify the Athlete or other Person about the Athlete Support Person's disqualifying status, such notice, if provided, would be important evidence to establish that the Athlete or other Person knew about the disqualifying status of the Athlete Support Person.]

body, hearing body or *Person* conducting an investigation for *WADA* or an *Anti-Doping Organization*.[16]

For purposes of Article 2.11, retaliation, threatening and intimidation include an act taken against such *Person* either because the act lacks a good faith basis or is a disproportionate response.[17]

ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

The *Anti-Doping Organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.[18] Where the *Code* places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified

16 [Comment to Article 2.11.2: This Article is intended to protect Persons who make good faith reports, and does not protect Persons who knowingly make false reports.]

17 [Comment to Article 2.11.2: Retaliation would include, for example, actions that threaten the physical or mental well-being or economic interests of the reporting Persons, their families or associates. Retaliation would not include an Anti-Doping Organization asserting in good faith an anti-doping rule violation against the reporting Person. For purposes of Article 2.11, a report is not made in good faith where the Person making the report knows the report to be false.]

18 [Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions.[19] The following rules of proof shall be applicable in doping cases:

3.2.1 Analytical methods or *Decision Limits* approved by *WADA* after consultation within the relevant scientific community or which have been the subject of peer review are presumed to be scientifically valid. Any *Athlete* or other *Person* seeking to challenge whether the conditions for such presumption have been met or to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify *WADA* of the challenge and the basis of the challenge. The initial hearing body, appellate body or *CAS*, on its own initiative, may also inform *WADA* of any such challenge. Within ten (10) days of *WADA's* receipt of such notice and the case file related to such challenge, *WADA* shall also have the right to intervene as a party, appear as amicus curiae or otherwise provide evidence

19 [Comment to Article 3.2: For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport.]

in such proceeding. In cases before *CAS*, at *WADA's* request, the *CAS* panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge.[20]

3.2.2 *WADA*-accredited laboratories, and other laboratories approved by *WADA*, are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the *International Standard* for Laboratories. The *Athlete* or other *Person* may rebut this presumption by establishing that a departure from the *International Standard* for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*.

If the *Athlete* or other *Person* rebuts the preceding presumption by showing that a departure from the *International Standard* for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*, then the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.[21]

20 [Comment to Article 3.2.1: For certain Prohibited Substances, WADA may instruct WADA-accredited laboratories not to report Samples as an Adverse Analytical Finding if the estimated concentration of the Prohibited Substance or its Metabolites or Markers is below a Minimum Reporting Level. WADA's decision in determining that Minimum Reporting Level or in determining which Prohibited Substances should be subject to Minimum Reporting Levels shall not be subject to challenge. Further, the laboratory's estimated concentration of such Prohibited Substance in a Sample may only be an estimate. In no event shall the possibility that the exact concentration of the Prohibited Substance in the Sample may be below the Minimum Reporting Level constitute a defense to an anti-doping rule violation based on the presence of that Prohibited Substance in the Sample.]

21 [Comment to Article 3.2.2: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. Thus, once the Athlete or other Person establishes the departure by a balance of probability, the Athlete or other Person's burden on causation is the somewhat lower standard of proof –

3.2.3 Departures from any other *International Standard* or other anti-doping rule or policy set forth in the *Code* or in an *Anti-Doping Organization's* rules shall not invalidate analytical results or other evidence of an anti-doping rule violation, and shall not constitute a defense to an anti-doping rule violation;[22] provided, however, if the *Athlete* or other *Person* establishes that a departure from one of the specific *International Standard* provisions listed below could reasonably have caused an anti-doping rule violation based on an *Adverse Analytical Finding* or whereabouts failure, then the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding* or whereabouts failure:

(i) a departure from the *International Standard* for *Testing* and Investigations related to *Sample* collection or *Sample* handling which could reasonably have caused an anti-doping rule violation based on an *Adverse Analytical Finding*, in which case the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*;

(ii) a departure from the *International Standard* for *Results Management* or *International Standard* for

"could reasonably have caused." If the Athlete or other Person satisfies this standard, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

22 [Comment to Article 3.2.3: Departures from an International Standard or other rule unrelated to Sample collection or handling, Adverse Passport Finding, or Athlete notification relating to whereabouts failure or B Sample opening – e.g., the International Standard for Education, International Standard for the Protection of Privacy and Personal Information or International Standard for Therapeutic Use Exemptions – may result in compliance proceedings by WADA but are not a defense in an anti-doping rule violation proceeding and are not relevant on the issue of whether the Athlete committed an anti-doping rule violation. Similarly, an Anti-Doping Organization's violation of the document referenced in Article 20.7.7 shall not constitute a defense to an anti-doping rule violation.]

Testing and Investigations related to an *Adverse Passport Finding* which could reasonably have caused an anti-doping rule violation, in which case the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the anti-doping rule violation;

(iii) a departure from the *International Standard* for *Results Management* related to the requirement to provide notice to the *Athlete* of the B *Sample* opening which could reasonably have caused an anti-doping rule violation based on an *Adverse Analytical Finding*, in which case the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*;[23]

(iv) a departure from the *International Standard* for *Results Management* related to *Athlete* notification which could reasonably have caused an anti-doping rule violation based on a whereabouts failure, in which case the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the whereabouts failure.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the *Athlete* or other *Person* to whom the decision pertained of those facts unless the *Athlete* or other *Person* establishes that the decision violated principles of natural justice.

3.2.5 The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the *Athlete* or other *Person* who is asserted to

23 [Comment to Article 3.2.3 (iii): An Anti-Doping Organization would meet its burden to establish that such departure did not cause the Adverse Analytical Finding by showing that, for example, the B Sample opening and analysis were observed by an independent witness and no irregularities were observed.]

have committed an anti-doping rule violation based on the *Athlete's* or other *Person's* refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the *Anti-Doping Organization* asserting the anti-doping rule violation.

ARTICLE 4 THE *PROHIBITED LIST*

4.1 Publication and Revision of the *Prohibited List*

WADA shall, as often as necessary and no less often than annually, publish the *Prohibited List* as an *International Standard*. The proposed content of the *Prohibited List* and all revisions shall be provided in writing promptly to all *Signatories* and governments for comment and consultation. Each annual version of the *Prohibited List* and all revisions shall be distributed promptly by *WADA* to each *Signatory*, *WADA*-accredited or approved laboratory, and government, and shall be published on *WADA's* website, and each *Signatory* shall take appropriate steps to distribute the *Prohibited List* to its members and constituents. The rules of each *Anti-Doping Organization* shall specify that, unless provided otherwise in the *Prohibited List* or a revision, the *Prohibited List* and revisions shall go into effect under the *Anti-Doping Organization's* rules three (3) months after publication of the *Prohibited List* by *WADA* without requiring any further action by the *Anti-Doping Organization*.[24]

24 [Comment to Article 4.1: The Prohibited List will be revised and published on an expedited basis whenever the need arises. However, for the sake of predictability, a new Prohibited List will be published every year whether or not changes have been made. WADA will always have the most current Prohibited List published on its website. The Prohibited List is an integral part of the International Convention against Doping in Sport. WADA will inform the Director-General of UNESCO of any change to the Prohibited List.]

4.2 *Prohibited Substances* and *Prohibited Methods* Identified on the *Prohibited List*

4.2.1 *Prohibited Substances* and *Prohibited Methods*

The *Prohibited List* shall identify those *Prohibited Substances* and *Prohibited Methods* which are prohibited as doping at all times (both *In-Competition* and *Out-of-Competition*) because of their potential to enhance performance in future *Competitions* or their masking potential, and those substances and methods which are prohibited *In-Competition* only. The *Prohibited List* may be expanded by *WADA* for a particular sport. *Prohibited Substances* and *Prohibited Methods* may be included in the *Prohibited List* by general category (e.g., anabolic agents) or by specific reference to a particular Substance or Method.[25]

4.2.2 *Specified Substances* or *Specified Methods*

For purposes of the application of Article 10, all *Prohibited Substances* shall be *Specified Substances* except as identified on the *Prohibited List*. No *Prohibited Method* shall be a *Specified Method* unless it is specifically identified as a *Specified Method* on the *Prohibited List*.[26]

25 [Comment to Article 4.2.1: Out-of-Competition Use of a Substance which is only prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the Substance or its Metabolites or Markers is reported for a Sample collected In-Competition.]

26 [Comment to Article 4.2.2: The Specified Substances and Specified Methods identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping Substances or methods. Rather, they are simply Substances and Methods which are more likely to have been consumed or used by an Athlete for a purpose other than the enhancement of sport performance.]

4.2.3 *Substances of Abuse*

For purposes of applying Article 10, *Substances of Abuse* shall include those *Prohibited Substances* which are specifically identified as *Substances of Abuse* on the *Prohibited List* because they are frequently abused in society outside of the context of sport.

4.2.4 New Classes of *Prohibited Substances* or *Prohibited Methods*

In the event *WADA* expands the *Prohibited List* by adding a new class of *Prohibited Substances* or *Prohibited Methods* in accordance with Article 4.1, *WADA*'s Executive Committee shall determine whether any or all *Prohibited Substances* or *Prohibited Methods* within the new class shall be considered *Specified Substances* or *Specified Methods* under Article 4.2.2 or *Substances of Abuse* under Article 4.2.3.

4.3 Criteria for Including Substances and Methods on the *Prohibited List*

WADA shall consider the following criteria in deciding whether to include a substance or method on the *Prohibited List*:

4.3.1 A substance or method shall be considered for inclusion on the *Prohibited List* if *WADA*, in its sole discretion, determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;[27]

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the *Use* of the substance or method represents an actual or potential health risk to the *Athlete*;

4.3.1.3 *WADA's* determination that the *Use* of the substance or method violates the spirit of sport described in the introduction to the *Code*.

4.3.2 A substance or method shall also be included on the *Prohibited List* if *WADA* determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the *Use* of other *Prohibited Substances* or *Prohibited Methods*.[28]

4.3.3 *WADA's* determination of the *Prohibited Substances* and *Prohibited Methods* that will be included on the *Prohibited List*, the classification of substances into categories on the *Prohibited List*, the classification of a substance as prohibited at all times or *In-Competition* only, the classification of a substance or method

27 [Comment to Article 4.3.1.1: This Article anticipates that there may be substances that, when used alone, are not prohibited but which will be prohibited if used in combination with certain other substances. A substance which is added to the Prohibited List because it has the potential to enhance performance only in combination with another substance shall be so noted and shall be prohibited only if there is evidence relating to both substances in combination.]

28 [Comment to Article 4.3.2: As part of the process each year, all Signatories, governments and other interested Persons are invited to provide comments to WADA on the content of the Prohibited List.]

as a *Specified Substance*, *Specified Method* or *Substance of Abuse* is final and shall not be subject to any challenge by an *Athlete* or other *Person* including, but not limited to, any challenge based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

4.4 *Therapeutic Use Exemptions ("TUEs")*

4.4.1 The presence of a *Prohibited Substance* or its *Metabolites* or *Markers*, and/or the *Use* or *Attempted Use*, *Possession* or *Administration* or *Attempted Administration* of a *Prohibited Substance* or *Prohibited Method* shall not be considered an anti-doping rule violation if it is consistent with the provisions of a *TUE* granted in accordance with the *International Standard* for *Therapeutic Use Exemptions*.

4.4.2 *Athletes* who are not *International-Level Athletes* shall apply to their *National Anti-Doping Organization* for a *TUE*. If the *National Anti-Doping Organization* denies the application, the *Athlete* may appeal exclusively to the appellate body described in Article 13.2.2.

4.4.3 *Athletes* who are *International-Level Athletes* shall apply to their International Federation.[29]

29 [Comment to Article 4.4.3: If the International Federation refuses to recognize a TUE granted by a National Anti-Doping Organization only because medical records or other information are missing that are needed to demonstrate satisfaction with the criteria in the International Standard for Therapeutic Use Exemptions, the matter should not be referred to WADA. Instead, the file should be completed and re-submitted to the International Federation.

If an International Federation chooses to test an Athlete who is not an International-Level Athlete, it must recognize a TUE granted by that Athlete's National Anti-Doping Organization.]

4.4.3.1 Where the *Athlete* already has a *TUE* granted by their *National Anti-Doping Organization* for the substance or method in question, if that *TUE* meets the criteria set out in the *International Standard* for *Therapeutic Use Exemptions*, then the International Federation must recognize it. If the International Federation considers that the *TUE* does not meet those criteria and so refuses to recognize it, it must notify the *Athlete* and the *Athlete's National Anti-Doping Organization* promptly, with reasons. The *Athlete* or the *National Anti-Doping Organization* shall have twenty-one (21) days from such notification to refer the matter to *WADA* for review. If the matter is referred to *WADA* for review, the *TUE* granted by the *National Anti-Doping Organization* remains valid for national-level *Competition* and *Out-of-Competition Testing* (but is not valid for international-level *Competition*) pending *WADA's* decision. If the matter is not referred to *WADA* for review within the twenty-one-day deadline, the *Athlete's National Anti-Doping Organization* must determine whether the original *TUE* granted by that *National Anti-Doping Organization* should nevertheless remain valid for national-level *Competition* and *Out-of-Competition Testing* (provided that the *Athlete* ceases to be an *International-Level Athlete* and does not participate in international-level *Competition*). Pending the *National Anti-Doping Organization's* decision, the *TUE* remains valid for national-level *Competition* and *Out-of-Competition Testing* (but is not valid for international-level *Competition*).

4.4.3.2 If the *Athlete* does not already have a *TUE* granted by their *National Anti-Doping Organization* for the substance or method in question, the *Athlete* must apply directly to the *Athlete's* International Federation for a *TUE* as soon as the need arises. If the International Federation (or the *National Anti-Doping Organization*, where it has agreed to consider the application on behalf of the International Federation) denies the *Athlete's* application, it must notify the *Athlete* promptly, with reasons. If the International Federation grants the *Athlete's* application, it must notify not only the *Athlete* but also the *Athlete's National Anti-Doping Organization*, and if the *National Anti-Doping Organization* considers that the *TUE* does not meet the criteria set out in the *International Standard* for *Therapeutic Use Exemptions*, it has twenty-one (21) days from such notification to refer the matter to *WADA* for review. If the *National Anti-Doping Organization* refers the matter to *WADA* for review, the *TUE* granted by the International Federation remains valid for international-level *Competition* and *Out-of-Competition Testing* (but is not valid for national-level *Competition*) pending *WADA's* decision. If the *National Anti-Doping Organization* does not refer the matter to *WADA* for review, the *TUE* granted by the International Federation becomes valid for national-level *Competition* as well when the twenty-one (21) day review deadline expires.

4.4.4 A *Major Event Organization* may require *Athletes* to apply to it for a *TUE* if they wish to *Use* a

Prohibited Substance or a *Prohibited Method* in connection with the *Event*. In that case:

4.4.4.1 The *Major Event Organization* must ensure a process is available for an *Athlete* to apply for a *TUE* if he or she does not already have one. If the *TUE* is granted, it is effective for its *Event* only.

4.4.4.2 Where the *Athlete* already has a *TUE* granted by the *Athlete's National Anti-Doping Organization* or International Federation, if that *TUE* meets the criteria set out in the *International Standard* for *Therapeutic Use Exemptions*, the *Major Event Organization* must recognize it. If the *Major Event Organization* decides the *TUE* does not meet those criteria and so refuses to recognize it, it must notify the *Athlete* promptly, explaining its reasons.

4.4.4.3 A decision by a *Major Event Organization* not to recognize or not to grant a *TUE* may be appealed by the *Athlete* exclusively to an independent body established or appointed by the *Major Event Organization* for that purpose. If the *Athlete* does not appeal (or the appeal is unsuccessful), the *Athlete* may not *Use* the substance or method in question in connection with the *Event*, but any *TUE* granted by the *Athlete's National Anti-Doping Organization* or International Federation for that substance or method remains valid outside of that *Event*.[30]

30 [Comment to Article 4.4.4.3: For example, the CAS Ad Hoc Division or a similar body may act as the independent appeal body for particular Events, or WADA may agree to perform that function. If neither CAS nor WADA are performing that function, WADA retains the right (but not the obligation) to review the TUE decisions made in connection with the Event at any time, in accordance with Article 4.4.6.]

4.4.5 If an *Anti-Doping Organization* chooses to collect a *Sample* from an *Athlete* who is not an *International-Level Athlete* or *National-Level Athlete*, and that *Athlete* is *Using* a *Prohibited Substance* or *Prohibited Method* for therapeutic reasons, the *Anti-Doping Organization* must permit the *Athlete* to apply for a retroactive *TUE*.

4.4.6 *WADA* must review an International Federation's decision not to recognize a *TUE* granted by the *National Anti-Doping Organization* that is referred to it by the *Athlete* or the *Athlete's National Anti-Doping Organization*. In addition, *WADA* must review an International Federation's decision to grant a *TUE* that is referred to it by the *Athlete's National Anti-Doping Organization*. *WADA* may review any other *TUE* decisions at any time, whether upon request by those affected or on its own initiative. If the *TUE* decision being reviewed meets the criteria set out in the *International Standard* for *Therapeutic Use Exemptions*, *WADA* will not interfere with it. If the *TUE* decision does not meet those criteria, *WADA* will reverse it.[31]

4.4.7 Any *TUE* decision by an International Federation (or by a *National Anti-Doping Organization* where it has agreed to consider the application on behalf of an International Federation) that is not reviewed by *WADA*, or that is reviewed by *WADA* but is not reversed upon review, may be appealed by the *Athlete* and/or the *Athlete's National Anti-Doping Organization*, exclusively to *CAS*.[32]

31 [Comment to Article 4.4.6: WADA shall be entitled to charge a fee to cover the costs of: (a) any review it is required to conduct in accordance with Article 4.4.6; and (b) any review it chooses to conduct, where the decision being reviewed is reversed.]

32 [Comment to Article 4.4.7: In such cases, the decision being appealed is the International Federation's TUE decision, not WADA's decision not to review the TUE decision or (having reviewed it) not to reverse the TUE decision. However, the time to appeal the TUE decision does not begin to run until the date that WADA communicates its decision. In any event, whether the decision has been reviewed by WADA or not, WADA shall be given notice of the appeal so that it may participate if it sees fit.]

4.4.8 A decision by *WADA* to reverse a *TUE* decision may be appealed by the *Athlete*, the *National Anti-Doping Organization* and/or the International Federation affected, exclusively to *CAS*.

4.4.9 A failure to render a decision within a reasonable time on a properly submitted application for grant/recognition of a *TUE* or for review of a *TUE* decision shall be considered a denial of the application thus triggering the applicable rights of review/appeal.

4.5 Monitoring Program

WADA, in consultation with *Signatories* and governments, shall establish a monitoring program regarding substances which are not on the *Prohibited List*, but which *WADA* wishes to monitor in order to detect potential patterns of misuse in sport. In addition, *WADA* may include in the monitoring program substances that are on the *Prohibited List*, but which are to be monitored under certain circumstances—e.g., *Out-of-Competition Use* of some substances prohibited *In-Competition* only or the combined *Use* of multiple substances at low doses ("stacking")—in order to establish prevalence of *Use* or to be able to implement adequate decisions in regards to their analysis by laboratories or their status within the *Prohibited List*.

WADA shall publish the substances that will be monitored.[33] Laboratories will report the instances of reported *Use* or detected presence of these substances to *WADA*. *WADA* shall make available to International Federations and *National Anti-Doping Organizations*, on at least an annual basis, aggregate information by sport regarding the monitored substances. Such monitoring program reports shall not contain additional details that

33 [Comment to Article 4.5: In order to improve the efficiency of the monitoring program, once a new substance is added to the published monitoring program, laboratories may re-process data and Samples previously analyzed in order to determine the absence or presence of any new substance.]

could link the monitoring results to specific *Samples*. *WADA* shall implement measures to ensure that strict anonymity of individual *Athletes* is maintained with respect to such reports. The reported *Use* or detected presence of a monitored substance shall not constitute an anti-doping rule violation.

ARTICLE 5 *TESTING* AND INVESTIGATIONS

5.1 Purpose of *Testing* and Investigations

Testing and investigations may be undertaken for any anti-doping purpose.[34]

5.1.1 *Testing* shall be undertaken to obtain analytical evidence as to whether the *Athlete* has violated Article 2.1 (Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*) or Article 2.2 (*Use* or *Attempted Use* by an *Athlete* of a *Prohibited Substance* or a *Prohibited Method*) of the *Code*.

5.2 Authority to Test

Any *Athlete* may be required to provide a *Sample* at any time and at any place by any *Anti-Doping Organization* with *Testing* authority over him or her.[35] Subject to the limitations for *Event Testing* set out in Article 5.3:

34 [Comment to Article 5.1: Where Testing is conducted for anti-doping purposes, the analytical results and data may be used for other legitimate purposes under the Anti-Doping Organization's rules. See, e.g., Comment to Article 23.2.2.]

35 [Comment to Article 5.2: Additional authority to conduct Testing may be conferred by means of bilateral or multilateral agreements among Signatories. Unless the Athlete has identified a sixty-minute Testing window during the following described time period, or otherwise consented to Testing during that period, before Testing an Athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organization should have serious and specific suspicion that the Athlete may be engaged in doping. A challenge to whether an Anti-Doping Organization had sufficient suspicion for Testing during this time period shall not be a defense to an anti-doping rule violation based on such test or attempted test.]

5.2.1 Each *National Anti-Doping Organization* shall have *In-Competition* and *Out-of-Competition Testing* authority over all *Athletes* who are nationals, residents, license-holders or members of sport organizations of that country or who are present in that *National Anti-Doping Organization's* country.

5.2.2 Each International Federation shall have *In-Competition* and *Out-of-Competition Testing* authority over all *Athletes* who are subject to its rules, including those who participate in *International Events* or who participate in *Events* governed by the rules of that International Federation, or who are members or license-holders of that International Federation or its member National Federations, or their members.

5.2.3 Each *Major Event Organization*, including the International Olympic Committee and the International Paralympic Committee, shall have *In-Competition Testing* authority for its *Events* and *Out-of-Competition Testing* authority over all *Athletes* entered in one of its future *Events* or who have otherwise been made subject to the *Testing* authority of the *Major Event Organization* for a future *Event*.

5.2.4 *WADA* shall have *In-Competition* and *Out-of-Competition Testing* authority as set out in Article 20.7.10.

5.2.5 *Anti-Doping Organizations* may test any *Athlete* over whom they have *Testing* authority who has not retired, including *Athletes* serving a period of *Ineligibility*.

5.2.6 If an International Federation or *Major Event Organization* delegates or contracts any part of *Testing* to a *National Anti-Doping Organization* directly or through a National Federation, that *National Anti-Doping Organization* may collect additional *Samples* or direct the laboratory to perform additional types of analysis at the *National Anti-Doping Organization's* expense. If

additional *Samples* are collected or additional types of analysis are performed, the International Federation or *Major Event Organization* shall be notified.

5.3 *Event Testing*

5.3.1 Except as otherwise provided below, only a single organization shall have authority to conduct *Testing* at *Event Venues* during an *Event Period*. At *International Events*, the international organization which is the ruling body for the *Event* (e.g., the International Olympic Committee for the Olympic Games, the International Federation for a World Championship and Panam Sports for the Pan American Games) shall have authority to conduct *Testing*. At *National Events*, the *National Anti-Doping Organization* of that country shall have authority to conduct *Testing*. At the request of the ruling body for an *Event*, any *Testing* during the *Event Period* outside of the *Event Venues* shall be coordinated with that ruling body.[36]

5.3.2 If an *Anti-Doping Organization*, which would otherwise have *Testing* authority but is not responsible for initiating and directing *Testing* at an *Event*, desires to conduct *Testing* of *Athletes* at the *Event Venues* during the *Event Period*, the *Anti-Doping Organization* shall first confer with the ruling body of the *Event* to obtain permission to conduct and coordinate such *Testing*. If the *Anti-Doping Organization* is not satisfied with the response from the ruling body of the *Event*, the *Anti-Doping Organization* may, in accordance with procedures described in the *International Standard* for *Testing* and Investigations, ask *WADA* for permission to conduct *Testing* and to

36 [Comment to Article 5.3.1: Some ruling bodies for International Events may be doing their own Testing outside of the Event Venues during the Event Period and thus want to coordinate that Testing with National Anti-Doping Organization Testing.]

determine how to coordinate such *Testing*. *WADA* shall not grant approval for such *Testing* before consulting with and informing the ruling body for the *Event*. *WADA's* decision shall be final and not subject to appeal. Unless otherwise provided in the authorization to conduct *Testing*, such tests shall be considered *Out-of-Competition* tests. *Results Management* for any such test shall be the responsibility of the *Anti-Doping Organization* initiating the test unless provided otherwise in the rules of the ruling body of the *Event*.[37]

5.4 *Testing* Requirements

5.4.1 *Anti-Doping Organizations* shall conduct test distribution planning and *Testing* as required by the *International Standard* for *Testing* and Investigations.

5.4.2 Where reasonably feasible, *Testing* shall be coordinated through *ADAMS* in order to maximize the effectiveness of the combined *Testing* effort and to avoid unnecessary repetitive *Testing*.

5.5 *Athlete* Whereabouts Information

Athletes who have been included in a *Registered Testing Pool* by their International Federation and/or *National Anti-Doping Organization* shall provide whereabouts information in the manner specified in the *International Standard* for *Testing* and Investigations and shall be subject to *Consequences* for Article 2.4 violations as provided in Article 10.3.2. The International Federations

37 [Comment to Article 5.3.2: Before giving approval to a National Anti-Doping Organization to initiate and conduct Testing at an International Event, WADA shall consult with the international organization which is the ruling body for the Event. Before giving approval to an International Federation to initiate and conduct Testing at a National Event, WADA shall consult with the National Anti-Doping Organization of the country where the Event takes place. The Anti-Doping Organization "initiating and directing Testing" may, if it chooses, enter into agreements with a Delegated Third Party to which it delegates responsibility for Sample collection or other aspects of the Doping Control process.]

and *National Anti-Doping Organizations* shall coordinate the identification of such *Athletes* and the collection of their whereabouts information. Each International Federation and *National Anti-Doping Organization* shall make available through *ADAMS* a list which identifies those Athletes included in its *Registered Testing Pool* by name. *Athletes* shall be notified before they are included in a *Registered Testing Pool* and when they are removed from that pool. The whereabouts information they provide while in the *Registered Testing Pool* will be accessible through *ADAMS* to *WADA* and to other *Anti-Doping Organizations* having authority to test the *Athlete* as provided in Article 5.2. Whereabouts information shall be maintained in strict confidence at all times; shall be used exclusively for purposes of planning, coordinating or conducting *Doping Control*, providing information relevant to the *Athlete Biological Passport* or other analytical results, to support an investigation into a potential anti-doping rule violation, or to support proceedings alleging an anti-doping rule violation; and shall be destroyed after it is no longer relevant for these purposes in accordance with the International Standard for the Protection of Privacy and Personal Information.

Anti-Doping Organizations may, in accordance with the *International Standard* for *Testing* and Investigations, collect whereabouts information from *Athletes* who are not included within a *Registered Testing Pool* and impose appropriate and proportionate non-*Code* Article 2.4 consequences under their own rules.

5.6 Retired *Athletes* Returning to *Competition*

5.6.1 If an *International*- or *National-Level Athlete* in a *Registered Testing Pool* retires and then wishes to return to active participation in sport, the *Athlete* shall not compete in *International Events* or *National Events* until the *Athlete* has made himself or herself available for *Testing*, by giving six-months prior written notice to their International Federation and *National Anti-Doping Organization*. *WADA*, in consultation

with the relevant International Federation and *National Anti-Doping Organization*, may grant an exemption to the six-month written notice rule where the strict application of that rule would be unfair to an *Athlete*. This decision may be appealed under Article 13.[38]

5.6.1.1 Any competitive results obtained in violation of Article 5.6.1 shall be *Disqualified* unless the *Athlete* can establish that he or she could not have reasonably known that this was an *International Event* or a *National Event*.

5.6.2 If an *Athlete* retires from sport while subject to a period of *Ineligibility*, the *Athlete* must notify the *Anti-Doping Organization* that imposed the period of *Ineligibility* in writing of such retirement. If the *Athlete* then wishes to return to active competition in sport, the *Athlete* shall not compete in *International Events* or *National Events* until the *Athlete* has made himself or herself available for *Testing* by giving six-month prior written notice (or notice equivalent to the period of *Ineligibility* remaining as of the date the *Athlete* retired, if that period was longer than six (6) months) to the *Athlete's* International Federation and *National Anti-Doping Organization*.

5.7 Investigations and Intelligence Gathering

Anti-Doping Organizations shall have the capability to conduct, and shall conduct, investigations and gather intelligence as required by the *International Standard* for *Testing* and Investigations.

38 [Comment to Article 5.6.1: Guidance for determining whether an exemption is warranted will be provided by WADA.]

ARTICLE 6 ANALYSIS OF *SAMPLES*

Samples shall be analyzed in accordance with the following principles:

6.1 Use of Accredited, Approved Laboratories and Other Laboratories

For purposes of directly establishing an *Adverse Analytical Finding* under Article 2.1, *Samples* shall be analyzed only in *WADA*-accredited laboratories or laboratories otherwise approved by *WADA*. The choice of the *WADA*-accredited or *WADA*-approved laboratory used for the *Sample* analysis shall be determined exclusively by the *Anti-Doping Organization* responsible for *Results Management*.[39]

6.1.1 As provided in Article 3.2, facts related to anti-doping rule violations may be established by any reliable means. This would include, for example, reliable laboratory or other forensic testing conducted outside of *WADA*-accredited or approved laboratories.

39 [Comment to Article 6.1: For cost and geographic access reasons, WADA may approve laboratories which are not WADA-accredited to perform particular analyses, for example, analysis of blood which should be delivered from the collection site to the laboratory within a set deadline. Before approving any such laboratory, WADA will ensure it meets the high analytical and custodial standards required by WADA. Violations of Article 2.1 may be established only by Sample analysis performed by a WADA-accredited laboratory or another laboratory approved by WADA. Violations of other Articles may be established using analytical results from other laboratories so long as the results are reliable.]

6.2 Purpose of Analysis of *Samples* and Data

Samples and related analytical data or *Doping Control* information shall be analyzed to detect *Prohibited Substances* and *Prohibited Methods* identified on the *Prohibited List* and other substances as may be directed by *WADA* pursuant to Article 4.5, or to assist an *Anti-Doping Organization* in profiling relevant parameters in an *Athlete's* urine, blood or other matrix, including for DNA or genomic profiling, or for any other legitimate anti-doping purpose.[40]

6.3 Research on *Samples* and Data

Samples, related analytical data and *Doping Control* information may be used for anti-doping research purposes, although no *Sample* may be used for research without the *Athlete's* written consent. *Samples* and related analytical data or *Doping Control* information used for research purposes shall first be processed in such a manner as to prevent *Samples* and related analytical data or *Doping Control* information being traced back to a particular *Athlete*.[41] Any research involving *Samples* and related analytical data or *Doping Control* information shall adhere to the principles set out in Article 19.

40 [Comment to Article 6.2: For example, relevant Doping Control-related information could be used to direct Target Testing or to support an anti-doping rule violation proceeding under Article 2.2, or both. See also Comments to Articles 5.1 and 23.2.2.]

41 [Comment to Article 6.3: As is the case in most medical or scientific contexts, use of Samples and related information for quality assurance, quality improvement, method improvement and development or to establish reference populations is not considered research. Samples and related information used for such permitted non-research purposes must also first be processed in such a manner as to prevent them from being traced back to the particular Athlete, having due regard to the principles set out in Article 19, as well as the requirements of the International Standard for Laboratories and International Standard for the Protection of Privacy and Personal Information.]

6.4 Standards for *Sample* Analysis and Reporting[42]

Laboratories shall analyze *Samples* and report results in conformity with the *International Standard* for Laboratories.

6.4.1 Laboratories at their own initiative and expense may analyze *Samples* for *Prohibited Substances* or *Prohibited Methods* not included on the standard *Sample* analysis menu, or as requested by the *Anti-Doping Organization* that initiated and directed *Sample* collection. Results from any such analysis shall be reported to that *Anti-Doping Organization* and have the same validity and *Consequences* as any other analytical result.

6.5 Further Analysis of a *Sample* Prior to or During *Results Management*

There shall be no limitation on the authority of a laboratory to conduct repeat or additional analysis on a *Sample* prior to the time an *Anti-Doping Organization* notifies an *Athlete* that the *Sample* is the basis for an Article 2.1 anti-doping rule violation charge. If after such notification the *Anti-Doping Organization* wishes to conduct additional analysis on that *Sample*, it may do so with the consent of the *Athlete* or approval from a hearing body.

6.6 Further Analysis of a *Sample* After it has been Reported as Negative or has Otherwise not Resulted in an Anti-Doping Rule Violation Charge

After a laboratory has reported a *Sample* as negative, or the *Sample* has not otherwise resulted in an anti-doping rule violation charge, it may be stored and subjected to further analyses for the purpose of Article 6.2 at any

42 [Comment to Article 6.4: The objective of this Article is to extend the principle of "Intelligent Testing" to the Sample analysis menu so as to most effectively and efficiently detect doping. It is recognized that the resources available to fight doping are limited and that increasing the Sample analysis menu may, in some sports and countries, reduce the number of Samples which can be analyzed.]

time exclusively at the direction of either the *Anti-Doping Organization* that initiated and directed *Sample* collection or *WADA*. Any other *Anti-Doping Organization* with authority to test the *Athlete* that wishes to conduct further analysis on a stored *Sample* may do so with the permission of the *Anti-Doping Organization* that initiated and directed *Sample* collection or *WADA*, and shall be responsible for any follow-up *Results Management*. Any *Sample* storage or further analysis initiated by *WADA* or another *Anti-Doping Organization* shall be at *WADA's* or that organization's expense. Further analysis of *Samples* shall conform with the requirements of the *International Standard* for Laboratories.

6.7 Split of A or B *Sample*

Where *WADA*, an *Anti-Doping Organization* with *Results Management* authority and/or a *WADA*-accredited laboratory (with approval from *WADA* or the *Anti-Doping Organization* with *Results Management* authority) wishes to split an A or B *Sample* for the purpose of using the first part of the split *Sample* for an A *Sample* analysis and the second part of the split *Sample* for confirmation, then the procedures set forth in the *International Standard* for Laboratories shall be followed.

6.8 *WADA*'s Right to Take Possession of *Samples* and Data

WADA may, in its sole discretion at any time, with or without prior notice, take physical possession of any *Sample* and related analytical data or information in the possession of a laboratory or *Anti-Doping Organization*. Upon request by *WADA*, the laboratory or *Anti-Doping Organization* in possession of the *Sample* or data shall immediately grant access to and enable *WADA* to take physical possession of the *Sample* or data.[43] If *WADA* has not provided prior notice to the laboratory or *Anti-Doping Organization* before taking possession of a *Sample* or data, it shall provide such notice to the laboratory and to each *Anti-Doping Organization* whose *Samples* or data have been taken by *WADA* within a reasonable time after taking possession. After analysis and any investigation of a seized *Sample* or data, *WADA* may direct another *Anti-Doping Organization* with authority to test the *Athlete* to assume *Results Management* responsibility for the *Sample* or data if a potential anti-doping rule violation is discovered.[44]

43 [Comment to Article 6.8: Resistance or refusal to WADA taking physical possession of Samples or data could constitute Tampering, Complicity or an act of non-compliance as provided in the International Standard for Code Compliance by Signatories, and could also constitute a violation of the International Standard for Laboratories. Where necessary, the laboratory and/or the Anti-Doping Organization shall assist WADA in ensuring that the seized Sample or data are not delayed in exiting the applicable country.]

44 [Comment to Article 6.8: WADA would not, of course, unilaterally take possession of Samples or analytical data without good cause related to a potential anti-doping rule violation, non-compliance by a Signatory or doping activities by another Person. However, the decision as to whether good cause exists is for WADA to make in its discretion and shall not be subject to challenge. In particular, whether there is good cause or not shall not be a defense against an anti-doping rule violation or its Consequences.]

ARTICLE 7 *RESULTS MANAGEMENT*: RESPONSIBILITY, INITIAL REVIEW, NOTICE AND *PROVISIONAL SUSPENSIONS*[45]

Results Management under the *Code* (as set forth in Articles 7, 8 and 13) establishes a process designed to resolve anti-doping rule violation matters in a fair, expeditious and efficient manner. Each *Anti-Doping Organization* conducting *Results Management* shall establish a process for the pre-hearing administration of potential anti-doping rule violations that respects the principles set forth in this Article. While each *Anti-Doping Organization* is permitted to adopt and implement its own *Results Management* process, *Results Management* for every *Anti-Doping Organization* shall at a minimum meet the requirements set forth in the *International Standard* for *Results Management*.

7.1 Responsibility for Conducting *Results Management*

Except as otherwise provided in Articles 6.6, 6.8 and 7.1.3 through 7.1.5 below, *Results Management* shall be the responsibility of, and shall be governed by, the procedural rules of the *Anti-Doping Organization* that initiated and directed *Sample* collection (or, if no *Sample* collection is involved, the *Anti-Doping Organization* which first provides notice to an *Athlete* or other *Person* of a potential anti-doping rule violation and then diligently

45 [Comment to Article 7: Various Signatories have created their own approaches to Results Management. While the various approaches have not been entirely uniform, many have proven to be fair and effective systems for Results Management. The Code does not supplant each of the Signatories' Results Management systems. This Article and the International Standard for Results Management do, however, specify basic principles in order to ensure the fundamental fairness of the Results Management process which must be observed by each Signatory. The specific anti-doping rules of each Signatory shall be consistent with these basic principles. Not all anti-doping proceedings which have been initiated by an Anti-Doping Organization need to go to hearing. There may be cases where the Athlete or other Person agrees to the sanction which is either mandated by the Code or which the Anti-Doping Organization considers appropriate where flexibility in sanctioning is permitted. In all cases, a sanction imposed on the basis of such an agreement will be reported to parties with a right to appeal under Article 13.2.3 as provided in Article 14 and published as provided in Article 14.3.]

pursues that anti-doping rule violation). Regardless of which organization conducts *Results Management*, it shall respect the *Results Management* principles set forth in this Article, Article 8, Article 13 and the *International Standard* for *Results Management*, and each *Anti-Doping Organization's* rules shall incorporate and implement the rules identified in Article 23.2.2 without substantive change.

7.1.1 If a dispute arises between *Anti-Doping Organizations* over which *Anti-Doping Organization* has *Results Management* responsibility, *WADA* shall decide which organization has such responsibility. *WADA's* decision may be appealed to *CAS* within seven (7) days of notification of the *WADA* decision by any of the *Anti-Doping Organizations* involved in the dispute. The appeal shall be dealt with by *CAS* in an expedited manner and shall be heard before a single arbitrator. Any *Anti-Doping Organization* seeking to conduct *Results Management* outside of the authority provided in this Article 7.1 may seek approval to do so from *WADA*.

7.1.2 Where a *National Anti-Doping Organization* elects to collect additional *Samples* pursuant to Article 5.2.6, then it shall be considered the *Anti-Doping Organization* that initiated and directed *Sample* collection. However, where the *National Anti-Doping Organization* only directs the laboratory to perform additional types of analysis at the *National Anti-Doping Organization's* expense, then the International Federation or *Major Event Organization* shall be considered the *Anti-Doping Organization* that initiated and directed *Sample* collection.

7.1.3 In circumstances where the rules of a *National Anti-Doping Organization* do not give the *National Anti-Doping Organization* authority over an *Athlete* or other *Person* who is not a national, resident, license holder, or member of a sport

organization of that country, or the *National Anti-Doping Organization* declines to exercise such authority, *Results Management* shall be conducted by the applicable International Federation or by a third party with authority over the *Athlete* or other *Person* as directed by the rules of the International Federation. For *Results Management* purposes, for a test or a further analysis conducted by *WADA* on its own initiative, or an anti-doping rule violation discovered by *WADA*, *WADA* shall designate an *Anti-Doping Organization* with authority over the *Athlete* or other *Person*.[46]

7.1.4 For *Results Management* relating to a *Sample* initiated and taken during an *Event* conducted by a *Major Event Organization*, or an anti-doping rule violation occurring during such *Event*, the *Major Event Organization* for that *Event* shall assume *Results Management* responsibility to at least the limited extent of conducting a hearing to determine whether an anti-doping rule violation was committed and, if so, the applicable *Disqualifications* under Articles 9 and 10.1, any forfeiture of any medals, points, or prizes from that *Event*, and any recovery of costs applicable to the anti-doping rule violation. In the event the *Major Event Organization* assumes only limited *Results Management* responsibility, the case shall be referred by the *Major Event Organization* to the applicable International Federation for completion of *Results Management*.

46 [Comment to Article 7.1.3: The Athlete's or other Person's International Federation has been made the Anti-Doping Organization of last resort for Results Management to avoid the possibility that no Anti-Doping Organization would have authority to conduct Results Management. An International Federation is free to provide in its own anti-doping rules that the Athlete's or other Person's National Anti-Doping Organization shall conduct Results Management.]

7.1.5 *WADA* may direct an *Anti-Doping Organization* with *Results Management* authority to conduct *Results Management* in a particular case. If that *Anti-Doping Organization* refuses to conduct *Results Management* within a reasonable deadline set by *WADA*, such refusal shall be considered an act of non-compliance, and *WADA* may direct another *Anti-Doping Organization* with authority over the *Athlete* or other *Person*, that is willing to do so, to take *Results Management* responsibility in place of the refusing *Anti-Doping Organization* or, if there is no such *Anti-Doping Organization*, any other *Anti-Doping Organization* that is willing to do so. In such case, the refusing *Anti-Doping Organization* shall reimburse the costs and attorney fees of conducting *Results Management* to the other *Anti-Doping Organization* designated by *WADA*, and a failure to reimburse costs and attorney's fees shall be considered an act of non-compliance.[47]

7.1.6 *Results Management* in relation to a potential whereabouts failure (a filing failure or a missed test) shall be administered by the International Federation or the *National Anti-Doping Organization* with whom the *Athlete* in question files whereabouts information, as provided in the *International Standard* for *Results Management*. The *Anti-Doping Organization* that determines a filing failure or a missed test shall submit that information to *WADA* through *ADAMS*, where it will be made available to other relevant *Anti-Doping Organizations*.

47 [Comment to Article 7.1.5: Where WADA directs another Anti-Doping Organization to conduct Results Management or other Doping Control activities, this is not considered a "delegation" of such activities by WADA.]

7.2 Review and Notification Regarding Potential Anti-Doping Rule Violations

Review and notification with respect to a potential anti-doping rule violation shall be carried out in accordance with the *International Standard* for *Results Management*.

7.3 Identification of Prior Anti-Doping Rule Violations

Before giving an *Athlete* or other *Person* notice of a potential anti-doping rule violation as provided above, the *Anti-Doping Organization* shall refer to *ADAMS* and contact *WADA* and other relevant *Anti-Doping Organizations* to determine whether any prior anti-doping rule violation exists.

7.4 Principles Applicable to *Provisional Suspensions*[48]

7.4.1 Mandatory *Provisional Suspension* after an *Adverse Analytical Finding* or *Adverse Passport Finding*

The *Signatories* described below in this paragraph shall adopt rules providing that when an *Adverse Analytical Finding* or *Adverse Passport Finding* (upon completion of the *Adverse Passport Finding*

48 [Comment to Article 7.4: Before a Provisional Suspension can be unilaterally imposed by an Anti-Doping Organization, the internal review specified in the Code must first be completed. In addition, the Signatory imposing a Provisional Suspension shall ensure that the Athlete is given an opportunity for a Provisional Hearing either before or promptly after the imposition of the Provisional Suspension, or an expedited final hearing under Article 8 promptly after imposition of the Provisional Suspension. The Athlete has a right to appeal under Article 13.2.3.

In the rare circumstance where the B Sample analysis does not confirm the A Sample finding, the Athlete who had been Provisionally Suspended will be allowed, where circumstances permit, to participate in subsequent Competitions during the Event.

Similarly, depending upon the relevant rules of the International Federation in a Team Sport, if the team is still in Competition, the Athlete may be able to take part in future Competitions.

Athletes and other Persons shall receive credit for a Provisional Suspension against any period of Ineligibility which is ultimately imposed or accepted as provided in Article 10.13.2.]

review process) is received for a *Prohibited Substance* or a *Prohibited Method*, other than a *Specified Substance* or *Specified Method*, a *Provisional Suspension* shall be imposed promptly upon or after the review and notification required by Article 7.2: where the *Signatory* is the ruling body of an *Event* (for application to that *Event*); where the *Signatory* is responsible for team selection (for application to that team selection); where the *Signatory* is the applicable International Federation; or where the *Signatory* is another *Anti-Doping Organization* which has *Results Management* authority over the alleged anti-doping rule violation. A mandatory *Provisional Suspension* may be eliminated if: (i) the *Athlete* demonstrates to the hearing panel that the violation is likely to have involved a *Contaminated Product*, or (ii) the violation involves a *Substance of Abuse* and the *Athlete* establishes entitlement to a reduced period of *Ineligibility* under Article 10.2.4.1. A hearing body's decision not to eliminate a mandatory *Provisional Suspension* on account of the *Athlete's* assertion regarding a *Contaminated Product* shall not be appealable.

7.4.2 Optional *Provisional Suspension* Based on an *Adverse Analytical Finding* for *Specified Substances*, *Specified Methods*, *Contaminated Products*, or Other Anti-Doping Rule Violations

A *Signatory* may adopt rules, applicable to any *Event* for which the *Signatory* is the ruling body or to any team selection process for which the *Signatory* is responsible or where the *Signatory* is the applicable International Federation or has *Results Management* authority over the alleged anti-doping rule violation, permitting *Provisional Suspensions* to be imposed for anti-doping rule violations not covered by Article 7.4.1 prior to analysis of the *Athlete's* B *Sample* or final hearing as described in Article 8.

7.4.3 Opportunity for Hearing or Appeal

Notwithstanding Articles 7.4.1 and 7.4.2, a *Provisional Suspension* may not be imposed unless the rules of the *Anti-Doping Organization* provide the *Athlete* or other *Person* with: (a) an opportunity for a *Provisional Hearing*, either before the imposition of the *Provisional Suspension* or on a timely basis after the imposition of the *Provisional Suspension*; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a *Provisional Suspension*. The rules of the *Anti-Doping Organization* shall also provide an opportunity for an expedited appeal against the imposition of a *Provisional Suspension*, or the decision not to impose a *Provisional Suspension*, in accordance with Article 13.

7.4.4 Voluntary Acceptance of *Provisional Suspension*

Athletes on their own initiative may voluntarily accept a *Provisional Suspension* if done so prior to the later of: (i) the expiration of ten (10) days from the report of the B *Sample* (or waiver of the B *Sample*) or ten (10) days from the notice of any other anti-doping rule violation, or (ii) the date on which the *Athlete* first competes after such report or notice. Other *Persons* on their own initiative may voluntarily accept a *Provisional Suspension* if done so within ten (10) days from the notice of the anti-doping rule violation. Upon such voluntary acceptance, the *Provisional Suspension* shall have the full effect and be treated in the same manner as if the *Provisional Suspension* had been imposed under Article 7.4.1 or 7.4.2; provided, however, at any time after voluntarily accepting a *Provisional Suspension*, the *Athlete* or other *Person* may withdraw such acceptance, in which event the *Athlete* or other *Person* shall not receive any credit for time previously served during the *Provisional Suspension*.

7.4.5 If a *Provisional Suspension* is imposed based on an A *Sample Adverse Analytical Finding* and a subsequent B *Sample* analysis (if requested by the *Athlete* or *Anti-Doping Organization*) does not confirm the A *Sample* analysis, then the *Athlete* shall not be subject to any further *Provisional Suspension* on account of a violation of Article 2.1. In circumstances where the *Athlete* (or the *Athlete's* team as may be provided in the rules of the applicable *Major Event Organization* or International Federation) has been removed from an *Event* based on a violation of Article 2.1 and the subsequent B *Sample* analysis does not confirm the A *Sample* finding, if, without otherwise affecting the *Event*, it is still possible for the *Athlete* or team to be reinserted, the *Athlete* or team may continue to take part in the *Event*.

7.5 *Results Management* Decisions

7.5.1 *Results Management* decisions or adjudications by *Anti-Doping Organizations*, must not purport to be limited to a particular geographic area or sport and shall address and determine without limitation the following issues: (i) whether an anti-doping rule violation was committed or a *Provisional Suspension* should be imposed, the factual basis for such determination, and the specific *Code* Articles violated, and (ii) all *Consequences* flowing from the anti-doping rule violation(s), including applicable *Disqualifications* under Articles 9 and 10.10, any forfeiture of medals or prizes, any period of *Ineligibility* (and the date it begins to run) and any *Financial Consequences*, except that *Major Event Organizations* shall not be required to determine *Ineligibility* or *Financial Consequences* beyond the scope of their *Event*.[49]

49 [Comment to Article 7.5.1: Results Management decisions include Provisional Suspensions.]

7.5.2 A *Results Management* decision or adjudication by a *Major Event Organization* in connection with one of its *Events* may be limited in its scope but shall address and determine, at a minimum, the following issues: (i) whether an anti-doping rule violation was committed, the factual basis for such determination, and the specific *Code* Articles violated, and (ii) applicable *Disqualifications* under Articles 9 and 10.1, with any resulting forfeiture of medals, points and prizes. In the event a *Major Event Organization* accepts only limited responsibility for *Results Management* decisions, it must comply with Article 7.1.4.[50]

7.6 Notification of *Results Management* Decisions

Athletes, other *Persons*, *Signatories* and *WADA* shall be notified of *Results Management* decisions as provided in Article 14 and the *International Standard* for *Results Management*.

50 [Comment to Article 7.5.2: With the exception of Results Management decisions by Major Event Organizations, each decision by an Anti-Doping Organization should address whether an anti-doping rule violation was committed and all Consequences flowing from the violation, including any Disqualifications other than Disqualification under Article 10.1 (which is left to the ruling body for an Event). Pursuant to Article 15, such decision and its imposition of Consequences shall have automatic effect in every sport in every country. For example, for a determination that an Athlete committed an anti-doping rule violation based on an Adverse Analytical Finding for a Sample taken In-Competition, the Athlete's results obtained in the Competition would be Disqualified under Article 9 and all other competitive results obtained by the Athlete from the date the Sample was collected through the duration of the period of Ineligibility are also Disqualified under Article 10.10; if the Adverse Analytical Finding resulted from Testing at an Event, it would be the Major Event Organization's responsibility to decide whether the Athlete's other individual results in the Event prior to Sample collection are also Disqualified under Article 10.1.]

7.7 Retirement from Sport[51]

If an *Athlete* or other *Person* retires while a *Results Management* process is underway, the *Anti-Doping Organization* conducting the *Results Management* process retains authority to complete its *Results Management* process. If an *Athlete* or other *Person* retires before any *Results Management* process has begun, the *Anti-Doping Organization* which would have had *Results Management* authority over the *Athlete* or other *Person* at the time the *Athlete* or other *Person* committed an anti-doping rule violation, has authority to conduct *Results Management*.

ARTICLE 8 *RESULTS MANAGEMENT*: RIGHT TO A FAIR HEARING AND NOTICE OF HEARING DECISION

8.1 Fair Hearings

For any *Person* who is asserted to have committed an anti-doping rule violation, the *Anti-Doping Organization* with responsibility for *Results Management* shall provide, at a minimum, a fair hearing within a reasonable time by a fair, impartial and *Operationally Independent* hearing panel in compliance with the *WADA International Standard* for *Results Management*. A timely reasoned decision specifically including an explanation of the reason(s) for any period of *Ineligibility* and *Disqualification* of results under Article 10.10 shall be *Publicly Disclosed* as provided in Article 14.3.[52]

51 [Comment to Article 7.7: Conduct by an Athlete or other Person before the Athlete or other Person was subject to the authority of any Anti-Doping Organization would not constitute an anti-doping rule violation but could be a legitimate basis for denying the Athlete or other Person membership in a sports organization.]

52 [Comment to Article 8.1: This Article requires that at some point in the Results Management process, the Athlete or other Person shall be provided the opportunity for a timely, fair and impartial hearing. These principles are also found in Article 6.1 of the Convention for the Protection

8.2 *Event* Hearings

Hearings held in connection with *Events* may be conducted by an expedited process as permitted by the rules of the relevant *Anti-Doping Organization* and the hearing panel.[53]

8.3 Waiver of Hearing

The right to a hearing may be waived either expressly or by the *Athlete's* or other *Person's* failure to challenge an *Anti-Doping Organization's* assertion that an anti-doping rule violation has occurred within the specific time period provided in the *Anti-Doping Organization's* rules.

8.4 Notice of Decisions

The reasoned hearing decision, or in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the *Anti-Doping Organization* with *Results Management* responsibility to the *Athlete* and to other *Anti-Doping Organizations* with a right to appeal under Article 13.2.3 as provided in Article 14 and published in accordance with Article 14.3.

8.5 Single Hearing Before *CAS*

Anti-doping rule violations asserted against *International-Level Athletes*, *National-Level Athletes* or other *Persons* may, with the consent of the *Athlete* or other *Person*, the *Anti-Doping Organization* with *Results Management*

of Human Rights and Fundamental Freedoms and are principles generally accepted in international law. This Article is not intended to supplant each Anti-Doping Organization's own rules for hearings but rather to ensure that each Anti-Doping Organization provides a hearing process consistent with these principles.]

53 [Comment to Article 8.2: For example, a hearing could be expedited on the eve of a major Event where the resolution of the anti-doping rule violation is necessary to determine the Athlete's eligibility to participate in the Event or during an Event where the resolution of the case will affect the validity of the Athlete's results or continued participation in the Event.]

responsibility, and *WADA*, be heard in a single hearing directly at *CAS*.[54]

ARTICLE 9 AUTOMATIC *DISQUALIFICATION* OF INDIVIDUAL RESULTS

An anti-doping rule violation in *Individual Sports* in connection with an *In-Competition* test automatically leads to *Disqualification* of the result obtained in that *Competition* with all resulting *Consequences*, including forfeiture of any medals, points and prizes.[55]

ARTICLE 10 SANCTIONS ON INDIVIDUALS[56]

10.1 *Disqualification* of Results in the *Event* during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an *Event* may, upon the decision of the ruling body of the *Event*, lead to *Disqualification* of all

54 [Comment to Article 8.5: In some cases, the combined cost of holding a hearing in the first instance at the international or national level, then rehearing the case de novo before CAS can be very substantial. Where all of the parties identified in this Article are satisfied that their interests will be adequately protected in a single hearing, there is no need for the Athlete or Anti-Doping Organizations to incur the extra expense of two hearings. An Anti-Doping Organization may participate in the CAS hearing as an observer.]

55 [Comment to Article 9: For Team Sports, any awards received by individual players will be Disqualified. However, Disqualification of the team will be as provided in Article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.]

56 [Comment to Article 10: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions

of the *Athlete's* individual results obtained in that *Event* with all *Consequences*, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.[57]

Factors to be included in considering whether to *Disqualify* other results in an *Event* might include, for example, the seriousness of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Competitions*.

10.1.1 If the *Athlete* establishes that he or she bears *No Fault or Negligence* for the violation, the *Athlete's* individual results in the other *Competitions* shall not be *Disqualified*, unless the *Athlete's* results in *Competitions* other than the *Competition* in which the anti-doping rule violation occurred were likely to have been affected by the *Athlete's* anti-doping rule violation.

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short, a standard period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, too much flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of conflicts between International Federations and National Anti-Doping Organizations.]

57 [Comment to Article 10.1: Whereas Article 9 Disqualifies the result in a single Competition in which the Athlete tested positive (e.g., the 100 meter backstroke), this Article may lead to Disqualification of all results in all races during the Event (e.g., the swimming World Championships).]

10.2.1 The period of *Ineligibility*, subject to Article 10.2.4, shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance* or a *Specified Method*, unless the *Athlete* or *other Person* can establish that the anti-doping rule violation was not intentional.[58]

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* or a *Specified Method* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of *Ineligibility* shall be two (2) years.

10.2.3 As used in Article 10.2, the term "intentional" is meant to identify those *Athletes* or other *Persons* who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.[59] An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not "intentional" if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was Used *Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding*

58 [Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

59 [Comment to Article 10.2.3: Article 10.2.3 provides a special definition of "intentional" which is to be applied solely for purposes of Article 10.2.]

for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

10.2.4 Notwithstanding any other provision in Article 10.2, where the anti-doping rule violation involves a *Substance of Abuse*:

10.2.4.1 If the *Athlete* can establish that any ingestion or *Use* occurred *Out-of-Competition* and was unrelated to sport performance, then the period of *Ineligibility* shall be three (3) months *Ineligibility*.

In addition, the period of *Ineligibility* calculated under this Article 10.2.4.1 may be reduced to one (1) month if the *Athlete* or other *Person* satisfactorily completes a *Substance of Abuse* treatment program approved by the *Anti-Doping Organization* with *Results Management* responsibility.[60] The period of *Ineligibility* established in this Article 10.2.4.1 is not subject to any reduction based on any provision in Article 10.6.

10.2.4.2 If the ingestion, *Use* or *Possession* occurred *In-Competition*, and the *Athlete* can establish that the context

60 [Comment to Article 10.2.4.1: The determinations as to whether the treatment program is approved and whether the Athlete or other Person has satisfactorily completed the program shall be made in the sole discretion of the Anti-Doping Organization. This Article is intended to give Anti-Doping Organizations the leeway to apply their own judgment to identify and approve legitimate and reputable, as opposed to "sham", treatment programs. It is anticipated, however, that the characteristics of legitimate treatment programs may vary widely and change over time such that it would not be practical for WADA to develop mandatory criteria for acceptable treatment programs.]

of the ingestion, *Use* or *Possession* was unrelated to sport performance, then the ingestion, *Use* or *Possession* shall not be considered intentional for purposes of Article 10.2.1 and shall not provide a basis for a finding of *Aggravating Circumstances* under Article 10.4.

10.3 *Ineligibility* for Other Anti-Doping Rule Violations

The period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 or 10.7 are applicable:

10.3.1 For violations of Article 2.3 or 2.5, the period of *Ineligibility* shall be four (4) years except: (i) in the case of failing to submit to *Sample* collection, if the *Athlete* can establish that the commission of the anti-doping rule violation was not intentional, the period of *Ineligibility* shall be two (2) years; (ii) in all other cases, if the *Athlete* or other *Person* can establish exceptional circumstances that justify a reduction of the period of *Ineligibility*, the period of *Ineligibility* shall be in a range from two (2) years to four (4) years depending on the *Athlete* or other *Person's* degree of *Fault*; or (iii) in a case involving a *Protected Person* or *Recreational Athlete*, the period of *Ineligibility* shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of *Ineligibility*, depending on the *Protected Person* or *Recreational Athlete's* degree of *Fault*.

10.3.2 For violations of Article 2.4, the period of *Ineligibility* shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the *Athlete's* degree of *Fault*. The flexibility between two (2) years and one (1) year of *Ineligibility* in this Article is not available to *Athletes* where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the *Athlete* was trying to avoid being available for *Testing*.

10.3.3 For violations of Article 2.7 or 2.8, the period of *Ineligibility* shall be a minimum of four (4) years up to lifetime *Ineligibility*, depending on the seriousness of the violation. An Article 2.7 or Article 2.8 violation involving a *Protected Person* shall be considered a particularly serious violation and, if committed by *Athlete Support Personnel* for violations other than for *Specified Substances*, shall result in lifetime *Ineligibility* for *Athlete Support Personnel*. In addition, significant violations of Article 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.[61]

10.3.4 For violations of Article 2.9, the period of *Ineligibility* imposed shall be a minimum of two (2) years, up to lifetime *Ineligibility*, depending on the seriousness of the violation.

10.3.5 For violations of Article 2.10, the period of *Ineligibility* shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the *Athlete* or other *Person's* degree of *Fault* and other circumstances of the case.[62]

10.3.6 For violations of Article 2.11, the period of *Ineligibility* shall be a minimum of two (2) years, up to lifetime *Ineligibility*, depending on the seriousness of the violation by the *Athlete* or other *Person*.[63]

61 [Comment to Article 10.3.3: Those who are involved in doping Athletes or covering up doping should be subject to sanctions which are more severe than the Athletes who test positive. Since the authority of sport organizations is generally limited to Ineligibility for accreditation, membership and other sport benefits, reporting Athlete Support Personnel to competent authorities is an important step in the deterrence of doping.]

62 [Comment to Article 10.3.5: Where the "other Person" referenced in Article 2.10 (Prohibited Association by an Athlete or Other Person) is an entity and not an individual, that entity may be disciplined as provided in Article 12.]

63 [Comment to Article 10.3.6: Conduct that is found to violate both Article 2.5 (Tampering) and Article 2.11 (Acts by an Athlete or Other Person to Discourage

10.4 *Aggravating Circumstances* which may Increase the Period of *Ineligibility*

If the *Anti-Doping Organization* establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (*Trafficking* or *Attempted Trafficking*), 2.8 (*Administration* or *Attempted Administration*), 2.9 (Complicity or *Attempted* Complicity) or 2.11 (Acts by an *Athlete* or Other *Person* to Discourage or Retaliate Against Reporting) that *Aggravating Circumstances* are present which justify the imposition of a period of *Ineligibility* greater than the standard sanction, then the period of *Ineligibility* otherwise applicable shall be increased by an additional period of *Ineligibility* of up to two (2) years depending on the seriousness of the violation and the nature of the *Aggravating Circumstances*, unless the *Athlete* or other *Person* can establish that he or she did not knowingly commit the anti-doping rule violation.[64]

10.5 Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.[65]

or Retaliate Against Reporting to Authorities) shall be sanctioned based on the violation that carries the more severe sanction.]

64 [Comment to Article 10.4: Violations under Articles 2.7 (Trafficking or Attempted Trafficking), 2.8 (Administration or Attempted Administration), 2.9 (Complicity or Attempted Complicity) and 2.11 (Acts by an Athlete or Other Person to Discourage or Retaliate Against Reporting to Authorities) are not included in the application of Article 10.4 because the sanctions for these violations already build in sufficient discretion up to a lifetime ban to allow consideration of any Aggravating Circumstance.]

65 [Comment to Article 10.5: This Article and Article 10.6.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances:

10.6 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6.

All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

10.6.1.1 *Specified Substances* or *Specified Methods*

Where the anti-doping rule violation involves a *Specified Substance* (other than a *Substance of Abuse*) or *Specified Method*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two (2) years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.6.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish both *No Significant Fault or Negligence* and that the detected *Prohibited Substance* (other than a *Substance of Abuse*) came from

(a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.]

a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two (2) years *Ineligibility*, depending on the *Athlete* or other *Person's* degree of *Fault*.[66]

10.6.1.3 *Protected Persons* or *Recreational Athletes*

Where the anti-doping rule violation not involving a *Substance of Abuse* is committed by a *Protected Person* or *Recreational Athlete*, and the *Protected Person* or *Recreational Athlete* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two (2) years *Ineligibility*, depending on the *Protected Person* or *Recreational Athlete's* degree of *Fault*.

66 [Comment to Article 10.6.1.2: In order to receive the benefit of this Article, the Athlete or other Person must establish not only that the detected Prohibited Substance came from a Contaminated Product, but must also separately establish No Significant Fault or Negligence. It should be further noted that Athletes are on notice that they take nutritional supplements at their own risk. The sanction reduction based on No Significant Fault or Negligence has rarely been applied in Contaminated Product cases unless the Athlete has exercised a high level of caution before taking the Contaminated Product. In assessing whether the Athlete can establish the source of the Prohibited Substance, it would, for example, be significant for purposes of establishing whether the Athlete actually Used the Contaminated Product, whether the Athlete had declared the product which was subsequently determined to be contaminated on the Doping Control form.

This Article should not be extended beyond products that have gone through some process of manufacturing. Where an Adverse Analytical Finding results from environment contamination of a "non-product" such as tap water or lake water in circumstances where no reasonable person would expect any risk of an anti-doping rule violation, typically there would be No Fault or Negligence under Article 10.5.]

10.6.2 Application of *No Significant Fault or Negligence* beyond the Application of Article 10.6.1[67]

If an *Athlete* or other *Person* establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Article 10.7, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight (8) years.

10.7 Elimination, Reduction, or Suspension of Period of *Ineligibility* or Other *Consequences* for Reasons Other than *Fault*

10.7.1 *Substantial Assistance* in Discovering or Establishing *Code* Violations[68]

10.7.1.1 An *Anti-Doping Organization* with *Results Management* responsibility for an anti-doping rule violation may, prior to an appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the *Consequences* (other than *Disqualification* and mandatory *Public Disclosure*) imposed in an individual

67 [Comment to Article 10.6.2: Article 10.6.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8, 2.9 or 2.11) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.]

68 [Comment to Article 10.7.1: The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport.

case where the *Athlete* or other *Person* has provided *Substantial Assistance* to an *Anti-Doping Organization*, criminal authority or professional disciplinary body which results in: (i) the *Anti-Doping Organization* discovering or bringing forward an anti-doping rule violation by another *Person*; or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another *Person* and the information provided by the *Person* providing *Substantial Assistance* is made available to the *Anti-Doping Organization* with *Results Management* responsibility; or (iii) which results in *WADA* initiating a proceeding against a *Signatory*, *WADA*-accredited laboratory or *Athlete* passport management unit (as defined in the *International Standard for Laboratories*) for non-compliance with the *Code*, *International Standard* or *Technical Document*; or (iv) with the approval by *WADA*, which results in a criminal or disciplinary body bringing forward a criminal offense or the breach of professional or sport rules arising out of a sport integrity violation other than doping. After an appellate decision under Article 13 or the expiration of time to appeal, an *Anti-Doping Organization* may only suspend a part of the otherwise applicable *Consequences* with the approval of *WADA* and the applicable International Federation.

The extent to which the otherwise applicable period of *Ineligibility* may be suspended shall be based on the seriousness of the anti-doping rule

violation committed by the *Athlete* or other *Person* and the significance of the *Substantial Assistance* provided by the *Athlete* or other *Person* to the effort to eliminate doping in sport, non-compliance with the *Code* and/or sport integrity violations. No more than three-quarters of the otherwise applicable period of *Ineligibility* may be suspended. If the otherwise applicable period of *Ineligibility* is a lifetime, the non-suspended period under this Article must be no less than eight (8) years. For purposes of this paragraph, the otherwise applicable period of *Ineligibility* shall not include any period of *Ineligibility* that could be added under Article 10.9.3.2.

If so requested by an *Athlete* or other *Person* who seeks to provide *Substantial Assistance*, the *Anti-Doping Organization* with *Results Management* responsibility shall allow the *Athlete* or other *Person* to provide the information to the *Anti-Doping Organization* subject to a *Without Prejudice Agreement*.

If the *Athlete* or other *Person* fails to continue to cooperate and to provide the complete and credible *Substantial Assistance* upon which a suspension of *Consequences* was based, the *Anti-Doping Organization* that suspended *Consequences* shall reinstate the original *Consequences*. If an *Anti-Doping Organization* decides to reinstate suspended *Consequences* or decides not to reinstate suspended *Consequences*, that decision may be appealed by any *Person* entitled to appeal under Article 13.

10.7.1.2 To further encourage *Athletes* and other *Persons* to provide *Substantial Assistance* to *Anti-Doping Organizations*, at the request of the *Anti-Doping Organization* conducting *Results Management* or at the request of the *Athlete* or other *Person* who has, or has been asserted to have, committed an anti-doping rule violation, or other violation of the *Code*, *WADA* may agree at any stage of the *Results Management* process, including after an appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of *Ineligibility* and other *Consequences*. In exceptional circumstances, *WADA* may agree to suspensions of the period of *Ineligibility* and other *Consequences* for *Substantial Assistance* greater than those otherwise provided in this Article, or even no period of *Ineligibility*, no mandatory *Public Disclosure* and/or no return of prize money or payment of fines or costs. *WADA's* approval shall be subject to reinstatement of *Consequences*, as otherwise provided in this Article. Notwithstanding Article 13, *WADA's* decisions in the context of this Article 10.7.1.2 may not be appealed.

10.7.1.3 If an *Anti-Doping Organization* suspends any part of an otherwise applicable sanction because of *Substantial Assistance*, then notice providing justification for the decision shall be provided to the other *Anti-Doping Organizations* with a right to appeal under Article 13.2.3 as provided in Article 14.

In unique circumstances where *WADA* determines that it would be in the best interest of anti-doping, *WADA* may authorize an *Anti-Doping Organization* to enter into appropriate confidentiality agreements limiting or delaying the disclosure of the *Substantial Assistance* agreement or the nature of *Substantial Assistance* being provided.

10.7.2 Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence

Where an *Athlete* or other *Person* voluntarily admits the commission of an anti-doping rule violation before having received notice of a *Sample* collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of *Ineligibility* may be reduced, but not below one-half of the period of *Ineligibility* otherwise applicable.[69]

10.7.3 Application of Multiple Grounds for Reduction of a Sanction

Where an *Athlete* or other *Person* establishes entitlement to reduction in sanction under more than one provision of Article 10.5, 10.6 or 10.7, before applying any reduction or suspension under Article 10.7, the otherwise applicable period

69 [Comment to Article 10.7.2: This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught. The amount by which Ineligibility is reduced should be based on the likelihood that the Athlete or other Person would have been caught had he or she not come forward voluntarily.]

of *Ineligibility* shall be determined in accordance with Articles 10.2, 10.3, 10.5, and 10.6. If the *Athlete* or other *Person* establishes entitlement to a reduction or suspension of the period of *Ineligibility* under Article 10.7, then the period of *Ineligibility* may be reduced or suspended, but not below one-fourth of the otherwise applicable period of *Ineligibility*.

10.8 *Results Management* Agreements

10.8.1 One-Year Reduction for Certain Anti-Doping Rule Violations Based on Early Admission and Acceptance of Sanction

Where an *Athlete* or other *Person*, after being notified by an *Anti-Doping Organization* of a potential anti-doping rule violation that carries an asserted period of *Ineligibility* of four (4) or more years (including any period of *Ineligibility* asserted under Article 10.4), admits the violation and accepts the asserted period of *Ineligibility* no later than twenty (20) days after receiving notice of an anti-doping rule violation charge, the *Athlete* or other *Person* may receive a one-year reduction in the period of *Ineligibility* asserted by the *Anti-Doping Organization*. Where the *Athlete* or other *Person* receives the one-year reduction in the asserted period of *Ineligibility* under this Article 10.8.1, no further reduction in the asserted period of *Ineligibility* shall be allowed under any other Article.[70]

70 [Comment to Article 10.8.1: For example, if an Anti-Doping Organization alleges that an Athlete has violated Article 2.1 for Use of an anabolic steroid and asserts the applicable period of Ineligibility is four (4) years, then the Athlete may unilaterally reduce the period of Ineligibility to three (3) years by admitting the violation and accepting the three-year period of Ineligibility within the time specified in this Article, with no further reduction allowed. This resolves the case without any need for a hearing.]

10.8.2 Case Resolution Agreement

Where the *Athlete* or other *Person* admits an anti-doping rule violation after being confronted with the anti-doping rule violation by an *Anti-Doping Organization* and agrees to *Consequences* acceptable to the *Anti-Doping Organization* and *WADA*, at their sole discretion, then: (a) the *Athlete* or other *Person* may receive a reduction in the period of *Ineligibility* based on an assessment by the *Anti-Doping Organization* and *WADA* of the application of Articles 10.1 through 10.7 to the asserted anti-doping rule violation, the seriousness of the violation, the *Athlete* or other *Person's* degree of *Fault* and how promptly the *Athlete* or other *Person* admitted the violation; and (b) the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the *Athlete* or other *Person* shall serve at least one-half of the agreed-upon period of *Ineligibility* going forward from the earlier of the date the *Athlete* or other *Person* accepted the imposition of a sanction or a *Provisional Suspension* which was subsequently respected by the *Athlete* or other *Person*. The decision by *WADA* and the *Anti-Doping Organization* to enter or not enter into a case resolution agreement, and the amount of the reduction to, and the starting date of the period of *Ineligibility*, are not matters for determination or review by a hearing body and are not subject to appeal under Article 13.

If so requested by an *Athlete* or other *Person* who seeks to enter into a case resolution agreement under this Article, the *Anti-Doping Organization* with *Results Management* responsibility shall allow the *Athlete* or other *Person* to discuss an

admission of the anti-doping rule violation with the *Anti-Doping Organization* subject to a *Without Prejudice Agreement*.[71]

10.9 Multiple Violations

10.9.1 Second or Third Anti-Doping Rule Violation

10.9.1.1 For an *Athlete* or other *Person's* second anti-doping rule violation, the period of *Ineligibility* shall be the greater of:

(a) A six-month period of *Ineligibility*; or

(b) A period of *Ineligibility* in the range between:

(i) the sum of the period of *Ineligibility* imposed for the first anti-doping rule violation plus the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, and

(ii) twice the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation.

The period of *Ineligibility* within this range shall be determined based on the entirety of the circumstances and the *Athlete* or other *Person's* degree of *Fault* with respect to the second violation.

71 [Comment to Article 10.8.2: Any mitigating or aggravating factors set forth in this Article 10 shall be considered in arriving at the Consequences set forth in the case resolution agreement, and shall not be applicable beyond the terms of that agreement.

In some countries, the imposition of a period of Ineligibility is left entirely to a hearing body. In those countries, the Anti-Doping Organization may not assert a specific period of Ineligibility for purposes of Article 10.8.1 nor have the power to agree to a specific period of Ineligibility under Article 10.8.2. In these circumstances, Article 10.8.1 and 10.8.2 will not be applicable but may be considered by the hearing body.]

10.9.1.2 A third anti-doping rule violation will always result in a lifetime period of *Ineligibility*, except if the third violation fulfills the condition for elimination or reduction of the period of *Ineligibility* under Article 10.5 or 10.6, or involves a violation of Article 2.4. In these particular cases, the period of *Ineligibility* shall be from eight (8) years to lifetime *Ineligibility*.

10.9.1.3 The period of *Ineligibility* established in Articles 10.9.1.1 and 10.9.1.2 may then be further reduced by the application of Article 10.7.

10.9.2 An anti-doping rule violation for which an *Athlete* or other *Person* has established *No Fault or Negligence* shall not be considered a violation for purposes of Article 10.9. In addition, an anti-doping rule violation sanctioned under Article 10.2.4.1 shall not be considered a violation for purposes of Article 10.9.

10.9.3 Additional Rules for Certain Potential Multiple Violations

10.9.3.1 For purposes of imposing sanctions under Article 10.9, except as provided in Articles 10.9.3.2 and 10.9.3.3, an anti-doping rule violation will only be considered a second violation if the *Anti-Doping Organization* can establish that the *Athlete* or other *Person* committed the additional anti-doping rule violation after the *Athlete* or other *Person* received notice pursuant to Article 7, or after the *Anti-Doping Organization* made reasonable efforts to give notice of the first anti-doping rule violation. If the *Anti-Doping Organization* cannot establish this, the violations shall be considered together

as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction, including the application of *Aggravating Circumstances*. Results in all *Competitions* dating back to the earlier anti-doping rule violation will be *Disqualified* as provided in Article 10.10.[72]

10.9.3.2 If the *Anti-Doping Organization* establishes that an *Athlete* or other *Person* committed an additional anti-doping rule violation prior to notification, and that the additional violation occurred twelve (12) months or more before or after the first-noticed violation, then the period of *Ineligibility* for the additional violation shall be calculated as if the additional violation were a stand-alone first violation and this period of *Ineligibility* is served consecutively, rather than concurrently, with the period of *Ineligibility* imposed for the earlier-noticed violation. Where this Article 10.9.3.2 applies, the violations taken together shall constitute a single violation for purposes of Article 10.9.1.

10.9.3.3 If the *Anti-Doping Organization* establishes that an *Athlete* or other *Person* committed a violation of Article 2.5 in connection with the *Doping Control* process for an underlying asserted anti-doping rule violation, the violation of Article 2.5 shall be treated

72 [Comment to Article 10.9.3.1: The same rule applies where, after the imposition of a sanction, the Anti-Doping Organization discovers facts involving an anti-doping rule violation that occurred prior to notification for a first anti-doping rule violation—e.g., the Anti-Doping Organization shall impose a sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time, including the application of Aggravating Circumstances.]

as a stand-alone first violation and the period of *Ineligibility* for such violation shall be served consecutively, rather than concurrently, with the period of *Ineligibility*, if any, imposed for the underlying anti-doping rule violation. Where this Article 10.9.3.3 is applied, the violations taken together shall constitute a single violation for purposes of Article 10.9.1.

10.9.3.4 If an *Anti-Doping Organization* establishes that an *Athlete* or other *Person* has committed a second or third anti-doping rule violation during a period of *Ineligibility*, the periods of *Ineligibility* for the multiple violations shall run consecutively, rather than concurrently.

10.9.4 Multiple Anti-Doping Rule Violations during Ten-Year Period

For purposes of Article 10.9, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations.

10.10 *Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9, all other competitive results of the *Athlete* obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires

otherwise, be *Disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.[73]

10.11 Forfeited Prize Money

An *Anti-Doping Organization* or other *Signatory* that has recovered prize money forfeited as a result of an anti-doping rule violation shall take reasonable measures to allocate and distribute this prize money to the *Athletes* who would have been entitled to it had the forfeiting *Athlete* not competed. An International Federation may provide in its rules whether or not the redistributed prize money shall be considered for purposes of its ranking of *Athletes*.[74]

10.12 *Financial Consequences*

Anti-Doping Organizations may, in their own rules, provide for proportionate recovery of costs or financial sanctions on account of anti-doping rule violations. However, *Anti-Doping Organizations* may only impose financial sanctions in cases where the maximum period of *Ineligibility* otherwise applicable has already been imposed. Financial sanctions may only be imposed where the principle of proportionality is satisfied. No recovery of costs or financial sanction may be considered a basis for reducing the *Ineligibility* or other sanction which would otherwise be applicable under the *Code*.

73 [Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

74 [Comment to Article 10.11: This Article is not intended to impose an affirmative duty on the Anti-Doping Organization or other Signatory to take any action to collect forfeited prize money. If the Anti-Doping Organization elects not to take any action to collect forfeited prize money, it may assign its right to recover such money to the Athlete(s) who should have otherwise received the money. "Reasonable measures to allocate and distribute this prize money" could include using collected forfeited prize money as agreed upon by an International Federation and its Athletes.]

10.13 Commencement of *Ineligibility* Period

Where an *Athlete* is already serving a period of *Ineligibility* for an anti-doping rule violation, any new period of *Ineligibility* shall commence on the first day after the current period of *Ineligibility* has been served. Otherwise, except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived or there is no hearing, on the date *Ineligibility* is accepted or otherwise imposed.

10.13.1 Delays Not Attributable to the *Athlete* or other *Person*

Where there have been substantial delays in the hearing process or other aspects of *Doping Control*, and the *Athlete* or other *Person* can establish that such delays are not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.[75]

10.13.2 Credit for *Provisional Suspension* or Period of *Ineligibility* Served

10.13.2.1 If a *Provisional Suspension* is respected by the *Athlete* or other *Person*, then the *Athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. If the *Athlete* or other

75 [Comment to Article 10.13.1: In cases of anti-doping rule violations other than under Article 2.1, the time required for an Anti-Doping Organization to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.]

Person does not respect a *Provisional Suspension*, then the *Athlete* or other *Person* shall receive no credit for any period of *Provisional Suspension* served. If a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *Athlete* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

10.13.2.2 If an *Athlete* or other *Person* voluntarily accepts a *Provisional Suspension* in writing from an *Anti-Doping Organization* with *Results Management* authority and thereafter respects the *Provisional Suspension*, the *Athlete* or other *Person* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete* or other *Person's* voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.[76]

10.13.2.3 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *Athlete* elected not to compete or was suspended by a team.

76 [Comment to Article 10.13.2.2: An Athlete's voluntary acceptance of a Provisional Suspension is not an admission by the Athlete and shall not be used in any way to draw an adverse inference against the Athlete.]

10.13.2.4 In *Team Sports*, where a period of *Ineligibility* is imposed upon a team, unless fairness requires otherwise, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed. Any period of team *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served.

10.14 Status during *Ineligibility* or *Provisional Suspension*

10.14.1 Prohibition against Participation during *Ineligibility* or *Provisional Suspension*

No *Athlete* or other *Person* who has been declared *Ineligible* or is subject to a *Provisional Suspension* may, during a period of *Ineligibility* or *Provisional Suspension*, participate in any capacity in a *Competition* or activity (other than authorized anti-doping *Education* or rehabilitation programs) authorized or organized by any *Signatory*, *Signatory's* member organization, or a club or other member organization of a *Signatory's* member organization, or in *Competitions* authorized or organized by any professional league or any international- or national-level *Event* organization or any elite or national-level sporting activity funded by a governmental agency.[77]

An *Athlete* or other *Person* subject to a period of *Ineligibility* longer than four (4) years may,

77 [Comment to Article 10.14.1: For example, subject to Article 10.14.2 below, Ineligible Athletes cannot participate in a training camp, exhibition or practice organized by their National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level Event organization

after completing four (4) years of the period of *Ineligibility*, participate as an *Athlete* in local sport events not sanctioned or otherwise under the authority of a *Code Signatory* or member of a *Code Signatory*, but only so long as the local sport event is not at a level that could otherwise qualify such *Athlete* or other *Person* directly or indirectly to compete in (or accumulate points toward) a national championship or *International Event*, and does not involve the *Athlete* or other *Person* working in any capacity with *Protected Persons*.

An *Athlete* or other *Person* subject to a period of *Ineligibility* shall remain subject to *Testing* and any requirement by an *Anti-Doping Organization* to provide whereabouts information.

10.14.2 Return to Training

As an exception to Article 10.14.1, an *Athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory's* member organization during the shorter of: (1) the last two (2) months of the *Athlete's* period of *Ineligibility*, or (2) the last one-quarter of the period of *Ineligibility* imposed.[78]

without triggering the Consequences set forth in Article 10.14.3. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Automatic Binding Effect of Decisions). An Athlete or other Person serving a period of Ineligibility is prohibited from coaching or serving as an Athlete Support Person in any other capacity at any time during the period of Ineligibility, and doing so could also result in a violation of 2.10 by another Athlete. Any performance standard accomplished during a period of Ineligibility shall not be recognized by a Signatory or its National Federations for any purpose.]

78 [Comment to Article 10.14.2: In many Team Sports and some individual sports (e.g., ski jumping and gymnastics), Athletes cannot effectively train on their own so as to be ready to compete at the end of the Athlete's period of Ineligibility. During the training period described in this Article, an Ineligible Athlete may not compete or engage in any activity described in Article 10.14.1 other than training.]

10.14.3 Violation of the Prohibition of Participation during *Ineligibility* or *Provisional Suspension*

Where an *Athlete* or other *Person* who has been declared *Ineligible* violates the prohibition against participation during *Ineligibility* described in Article 10.14.1, the results of such participation shall be *Disqualified* and a new period of *Ineligibility* equal in length to the original period of *Ineligibility* shall be added to the end of the original period of *Ineligibility*. The new period of *Ineligibility*, including a reprimand and no period of *Ineligibility*, may be adjusted based on the *Athlete* or other *Person's* degree of *Fault* and other circumstances of the case. The determination of whether an *Athlete* or other *Person* has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the *Anti-Doping Organization* whose *Results Management* led to the imposition of the initial period of *Ineligibility*. This decision may be appealed under Article 13.

An *Athlete* or other *Person* who violates the prohibition against participation during a *Provisional Suspension* described in Article 10.14.1 shall receive no credit for any period of *Provisional Suspension* served and the results of such participation shall be *Disqualified*.

Where an *Athlete Support Person* or other *Person* assists a *Person* in violating the prohibition against participation during *Ineligibility* or a *Provisional Suspension*, an *Anti-Doping Organization* with authority over such *Athlete Support Person* or other *Person* shall impose sanctions for a violation of Article 2.9 for such assistance.

10.14.4 Withholding of Financial Support during *Ineligibility*

In addition, for any anti-doping rule violation not involving a reduced sanction as described in Article 10.5 or 10.6, some or all sport-related financial support or other sport-related benefits received by such *Person* will be withheld by *Signatories*, *Signatories*' member organizations and governments.

10.15 Automatic Publication of Sanction

A mandatory part of each sanction shall include automatic publication, as provided in Article 14.3.

ARTICLE 11 *CONSEQUENCES* TO TEAMS

11.1 *Testing* of *Team Sports*

Where more than one member of a team in a *Team Sport* has been notified of an anti-doping rule violation under Article 7 in connection with an *Event*, the ruling body for the *Event* shall conduct appropriate *Target Testing* of the team during the *Event Period*.

11.2 *Consequences* for *Team Sports*

If more than two members of a team in a *Team Sport* are found to have committed an anti-doping rule violation during an *Event Period*, the ruling body of the *Event* shall impose an appropriate sanction on the team (e.g., loss of points, *Disqualification* from a *Competition* or *Event*, or other sanction) in addition to any *Consequences* imposed upon the individual *Athletes* committing the anti-doping rule violation.

11.3 *Event* Ruling Body or International Federation may Establish Stricter *Consequences* for *Team Sports*

The ruling body for an *Event* may elect to establish rules for the *Event* which impose *Consequences* for *Team Sports* stricter than those in Article 11.2 for purposes of the *Event*.[79] Similarly, an International Federation may elect to establish rules imposing stricter *Consequences* for *Team Sports* within its authority than those in Article 11.2.

ARTICLE 12 SANCTIONS BY *SIGNATORIES* AGAINST OTHER SPORTING BODIES

Each *Signatory* shall adopt rules that obligate each of its member organizations and any other sporting body over which it has authority to comply with, implement, uphold and enforce the *Code* within that organization's or body's area of competence. When a *Signatory* becomes aware that one of its member organizations or other sporting body over which it has authority has failed to fulfill such obligation, the *Signatory* shall take appropriate action against such organization or body.[80] In particular, a *Signatory's* action and rules shall include the possibility of excluding all, or some group of, members of that organization or body from specified future *Events* or all *Events* conducted within a specified period of time.[81]

79 [Comment to Article 11.3: For example, the International Olympic Committee could establish rules which would require Disqualification of a team from the Olympic Games based on a lesser number of anti-doping rule violations during the period of the Games.]

80 [Comment to Article 12: This Article is not intended to impose an affirmative duty on the Signatory to actively monitor each of its member organizations for acts of non-compliance, but rather only requires the Signatory to take action when it becomes aware of such acts.]

81 [Comment to Article 12: This Article makes it clear that the Code does not restrict whatever disciplinary rights between organizations may otherwise exist. For sanctions against Signatories for non-compliance with the Code, see Article 24.1]

ARTICLE 13 *RESULTS MANAGEMENT*: APPEALS[82]

13.1 Decisions Subject to Appeal

Decisions made under the *Code* or under rules adopted pursuant to the *Code* may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in the *Code* or *International Standards*. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise.

13.1.1 Scope of Review Not Limited

The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing.[83]

82 [Comment to Article 13: The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal. Anti-doping decisions by Anti-Doping Organizations are made transparent in Article 14. Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions. Note that the definition of interested Persons and organizations with a right to appeal under Article 13 does not include Athletes, or their National Federations, who might benefit from having another competitor Disqualified.]

83 [Comment to Article 13.1.1: The revised language is not intended to make a substantive change to the 2015 Code, but rather for clarification. For example, where an Athlete was charged in the first instance hearing only with Tampering but the same conduct could also constitute Complicity, an appealing party could pursue both Tampering and Complicity charges against the Athlete in the appeal.]

13.1.2 *CAS* Shall Not Defer to the Findings Being Appealed

In making its decision, *CAS* shall not give deference to the discretion exercised by the body whose decision is being appealed.[84]

13.1.3 *WADA* Not Required to Exhaust Internal Remedies[85]

Where *WADA* has a right to appeal under Article 13 and no other party has appealed a final decision within the *Anti-Doping Organization's* process, *WADA* may appeal such decision directly to *CAS* without having to exhaust other remedies in the *Anti-Doping Organization's* process.

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, *Consequences, Provisional Suspensions*, Implementation of Decisions and Authority

A decision that an anti-doping rule violation was committed, a decision imposing *Consequences* or not imposing *Consequences* for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision by *WADA* not to grant an exception to the six-months notice requirement for a retired *Athlete* to return to competition under Article 5.6.1; a decision by *WADA* assigning *Results Management* under Article 7.1; a decision by an *Anti-Doping Organization* not to bring forward an *Adverse Analytical Finding* or an *Atypical Finding* as an

84 [Comment to Article 13.1.2: CAS proceedings are de novo. Prior proceedings do not limit the evidence or carry weight in the hearing before CAS.]

85 [Comment to Article 13.1.3: Where a decision has been rendered before the final stage of an Anti-Doping Organization's process (for example, a first hearing) and no party elects to appeal that decision to the next level of the Anti-Doping Organization's process (e.g., the Managing Board), then WADA may bypass the remaining steps in the Anti-Doping Organization's internal process and appeal directly to CAS.]

anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation in accordance with the *International Standard* for *Results Management*; a decision to impose, or lift, a *Provisional Suspension* as a result of a *Provisional Hearing*; an *Anti-Doping Organization's* failure to comply with Article 7.4; a decision that an *Anti-Doping Organization* lacks authority to rule on an alleged anti-doping rule violation or its *Consequences*; a decision to suspend, or not suspend, *Consequences* or to reinstate, or not reinstate, *Consequences* under Article 10.7.1; failure to comply with Articles 7.1.4 and 7.1.5; failure to comply with Article 10.8.1; a decision under Article 10.14.3; a decision by an *Anti-Doping Organization* not to implement another *Anti-Doping Organization's* decision under Article 15; and a decision under Article 27.3 may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving *International-Level Athletes* or *International Events*

In cases arising from participation in an *International Event* or in cases involving *International-Level Athletes*, the decision may be appealed exclusively to *CAS*.[86]

13.2.2 Appeals Involving Other *Athletes* or Other *Persons*

In cases where Article 13.2.1 is not applicable, the decision may be appealed to an appellate body in accordance with rules established by the *National Anti-Doping Organization*. The rules for such appeal shall respect the following principles:

- a timely hearing;
- a fair, impartial, and *Operationally Independent* and *Institutionally Independent* hearing panel;
- the right to be represented by counsel at the *Person's* own expense; and

86 [Comment to Article 13.2.1: CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards.]

- a timely, written, reasoned decision.

If no such body as described above is in place and available at the time of the appeal, the *Athlete* or other *Person* shall have a right to appeal to *CAS*.

13.2.3 *Persons* Entitled to Appeal

13.2.3.1 Appeals Involving *International-Level Athletes* or *International Events*

In cases under Article 13.2.1, the following parties shall have the right to appeal to *CAS*: (a) the *Athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the *National Anti-Doping Organization* of the *Person's* country of residence or countries where the *Person* is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) *WADA*.

13.2.3.2 Appeals Involving Other *Athletes* or Other *Persons*

In cases under Article 13.2.2, the parties having the right to appeal to the appellate body shall be as provided in the *National Anti-Doping Organization's* rules but, at a minimum, shall include the following parties: (a) the *Athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International

Federation; (d) the *National Anti-Doping Organization* of the *Person's* country of residence or countries where the *Person* is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games, and (f) *WADA*. For cases under Article 13.2.2, *WADA*, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to *CAS* with respect to the decision of the appellate body. Any party filing an appeal shall be entitled to assistance from *CAS* to obtain all relevant information from the *Anti-Doping Organization* whose decision is being appealed and the information shall be provided if *CAS* so directs.

13.2.3.3 Duty to Notify

All parties to any *CAS* appeal must ensure that *WADA* and all other parties with a right to appeal have been given timely notice of the appeal.

13.2.3.4 Appeal Deadline for Parties Other than *WADA*

The deadline to file an appeal for parties other than *WADA* shall be as provided in the rules of the *Anti-Doping Organization* conducting *Results Management*.

13.2.3.5 Appeal Deadline for *WADA*

The filing deadline for an appeal filed by *WADA* shall be the later of:

(a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed,

or

(b) Twenty-one (21) days after *WADA's* receipt of the complete file relating to the decision.[87]

13.2.3.6 Appeal from Imposition of *Provisional Suspension*

Notwithstanding any other provision herein, the only *Person* who may appeal from the imposition of a *Provisional Suspension* is the *Athlete* or other *Person* upon whom the *Provisional Suspension* is imposed.

13.2.4 Cross Appeals and other Subsequent Appeals Allowed[88]

Cross appeals and other subsequent appeals by any respondent named in cases brought to *CAS* under the *Code* are specifically permitted. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal at the latest with the party's answer.

87 [Comments to Article 13.2.3: Whether governed by CAS rules or Article 13.2.3, a party's deadline to appeal does not begin running until receipt of the decision. For that reason, there can be no expiration of a party's right to appeal if the party has not received the decision.]

88 [Comment to Article 13.2.4: This provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision permits a full hearing for all parties.]

13.3 Failure to Render a Timely Decision by an *Anti-Doping Organization*[89]

Where, in a particular case, an *Anti-Doping Organization* fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by *WADA*, *WADA* may elect to appeal directly to *CAS* as if the *Anti-Doping Organization* had rendered a decision finding no anti-doping rule violation. If the *CAS* hearing panel determines that an anti-doping rule violation was committed and that *WADA* acted reasonably in electing to appeal directly to *CAS*, then *WADA's* costs and attorney fees in prosecuting the appeal shall be reimbursed to *WADA* by the *Anti-Doping Organization*.

13.4 Appeals Relating to *TUEs*

TUE decisions may be appealed exclusively as provided in Article 4.4.

13.5 Notification of Appeal Decisions

Any *Anti-Doping Organization* that is a party to an appeal shall promptly provide the appeal decision to the *Athlete* or other *Person* and to the other *Anti-Doping Organizations* that would have been entitled to appeal under Article 13.2.3 as provided under Article 14.

13.6 Appeals from Decisions under Article 24.1

A notice that is not disputed and so becomes a final decision under Article 24.1, finding a *Signatory* non-compliant with the *Code* and imposing consequences

89 [Comment to Article 13.3: Given the different circumstances of each anti-doping rule violation investigation and Results Management process, it is not feasible to establish a fixed time period for an Anti-Doping Organization to render a decision before WADA may intervene by appealing directly to CAS. Before taking such action, however, WADA will consult with the Anti-Doping Organization and give the Anti-Doping Organization an opportunity to explain why it has not yet rendered a decision. Nothing in this Article prohibits an International Federation from also having rules which authorize it to assume authority for matters in which the Results Management performed by one of its National Federations has been inappropriately delayed.]

for such non-compliance, as well as conditions for *Reinstatement* of the *Signatory*, may be appealed to *CAS* as provided in the *International Standard* for *Code* Compliance by *Signatories*.

13.7 Appeals from Decisions Suspending or Revoking Laboratory Accreditation

Decisions by *WADA* to suspend or revoke a laboratory's *WADA* accreditation may be appealed only by that laboratory with the appeal being exclusively to *CAS*.

ARTICLE 14 CONFIDENTIALITY AND REPORTING

The principles of coordination of anti-doping results, public transparency and accountability and respect for the privacy of all *Athletes* or other *Persons* are as follows:

14.1 Information Concerning *Adverse Analytical Findings*, *Atypical Findings*, and other Asserted Anti-Doping Rule Violations

14.1.1 Notice of Anti-Doping Rule Violations to *Athletes* and other *Persons*

The form and manner of notice of an asserted anti-doping rule violation shall be as provided in the rules of the *Anti-Doping Organization* with *Results Management* responsibility.

14.1.2 Notice of Anti-Doping Rule Violations to *National Anti-Doping Organizations*, International Federations and *WADA*

The *Anti-Doping Organization* with *Results Management* responsibility shall also notify the *Athlete's National Anti-Doping Organization*, International Federation and *WADA* of the assertion of an anti-doping rule violation simultaneously with the notice to the *Athlete* or other *Person*.

14.1.3 Content of an Anti-Doping Rule Violation Notice

Notification shall include: the *Athlete's* or other *Person's* name, country, sport and discipline within the sport, the *Athlete's* competitive level, whether the test was *In-Competition* or *Out-of-Competition*, the date of *Sample* collection, the analytical result reported by the laboratory and other information as required by the *International Standard* for *Results Management*, or, for anti-doping rule violations other than Article 2.1, the rule violated and the basis of the asserted violation.

14.1.4 Status Reports

Except with respect to investigations which have not resulted in a notice of an anti-doping rule violation pursuant to Article 14.1.1, the *Anti-Doping Organizations* referenced in Article 14.1.2 shall be regularly updated on the status and findings of any review or proceedings conducted pursuant to Article 7, 8 or 13 and shall be provided with a prompt written reasoned explanation or decision explaining the resolution of the matter.

14.1.5 Confidentiality

The recipient organizations shall not disclose this information beyond those *Persons* with a need to know (which would include the appropriate personnel at the applicable *National Olympic Committee*, National Federation, and team in a *Team Sport*) until the *Anti-Doping Organization* with *Results Management* responsibility has made *Public Disclosure* as permitted by Article 14.3.[90]

90 [Comment to Article 14.1.5: Each Anti-Doping Organization shall provide, in its own anti-doping rules, procedures for the protection of confidential information and for investigating and disciplining improper disclosure of confidential information by any employee or agent of the Anti-Doping Organization.]

14.2 Notice of Anti-Doping Rule Violation or Violations of *Ineligibility* or *Provisional Suspension* Decisions and Request for Files

14.2.1 Anti-doping rule violation decisions or decisions related to violations of *Ineligibility* or *Provisional Suspension* rendered pursuant to Article 7.6, 8.4, 10.5, 10.6, 10.7, 10.14.3 or 13.5 shall include the full reasons for the decision, including, if applicable, a justification for why the maximum potential sanction was not imposed. Where the decision is not in English or French, the *Anti-Doping Organization* shall provide an English or French summary of the decision and the supporting reasons.

14.2.2 An *Anti-Doping Organization* having a right to appeal a decision received pursuant to Article 14.2.1 may, within fifteen (15) days of receipt, request a copy of the full case file pertaining to the decision.

14.3 *Public Disclosure*

14.3.1 After notice has been provided to the *Athlete* or other *Person* in accordance with the *International Standard* for *Results Management*, and to the applicable *Anti-Doping Organizations* in accordance with Article 14.1.2, the identity of any *Athlete* or other *Person* who is notified of a potential anti-doping rule violation, the *Prohibited Substance* or *Prohibited Method* and nature of the violation involved, and whether the *Athlete* or other *Person* is subject to a *Provisional Suspension* may be *Publicly Disclosed* by the *Anti-Doping Organization* with *Results Management* responsibility.

14.3.2 No later than twenty (20) days after it has been determined in an appellate decision under Article 13.2.1 or 13.2.2, or such appeal has been waived, or a hearing in accordance with Article 8 has been waived, or the assertion of

an anti-doping rule violation has not otherwise been timely challenged, or the matter has been resolved under Article 10.8, or a new period of *Ineligibility*, or reprimand, has been imposed under Article 10.14.3, the *Anti-Doping Organization* responsible for *Results Management* must *Publicly Disclose* the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the *Athlete* or other *Person* committing the violation, the *Prohibited Substance* or *Prohibited Method* involved (if any) and the *Consequences* imposed. The same *Anti-Doping Organization* must also *Publicly Disclose* within twenty (20) days the results of appellate decisions concerning anti-doping rule violations, including the information described above.[91]

14.3.3 After an anti-doping rule violation has been determined to have been committed in an appellate decision under Article 13.2.1 or 13.2.2 or such appeal has been waived, or in a hearing in accordance with Article 8 or where such hearing has been waived, or the assertion of an anti-doping rule violation has not otherwise been timely challenged, or the matter has been resolved under Article 10.8, the *Anti-Doping Organization* responsible for *Results Management* may make public such determination or decision and may comment publicly on the matter.

14.3.4 In any case where it is determined, after a hearing or appeal, that the *Athlete* or other *Person* did not commit an anti-doping rule violation, the fact that the decision has been

91 [Comment to Article 14.3.2: Where Public Disclosure as required by Article 14.3.2 would result in a breach of other applicable laws, the Anti-Doping Organization's failure to make the Public Disclosure will not result in a determination of non-compliance with Code as set forth in Article 4.2 of the International Standard for the Protection of Privacy and Personal Information.]

appealed may be *Publicly Disclosed*. However, the decision itself and the underlying facts may not be *Publicly Disclosed* except with the consent of the *Athlete* or other *Person* who is the subject of the decision. The *Anti-Doping Organization* with *Results Management* responsibility shall use reasonable efforts to obtain such consent, and if consent is obtained, shall *Publicly Disclose* the decision in its entirety or in such redacted form as the *Athlete* or other *Person* may approve.

14.3.5 Publication shall be accomplished at a minimum by placing the required information on the *Anti-Doping Organization's* website and leaving the information up for the longer of one (1) month or the duration of any period of *Ineligibility*.

14.3.6 Except as provided in Articles 14.3.1 and 14.3.3, no *Anti-Doping Organization* or *WADA*-accredited laboratory, or official of either, shall publicly comment on the specific facts of any pending case (as opposed to general description of process and science) except in response to public comments attributed to, or based on information provided by the *Athlete*, other *Person* or their entourage or other representatives.

14.3.7 The mandatory *Public Disclosure* required in 14.3.2 shall not be required where the *Athlete* or other *Person* who has been found to have committed an anti-doping rule violation is a *Minor*, *Protected Person* or *Recreational Athlete*. Any optional *Public Disclosure* in a case involving a *Minor*, *Protected Person* or *Recreational Athlete* shall be proportionate to the facts and circumstances of the case.

14.4 Statistical Reporting

Anti-Doping Organizations shall, at least annually, publish publicly a general statistical report of their *Doping Control* activities, with a copy provided to *WADA*. *Anti-Doping Organizations* may also publish reports showing the

name of each *Athlete* tested and the date of each *Testing*. *WADA* shall, at least annually, publish statistical reports summarizing the information that it receives from *Anti-Doping Organizations* and laboratories.

14.5 *Doping Control* Information Database and Monitoring of Compliance

To enable *WADA* to perform its compliance monitoring role and to ensure the effective use of resources and sharing of applicable *Doping Control* information among *Anti-Doping Organizations*, *WADA* shall develop and manage a *Doping Control* information database, such as *ADAMS*, and *Anti-Doping Organizations* shall report to *WADA* through such database *Doping Control*-related information, including, in particular,

a) *Athlete Biological Passport* data for *International-Level Athletes* and *National-Level Athletes*,

b) Whereabouts information for *Athletes* including those in *Registered Testing Pools*,

c) *TUE* decisions, and

d) *Results Management* decisions,

as required under the applicable *International Standard(s)*.

14.5.1 To facilitate coordinated test distribution planning, avoid unnecessary duplication in *Testing* by various *Anti-Doping Organizations*, and to ensure that *Athlete Biological Passport* profiles are updated, each *Anti-Doping Organization* shall report all *In-Competition* and *Out-of-Competition* tests to *WADA* by entering the *Doping Control* forms into *ADAMS* in accordance with the requirements and timelines contained in the *International Standard* for *Testing* and Investigations.

14.5.2 To facilitate *WADA's* oversight and appeal rights for *TUEs*, each *Anti-Doping Organization* shall report all *TUE* applications, decisions and supporting documentation using *ADAMS* in accordance with the requirements and timelines

contained in the *International Standard* for *Therapeutic Use Exemptions*.

14.5.3 To facilitate *WADA's* oversight and appeal rights for *Results Management*, *Anti-Doping Organizations* shall report the following information into *ADAMS* in accordance with the requirements and timelines outlined in the *International Standard* for *Results Management*: (a) notifications of anti-doping rule violations and related decisions for *Adverse Analytical Findings*; (b) notifications and related decisions for other anti-doping rule violations that are not *Adverse Analytical Findings*; (c) whereabouts failures; and (d) any decision imposing, lifting or reinstating a *Provisional Suspension*.

14.5.4 The information described in this Article will be made accessible, where appropriate and in accordance with the applicable rules, to the *Athlete*, the *Athlete's National Anti-Doping Organization* and International Federation, and any other *Anti-Doping Organizations* with *Testing* authority over the *Athlete*.[92]

14.6 Data Privacy[93]

Anti-Doping Organizations may collect, store, process or disclose personal information relating to *Athletes* and other *Persons* where necessary and appropriate to conduct their *Anti-Doping Activities* under the *Code*

92 [Comment to Article 14.5: ADAMS is operated, administered and managed by WADA, and is designed to be consistent with data privacy laws and norms applicable to WADA and other organizations using such system. Personal information regarding Athletes or other Persons maintained in ADAMS is and will be treated in strict confidence and in accordance with the International Standard for the Protection of Privacy and Personal Information.]

93 [Comment to Article 14.6: Each government should put in place legislation, regulation, policies or administrative practices for: cooperation and sharing of information with Anti-Doping Organizations; sharing of data among Anti-Doping Organizations as provided in the Code(...)].

and *International Standards* (including specifically the International Standard for the Protection of Privacy and Personal Information), and in compliance with applicable law.

ARTICLE 15 IMPLEMENTATION OF DECISIONS

15.1 Automatic Binding Effect of Decisions by *Signatory Anti-Doping Organizations*

15.1.1 A decision of an anti-doping rule violation made by a *Signatory Anti-Doping Organization*, an appellate body (Article 13.2.2) or *CAS* shall, after the parties to the proceeding are notified, automatically be binding beyond the parties to the proceeding upon every *Signatory* in every sport with the effects described below:

15.1.1.1 A decision by any of the above-described bodies imposing a *Provisional Suspension* (after a *Provisional Hearing* has occurred or the *Athlete* or other *Person* has either accepted the *Provisional Suspension* or has waived the right to a *Provisional Hearing*, expedited hearing or expedited appeal offered in accordance with Article 7.4.3) automatically prohibits the *Athlete* or other *Person* from participation (as described in Article 10.14.1) in all sports within the authority of any *Signatory* during the *Provisional Suspension*.

15.1.1.2 A decision by any of the above-described bodies imposing a period of *Ineligibility* (after a hearing has occurred or been waived) automatically prohibits the *Athlete* or other *Person* from participation (as described in Article 10.14.1) in all sports within the

authority of any *Signatory* for the period of *Ineligibility*.

15.1.1.3 A decision by any of the above-described bodies accepting an anti-doping rule violation automatically binds all *Signatories*.

15.1.1.4 A decision by any of the above-described bodies to *Disqualify* results under Article 10.10 for a specified period automatically *Disqualifies* all results obtained within the authority of any *Signatory* during the specified period.

15.1.2 Each *Signatory* is under the obligation to recognize and implement a decision and its effects as required by Article 15.1.1, without any further action required, on the earlier of the date the *Signatory* receives actual notice of the decision or the date the decision is placed into *ADAMS*.

15.1.3 A decision by an *Anti-Doping Organization*, an appellate body or *CAS* to suspend, or lift, *Consequences* shall be binding upon each *Signatory* without any further action required, on the earlier of the date the *Signatory* receives actual notice of the decision or the date the decision is placed into *ADAMS*.

15.1.4 Notwithstanding any provision in Article 15.1.1, however, a decision of an anti-doping rule violation by a *Major Event Organization* made in an expedited process during an *Event* shall not be binding on other *Signatories* unless the rules of the *Major Event Organization* provide the *Athlete* or other *Person* with an opportunity to an appeal under non-expedited procedures.[94]

94 [Comment to Article 15.1.4: By way of example, where the rules of the Major Event Organization give the Athlete or other Person the option of choosing an expedited CAS appeal or a CAS appeal under normal CAS procedure, the final decision or adjudication by the Major Event Organization is binding on other Signatories regardless of whether the Athlete or other Person chooses the expedited appeal option.]

15.2 Implementation of Other Decisions by *Anti-Doping Organizations*

Signatories may decide to implement other anti-doping decisions rendered by *Anti-Doping Organizations* not described in Article 15.1.1 above, such as a *Provisional Suspension* prior to a *Provisional Hearing* or acceptance by the *Athlete* or other *Person*.[95]

15.3 Implementation of Decisions by Body that is not a *Signatory*

An anti-doping decision by a body that is not a *Signatory* to the *Code* shall be implemented by each *Signatory* if the *Signatory* finds that the decision purports to be within the authority of that body and the anti-doping rules of that body are otherwise consistent with the *Code*.[96]

95 [Comment to Articles 15.1 and 15.2: Anti-Doping Organization decisions under Article 15.1 are implemented automatically by other Signatories without the requirement of any decision or further action on the Signatories' part. For example, when a National Anti-Doping Organization decides to Provisionally Suspend an Athlete, that decision is given automatic effect at the International Federation level. To be clear, the "decision" is the one made by the National Anti-Doping Organization, there is not a separate decision to be made by the International Federation. Thus, any claim by the Athlete that the Provisional Suspension was improperly imposed can only be asserted against the National Anti-Doping Organization. Implementation of Anti-Doping Organizations' decisions under Article 15.2 is subject to each Signatory's discretion. A Signatory's implementation of a decision under Article 15.1 or Article 15.2 is not appealable separately from any appeal of the underlying decision. The extent of recognition of TUE decisions of other Anti-Doping Organizations shall be determined by Article 4.4 and the International Standard for Therapeutic Use Exemptions.]

96 [Comment to Article 15.3: Where the decision of a body that has not accepted the Code is in some respects Code compliant and in other respects not Code compliant, Signatories should attempt to apply the decision in harmony with the principles of the Code. For example, if in a process consistent with the Code a non-Signatory has found an Athlete to have committed an anti-doping rule violation on account of the presence of a Prohibited Substance in the Athlete's body but the period of Ineligibility applied is shorter than the period provided for in the Code, then all Signatories should recognize the finding of an anti-doping rule violation and the Athlete's National Anti-Doping Organization should conduct a hearing consistent with Article 8 to determine whether the longer period of Ineligibility provided in the Code should be imposed. A Signatory's implementation of a decision or its decision not to implement a decision under Article 15.3, is appealable under Article 13.]

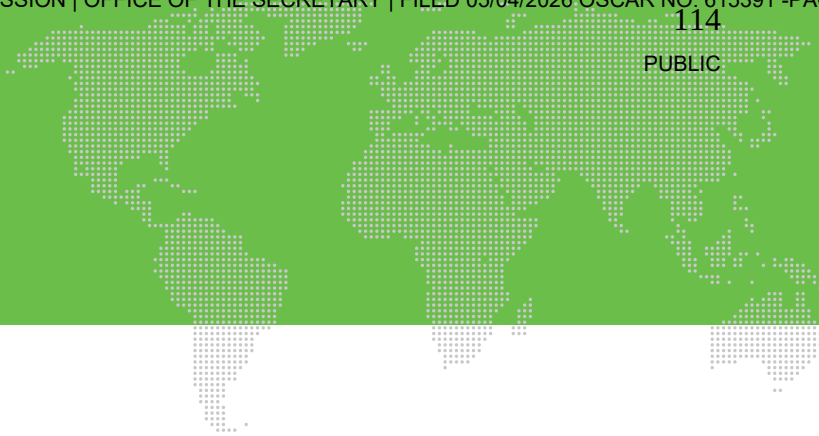
ARTICLE 16 *DOPING CONTROL* FOR ANIMALS COMPETING IN SPORT

16.1 In any sport that includes animals in *Competition*, the International Federation for that sport shall establish and implement anti-doping rules for the animals included in that sport. The anti-doping rules shall include a list of *Prohibited Substances*, appropriate *Testing* procedures and a list of approved laboratories for *Sample* analysis.

16.2 With respect to determining anti-doping rule violations, *Results Management*, fair hearings, *Consequences*, and appeals for animals involved in sport, the International Federation for that sport shall establish and implement rules that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13 and 17 of the *Code*.

ARTICLE 17 STATUTE OF LIMITATIONS

No anti-doping rule violation proceeding may be commenced against an *Athlete* or other *Person* unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, within ten (10) years from the date the violation is asserted to have occurred.



PART TWO
EDUCATION AND RESEARCH

ARTICLE 18 *EDUCATION*

18.1 Principles

Education programs are central to ensure harmonized, coordinated and effective anti-doping programs at the international and national level. They are intended to preserve the spirit of sport and the protection of *Athletes'* health and right to compete on a doping free level playing field as described in the Introduction to the *Code*.

Education programs shall raise awareness, provide accurate information and develop decision-making capability to prevent intentional and unintentional anti-doping rule violations and other breaches of the *Code*. *Education* programs and their implementation shall instill personal values and principles that protect the spirit of sport.

All *Signatories* shall, within their scope of responsibility and in cooperation with each other, plan, implement, monitor, evaluate and promote *Education* programs in line with the requirements set out in the *International Standard* for *Education*.

18.2 *Education* Program and Plan by *Signatories*

Education programs as outlined in the *International Standard* for *Education* shall promote the spirit of sport and have a positive and long-term influence on the choices made by *Athletes* and other *Persons*.

Signatories shall develop an *Education* plan as required in the *International Standard* for *Education*. Prioritization of target groups or activities shall be justified based on a clear rationale of the *Education* Plan.[97]

97 [Comment to Article 18.2: The Risk Assessment that Anti-Doping Organizations are required to conduct under the International Standard for Testing and Investigations provides a framework relating to the risk of doping within sports. Such assessment can be used to identify priority target groups for Education programs. WADA also provides Education resources for Signatories to use to support their program delivery.]

Signatories shall make their *Education* plans available to other *Signatories* upon request in order to avoid duplication of efforts where possible and to support the recognition process outlined in the *International Standard* for *Education*.

An *Anti-Doping Organization's Education* program shall include the following awareness, information, values-based and *Education* components which shall at a minimum be available on a website.[98]

- Principles and values associated with clean sport
- *Athletes'*, *Athlete Support Personnel's* and other groups' rights and responsibilities under the *Code*
- The principle of *Strict Liability*
- Consequences of doping, for example, physical and mental health, social and economic effects, and sanctions
- Anti-doping rule violations
- Substances and Methods on the *Prohibited List*
- Risks of supplement use
- *Use* of medications and *Therapeutic Use Exemptions*
- *Testing* procedures, including urine, blood and the *Athlete Biological Passport*
- Requirements of the *Registered Testing Pool*, including whereabouts and the use of *ADAMS*
- Speaking up to share concerns about doping

98 [Comment to Article 18.2: Where, for example, a particular National Anti-Doping Organization does not have its own website, the required information may be posted on the website of the country's National Olympic Committee or other organization responsible for sport in the country.]

18.2.1 *Education* Pool and Target Groups Established by *Signatories*

Signatories shall identify their target groups and form an *Education* pool in line with the minimum requirements outlined in the *International Standard* for *Education*.[99]

18.2.2 *Education* Program Implementation by *Signatories*

Any *Education* activity directed at the *Education* pool shall be delivered by a trained and authorized *Person* according to the requirements set out in the *International Standard* for *Education*.[100]

18.2.3 Coordination and Cooperation

WADA shall work with relevant stakeholders to support the implementation of the *International Standard* for *Education* and act as a central repository for information and *Education* resources and/or programs developed by *WADA* or *Signatories*. *Signatories* shall cooperate with each other and governments to coordinate their efforts.

99 [Comment to Article 18.2.1: The Education pool should not be limited to National- or International-Level Athletes and should include all Persons, including youth, who participate in sport under the authority of any Signatory, government or other sports organization accepting the Code.]

100 [Comment to Article 18.2.2: The purpose of this provision is to introduce the concept of an Educator. Education shall only be delivered by a trained and competent Person, similar to Testing whereby only trained and appointed Doping Control officers can conduct tests. In both cases, the requirement for trained personnel is to safeguard the Athlete and maintain consistent standards of delivery. Further details on instituting a simple accreditation program for Educators are outlined in the WADA Model Guidelines for Education, including best practice examples of interventions that can be implemented.]

On a national level, *Education* programs shall be coordinated by the *National Anti-Doping Organization*, working in collaboration with their respective national sports federations, *National Olympic Committee*, National Paralympic Committee, governments and *Educational* institutions. This coordination shall maximize the reach of *Education* programs across sports, *Athletes* and *Athlete Support Personnel* and minimize duplication of effort.

Education programs aimed at *International-Level Athletes* shall be the priority for International Federations. *Event*-based *Education* shall be a mandatory element of any anti-doping program associated with an *International Event*.

All *Signatories* shall cooperate with each other and governments to encourage relevant sports organizations, *Educational* institutions, and professional associations to develop and implement appropriate Codes of Conduct that reflect good practice and ethics related to sport practice regarding anti-doping. Disciplinary policies and procedures shall be clearly articulated and communicated, including sanctions which are consistent with the *Code*. Such Codes of Conduct shall make provision for appropriate disciplinary action to be taken by sports bodies to either support the implementation of any doping sanctions, or for an organization to take its own disciplinary action should insufficient evidence prevent an anti-doping rule violation being brought forward.

ARTICLE 19 RESEARCH

19.1 Purpose and Aims of Anti-Doping Research

Anti-doping research contributes to the development and implementation of efficient programs within *Doping Control* and to information and *Education* regarding doping-free sport.

All *Signatories* and *WADA* shall, in cooperation with each other and governments, encourage and promote such research and take all reasonable measures to ensure that the results of such research are used for the promotion of the goals that are consistent with the principles of the *Code*.

19.2 Types of Research

Relevant anti-doping research may include, for example, sociological, behavioral, juridical and ethical studies in addition to scientific, medical, analytical, statistical and physiological investigation. Without limiting the foregoing, studies on devising and evaluating the efficacy of scientifically-based physiological and psychological training programs that are consistent with the principles of the *Code* and respectful of the integrity of the human subjects, as well as studies on the *Use* of emerging substances or methods resulting from scientific developments should be conducted.

19.3 Coordination of Research and Sharing of Results

Coordination of anti-doping research through *WADA* is essential. Subject to intellectual property rights, the results of such anti-doping research shall be provided to *WADA* and, where appropriate, shared with relevant *Signatories* and *Athletes* and other stakeholders.

19.4 Research Practices

Anti-doping research shall comply with internationally recognized ethical practices.

19.5 Research Using *Prohibited Substances* and *Prohibited Methods*

Research efforts should avoid the *Administration* of *Prohibited Substances* or *Prohibited Methods* to *Athletes*.

19.6 Misuse of Results

Adequate precautions should be taken so that the results of anti-doping research are not misused and applied for doping purposes.

PART THREE
ROLES AND RESPONSIBILITIES

All *Signatories* and *WADA* shall act in a spirit of partnership and collaboration in order to ensure the success of the fight against doping in sport and the respect of the *Code*.[101]

101 [Comment: Responsibilities for Signatories and Athletes or other Persons are addressed in various Articles in the Code and the responsibilities listed in this part are additional to these responsibilities.]

ARTICLE 20 ADDITIONAL ROLES AND RESPONSIBILITIES OF *SIGNATORIES* AND *WADA*

Each *Anti-Doping Organization* may delegate aspects of *Doping Control* or anti-doping *Education* for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the *Code*. To the extent such delegation is made to a *Delegated Third Party* that is not a *Signatory*, the agreement with the *Delegated Third Party* shall require its compliance with the *Code* and *International Standards*.[102]

20.1 Roles and Responsibilities of the International Olympic Committee

20.1.1 To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the *Code* and the *International Standards*.

20.1.2 To require, as a condition of recognition by the International Olympic Committee, that International Federations and *National Olympic Committees* within the Olympic Movement are in compliance with the *Code* and the *International Standards*.

20.1.3 To withhold some or all Olympic funding and/or other benefits from sport organizations that are not in compliance with the *Code* and/or the *International Standards*, where required under Article 24.1.

102 [Comment to Article 20: Obviously, an Anti-Doping Organization is not responsible for a failure to comply with the Code by its non-Signatory Delegated Third Parties if the Delegated Third Party's' failure is committed in connection with services provided to a different Anti-Doping Organization. For example, if FINA and FIBA both delegate aspects of Doping Control to the same non-Signatory Delegated Third Party, and the provider fails to comply with the Code in performing the services for FINA, only FINA and not FIBA would be responsible for the failure. However, Anti-Doping Organizations shall contractually require Delegated Third Parties to whom they have delegated anti-doping responsibilities to report to the Anti-Doping Organization any finding of non-compliance by the Delegated Third Parties.]

20.1.4 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories*, and (b) by any other sporting body over which it has authority, in accordance with Article 12.

20.1.5 To authorize and facilitate the *Independent Observer Program*.

20.1.6 To require all *Athletes* preparing for or participating in the Olympic Games, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to and be bound by anti-doping rules in conformity with the *Code* as a condition of such participation or involvement.

20.1.7 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.1.8 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.1.9 To vigorously pursue all potential anti-doping rule violations within its authority including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.1.10 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*.

20.1.11 To accept bids for the Olympic Games only from countries where the government has ratified, accepted, approved or acceded to the *UNESCO Convention*, and (where required under Article 24.1.9) to not accept bids for *Events* from countries where the *National Olympic Committee*, the National Paralympic Committee and/or the *National Anti-Doping Organization* is not in compliance with the *Code* or the *International Standards*.

20.1.12 To cooperate with relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.1.13 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.1.14 To adopt a policy or rule implementing Article 2.11.

20.2 Roles and Responsibilities of the International Paralympic Committee

20.2.1 To adopt and implement anti-doping policies and rules for the Paralympic Games which conform with the *Code* and the *International Standards*.

20.2.2 To require, as a condition of membership of the International Paralympic Committee, that International Federations and National Paralympic Committees within the Paralympic Movement are in compliance with the *Code* and the *International Standards*.

20.2.3 To withhold some or all Paralympic funding and/or other benefits from sport organizations that are not in compliance with the *Code* and/or the *International Standards*, where required under Article 24.1.

20.2.4 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories*, and (b) by any other sporting body over which it has authority, in accordance with Article 12.

20.2.5 To authorize and facilitate the *Independent Observer Program*.

20.2.6 To require all *Athletes* preparing for or participating in the Paralympic Games, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to and be bound by anti-doping rules in conformity with the *Code* as a condition of such participation or involvement.

20.2.7 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.2.8 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation

of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.2.9 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*.

20.2.10 To vigorously pursue all potential anti-doping rule violations within its authority including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.2.11 To cooperate with relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.2.12 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.3 Roles and Responsibilities of International Federations

20.3.1 To adopt and implement anti-doping policies and rules which conform with the *Code* and *International Standards*.

20.3.2 To require, as a condition of membership, that the policies, rules and programs of their National Federations and other members are in compliance with the *Code* and the *International Standards*, and to take appropriate action to enforce such compliance; areas of compliance shall include but not be limited to: (i) requiring that their National Federations conduct *Testing* only under the documented authority of their International Federation and use their *National Anti-Doping Organization* or other *Sample* collection authority to collect *Samples* in compliance with the *International Standard* for *Testing* and Investigations; (ii) requiring that their National Federations recognize the authority of the *National Anti-Doping Organization* in their country in accordance with Article 5.2.1 and assist as appropriate with the *National*

Anti-Doping Organization's implementation of the national *Testing* program for their sport; (iii) requiring that their National Federations analyze all *Samples* collected using a *WADA*-accredited or *WADA*-approved laboratory in accordance with Article 6.1; and (iv) requiring that any national level anti-doping rule violation cases discovered by their National Federations are adjudicated by an *Operationally Independent* hearing panel in accordance with Article 8.1 and the *International Standard* for *Results Management*.

20.3.3 To require all *Athletes* preparing for or participating in a *Competition* or activity authorized or organized by the International Federation or one of its member organizations, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to and be bound by anti-doping rules in conformity with the *Code* as a condition of such participation or involvement.

20.3.4 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.3.5 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation

of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.3.6 To require *Athletes* who are not regular members of the International Federation or one of its member National Federations to be available for *Sample* collection and to provide accurate and up-to-date whereabouts information as part of the International Federation's *Registered Testing Pool* consistent with the conditions for eligibility established by the International Federation or, as applicable, the *Major Event Organization*.[103]

20.3.7 To require each of their National Federations to establish rules requiring all *Athletes* preparing for or participating in a *Competition* or activity authorized or organized by a National Federation or one of its member organizations, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to be bound by anti-doping rules and the *Results Management* authority of *Anti-Doping Organization* in conformity with the *Code* as a condition of such participation.

20.3.8 To require National Federations to report any information suggesting or relating to an anti-doping rule violation to their *National Anti-Doping Organization* and International Federation and to cooperate with investigations conducted by any *Anti-Doping Organization* with authority to conduct the investigation.

20.3.9 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories*, and (b) by any other sporting body over which they have authority, in accordance with Article 12.

103 [Comment to Article 20.3.6: This would include, for example, Athletes from professional leagues.]

20.3.10 To authorize and facilitate the *Independent Observer Program* at *International Events*.

20.3.11 To withhold some or all funding to their member or recognized National Federations that are not in compliance with the *Code* and/or the *International Standards*.

20.3.12 To vigorously pursue all potential anti-doping rule violations within their authority including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping, to ensure proper enforcement of *Consequences*, and to conduct an automatic investigation of *Athlete Support Personnel* in the case of any anti-doping rule violation involving a *Protected Person* or *Athlete Support Person* who has provided support to more than one *Athlete* found to have committed an anti-doping rule violation.

20.3.13 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*, including requiring National Federations to conduct anti-doping *Education* in coordination with the applicable *National Anti-Doping Organization*.

20.3.14 To accept bids for World Championships and other *International Events* only from countries where the government has ratified, accepted, approved or acceded to the *UNESCO Convention*, and (where required under Article 24.1.9) to not accept bids for *Events* from countries where the *National Olympic Committee*, the National Paralympic Committee and/or the *National Anti-Doping Organization* is not in compliance with the *Code* or the *International Standards*.

20.3.15 To cooperate with relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.3.16 To cooperate fully with *WADA* in connection with investigations conducted by *WADA* pursuant to Article 20.7.14.

20.3.17 To have disciplinary rules in place and require National Federations to have disciplinary rules in place to prevent *Athlete Support Personnel* who are *Using Prohibited Substances* or *Prohibited Methods* without valid justification from providing support to *Athletes* within the International Federation's or National Federation's authority.

20.3.18 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.3.19 To adopt a policy or rule implementing Article 2.11.

20.4 Roles and Responsibilities of *National Olympic Committees* and National Paralympic Committees

20.4.1 To ensure that their anti-doping policies and rules conform with the *Code* and the *International Standards*.

20.4.2 To require, as a condition of membership, that the policies, rules and programs of their National Federations and other members are in compliance with the *Code* and the *International Standards*, and to take appropriate action to enforce such compliance.

20.4.3 To respect the autonomy of the *National Anti-Doping Organization* in their country and not to interfere in its operational decisions and activities.

20.4.4 To require National Federations to report any information suggesting or relating to an anti-doping rule violation to their *National Anti-Doping Organization* and International Federation and to cooperate with investigations conducted by any *Anti-Doping Organization* with authority to conduct the investigation.

20.4.5 To require, as a condition of participation in the Olympic Games and Paralympic Games that, at a minimum, *Athletes* who are not regular members of a National Federation be available for *Sample* collection and to provide whereabouts information as required by the *International Standard* for *Testing* and Investigations as soon as the *Athlete* is identified on the long list or subsequent entry document submitted in connection with the Olympic Games or Paralympic Games.

20.4.6 To cooperate with their *National Anti-Doping Organization* and to work with their government to establish a *National Anti-Doping Organization* where one does not already exist, provided that, in the interim, the *National Olympic Committee* or its designee shall fulfill the responsibility of a *National Anti-Doping Organization*. For those countries that are members of a *Regional Anti-Doping Organization*, the *National Olympic Committee*, in cooperation with the government, shall maintain an active and supportive role with their respective *Regional Anti-Doping Organization*.

20.4.7 To require each of their National Federations to establish rules (or other means) requiring all *Athletes* preparing for or participating in a *Competition* or activity authorized or organized by a National Federation or one of its member organizations, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to and be bound by anti-doping rules and *Anti-Doping Organization Results Management* authority in conformity with the *Code* as a condition of such participation or involvement.

20.4.8 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect

of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.4.9 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.4.10 To withhold some or all funding, during any period of *Ineligibility*, to any *Athlete* or *Athlete Support Person* who has violated anti-doping rules.

20.4.11 To withhold some or all funding to their member or recognized National Federations that are not in compliance with the *Code* and/or the *International Standards*.

20.4.12 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*, including requiring National Federations to conduct anti-doping *Education* in coordination with the applicable *National Anti-Doping Organization*.

20.4.13 To vigorously pursue all potential anti-doping rule violations within their authority including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.4.14 To cooperate with relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.4.15 To have disciplinary rules in place to prevent *Athlete Support Personnel* who are *Using Prohibited*

Substances or *Prohibited Methods* without valid justification from providing support to *Athletes* within the *National Olympic Committee's* or National Paralympic Committee's authority.

20.4.16 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.4.17 To adopt a policy or rule implementing Article 2.11.

20.4.18 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories* and (b) by any other sporting body over which it has authority, in accordance with Article 12.

20.5 Roles and Responsibilities of *National Anti-Doping Organizations*[104]

20.5.1 To be independent in their operational decisions and activities from sport and government, including without limitation by prohibiting any involvement in their operational decisions or activities by any *Person* who is at the same time involved in the management or operations of any International Federation, National Federation, *Major Event Organization*, *National Olympic Committee*, National Paralympic Committee, or government department with responsibility for sport or anti-doping.[105]

104 [Comment to Article 20.5: For some smaller countries, a number of the responsibilities described in this Article may be delegated by their National Anti-Doping Organization to a Regional Anti-Doping Organization.]

105 [Comment to Article 20.5.1: This would not, for example, prohibit a National Anti-Doping Organization from acting as a Delegated Third Party for a Major Event Organization or other Anti-Doping Organization.]

20.5.2 To adopt and implement anti-doping rules and policies which conform with the *Code* and the *International Standards*.

20.5.3 To cooperate with other relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.5.4 To encourage reciprocal *Testing* between *Anti-Doping Organizations*.

20.5.5 To promote anti-doping research.

20.5.6 Where funding is provided, to withhold some or all funding, during any period of *Ineligibility*, to any *Athlete* or *Athlete Support Person* who has violated anti-doping rules.

20.5.7 To vigorously pursue all potential anti-doping rule violations within their authority including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping and to ensure proper enforcement of *Consequences*.

20.5.8 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*.

20.5.9 Each *National Anti-Doping Organization* shall be the authority on *Education* within their respective countries.

20.5.10 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.5.11 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control*

(other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.5.12 To conduct an automatic investigation of *Athlete Support Personnel* within their authority in the case of any anti-doping rule violation by a *Protected Person* and to conduct an automatic investigation of any *Athlete Support Person* who has provided support to more than one *Athlete* found to have committed an anti-doping rule violation.

20.5.13 To cooperate fully with *WADA* in connection with investigations conducted by *WADA* pursuant to Article 20.7.14.

20.5.14 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.5.15 To adopt a policy or rule implementing Article 2.11.

20.5.16 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories* and (b) by any other sporting body over which it has authority, in accordance with Article 12.

20.6 Roles and Responsibilities of *Major Event Organizations*

20.6.1 To adopt and implement anti-doping policies and rules for its *Events* which conform with the *Code* and the *International Standards*.

20.6.2 To take appropriate action to discourage non-compliance with the *Code* and the *International Standards* (a) by *Signatories*, in accordance with Article 24.1 and the *International Standard* for *Code* Compliance by *Signatories*, and (b) by any other sporting body over which it has authority, in accordance with Article 12.

20.6.3 To authorize and facilitate the *Independent Observer Program*.

20.6.4 To require all *Athletes* preparing for or participating in the *Event*, and all *Athlete Support Personnel* associated with such *Athletes*, to agree to and be bound by anti-doping rules in conformity with the *Code* as a condition of such participation or involvement.

20.6.5 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.6.6 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.6.7 To vigorously pursue all potential anti-doping rule violations within its authority including investigation into whether *Athlete Support*

Personnel or other *Persons* may have been involved in each case of doping.

20.6.8 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*.

20.6.9 To accept bids for *Events* only from countries where the government has ratified, accepted, approved or acceded to the *UNESCO Convention*, and (where required under Article 24.1.9) to not accept bids for *Events* from countries where the *National Olympic Committee*, the National Paralympic Committee and/or the *National Anti-Doping Organization* is not in compliance with the *Code* or the *International Standards*.

20.6.10 To cooperate with relevant national organizations and agencies and other *Anti-Doping Organizations*.

20.6.11 To respect the operational independence of laboratories as provided in the *International Standard* for Laboratories.

20.6.12 To adopt a policy or rule implementing Article 2.11.

20.7 Roles and Responsibilities of *WADA*

20.7.1 To accept the *Code* and commit to fulfill its roles and responsibilities under the *Code* through a declaration approved by *WADA's* Foundation Board.[106]

20.7.2 To adopt and implement policies and procedures which conform with the *Code* and the *International Standards*.

20.7.3 To provide support and guidance to *Signatories* in their efforts to comply with the *Code* and the *International Standards* and monitor such compliance in accordance with Article 24.1 of the *Code* and the *International Standard* for *Code* Compliance by *Signatories*.

106 [Comment to Article 20.7.1: WADA cannot be a Signatory because of its role in monitoring Signatory compliance with the Code.]

20.7.4 To approve *International Standards* applicable to the implementation of the *Code*.

20.7.5 To accredit and reaccredit laboratories to conduct *Sample* analysis or to approve others to conduct *Sample* analysis.

20.7.6 To develop and publish guidelines and models of best practice.

20.7.7 To submit to the *WADA* Executive Committee for approval, upon the recommendation of the *WADA Athletes* Committee the *Athletes'* Anti-Doping Rights Act which compiles in one place those *Athletes'* rights which are specifically identified in the *Code* and *International Standards*, and other agreed upon principles of best practice with respect to the overall protection of *Athletes'* rights in the context of anti-doping.

20.7.8 To promote, conduct, commission, fund and coordinate anti-doping research and to promote anti-doping *Education*.

20.7.9 To design and conduct an effective *Independent Observer Program* and other types of *Event* advisory programs.

20.7.10 To conduct, in exceptional circumstances and at the direction of the *WADA* Director General, *Testing* on its own initiative or as requested by other *Anti-Doping Organizations*, and to cooperate with relevant national and international organizations and agencies, including but not limited to, facilitating inquiries and investigations.[107]

20.7.11 To approve, in consultation with International Federations, *National Anti-Doping Organizations*, and *Major Event Organizations*, defined *Testing* and *Sample* analysis programs.

107 [Comment to Article 20.7.10: WADA is not a Testing agency, but it reserves the right, in exceptional circumstances, to conduct its own tests where problems have been brought to the attention of the relevant Anti-Doping Organization and have not been satisfactorily addressed.]

20.7.12 Subject to applicable law, as a condition of such position or involvement, to require all of its board members, directors, officers, and those employees (and those of appointed *Delegated Third Parties*), who are involved in any aspect of *Doping Control*, to agree to be bound by anti-doping rules as *Persons* in conformity with the *Code* for direct and intentional misconduct, or to be bound by comparable rules and regulations put in place by the *Signatory*.

20.7.13 Subject to applicable law, to not knowingly employ a *Person* in any position involving *Doping Control* (other than authorized anti-doping *Education* or rehabilitation programs) who is *Provisionally Suspended* or is serving a period of *Ineligibility* under the *Code* or, if a *Person* was not subject to the *Code*, who has directly and intentionally engaged in conduct within the previous six (6) years which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*.

20.7.14 To initiate its own investigations of anti-doping rule violations, non-compliance of *Signatories* and *WADA*-accredited laboratories, and other activities that may facilitate doping.

20.8 Cooperation Regarding Third Party Regulations

Signatories shall cooperate with each other, *WADA* and governments to encourage professional associations and institutions with authority over *Athlete Support Personnel* who are otherwise not subject to the *Code* to implement regulations prohibiting conduct which would be considered an anti-doping rule violation if committed by *Athlete Support Personnel* who are subject to the *Code*.

ARTICLE 21 ADDITIONAL ROLES AND RESPONSIBILITIES OF *ATHLETES* AND OTHER *PERSONS*

21.1 Roles and Responsibilities of *Athletes*

21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the *Code*.

21.1.2 To be available for *Sample* collection at all times.[108]

21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and *Use*.

21.1.4 To inform medical personnel of their obligation not to *Use Prohibited Substances* and *Prohibited Methods* and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the *Code*.

21.1.5 To disclose to their *National Anti-Doping Organization* and International Federation any decision by a non-*Signatory* finding that the *Athlete* committed an anti-doping rule violation within the previous ten (10) years.

21.1.6 To cooperate with *Anti-Doping Organizations* investigating anti-doping rule violations.[109]

108 [Comment to Article 21.1.2: With due regard to an Athlete's human rights and privacy, legitimate anti-doping considerations sometimes require Sample collection late at night or early in the morning. For example, it is known that some Athletes Use low doses of EPO during these hours so that it will be undetectable in the morning.]

109 [Comment to Article 21.1.6: Failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a Signatory's rules.]

21.1.7 To disclose the identity of their *Athlete Support Personnel* upon request by any *Anti-Doping Organization* with authority over the *Athlete*.

21.2 Roles and Responsibilities of *Athlete Support Personnel*

21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the *Code* and which are applicable to them or the *Athletes* whom they support.

21.2.2 To cooperate with the *Athlete Testing* program.

21.2.3 To use their influence on *Athlete* values and behavior to foster anti-doping attitudes.

21.2.4 To disclose to their *National Anti-Doping Organization* and International Federation any decision by a non-*Signatory* finding that they committed an anti-doping rule violation within the previous ten (10) years.

21.2.5 To cooperate with *Anti-Doping Organizations* investigating anti-doping rule violations.[110]

21.2.6 *Athlete Support Personnel* shall not *Use* or *Possess* any *Prohibited Substance* or *Prohibited Method* without valid justification.[111]

110 [Comment to Article 21.2.5: Failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a Signatory's rules.]

111 [Comment to Article 21.2.6: In those situations where Use or personal Possession of a Prohibited Substance or Prohibited Method by an Athlete Support Person without justification is not an anti-doping rule violation under the Code, it should be subject to other sport disciplinary rules. Coaches and other Athlete Support Personnel are often role models for Athletes. They should not be engaging in personal conduct which conflicts with their responsibility to encourage their Athletes not to dope.]

21.3 Roles and Responsibilities of Other *Persons* Subject to the *Code*

21.3.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the *Code* and which are applicable to them.

21.3.2 To disclose to their *National Anti-Doping Organization* and International Federation any decision by a non-*Signatory* finding that they committed an anti-doping rule violation within the previous ten (10) years.

21.3.3 To cooperate with *Anti-Doping Organizations* investigating anti-doping rule violations.

21.4 Roles and Responsibilities of *Regional Anti-Doping Organizations*

21.4.1 To ensure member countries adopt and implement rules, policies and programs which conform with the *Code*.

21.4.2 To require, as a condition of membership, that a member country sign an official *Regional Anti-Doping Organization* membership form which clearly outlines the delegation of anti-doping responsibilities to the *Regional Anti-Doping Organization*.

21.4.3 To cooperate with other relevant national and regional organizations and agencies and other *Anti-Doping Organizations*.

21.4.4 To encourage reciprocal *Testing* between *National Anti-Doping Organizations* and *Regional Anti-Doping Organizations*.

21.4.5 To promote and assist with capacity building among relevant *Anti-Doping Organizations*.

21.4.6 To promote anti-doping research.

21.4.7 To plan, implement, evaluate and promote anti-doping *Education* in line with the requirements of the *International Standard* for *Education*.

ARTICLE 22 INVOLVEMENT OF GOVERNMENTS[112]

Each government's commitment to the *Code* will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of 3 March 2003, and by ratifying, accepting, approving or acceding to the *UNESCO Convention*.

The *Signatories* are aware that any action taken by a government is a matter for that government and subject to the obligations under international law as well as to its own laws and regulations. While governments are bound only by the requirements of the relevant international intergovernmental treaties (and notably of the *UNESCO Convention*), the following Articles set forth the expectations of the *Signatories* to support them in the implementation of the *Code*.

22.1 Each government should take all actions and measures necessary to comply with the *UNESCO Convention*.

22.2 Each government should put in place legislation, regulation, policies or administrative practices for: cooperation and sharing of information with *Anti-Doping Organizations*; sharing of data among *Anti-Doping Organizations* as provided in the *Code*; unrestricted transport of urine and blood *Samples* in a manner that maintains their security and integrity; and unrestricted entry and exit of *Doping Control* officials and unrestricted access for *Doping Control* officials to all areas where *International-Level Athletes* or *National-Level Athletes*

112 [Comment to Article 22: Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code. For that reason, governments are not asked to be Signatories to the Code but rather to sign the Copenhagen Declaration and ratify, accept, approve or accede to the UNESCO Convention. Although the acceptance mechanisms may be different, the effort to combat doping through the coordinated and harmonized program reflected in the Code is very much a joint effort between the sport movement and governments.

This Article sets forth what the Signatories clearly expect from governments. However, these are simply "expectations" since governments are only "obligated" to adhere to the requirements of the UNESCO Convention.]

live or train to conduct no advance notice *Testing*, subject to applicable border control, immigration and access requirements and regulations.

22.3 Each government should adopt rules, regulations or policies to discipline officials and employees who are involved in *Doping Control*, sport performance or medical care in a sport setting, including in a supervisory capacity, for engaging in activities which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Persons*.

22.4 Each government should not permit any *Person* to be involved in any position involving *Doping Control*, sport performance or medical care in a sport setting, including in a supervisory capacity, where such *Person*: (i) is serving a period of *Ineligibility* for an anti-doping rule violation under the *Code*, or (ii) if not subject to the authority of an *Anti-Doping Organization*, and where *Ineligibility* has not been addressed in a *Results Management* process pursuant to the *Code*, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*, in which case the disqualifying status of such *Person* should be in force for the longer of six (6) years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed.

22.5 Each government should encourage cooperation between all of its public services or agencies and *Anti-Doping Organizations* to timely share information with *Anti-Doping Organizations* which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited.

22.6 Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law.

22.7 Each government that does not have a *National Anti-Doping Organization* in its country should work with its *National Olympic Committee* to establish one.

22.8 Each government should respect the autonomy of a *National Anti-Doping Organization* in its country or a *Regional Anti-Doping Organization* to which its country belongs and any *WADA*-accredited or approved laboratory in its country and not interfere in their operational decisions and activities.

22.9 Each government should not limit or restrict *WADA's* access to any doping *Samples* or anti-doping records or information held or controlled by any *Signatory*, member of a *Signatory* or *WADA*-accredited or approved laboratory.

22.10 Failure by a government to ratify, accept, approve or accede to the *UNESCO Convention* may result in ineligibility to bid for and/or host *Events* as provided in Articles 20.1.11, 20.3.14 and 20.6.9, and the failure by a government to comply with the *UNESCO Convention* thereafter, as determined by UNESCO, may result in meaningful consequences by UNESCO and *WADA* as determined by each organization.

PART FOUR

ACCEPTANCE, COMPLIANCE, MODIFICATION AND INTERPRETATION

ARTICLE 23 ACCEPTANCE AND IMPLEMENTATION

23.1 Acceptance of the *Code*

23.1.1 The following entities may be *Signatories* to the *Code*: the International Olympic Committee, International Federations, the International Paralympic Committee, *National Olympic Committees*, National Paralympic Committees, *Major Event Organizations*, *National Anti-Doping Organizations* and other organizations having significant relevance in sport.

23.1.2 The International Olympic Committee; International Federations recognized by the International Olympic Committee; the International Paralympic Committee; *National Olympic Committees*; National Paralympic Committees; *National Anti-Doping Organizations*; and *Major Event Organizations* recognized by one or more of the aforementioned entities shall become *Signatories* by signing a declaration of acceptance or by another form of acceptance determined to be acceptable by *WADA*.

23.1.3 Any other entity described in Article 23.1.1 may submit an application to *WADA* to become a *Signatory* which will be reviewed under a policy adopted by *WADA*. *WADA's* acceptance of such applications shall be subject to conditions and requirements established by *WADA* in such policy.[113] Upon acceptance of an application by *WADA*, the applicant's becoming a *Signatory* is subject to the applicant signing a declaration

113 [Comment to Article 23.1.3: For example, these conditions and requirements would include financial contributions by the entity to cover WADA's administrative, monitoring and compliance costs that may be attributable to the application process and the entity's subsequent Signatory status.]

of acceptance of the *Code* and an acceptance of the conditions and requirements established by *WADA* for such applicant.

23.1.4 A list of all acceptances will be made public by *WADA*.

23.2 Implementation of the *Code*

23.2.1 The *Signatories* shall implement applicable *Code* provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.

23.2.2 The following Articles as applicable to the scope of the *Anti-Doping Activity* which the *Anti-Doping Organization* performs must be implemented by *Signatories* without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.):[114]

- Article 1 (Definition of Doping)
- Article 2 (Anti-Doping Rule Violations)
- Article 3 (Proof of Doping)
- Article 4.2.2 (*Specified Substances* or *Specified Methods*)
- Article 4.2.3 (*Substances of Abuse*)
- Article 4.3.3 (*WADA's* Determination of the *Prohibited List*)
- Article 7.7 (Retirement from Sport)
- Article 9 (Automatic *Disqualification* of Individual Results)

114 [Comment to Article 23.2.2: Nothing in the Code precludes an Anti-Doping Organization from adopting and enforcing its own specific disciplinary rules for conduct by Athlete Support Personnel related to doping but which does not, in and of itself, constitute an anti-doping rule violation under the Code. For example, a National or International Federation could refuse to renew the license of a coach when multiple Athletes have committed anti-doping rule violations while under that coach's supervision.]

- Article 10 (Sanctions on Individuals)
- Article 11 (*Consequences* to Teams)
- Article 13 (Appeals) with the exception of 13.2.2, 13.6, and 13.7
- Article 15.1 (Automatic Binding Effect of Decisions)
- Article 17 (Statute of Limitations)
- Article 26 (Interpretation of the *Code*)
- Appendix 1 – Definitions

No additional provision may be added to a *Signatory's* rules which changes the effect of the Articles enumerated in this Article. A *Signatory's* rules must expressly acknowledge the Commentary of the *Code* and endow the Commentary with the same status that it has in the *Code*. However, nothing in the *Code* precludes a *Signatory* from having safety, medical, eligibility or Code of Conduct rules which are applicable for purposes other than anti-doping.[115]

23.2.3 In implementing the *Code*, *Signatories* are encouraged to use the models of best practice recommended by *WADA*.

23.3 Implementation of Anti-Doping Programs

Signatories shall devote sufficient resources in order to implement anti-doping programs in all areas that are compliant with the *Code* and the *International Standards*.

115 [Comment to Article 23.2.2: For example, an International Federation could decide, for reputational and health reasons, to have a Code of Conduct rule prohibiting an Athlete's Use or Possession of cocaine Out-of-Competition. In an anti-doping Sample collection Out-of-Competition, such International Federation would be able to have the laboratory test for cocaine as part of the enforcement of its Code of Conduct policy. On the other hand, the International Federation's Code of Conduct could not impose additional sanctions for the Use of cocaine In-Competition since that is already covered by the sanction scheme established in the Code. Other possible examples include rules governing the use of alcohol or oxygen. Similarly, an International Federation could use data from a Doping Control test to monitor eligibility relating to transgender and other eligibility rules.]

ARTICLE 24 MONITORING AND ENFORCING COMPLIANCE WITH THE *CODE* AND *UNESCO CONVENTION*

24.1 Monitoring and Enforcing Compliance with the *Code*[116]

24.1.1 Compliance by *Signatories* with the *Code* and the *International Standards* shall be monitored by *WADA* in accordance with the *International Standard* for *Code* Compliance by *Signatories*.

24.1.2 To facilitate such monitoring, each *Signatory* shall report to *WADA* on its compliance with the *Code* and the *International Standards* as and when required by *WADA*. As part of that reporting, the *Signatory* shall accurately provide all of the information requested by *WADA* and shall explain the actions it is taking to correct any *Non-Conformities*.

24.1.3 Failure by a *Signatory* to provide accurate information in accordance with Article 24.1.2 itself constitutes an instance of *Non-Conformity* with the *Code*, as does failure by a *Signatory* to submit accurate information to *WADA* where required by other Articles of the *Code* or by the *International Standard* for *Code* Compliance by *Signatories* or other *International Standard*.

24.1.4 In cases of *Non-Conformity* (whether with reporting obligations or otherwise), *WADA* shall follow the corrective procedures set out in the *International Standard* for *Code* Compliance by *Signatories*. If the *Signatory* or its delegate fails to correct the *Non-Conformities* within the specified timeframe, then (following approval of such course by *WADA's* Executive Committee) *WADA* shall send a formal notice to the *Signatory*,

116 [Comment to Article 24.1: Defined terms specific to Article 24.1 are set forth at the end of Appendix 1 to the Code.]

alleging that the *Signatory* is non-compliant, specifying the consequences that *WADA* proposes should apply for such non-compliance from the list of potential consequences set forth in Article 24.1.12, and specifying the conditions that *WADA* proposes the *Signatory* should have to satisfy in order to be *Reinstated* to the list of *Code*-compliant *Signatories*. That notice will be publicly reported in accordance with the *International Standard* for *Code* Compliance by *Signatories*.

24.1.5 If the *Signatory* does not dispute *WADA's* allegation of non-compliance or the consequences or *Reinstatement* conditions proposed by *WADA* within twenty-one (21) days of receipt of the formal notice, the non-compliance alleged will be deemed admitted and the consequences and *Reinstatement* conditions proposed will be deemed accepted, the notice will automatically become and will be issued by *WADA* as a final decision, and (without prejudice to any appeal filed in accordance with Article 13.6) it will be enforceable with immediate effect in accordance with Article 24.1.9. The decision will be publicly reported as provided in the *International Standard* for *Code* Compliance by *Signatories* or other *International Standards*.

24.1.6 If the *Signatory* wishes to dispute *WADA's* allegation of non-compliance, and/or the consequences and/or the *Reinstatement* conditions proposed by *WADA*, it must notify *WADA* in writing within twenty-one (21) days of its receipt of the notice from *WADA*. In that event, *WADA* shall file a formal notice of dispute with *CAS*, and that dispute will be resolved by the *CAS* Ordinary Arbitration Division in accordance with the *International Standard* for *Code* Compliance by *Signatories*. *WADA* shall have the burden of proving to the *CAS* Panel, on the balance of probabilities, that the *Signatory* is non-compliant (if that is disputed). If the *CAS* Panel decides that

WADA has met that burden, and if the *Signatory* has also disputed the consequences and/or the *Reinstatement* conditions proposed by *WADA*, the *CAS* Panel will also decide, by reference to the relevant provisions of the *International Standard* for *Code* Compliance by *Signatories*: (a) what consequences should be imposed from the list of potential consequences set out in Article 24.1.12 of the *Code*; and (b) what conditions the *Signatory* should be required to satisfy in order to be *Reinstated*.

24.1.7 *WADA* will publicly report the fact that the case has been referred to *CAS* for determination. Each of the following *Persons* shall have the right to intervene and participate as a party in the case, provided it gives notice of its intervention within ten (10) days of such publication by *WADA*:

24.1.7.1 the International Olympic Committee and/or the International Paralympic Committee (as applicable), and the *National Olympic Committee* and/or the National Paralympic Committee (as applicable), where the decision may have an effect in relation to the Olympic Games or Paralympic Games (including decisions affecting eligibility to attend/participate in the Olympic Games or Paralympic Games); and

24.1.7.2 an International Federation, where the decision may have an effect on participation in the International Federation's World Championships and/or other International *Events* and/or on a bid that has been submitted for a country to host the International Federation's World Championships and/or other *International Events*.

Any other *Person* wishing to participate as a party in the case must apply to *CAS*

within ten (10) days of publication by *WADA* of the fact that the case has been referred to *CAS* for determination. *CAS* shall permit such intervention (i) if all other parties in the case agree; or (ii) if the applicant demonstrates a sufficient legal interest in the outcome of the case to justify its participation as a party.

24.1.8 *CAS's* decision resolving the dispute will be publicly reported by *CAS* and by *WADA*. Subject to the right under Swiss law to challenge that decision before the Swiss Federal Tribunal, the decision shall be final and enforceable with immediate effect in accordance with Article 24.1.9.

24.1.9 Final decisions issued in accordance with Article 24.1.5 or Article 24.1.8, determining that a *Signatory* is non-compliant, imposing consequences for such non-compliance, and/or setting conditions that the *Signatory* has to satisfy in order to be *Reinstated* to the list of *Code*-compliant *Signatories*, and decisions by *CAS* further to Article 24.1.10, are applicable worldwide, and shall be recognized, respected and given full effect by all other *Signatories* in accordance with their authority and within their respective spheres of responsibility.

24.1.10 If a *Signatory* wishes to dispute *WADA's* allegation that the *Signatory* has not yet met all of the *Reinstatement* conditions imposed on it and therefore is not yet entitled to be *Reinstated* to the list of *Code*-compliant *Signatories*, the *Signatory* must advise *WADA* in writing within twenty-one (21) days of its receipt of the allegation from *WADA*. In that event, *WADA* shall file a formal notice of dispute with *CAS*, and the dispute will be resolved by the *CAS* Ordinary Arbitration Division in accordance with Articles 24.1.6 to 24.1.8. *WADA* shall have the burden to prove to the *CAS*

Panel, on the balance of probabilities, that the *Signatory* has not yet met all of the *Reinstatement* conditions imposed on it and therefore is not yet entitled to be *Reinstated*. Subject to the right under Swiss law to challenge *CAS's* decision before the Swiss Federal Tribunal, *CAS's* decision shall be final and enforceable with immediate effect in accordance with Article 24.1.9.

24.1.11 The various requirements imposed on *Signatories* by the *Code* and the *International Standards* shall be classified either as *Critical*, or as *High Priority*, or as *General*, in accordance with the *International Standard* for *Code* Compliance by *Signatories*, depending on their relative importance to the fight against doping in sport. That classification shall be a key factor in determining what consequences should be imposed in the event of non-compliance with such requirement(s), in accordance with Article 10 of the *International Standard* for *Code* Compliance by *Signatories*. The *Signatory* has the right to dispute the classification of the requirement, in which case *CAS* will decide on the appropriate classification.

24.1.12 The following consequences may be imposed, individually or cumulatively, on a *Signatory* that has failed to comply with the *Code* and/or the *International Standards*, based on the particular facts and circumstances of the case at hand, and the provisions of Article 10 of the *International Standard* for *Code* Compliance by *Signatories*:

24.1.12.1 Ineligibility or withdrawal of *WADA* privileges:

(a) in accordance with the relevant provisions of *WADA's* Statutes, the *Signatory's Representatives* being ruled ineligible for a specified period to hold any *WADA* office or any position as a member of any *WADA* board or committee or other body (including but not limited

to *WADA's* Foundation Board, the Executive Committee, and any Standing Committee) (although *WADA* may exceptionally permit *Representatives* of the *Signatory* to remain as members of *WADA* expert groups where there is no effective substitute available);

(b) the *Signatory* being ruled ineligible to host any event organized or co-hosted or co-organized by *WADA*;

(c) the *Signatory's Representatives* being ruled ineligible to participate in any *WADA Independent Observer Program* or *WADA* Outreach program or other *WADA* activities;

(d) withdrawal of *WADA* funding to the *Signatory* (whether direct or indirect) relating to the development of specific activities or participation in specific programs; and

24.1.12.2 the *Signatory's Representatives* being ruled ineligible for a specified period to hold any office of or position as a member of the board or committees or other bodies of any other *Signatory* (or its members) or association of *Signatories*.

24.1.12.3 *Special Monitoring* of some or all of the *Signatory's Anti-Doping Activities*, until *WADA* considers that the *Signatory* is in a position to implement such *Anti-Doping Activities* in a compliant manner without such monitoring.

24.1.12.4 *Supervision* and/or *Takeover* of some or all of the *Signatory's Anti-Doping Activities* by an *Approved Third Party*, until *WADA* considers that the *Signatory* is in a position to implement such *Anti-Doping*

Activities itself in a compliant manner without such measures:

(a) If the non-compliance involves non-compliant rules, regulations and/or legislation, then the *Anti-Doping Activities* in issue shall be conducted under other applicable rules (of one or more other *Anti-Doping Organizations*, e.g., International Federations or *National Anti-Doping Organizations* or *Regional Anti-Doping Organizations*) that are compliant, as directed by *WADA*. In that case, while the *Anti-Doping Activities* (including any *Testing* and *Results Management*) will be administered by the *Approved Third Party* under and in accordance with those other applicable rules at the cost of the non-compliant *Signatory*, any costs incurred by the *Anti-Doping Organizations* as a result of the use of their rules in this manner shall be reimbursed by the non-compliant *Signatory*.

(b) If it is not possible to fill the gap in the *Signatory's Anti-Doping Activities* in this way (for example, because national legislation prohibits it, and the *National Anti-Doping Organization* has not secured an amendment to that legislation or other solution), then it may be necessary as an alternative measure to exclude *Athletes* who would have been covered by the *Signatory's Anti-Doping Activities* from participating in the Olympic Games/Paralympic Games/other *Events*, in order to protect the rights of clean *Athletes* and to preserve public confidence in the integrity of competition at those events.

24.1.12.5 A *Fine*.

24.1.12.6 Suspension or loss of eligibility to receive some or all funding and/or other benefits from the International Olympic Committee or the International Paralympic Committee or any other *Signatory* for a specified period (with or without the right to receive such funding and/or other benefits for that period retrospectively following *Reinstatement*).

24.1.12.7 Recommendation to the relevant public authorities to withhold some or all public and/or other funding and/or other benefits from the *Signatory* for a specified period (with or without the right to receive such funding and/or other benefits for that period retrospectively following *Reinstatement*).[117]

24.1.12.8 Where the *Signatory* is a *National Anti-Doping Organization* or a *National Olympic Committee* acting as a *National Anti-Doping Organization*, the *Signatory's* country being ruled ineligible to host or co-host and/or to be awarded the right to host or co-host an *International Event* (e.g., Olympic Games, Paralympic Games, any other *Major Event Organization's Event*, World Championships, regional or continental championships, and/or any other *International Event*):

(a) If the right to host or co-host a World Championship and/or other *International Event(s)* has already been awarded to the

117 [Comment to Article 24.1.12.7: Public authorities are not Signatories to the Code. In accordance with Article 11(c) of the UNESCO Convention, however, State Parties shall, where appropriate, withhold some or all financial or other sport-related support from any sports organization or Anti-Doping Organization that is not in compliance with the Code.]

country in question, the *Signatory* that awarded that right must assess whether it is legally and practically possible to withdraw that right and re-assign the *Event* to another country. If it is legally and practically possible to do so, then the *Signatory* shall do so.

(b) *Signatories* shall ensure that they have due authority under their statutes, rules and regulations, and/or hosting agreements, to comply with this requirement (including a right in any hosting agreement to cancel the agreement without penalty where the relevant country has been ruled ineligible to host the *Event*).

24.1.12.9 Where the *Signatory* is a *National Anti-Doping Organization* or a *National Olympic Committee* or a National Paralympic Committee, exclusion of the following *Persons* from participation in or attendance at the Olympic Games and the Paralympic Games and/or other specified *Events*, World Championships, regional or continental championships and/or any other *International Events* for a specified period:

(a) the *National Olympic Committee* and/or the National Paralympic Committee of the *Signatory's* country;

(b) the *Representatives* of that country and/or of the *National Olympic Committee* and/or the National Paralympic Committee of that country; and/or

(c) the *Athletes* and *Athlete Support Personnel* affiliated to that country and/or to the *National Olympic Committee* and/or to the National Paralympic

Committee and/or to the National Federation of that country.

24.1.12.10 Where the *Signatory* is an International Federation, exclusion of the following *Persons* from participation in or attendance at the Olympic Games and the Paralympic Games and/or other *Events* for a specified period: the *Representatives* of that International Federation and/or the *Athletes* and *Athlete Support Personnel* participating in the International Federation's sport (or in one or more disciplines of that sport).

24.1.12.11 Where the *Signatory* is a *Major Event Organization*:

(a) *Special Monitoring* or *Supervision* or *Takeover* of the *Major Event Organization's Anti-Doping Activities* at the next edition(s) of its *Event*; and/or

(b) Suspension or loss of eligibility to receive funding and other benefits from and/or the recognition/membership/patronage (as applicable) of the International Olympic Committee, the International Paralympic Committee, the Association of *National Olympic Committees*, or other patron body; and/or

(c) loss of recognition of its *Event* as a qualifying event for the Olympic Games or the Paralympic Games.

24.1.12.12 Suspension of recognition by the Olympic Movement and/or of membership of the Paralympic Movement.

24.1.13 Other Consequences

Governments and *Signatories* and associations of *Signatories* may impose additional consequences within their respective spheres of authority for non-compliance by *Signatories*, provided that this does not compromise or restrict in any way the ability to apply consequences in accordance with this Article 24.1.[118]

24.2 Monitoring Compliance with the *UNESCO Convention*

Compliance with the commitments reflected in the *UNESCO Convention* will be monitored as determined by the Conference of Parties to the *UNESCO Convention*, following consultation with the State Parties and *WADA*. *WADA* shall advise governments on the implementation of the *Code* by the *Signatories* and shall advise *Signatories* on the ratification, acceptance, approval or accession to the *UNESCO Convention* by governments.

ARTICLE 25 MODIFICATION AND WITHDRAWAL

25.1 Modification

25.1.1 *WADA* shall be responsible for overseeing the evolution and improvement of the *Code*. *Athletes* and other stakeholders and governments shall be invited to participate in such process.

118 [Comment to Article 24.1.13: For example, the International Olympic Committee may decide to impose symbolic or other consequences on an International Federation or a National Olympic Committee pursuant to the Olympic Charter, such as withdrawal of eligibility to organize an International Olympic Committee Session or an Olympic Congress; while an International Federation may decide to cancel International Events that were scheduled to be held in the country of a non-compliant Signatory, or move them to another country.]

25.1.2 *WADA* shall initiate proposed amendments to the *Code* and shall ensure a consultative process to both receive and respond to recommendations and to facilitate review and feedback from *Athletes* and other stakeholders and governments on recommended amendments.

25.1.3 Amendments to the *Code* shall, after appropriate consultation, be approved by a two-thirds majority of the *WADA* Foundation Board including a majority of both the public sector and Olympic Movement members casting votes. Amendments shall, unless provided otherwise, go into effect three (3) months after such approval.

25.1.4 *Signatories* shall modify their rules to incorporate the 2021 *Code* on or before 1 January 2021, to take effect on 1 January 2021. *Signatories* shall implement any subsequent applicable amendment to the *Code* within one (1) year of approval by the *WADA* Foundation Board.[119]

25.2 Withdrawal of Acceptance of the *Code*

Signatories may withdraw acceptance of the *Code* after providing *WADA* six-months written notice of their intent to withdraw. *Signatories* shall no longer be considered in compliance once acceptance has been withdrawn.

119 [Comment to Articles 25.1.3 and 25.1.4: Under Article 25.1.3, new or changed obligations imposed on Signatories automatically go into effect three (3) months after approval unless provided otherwise. In contrast, Article 25.1.4 addresses new or changed obligations imposed on Athletes or other Persons which can only be enforced against individual Athletes or other Persons by changes to the anti-doping rules of the relevant Signatory (e.g., an International Federation). For that reason, Article 25.1.4 provides for a longer period of time for each Signatory to conform its rules to the 2021 Code and take any necessary measures to ensure the appropriate Athletes and other Persons are bound by the rules.]

ARTICLE 26 INTERPRETATION OF THE *CODE*

26.1 The official text of the *Code* shall be maintained by *WADA* and shall be published in English and French. In the event of any conflict between the English and French versions, the English version shall prevail.

26.2 The comments annotating various provisions of the *Code* shall be used to interpret the *Code*.

26.3 The *Code* shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the *Signatories* or governments.

26.4 The headings used for the various Parts and Articles of the *Code* are for convenience only and shall not be deemed part of the substance of the *Code* or to affect in any way the language of the provisions to which they refer.

26.5 Where the term "days" is used in the *Code* or an *International Standard*, it shall mean calendar days unless otherwise specified.

26.6 The *Code* shall not apply retroactively to matters pending before the date the *Code* is accepted by a *Signatory* and implemented in its rules. However, pre-*Code* anti-doping rule violations would continue to count as "First violations" or "Second violations" for purposes of determining sanctions under Article 10 for subsequent post-*Code* violations.

26.7 The Purpose, Scope and Organization of the World Anti-Doping Program and the *Code* and Appendix 1, Definitions, shall be considered integral parts of the *Code*.

ARTICLE 27 TRANSITIONAL PROVISIONS

27.1 General Application of the 2021 *Code*

The 2021 *Code* shall apply in full as of 1 January 2021 (the "Effective Date").

27.2 Non-Retroactive except for Articles 10.9.4 and 17 or Unless Principle of "Lex Mitior" Applies

Any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive anti-doping rules set out in this 2021 *Code*, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case. For these purposes, the retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.9.4 and the statute of limitations set forth in Article 17 are procedural rules, not substantive rules, and should be applied retroactively along with all of the other procedural rules in the 2021 *Code* (provided, however, that Article 17 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date).

27.3 Application to Decisions Rendered Prior to the 2021 *Code*

With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the *Athlete* or other *Person* is still serving the period of *Ineligibility* as of the Effective Date, the *Athlete* or other *Person* may apply to the *Anti-Doping Organization* which had *Results Management* responsibility for the anti-doping rule violation to consider a reduction in the period of *Ineligibility* in light of the 2021 *Code*. Such application must be made before the period of *Ineligibility* has expired. The decision rendered by the *Anti-Doping Organization* may be appealed pursuant to Article 13.2. The 2021 *Code* shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of *Ineligibility* has expired.

27.4 Multiple Violations Where the First Violation Occurs Prior to 1 January 2021

For purposes of assessing the period of *Ineligibility* for a second violation under Article 10.9.1, where the sanction for the first violation was determined based on pre-2021 *Code* rules, the period of *Ineligibility* which would have been assessed for that first violation had 2021 *Code* rules been applicable, shall be applied.[120]

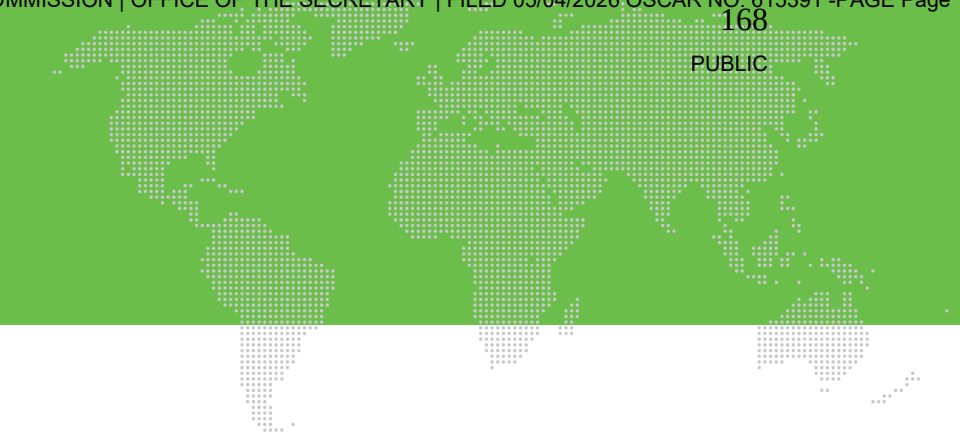
27.5 Additional *Code* Amendments

Any additional *Code* amendments shall go into effect as provided in Article 27.1.

27.6 Changes to the *Prohibited List*

Changes to the *Prohibited List* and *Technical Documents* relating to substances or methods on the *Prohibited List* shall not, unless they specifically provide otherwise, be applied retroactively. As an exception, however, when a *Prohibited Substance* or *Prohibited Method* has been removed from the *Prohibited List*, an *Athlete* or other *Person* currently serving a period of *Ineligibility* on account of the formerly *Prohibited Substance* or *Prohibited Method* may apply to the *Anti-Doping Organization* which had *Results Management* responsibility for the anti-doping rule violation to consider a reduction in the period of *Ineligibility* in light of the removal of the substance or method from the *Prohibited List*.

120 [Comment to Article 27.4: Other than the situation described in Article 27.4, where a final decision finding an anti-doping rule violation has been rendered prior to the existence of the Code or under the Code in force before the 2021 Code and the period of Ineligibility imposed has been completely served, the 2021 Code may not be used to re-characterize the prior violation.]



APPENDIX 1
DEFINITIONS

DEFINITIONS[121]

ADAMS: The Anti-Doping Administration and Management System is a Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and *WADA* in their anti-doping operations in conjunction with data protection legislation.

Administration: Providing, supplying, supervising, facilitating, or otherwise participating in the *Use* or *Attempted Use* by another *Person* of a *Prohibited Substance* or *Prohibited Method*. However, this definition shall not include the actions of bona fide medical personnel involving a *Prohibited Substance* or *Prohibited Method Used* for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving *Prohibited Substances* which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate that such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

Adverse Analytical Finding: A report from a *WADA*-accredited laboratory or other *WADA*-approved laboratory that, consistent with the *International Standard* for Laboratories, establishes in a *Sample* the presence of a *Prohibited Substance* or its *Metabolites* or *Markers* or evidence of the *Use* of a *Prohibited Method*.

Adverse Passport Finding: A report identified as an *Adverse Passport Finding* as described in the applicable *International Standards*.

Aggravating Circumstances: Circumstances involving, or actions by, an *Athlete* or other *Person* which may justify the imposition of a period of *Ineligibility* greater than the standard sanction. Such circumstances and actions shall include, but are not limited to: the *Athlete* or other *Person Used* or *Possessed* multiple *Prohibited Substances* or *Prohibited Methods*, *Used* or *Possessed* a *Prohibited Substance* or *Prohibited Method* on multiple occasions or committed multiple other anti-doping rule violations; a normal individual would be likely to enjoy the performance-enhancing

121 [Comment to Definitions: Defined terms shall include their plural and possessive forms, as well as those terms used as other parts of speech.]

effects of the anti-doping rule violation(s) beyond the otherwise applicable period of *Ineligibility*; the *Athlete* or *Person* engaged in deceptive or obstructive conduct to avoid the detection or adjudication of an anti-doping rule violation; or the *Athlete* or other *Person* engaged in *Tampering* during *Results Management*. For the avoidance of doubt, the examples of circumstances and conduct described herein are not exclusive and other similar circumstances or conduct may also justify the imposition of a longer period of *Ineligibility*.

Anti-Doping Activities: Anti-doping *Education* and information, test distribution planning, maintenance of a *Registered Testing Pool*, managing *Athlete Biological Passports*, conducting *Testing*, organizing analysis of *Samples*, gathering of intelligence and conduct of investigations, processing of *TUE* applications, *Results Management*, monitoring and enforcing compliance with any *Consequences* imposed, and all other activities related to anti-doping to be carried out by or on behalf of an *Anti-Doping Organization*, as set out in the *Code* and/or the *International Standards*.

Anti-Doping Organization: *WADA* or a *Signatory* that is responsible for adopting rules for initiating, implementing or enforcing any part of the *Doping Control* process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other *Major Event Organizations* that conduct *Testing* at their *Events*, International Federations, and *National Anti-Doping Organizations*.

Athlete: Any *Person* who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each *National Anti-Doping Organization*). An *Anti-Doping Organization* has discretion to apply anti-doping rules to an *Athlete* who is neither an *International-Level Athlete* nor a *National-Level Athlete*, and thus to bring them within the definition of *"Athlete."* In relation to *Athletes* who are neither *International-Level* nor *National-Level Athletes*, an *Anti-Doping Organization* may elect to: conduct limited *Testing* or no *Testing* at all; analyze *Samples* for less than the full menu of *Prohibited Substances*; require limited or no whereabouts information; or not require advance *TUEs*. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any *Athlete* over

whom an *Anti-Doping Organization* has elected to exercise its authority to test and who competes below the international or national level, then the *Consequences* set forth in the *Code* must be applied. For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and *Education*, any *Person* who participates in sport under the authority of any *Signatory*, government, or other sports organization accepting the *Code* is an *Athlete*.[122]

Athlete Biological Passport: The program and methods of gathering and collating data as described in the *International Standard* for *Testing* and Investigations and *International Standard* for Laboratories.

Athlete Support Personnel: Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other *Person* working with, treating or assisting an *Athlete* participating in or preparing for sports *Competition*.

Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an *Attempt* to commit a violation if the *Person* renounces the *Attempt* prior to it being discovered by a third party not involved in the *Attempt*.

Atypical Finding: A report from a *WADA*-accredited laboratory or other *WADA*-approved laboratory which requires further investigation as provided by the *International Standard* for Laboratories or related *Technical Documents* prior to the determination of an *Adverse Analytical Finding*.

122 [Comment to Athlete: Individuals who participate in sport may fall in one of five categories: 1) International-Level Athlete, 2) National-Level Athlete, 3) individuals who are not International- or National-Level Athletes but over whom the International Federation or National Anti-Doping Organization has chosen to exercise authority, 4) Recreational Athlete, and 5) individuals over whom no International Federation or National Anti-Doping Organization has, or has chosen to, exercise authority. All International- or National-Level Athletes are subject to the anti-doping rules of the Code, with the precise definitions of international and national level sport to be set forth in the anti-doping rules of the International Federations and National Anti-Doping Organizations.]

Atypical Passport Finding: A report described as an *Atypical Passport Finding* as described in the applicable *International Standards*.

CAS: The Court of Arbitration for Sport.

Code: The World Anti-Doping *Code*.

Competition: A single race, match, game or singular sport contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletics. For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a *Competition* and an *Event* will be as provided in the rules of the applicable International Federation.

Consequences of Anti-Doping Rule Violations ("Consequences"): An *Athlete's* or other *Person's* violation of an anti-doping rule may result in one or more of the following: (a) *Disqualification* means the *Athlete's* results in a particular *Competition* or *Event* are invalidated, with all resulting *Consequences* including forfeiture of any medals, points and prizes; (b) *Ineligibility* means the *Athlete* or other *Person* is barred on account of an anti-doping rule violation for a specified period of time from participating in any *Competition* or other activity or funding as provided in Article 10.14; (c) *Provisional Suspension* means the *Athlete* or other *Person* is barred temporarily from participating in any *Competition* or activity prior to the final decision at a hearing conducted under Article 8; (d) *Financial Consequences* means a financial sanction imposed for an anti-doping rule violation or to recover costs associated with an anti-doping rule violation; and (e) *Public Disclosure* means the dissemination or distribution of information to the general public or *Persons* beyond those *Persons* entitled to earlier notification in accordance with Article 14. Teams in *Team Sports* may also be subject to *Consequences* as provided in Article 11.

Contaminated Product: A product that contains a *Prohibited Substance* that is not disclosed on the product label or in information available in a reasonable Internet search.

Decision Limit: The value of the result for a threshold substance in a *Sample*, above which an *Adverse Analytical Finding* shall be reported, as defined in the *International Standard* for Laboratories.

Delegated Third Party: Any *Person* to which an *Anti-Doping Organization* delegates any aspect of *Doping Control* or anti-doping *Education* programs including, but not limited to, third parties or other *Anti-Doping Organizations* that conduct *Sample* collection or other *Doping Control* services or anti-doping *Educational* programs for the *Anti-Doping Organization*, or individuals serving as independent contractors who perform *Doping Control* services for the *Anti-Doping Organization* (e.g., non-employee *Doping Control* officers or chaperones). This definition does not include *CAS*.

Disqualification: See *Consequences of Anti-Doping Rule Violations* above.

Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal and the enforcement of *Consequences*, including all steps and processes in between, including but not limited to, *Testing*, investigations, whereabouts, *TUEs*, *Sample* collection and handling, laboratory analysis, *Results Management* and investigations or proceedings relating to violations of Article 10.14 (Status During *Ineligibility* or *Provisional Suspension*).

Education: The process of learning to instill values and develop behaviors that foster and protect the spirit of sport, and to prevent intentional and unintentional doping.

Event: A series of individual *Competitions* conducted together under one ruling body (e.g., the Olympic Games, World Championships of an International Federation, or Pan American Games).

Event Period: The time between the beginning and end of an *Event*, as established by the ruling body of the *Event*.

Event Venues: Those venues so designated by the ruling body for the *Event*.

Fault: *Fault* is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete's* or other *Person's* degree of *Fault* include, for example, the *Athlete's* or other *Person's* experience, whether the *Athlete* or other *Person* is a *Protected Person*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of

care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk. In assessing the *Athlete's* or other *Person's* degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete's* or other *Person's* departure from the expected standard of behavior. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.6.1 or 10.6.2.[123]

Financial Consequences: See *Consequences of Anti-Doping Rule Violations* above.

In-Competition: The period commencing at 11:59 p.m. on the day before a *Competition* in which the *Athlete* is scheduled to participate through the end of such *Competition* and the *Sample* collection process related to such *Competition*. Provided, however, *WADA* may approve, for a particular sport, an alternative definition if an International Federation provides a compelling justification that a different definition is necessary for its sport; upon such approval by *WADA*, the alternative definition shall be followed by all *Major Event Organizations* for that particular sport.[124]

123 [Comment to Fault: The criterion for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under Article 10.6.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

124 [Comment to In-Competition: Having a universally accepted definition for In-Competition provides greater harmonization among Athletes across all sports, eliminates or reduces confusion among Athletes about the relevant timeframe for In-Competition Testing, avoids inadvertent Adverse Analytical Findings in between Competitions during an Event and assists in preventing any potential performance enhancement benefits from Substances prohibited Out-of-Competition being carried over to the Competition period.]

Independent Observer Program: A team of observers and/or auditors, under the supervision of *WADA*, who observe and provide guidance on the *Doping Control* process prior to or during certain *Events* and report on their observations as part of *WADA's* compliance monitoring program.

Individual Sport: Any sport that is not a *Team Sport*.

Ineligibility: See *Consequences of Anti-Doping Rule Violations* above.

Institutional Independence: Hearing panels on appeal shall be fully independent institutionally from the *Anti-Doping Organization* responsible for *Results Management*. They must therefore not in any way be administered by, connected or subject to the *Anti-Doping Organization* responsible for *Results Management*.

International Event: An *Event* or *Competition* where the International Olympic Committee, the International Paralympic Committee, an International Federation, a *Major Event Organization*, or another international sport organization is the ruling body for the *Event* or appoints the technical officials for the *Event*.

International-Level Athlete: *Athletes* who compete in sport at the international level, as defined by each International Federation, consistent with the *International Standard* for *Testing* and Investigations.[125]

International Standard: A standard adopted by *WADA* in support of the *Code*. Compliance with an *International Standard* (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the *International Standard* were performed properly.

125 [Comment to International-Level Athlete: Consistent with the International Standard for Testing and Investigations, the International Federation is free to determine the criteria it will use to classify Athletes as International-Level Athletes, e.g., by ranking, by participation in particular International Events, by type of license, etc. However, it must publish those criteria in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes. For example, if the criteria include participation in certain International Events, then the International Federation must publish a list of those International Events.]

International Standards shall include any *Technical Documents* issued pursuant to the *International Standard*.

Major Event Organizations: The continental associations of *National Olympic Committees* and other international multi-sport organizations that function as the ruling body for any continental, regional or other International *Event*.

Marker: A compound, group of compounds or biological variable(s) that indicates the *Use* of a *Prohibited Substance* or *Prohibited Method*.

Metabolite: Any substance produced by a biotransformation process.

Minimum Reporting Level: The estimated concentration of a *Prohibited Substance* or its *Metabolite(s)* or *Marker(s)* in a *Sample* below which *WADA*-accredited laboratories should not report that *Sample* as an *Adverse Analytical Finding*.

Minor: A natural *Person* who has not reached the age of eighteen years.

National Anti-Doping Organization: The entity(ies) designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of *Samples*, manage test results and conduct *Results Management* at the national level. If this designation has not been made by the competent public authority(ies), the entity shall be the country's *National Olympic Committee* or its designee.

National Event: A sport *Event* or *Competition* involving *International-* or *National-Level Athletes* that is not an *International Event*.

National-Level Athlete: *Athletes* who compete in sport at the national level, as defined by each *National Anti-Doping Organization*, consistent with the *International Standard* for *Testing* and Investigations.

National Olympic Committee: The organization recognized by the International Olympic Committee. The term *National Olympic Committee* shall also include the National Sport Confederation in those countries where the National Sport Confederation

assumes typical *National Olympic Committee* responsibilities in the anti-doping area.

No Fault or Negligence: The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Protected Person* or *Recreational Athlete*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered the *Athlete's* system.

No Significant Fault or Negligence: The *Athlete* or other *Person's* establishing that any *Fault* or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Protected Person* or *Recreational Athlete*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered the *Athlete's* system.

Operational Independence: This means that (1) board members, staff members, commission members, consultants and officials of the *Anti-Doping Organization* with responsibility for *Results Management* or its affiliates (e.g., member federation or confederation), as well as any *Person* involved in the investigation and pre-adjudication of the matter cannot be appointed as members and/or clerks (to the extent that such clerk is involved in the deliberation process and/or drafting of any decision) of hearing panels of that *Anti-Doping Organization* with responsibility for *Results Management* and (2) hearing panels shall be in a position to conduct the hearing and decision-making process without interference from the *Anti-Doping Organization* or any third party. The objective is to ensure that members of the hearing panel or individuals otherwise involved in the decision of the hearing panel, are not involved in the investigation of, or decisions to proceed with, the case.

Out-of-Competition: Any period which is not *In-Competition*.

Participant: Any *Athlete* or *Athlete Support Person*.

Person: A natural *Person* or an organization or other entity.

Possession: The actual, physical *Possession*, or the constructive *Possession* (which shall be found only if the *Person* has exclusive control or intends to exercise control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists); provided, however, that if the *Person* does not have exclusive control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists, constructive *Possession* shall only be found if the *Person* knew about the presence of the *Prohibited Substance* or *Prohibited Method* and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on *Possession* if, prior to receiving notification of any kind that the *Person* has committed an anti-doping rule violation, the *Person* has taken concrete action demonstrating that the *Person* never intended to have *Possession* and has renounced *Possession* by explicitly declaring it to an *Anti-Doping Organization*. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a *Prohibited Substance* or *Prohibited Method* constitutes *Possession* by the *Person* who makes the purchase.[126]

Prohibited List: The list identifying the *Prohibited Substances* and *Prohibited Methods*.

Prohibited Method: Any method so described on the *Prohibited List*.

Prohibited Substance: Any substance, or class of substances, so described on the *Prohibited List*.

126 [Comment to Possession: Under this definition, anabolic steroids found in an Athlete's car would constitute a violation unless the Athlete establishes that someone else used the car; in that event, the Anti-Doping Organization must establish that, even though the Athlete did not have exclusive control over the car, the Athlete knew about the anabolic steroids and intended to have control over them. Similarly, in the example of anabolic steroids found in a home medicine cabinet under the joint control of an Athlete and spouse, the Anti-Doping Organization must establish that the Athlete knew the anabolic steroids were in the cabinet and that the Athlete intended to exercise control over them. The act of purchasing a Prohibited Substance alone constitutes Possession, even where, for example, the product does not arrive, is received by someone else, or is sent to a third-party address.]

Protected Person: An *Athlete* or other natural *Person* who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any *Registered Testing Pool* and has never competed in any *International Event* in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation.[127]

Provisional Hearing: For purposes of Article 7.4.3, an expedited abbreviated hearing occurring prior to a hearing under Article 8 that provides the *Athlete* with notice and an opportunity to be heard in either written or oral form.[128]

Provisional Suspension: See *Consequences of Anti-Doping Rule Violations* above.

Publicly Disclose: See *Consequences of Anti-Doping Rule Violations* above.

Recreational Athlete: A natural *Person* who is so defined by the relevant *National Anti-Doping Organization*; provided, however, the term shall not include any *Person* who, within the five years (5) prior to committing any anti-doping rule violation, has been an *International-Level Athlete* (as defined by each International Federation consistent with the *International Standard* for *Testing* and Investigations) or *National-Level Athlete* (as defined by each *National Anti-Doping Organization* consistent with the *International Standard* for *Testing* and Investigations), has

127 [Comment to Protected Person: The Code treats Protected Persons differently than other Athletes or Persons in certain circumstances based on the understanding that, below a certain age or intellectual capacity, an Athlete or other Person may not possess the mental capacity to understand and appreciate the prohibitions against conduct contained in the Code. This would include, for example, a Paralympic Athlete with a documented lack of legal capacity due to an intellectual impairment. The term "open category" is meant to exclude competition that is limited to junior or age group categories.]

128 [Comment to Provisional Hearing: A Provisional Hearing is only a preliminary proceeding which may not involve a full review of the facts of the case. Following a Provisional Hearing, the Athlete remains entitled to a subsequent full hearing on the merits of the case. By contrast, an "expedited hearing", as that term is used in Article 7.4.3, is a full hearing on the merits conducted on an expedited time schedule.]

represented any country in an *International Event* in an open category or has been included within any *Registered Testing Pool* or other whereabouts information pool maintained by any International Federation or *National Anti-Doping Organization*.[129]

Regional Anti-Doping Organization: A regional entity designated by member countries to coordinate and manage delegated areas of their national anti-doping programs, which may include the adoption and implementation of anti-doping rules, the planning and collection of *Samples*, the management of results, the review of *TUEs*, the conduct of hearings, and the conduct of *Educational* programs at a regional level.

Registered Testing Pool: The pool of highest-priority *Athletes* established separately at the international level by International Federations and at the national level by *National Anti-Doping Organizations*, who are subject to focused *In-Competition* and *Out-of-Competition Testing* as part of that International Federation's or *National Anti-Doping Organization's* test distribution plan and therefore are required to provide whereabouts information as provided in Article 5.5 and the *International Standard* for *Testing* and Investigations.

Results Management: The process encompassing the timeframe between notification as per Article 5 of the *International Standard* for *Results Management*, or in certain cases (e.g., *Atypical Finding*, *Athlete Biological Passport*, whereabouts failure), such pre-notification steps expressly provided for in Article 5 of the *International Standard* for *Results Management*, through the charge until the final resolution of the matter, including the end of the hearing process at first instance or on appeal (if an appeal was lodged).

129 [Comment to Recreational Athlete: The term "open category" is meant to exclude competition that is limited to junior or age group categories.]

Sample or Specimen: Any biological material collected for the purposes of *Doping Control*.[130]

Signatories: Those entities accepting the *Code* and agreeing to implement the *Code*, as provided in Article 23.

Specified Method: See Article 4.2.2.

Specified Substance: See Article 4.2.2.

Strict Liability: The rule which provides that under Article 2.1 and Article 2.2, it is not necessary that intent, *Fault*, *Negligence*, or knowing *Use* on the *Athlete's* part be demonstrated by the *Anti-Doping Organization* in order to establish an anti-doping rule violation.

Substance of Abuse: See Article 4.2.3.

Substantial Assistance: For purposes of Article 10.7.1, a *Person* providing *Substantial Assistance* must: (1) fully disclose in a signed written statement or recorded interview all information he or she possesses in relation to anti-doping rule violations or other proceeding described in Article 10.7.1.1, and (2) fully cooperate with the investigation and adjudication of any case or matter related to that information, including, for example, presenting testimony at a hearing if requested to do so by an *Anti-Doping Organization* or hearing panel. Further, the information provided must be credible and must comprise an important part of any case or proceeding which is initiated or, if no case or proceeding is initiated, must have provided a sufficient basis on which a case or proceeding could have been brought.

Tampering: Intentional conduct which subverts the *Doping Control* process but which would not otherwise be included in the definition of *Prohibited Methods*. *Tampering* shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a *Sample*, affecting or making impossible the analysis of a *Sample*, falsifying documents submitted to an *Anti-Doping Organization* or *TUE* committee or hearing panel, procuring false testimony

130 [Comment to Sample or Specimen: It has sometimes been claimed that the collection of blood Samples violates the tenets of certain religious or cultural groups. It has been determined that there is no basis for any such claim.]

from witnesses, committing any other fraudulent act upon the *Anti-Doping Organization* or hearing body to affect *Results Management* or the imposition of *Consequences*, and any other similar intentional interference or *Attempted* interference with any aspect of *Doping Control*.[131]

Target Testing: Selection of specific *Athletes* for *Testing* based on criteria set forth in the *International Standard* for *Testing* and Investigations.

Team Sport: A sport in which the substitution of players is permitted during a *Competition*.

Technical Document: A document adopted and published by *WADA* from time to time containing mandatory technical requirements on specific anti-doping topics as set forth in an *International Standard*.

Testing: The parts of the *Doping Control* process involving test distribution planning, *Sample* collection, *Sample* handling, and *Sample* transport to the laboratory.

Therapeutic Use Exemption (TUE): A *Therapeutic Use Exemption* allows an *Athlete* with a medical condition to *Use* a *Prohibited Substance* or *Prohibited Method*, but only if the conditions set out in Article 4.4 and the *International Standard* for *Therapeutic Use Exemptions* are met.

Trafficking: Selling, giving, transporting, sending, delivering or distributing (or *Possessing* for any such purpose) a *Prohibited Substance* or *Prohibited Method* (either physically or by any electronic or other means) by an *Athlete*, *Athlete Support Person* or any other *Person* subject to the authority of an *Anti-Doping Organization* to any third party; provided, however, this definition

131 [Comment to Tampering: For example, this Article would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, altering a Sample by the addition of a foreign substance, or intimidating or attempting to intimidate a potential witness or a witness who has provided testimony or information in the Doping Control process. Tampering includes misconduct which occurs during the Results Management process. See Article 10.9.3.3. However, actions taken as part of a Person's legitimate defense to an anti-doping rule violation charge shall not be considered Tampering. Offensive conduct towards a Doping Control official or other Person involved in Doping Control which does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organizations.]

shall not include the actions of bona fide medical personnel involving a *Prohibited Substance Used* for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving *Prohibited Substances* which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

UNESCO Convention: The International Convention against Doping in Sport adopted by the 33rd session of the UNESCO *General* Conference on 19 October 2005, including any and all amendments adopted by the States Parties to the Convention and the Conference of Parties to the International Convention against Doping in Sport.

Use: The utilization, application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method*.

WADA: The World Anti-Doping Agency.

Without Prejudice Agreement: For purposes of Articles 10.7.1.1 and 10.8.2, a written agreement between an *Anti-Doping Organization* and an *Athlete* or other *Person* that allows the *Athlete* or other *Person* to provide information to the *Anti-Doping Organization* in a defined time-limited setting with the understanding that, if an agreement for *Substantial Assistance* or a case resolution agreement is not finalized, the information provided by the *Athlete* or other *Person* in this particular setting may not be used by the *Anti-Doping Organization* against the *Athlete* or other *Person* in any *Results Management* proceeding under the *Code*, and that the information provided by the *Anti-Doping Organization* in this particular setting may not be used by the *Athlete* or other *Person* against the *Anti-Doping Organization* in any *Results Management* proceeding under the *Code*. Such an agreement shall not preclude the *Anti-Doping Organization*, *Athlete* or other *Person* from using any information or evidence gathered from any source other than during the specific time-limited setting described in the agreement.

DEFINITIONS SPECIFIC TO ARTICLE 24.1

Aggravating Factors: This term encompasses a deliberate attempt to circumvent or undermine the *Code* or the *International Standards* and/or to corrupt the anti-doping system, an attempt to cover up non-compliance, or any other form of bad faith on the part of the *Signatory* in question; a persistent refusal or failure by the *Signatory* to make any reasonable effort to correct *Non-Conformities* that are notified to it by *WADA*; repeat offending; and any other factor that aggravates the *Signatory's* non-compliance.

Approved Third Party: One or more *Anti-Doping Organizations* and/or *Delegated Third Parties* selected or approved by *WADA*, following consultation with the non-compliant *Signatory*, to *Supervise* or *Takeover* some or all of that *Signatory's Anti-Doping Activities*. As a last resort, if there is no other suitable body available, then *WADA* may carry out this function itself.

Critical: A requirement that is considered to be *Critical* to the fight against doping in sport. See further Annex A of the *International Standard* for *Code* Compliance by *Signatories*.

Fine: Payment by the *Signatory* of an amount that reflects the seriousness of the non-compliance/*Aggravating Factors*, its duration, and the need to deter similar conduct in the future. In a case that does not involve non-compliance with any *Critical* requirements, the *Fine* shall not exceed the lower of (a) 10% of the *Signatory's* total annual budgeted expenditure; and (b) US $100,000. The *Fine* will be applied by *WADA* to finance further *Code* compliance monitoring activities and/or anti-doping *Education* and/or anti-doping research.

General: A requirement that is considered to be important to the fight against doping in sport but does not fall into the categories of *Critical* or *High Priority*. See further Annex A of the *International Standard* for *Code* Compliance by *Signatories*.

High Priority: A requirement that is considered to be *High Priority* but not *Critical* in the fight against doping in sport. See further Annex A of the *International Standard* for *Code* Compliance by *Signatories*.

Non-Conformity: Where a *Signatory* is not complying with the *Code* and/or one or more *International Standards* and/or any requirements imposed by the *WADA* Executive Committee, but the opportunities provided in the *International Standard* for *Code* Compliance by *Signatories* to correct the *Non-Conformity*/*Non-Conformities* have not yet expired and so *WADA* has not yet formally alleged that the *Signatory* is non-compliant.

Reinstatement: When a *Signatory* that was previously declared non-compliant with the *Code* and/or the *International Standards* is determined to have corrected that non-compliance and to have met all of the other conditions imposed in accordance with Article 11 of the *International Standard* for *Code* Compliance by *Signatories* for *Reinstatement* of its name to the list of *Code*-compliant *Signatories* (and *Reinstated* shall be interpreted accordingly).

Representatives: Officials, directors, officers, elected members, employees, and committee members of the *Signatory* or other body in question, and also (in the case of a *National Anti-Doping Organization* or a *National Olympic Committee* acting as a *National Anti-Doping Organization*) *Representatives* of the government of the country of that *National Anti-Doping Organization* or *National Olympic Committee*.

Special Monitoring: Where, as part of the consequences imposed on a non-compliant *Signatory*, *WADA* applies a system of specific and ongoing monitoring to some or all of the *Signatory's Anti-Doping Activities*, to ensure that the *Signatory* is carrying out those activities in a compliant manner.

Supervision: Where, as part of the consequences imposed on a non-compliant *Signatory*, an *Approved Third Party* oversees and supervises the *Signatory's Anti-Doping Activities*, as directed by *WADA*, at the *Signatory's* expense (and *Supervise* shall be interpreted accordingly). Where a *Signatory* has been declared non-compliant and has not yet finalized a *Supervision* agreement with the *Approved Third Party*, that *Signatory* shall not implement independently any *Anti-Doping Activity* in the area(s) that the *Approved Third Party* is to oversee and supervise without the express prior written agreement of *WADA*.

Takeover: Where, as part of the consequences imposed on a non-compliant *Signatory*, an *Approved Third Party* takes over all or some of the *Signatory's Anti-Doping Activities*, as directed by *WADA*, at the *Signatory's* expense. Where a *Signatory* has been declared non-compliant and has not yet finalized a *Takeover* agreement with the *Approved Third Party*, that *Signatory* shall not implement independently any *Anti-Doping Activity* in the area(s) that the *Approved Third Party* is to take over without the express prior written agreement of *WADA*.

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TAB 2

PUBLIC

Fédération Equestre Internationale

DECISION of the FEI TRIBUNAL

dated 27 November 2012

Human Anti-Doping Case No.: 2012/02

Athlete / NF: Aleksandr Kovshov / UKR **FEI ID:** 10039044

Event: CDI-W Zhashkiv (UKR)

Sampling Date: In competition test, 25 February 2012

Prohibited Substance: 11-nor-delta-9-tetrahydrocannabinol-9-carboxylicacid (Carboxy-THC)

1. COMPOSITION OF PANEL

Mr. Pierre Ketterer, Chair
Mr. Patrick A. Boelens, Panel Member
Ms. Randi Haukebó, Panel Member

Ms. Erika O'Leary, FEI Tribunal Clerk

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department

2.2 Summary information provided by the Athlete: The FEI Tribunal took into consideration all evidence, submissions and documents presented in the case file, as also made available by and to the Athlete.

2.3 Oral Hearing: None, by correspondence.

3. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

3.1 Articles of the Statutes / Regulations which are applicable or have been infringed.

Statutes 23rd edition, effective 15th November 2011 ("**Statutes**"), Arts. 36 and 39.

General Regulations, 23rd edition, 1st January 2009, updates effective 1st January 2012, Arts. 143.1, 168.4 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal, 2nd edition, 1st January 2012 ("**IRs**").

FEI Anti-Doping Rules for Human Athletes, 1st January 2011, updates effective 1st January 2012 ("**ADRHA**").

The World Anti-Doping Code 2009.

2012 World Anti Doping Agency Prohibited List ("the WADA Prohibited List").

3.2 Athlete: Mr Aleksandr Kovshov

3.3 Justification for sanction:

GR Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Medication Controlled Medication Regulations (EADCM Regulations)."

Art. 2.1.1 ADRHA: "It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. Athletes are responsible for any *Prohibited Substance* or its *Metabolites or Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1."

Art. 4.1 ADRHA: "These Anti-Doping Rules incorporate the *Prohibited List* which is published and revised by *WADA* as described in Article 4.1 of the Code. The *FEI* will make the current *Prohibited List* available to each *National Federation*, and each National Federation shall ensure that the current *Prohibited List* is available to all its members and constituents."

4. DECISION

4.1 Factual Background

1. Mr. Aleksandr Kovshov (the "**Athlete**") participated at the CDI-W in Zhashkiv, UKR (the "**Event**") from 24 to 26 February 2012, in the discipline of Dressage.

2. On 25 February 2012, the Athlete was selected for in-competition testing. Analysis of the urine sample no.3042880 taken from the Athlete at the Event was performed at the WADA accredited laboratory, Institut Municipal d'Investigacio Medica in Barcelona, Spain. The analysis revealed the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylicacid (Carboxy-THC), which is a Prohibited Substance according to the WADA Prohibited List in force at the time of the Sample collection (certificate of analysis dated 30 March 2012).

3. Carboxy-THC is a metabolite of THC, which is listed in Class S8 "Cannabiniods" of Prohibited Substances. It is prohibited in-competition and considered a "Specified Substance" under the WADA Prohibited List. While the presence of Carboxy-THC in the Athlete's Sample constitutes an Anti-Doping Rule Violation, because of the fact that Cannabinoids are classified as "Specified Substances" on the Prohibited List, they are treated differently from other Prohibited Substances.

4. No valid Therapeutic Use Exemption ("**TUE**") under Article 4.4 of the ADRHA had been granted for this substance. Therefore, the positive finding for Carboxy-THC gives rise to an Anti-Doping Rule Violation under the ADRHA.

4.2 The Proceedings

5. The presence of the Prohibited Substance following the laboratory analysis, the possible rule violation and the consequences implicated, were officially notified to the Athlete by the FEI Legal Department on 25 May 2012, through the Ukrainian Equestrian Federation ("UKR-NF"). Together with the Notification Letter, the FEI submitted a copy of the Doping Control Form, on which the Athlete had declared the use of vitamin C and calcium supplements.

4.3 The B-Sample Analysis

6. The Athlete was also informed in the Notification Letter of 25 May 2012 that he was entitled to (1) the performance of a B-Sample analysis and (2) to attend or to be represented at the B-Sample analysis.

7. By letter dated 31 May 2012, the Athlete waived his right to have the B-Sample analysis performed.

4.4 The Further Proceedings

8. On 31 May 2012, the Athlete further provided his response to the charges. The Athlete submitted that on the eve of the competition he had attended a billiard club with friends. That they had ordered a hookah containing a fruit mixture, and that his friends had persuaded him to try it. He further submitted that he was not aware that the hookah contained any Prohibited Substances and was therefore relaxed when informed at the Event that he had been selected for doping control. That he was surprised at the subsequent positive test result. That he had no intention to enhance his sporting performance, that the case at hand was his first violation in his career, and that he regretted the incident.

9. The FEI responded to the Athlete's submission on 29 August 2012. The FEI argued that it had discharged its burden of establishing that the Athlete had violated Article 2.1 of the ADRHA. It further submitted that a Period of Ineligibility under Article 10.2 of the ADRHA of two (2) years

should be imposed on the Athlete since the prerequisites of Article 10.4 of the ADRHA were not fulfilled. Specifically, the FEI argued that while Carboxy-THC is a Specified Substance, the Athlete had failed to establish, by a balance of probability, how the Specified Substance entered his body, since he had not indicated the precise date of the alleged consumption of Carboxy-THC, and had adduced no evidence that the hookah with the fruit mixture also contained the Prohibited Substance detected in his Sample. With regard to the question of the intention to enhance his sport performance, the FEI highlighted that the Athlete had not submitted, as required under Article 10.4 of the ADRHA rules, any corroborating evidence to prove the absence of intent to enhance his sport performance, or mask the use of a performance enhancing substance. The FEI further argued that no elimination or reduction of the Period of Ineligibility based on exceptional circumstances under Article 10.5 of the ADRHA should be granted, even if the Tribunal would consider that the Athlete had established how the Carboxy-THC had entered his body. In this context the FEI argued that the Athlete had been highly negligent to smoke the hookah as he could not possibly have known what he ingested by smoking the fruit mixture, and that apparently he did not question the content of the hookah, in order to assure that it did not contain any Prohibited Substances. The FEI further requested that in addition to the automatic disqualification of results under Article 9 of the ADRHA, all the results obtained by the Athlete in the Event should be disqualified, in accordance with Article 10.1 of the ADRHA.

10. On 19 November 2012, the Athlete through the UKR-NF informed the FEI that he had chosen not to submit a response to the FEI submission.

4.5 Jurisdiction

11. The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and the ADRHA.

4.6 The Decision

12. Under Article 3.1 of the ADRHA, it is the burden of the FEI to establish that an Anti-Doping rule violation has occurred.

13. The Athlete has been charged with a violation of Article 2.1 of the ADRHA, i.e. "the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample". Athletes subject to the ADRHA are strictly responsible for any Prohibited Substances found in their Sample and it is not necessary for the FEI to establish any intent, fault, negligence or even knowledge on the part of the Athlete charged, in order to establish a violation under Article 2.1 of the ADRHA. Therefore, to discharge its burden, the FEI must establish, to the comfortable satisfaction of the hearing panel, i.e. the Tribunal that the Prohibited Substance (or its Metabolites or Makers) was present in the urine sample collected from the Athlete on 25 February 2012.

14. In support of its charge, the FEI relies on the Adverse Analytical findings of the WADA accredited laboratory, Institut Municipal d'Investigacio Medica, Barcelona, Spain. Article 3.2.1 of the ADRHA provides that WADA accredited laboratories are presumed to have complied with the International Standard for Laboratories and that it is for the Athlete to prove otherwise. The Athlete has not sought to do so in the case at hand, and therefore the presumption prevails. The Athlete had further waived his right to the B-Sample analysis and therefore accepted the accuracy of the Adverse Analytical findings made in regard of his A-Sample, in accordance with Article 7.1.4 of the ADRHA.

15. The Tribunal is satisfied that the laboratory report relating to the A-Sample reflects that the findings of the Institut Municipal d'Investigacio Medica are accurate, and that the test results evidence the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylicacid (Carboxy-THC).

16. The presence of a Prohibited Substance or its Metabolites or Makers in an Athlete's sample is not considered an Anti-Doping Rule Violation if it is consistent with a TUE previously obtained by the Athlete. The Tribunal acknowledges that the Athlete has not provided any applicable TUE for the Prohibited Substance. In the absence of any TUE for the Prohibited Substance found in the Athlete's Sample, all the elements of the Anti-Doping rule violation under Article 2.1 of the ADRHA have been met. Accordingly, the Tribunal is comfortably satisfied that the Athlete has committed an Anti-Doping rule violation under Article 2.1 of the ADRHA. This is undisputed between the Parties.

17. The violation at question is the Athlete's first Anti-Doping rule violation, and Article 2.1 of the ADRHA provides for a Period of Ineligibility of two (2) years for a first time offender, unless the conditions for eliminating, reducing or increasing that period, as set out in Articles 10.4, 10.5 and 10.6 of the ADRHA are met.

18. Carboxy-THC, a metabolite of THC, is classified as a Specified Substance on the 2012 WADA Prohibited List. However, the Tribunal finds that the Athlete has not established the prerequisites under Article 10.4 of the ADRHA. Specifically, the Tribunal finds that on the balance of probability, the Athlete has failed to establish how the Prohibited Substance entered his body. A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete's burden of showing how the Prohibited Substance entered his body. Rather, the Athlete needs to adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct[1]. The Tribunal

[1] IRB v. Keyter, CAS 2006/A/1067: *"One hypothetical source of a positive test does not prove to the level of satisfaction required that [his explanation of how the prohibited substance came to be in his body] is factually or scientifically probable. Mere speculation is not proof that it did actually occur...The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred..."*

finds that the Athlete has provided no evidence to support his speculation that the hookah was contaminated with the Prohibited Substance and has therefore failed the balance of probability test. The Tribunal therefore holds that the Athlete has not established how the Prohibited Substance entered his body. Moreover, even if the Athlete had established how the Prohibited Substance had entered his body, the Tribunal finds that he has not met the further prerequisites of Article 10.4 of the ADRHA. Specifically, the Athlete has not produced any evidence – in addition to his word – which establishes the absence of intent to enhance sport performance. In conclusion, the Tribunal finds that the pre requisites of Article 10.4 of the ADRHA are not fulfilled.

19. In the absence of any evidence and re-iterating the Tribunal's assessment in paragraph 18, the Tribunal further determines that no reduction or elimination under Article 10.5 of the ADRHA may be applied since the Athlete has failed to establish how the Prohibited Substance entered his body. Therefore the Tribunal does not need to assess the Athlete's degree of fault or negligence for the rule violation. The Tribunal therefore determines that no elimination or reduction under Articles 10.4 or 10.5 of the ADRHA is granted, and that the Period of Ineligibility of two (2) years applies.

20. Under Article 10.9 of the ADRHA, in cases as the present, where a hearing is waived, the period of Ineligibility shall commence on the date Ineligibility is accepted or imposed. As the period of Ineligibility is imposed by the present decision, it shall be effective as of the date of this decision.

4.7 Disqualification

21. For the reasons set forth above, the Tribunal is disqualifying the Athlete from the Competition and all medals, points and prize money won in that Competition must be forfeited, in accordance with Article 9 of the ADRHA. The Tribunal is further disqualifying all other individual results obtained by the Athlete at the Event, with any and all horses, in accordance with Article 10.1 of the ADRHA.

4.8 Sanctions

22. As a consequence of the foregoing, the Tribunal decides to impose the following sanctions on the Athlete, in accordance with Article 169 of the GRs and Article 10 of the ADRHA:

1) The Athlete shall be suspended for a period of **two (2) years** to be effective immediately and without further notification. Therefore the Athlete shall be ineligible through 26 November 2014.

2) The Athlete is fined **CHF 1,000.-**.

3) The Athlete shall contribute **CHF 500.-** towards the legal costs of the legal procedure.

23. No Athlete who has been declared Ineligible may, during the Period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) that is authorised or organised by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorised or organised by the FEI or any National Federation, or participate in any capacity in Competitions authorised or organised by any international or national-level Event organisation (Article 10.10.1 of the ADRHA). Under Article 10.10.2 of the ADRHA, specific consequences are foreseen for a violation of the Period of Ineligibility.

24. According to Article 168.4 of the GRs, the present Decision is effective from the day of written notification to the persons or bodies concerned.

25. In accordance with Article 13 of the ADRHA, the Athlete and the FEI may appeal against the decision by lodging an appeal with the Court of Arbitration for Sport within thirty (30) days of receipt hereof.

5. DECISION TO BE FOWARDED TO:

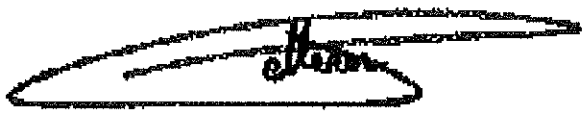
5.1 The person sanctioned: Yes

5.2 The President of the NF of the person sanctioned: Yes

5.3 The President of the Organising Committee of the event through his NF: Yes

5.4 Any other: WADA

FOR THE PANEL



THE CHAIRMAN, Mr. Pierre Ketterer

TAB 3

Arbitration CAS 2012/A/2807 & 2808 Khaled Abdullaziz Al Eid & Abdullah Waleed Sharbatly v. Fédération Equestre Internationale (FEI), award of 17 July 2012 (operative part of 11 June 2012)

Panel: Mr Graeme Mew (Canada), Sole Arbitrator

Equestrian (jumping)
Disciplinary sanctions for the presence of controlled medication substances (phenylbutazone; oxyphenbutazone)
CAS' power of review and deference to the first-instance tribunal
No significant fault or negligence in the WADC Code and the ECM Rules
Exercise of sanctioning power by the CAS panel

1. **While specialist tribunals of sport federations are entitled to considerable deference and, in particular, that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is *"evidently and grossly disproportionate to the offence"*, such principles do not limit a CAS panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances. Where the rules confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where a tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS panel, nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.**

2. **Article 10.4 of the Equine Controlled Medication (ECM) Rules provides for the elimination or reduction of a period of ineligibility based on exceptional circumstances. The language of the Rule tracks, in large measure, the corresponding rule in Article 10.5 of the World Anti-Doping Code (WADC). A key difference is that Article 10.4.2 ECM Rules (No Significant Fault or Negligence) does not limit the reduction of the otherwise applicable sanction to 50% of that sanction (a requirement of Article 10.5.2 WADC). A key similarity, however, is that in order to engage the application of Article 10.4 ECM Rules, the Person Responsible must be able to establish how the controlled medication substance entered the horse's system in order to have the period of ineligibility and other sanctions eliminated or reduced.**

3. **Any exercise of sanctioning power is an interference with the rights of athletes. It is therefore necessary to weigh the objectives of the federation's rules against the consequences of infringement, including the impact on the offender. The correct approach is to start low and only move up the scale if it is necessary to do so to meet the overriding objectives of the federation's rules. "Fault" is not a specified yardstick to**

be employed in undertaking this assessment (again, a distinguishing feature between Article 10.2 ECM Rules and Article 10.5 WADC).

1. INTRODUCTION

1.1 The two cases which form the subject of this appeal award engage consideration of the *Equine Controlled Medication Rules* (*"ECM Rules"*) of the Fédération Equestre Internationale ("FEI").

1.2 At the outset is important to record that neither case involves anti-doping rule violations. The *ECM Rules* exist 'to ensure horse welfare and the highest levels of professionalism', by ensuring that medications ("Controlled Medication Substances") and methods ("Controlled Medication Methods") that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.

1.3 While doping and inappropriate use of medication are certainly related, and in some respects the way they are regulated is similar, the nature, scope and purposes of the *ECM Rules* are very different from the nature, scope and purposes of the anti-doping rules.

1.4 The Appellants are equestrian athletes. They were not accused of doping but, instead, were charged because of the presence of the medications, Phenylbutazone and Oxyphenbutazone (commonly known collectively, as "Bute"), in their competition horses' systems without the required pre-authorisation.

1.5 Phenylbutazone is a non-steroidal anti-inflammatory and pain-relieving drug that is primarily used for musculoskeletal conditions; Oxyphenbutazone (a metabolite of Phenylbutazone) is also a non-steroidal anti-inflammatory and pain-relieving drug. Both substances are classified as *Controlled Medication Substances* in the *Equine Prohibited Substances List*.

1.6 To put things in context, in the course of submissions, counsel for the Appellants described Bute as *"ibuprofen for horses"*.

1.7 In many cases involving adverse analytical findings for controlled medication substances, such as Bute, a "Person Responsible" (which would include an Athlete who rides a Horse during an Event – see Appendix 1 – Definitions of the ECM Rules) can elect to have his or her case processed under the "Administrative Procedure" set out in Article 8.3 of the ECM Rules. Where this procedure applies, the following sanctions would apply:

a. Disqualification of the Person Responsible and/or member of the Support Personnel (where applicable) and the Horse from the whole Event and forfeiture of all prizes and prize money won at the Event;

b. A Fine of CHF 1,500; and

c. Costs of CHF 1,000. However, if a B Sample analysis is requested and the administrative Sanction accepted after the B Sample Analysis, the costs shall be increased to CHF 2,000.

1.8 The Appellants were, for reasons explained more fully below, unable to elect to have the Administrative Procedure applied to their cases. Instead, the charges against the Appellants were heard by the FEI Tribunal (oral hearing on 18 and 19 April 2012; decision dated 23 May 2012).

1.9 The tribunal imposed a sanction of Ineligibility of eight months on each of the Appellants.

1.10 Due to the impending 2012 Olympic Games in which, but for the sanction imposed by the FEI Tribunal, both of the Appellants had hoped to participate as representatives of the Kingdom of Saudi Arabia, the parties agreed to an expedited appeal from the decisions of the FEI Tribunal.

1.11 This Panel's decision was announced on 11 June 2012 with reasons to follow.

1.12 For the reasons set out below, this CAS Panel concludes that the FEI Tribunal conflated the sanctioning principles set out in the *Equine Anti-Doping Rules* with those applicable under the *ECM Rules*, with the result that an excessive sanction was applied having regard to all of the circumstances of each case.

1.13 The sanction of 8 months Ineligibility imposed on each of the Appellants by the FEI Tribunal should therefore be set aside and replaced with a sanction of 2 months Ineligibility for each of the Appellants.

2. THE PARTIES

2.1 The Appellant Khaled Abdulaziz Al Eid ("Al Eid") is a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. He won a bronze medal at the 2000 Olympic Games in Sydney, an individual gold medal in the 2006 Asian Games in Doha and an individual bronze medal in the 2010 Asian Games in Guangzhou.

2.2 The Appellant Abdullah Waleed Sharbatly ("Sharbatly") is also a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. Sharbatly won an individual silver medal at the 2010 World Equestrian Games in Kentucky.

2.3 The FEI is the international governing body for equestrian sport. Its responsibilities include making and enforcing regulations that protect the integrity of the sport.

2.4 Al Eid and Sharbatly are each subject to the disciplinary jurisdiction of the FEI.

3. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

Al-Eid v. FEI

3.2 Al Eid rode VANHOEVE in the CSI 3* Event in Riyadh, Saudi Arabia between 30 November 2011 and 3 December 2012 (the 'Riyadh Event"). The horses competing in the Riyadh Event, including VANHOEVE, were stabled at the International Riding School, which was located next door to the showground for the Riyadh Event. Al Eid was placed in two competitions on VANHOEVE at the Riyadh Event on 3 December 2011.

3.3 At 5:00 p.m. on 3 December 2011, a blood Sample was taken from VANHOEVE for testing under the *FEI Equine Anti-Doping and Controlled Medication Regulations* ("EADCMR") and Veterinary Regulations. The EADCMR contains both the *Equine Anti-Doping Rules* and the *ECM Rules*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the FEI approved Hong Kong Jockey Club Racing Laboratory (the "Hong Kong Laboratory") for analysis.

3.4 The Hong Kong Laboratory analyzed the A Sample of VANHOEVE's blood and found Phenylbutazone and Oxyphenbutazone to be present.

3.5 Both Phenylbutazone and Oxyphenbutazone are classified Controlled Medication Substances under the *Equine Prohibited Substances List*.

3.6 By a letter dated 2 February 2012, the FEI charged Al Eid with a violation of Article 2.1 of the *ECM Rules*, pursuant to which *"[t]he presence of a Controlled Medication Substance or its Metabolites or Markers in a Horse's sample"* constitutes an ECM Rule violation. Article 2.1.1. of the *ECM Rules* states that *"[i]t is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse's body. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples …".*

3.7 No request had been made for the use of Phenylbutazone and Oxyphenbutazone on the Horse, and no Equine Therapeutic Use Exemption ("ETUE") or medication form had been presented for the substances at the Riyadh Event.

3.8 On 22 February 2012, the B Sample was analysed at the FEI-approved HFL Sport Science Laboratory in England. The HFL Laboratory confirmed the analytical findings made by the Hong Kong Laboratory with respect to the A Sample.

3.9 By letter of 24 February 2012, Al Eid accepted a period of voluntary Provisional Suspension, effective as of 24 February 2012.

3.10 Al Eid does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the *ECM Rules*.

3.11 Before the FEI Tribunal and this Panel, however, Al Eid contended that Bute was found in VANHOEVE'S Sample as a result of *"inadvertent ingestion of powdered bute that was present at the [International Riding School] stables, and most probably in VANHOEVE's stable, because the stable and wall-mounted feed bucket had not been cleared prior to VANHOEVE's arrival and nor had the stable yard as a whole"*.

3.12 Al Eid denies any deliberately knowing administration of Bute to VANHOEVE. VANHOEVE's medical records, corroborated by Dr. Philippe Benoit, the Saudi Equestrian team veterinarian, confirm that VANHOEVE was not prescribed with Bute (or any medication containing Bute) in the run up to the Riyadh Event.

3.13 The evidence of Al Eid and other individuals charged with the care of VANHOEVE and his preparation for the Riyadh Event, is that care was taken to prevent VANHOEVE from inadvertently coming into contact with prohibited substances prior to the Riyadh Event.

3.14 Al Eid expressed the belief that VANHOEVE must have come into contact with Bute while stabled at the International Riding School for the following reasons:

(a) Due to exceptional weather conditions including unprecedented rainfall and flooding, Al Eid found that the stables at the International Riding School had not been cleaned out before the horses competing at the Riyadh Event, including VANHOEVE, had to be put into them. It was not possible to properly clean VANHOEVE's stable until after the vet check had taken place;

(b) When VANHOEVE was put into his stable, he nosed around in the old bedding and in the dirty wall-mounted feed bucket before the groom was able to clean the stable;

(c) Dr. Mahrous Abdelkarim, one of the vets who treated the horses at the International Riding School, confirmed that Bute, in its powdered form, is regularly used by him and the other vets at the International Riding School, to treat the horses. They use Bute because it is cheap, reliable, and easy to administer in powder form into the food of the horses;

(d) Dr. Mark Dunnett, an expert witness retained by Al Eid, confirmed in his report that contamination of the stable environment in which VANHOEVE was kept at the International Riding School would be a plausible explanation for the levels of P and O detected in the blood sample taken at the Riyadh Event.

3.15 Under the *ECM Rules*, in the cases of Controlled Medication Substances, Al Eid would have been able to elect Administrative Procedure (also referred to as "Fast Track"), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Al Eid would qualify for the Administrative Procedure if there had been no Controlled Medication violation by him in the previous eight years. However, Al Eid committed a first Controlled Medication rule

violation in January 2005, and could therefore not be considered a first time offender within the meaning of Article 8.3.1 (b) of the *ECM Rules*. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the *ECM Rules*, because to be considered a multiple violation, triggering increased sanctions, the previous violation would have to have occurred within four years of the current violation.

Sharbatly v. FEI

3.16 Sharbatly rode LOBSTER in the CSI 3* Event held in Al Ain, UAE, from 9 – 11 February 2012 (the "Al Ain Event"). As a result of his and LOBSTER'S performance in the Grand Prix Qualifier Competition on 10 February 2012 at the Al Ain Event, they won that Competition.

3.17 Sharbatly further competed with LOBSTER on 9 February 2012 in the Two Phases Competition, and on 11 February 2012 in the Al Ain Grand Prix.

3.18 At 10:05 p.m. on 10 February 2012, a blood Sample was taken from LOBSTER for testing under the EADCMR and *FEI Veterinary Regulations*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the HFL Laboratory for analysis.

3.19 The HFL Laboratory analysed the A Sample of LOBSTER'S blood and found Phenylbutazone and Oxyphenbutazone to be present.

3.20 By letter dated 24 February 2012, the FEI charged Sharbatly with a violation of Article 2.1 of the *ECM Rules* (see paragraph 3.6 above for the pertinent provisions of that rule).

3.21 No request had been made for the use of Phenylbutazone and/or Oxyphenbutazone on the Horse, and no ETUE or medication form had been presented for the substances at the Al Ain Event.

3.22 By letter dated 28 February 2012, Sharbatly accepted a period of voluntary Provisional Suspension, effective as of that date.

3.23 On 6 March 2012, the B Sample was analysed at the HFL Laboratory and was attended by Neville Dunnett on Sharbatly's behalf. The HFL Laboratory confirmed the analytical findings that had been made by it with respect to the A Sample.

3.24 At the time of the hearing before this CAS Panel, Sharbatly had not competed since the Al Ain Event.

3.25 Sharbatly does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the ECM Rules. Accordingly, Sharbatly accepts the Adverse Analytical Findings of the HFL Laboratory, namely that Phenylbutazone and Oxyphenbutazone were present in the blood Sample collected from LOBSTER at the Al Ain Event on 10 February 2012.

3.26 Sharbatly further accepts that, for the purposes of Article 10.4.1 of the ECM Rules, he cannot establish how the substances entered into LOBSTER'S system.

3.27 Sharbatly nevertheless asserts that the substances were not, to his knowledge, administered to LOBSTER in the lead up to the Al Ain Event. Following extensive inquiries, the only possible explanation Sharbatly is able to offer for the presence of the substances are contamination or sabotage (although he acknowledges that sabotage is unlikely) and that both he and the Saudi Equestrian team exercised utmost caution in relation to compliance with the EADCMR and ensuring that LOBSTER did not come into contact with any Prohibited Substances. This evidence was corroborated by witness statements from other personnel affiliated with the Saudi Equestrian team including Dr. Philippe Benoit the team veterinarian. Dr. Benoit asserted that the only possible explanation for the presence of the substances was contamination.

3.28 An expert report from Dr. Mark Dunnett concluded, on the basis of the evidence presented to him, that *"[c]ontamination of the stable environment with residues of Phenylbutazone from the legitimate treatment of other horses prior to the event is a plausible explanation for the presence of the levels of Phenylbutazone and Oxyphenbutazone in the sample from Lobster"*.

3.29 Dr. Dunnett noted that the estimated level of Phenylbutazone in the A Sample from LOBSTER was only 12ng/ml (or 12%) above the FEI Reporting Level of 100ng/ml. Dr. Dunnett added that *"Given that the value reported is only an estimate which will have an inherent uncertainty it is conceivable that the true value may be below the reporting level"*. In any event, according to Dr. Dunnett, the estimated concentrations of Phenylbutazone and Oxyphenbutazone in the A Sample was very low in comparison with the levels more commonly encountered in positive post-competition and post-race drug surveillance samples.

3.30 Other than the expert report of Dr. Dunnett, there was no evidence demonstrating that the environment at the Al Ain Equestrian Club was contaminated.

3.31 Under the ECM Rules, in the case of Controlled Medication Substances, Sharbatly would have been able to elect Administrative Procedure (also referred to as "Fast Track"), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Sharbatly would have qualified for the Administrative Procedure if this had been his first Controlled Medication Violation in eight years. However, Sharbatly committed a first Controlled Medication Rule Violation in January 2006, and therefore could not be considered a first time offender within the meaning of Article 8.3.1(b) of the ECM Rules. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the ECM Rules, because to be considered a multiple violation, triggering increased sanctions, the second violation would have to have occurred within four years of a first violation.

Sanctions Under the *ECM Rules*

3.32 The applicable sanctioning regime is set out in Article 10 of the *ECM Rules*.

3.33 Article 10.2 provides, in relevant part, as follows:

> *… the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers) … shall be:*
>
> *First violation: Up to two (2) years of Ineligibility.*
>
> *A Fine of up to CHF 15,000 and appropriate legal costs shall also be imposed for any Controlled Medication violation.*
>
> *However, the Person Responsible … shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating, reducing, or increasing, this Sanction as provided in Article 10.4.*

3.34 Article 10.4, relied upon by El Aid, provides for the elimination or reduction of a period of Ineligibility based on "Exceptional Circumstances":

> *10.4.1 No Fault or Negligence*
>
> *If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the ECM Rule violation, the otherwise applicable period of Ineligibility and other Sanctions may be eliminated in regard to such Person. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance), the Person Responsible and/or member of the Support Personnel (where applicable) must also establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable and other Sanctions are eliminated, the ECM Rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for Multiple Violations under Article 10.6 below.*
>
> *10.4.2 No Significant Fault or Negligence*
>
> *If a Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility and other Sanctions may be reduced in regard to such Person. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers), the Person alleged to have committed the ECM Rule violation must also establish how the Controlled Medication Substance or its Metabolites or Markers entered the Horse's system in order to have the period of Ineligibility and other Sanctions reduced.*

FEI Tribunal Decisions

3.35 Oral hearings concerning the infringements alleged by the FEI to have been committed by the Appellants took place before the FEI Tribunal in Lausanne on 18 and 19 April 2012.

3.36 In separate decisions each released on 23 May 2012, the FEI Tribunal ruled, in respect of each of the Appellants, that:

(a) The FEI had established an Adverse Analytical Finding for the presence of Phenylbutazone and Oxyphenbutazone in the Samples taken from their respective Horses during in-competition testing;

(b) Accordingly, an ECM Rule violation had been established;

(c) While it was accepted that there had been no deliberate administration to the Horses concerned of Phenylbutazone and/or Oxyphenbutazone, the Appellants had not established on a balance of probabilities the source of the Phenylbutazone and Oxyphenbutazone found in the Samples taken from the Horses;

(d) The Appellants and the Horses were disqualified from the Riyadh and Al Ain Events respectively, with all medals, points and prize money to be forfeited in accordance with Article 9 of the ECM Rules and that all other results obtained by the Appellants with the Horses at the Events would also be disqualified;

(e) A period of suspension of eight months would be applied;

(f) A fine of CHF 1,000 would be paid;

(g) A contribution of CHF 3,000 towards the legal costs of the judicial procedure and the cost of the B-sample analysis would be made.

3.37 In the case of Al Eid, the Athlete had taken the position that any otherwise applicable sanction should be reduced or eliminated in accordance with Articles 10.4.1 or 10.4.2 of the *ECM Rules* on the basis that there was "No Fault or Negligence" or "No Significant Fault or Negligence" on his part for the positive findings.

3.38 The FEI Tribunal rejected this position. Noting that in order to benefit from any elimination or reduction of the applicable sanction under Article 10.4 of the *ECM Rules*, an Athlete must first establish, on a balance of probabilities, how the Prohibited Substance entered the Horse's system, the FEI Tribunal concluded that El Aid had failed to do so.

3.39 Each of the Athletes was given the full benefit of the voluntary Provisional Suspensions which they had taken, with the result that Al Eid's period of Ineligibility was ordered to have commenced on 24 February 2012 (the date that he elected a period of Voluntary Provisional Suspension) and to expire on 23 October 2012 at midnight and that Sharbatly's period of Ineligibility was ordered to have commenced on 10 February 2012 (the date of Sample collection) and to expire on 9 October 2012 at midnight.

3.40 No issue is taken on appeal with the commencement dates selected by the FEI Tribunal.

3.41 In determining the applicable sanctions, the FEI Tribunal took into consideration as mitigating factors:

(a) the fact that a professional team structure was in place with procedures for avoiding "anti-doing rule violations" [sic];

(b) that the Appellants' team employed a professional veterinary team which the Athletes had access to both during and outside business hours;

(c) the prompt admission of the ECM Rule violation and the taking of Voluntary Provisional Suspensions.

3.42 The FEI Tribunal stated that it had taken into account that Al Eid's 2005 ECM Rule violation had also involved a Controlled Medication and that Sharbatly's 2006 violation had been a Doping offence.

3.43 The FEI Tribunal declined to take into account (for the purpose of sanctioning):

(a) The low levels of Phenylbutazone and Oxyphenbutazone detected on the basis that neither is a "Threshold Substance" as a result of which any quantity of those substances is considered a positive and that in any event, the screening levels of the substances had been exceeded;

(b) The upcoming London Olympic Games in which each of the Appellants hoped to compete and the alleged effect of the Appellants' suspensions on the Saudi Arabian team.

4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

4.1 On 24 May 2012, in accordance with Article 12 of the *ECM Rules* and Articles R47 and R48 of the *Code of Sports-related Arbitration* (the "Code") 2010 edition, the Appellants each filed appeals from the decisions of the FEI Tribunal.

4.2 Pursuant to Article R52 of the Code, the CAS, with the agreement of the parties, proceeded in an expedited manner.

4.3 On 29 May 2012, in accordance with Article R51 of the Code and the procedural timetable agreed by the parties, the Appellants filed their appeal briefs.

4.4 On 4 June 2012, in accordance with Article R55 of the Code and the procedural timetable agreed by the parties, the Respondent filed its answers.

5. THE CONSTITUTION OF THE PANEL AND THE HEARING

5.1 By letter dated 30 May 2012, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Graeme Mew (Sole Arbitrator). The parties did not raise any objection as to the constitution and composition of the Panel then or at the hearing.

5.2 On 5 June 2012, Orders of Procedure were made in respect of each of the appeals.

5.3 The Orders of Procedure scheduled a hearing on 7 June 2012 in London, United Kingdom.

5.4 On 7 June 2012, a hearing was duly heard at the offices of Bird & Bird LLP in London.

5.5 The following persons attended the hearing:

For the Appellants:

Mr Jeremy Dickerson, Mr James Pheasant and Miss Georgina Shaw, counsel for the Appellants

Mr Khaled Abdulaziz Al Eid and Mr Abdullah Waleed Sharbatly, the Appellants

For the Respondent:

Mr Jonathan Taylor, Ms Anna-Marie Blakeley and Ms Lisa Lazarus, counsel for the Respondent

5.6 The Panel was assisted at the hearing by Ms. Louise Reilly, Counsel to the CAS.

5.7 At the hearing, the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

***Sami Al Duhami**, Team Director, Saudi Equestrian Team, who lives in Riyadh, described the unusually adverse weather conditions which prevailed immediately prior to the Riyadh Event. There was very heavy rain causing schools to shut down for two days because of flooding. He verified photographs taken by his secretary which purportedly showed conditions in the stall used by VANHOEVE. He noted that the International Riding School was one of the older riding schools. Its standards of upkeep are not as high as one would find in Europe. 15 shows each year take place at the riding school, however only one of them is an "International" show.*

***Rogier Van Iersel**, Team Manager, Saudi Equestrian Team, who also described the weather in Riyadh at the time of the Riyadh Event. A combination of heavy rain and poor drainage led to flooding. The Riyadh event itself had to be delayed, initially for one, and then two days. The horses were put in the stables at the riding school. Dr Van Iersel also expressed the view that facilities at the International Riding School in Riyadh were not as good as those that would be found in Europe or the United States.*

***Mahros Abdelkarim**, treating veterinarian at the Riyadh International Riding School, who was present at the Riyadh Event. At the time of the Riyadh Event, Dr Abdelkarim went to the riding school to treat some horses under his care. Because of the heavy rain there was a lot of mess. There was also a lot of movement between stables. Dr Abdelkarim said that Bute is used a lot in Saudi Arabia. It is available over the counter. It is a common, inexpensive treatment. Dr Abdelkarim estimates that 70% to 80% of the horses stabled at the International Riding School would use Bute. It can be administered by either veterinarians or by grooms. It can either be injected or be administered in powder form. At the International Riding School, the predominant application is by using powder. There are approximately 170 boxes at the International Riding School, approximately 140 of which are used by school horses and the other 30 or so by horses which are boarded at the school. 60 to 70 of the horses at the school are under the regular care of Dr Abdelkarim. He would also see some of the other horses from time to time. Although Dr Abdelkarim does not know which stall VANHOEVE was in, he does know the area. He could not say which horses had been in the stall before VANHOEVE and, specifically whether they were given Bute or not. He can say that there were horses in the area who were receiving Bute.*

***Khaled Abdullaziz Al Eid**, one of the Appellants, who, in addition to confirming his witness statement, described the conditions at the International Riding School when his horse arrived. The stable was not clean. Feed, buckets and hay were all present in the stall. The shavings on the stall of the floor were dirty. However, because fresh shavings could not be provided until the next day, not all of the shavings were removed as it would have been inappropriate to put the horse on bare concrete. Ordinarily Al Eid would have withdrawn from competition under such circumstances. However, he felt it important that he continue because it was an international show taking place in his country and having regard to the interest and support of sponsors and the King. Al Eid also spoke to his Olympic ambitions and the number of events that he had missed as a result of accepting a voluntary temporary suspension.*

***Abdullah Waleed Sharbatly**, one Appellant, described how before the Al Ain event, his horse, Lobster was coughing. Sharbatly had the horse checked by the event veterinarian. The reports he received referred to the medications used by the horse. Sharbatly said that if Bute had been given to the horse, then it would have been listed and an ETUE would have been requested. Ultimately, Sharbatly had no concerns about whether the horse should compete. Sharbatly said that he had been told at the time that he had Lobster checked by the event veterinarian, that Lobster would be tested. Accordingly, if Sharbatly had had any reason to believe that Lobster had Bute on board, he would not have entered him.*

6. THE PARTIES' SUBMISSIONS

A. Appellant's Submissions and Requests for Relief

6.1 In summary, the Appellants submit the following in support of their appeals:

1. Al Eid

6.2 Al Eid argues that he has established, on the requisite balance of probabilities, that the explanation for the presences of the Controlled Medications in the Sample of VANHOEVE

is the ingestion of residual traces of the Controlled Medications through exposure to a contaminated stable environment at the Riyadh Event.

6.3 Having established the route of ingestion of the Bute found in VANHOEVE's sample, Al Eid bears No Fault or Negligence or, in the alternative, No Significant Fault or Negligence for the Presence of Controlled Medications in VANHOEVE's Sample.

6.4 The FEI Tibunal erred in finding that Al Eid had failed to establish, on a balance of probabilities, how the Controlled Medications entered VANHOEVE's system. Al Eid highlighted the following evidentiary points in support of this submission:

(a) Bute was regularly used at the stables where the Riyadh Event took place.

(b) Photographs of the stables at the time of the Riyadh Event reflect the poor state of cleanliness. The evidence of the witnesses was to similar effect.

(c) The weather conditions which prevailed at the Riyadh Event were exceptionally bad. This contributed to the lack of cleanliness and controls in place to prevent the risk of contamination.

(d) The movements of the horse explain how it came into contact with contaminated foraging and bedding.

(e) The risk of contamination in the stable environment posed by the use of Bute and the plausibility of the explanation put forward by Al Eid.

6.5 Al Eid notes that in the FEI tribunal in the case of *Tackeray* (24 September 2009), the Athlete's groom provided a statement that she had either failed to wash the feed buckets properly or gave the wrong feed to the wrong horse, but she could not be absolutely certain. The Tribunal found that the evidence was sufficient to discharge the standard of proof by reference to its cumulative effect:

"The Tribunal finds that the cumulative effect of all evidence in this case is sufficient for the PR to establish under the balance of probability that the first prerequisite of EADMCR Article 10.5.2 was met. The PR's groom testified that it is more likely than not that the feed buckets had been mixed".

The FEI Tribunal continued:

"There was sufficient evidence regarding the special circumstances that caused the PR's groom to feed the Horse and the mare after a hectic journey and in a state of fatigue [the experts] all testified that it was scientifically plausible … and an intentional application of the Prohibited Substance would not have served any purpose …".

6.6 Al Eid points to the expert evidence of Dr Dunnett, who concluded that it was scientifically plausible that residual contamination at the stables at the Riyadh event led to the levels of the Controlled Medications that were detected in the Sample and, also, to the evidence from the Team Veterinarian, Dr. Philippe Benoit. Al Eid notes that Dr. Dunnett's evidence was not contested by any contrary views from another expert.

6.7 Al Eid argues that the cumulative effect of the evidence demonstrates, on a balance of probability, that the source of the positive finding was the contaminated environment at the Riding School where the Horse was stabled prior to and during the Riyadh Event.

6.8 When considering the totality of the circumstances of the case, Al Eid submits that the following factors are relevant to a determination of his Fault or Negligence (or lack thereof):

(a) The truly exceptional circumstances which resulted in the contamination of the stables, including:

(i) The unclean state of the stables at an FEI certified event; and

(ii) The exceptional weather conditions at the Riyadh Event;

(b) The extremely low levels of the Controlled Medications in the Sample and the fact that these could not have had any performance enhancing or therapeutic effect on the Horse at the time of the Riyadh event;

(c) The inadvertent nature of the ingestion of the Controlled Medications;

(d) The steps taken by Mr Al Eid to try and avoid the possibility of his horse ingesting any contaminated materials;

(e) The importance of the Riyadh Event such that Mr Al Eid had to compete at it notwithstanding his concerns about the state of the facilities.

6.9 The evaluation of No Fault or Negligence or No Significant Fault or Negligence should be guided by principles set out by the CAS in CAS 2005/A/830 and CAS 2006/A/1025, which require examination of all of the circumstances of the case, always having regard to the overarching doctrine of proportionality.

2. Sharbatly

6.10 Sharbatly carried out extensive investigations to try and identify the explanation for the presence of the Controlled Medications in the Sample. This included tests on the supplements given to the horse and investigations conducted alongside the FEI Integrity Unit into the use of Bute at the Al Ain Equestrian Club.

6.11 While these tests and investigations point strongly to the explanation being the ingestion of the Controlled Medications through traces of residual contamination at the Al Ain Event, Sharbatly accepts that in spite of his best efforts the evidence he has obtained in support of contamination being the explanation is not sufficient to demonstrate, on the balance of probabilities, that that explanation is the correct one.

6.12 Sharbatly submits that the Panel should take into account:

(a) the steps taken by him to investigate the cause of the presence of the Controlled Medications in LOBSTER's Sample;

(b) the evidence obtained by him as to possible explanations for the presence of the Controlled Medications in the Sample (in particular the expert evidence of Dr Dunnett which that shows that the levels of the Controlled Medications in the Sample are consistent with contamination); and

(c) the evidence obtained by him which effectively rules out other possible explanations (including deliberate administration of the Controlled Medications)

6.13 Overall, Sharbatly contends that the circumstances of the case are such that it is wholly disproportionate and unjust to impose a penalty on him greater than two months. In addition to the matters referenced at above, these circumstances include:

(a) The nature of the substances in question being controlled medications rather than doping substances;

(b) The level of the Controlled Medications detected in the Sample being extremely low and incapable of having exerted any performance enhancing or therapeutic effect;

(c) The upcoming Olympic Games;

(d) The impact any greater period of suspension would have on the Saudi Equestrian Team;

(e) Sharbatly's professionalism and commitment to the ECM Rules and their objectives; and

(f) Sharbatly's apology.

3. Both Appellants

6.14 Sharbatly and Al Eid (further and in the alternative) submit that the sanctions imposed on them by the FEI tribunal were disproportionate, having regard to the particular circumstances of their respective cases.

6.15 Article 10.2 of the *ECM Rules* provides for a wide discretion in assessing the appropriate sanction as compared with the mandatory imposition of a two (2) year period of ineligibility under the FEI *Equine Anti-Doping Rules* (the "EAD Rules").

6.16 Proportionality has been consistently upheld as a general and fundamental legal principle which requires that discretion as to sanction be exercised in such a manner that the severity of the sanction imposed is just and in proportion to the seriousness of the offence (CAS 2006/A/1133; CAS 2005/A/830; CAS 2004/A/690).

6.17 The exercise of discretion as to the appropriate sanction is wide, but it must be exercised in accordance with the principle of proportionality. In this regard, the Appellants argue that the FEI Tribunal took an unduly restrictive approach to the exercise of discretion and by doing so failed to take into account a number of relevant considerations which would and should have yielded a different outcome.

B. Respondent's Submissions and Requests for Relief

6.18 In summary, Respondent submits the following in defence.

6.19 There is no material dispute about the basic facts. Rather, the parties disagree only about the findings that may properly be made based on those facts.

6.20 In El Aid's case, the parties disagree about whether facts establish that it is more likely than not that the Bute got into the VANHOEVE's system as a result of inadvertent contamination due to unclean conditions at the stables at Riyadh Event.

6.21 Otherwise, the only dispute is as to whether the FEI Tribunal was entitled, in the exercise of its sanctioning discretion under Article 10.2 of the ECM Rules, to impose a period of ineligibility on the Appellant of eight months.

6.22 The FEI Tribunal is a knowledgeable and experienced tribunal. The procedure it followed was full and fair, and it clearly made its decision carefully and in good faith. Therefore the CAS Sole Arbitrator should proceed on the basis that the decision is entitled to 'respect' and he should not 'easily tinker' with it (see CAS 2011/A/2518 at para 10.7).

6.23 According to the principles that govern the exercise of the Tribunal's sanctioning powers under Article 10.2, and taking into account all of the relevant facts and circumstances of this case, a four month sanction was warranted (the FEI made a similar submission to the FEI Tribunal). Counsel for the FEI noted that a four month sanction would be a "serious" sanction for a Bute violation.

6.24 A central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine. One of those partners is unable to speak for itself, and therefore the FEI has assumed responsibility for speaking on its behalf, by taking every necessary step to ensure that, in every aspect of the sport, the welfare of the horse is paramount.

6.25 This responsibility is reflected in the ECM Rules, the purpose of which is not to preserve the integrity of the sport (which is the objective of anti-doping rules) but rather 'to ensure horse welfare and the highest levels of professionalism' [EADCMR, p.5], by ensuring that medications (Controlled Medication Substances) and methods (Controlled Medication Methods) that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.

6.26 According to the FEI Medication Code (EADMCR p.29):

All treatments must be given in the best health and welfare interests of the Horse. Therefore:

Every treatment must be fully justifiable by the medical condition of the Horse receiving the treatment.

Horses that cannot compete as a result of injury or disease must be given appropriate veterinary treatment. Persons Responsible and their Support Personnel must obtain advice from their treating Veterinarian or team Veterinarian prescribing a treatment and the necessary duration of treatment.

No Controlled Medication Substance shall be given to any Horse during or close to an event unless the appropriate FEI guidelines for medication authorization have been followed.

A complete and accurate record of all treatments during or close to an event should be maintained in the form of a Medication Logbook.

6.27 The distinction between anti-doping and Controlled Medication rules has important ramifications in the present cases, where the Appellants are not accused of doping but, instead, are being held to account for the presence of a medication, Bute, in their competition horses' systems without the required pre-authorisation. In particular:

(a) It means that when it comes to assessing (for the purposes of sanction) the fault of the Appellants and the harm that their actions have caused, the assessment is to be made not by reference to the anti-doping imperatives but rather by reference to the specific and distinct objectives of the ECM Rules and the particular mischief that they are aimed at avoiding.

(b) While the ECM Rules borrow some concepts from the World Anti-Doping Code ("WADC"), the primary imperative behind the WADC – the need to harmonise doping and sanctions for doping across all countries and sports – simply does not apply in the context of the ECM Rules. And that is reflected in the fact that the rigid system of sanctioning adopted in the WADC (fixed sanctions that cannot be departed from except in narrow circumstances where specific mitigating provisions are triggered) is not followed in the ECM Rules.

(c) For example, while the ECM Rules borrow the WADC concept of elimination of sanction in cases of 'No Fault or Negligence' and "No Significant Fault or Negligence", if such a plea is not available on the facts then (unlike the WADC) the ECM Rules do not mandate the application of a fixed sanction, but, instead, still confer a broad discretion on the FEI Tribunal to determine a sanction (including a ban in the range of 0-24 months) that is fair and proportionate in all the facts and circumstances of the case, measured against the underlying objectives of the ECM Rules, and the specific mischief it is designed to prevent.

6.28 With respect to Al Eid's defence of exceptional circumstances, pursuant to Article 10.4, the FEI Tribunal correctly rejected El Aid's plea.

6.29 El Aid has not satisfied the pre-condition to application of Article 10.4, i.e., he has not discharged his burden of proving, on the balance of probabilities, how the Bute got into VANHOEVE's system. In the regard:

(a) It is not enough merely to deny intentional administration and to assert that 'therefore' the explanation must be inadvertent ingestion. Nor is it enough to establish that inadvertent contamination is a possible explanation on the facts and the science. Instead, the Appellant has to establish by adducing specific, competent

and persuasive evidence that establishes the factual circumstances in which the Bute entered VANHOEVE's system, that inadvertent contamination is more likely than not to have occurred.

(b) El Aid's evidence shows (at most) that, as a general proposition, Bute was used therapeutically on horses stabled at the International Riding School where the Riyadh Event was held; and that some old bedding and old feed remnants were present in the stables when VANHOEVE arrived (although the Appellant got his groom to clean out VANHOEVE's stable and the feed bucket, and put fresh shavings on top of the dirty shavings shortly after arrival, i.e., four days before the sample was collected). There is no evidence that Bute was used in the particular stable housing VANHOEVE, or had been administered to any of the horses occupying that stable prior to VANHOEVE, or indeed generally that Bute was used at the International Riding School in a way that could have led to contamination of the feed or the bedding in that stable. There is no evidence of any such contamination before or after the Riyadh Event, and nor did either of the other horses tested at the Riyadh Event test positive for Bute.

(c) Dr. Dunnett opined that if some of the old shavings or old feed present in the stable when VANHOEVE arrived had been contaminated with Bute residue, and if VANHOEVE had ingested some of those shavings or old feed 'within a few hours of sampling', or if there had been 'sustained ingestion of phenylbutazone from the stall environment over the 3 to 4 day period immediately prior to the event', that could have caused the presence of Bute and its metabolite at the very low levels found in VANHOEVE's sample, making it 'a plausible explanation' for the laboratory's finding in this case. But that was speculation, not proof: 'proof that [it] is scientifically possible is not proof that it did actually occur.' (see Camiro, FEI Tribunal decision dated 22 December 2008 at para 72).

6.30 Even assuming that Al Eid had established it was more likely than not that the cause of the finding was inadvertent contamination in the stables at the Riyadh Event, to sustain his plea of No Fault or Negligence he would also have to show that he used 'utmost caution' to avoid such inadvertent contamination, he cannot do so, because there were a number of reasonable and practical steps that he could and should have taken to avoid inadvertent contamination, such as requesting a clean stable, or keeping VANHOEVE out of the stable until it had been thoroughly cleaned.

6.31 The starting point in the exercise of the Article 10.2 discretion is not a two year ban (as it would be under the *WADC*, with fault presumed and the Person Responsible having to justify any downward departure). Instead, under Article 10.2 of the *ECM Rules* there is no presumption of fault, so the starting-point is zero, and the tribunal has to decide to what extent (if at all) it should go up from there (to the maximum of 24 months) in all of the circumstances of the case.

6.32 The least serious sanction available should be considered first, and should only be rejected in favour of a more serious sanction if it is considered that the lesser sanction would be insufficient in the circumstances.

6.33 Furthermore, the discretion as to what length of ban (if any) to impose should be exercised 'in the round', i.e., in conjunction with any other discretion as to sanction conferred by the *ECM Rules*, 'so as to arrive at a result that meets the justice of the case overall'. Thus, the

tribunal also has discretion under Article 10.2 as to whether to impose a fine, and (if so) how much (up to CHF 15,000), whether to order the Appellant to contribute to the costs of the proceedings, and (if so) in what amount, and (under Article 10.1) whether to disqualify the other results obtained by the Appellant in the event in question. All of these factors must be considered, individually and collectively, in order to weigh up what is the least serious sanction necessary to vindicate the objectives underlying the *ECM Rules*, in all of the circumstances of the case at hand.

6.34 As a general principle the assessment of proportionality includes taking into account the impact of the proposed sanction on the athlete concerned, eg missing the Olympic Games. The commentary to the *WADC* (which specifically precludes consideration of what events will be missed in determining the proper sanction for a doping offence) does not apply directly in this case. Accordingly, if the conduct at issue was not so culpable, and the mischief caused was slight, that that would have to be weighed against the serious prejudice to the Appellants in missing the Olympic Games.

6.35 Any alleged prejudice to the Saudi Equestrian team would not be a relevant factor in the exercise of discretion under Article 10.2.

6.36 Other relevant considerations would include the FEI Tribunal's findings that:

(a) Neither the Appellants nor anyone else on their team had knowingly administered Bute to their respective Horses.

(b) A professional team structure was in place with clear procedures for avoiding anti-doping rule violations. The Saudi Team employed a professional veterinary staff whom the Athletes had access to both during and outside of business hours

(c) Because the Bute was not deliberately administered to the Horses by the Appellants or any of their team, this is not a case where the horses were given a treatment that their medical conditions did not justify, nor was they given Bute in order to compete when they were not fit to do so, nor was there a failure to follow the guidelines for obtaining medication pre-authorisation. In other words, these cases do not involve the key mischiefs that the ECM Rules are designed to prevent.

(d) The violations raise no issues as to the welfare of the horses.

(e) The estimated levels detected in the Samples were very low and that these levels were consistent with a lack of performance-enhancing or therapeutic effect.

(f) When given notice of their respective violations the Appellants showed a responsible attitude and attempted to limit the adverse consequences for the sport (a) by promptly admitting the violation; and (b) by voluntarily suspending themselves from competition pending resolution.

7. JURISDICTION OF THE CAS AND ADMISSIBILITY

7.1 Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

7.2 CAS jurisdiction to hear this appeal is derived from ECM Rule 12.2.1 which provides that in cases arising from participation in an International Event or in cases involving FEI-registered Horses the decision may be appealed exclusively to CAS. An appeal must be filed 30 days from the date of Receipt of the Hearing Panel decision by the appealing party. Furthermore, each party confirmed CAS jurisdiction by signing the Order of Procedure.

7.3 The FEI Tribunal rendered its decisions on 23 May 2012. The Appellants filed their appeals on 24 May 2012 and are therefore admissible

8. APPLICABLE LAW

8.1 Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

8.2 Pursuant to Article 36.3 of the *Statutes* of the FEI (23rd Edition, effective 6 May 2011), all disputes shall be settled by Swiss law.

9. ISSUES

9.1 The standard of review on appeal and, in particular, whether there should be any deference to the FEI Tribunal's decisions.

9.2 In the case of El Aid, whether:

(a) He has established on a balance of probabilities how the Bute entered VANHOEVE's system; and, if so

(b) Whether he bears No Fault or Negligence or No Significant Fault or Negligence therefor.

9.3 Whether a reasonable application of the discretion afforded under ECM Rule 10.2 merits a reduction or change in the sanctions imposed on the Appellants by the FEI Tribunal.

10. MERITS OF THE APPEAL

A. The Scope of a Panel's Powers in an Appeal Procedure

10.1 The source of the Panel's powers under Article R57 of the *CAS Code* accords to the Panel "full power to review the facts and the law". The Panel *"may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*. The Panel can, as it did in this case, hear the key witnesses and even receive testimony that was not provided to the FEI Tribunal.

10.2 While CAS decisions such as CAS 2009/A/1870 and CAS 2009/A/1918 are cited for the proposition that the specialist tribunals of sport federations are entitled to considerable deference and, in particular, that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is "evidently and grossly disproportionate to the offence", such principles do not limit a CAS Panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances. As the Panel in CAS 2011/A/2518 said (at para. 10.6):

> *"Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where a tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision".*

10.3 The comments of the CAS Panel in CAS 2010/A/2283 at para. 13.46 are also apposite:

> *"The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so".*

10.4 The foregoing jurisprudence has, therefore, guided this Panel in the task at hand.

B. Whether Al Eid has Established the Existence of Exceptional Circumstances

10.5 Article 10.4 of the *ECM Rules* provides for the elimination or reduction of a period of Ineligibility based on exceptional circumstances. The language of the Rule tracks, in large measure, the corresponding rule in Article 10.5 of the *WADC*. A key difference is that Article 10.4.2 (No Significant Fault or Negligence) does not limit the reduction of the otherwise applicable sanction to 50% of that sanction (a requirement of *WADC* Article 10.5.2). A key similarity, however, is that in order to engage the application of Article 10.4 of the *ECM Rules*,

the Person Responsible (in this case, Al Eid) must be able to establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated or reduced.

10.6 In the Panel's view, Al Eid has not met this burden.

10.7 The evidence of Dr. Abdelkarim, the treating veterinarian at the Riyadh International Riding School, provided an explanation for the fairly wide availability of Bute at the facility. It was argued that this evidence, when taken with all of the other evidence adduced by Al Eid, should have the cumulative effect of enabling Al Eid to meet his burden. The problem with this approach is that it would enable someone in the position of Al Eid to discharge his burden by putting forward a theory of inadvertent contamination and requiring that the theory be accepted, by default, because of the absence of any other explanation or evidence. As a CAS Panel observed in CAS 2010/A/2230, which was an anti-doping case involving a Specified Substance, at paragraph 11.5:

"An athlete cannot by asserting even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance sport performance thereby alone establishing how the substance entered his body. Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in "The Sign of Four" but his reasoning impermissible for a judicial officer or body".

10.8 While there is no suggestion of any improper behaviour on the part of Al Eid or members of his team, that is not the issue. Explanations as to the possible cause of the positive test, however plausible, will, as noted above, not be enough absent more than tangible evidence. This Panel therefore agrees with the FEI Tribunal which concluded (at paragraph 47):

"… The Tribunal is however not persuaded by the explanation provided by Dr Dunnett that there was ingestion by contamination. The Tribunal finds that in the first place, insufficient evidence was offered by the PR regarding the alleged contamination. The Tribunal further considers that the PR's groom had cleaned the stable shortly after the arrival, and thereby further reduced the risk of contamination. Furthermore, the Tribunal holds that insufficient evidence has been adduced to establish the causal link between the alleged contamination and the positive test result. It is therefore the opinion of the Tribunal that the PR has failed to prove that ingestion by means of exposure to a contaminated stable environment was more likely than not to be the source of the Phenylbutazone and Oxyphenbutazone …".

C. The Sanction under Article 10.2 of the ECM Rules

10.9 The Panel is in substantial agreement with the submissions made by counsel for the FEI.

10.10 The starting point of this discussion is, once again, to emphasise a key difference between Article 10.2 of the *ECM Rules* and its relative, Article 10.4 of the WADC (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances).

10.11 Whereas under the WADC, the task is to determine by how much the presumptive sanction of 24 months should be reduced, having regard to the athlete's degree of fault, the reverse process is followed under Article 10.2 of the *ECM Rules*. Instead, a first violation, in most circumstances, is dealt with through the Administrative Procedure, which would almost inevitably result in no period of Ineligibility being imposed on the Athlete at all.

10.12 Both of the appellants had previous infractions. However, those incidents were sufficiently long ago that they are regarded as having been "spent" for sanctioning purposes (i.e. the current charges were regarded as first offences) in the context of whether the Appellants should be sanctioned for multiple *ECM Rule* violations. For administrative purposes, however, the existence of the previous infractions remains relevant because it precludes the Appellants from electing to be dealt with in accordance with the Administrative Procedure.

10.13 A key element of the sanctioning regime provided by Article 10.2 of the *ECM Rules* is there is no presumption of fault. This stands in direct contrast to WADC Article 10.4. So the starting point is zero.

10.14 In CAS 2007/A/1370 & 1376 it was noted that any exercise of sanctioning power is an interference with the rights of athletes. It is therefore necessary to weigh the objectives of the *ECM Rules* against the consequences of infringement, including the impact on the offender. The correct approach is to start low and only move up the scale if it is necessary to do so to meet the overriding objectives of the *ECM Rules*. "Fault" is not a specified yardstick to be employed in undertaking this assessment (again, a distinguishing feature between Article 10.2 and WADC Article 10.5).

10.15 Having regard to the two appeals before this Panel, the following factors are supportive of the conclusion that the culpability of the Appellants is at the low end of the scale:

(a) The FEI Tribunal's finding of professionalism (the Saudi professional team structure is at a very high end of the spectrum);

(b) The finding that there was no deliberate taking or administration of medication;

(c) The fact that when other medications were administered to the horses, ETUEs were routinely applied for;

(d) The lack of any evidence of harmful impact on the horses concerned;

(e) The lack of any welfare concerns relating to the horses;

(f) The lack of any reasonable explanation for the Athletes not to have sought an ETUE had they wished to use Bute on their horses;

(g) The levels of Bute detected in the horses' systems were consistent with a lack of any possible enhancement of performance or therapeutic effect;

(h) The extensive investigation by the Athletes and their teams, their prompt admission to the charges and their acceptance of voluntary suspensions.

10.16 Although the FEI Tribunal made reference to a number of "comparable" cases in coming to a conclusion that eight month sanctions were appropriate, upon closer examination these cases cannot be regarded as appropriate comparables. In these cases horses had either been given a cocktail of medications and/or there were few mitigating factors.

10.17 By way of example, in *Cameo Renazar* (FEI Tribunal, 21 November 2011), after repeated attempts on the part of the FEI to obtain an explanation from the Person Responsible, the Person Responsible stated that he had given his horse a paste containing Bute prior to the Event in question, since the horse had shown signs of colic. When a questionnaire, completed by the Person Responsible, was eventually obtained, it indicated that prior to the competition in question, the horse had been treated by different veterinarians, but that specific information concerning the horse's treatments was not available. The Person Responsible apparently attempted to resile from him previous admission by suggesting that the Bute detected in the horse's Sample must have been given to the horse by a veterinarian working at a particular stable. The FEI Tribunal concluded (at paragraph 25):

"In the opinion of the Tribunal, however, the degree of fault or negligence of the PR is difficult to access [sic] given the information provided. The PR has shown very little knowledge of the rules of the FEI, and shows even less signs of a determination to achieve regulatory compliance in the future".

10.18 While the foregoing comments were made in the context of an Article 10.4 analysis, they would presumably have informed the Tribunal's subsequent evaluation of fault under Article 10.2. The result: a period of ineligibility of eight months.

10.19 In *Tiburon* (FEI Tribunal, 2 December 2011) a case involving the controlled medications Bute and Flunixin, the horse had been medicated for colic a few days before the event at which the horse was tested. The Person Responsible explained that he did not know that this treatment would be detectible as long as six days after administration. No ETUE had been applied for and there appears to have been non-compliance with the requirement to maintain an FEI medication log book, a record of who had administered medications to the horse and a lack of steps being taken by the Person Responsible to educate himself about the consequences of the treatment received by the horse. Again, while all of these comments were made in relation to the plea of exceptional circumstances, they no doubt informed that FEI Tribunal's decision to impose a term of ineligibility of eight months.

10.20 Simply comparing the facts and circumstances of the instant appeals from those considered in the *Cameo Renazar* and *Tiburon* matters, it is readily apparent that the Appellants' infractions were far less serious than those described in the other cases.

10.21 More fundamentally, however, the reasons of the FEI Tribunal leave the impression that the Tribunal approached the exercise of its discretion in the Appellants' Controlled Medication

cases in much the same way as a tribunal would look at sanctioning in a Specified Substance case under *WADC* Article 10.4.

10.22 Although the FEI Tribunal recites, in paragraphs 48 (Al Eid) and 55 (Sharbatly) of its decisions that the presumptive starting point of two years provided for in *EAD Rules* does not apply in cases of Controlled Medication substances, the FEI Tribunal goes on to say that because the Appellants failed to prove how the Controlled Medications entered their Horses' systems, it was not possible for the Tribunal to assess the appellants' "Fault or Negligence" for the *ECM Rule* violation.

10.23 Having stated that it was unable to assess "Fault or Negligence", the FEI Tribunal goes on to say that it *"is forced to take into account other, more objective factors in order to determine the period of Ineligibility"* (emphasis added).

10.24 It is worth repeating at this juncture that in exercising its discretion under Article 10.2, the key consideration should be the legal principle of proportionality, i.e., the sanction has to be commensurate with the seriousness of the offence, taking into account the underlying objectives of the *ECM Rules* and the mischief they are aimed at preventing. Or, in more formal terms, (i) the objectives being pursued must be sufficiently important to justify taking away an offender's right to pursue his or her profession, (ii) the sanction imposed must be rationally connected to the pursuit of those objectives, and (iii) it must go no further than is necessary to meet those objectives.

10.25 There is therefore a balancing exercise to be done. The Panel must assess (1) the culpability of the offender; and (2) the harm caused or risked by his offence, measured in each case by reference to the objectives of the rules in question and in particular the mischief that they are aimed at preventing. Against that, the Panel should weigh the impact of the sanction on the offender, and any mitigating factors.

10.26 Although the FEI Tribunal made reference to many of the factors which the parties on these appeals submit were relevant and correct, the Panel is of the view the FEI Tribunal erred by failing to take into account the effect of the eight month sanction (in particular that it would exclude both Appellants from the Olympic Games). Consistent with its general approach of considering these Controlled Medication cases in much the same way as an anti-doping case, the FEI Tribunal found that the reasoning behind the commentary in the *WADC* that the effect of the suspensions should not influence the period of Ineligibility selected was persuasive in an Article 10.2 case. By doing so the FEI Tribunal deprived itself of the opportunity to weigh the effect of a relevant factor.

10.27 Further, the FEI Tribunal appears to have applied little if any weight to the fact that under the Administrative Procedure, the Appellants' offences would not have generated any period of Ineligibility at all.

10.28 This Panel agrees with the FEI's submission that in deciding what is a necessary and proportionate sanction in these cases, it is fair to take account of the fact (which reflects the

nature and purpose of the *ECM Rules*) that if the Appellants' previous offences had taken place more than eight years prior to the current offences, they would have been entitled to accept an administrative sanction for this present violation of a fine, costs and no period of Ineligibility. Specifically, the question would be: what makes this case different from an offence that would have attracted an administrative sanction only, and what greater sanction does that difference justify?

10.29 The fact is that the Appellants have infringed the *ECM Rules* previously, albeit seven years (in the case of Al Eid) and six years (in the case of Sharbatly). Having decided that those infractions should be taken into account when considering the exercise of discretion under Article 10.2, it would be reasonable to impose some period of Ineligibility, in addition to the fines and costs awards that were imposed by the FEI Tribunal. The *ECM Rules* and, in particular, the principle of strict liability contained in those *Rules*, need to be respected and vindicated. The sanction imposed must therefore be meaningful and stand as a deterrent, particularly where, as here, the Administrative Procedure would not apply.

10.30 That said, even the four month period of Ineligibility which was suggested by the FEI would be a tough sanction, particularly having regard to the fines, costs, a period of voluntary suspension served and disqualification of results.

10.31 While there is inevitably an element of arbitrariness in selecting an appropriate sanction, the Panel has concluded that two months would be an appropriate period of Ineligibility in all of the circumstances of this case.

CONCLUSION

10.32 This Panel would allow the appeals of Al Eid and Sharbatly to the extent that the eight month period of Ineligibility imposed on each of them by the FEI Tribunal should be reduced to two months. The starting date for the term of Ineligibility is 24 February 2012 in the case of Al Eid and 10 February 2012 in the case of Sharbatly.

10.33 The remainder of the FEI Tribunal's decisions dated 23 May 2012 are continued.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Abdullah Waleed Sharbatly on 24 May 2012 against the decision of the Fédération Equestre Internationale Tribunal ("FEI Tribunal") dated 23 May 2012 is partially upheld.

2. Paragraph 61(1) of the decision of the FEI Tribunal dated 23 May 2012 is set aside and replaced with the following:

   Abdullah Waleed Sharbatly is sanctioned with a period of Ineligibility of two months, commencing on 10 February 2012.

3. The remainder of the FEI Tribunal's decision dated 23 May 2012 is confirmed.

5. (…).

6. (…).

7. All other or further claims are dismissed.

TAB 4

Agyeman v. INS

United States Court of Appeals for the Ninth Circuit

October 16, 2001, Argued and Submitted, Seattle, Washington ; July 23, 2002, Filed

No. 99-70396

Reporter
296 F.3d 871 *; 2002 U.S. App. LEXIS 14740 **; 2002 Cal. Daily Op. Service 6569; 2002 Daily Journal DAR 8261

EMMANUEL SENYO AGYEMAN, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.

Subsequent History: Habeas corpus proceeding at *Agyeman v. INS Asst. Dist. Dir. Coachman, 2003 U.S. App. LEXIS 12806 (9th Cir. Ariz., June 23, 2003)*

Prior History: **[**1]** On Petition for Review of an Order of the Board of Immigration Appeals. INS No. A29-765-590.

Disposition: Petition granted. Board's decision vacated and remanded with instructions.

Counsel: Christopher B. Durbin (argued), Kristen Kay Mitchell (argued), Eric Schnapper, Amy Edwards, Seattle, Washington (University of Washington School of Law (Students of Pro Bono Program)); Leonard J. Feldman, Heller, Ehrman, White & McAuliffe, Seattle, Washington; Daniel M. Kowalski, Ryan, Swanson & Cleveland, Seattle, Washington, for the petitioner-appellant.

John S. Hogan (argued) and John M. McAdams, Jr., U.S. Department of Justice, Washington, D.C., for the respondent-appellee.

Judges: Before: Warren J. Ferguson, Andrew J. Kleinfeld, and Ronald M. Gould, Circuit Judges. Opinion by Judge Ferguson; Dissent by Judge Kleinfeld.

Opinion by: Warren J. Ferguson

Opinion

[*875] FERGUSON, Circuit Judge:

Emmanuel Senyo Agyeman ("Agyeman"), a native and citizen of Ghana, petitions for review of the Board of Immigration Appeals' ("BIA") decision, affirming the Immigration Judge's ("IJ") denial of his request for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Naturalization Act ("INA"), *8 U.S.C. § 1254(a)(1)* (repealed 1996) ("Section 244"), and adjustment of **[**2]** status pursuant to Section 245 of the INA, *8 U.S.C. § 1255* ("Section 245"). Agyeman claims that he was denied a full and fair hearing because he was not given adequate instructions as to how to proceed with his applications for relief. Specifically, he alleges, among other errors, that the denial of adjustment of status was predicated on his inability to procure his wife's attendance at the deportation hearing to testify on his behalf. Given that his wife suffers from bipolar disorder and resides thousands of miles from the site of the proceedings, we agree. Accordingly, we grant the petition and now remand for a new hearing. In addition, we hold that the filing fees provisions of the Prison Litigation Reform Act ("PLRA") do not apply to INS detainees.

I. BACKGROUND

Agyeman entered the United States on a B-1 visitor visa in 1988. In 1991, he married a United States citizen, Barbara Levy ("Levy"), and the couple established a home together in Elizabeth, New Jersey. Levy subsequently filed an Form I-130 immediate relative visa petition, which was approved in 1992. However, Agyeman's application for adjustment of status was denied because the couple **[**3]** failed to attend the scheduled interview and submit Agyeman's medical examination. As reflected in the record, Levy was unable to attend the interview because she was hospitalized for bipolar disorder at the time.

In 1993, Agyeman relocated to Carson City, Nevada, for business purposes, and resided there until being detained by the INS for overstaying his visa in early 1997. INS officials transported Agyeman to a detention facility in Eloy, Arizona, where he remained during the course of the proceedings.

On July 28, 1997, the IJ found Agyeman deportable under Section 241(a)(1)(B) of the INA, *8 U.S.C. §*

1231(a)(1)(B), and denied his request for suspension of deportation under Section 244. Reviewing Agyeman's application for adjustment of status based on his marriage to a United States citizen pursuant to Section 216 of the INA, 8 U.S.C. § 1186a ("Section 216"), the IJ instructed Agyeman that his wife's testimony was mandatory to determine the bona fides of their marriage. Upon questioning about his wife, Agyeman informed the IJ that Levy suffered from bipolar disorder and had been hospitalized for two or three months at a time. The IJ **[**4]** asked whether Levy was still hospitalized, to which Agyeman responded: "I don't know." At the close of the hearing, the **[*876]** IJ stated that "you need to contact and have available at the next hearing, your spouse. *She must be physically present at that hearing*, otherwise, I can't grant your application for adjustment of status." (emphasis added). The IJ granted a continuance for Agyeman to procure her attendance. On November 5, the IJ denied Agyeman's application for adjustment of status because Levy did not appear and testify on his behalf and because his medical examination was not on file. The IJ granted his application for voluntary departure to Ghana pursuant to Section 244(e) of the INA, 8 U.S.C. § 1254(e).

On appeal, the BIA affirmed in all respects. It denied Agyeman's application for an adjustment of status pursuant to Section 245 on the basis that he had failed to establish the validity of his marriage to Levy, affirming the IJ's rationale that she failed to testify at the deportation hearing. [1] It also refused to grant the application on discretionary grounds. As to the denial of suspension for deportation, the BIA affirmed on the basis that Agyeman **[**5]** had failed to demonstrate an "extreme hardship" to himself or to his wife.

This timely petition for review followed. We granted Agyeman's request for leave to proceed *in forma pauperis* and instructed the parties to brief the issue whether the PLRA filing fee **[**6]** provisions apply to INS detainees.

II. JURISDICTION

This petition is governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Kalaw v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997). We have jurisdiction to hear Agyeman's due process claims pursuant to 8 U.S.C. § 1105a(a), as amended by IIRIRA section 309(c)(4). Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998).

III. STANDARD OF REVIEW

We review claims of due process violations in deportation proceedings de novo. Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001). We also review de novo legal interpretations of the INA's requirements. Andreiu v. Ashcroft, 253 F.3d 477, 482 (9th Cir. 2001) (en banc). Because our standard of review is de novo, we conduct an independent examination of the entire record. Perez-Lastor v. INS, 208 F.3d 773, 777 (9th Cir. 2000). When the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent that the BIA adopted the IJ's opinion. Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000) **[**7]** (citing Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995)).

IV. DISCUSSION

A. Due Process Rights in Deportation Proceedings

The Fifth Amendment guarantees individuals who are subject to deportation due process in INS proceedings. Jacinto v. INS, 208 F.3d 725, 727 (9th Cir. 2000) (citing Campos-Sanchez v. INS, **[*877]** 164 F.3d 448, 450 (9th Cir. 1999)). "An alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000). In addition, aliens in deportation proceedings are entitled by statute and regulation to certain procedural protections. Barraza Rivera v. INS, 913 F.2d 1443, 1447 (9th Cir. 1990); Baires v. INS, 856 F.2d 89, 91 (9th Cir. 1988). For example, an alien must be afforded a reasonable opportunity to present evidence on his behalf. INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4); 8

[1] In its opinion, the BIA stated that the IJ denied Agyeman's application for adjustment of status pursuant to Section 245. However, the IJ explicitly analyzed the application under Section 216, presumably because the petition upon which Agyeman's application relied was filed prior to the second anniversary of his marriage and, thus, subject to the additional requirements of the statute. As explained below, these statutes are not mutually exclusive; the applicable regulations provide that an application for adjustment of status filed in deportation proceedings under Section 245 and based on a marriage, which is less than two years old, results in conditional residency pursuant to Section 216. 8 C.F.R. § 240.11(a)(1) (2001).

C.F.R. § 240.10(a)(4) (2001); *see also* INA § 240(b)(1); 8 U.S.C. § 1229a(b)(1) (providing **[**8]** that the immigration judge must receive evidence); 8 C.F.R. § 240.10(c) (2001) (same). If an alien is prejudiced by a denial of any of the applicable procedural protections, he is denied his constitutional guarantee of due process. *Campos-Sanchez, 164 F.3d at 450*.

One of the components of a full and fair hearing is that the IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief. *Jacinto, 208 F.3d at 728*. In addition, when the alien appears pro se, it is the IJ's duty to "fully develop the record." *Id. at 733-34* . Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Id. at 733* (quoting *Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985)*).

B. Full and Fair Hearing

Agyeman claims that he was denied **[**9]** a full and fair hearing because, among other errors, the IJ failed to provide an adequate explanation of the procedures and thereby denied him a full and fair hearing. At his deportation hearing, the IJ ruled that Levy's testimony was the only means by which Agyeman could successfully prosecute his application for adjustment of status, despite the fact that she suffered from a bipolar disorder and lived thousands of miles away. On appeal, the BIA affirmed the IJ's denial of Agyeman's applications for relief on the basis that Agyeman had failed to establish his marriage to a United States citizen. Under the circumstances, we find that Agyeman did not receive an adequate explanation as to what he had to prove to support his application for adjustment of status and was thereby denied a full and fair hearing.

1. Exhaustion of Administrative Remedies

As a threshold matter, we find that Agyeman's due process claim was properly exhausted below. While we retain jurisdiction to review due process challenges to immigration decisions, *Antonio-Cruz, 147 F.3d at 1130*, we may not entertain due process claims based on correctable procedural errors unless the alien raised **[**10]** them below. *Sanchez-Cruz, 255 F.3d at 780*; *Cortez-Acosta v. INS, 234 F.3d 476, 480 (9th Cir. 2000)*. The exhaustion requirement applies to claims that an alien was denied a "full and fair hearing." *Sanchez-Cruz, 255 F.3d at 780*.

Albeit inartfully, Agyeman raised pro se his due process claims in his notice of appeal to the BIA. Although he did not use the specific phrase 'due process violation,' he did protest the requirement that his wife testify at the hearing, explaining that she was in poor health and advised by her doctor not to make the trip. He also **[*878]** requested that she be permitted to appear "at a convenient location for the required interview."

Because Agyeman raised his claims pro se, we construe them liberally. *Estelle v. Gamble, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1975)*. Under this scrutiny, Agyeman satisfies the exhaustion requirement for his due process claim that he was denied a full and fair hearing, due to the IJ's insistence that his wife appear and testify at the hearing. Further, because the BIA conducted a de novo review of the IJ's decision, "it had a full opportunity to resolve [the] **[**11]** controversy or correct its own errors before judicial intervention." *Ladha v. INS, 215 F.3d 889, 903 (9th Cir. 2000)*. Thus, even to the extent that Agyeman's pro se appeal did not contain the exact legalese, the BIA had adequate opportunity to correct any errors occurring in the proceedings below. Accordingly, we hold that Agyeman's due process claim was properly exhausted before the BIA.

2. Requirement of Spouse's Testimony

At the deportation hearing, the IJ instructed Agyeman that his wife must appear and testify on his behalf, granting a continuance for him to produce her as a witness. When she did not appear, the IJ denied the application for adjustment of status, reasoning that his spouse was "unable or unwilling to appear and testify in his behalf." *Matter of Agyeman*, No. A-29-765-590, slip op. at 3 (IJ Nov. 5, 1997). The BIA affirmed the IJ's denial of Agyeman's application, observing that Agyeman "was on notice of the need for his wife to testify," but failed to produce her or any other witnesses at the deportation hearing. *Matter of Agyeman*, No. A29-765-590-Eloy, slip op. at 2 (BIA Mar. 16, 1999). Therefore, the BIA ruled, Agyeman "failed to **[**12]** establish his marriage to a United States citizen for purposes of adjustment of status." *Id*.

At the outset, we note that Levy's attendance and

testimony at the deportation hearing was not a statutory prerequisite for adjustment of status. On the face of the statute and accompanying regulations, Agyeman was only required to provide sufficient evidence of his bona fide marriage to a United States citizen. Yet, this was never explained to him. He was simply told that she must be there or his application would be denied. For a full understanding of what was legally required, we turn to a discussion of the statutory and regulatory framework governing the adjudication of adjustment of status applications based on marriage to a United States citizen.

a. Statutory and Regulatory Framework

Section 245 is the proper statutory framework for adjudicating an application for adjustment of status filed by an alien in deportation proceedings. 8 C.F.R. §§ 240.1(a)(1)(ii), 240.11(a)(1) (2001). The IJ has exclusive jurisdiction to decide the adjustment of status application. *8 C.F.R. § 245.2(a)(1) (2001)*. However, only the INS may adjudicate **[**13]** the underlying

I-130 visa petition. *8 C.F.R. § 204.1(e) (2001)*; *Dielmann v. INS, 34 F.3d 851, 854 (9th Cir. 1994)*.

Under Section 245, an alien may be eligible for adjustment of status if, among other prerequisites, an immigrant visa is immediately available. INA § 245(a); *8 U.S.C. § 1255(a)*. One of the ways by which an alien may become eligible to receive an immigrant visa is through marriage to a United States citizen. INA § 201(b), *8 U.S.C. § 1151(b)*. An approved I-130 filed by the spouse satisfies the requirement that a visa is immediately available. *INS v. Miranda, 459 U.S. 14, 15, 74 L. Ed. 2d 12, **[*879]** 103 S. Ct. 281 (1982)*. Once approved, the I-130 remains valid for the legal duration of the marriage. *8 C.F.R. § 204.2(h)(1) (2001)*.

However, approval of the I-130 petition does not automatically entitle the alien to adjustment of status as an immediate relative of a United States citizen. *INS v. Chadha, 462 U.S. 919, 937, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)* (citing *Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979)*). While **[**14]** an I-130 establishes eligibility for status, the Attorney General - or in the context of deportation proceedings, the IJ - must still decide to accord the status. [2] *Amarante v. Rosenberg, 326 F.2d 58, 62 (9th Cir. 1964)*.

[15]** As part of the investigative process for adjustment of status, the alien must attend an interview with an immigration officer. *8 C.F.R. § 245.6 (2001)*. While the regulations do not explicitly require the spouse to appear or testify on the alien's behalf, as a practical matter, the INS often requests the attendance of both the alien and the spouse at the initial adjustment interview. *See* SARAH IGNATIUS, IMMIGRATION LAW AND THE FAMILY § 8.04[5] at 8-60 (2001). Its authority to do so is found in its general regulatory power to request the appearance of an applicant, petitioner, sponsor, or beneficiary. *8 C.F.R. § 103.2(b)(9) (2001)*. This authority to request an appearance does not generally extend to the IJ in deportation proceedings; however, he may "issue subpoenas for the attendance

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[2] Agyeman argues that, because he had an approved I-130 on file and his marriage was consummated prior to being placed in deportation proceedings, he was not required to prove his bona fide marriage to a United States citizen. For a marriage to confer immigration benefits, it must satisfy three criteria. First, it must be legally valid. *Adams v. Howerton, 673 F.2d 1036, 1038-39 (9th Cir. 1982)*. Second, the couple must have married out of a bona fide desire to establish a life together, not to evade immigration laws. *Lutwak v. United States, 344 U.S. 604, 611, 97 L. Ed. 593, 73 S. Ct. 481 (1953)*; *Bark v. INS, 511 F.2d 1200, 1202 (9th Cir. 1975)*. Third, the marriage must not be against public policy. *Matter of H* --, *9 I. & N. Dec. 640, 641 (BIA 1962)*.

The approved I-130 provides prima facie evidence that the alien is eligible for adjustment as an immediate relative of a United States citizen. *Amarante v. Rosenberg, 326 F.2d 58, 62 (9th Cir. 1964)*. However, we reject Agyeman's argument that no other evidence of the marriage is ever necessary. His reliance on *Varela v. INS, 204 F.3d 1237 (9th Cir. 2000)*, is misplaced. In *Varela*, we remanded to the BIA to review the merits of a motion to reopen, noting that the alien had made a prima facie showing of eligibility for adjustment of status because he had submitted the application and all necessary supporting documentation. *204 F.3d at 1240 n. 6*. We noted further that he was not required to demonstrate the bona fides of his marriage by clear and convincing evidence because his marriage preceded the deportation hearings. *Id*.

Varela concerned whether the alien had made a prima facie showing to warrant the BIA's granting of a motion to reopen when deportation had proceeded *in absentia*. *Id. at 1239-40* . Here, Agyeman had the responsibility to prove his eligibility for adjustment of status by the preponderance of the evidence. While the I-130 may suffice in many cases, in cases such as this when the spouse has never testified as to the bona fides of the marriage, the approved petition might not *standing alone* prove by a preponderance of the evidence that the marriage was bona fide and not entered into to evade immigration laws.

of witnesses and presentation of evidence." INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).

If the alien's marriage is less than two years old, adjustment of status is granted on a conditional basis pursuant to Section 216. [3] INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1). **[*880]** The conditional status remains in effect **[**16]** for a two-year period, after which the alien must satisfy additional requirements under Section 216 to remove the conditionality of his legal residency. 8 C.F.R. § 240.11(a)(1) (2001). These requirements include a joint petition and interview with his spouse. INA § 216, 8 U.S.C. § 1186a. However, if the spouse refuses to participate in this process, the alien may file the petition alone and request a hardship waiver of the joint filing requirement. 8 C.F.R. §§ 216.4(a)(1), 216.5 (2001). In addition, while both the alien and the spouse must ordinarily appear for an interview at a local INS office, this requirement may be waived for good cause. INA §§ 216(c)(1)(B), (c)(2)(A)(ii), (d)(3), 8 U.S.C. §§ 1186a(c)(1)(B), (c)(2)(A)(ii), (d)(3); 8 C.F.R. § 216.4(b)(3) (2001). Whether or not the alien fulfills these additional requirements is left to the exclusive jurisdiction of the INS District Director. *Id*.

[17]** In this case, Levy filed an I-130 visa petition on Agyeman's behalf, and the INS approved it in 1992. Agyeman filed an application for adjustment of status, and the INS requested an interview with both spouses. However, Levy could not attend the interview because she was hospitalized for bipolar disorder at the time. Consequently, the INS denied Agyeman's application for adjustment of status for lack of prosecution.

In the deportation proceedings, the IJ analyzed Agyeman's application for adjustment of status under Section 216, even though his marriage was more than two years old, presumably because the petition upon which he relied was filed within two years of his marriage to Levy. One of the requirements that the IJ specified for the application was that Agyeman's wife must appear and testify at the hearing. It is unclear under what authority the IJ undertook this request. We decline to interpret the IJ's request as an attempt to enact a statutory requirement that the spouse must attend and testify at the deportation hearing in every case in which an application for adjustment relies on a marriage to a United States citizen. We also decline to interpret this as an improper attempt **[**18]** to either readjudicate Levy's original petition or to enforce Section 216's joint interview requirement. [4] Nevertheless, the IJ's demand was fundamentally unfair under the circumstances. The IJ and the BIA, on appeal, should have acknowledged the role that Levy's illness played in her inability to attend the original interview, and this hearing as well.

[19]** **b. Good Cause Waiver**

Under the statutory and regulatory scheme governing INS interviews, a good cause waiver may apply. For example, if the INS requests an appearance by an applicant or petitioner, the interview may **[*881]** be rescheduled upon a showing of good cause. [5] 8 C.F.R. § 103.2(b)(9) (2001). In addition, the regulations pertaining to Section 216' s joint interview requirement provide for good cause waivers in cases in which the alien and/or the spouse cannot attend the INS interview preceding the removal of the conditional status of their legal residency based on the marriage. INA § 216(c)(2)(A)(ii), 8 U.S.C. § 1186a(c)(2)(A)(ii); 8 C.F.R. § 216.4(b)(3) (2001). A documented serious illness may constitute good cause for a spouse's absence at the interview. *See generally* IGNATIUS, *supra*, at §

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[3] In 1986, Congress enacted the Immigration Marriage Fraud Amendments ("IMFA") to deter marriage fraud in immigration petitions. Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified in scattered sections of Title 8 of the U.S. Code). Under the IMFA, an alien whose status is adjusted to legal permanent resident on the basis of a marriage that is less than two years old must serve a two-year "conditional" residency period to ensure that the marriage is bona fide and not entered into to evade immigration laws. INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

[4] However, there is some evidence in the record that suggests the IJ did intend to adjudicate the relative petition. For example, he stated that:

Q: When we conduct this adjustment of status application … I will set it up for a hearing date on which I want your, your wife must appear and testify and indicate that she still wants to support you or to petition for you as a relative of hers. Okay. It is her petition, not really yours, okay. So, she … must be present for me to ask questions of and the Government can cross examine, too, as the validity of the marriage and her willingness to basically support your application for residency here.

[5] We observe that 8 C.F.R. § 103.2(b)(9) only provides that good cause will permit the requested individual to reschedule the interview. It does not specifically address a circumstance in which the person is simply unable to attend the interview due to serious illness or otherwise. However, we do not interpret the provision to exclude such a possibility because to do so would raise serious due process concerns.

5.08[3][c] (advising that "good cause" to waive the spouse's attendance at an INS interview prior to removal of the conditional basis of residency must be "legitimate and well documented, such as extreme illness ….").

[20]** In this case, the IJ or the BIA, on appeal, should have recognized that good cause excused Levy's absence at the original INS interview, and at the deportation hearing, as well. Levy suffers from bipolar disorder, which is a "chronic condition that has potentially devastating effects on many aspects of the patient's life and that carries with it a high risk of suicide." AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINES FOR THE TREATMENT OF PSYCHIATRIC DISORDERS 531 (2000); William Coryell, M. D., et al., *The Enduring Psychosocial Consequences of Mania and Depression*, 150 AM. J. PSYCHIATRY 720-27 (1993) (explaining that bipolar disorder diminishes one's ability to function on nearly all levels and persists despite medication and treatment). Bipolar disorder is a severe psychiatric illness marked by episodes of mania and depression, impairment of functioning - both cognitive and behavioral, and is frequently complicated by psychotic symptoms (e.g., delusions, hallucinations, and disorganized thinking). Paul E. Keck, Jr., et al., *Bipolar Disorder*, 85 THE MEDICAL CLINICS OF NORTH AMERICA 645 (2001). Persons suffering from bipolar disorder "are prone to rapid mood fluctuations" **[**21]** and thus pose a particular risk of suicide or other harmful behavior. AM. PSYCHIATRIC ASS'N, *supra*, at 530.

As explained to the IJ at the July 28th hearing, Levy had been hospitalized for periods of two to three months at a time, due to her mental illness. Upon the IJ's questioning, Agyeman did not know whether she was hospitalized at the time. [6] **[**22]** However, given Levy's history of serious mental illness, it would be understandable if she was unable to travel to Arizona to testify at the deportation hearing. Indeed, one of the most critical aspects of treating bipolar disorder is establishing and maintaining a stable routine to avoid recurrence of manic and depressive episodes. CLINICIAN'S GUIDE TO MENTAL ILLNESS 111 (Dennis C. Daley, ed., 2001). Agyeman attempted to explain the difficulty of having Levy attend, specifically mentioning concerns about placing undue pressure **[*882]** on her and the fact that his detention prevented him from traveling to New Jersey to accompany her on her trip. [7]

Notwithstanding these indicators, the IJ instructed Agyeman to arrange for Levy's appearance. Agyeman complied and asked Levy to travel to Eloy, Arizona, in order to testify at the November 5th hearing. However, she did not appear, and Agyeman was unable to confirm that she had arrived in Phoenix, where she was to stay with his friend. Thus, contrary to the dissent's assertion, it is unclear from the record whether Levy did, in fact, travel from her home in New Jersey to appear at the deportation hearing. [8] The lack of clarity in the record **[**23]** regarding whether Levy actually attempted to attend the hearing is further demonstrated by Agyeman's explanation of her absence in his notice

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[6] Contrary to the dissent's assertion, we do not imply that Levy was, in fact, in the hospital at that time. Rather, we observe that it is unclear from the record whether she was hospitalized at any relevant point during the proceedings. The seriousness of her illness, as well as her prior history of hospitalization, raises due process concerns because the success of Agyeman's applications for relief hinged on the presence of a person whose attendance may have been physically impossible or medically inadvisable.

[7] This reaction is entirely consistent with how a family member of a person suffering from bipolar disorder might respond when faced with the decision whether to place that person in a stressful situation. Family members, who are experienced with the illness and its effects, likely understand that placing stress on a loved one suffering from bipolar disorder is likely to cause the onset of manic symptoms. *See* AM. PSYCHIATRIC ASS'N, *supra* at 543 (explaining that psycho-social stressors precipitates mania in persons suffering from bipolar disorder).

[8] Indeed, the dissent picks and chooses from the record to support its statement that "Agyeman's wife was in fact in Arizona, not New Jersey, at the time of the hearing," Dis. Op. at 10371. In so doing, it cites certain statements by Agyeman out of the context from other statements demonstrating his lack of knowledge as to her whereabouts at the time of the hearing. In fact, in response to the IJ's questioning, Agyeman stated:

A: She *should have arrived* here last week. She would (indiscernible) staying with my friend. I've given a -

…

She *must be* in Phoenix since last week. That's why -

Q: So, why isn't she in my Courtroom today to help you in your case?

A: The past seven days I've been in special housing. I've not been allowed telephone, visiting hours. I tried to -

(emphasis added).

of appeal to the BIA, wherein he stated that she was unable to be there because of her "poor health and [because] her doctor has recommended against making the trip." Thus, the record is not established as to whether Levy was in Arizona at the time of the hearing.

[24]** For our purposes, it is sufficient that, despite the IJ's awareness of Levy's serious illness and possible hospitalization, he still required Agyeman to procure her attendance and interpreted her subsequent absence as dispositive in his determination that Agyeman's marriage to Levy was not bona fide. Moreover, although Agyeman argued on appeal to the BIA that his wife was ill and had been unable to make the trip across country to testify, the BIA simply acknowledged that the situation was "regrettable" and affirmed the IJ's denial. *Matter of Agyeman*, slip op. at 2.

3. Inadequate Explanation of Procedures

As the bona fides of Agyeman's marriage were in question, the IJ had a duty to apprise Agyeman of reasonable means of proving them. *Jacinto, 208 F.3d at 728*. Although Levy's testimony would clearly be the most persuasive form of evidence, other types of evidence could very well have demonstrated the validity of Agyeman's marriage. Evidence of the marriage's bona fides may include: jointly-filed tax returns; shared bank accounts or credit cards; insurance policies covering both spouses; property leases or mortgages in both names; documents reflecting joint **[**25]** ownership of a car or other property; medical records showing the other spouse as the person to contact; telephone bills **[*883]** showing frequent communication between the spouses; and testimony or other evidence regarding the couple's courtship, wedding ceremony, honeymoon, correspondences, and shared experiences. *Matter of Soriano, 19 I. & N. Dec. 764, 766 (BIA 1988)*; *see also* *8 C.F.R. § 216.4(a)(5) (2001)* (listing similar types of evidence as proof that marriage was not entered into to evade immigration laws of the United States). Yet, the IJ failed to suggest these sources of evidence, which would have supported his application for adjustment of status.

To the extent that Levy's testimony was essential to Agyeman's adjustment application, the IJ should have explained to Agyeman that she could participate telephonically. *Beltran-Tirado v. INS, 213 F.3d 1179, 1185-86 (9th Cir. 2000)*. Otherwise, because Levy resided in New Jersey - thousands of miles from the deportation proceedings - she could have appeared at the INS office nearest to her residence and submitted to a deposition. 8 C.F.R. § 3.35(a) (2001); **[**26]** *see also* *8 C.F.R. § 287.4(a)(2)(ii)(D) (2001)* (providing that witness who is more than 100 miles from place of proceeding may be subpoenaed to appear at the nearest INS office and respond to oral or written interrogatories). However, the IJ did not explore these options, and the BIA similarly failed to suggest these alternatives on appeal. [9]

[27]** Moreover, the IJ represented to Agyeman that he was ineligible for adjustment of status if his wife was no longer in love with him. [10] However, our case law has long held to the contrary. Thus, the IJ failed to explain that Agyeman could submit evidence showing that he entered into the marriage in good faith, even if it was the case that they were no longer in love. On remand, Agyeman's marriage to Levy must be found bone fide for purposes of adjustment of status if it was "not sham or fraudulent from its inception." *Dabaghian v. Civiletti, 607 F.2d 868, 869 (9th Cir. 1979)*. The key issue is: "Did the petitioner and his wife intend to establish a life together at the time of their marriage?" *Bark, 511 F.2d at 1202*. As we held in *Bark*, "evidence that the parties separated after their wedding is relevant to ascertaining whether they intended to establish a life together when they exchanged marriage vows. But evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered." *Id.; see also* *Matter of McKee, 17 I. & N. Dec. 332, 333 (BIA 1980)* (distinguishing between nonviable and **[**28]** sham marriages).

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[9] The dissent would place the burden on Agyeman to request these alternatives. However, it is the IJ's duty to outline Agyeman's procedural rights for him, as a pro se alien in deportation proceedings. *Jacinto, 208 F.3d at 734*. Moreover, Agyeman might have perceived that such a request would be futile, due to the IJ's repeated insistence that his wife appear in person. Indeed, the administrative record is replete with examples of the IJ's unequivocal statements that Levy was required to attend the hearing in Eloy, Arizona. For example, the IJ stated: "You need to contact and have available at the next hearing, your spouse. She *must be physically present at that hearing*, otherwise, I can't grant your application for adjustment of status." (emphasis added).

[10] For example, the IJ stated: "Well, I know this, if I was in jail and I got a hold of my wife and I said, honey, I'm in jail, I need you to show up in Timbuktu, Arizona, to let me stay here, if she loved me, she would come for me. If she didn't like me anymore, then your adjustment of status is gone anyway, Mr. Agyeman. That's all I'm telling you …."

We have previously emphasized the importance of explaining to an alien what evidence will demonstrate their eligibility for relief from deportation. *Jacinto, 208 F.3d at 728*. Moreover, it is critical **[*884]** when the alien appears pro se that the IJ develop the record by eliciting all relevant facts. *Id. at 734*. The IJ must be responsive to the particular circumstances of the case, including what types of evidence the alien can and cannot reasonably be expected to produce in support of his applications for relief from deportation. *Cf. Gomez-Saballos v. INS, 79 F.3d 912, 916 (9th Cir. 1996)* (rejecting **[**29]** BIA's requirement that asylum applicant must produce independent evidence of threat on his life or others because "evidentiary burden would be too great" for an alien who has fled his home country). Sensitivity to what evidence the alien can reasonably be expected to produce is especially critical when the alien is in the INS's custody. In such cases, the alien may have limited access to relevant documents and will, therefore, depend even more heavily on the IJ for assistance in identifying appropriate sources of evidence to support his claim.

Here, the IJ focused solely on the testimony of Agyeman's wife, despite her illness, and neglected to explain how Agyeman could otherwise establish eligibility for adjustment of status. Further, the IJ failed to adequately explore with Agyeman what evidence he could produce, given his limited access to documents and restricted ability to place telephone calls in detention. Although the BIA was correct in noting that Agyeman bore the "responsibility to provide evidence supporting his applications," *Matter of Agyeman*, slip op. at 2, the IJ also had an obligation to assist him, as a pro se applicant, in determining what evidence was relevant **[**30]** and by what means he could prove his claims. *See Jacinto, 208 F.3d at 733-34* . As in *Jacinto*, we are concerned here that Agyeman lacked the legal knowledge to discern what evidence was relevant and in what form that evidence could be presented. *Id*. Accordingly, it was critical that the IJ probed into all the relevant facts regarding Agyeman's marriage and provided sufficient guidance as to how Agyeman could prove the bona fides of the marriage. Because he failed to do so, instead representing that Levy's attendance was the only possible means of demonstrating Agyeman's bona fide marriage, and because the BIA affirmed rather than corrected this error, Agyeman was deprived of a full and fair hearing.

We emphasize that our holding today will not transform IJs into attorneys for aliens appearing pro se in deportation proceedings, as the dissent attempts to argue. However, consistent with our holding in *Jacinto*, the IJ has a duty to fully develop the record when an alien proceeds pro se by probing into relevant facts and by providing appropriate guidance as to how the alien may prove his application for relief. A pro se alien is deprived of a full and fair **[**31]** hearing when the IJ misinforms him about the forms of evidence that are permissible to prove his eligibility for relief. Here, the IJ led Agyeman to believe that he could not prove the bona fides of his marriage, short of producing a wife who testified that she was still in love with him. Thus, Agyeman was not only uninformed, but he was also misinformed about how to prosecute his application for adjustment of status. Therefore, Agyeman was deprived of a full and fair hearing.

C. Prejudice

To merit relief, Agyeman must also show prejudice. Prejudice is shown if the violation "*potentially* … affects the outcome of the proceedings." *Perez-Lastor, 208 F.3d at 780* (quoting *Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994))* (emphasis in original); *accord Colmenar, 210 F.3d at 972*. We have held that prejudice may be shown where the IJ's inadequate explanation of the hearing procedures and **[*885]** failure to elicit pertinent facts prevented the alien from presenting evidence relevant to their claim. *Jacinto, 208 F.3d at 734-35* .

Here, the IJ represented that the testimony of Agyeman's wife was the sole means of proving **[**32]** that his marriage was bona fide and cited her absence as one of the primary reasons for denying the application for adjustment of status. On appeal, the BIA expressly adopted the IJ's reasoning and affirmed. Had the IJ suggested other ways for Agyeman to prove the bona fides of his marriage, Agyeman might have proffered such evidence. *Singh v. INS, 213 F.3d 1050, 1054 (9th Cir. 2000)* (finding prejudice when BIA applied new evidentiary requirements to alien's appeal because, if petitioner had been given notice, he might have secured the necessary documents). Moreover, the IJ's statements that adjustment depended on Levy's testimony that she still "wanted" and loved Agyeman deprived him of the notice and opportunity to pursue other forms of evidence demonstrating the couple's bona fide intent to establish a life together, even if they were no longer in love. *Id*.

Further, the IJ denied Agyeman's application out of hand at the November 5th hearing upon being informed that Levy was not present to testify. Thus, while the

absence of a medical examination would also prevent adjustment of status, it was rendered moot by the IJ's ruling that Agyeman had withdrawn his application, **[**33]** due to his failure to produce his wife for testimony at the deportation hearing. [11]

The INS argues that no prejudice may be found because Agyeman fails to cite record evidence establishing that the outcome of the proceedings would have been different. However, contrary to the INS' contention, Agyeman need not "explain exactly what evidence he would have presented" in support of his applications for relief. *Colemnar, 210 F.3d at 972*. Rather, we may infer prejudice in the absence of any specific allegation as to what evidence Agyeman would have presented had the IJ adequately explained what he needed to prove to demonstrate his eligibility for **[**34]** relief and had he been provided the opportunity to present that evidence. *Perez-Lastor, 208 F.3d at 782*.

We do not require Agyeman to "produce a record that does not exist." *Perez-Lastor, 208 F.3d at 782*. It is sufficient that the record reflects Agyeman was not provided an adequate explanation of how to prove the existence of his marriage to a United States citizen, short of producing her in front of the IJ, and that his failure to produce her resulted in the denial of his application for relief. Had the IJ provided an adequate explanation or sufficiently developed the record, Agyeman may have provided sufficient evidence to support his application for adjustment of status. Fundamental fairness requires that he have the opportunity to do so. Because the error potentially affected the outcome of the proceedings, we hold that Agyeman was prejudiced by the lack of a full and fair hearing.

V. PRISON LITIGATION REFORM ACT

We also hold that the filing fee provisions of the PLRA, Pub. L. No. 104-134, 110 Stat. 1321 (1996), do not apply to **[*886]** an alien detainee who proceeds *in forma pauperis* to petition for review from a BIA decision, so **[**35]** long as he does not also face criminal charges.

Unlike other indigent litigants, prisoners proceeding *in forma pauperis* must pay the full amount of the filing fees in civil actions and appeals pursuant to the PLRA. *28 U.S.C. § 1915(b)(1)*; *Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002)*. If the prisoner lacks the means to pay the fee at the time of filing, the PLRA provides for assessment and subsequent collection of the fees as funds become available to him. *28 U.S.C. § 1915(b)*; *Taylor, 281 F.3d at 847*.

As defined in the PLRA, a "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *28 U.S.C. § 1915(h)*. We have held that the statutory term "prisoner" is limited to an individual who is "currently detained as a result of accusation, conviction, or sentence for a *criminal* offense." *Page v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000)* (emphasis **[**36]** added). Thus, the term "prisoner" does not encompass a civil detainee for purposes of the PLRA. *Id*. We must now determine whether an alien detained by the INS pending deportation falls within the term "prisoner," or is a civil detainee falling outside the ambit of the PLRA.

It is well established that deportation proceedings are civil, rather than criminal, in nature. *INS v. Lopez-Mendoza, 468 U.S. 1032, 82 L. Ed. 2d 778, 104 S. Ct. 3479*, (1984)); *Kim v. Ziglar, 276 F.3d 523, 530 (9th Cir. 2002)*. As early as 1893, the Supreme Court held: "The order of deportation is not a punishment for crime." *Ting v. United States, 149 U.S. 698, 730, 37 L. Ed. 905, 13 S. Ct. 1016 (1893)*. By means of explanation, Justice Holmes later stated: "Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz v. Adams, 228 U.S. 585, 591, 57 L. Ed. 978, 33 S. Ct. 607 (1913)*. **[**37]** In accordance with these earlier pronouncements, "deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades v. Shaughnessy, 342 U.S. 580, 594, 96 L. Ed. 586, 72 S. Ct. 512 (1952)*; *see also United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994)* (dismissing an ex post facto challenge to

[11] In fact, the IJ did not even inquire as to whether Agyeman had documentation of his medical examination at the November 5th hearing. Thus, because the IJ summarily ruled that Agyeman's application was withdrawn due to his wife's failure to appear, we do not know whether the absence of an examination would have prevented Agyeman from obtaining relief.

deportation because the ex post facto clause is only applicable to "criminal laws").

Consistent with the principle that deportation is a civil rather than a criminal procedure, we hold that an alien detained by the INS pending deportation is not a "prisoner" within the meaning of the PLRA. Thus, we join two of our sister circuits in holding that the filing fee requirements of the PLRA do not apply to an alien detainee proceeding *in forma pauperis* to petition for review of a BIA decision. *See* *LaFontant v. INS, 328 U.S. App. D.C. 359, 135 F.3d 158, 165 (D.C. Cir. 1998)*; *Ojo v. INS, 106 F.3d 680, 682-83 (5th Cir. 1997)*.

In the case at bar, Agyeman was detained by the INS as deportable under INA § 241(a)(1)(B) for overstaying his visa. He was not accused **[**38]** or convicted of, sentenced or adjudicated delinquent for, a violation of criminal law. Thus, Agyeman is not a "prisoner" within the meaning of the statute, and the PLRA's filing fee provisions do not, therefore, apply.

[*887] VI. CONCLUSION

We do not decide the merits of Agyeman's applications for relief from deportation. We hold only that he did not receive a full and fair hearing, that he suffered prejudice, and thus was denied his constitutional right to due process. Accordingly, we **VACATE** the Board's decision, and we **REMAND** the case to the Board with instructions to remand to the Immigration Judge for a new hearing to determine whether Agyeman is eligible for an adjustment of status in accordance with this opinion.

Petition GRANTED.

Dissent by: Andrew J. KLEINFELD

Dissent

KLEINFELD, Circuit Judge, dissenting:

I dissent.

The majority opinion provides a misleading description of the facts and creates bizarre new constitutional law. We had previously held, in a split decision, that an immigration judge must, as a matter of due process, diligently elicit relevant facts from a pro se asylum seeker facing deportation, such as asking the alien to provide narrative testimony **[**39]** that might explain away apparent credibility problems. [1] Yet today, we hold that when the immigration judge did just that, by telling the prospective deportee that to win his case he was going to need his wife's testimony, the judge *denied* the applicant due process. The majority opinion reaches that conclusion by offering a psychiatric diagnosis and prognosis of the wife that no physician has ever given, so far as the record shows. The wife never appeared, and her medical records have never been provided. Under today's decision, not only does an immigration judge have to act as a lawyer and psychiatrist, but if he tells the petitioner that he must present more than the minimum required by law to prevail, even if it's true, it's a denial of due process. There just isn't any point to an administrative law system that delegates decision-making to specialized administrative judges, if this is how we perform our review function.

The majority's **[**40]** theory appears to be that the INS denied Agyeman due process of law because it imposed an impossible and unjustified requirement on him, that his wife appear in person in Arizona at the hearing when she was perhaps hospitalized in New Jersey or unable to travel to Arizona. This is wrong for several reasons:

(1) the testimony before the IJ established that Agyeman's wife was in fact in Arizona, not New Jersey, at the time of the hearing;

(2) the record does not establish that the wife was hospitalized in New Jersey at the time of the hearing;

(3) the hearing was for two purposes, to give Agyeman a second chance to have his petition for adjustment of his status granted, and also to give him a chance to avoid deportation by showing that it would work a hardship on his wife, and it was entirely fair for the IJ to tell him he wasn't going to grant relief unless he heard from Agyeman's wife;

(4) the IJ gave Agyeman multiple continuances for several months to produce his wife, and Agyeman never advised the IJ of any difficulty in doing so arising from her mental condition or his finances, just from his being in jail; and

(5) even if his wife had come to court **[**41]** and testified, he couldn't have gotten his adjustment of

[1] *Jacinto v. INS, 208 F.3d 725, 734 (9th Cir. 2000)*.

status, because he **[*888]** hadn't produced the necessary medical certificate.

Facts

I lay out the hearings in considerable detail to show the very great extent to which the IJ went to try to help Agyeman avoid deportation. Agyeman was born in Ghana and grew up in England. Before coming to the United States he had been living in Brussels. He has a Master's Degree from the London School of Economics. He testified that he had an importing business from which over the past four years he had made about $ 50,000 per year in profits on average. He had married an American citizen, Barbara Barrett Levy, who also had a post-graduate degree. Ms. Levy apparently developed a mental illness, bipolar disorder, which occasionally put her in the hospital for two or three months, but which was controlled by medication the rest of the time. No medical records or physicians' reports have ever been provided to establish the exact nature or intensity of her disorder. Everything about bipolar disorder in the majority opinion is generic research done in an appellate judge's chambers, totally without foundation in the record. All we have in the record **[**42]** is Agyeman's lay testimony, and his contact with his wife seems to have been tenuous at best.

In 1991, after her marriage to Agyeman, Ms. Levy applied for an adjustment of her husband's status to permanent resident, based on his being her spouse. His visa was approved on the basis of her application, and the couple was given a time for an interview for the adjustment of status, with a form notice saying, "IF YOUR APPLICATION IS BASED ON A MARRIAGE TO A U.S. CITIZEN OR LAWFUL PERMANENT RESIDENT *BOTH SPOUSES MUST APPEAR*." However, in 1992, Agyeman and his wife failed to appear at an adjustment of status interview. The INS denied his application without prejudice to renewal, and Agyeman was ordered to depart from the United States. The decision wasn't only based on failure to appear. It also referred to "a required medical examination report from an authorized physician" and said: "Having failed to present the required documentation at interview, your application is denied for lack of prosecution." The notice ordered Agyeman to depart from the United States the following month. But he didn't.

Agyeman next turned up before the INS in 1997. He had been arrested in February of that **[**43]** year on unrelated criminal charges in Nevada (passing a bad check, which Agyeman said was a contract dispute relating to his business), and the INS was notified and commenced deportation proceedings. On May 13, 1997, he appeared for a hearing. It was the third time Agyeman had appeared, having already obtained two continuances. At the May hearing, the IJ gave Agyeman additional time so that he could ask his wife to mail his passport from New Jersey, where she lived and where Agyeman said his passport was, and so that the INS could obtain additional documentation regarding Agyeman's status, since he said he had had an approved visa.

At the next hearing, two weeks later, Agyeman said he'd written to his wife but had neither heard from her nor received the passport. The IJ gave Agyeman another continuance so that his wife could send the documents. The INS lawyer noted that the file showed that the 1992 adjustment of status was denied both because Agyeman's medical report was not filed and also because "his spouse failed to attend the interview and she apparently is, there's a letter in here from her mother saying that she's mentally ill and was hospitalized **[*889]** and there is some allegation **[**44]** of marriage fraud." This is evidently why the majority opinion hypothesizes that she might have been hospitalized in New Jersey at the time of the hearing. That overlooks the five year gap between the initial hearing where Levy didn't show up because she was hospitalized, and the hearing at issue, where Agyeman testified that ordinarily his wife's disease was controlled by medication and did not require hospitalization.

The IJ sustained the charge of deportability, but told Agyeman (who was pro se) that he could avoid actually getting deported in either of two ways: he could pursue the same adjustment of status that he had failed to prosecute five years before, when his wife didn't appear, and he didn't file the medical report; or, alternatively, if he could show that his deportation would cause extreme hardship to himself or his wife, or any children or parents legally present in the U.S. and had seven years of residence with no crimes of moral turpitude, he could apply for suspension of deportation. The IJ suggested that Agyeman fill out an adjustment of status application for his wife to get him in as her spouse and that he get the medical report. He said that at the next hearing, **[**45]** he would give Agyeman both an adjustment of status hearing and a hardship suspension hearing. But, the IJ told him, because Agyeman needed to show that she still wanted him in the country, "the petitioning relative must be present for me to ask questions of and the government can cross-examine

too, as to the validity of the marriage and her willingness to basically support your application for residency here."

Told that his wife should be present, Agyeman did not say she couldn't be, did not say she was hospitalized (that had been five years ago), and did not ask that the hearing be in New Jersey or anywhere else. Instead he asked for a month to arrange for her to be present. The IJ set a date four weeks later, for June 24, just to file the papers, and said they would pick a day then for Agyeman's wife to appear.

Yet another hearing was held July 28. Agyeman had the papers for the suspension of deportation, but not the money for the fee, so the judge asked the INS if it would waive the fee, and it did. Agyeman had not filed the required medical report for the adjustment of status application, and his wife was not present, so the judge denied it without prejudice to renewing it when **[**46]** Agyeman had the necessary supporting evidence. Before proceeding with the suspension of deportation part of the hearing, he told Agyeman that if he didn't qualify for the hardship suspension of deportation, he would give him another opportunity to seek a change of status on his wife's application, and time to "talk to your wife on the phone and have her come down here and testify on your behalf."

Agyeman didn't ask for any other arrangement relating to his wife. He did ask if he could have friends testify by telephone. The IJ said that "telephonic witnesses are allowed in some cases where the witness can establish an extreme hardship to coming out here to testify, but you need to get permission from me in advance." This is the advice the majority says should have been given. It was. The IJ noted that he would have them go to the INS office closest to them, present identification, and testify on the record from there. He also stated that the general rule was that the INS objected, and it was not usually allowed. Agyeman did not ask for any arrangement for his wife to testify by telephone from New Jersey, even though he had just been told that it was possible but disfavored. Had Agyeman **[**47]** asked, the IJ could have asked about **[*890]** the wife's condition, perhaps obtained some verification, and decided whether to allow it.

Then the IJ considered hardship. The judge referred to his notes of the previous hearing where his wife's mental illness was mentioned, and asked whether she was confined to an institution. Agyeman said "occasionally she suffers a collapse when she's, when she would be admitted to hospital for periods like two or three months," but he indicated that "when she takes her medicine she's okay." Agyeman testified that he had only seen one episode of her illness while they lived in New Jersey, and "she normally lives on her own." When they both lived in New Jersey, she did not see a doctor on a regular basis, and would just get her prescription renewed when her medication ran out. Asked if his wife was presently institutionalized, he said, "I don't know." There's nothing here to justify the majority's claim that the IJ denied Agyeman due process by not arranging for the wife to testify from New Jersey.

Asked where his wife lived, Agyeman said, "I believe in New Jersey." She hadn't replied to his last two letters, and he had last talked to her six months before. **[**48]** He had been living in Carson City, Nevada, and his wife in New Jersey, for the last four years (since 1993). He said he preferred to run his business from Nevada because it was closer to Oakland, California, where his imports came into port. As to hardship, Agyeman merely testified, "I want to be reunited with my wife and she, it's my only marriage and the only person I am really very close to." However, when asked why he hadn't written the date of his marriage on his application, he said "I don't remember it exactly" but it was "in summer … around 1990, 1990, maybe, yeah, thereabout." Although he did know where his wife was born, when asked his wife's date of birth, he said, "she's about five years older than me. I think 53. I'm not really sure. I, I guess 53." The IJ then asked if Agyeman could say anything else to justify claiming hardship to himself or anyone else if he was deported, Agyeman said "it would be extremely difficult for me to begin in, in a, in Ghana at this time."

The IJ said that he would deny a hardship suspension, because nothing was shown except ordinary economic hardship, [2] but he would give Agyeman another opportunity to apply for adjustment of status. He **[**49]** told him how to arrange for a medical examination and report from a doctor approved by the INS and explained "you need to contact and have available at the next hearing your spouse." She needed to be present because he had "to determine whether there's a bona fide marriage and whether she still wants you to comfort her." Again, Agyeman didn't ask to have his wife testify by phone, or to have the hearing or part of it moved to New Jersey. He did ask for release on bond, but the IJ

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[2] The common results of deportation, such as a potentially lower standard of living and fewer job opportunities, are insufficient to prove extreme hardship. *Perez v. INS, 96 F.3d 390, 392 (9th Cir. 1996)*.

did not reduce the $ 5,000 bond, although he said Agyeman could apply for a reduction and show new facts. The IJ set the next hearing for September 17, almost two months later, to give Agyeman plenty of time to arrange for the medical report and his wife's presence, and said that even for the hardship suspension of deportation his adverse decision was not final. Agyeman then said he "might have to go for her" to get his wife there, because it would be hard to get her to fly to Arizona even if he got her on the phone. The judge said that he would "grant [Agyeman] continuances if [he was] working on something."

[50] [*891]** Agyeman subsequently asked for another continuance, and got it, moving the hearing to November 5. At that hearing, more than eight months after his original detention, the IJ asked Agyeman if his wife was going to be present. Agyeman said, "She is in Phoenix," and then presented a motion for reduction of his bond. The IJ indicated that he would give him a written decision on the bond reduction later. He then asked Agyeman about his wife's location. Agyeman stated again that his wife was staying with some friends in Phoenix, and that she knew that the hearing would be "this week," but that she was not present because he hadn't been able to contact her again because of his detention. The IJ replied that Agyeman was given notice of the November 5 hearing on September 17, and that Agyeman was on notice that his wife needed to be present. The IJ then conducted the hearing without Ms. Levy. The IJ found that "failure to bring your spouse to testify today after as many continuances as you've been granted, constitutes a withdrawal or abandonment of your application for adjustment of status." The IJ then granted Agyeman voluntary departure. Agyeman reserved his right to appeal.

Analysis

[51]** 1. *Due Process*

There is no factual basis for the majority's decision. The majority opinion says that "the IJ's demand" that Ms. Levy travel to Arizona for Agyeman's adjustment of status hearing, to get him a green card as her spouse, "was fundamentally unfair in the circumstances." [3] The reason it was so "fundamentally unfair" as to deny Agyeman due process of law, according to the majority opinion, is that "[a] documented serious illness may constitute good cause for a spouse's absence at the interview." [4] Well, of course it would, but so what? Why even mention that in this case? There is no evidence whatsoever in the record that Ms. Levy was hospitalized at any time relevant to the 1997 hearing, that she was regularly or repeatedly hospitalized, or that her illness in any way actually prevented her from traveling to Arizona. The BIA fairly and accurately took into account the evidence in the record as to Agyeman's wife's illness: "We recognize that respondent's wife suffers from some form of mental illness, which the respondent describes as bipolar." The only evidence before the IJ was that, not only was she *not* hospitalized, but *she had in fact traveled to Arizona* **[**52]** .

The majority opinion's assertion to the contrary presents a misleading characterization of the record. In his unsworn appeal brief to the BIA, which is *not* evidence and which was subsequent to his hearing, Agyeman said his wife had "found it unnecessary to travel from New Jersey" and that "her doctor has recommended against making the trip," but in his sworn testimony before the IJ, he testified, "She is in Phoenix." The majority opinion tries to muddy this clear declaration of fact in sworn testimony by quoting out of context Agyeman's testimony that "she should have arrived here last week" as though he was saying he didn't know if she was there. Agyeman testified, "She is in Phoenix," and presented a motion, not for any accommodation for his wife, but for a bond reduction for himself. After speaking to the motion, the judge said, "You said she's in Phoenix." Agyeman testified, "Yeah," and then made the remark the majority uses to try to create an ambiguity **[**53]** that isn't there. Following "Yeah [she's in **[*892]** Phoenix]," Agyeman testified, "She should have arrived here last week. She would (indiscernible) staying with my friend …. She must be in Phoenix since last week." The uncertainty he testified to wasn't about whether his wife had traveled to Phoenix, but *when* she had arrived, and he explained the point of this by bringing the discussion back to his request for reduced bond and explanation that his confinement made it hard to contact her.

Now it may be the case that, as Agyeman claimed in his brief to the BIA, that his wife "found it unnecessary to travel" and that "her doctor has recommended against making the trip." Who knows? But he had told the IJ just the opposite, under oath. So the IJ had no reason to make his decision based on Agyeman's subsequent, unsworn claim. Yet the majority deems it unconstitutional for the IJ *not* to have accommodated

[3] Majority at 10359.

[4] Majority at 10359.

Agyeman's wife based on this account that hadn't even been made, and that contradicted what Agyeman testified to.

The IJ was helping Agyeman just the way *Jacinto* said he should, trying to help him present evidence that would help him win if was entitled to win. Agyeman had obvious **[**54]** credibility problems. An exhibit showed he'd been arrested several times, most recently for a crime of dishonesty, and his marriage gave some indication of being a sham. The majority says that had the IJ been a better lawyer for Agyeman, he would have told him that his wife could appear by phone, or maybe that he could get the hearing moved to New Jersey, but the IJ did tell him he could ask for leave to have witnesses testify by phone. As for New Jersey, since Agyeman didn't ask for it, didn't claim that his wife couldn't travel, and testified that she was in Phoenix, it's hard to see why the IJ should be required to have imagined that actually she was in New Jersey and couldn't travel to Arizona because of illness.

The majority cites *Jacinto* [5] for the proposition the majority articulates as the IJ's "obligation to assist" [6] Agyeman in determining what evidence was relevant. Actually, *Jacinto* held that the IJ should have "attempted to elicit more information," because failure to do so left the applicant (an asylum seeker) with testimony that was not credible, but might have been had the IJ "fully developed the record." [7] We put judicial officers in a difficult position **[**55]** when we require them to act as lawyers for the applicants, not just as neutral arbiters. Today's decision makes it impossible. The IJ in this case was doing just what we faulted the IJ in *Jacinto* for not doing. He was attempting to elicit more information that might have gotten Agyeman over the hump of a losing application.

The most captiously critical way to read the IJ's remarks, which is the way the majority opinion reads them, is that he was making up law that wasn't so and imposing it on Agyeman just to give him a hard, likely impossible, time. The fairer way to read the record is that the IJ was giving Agyeman every possible chance to avoid deportation, and helping him by telling him what would work. In this case, Agyeman's own testimony had shed so much doubt on the validity of the marriage, that nothing short of an effort by Ms. Levy personally to keep her husband in America would have convinced the IJ that the **[**56]** marriage was bona fide or that deportation would work a hardship on her. The INS lawyer had already suggested that the marriage Agyeman wanted to rely on was a sham, and there were reasons to suspect that. Among them: Agyeman hadn't lived with his wife for four years, **[*893]** didn't know when she was born or just when they were married, and hadn't been in touch with her for six months. But he needed to show merely that he had married Ms. Levy, "intending to live with her as her husband." [8] That was possible, but it was going to be hard to sell without the wife's testimony to corroborate it. Likewise, for hardship, the IJ had already concluded that he couldn't give a hardship suspension based on the economic hardship Agyeman would face if deported to Ghana, so he needed Ms. Levy to say it would be a hardship for her if her husband was deported.

Not only was this not a due process violation, but there is simply nothing wrong at all with **[**57]** a judge trying to help a pro se applicant like Agyeman by telling him what evidence could win his otherwise losing case. Because Agyeman gave no indication that his wife could not travel, and indeed he testified that she was in Arizona, the IJ's requirement was entirely reasonable. *Colmenar v. INS* [9] allows reversal on due process grounds where "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." [10] Mr. Agyeman had ample opportunity to present his case.

Finally, the majority opinion's discussion of bipolar disorder is entirely misplaced. In order to derive the result it desires, the majority diagnoses and provides a prognosis and medical recommendation for a woman it has never examined. Even if it were appropriate for judges to diagnose patients for mental illness and provide medical recommendations regarding travel, which it obviously is not, there is nothing in the **[**58]** record to support the majority opinion's assumptions about this particular woman's condition. We have no medical records, just Agyeman's unsworn statement in his subsequent brief to the BIA about what his wife's

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[5] *208 F.3d 725 (9th Cir. 2000)*.

[6] Majority at 10365.

[7] *208 F.3d at 734*.

[8] United *States v. Tagalicud, 84 F.3d 1180, 1185 (9th Cir. 1996)*.

[9] *210 F.3d 967 (9th Cir. 2000)*.

[10] *Id. at 971*.

physician supposedly said, which contradicts Agyeman's sworn testimony to the IJ about whether his wife traveled. What's more, if we're going to accept as true whatever Agyeman says about his wife's mental condition, even though he hasn't even seen her for six months, why not accept his statement that she ordinarily required neither hospitalization nor even attention from physicians, just renewal of her regular medication?

2. *Prejudice*

Additionally, the majority errs because even if it were correct on the due process theory that Agyeman's wife was institutionalized in New Jersey so it was fundamentally unfair to order that she appear in Arizona, Agyeman still could not get relief. He couldn't get the adjustment of status, because he still hadn't produced the medical report. It was required by law. [11] Agyeman knew it was required, and he never presented it. And he couldn't get the hardship suspension, because he hadn't testified to any hardship to anyone, not even **[**59]** his wife, even when the IJ asked for more hardship testimony. All he had was the inadequate testimony that it would be hard for him to start over again in Ghana.

Conclusion

Because the IJ in this case did exactly what he was supposed to do, and because the majority opinion imposes excessive new burdens on immigration proceedings, I dissent.

End of Document

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[11] *8 CFR § 245.5*.

TAB 5

Guier v. Teton County Hosp. Dist.

Supreme Court of Wyoming

February 24, 2011, Decided

No. S-09-0259

Reporter
2011 WY 31 *; 248 P.3d 623 **; 2011 Wyo. LEXIS 32 ***; 31 I.E.R. Cas. (BNA) 1726

CHRISTIAN GUIER, M.D., Appellant (Petitioner), v. TETON COUNTY HOSPITAL DISTRICT, d/b/a ST. JOHN'S MEDICAL CENTER, Appellee (Respondent).

Subsequent History: As Amended March 22, 2011.

Prior History: **[***1]** Appeal from the District Court of Teton County. The Honorable Nancy J. Guthrie, Judge.

Counsel: Representing Appellant: Anna M. Reeves Olson and Weston W. Reeves, Park Street Law Offices, Casper, Wyoming. Argument by Mr. Reeves.

Representing Appellee: Mark A. Kadzielski, Fulbright & Jaworski, LLP, Los Angeles, California; Janet Lewis, Janet Lewis, PC, Jackson, Wyoming; Thomas E. Lubnau, II, Lubnau Law Office, PC, Gillette, Wyoming. Argument by Mr. Lubnau.

Judges: Before KITE, C.J., and GOLDEN, HILL, VOIGT [*], and BURKE, JJ.

Opinion by: BURKE

Opinion

[626]** BURKE, Justice**.

[*P1] Dr. Christian Guier appeals from an order of the district court affirming a decision by St. John's Medical Center Board of Trustees to revoke his medical staff privileges. After reviewing the entire record, we conclude the Board's decision is supported by substantial evidence, is not arbitrary or capricious, and is otherwise in accordance with law. We affirm.

ISSUES

[*P2] Dr. Guier presents the following issues for review:

> 1. Whether Dr. Guier was denied his constitutional and statutory right to a contested case hearing when the Agency reversed the burden of proof.
>
> 2. Whether the Agency's breach of the Medical Staff Reappointment Agreement, **[***2]** by refusing to notify Dr. Guier of complaints that had been made against him, its disregard for its own policies, and its persistent concealment of evidence, renders its decision arbitrary and capricious.

St. John's styles the issues as follows:

> 1. Was the burden of proof applied appropriately in Dr. Guier's fair hearing? In any event was there substantial evidence to support the Board's final decision?
>
> 2. Did St. John's Medical Center provide Dr. Guier procedural due process?
>
> 3. Did St. John's Medical Center act arbitrarily and capriciously?

FACTS

[*P3] Teton County Hospital District, doing business as St. John's Medical Center, is a Wyoming Governmental Agency organized pursuant to *Wyo. Stat. Ann. §§ 35-2-401 through 35-2-404*. St. John's Board of Trustees (Board of Trustees or Board) is an "agency" as defined by *Wyo. Stat. Ann. § 16-3-101(b)(i)*. Medical Staff Bylaws govern the management of the Hospital and were adopted pursuant to *Wyo. Stat. Ann. § 35-2-113*. As a requirement of continuing medical staff membership, all physicians must periodically submit an application for reappointment. The application for reappointment requires physicians to abide by all **[**627]** of the Bylaws, including those governing **[***3]** standards of professional conduct, and to sign a Code of Conduct resolution.

[*P4] Dr. Guier, an orthopedic surgeon, joined the

[*] Chief Justice at time of oral argument.

medical staff in 1990. During his tenure, Dr. Guier exhibited disruptive behavior in the operating room on multiple occasions. Prior to the events leading to this litigation, the operating room staff at St. John's had refused to work with Dr. Guier on two occasions due to his disruptive behavior. The first of these incidents occurred in 1992 and the second occurred sometime between 1994 and 1996. A focused review of Dr. Guier's performance at the hospital was conducted from December 1, 2005 through May 31, 2006. [1] The summary report from that review stated that "[r]epeated instances of behavioral issues with Dr. Guier have created a strain in the working relationships between Dr. Guier and some members of the staff."

[*P5] In May of 2006, Dr. Guier completed an application for reappointment to the medical staff. As part of its consideration of Dr. Guier's application, the Medical Executive Committee (MEC), the professional review body at the Hospital, reviewed the focused report. In a June 21, 2006 letter, the Chief-of-Staff of the Hospital advised Dr. Guier that "the MEC is concerned about your professional conduct. Your inappropriate interactions with staff on several occasions, as noted in the focused review report, raise questions about your ability to work reasonably with others in the hospital." In July, the MEC recommended a six-month reappointment of Dr. Guier's privileges, on the conditions that Dr. Guier would sign a Medical Staff Reappointment Agreement and that the MEC would continue the focused review of his professional conduct and clinical performance for the entire term of the reappointment. The Reappointment Agreement identified several specific behavioral concerns and set forth the following conditions of reappointment:

> a. Dr. Guier shall not, under any circumstances, shout or otherwise **[***5]** raise his voice with any individual at St. John's, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. This includes responding to any individual who calls to discuss concerns or issues regarding Dr. Guier or his patients.
>
> b. Dr. Guier shall not, under any circumstances, make discourteous comments, including but not limited to, name calling, or give discourteous orders or demands to any individual at St. John's, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. This includes responding to any individual who calls to discuss concerns or issues regarding Dr. Guier or his patients.
>
> c. Dr. Guier shall not, under any circumstances, criticize any individual at St. John's in front of or within earshot of any other individual at St. John's, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. Dr. Guier will address any criticisms of or concerns about employees or staff members to the appropriate supervisor in a courteous manner and in private.
>
> d. Dr. Guier shall not threaten, physically **[***6]** or otherwise, any person at St. John's, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.
>
> e. Dr. Guier shall not exhibit any other inappropriate, unprofessional or disruptive behavior while on St. John's premises.

Dr. Guier signed the Reappointment Agreement on July 10, 2006, after writing his own "addendum," which he testified was "an avenue in which we could try and institute some reasonable process to try and deal with some **[**628]** of the issues that were at hand." The typewritten addendum appeared at the bottom of the last page of the Agreement and was signed by Dr. Guier. It provided:

> This agreement is signed with the understanding, that certain terms need to be defined, some facts or conclusions are in need of verification, and that the agreement is subject to acceptable amendments to be agreed upon in the near future. As a beginning we agree to due process in the event of any complaint brought against Dr. Guier and vice versa, by Dr. Guier against the Hospital Staff or Medical Staff. Due process is defined as (1) notification of a complaint (2) the nature of the complaint (3) an opportunity to respond and (4) call **[***7]** for witnesses (including the accusers with some exceptions)[.] Due process needs to be granted to all individuals from the beginning.

The Board of Trustees approved the six-month

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[1] A focused review is authorized under the Medical Staff Bylaws as part of a "program (1) to monitor and assess the quality of professional practice in the Hospital and (2) to promote quality and efficiency of clinical and Hospital services by (a) providing education and counseling, (b) issuing letters of admonition, warning or censure, as necessary, **[***4]** and (c) requiring routine monitoring when deemed appropriate by the Medical Executive Committee."

reappointment.

[*P6] In the ensuing months, several employees reported incidents of Dr. Guier's inappropriate behavior. Some of these incidents were verbally relayed to supervisors and others were also documented in written reports. The supervisors did not discuss the verbal reports with Dr. Guier at the time they were made. The workplace discord reached a crisis level on October 16, 2006 when the MEC was presented with a "Work Refusal Petition" signed by the entire operating room staff. The Petition stated:

> This petition represents repeated documented occurrences in the operating room as well as psychological abuse in a hostile work environment. This petition also represents the concerns of the current operating room staff at St. John[']s Medical Center. These concerns are in reference to **Dr. Chris Guier** and his repeated abuse to the operating room staff. We have exhausted our pleas for change and have finally resorted to this method of resolution. As of this 16th day of October 2006, the Operating Room staff at **[***8]** St. John[']s Medical Center ***refuses*** to continue performing any cases with Dr. Chris Guier. The signatures below support this letter, as a much anticipated resolution is needed.

(Emphasis in original.) The MEC discussed the Petition with Dr. Guier at a meeting held the following day. At that meeting, the doctor in charge of the focused review shared the findings from the latest focused review report with Dr. Guier. The doctor explained that the most significant part of the report involved Dr. Guier's interaction with operating room personnel, and noted that all of the incident reports generated regarding Dr. Guier had been discussed with him by human resources. Dr. Guier acknowledged that he had reviewed the incident reports, but stated that no one had brought up to him that there were behavioral issues. He stated that the Petition came as a surprise to him because he made an attempt to address problems in the operating room as they arose.

[*P7] At the conclusion of the meeting, the Medical Executive Committee summarily suspended Dr. Guier's privileges for 29 days pending investigations by the Hospital's CEO and by an ad hoc committee created by the MEC. Dr. Guier was notified in writing of **[***9]** the suspension and of the fact that there was a request for an investigation pursuant to the Bylaws. The MEC informed Dr. Guier that

> it was the unanimous consensus of the MEC that there are reasonable grounds to believe your conduct and activities pose a threat to the life, health, or safety of any patient, employee, or other person present at the Hospital and that the failure to take prompt action may result in imminent danger to the life, health or safety of any such person. Thus, the MEC decided to impose this temporary precautionary suspension.

[*P8] Dr. Guier was given the opportunity to provide information to the ad hoc committee at two meetings held on October 30th and 31st, 2006. The ad hoc committee presented its findings to the MEC on November 9, 2006. The committee reported six incidents between July and October of 2006 that it considered disruptive and abusive. The CEO presented a report with substantially similar findings. The MEC determined that the incidents sufficiently supported a recommendation that Dr. Guier's medical staff membership and clinical privileges be terminated. Dr. Guier was notified of the MEC's decision and his right to a contested case **[**629]** hearing on the matter. **[***10]** He subsequently requested a contested case hearing.

[*P9] The contested case hearing was held over several evenings before a Judicial Review Committee (JRC) comprised of four physicians from the medical staff. The JRC was assisted by a hearing officer. The parties agreed that the Bylaws would apply to the contested case hearing unless they conflicted with the Wyoming Administrative Procedure Act (WAPA) or other applicable law. The parties also agreed that only Dr. Guier's behavior, not the quality of care provided to patients, was at issue. Dr. Guier took the pretrial depositions of several nurses, technicians, and operating room staff involved in the incidents. He was represented by counsel during the hearing, evidence was presented on his behalf, and he was provided the opportunity to cross-examine each witness.

[*P10] The JRC issued its Findings and Conclusions following the contested case hearing. It concluded that the application for reappointment and the terms of the Reappointment Agreement placed Dr. Guier on notice of expected standards of conduct. The JRC also concluded that Dr. Guier violated those standards during six separate incidents when he displayed anger or responded inappropriately **[***11]** 1) to the opening of an extra set of sponges; 2) to the suction not working properly during a procedure; 3) when a surgical supply item was unavailable; 4) to the loss of a bone fragment

after surgery; 5) to the postponement of a surgical procedure and, during that procedure, to surgical items that were available but not opened; and 6) to the potential contamination of a gown. The JRC concluded that Dr. Guier had failed to prove that the MEC's decision to permanently suspend his privileges should be reversed or modified. Dr. Guier appealed the decision of the JRC to the Board of Trustees, as provided for in the Bylaws. The Board reviewed the entire record and found substantial evidence to support the MEC's action and recommendation.

[*P11] Dr. Guier appealed the Board's final decision to the district court. The district court found that some of the procedures used during the investigation and contested case hearing were flawed, but concluded that Dr. Guier's right to due process was not impacted. The district court determined that the Board's decision was supported by substantial evidence and affirmed the JRC's decision. Dr. Guier timely appealed to this Court.

STANDARD OF REVIEW

[*P12] We review **[***12]** the Board's action as we would review any other agency's decision. *Reynolds v. West Park Hospital District, 2010 WY 69, ¶ 6, 231 P.3d 1275, 1277 (Wyo. 2010)*. When we consider an appeal from a district court's review of an administrative agency's decision, we review the case as though it had come directly from the administrative agency. *Id*. Our review of an agency decision is limited to those considerations specified in *Wyo. Stat. Ann. § 16-3-114(c)* (LexisNexis 2009) which provides, in pertinent part:

> (c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:
>
> (i) Compel agency action unlawfully withheld or unreasonably delayed; and
>
> (ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
>
> (A) Arbitrary, capricious, an abuse of discretion or otherwise not in **[***13]** accordance with law;
>
> (B) Contrary to constitutional right, power, privilege or immunity;
>
> (C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
>
> (D) Without observance of procedure required by law; or
>
> (E) Unsupported by substantial evidence in a case reviewed on the record **[**630]** of an agency hearing provided by statute.

[*P13] We affirm an agency's findings of fact if they are supported by substantial evidence. *Dale v. S & S Builders, LLC, 2008 WY 84, ¶ 22, 188 P.3d 554, 561 (Wyo. 2008)*. An administrative agency's conclusions of law are not entitled to the same deference as its factual findings. We review an agency's conclusions of law *de novo*, and "[w]e will affirm an agency's legal conclusion only if it is in accordance with the law." *DC Production Service v. Wyo. Dep't of Employment, 2002 WY 142, ¶ 7, 54 P.3d 768, 771 (Wyo. 2002)*. We employ the arbitrary and capricious standard as a safety net against administrative agency action that is contrary to law but not readily correctible under the other applicable standards of review. *Reynolds, ¶ 6, 231 P.3d at 1277*.

DISCUSSION

[*P14] It is well-established that a hospital board may prescribe reasonable rules and regulations **[***14]** to be followed by physicians using the hospital facilities. *Board of Trustees of Memorial Hospital of Sheridan County v. Pratt, 72 Wyo. 120, 262 P.2d 682, 688-89 (Wyo. 1953)*; *see also 41 C.J.S., Hospitals*, § 5, p. 336; 28 A.L.R.5th 107; *Green v. City of St. Petersburg, 154 Fla. 339, 17 So. 2d 517 (Fla. 1944)*; *Selden v. City of Sterling, 316 Ill. App. 455, 45 N.E.2d 329 (Ill. App. Ct. 1942)*; *Bryant v. City of Lakeland, 158 Fla. 151, 28 So. 2d 106 (Fla. 1946)*; *Jacobs v. Martin, 20 N.J. Super. 531, 90 A.2d 151 (Ch. Div. 1952)*. The Wyoming statute that governs hospital privileges provides individual hospitals broad discretion in the management of their staffs:

> Any hospital owned by the state, or any hospital district, county or city thereof, and any hospital whose support, either in whole or in part, is derived from public funds, shall be open for practice to doctors of medicine, doctors of osteopathy, doctors

> of chiropractic, doctors of dentistry and podiatrists, who are licensed to practice medicine or surgery, chiropractic, dentistry or podiatry in this state. ***Provided, however, that these hospitals by appropriate bylaws shall promulgate reasonable and uniform rules and regulations covering staff [***15] admissions and staff privileges***. Admission shall not be predicated solely upon the type of degree of the applicant and the governing body shall consider the competency and character of each applicant.

Wyo. Stat. Ann. § 35-2-113 (LexisNexis 2009) (emphasis added). We have said that it is improper for any court to substitute its judgment for that of a hospital concerning the management and operation of a health care facility. Gonzales v. Personal Collection Service, 494 P.2d 201, 206 (Wyo. 1972). However, a physician may not be excluded by rules, regulations, or acts of the hospital's governing authorities which are unreasonable, arbitrary, capricious, or discriminatory. Pratt, 262 P.2d at 689. We have stated:

> In reviewing a decision of a public hospital to refuse to grant or to terminate staff privileges of a physician, whether the review is conducted in the district court or in this court, the applicable standard of review is one which accords great deference to a hospital's decision. That review is limited to a determination of whether the exclusion was made on a rational basis, supported by substantial evidence, in accordance with reasonable hospital bylaws, and was not discriminatory, **[***16]** arbitrary, or capricious.

Garrison v. Board of Trustees of Memorial Hospital, 795 P.2d 190, 193 (Wyo. 1990).

Standard & Burden of Proof

[*P15] In his first issue, Dr. Guier asserts that the burden of proof in his contested case hearing is controlled by the Wyoming Administrative Procedure Act, and that the hearing examiner erred by applying the burden of proof identified in the Medical Staff Bylaws. We note initially that the proper allocation of the burden of proof is a matter of law and is reviewed *de novo*. Penny v. State ex rel. Wyo. Mental Health Prof. Licensing Bd., 2005 WY 117, ¶ 13, 120 P.3d 152, 160 (Wyo. 2005).

[*P16] Prior to the contested case hearing, the parties stipulated that "[t]he Medical Staff Bylaws of St. John's Medical Staff shall remain in full force and effect, and **[**631]** shall apply to the Contested Case Hearing except where they are in conflict with the WAPA, or other applicable law and this Stipulation, in which case the WAPA, or other applicable law and this Stipulation, shall control." The hearing examiner determined that the burden of proof in the Bylaws did not conflict with the WAPA and instructed the JRC to apply the burden of proof provided for in the Bylaws. The Bylaw governing **[***17]** the burden of proof at hearings provides, in pertinent part:

> VIII.D.7. BURDENS OF PRESENTING EVIDENCE AND PROOF
>
> > . . . [T]he professional review body that proposed the adverse recommendation or action shall present supporting evidence, but ***the Medical Staff appointee shall have the burden of proving, by a preponderance of the evidence***, that the proposed adverse recommendation or action should be rejected and/or modified.

(Emphasis added.) The hearing examiner instructed the JRC as follows:

> According to Section VIII.D.7 of the Bylaws, the MEC must first present evidence "in support of" its action and recommendation. To satisfy this initial obligation, the MEC does not have to prove that its action was the best or only action to take, or to establish that its decision was the "correct" one. Rather, to satisfy this initial obligation, the MEC only must show that its action and recommendation are supported by evidence or, in other words, that its action and recommendation are not arbitrary or capricious and are based on evidence that a reasonable mind might accept in support of the actions and recommendation.
>
> ***If you decide that the MEC has presented evidence "in support of" its action and recommendation, [***18] then, according to Section VIII.D.7 of the Bylaws, Dr. Guier has the burden of proving, "by a preponderance of the evidence" that the MEC's action and recommendation must be rejected or modified***.

(Emphasis added.) Dr Guier asserts that the WAPA requires the MEC to prove its allegations by "clear and convincing evidence." He contends that this burden of proof conflicts with the burden identified in the Bylaws and therefore supersedes the provision in the Bylaws pursuant to the parties' stipulation.

[*P17] The language of the WAPA does not expressly provide a standard of proof in contested case hearings. *See* Wyo. Stat. Ann. § 16-3-114(c). We have previously recognized that the standard applicable to an adjudicatory hearing before an agency, unless otherwise stated, is the "preponderance of the evidence" standard customarily used in civil cases. Willadsen v. Christopulos, 731 P.2d 1181, 1184 (Wyo. 1987). A "preponderance of the evidence" is defined as "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence." Judd v. State ex rel. Wyo. Workers' Safety & Comp. Div., 2010 WY 85, ¶ 31, 233 P.3d 956, 968 (Wyo. 2010). We have also **[***19]** recognized that the preponderance of the evidence standard generally does not adequately protect the property interest one has in a professional license, and have instead required a licensing board to prove its disciplinary cases by clear and convincing evidence. Painter v. Abels, 998 P.2d 931, 940 (Wyo. 2000). Dr. Guier contends that our cases applying the WAPA to the revocation of professional licenses required the Hospital to prove the allegations supporting revocation of his privileges by "clear and convincing evidence." *See, e.g.,* In re Greene, 2009 WY 42, ¶ 10, 204 P.3d 285, 290 (Wyo. 2009) (suspension of chiropractor's license); Dorr v. Wyo. Bd. of Cert. Pub. Accountants, 2006 WY 144, ¶ 13, 146 P.3d 943, 949 (Wyo. 2006) (suspension of certificate to practice public accounting); Devous v. Wyoming State Bd. of Med. Examiners, 845 P.2d 408, 416 (Wyo. 1993) (suspension of medical license). The Hospital asserts that the clear and convincing standard does not apply because Dr. Guier faced the revocation of his medical staff privileges, not the revocation of his medical license.

[*P18] A "license" is defined in the WAPA as "any agency permit, certificate, approval, registration, charter or **[***20]** similar form of permission required by law." Wyo. Stat. Ann. § 16-3-101(b)(iii). The Hospital argues that staff privileges are not a medical license. It **[**632]** points out that Dr. Guier still has his license to practice medicine in the State of Wyoming, and is able to practice his profession at other facilities in the state. Dr. Guier asserts that staff privileges are required by law in order for him to perform operations, admit patients to a hospital, and treat patients, and that privileges therefore meet the definition of a "license." He supports this position by citing to Bylaw § V.A.1 which prohibits any person from admitting a patient or providing medical treatment unless they have been granted privileges. That Bylaw also states that medical staff privileges are "in the nature of a license."

[*P19] Although medical staff privileges may be "in the nature of" a license, we find there is a clear and important distinction between hospital privileges and a medical license. Medical staff privileges allow a physician to use hospital facilities and be assisted by hospital staff. As Dr. Guier points out, this includes the authority to admit and treat patients. A medical license, however, confers a general **[***21]** right to practice medicine within the boundaries of a particular jurisdiction. The distinction between a medical license and staff privileges is acknowledged in Wyoming, as indicated by the fact that licensing and privileging decisions are granted to different administrative bodies.

[*P20] Pursuant to statute, the Wyoming Board of Medicine, not the Judicial Review Committee or the Boards of Trustees of individual hospitals, oversees physician licensing matters. Title 33, Chapter 26 of the Wyoming statutes, known as the "Medical Practice Act," provides rules relating to licensing of physicians. The Medical Practice Act empowers the Wyoming Board of Medicine to "[g]rant, refuse to grant, suspend, restrict, revoke, reinstate or renew licenses to practice medicine," and lists more than thirty specific reasons justifying revocation, restriction, or suspension of a medical license. *Wyo. Stat. Ann. §§ 33-26-202(b)(i)*, *33-26-402(a)(i)-(xxxiv)*. The Act provides a clear and convincing burden of proof and allocates the burden to the Wyoming Board of Medicine. Wyo. Stat. Ann. § 33-26-407. The Act defines a "license" as "a license to practice medicine in this state issued by the board pursuant to this **[***22]** chapter" and clearly distinguishes between a license and medical staff privileges. Wyo. Stat. Ann. § 33-26-102(a)(ix); *see Wyo. Stat. Ann. §§ 33-26-202*, 30-3-409.

[*P21] Medical staff privileges, on the other hand, are addressed in the Wyoming Public Health and Safety statutes relating to hospitals and other care facilities. The statute governing hospital privileges expressly entrusts matters of staff admissions and privileges to hospital administration. As stated above, that statute provides that "hospitals by appropriate bylaws shall promulgate reasonable and uniform rules and regulations covering staff admissions and staff privileges." Wyo. Stat. Ann. § 35-2-113. Staff privileges, in contrast to medical licenses, are specific to individual hospitals, and decisions regarding staff privileges are within the discretion of hospital management.

The cases that Dr. Guier cites involving license suspensions are inapposite. In this case, Dr. Guier faced the revocation of his medical staff privileges. The

Hospital, pursuant to its prerogative, decided that privileging decisions would be subject to a burden of proof expressly identified in the Bylaws, and the burden of proof set forth in those Bylaws **[***23]** was applied at the contested case hearing. Dr. Guier agreed to be bound by the Bylaws when he initially sought hospital privileges and in his subsequent application for reappointment. The Bylaws do not require a clear and convincing burden of proof and do not require the burden of proof to be carried by the Hospital.

[*P22] Dr. Guier also asserts that his loss of privileges is similar to the loss of his medical license because it has impacted his ability to earn a living by practicing medicine. He stated that the termination of his privileges was reported to the National Practitioner Data Bank as required by federal law. *42 U.S.C. § 11133(a)(1)(A)*. As a result of the reporting and subsequent notification to other hospitals, Dr. Guier stated that he had lost privileges at a nearby hospital, and was called to hearings before the Wyoming and Montana Boards of Medicine. We note that Dr. Guier did not provide details of those hearings and did not testify that revocation **[**633]** of his hospital privileges resulted in revocation of his license to practice medicine in Montana or Wyoming. We do not dispute that the loss of privileges at a particular hospital or health care facility may seriously impact a physician's **[***24]** ability to maintain a medical practice.

[*P23] Under *Wyo. Stat. Ann. § 33-26-303(d)*, the Board of Medicine may deny licensure to a person whose privileges have been revoked at a particular health care facility on that basis alone. Also, under *Wyo. Stat. Ann. § 33-26-402(a)(xxvi)(A)*, a license may be revoked based on any action by a health care entity that adversely affects clinical privileges for a period of thirty or more days. The fact that there may be additional consequences to a physician who loses staff privileges, however, does not impair the ability of a hospital to establish reasonable bylaws and requirements for physicians seeking hospital privileges at its facility, and does not transform a privilege to practice at a particular hospital into a medical license. In this case, Dr. Guier was aware that his professional behavior was under intense scrutiny, as indicated by the focused review of his performance, the Reappointment Agreement, and correspondence during the reappointment application process. He was aware that failure to abide by the Reappointment Agreement could result in the loss of privileges and consequently damage his career. In spite of the terms of his Reappointment **[***25]** Agreement, however, Dr. Guier continued to act in a manner that jeopardized his ability to practice at St. John's and other facilities where he had privileges.

[*P24] The WAPA does not mandate a clear and convincing burden of proof for suspension of hospital privileges. *Wyo. Stat. Ann. § 35-2-113* provides broad discretion to a hospital in determining requirements for the ability to practice at a particular hospital. We have previously recognized that a hospital is entitled to great deference in the management of its facility and we afford great deference to the hospital's determination of standards relating to hospital privileges. *Garrison, 795 P.2d at 193*. In sum, the Hospital was entitled to establish the burden of proof to be applied. While it is not the level of proof that every hospital might adopt, we cannot find that it is unreasonable or that it conflicts with the WAPA.

[*P25] Dr. Guier also argues that, even if a clear and convincing standard of proof does not apply, Bylaw § VIII.D.7 is not reasonable because it places the burden on the physician facing charges to show that the adverse recommendation should be rejected or modified. Pursuant to the Bylaws, the Medical Executive Committee **[***26]** has the burden of producing evidence supporting its recommendation. Once that evidence is produced, the burden shifts to the medical staff appointee to persuade the JRC that the action should not be taken. Dr. Guier asserts that the burden-shifting under the Bylaws logically requires him to carry both the burden of production and the burden of persuasion, and that the practical effect of requiring the MEC to produce "some evidence" supporting its decision does not in any way assuage his burden. However, our conclusion that the Hospital has discretion to enact reasonable and uniform rules and regulations, based on an express statutory grant of that power, obviates the need for a discussion regarding the effect of burden-shifting under the Bylaws. As indicated above, we do not find that the Hospital's decision to place the burden of proof on the medical staff appointee, and to require that the burden be met by a preponderance of the evidence, is unreasonable.

Substantial Evidence

[*P26] Although somewhat entangled in his standard of proof argument, Dr. Guier also appears to contend that the Board's decision was not supported by substantial evidence. Substantial evidence is relevant evidence **[***27]** which a reasonable mind might accept in support of the agency's conclusions. *Dale, ¶ 11, 188*

P.3d at 558.

[*P27] Dr. Guier asserts that the record lacks substantial evidence to support each of the six incidents of his misbehavior. He contends that several incidents were not documented by written reports. Of the written reports that were made, Dr. Guier claims they did not contain the level of detail required to determine he violated the application **[**634]** for reappointment or the Reappointment Agreement. He also maintains that the ad hoc committee learned of several of the incidents from individuals who did not actually witness the outbursts.

[*P28] The Medical Staff Bylaws require a medical staff member to "agree to work harmoniously with others;" to "work[] cooperatively with members, nurses, Hospital Administration and others so as to promote high quality patient care;" and to adhere to a professional code of conduct, which includes "the ability to relate to others in a civil, collegial, and courteous manner." Bylaws §§ II.B.1.e; II.E.7; II.E.14. The Code of Conduct provides:

> The policy of St. John's Medical Center & Living Center is that all individuals within its facilities be treated courteously, **[***28]** respectfully and with dignity. To that end, while in St. John's facilities, individuals who are granted medical privileges agree to conduct themselves in a professional and cooperative manner. All such individuals shall refrain from disruptive, abusive, rude, hostile or otherwise inappropriate conduct.

[*P29] The record contains ample evidence of Dr. Guier's inability to work cooperatively with others, to relate to others in a civil, collegial, and courteous manner, and to refrain from disruptive conduct. Six members of the operating room staff who worked directly with Dr. Guier testified at the contested case hearing, as did the Chief-of-Staff, Chief-of- Surgery, and Operating Room Supervisor. The written reports of the ad hoc committee and the CEO investigation were submitted as evidence. The head of the ad hoc committee and the CEO also testified during the contested case hearing regarding those reports.

[*P30] The decision to permanently suspend Dr. Guier's privileges was based on six separate incidents of misconduct. Dr. Guier does not dispute that these incidents occurred. He either could not remember the incidents or contends the incidents were not as serious as reported. All incidents involved **[***29]** anger, mistreatment of staff, and disruptive behavior, and all incidents demonstrated an inability to relate to others in a civil, collegial, and courteous manner. The evidence supporting those incidents can be summarized as follows:

> July 18, 2006: Two nurses testified that Dr. Guier became angry during a procedure when the operating room staff used unauthorized materials. One nurse stated that when Dr. Guier realized an extra set of surgical sponges had been opened he stopped what he was doing, became angry and red in the face, was shaking, and yelling, "like level 10 yelling." This incident occurred eight days after Dr. Guier signed the Reappointment Agreement.
>
> July 20, 2006: Two nurses testified that Dr. Guier yelled and was intimidating toward operating room personnel during a procedure in which an instrument's suction was not working properly.
>
> July 21, 2006: Two nurses testified that Dr. Guier became upset when a surgical supply item was unavailable. Both nurses testified that Dr. Guier forcefully tore the drapes off the patient and threw a pair of scissors during this incident. The incident was also documented in an incident report.
>
> October 2, 2006: An incident report stated that **[***30]** Dr. Guier became angry with the operating room staff when he learned of the mishandling of a bone fragment. A nurse involved in the incident testified that Dr. Guier "was so angry. He started coming at me." Dr. Guier accused the nurse of sabotage when he learned the fragment had been discarded.
>
> October 9, 2006: A nurse testified that Dr. Guier became angry when surgery was postponed because of a room conflict. Another member of the operating room staff testified that, after a room was arranged, Dr. Guier yelled at operating room personnel during the procedure for not unwrapping items that would be needed, though they were available in the room.
>
> October 11, 2006: The investigation by the ad hoc committee revealed that Dr. Guier reacted angrily to the possible contamination of his surgical gown. According to the committee's report, Dr. Guier grabbed the gown from one of the operating room staff members, threw the gown to the floor, and made a demeaning comment to the staff member. Dr. Guier defended his behavior **[**635]** by stating that he prefers to take his own gown to decrease

the possibility of infection. According to the committee's report, Dr. Guier stated that he discussed the incident with **[***31]** another doctor, who agreed that Dr. Guier's reaction could be interpreted as demeaning.

[*P31] The Judicial Review Committee and the Board of Trustees found that all of these incidents were supported by substantial evidence. We agree with this conclusion. The incident where Dr. Guier was alleged to have angrily thrown a contaminated gown on the floor was based on hearsay. Nonetheless, hearsay is admissible in administrative proceedings if it is probative, trustworthy, and credible, and otherwise satisfies the requirements of *Wyo. Stat. Ann. § 16-3-108*. *Story v. Wyoming State Board of Medical Examiners, 721 P.2d 1013, 1018 (Wyo. 1986)*. Further, Dr. Guier did not deny that this incident occurred. The other incidents were testified to by eye-witnesses and several were corroborated by more than one witness. The six members of the operating room staff who testified at the contested case hearing provided evidence of Dr. Guier's disruptive behavior. All six members of the staff testified that they would continue to refuse to operate with Dr. Guier if his privileges were reinstated. We are satisfied that there is substantial evidence supporting the JRC's decision to revoke Dr. Guier's medical staff **[***32]** privileges.

[*P32] We also cannot find error in the Board's conclusion that Dr. Guier did not carry his burden of proving, by a preponderance of the evidence, that the recommendation should be set aside or modified. Dr. Guier presented some conflicting evidence regarding his conduct in the operating room. One physician's assistant who frequently worked with Dr. Guier testified in support of Dr. Guier. In reference to Dr. Guier's professional behavior, the physician's assistant stated: "I've never heard Dr. Guier raise his voice. . . . I've never heard him call people names," and "I've never heard him use profanity in any form, even when we're out—you know, outside of the OR. It's just not in his nature." He testified that the OR is a very loud and sometimes stressful place and that Dr. Guier's voice may have taken on a stressor during several of the incidents, but that he did not witness Dr. Guier lose his temper during any of the incidents. Dr. Guier also called one other doctor on his behalf, who testified that Dr. Guier did not have any behavioral problems at any of the other hospitals at which he had privileges to practice.

[*P33] Dr. Guier also testified at the contested case hearing. He did **[***33]** not recall several of the incidents. He admitted to being angry when he found out about the mishandling of the bone fragment. However, he denied yelling, approaching anyone in a threatening manner, or losing his focus on the patient.

[*P34] The JRC, as the trier of fact, was in the best position to determine the credibility of the witnesses and to weigh the evidence. Upon weighing the evidence, the JRC found that "Dr. Guier failed to meet his burden of proving, by a preponderance of the evidence, that the decision of the Medical Executive Committee to permanently suspend his privileges should be reversed or modified." The JRC found that the documentary and testimonial evidence demonstrated that Dr. Guier engaged in unacceptable personal conduct. Given the extensive testimony regarding Dr. Guier's conduct in the operating room, and the ample documentation produced by the investigations of the ad hoc committee and the Hospital's CEO, we cannot conclude the JRC erred in determining that Dr. Guier had not met his burden of proof.

Arbitrary & Capricious

[*P35] In his last issue, Dr. Guier asserts that the Board's decision was arbitrary and capricious. The arbitrary and capricious standard remains as a **[***34]** "safety net" to catch agency action that prejudices a party's substantial rights or that may be contrary to the other WAPA review standards yet is not easily categorized or fit to any one particular standard. *Dale, ¶ 23, 188 P.3d at 561*.

> Underlying our often repeated statement that "in determining whether the action of an agency is arbitrary, capricious, or an abuse of discretion, the court ascertains **[**636]** whether the decision is supported by the record," is the assumption that an agency will abide by the rules it promulgates. The failure of an agency to abide by its rules is per se arbitrary and capricious.

Bowen v. Wyoming Real Estate Comm'n, 900 P.2d 1140, 1142 (Wyo. 1995) (citation omitted).

[*P36] Dr. Guier contends that the Board's decision was per se arbitrary and capricious because the Medical Executive Committee did not follow the notice procedures provided for in the Reappointment Agreement or the Hospital's internal Disruptive Practitioner Policy. The Disruptive Practitioner Policy provides that if disruptive behavior is reported, the

Chief-of-Staff and CEO shall meet with the practitioner, discuss the incident, and document all meetings and conversations concerning the behavior. However, **[***35]** the last paragraph of the policy also provides:

> Notwithstanding the foregoing, at any time an issue pertaining to a practitioner's disruptive conduct may be referred to the Medical Executive Committee. Such referral may lead to a formal investigation and corrective action as set forth in the Medical Staff bylaws. Nothing in this policy shall be interpreted to prevent the Medical Executive Committee from exercising its prerogatives in these matters. This policy presents an informal approach to dealing with a disruptive practitioner, which does not replace the right of the Medical Executive Committee to exercise its powers as set forth in the Medical Staff bylaws.

The MEC chose to bypass the Hospital's Disruptive Practitioner Policy, and opted to address the disruptive conduct under the Bylaws, which was its right under the policy. The Disruptive Practitioner Policy is not a rule promulgated by the Hospital. It is designated a "policy" and does not carry the authority of the Medical Staff Bylaws. Likewise, the Reappointment Agreement is not a hospital rule or regulation. We note that the MEC failed to adhere to the "critical" documentation standards of the Disruptive Practitioner Policy, **[***36]** and that none of the suggested steps were taken by the Hospital's CEO or Chief-of-Staff to resolve the problems informally. Nonetheless, the Disruptive Practitioner Policy does not replace the right of the MEC to exercise its powers under the Medical Staff Bylaws. The MEC was entitled to proceed under the Bylaws and its decision to do so was not arbitrary or capricious.

[*P37] The Medical Executive Committee was required to follow the formal procedures provided for in its Bylaws, which were promulgated pursuant to statute. The record reflects that it did that. The MEC, finding that the Work Refusal Petition prevented the Hospital from properly staffing the OR, creating a threat to the life, health and safety of its patients, summarily suspended Dr. Guier's privileges for 29 days according to Bylaw § VII.C.1. Following the summary suspension, the MEC appointed an ad hoc committee to investigate the incidents as required by Bylaw § VII.B.3. The MEC determined that the ad hoc committee's investigation supported a recommendation that Dr. Guier's medical staff membership and clinical privileges be terminated pursuant to Bylaw § VII.B.4. Dr. Guier was immediately notified of the decision and his **[***37]** right to a contested case hearing on the matter in accord with Bylaw § VII.B.5. A contested case hearing was held by the JRC and Dr. Guier was afforded an appeal to the Board of Trustees according to Bylaws §§ VIII.D and VIII.E. We cannot conclude that the MEC did not follow its rules and regulations.

[*P38] Although he does not expressly argue that the Medical Executive Committee violated his due process rights, Dr. Guier makes much of the fact that the MEC did not notify him immediately of each incident of inappropriate behavior. We note initially that Dr. Guier does not actually contend that he lacked notice of the issues that were considered at the contested case hearing. Rather, he asserts that had the MEC discussed and documented complaints regarding his professional conduct prior to the Work Refusal Petition, he could have apologized and been admonished if necessary. He claims "[t]he controlling question is whether good faith work with Dr. Guier of the kind pledged would have saved his career." Dr. Guier received notice of the charges against **[**637]** him, a hearing before an impartial tribunal, representation by counsel, the opportunity to cross-examine witnesses and to present evidence, **[***38]** and the opportunity to inspect documentary evidence against him. In light of the ample process that was provided to contest the decision of the MEC, we cannot conclude that the Board's decision was arbitrary or capricious. While it may have been possible to resolve informally under the methods of conflict resolution identified in the Disruptive Practitioner Policy, the fact that the MEC did not follow its recommended procedures does not violate Dr. Guier's due process rights.

[*P39] "Parties to administrative proceedings are entitled to due process of law. Procedural due process principles require reasonable notice and a meaningful opportunity to be heard." *Amoco Production Co. v. Wyoming State Bd. of Equalization, 7 P.3d 900, 905 (Wyo. 2000)* (internal citations and quotation marks omitted). Dr. Guier signed an application for reappointment and a Reappointment Agreement, both of which specifically articulated the professional behavior expected of those with medical staff privileges. We find no error in the Board's conclusion that the "Reappointment Agreement placed Dr. Guier on unequivocal notice that his personal conduct had been an issue and would be closely scrutinized during the period **[***39]** of his reappointment to the medical staff." Dr. Guier's testimony indicated his awareness of issues relating to his interactions with operating room personnel and he was clearly aware of the type of

behavior which would be considered unacceptable under the Medical Staff Bylaws and the Reappointment Agreement.

[*P40] Having reviewed the record we cannot conclude that the Board's decision was arbitrary, capricious, or otherwise not in accordance with law. We affirm the Board's decision for reasons articulated by the Oregon Supreme Court when faced with a similar situation:

> Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients. . . . Hospitals uniformly consider cooperativeness an important factor, and in these circumstances it seems questionable whether this court should gainsay the hospitals' experience and judgment in **[***40]** this matter.

Huffaker v. Bailey, 273 Ore. 273, 540 P.2d 1398, 1400-01 (Or. 1975) (footnotes omitted).

[*P41] Affirmed.

End of Document

TAB 6

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.

Supreme Court of the United States

April 26, 1983, Argued ; June 24, 1983, Decided *

No. 82-354

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* Together with No. 82-355, Consumer Alert et al. v. State Farm Mutual Automobile Insurance Co. et al.; and No. 82-398, United States Department of Transportation et al. v. State Farm Mutual Automobile Insurance Co. et al., also on certiorari to the same court.

Reporter
463 U.S. 29 *; 103 S. Ct. 2856 **; 77 L. Ed. 2d 443 ***; 1983 U.S. LEXIS 84 ****; 51 U.S.L.W. 4953; 13 ELR 20672

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.

Prior History: **[****1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Disposition: *220 U. S. App. D. C. 170, 680 F.2d 206*, vacated and remanded.

Core Terms

belt, passive, seatbelt, automatic, air bag, detachable, rescission, passive restraint, install, usage, motor vehicle safety, technology, rulemaking, rescind, mandatory, crash, arbitrary and capricious, interlock, transport, ignite, manufacturer, occupant, modify, revoke, substantial increase, agency's action, compliance, promulgate, expertise, traffic

Case Summary

Procedural Posture

Certiorari was granted to the United States Court of Appeals for the District of Columbia Circuit, in a review filed by respondent automobile insurance companies contesting the National Highway Traffic Safety Administration's (NHTSA) rescission of a passive restraint safety standard for all new automobiles as arbitrary and capricious under the informal rulemaking procedures of the Administrative Procedure Act, *5 U.S.C.S. § 553*.

Overview

Under authority of the National Traffic and Motor Vehicle Safety Act of 1966 (Act), *15 U.S.C.S. § 1381 et seq.*, the National Highway Traffic Safety Administration (NHTSA) promulgated Standard 208 to require installation of seatbelts in all automobiles. Subsequently, the NHTSA promulgated rules to require passive restraint systems in new vehicles, but then rescinded the requirement on the basis that it was no longer able to find that the requirement would produce significant safety benefits. Respondent automobile insurers filed petitions for review of the NHTSA's rescission. The appellate court held that the NHTSA's rescission was arbitrary and capricious. Petitioners sought a writ of certiorari, which was granted. The court held that the NHTSA failed to present an adequate basis and explanation for rescinding the passive restraint requirement and required the NHTSA to either reconsider the restraint issue further, or amend Standard 208 to comply with the supporting analysis. The court held that under the "arbitrary and capricious" standard of judicial review, the NHTSA failed to provide clear and convincing reasons for its action to abandon the passive restraint system.

Outcome

The court vacated the judgment of the lower court and remanded the cases to the lower court with directions to remand the matter to the NHTSA for further consideration consistent with the court's opinion that the NHTSA failed to present an adequate basis and explanation for rescission, as required under the Administrative Procedure Act.

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > Informal Rulemaking

Transportation Law > Commercial Vehicles > Maintenance & Safety
Business & Corporate Compliance > Transportation > Commercial Drivers & Vehicles > Maintenance & Safety

Transportation Law > Private Vehicles > Safety Standards > General Overview

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of

Review

HN1 Agency Rulemaking, Informal Rulemaking

Both the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.S. § 1381 et seq., and the 1974 amendments concerning occupant crash protection standards indicate that motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of the Administrative Procedure Act. 5 U.S.C.S. § 553. The National Highway Traffic Safety Administration's action in promulgating such standards therefore may be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A).

Administrative Law > Judicial Review > General Overview

Transportation Law > Commercial Vehicles > Maintenance & Safety
Business & Corporate Compliance > Transportation > Commercial Drivers & Vehicles > Maintenance & Safety

Transportation Law > Private Vehicles > Safety Standards > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN2 Administrative Law, Judicial Review

Section 103(b) (15 U.S.C.S. § 1392(b)) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.S. § 1381 et seq., states that the procedural and judicial review provisions of the Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a federal motor vehicle safety standard, and suggests no difference in the scope of judicial review depending upon the nature of the National Highway Traffic Safety Administration's action.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Business & Corporate Law > Agency Relationships > Termination > General Overview

HN3 Agency Rulemaking, Formal Rulemaking

A settled course of behavior embodies an agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN4 Agency Rulemaking, Formal Rulemaking

Regulatory agencies do not establish rules of conduct to last forever, and an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances. But the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation.

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN5 Judicial Review, Standards of Review

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, the court must consider whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN6 Standards of Review, Arbitrary & Capricious Standard of Review

Normally, an agency rule will be arbitrary and capricious if the agency relies on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; the court may not supply a reasoned basis for the agency's action that the agency itself has not given. The court will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN7 Agency Rulemaking, Formal Rulemaking

An agency must cogently explain why it has exercised its discretion in a given manner.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN8 Judicial Review, Standards of Review

It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN9 Agency Rulemaking, Formal Rulemaking

Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. The agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN10 Agency Rulemaking, Formal Rulemaking

An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.

Lawyers' Edition Display

Decision

NHTSA's rescission of motor vehicle passive restraint standard held arbitrary and capricious.

Summary

In 1977, the National Highway Traffic Safety Administration (NHTSA) issued a motor vehicle safety standard pursuant to the National Traffic and Motor Vehicle Safety Act (15 USCS 1381 et seq.) that required newly sold cars to be equipped with either airbags or detachable or nondetachable passive seatbelts as of the 1982 or 1984 model year, depending on the model. But before the effective date, the agency issued a final rule rescinding the passive restraint requirement in the standard, the agency stating that the requirement was no longer reasonable or practical in view of the possibly minimal safety benefits and the costs of implementing the requirement. An insurance company and an association of independent insurers filed petitions for review of NHTSA's rescission of the passive restraint standard. The United States Court of Appeals for the District of Columbia Circuit held that the agency's rescission of the passive restraint requirement was arbitrary and capricious (680 F2d 206).

On certiorari, the United States Supreme Court Court vacated and remanded. In an opinion by White, J., joined by Brennan, Marshall, Blackmun, and Stevens, JJ., and joined in part (all but the holding as to the detachable passive seatbelts) by Burger, Ch. J., and O'Connor, JJ., it was held that although not all of the Court of Appeals' reasoning was correct, the NHTSA's rescission of the passive restraint requirement was arbitrary and capricious, since the agency failed to present an adequate basis and explanation for

rescinding the requirement in regards to each of the three passive restraint options, the agency having failed to supply the requisite reasoned analysis for its action, and that the agency was therefore required to consider the matter further or adhere to or amend the standard along the lines which its analysis supports.

Rehnquist, J., joined by Burger Ch. J., and Powell and O'Connor, JJ., concurred in part and dissented in part, stating that although the agency must explain further why it rescinded requirements as to airbags and nondetachable passive seatbelts, the agency's view of detachable passive seatbelts was not arbitrary and capricious, since the agency adequately explained its decision to rescind the standard insofar as it was satisfied by detachable belts.

Headnotes

LAW §77 > motor vehicles -- passive restraint standard -- rescission -- validity -- > Headnote:
LEdHN[1A] [1A]LEdHN[1B] [1B]LEdHN[1C] [1C]LEdHN[1D] [1D]LEdHN[1E] [1E]LEdHN[1F] [1F]LEdHN[1G] [1G]LEdHN[1H] [1H]

The National Highway Traffic Safety Administration's rescission of the requirement in a motor vehicle safety standard that new automobiles be equipped with either air bags or detachable or nondetachable passive seatbelts is arbitrary and capricious, where the agency failed to present an adequate basis and explanation for rescinding the requirement as to each of the three passive restraint options, the agency having failed to supply the requisite reasoned analysis for its actions, and the agency must therefore consider the matter further or adhere to or amend the standard along lines which its analysis supports. (Rehnquist, J., Burger, Ch. J., and Powell and O'Connor, JJ., dissented in part from this holding.)

LAW §250 > motor vehicle safety standards -- promulgation -- scope of judicial review -- > Headnote:
LEdHN[2] [2]

Pursuant to the Motor Vehicle Safety Act (15 USCS 1381 et seq.), motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of 553 of the Administrative Procedure Act (5 USCS 553), and an agency's action in promulgating such standards may therefore be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law pursuant to 5 USCS 706(2)(A).

LAW §250 > motor vehicles -- occupant protection standards -- rescission -- scope of judicial review -- > Headnote:
LEdHN[3] [3]

The rescission or modification of an occupant protection standard promulgated pursuant to the Motor Vehicle Safety Act (15 USCS 1381 et seq.) may be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, this being the same test for reviewing the promulgation of a standard, since 103(b) of the Act (15 USCS 1392(b) suggests no difference in the scope of judicial review depending on the nature of the agency's action.

LAW §89 > rescission of regulations -- basis for change in policy -- reasoned analysis -- > Headnote:
LEdHN[4] [4]

A settled course of behavior by a regulatory agency embodies the agency's informed judgment that by pursuing that course it will carry out the policies committed to it by Congress, there therefore being at least a presumption that those policies will be carried out best if the settled rule is adhered to, and accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

LAW §89 > deregulation -- change in rules and policies -- justification -- > Headnote:
LEdHN[5] [5]

Regulatory agencies do not establish rules of conduct to last forever, and an agency must be given ample latitude to adapt their rules and policies to the demands

of changing circumstances, but that change does not always point to deregulation, and any presumption from which judicial review should start would be a presumption not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.

EVIDENCE §99(1) > agency action -- presumption of regularity -- > Headnote:
LEdHN[6A] [6A]LEdHN[6B] [6B]

The presumption of constitutionality afforded legislation drafted by Congress is not equivalent to the presumption of regularity afforded an agency in fulfilling its statutory mandate.

LAW §159 > 250 scope of review -- arbitrary and capricious standard -- > Headnote:
LEdHN[7] [7]

The scope of review under the arbitrary and capricious standard for reviewing an agency's action is narrow, and a court is not to substitute its judgment for that of the agency, but the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made, and in reviewing that explanation, the United States Supreme Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

LAW §250 > agency rules -- arbitrary and capricious standard -- > Headnote:
LEdHN[8] [8]

Normally, an agency rule is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

LAW §238 > judicial review -- agency rules -- reasonable basis -- arbitrary and capricious standard -- > Headnote:
LEdHN[9] [9]

A court reviewing whether an agency rule is arbitrary and capricious may not supply a reasoned basis for the agency's action that the agency itself has not given, but the reviewing court will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.

LAW §158 > agency findings -- motor vehicle safety -- substantial evidence. -- > Headnote:
LEdHN[10] [10]

Agency findings under the Motor Vehicle Safety Act (15 USCS 1381 et seq.) are required to be supported by substantial evidence on the record considered as a whole.

LAW §89 > scope of review -- agency rule -- congressional reaction -- rescission by agency -- > Headnote:
LEdHN[11] [11]

It is improper, when reviewing the National Highway Traffic Safety Administration's rescission of its regulation requiring passive restraints in newly sold cars, to intensify, on the basis of congressional reaction to various versions of the requirement, the scope of review beyond the arbitrary and capricious test to require that the agency provide increasingly clear and convincing reasons for its actions, since even an unequivocal ratification, short of statutory incorporation, of the passive restraint standard would not connote approval or disapproval of the agency's decision to rescind the regulation, and even if it was proper to rely on such congressional reaction, the inference to be drawn fails to suggest that the agency acted improperly in rescinding the regulation.

STATUTES §158.4 > agency interpretation -- ratification --

congressional inaction -- > Headnote:
LEdHN[12] [12]

An agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation.

LAW §93 > exercise of agency discretion -- explanation -- > Headnote:
LEdHN[13] [13]

An agency must cogently explain why it has exercised its discretion in a given manner.

LAW §288 > agency action -- judicial review -- basis of action -- > Headnote:
LEdHN[14] [14]

Courts, when reviewing an agency's action, may not accept an appellate counsel's post hoc rationalization for agency action; an agency's action must be upheld, if at all, on the basis articulated by the agency itself.

LAW §89 > change in rules -- rescission -- notice -- > Headnote:
LEdHN[15A] [15A]LEdHN[15B] [15B]

Even if a new notice of proposed rulemaking is required in order for the National Highway Traffic Safety Administration to change a passive restraint standard for newly sold cars to require all cars to have air bags, as opposed to previously requiring either air bags or passive seatbelts, that requirement does not constitute sufficient cause to rescind the previous passive restraint requirement.

LAW §89 > rescission of rule -- study of alternatives -- suspension or delay -- > Headnote:
LEdHN[16A] [16A]LEdHN[16B] [16B]

It is permissible for the National Highway Traffic Safety Administration to temporarily suspend its passive restraint standard requiring that newly sold cars be equipped with air bags or passive seat belts, or to delay its implementation date, while a standard requiring air bags only is studied, but that option must be considered before the passive restraint requirement is revoked.

LAW §77 > rulemaking -- policy alternatives -- > Headnote:
LEdHN[17] [17]

An agency is not broadly required to consider all policy alternatives in reaching a decision, and a rulemaking cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable to the mind of man, regardless of how uncommon or unknown that alternative may have been.

LAW §89 > airbag regulations -- repeal -- > Headnote:
LEdHN[18] [18]

Given the judgment that airbags are an effective and cost-beneficial life-saving technology, which underlay a modified motor vehicle safety standard mandating the phasing in of passive restraints--either airbags or passive seatbelts--in new automobiles, the mandatory passive-restraint rule may not be abandoned by the agency without any consideration whatsoever of an airbags-only requirement.

LAW §89 > rescission of safety standard -- justification -- effectiveness -- uncertainty -- > Headnote:
LEdHN[19] [19]

Just as an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy, an agency may also revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained, but allowing for such uncertainty does not imply that it is sufficient for an agency to recite the terms "substantial uncertainty" as a justification for its actions, and one aspect of the necessary explanation for its actions would be a justification for rescinding the regulation before engaging in a search for further evidence.

LAW §257 > judicial review -- agency expertise -- motor vehicle safety -- > Headnote:
LEdHN[20] [20]

It is within the discretion of the National Highway Traffic Safety Administration to pass upon the generalizability of field studies concerning passive seat belt usage to an across-the-board mandatory standard, this type of issue resting within the expertise of the agency, and upon which a reviewing court must be most hesitant to intrude.

LAW §77 > motor vehicle safety -- rescission of rule -- grounds -- > Headnote:
LEdHN[21] [21]

Whether the fact that 20 to 50 percent of motorists currently wear seatbelts on some occasion provides grounds to believe that seatbelt use by occasional users will be substantially increased by detachable passive belts is a matter for the National Highway Traffic Safety Administration to decide, but it must bring its expertise to bear on the question when deciding whether a passive restraint standard for newly sold automobiles should be rescinded.

LAW §77 > motor vehicle safety -- passive restraint standards -- costs and benefits -- > Headnote:
LEdHN[22] [22]

The National Highway Traffic Safety Administration is correct to look at the costs as well the benefits of a passive restraint standard for newly sold automobiles, but when reconsidering its judgment of the reasonableness of the monetary and other costs associated with the standard, the agency should take into account that Congress intended safety to be the pre-eminent factor under the Motor Vehicle Safety Act (15 USCS 1381 et seq.).

LAW §77 > motor vehicle safety standards -- passive restraints -- acceptability -- rescission -- justification -- > Headnote:
LEdHN[23] [23]

The National Highway Traffic Safety Administration is entitled to change its view on the acceptability of continuous passive seatbelts, but it is obligated to explain its reasons for doing so when deciding to rescind a motor vehicle safety standard requiring that newly sold cars be equipped with passive restraints.

LAW §89 > rescission of motor vehicle safety standard -- explanation -- by agency -- > Headnote:
LEdHN[24] [24]

It is the responsibility of the National Highway Traffic Administration, and not that of the United States Supreme Court, to explain the agency's decision to rescind a motor vehicle safety standard requiring that newly sold cars be equipped with passive restraints.

LAW §89 > agency policy -- change -- reasoned analysis -- > Headnote:
LEdHN[25] [25]

An agency's view of what is in the public interest may change, either with or without a change in circumstances, but an agency changing its course must supply a reasoned analysis.

LAW §89 > motor vehicle safety standards -- passive restraints -- suspension -- further consideration -- justification -- > Headnote:
LEdHN[26A] [26A]LEdHN[26B] [26B]

The National Highway Traffic Safety Administration has sufficient justification to suspend, although not rescind, a motor vehicle safety standard requiring that newly sold cars be equipped with passive restraints, pending the agency's further consideration of the standard as required by the United States Supreme Court.

Syllabus

The National Traffic and Motor Vehicle Safety Act of 1966 (Act) directs the Secretary of Transportation to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." In issuing these standards, the Secretary is directed to consider "relevant available motor vehicle safety data," whether the proposed standard is "reasonable, practicable and appropriate" for the particular type of motor vehicle for which it is prescribed, and "the extent to which such standards will contribute to carrying out the purposes" of the Act. The Act authorizes judicial review, under the Administrative Procedure Act, of "all orders establishing, amending, or revoking" a motor vehicle safety standard. The National **[****2]** Highway Traffic Safety Administration (NHTSA), to which the Secretary has delegated his authority to promulgate safety standards, rescinded the requirement of Modified Standard 208 that new motor vehicles produced after September 1982 be equipped with passive restraints (automatic seatbelts or airbags) to protect the safety of the occupants of the vehicle in the event of a collision. In explaining the rescission, NHTSA maintained that it was no longer able to find, as it had in 1977 when Modified Standard 208 was issued, that the automatic restraint requirement would produce significant safety benefits. In 1977, NHTSA had assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. But by 1981 it became apparent that automobile manufacturers planned to install automatic seatbelts in approximately 99% of the new cars and that the overwhelming majority of such seatbelts could be easily detached and left that way permanently, thus precluding the realization of the lifesaving potential of airbags and requiring the same type of affirmative action that was the stumbling block to achieving high usage of manual belts. For this reason, NHTSA concluded that **[****3]** there was no longer a basis for reliably predicting that Modified Standard 208 would lead to any significant increased usage of restraints. Hence, in NHTSA's view, the automatic restraint requirement was no longer reasonable or practicable. Moreover, given the high expense of implementing such a requirement and the limited benefits arising therefrom, NHTSA feared that many consumers would regard Modified Standard 208 as an instance of ineffective regulation. On petitions for review of NHTSA's rescission of the passive restraint requirement, the Court of Appeals held that the rescission was arbitrary and capricious on the grounds that NHTSA's conclusion that it could not reliably predict an increase in belt usage under the Standard was an insufficient basis for the rescission, that NHTSA inadequately considered the possibility of requiring manufacturers to install nondetachable rather than detachable passive belts, and that the agency failed to give any consideration to requiring compliance with the Standard by the installation of airbags. The court found that congressional reaction to various versions of the Standard "raised doubts" that NHTSA's rescission "necessarily demonstrates **[****4]** an effort to fulfill its statutory mandate" and that therefore the agency was obligated to provide "increasingly clear and convincing reasons" for its action.

Held: NHTSA's rescission of the passive restraint requirement in Modified Standard 208 was arbitrary and capricious; the agency failed to present an adequate basis and explanation for rescinding the requirement and must either consider the matter further or adhere to or amend the Standard along lines which its analysis supports. Pp. 40-57.

(a) The rescission of an occupant crash protection standard is subject to the same standard of judicial review -- the "arbitrary and capricious" standard -- as is the promulgation of such a standard, and should not be judged by, as petitioner Motor Vehicle Manufacturers Association contends, the standard used to judge an agency's refusal to promulgate a rule in the first place. The Act expressly equates orders "revoking" and "establishing" safety standards. The Association's view would render meaningless Congress' authorization for judicial review of orders revoking safety standards. An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for **[****5]** the change beyond that which may be required when an agency does not act in the first instance. While the scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action. In reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. Pp. 40-44.

(b) The Court of Appeals correctly found that the "arbitrary and capricious" standard of judicial review applied to rescission of agency regulations, but erred in intensifying the scope of its review based upon its reading of legislative events. While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that

interpretation, here, even an unequivocal ratification of the passive restraint requirement would not connote approval or disapproval of NHTSA's later decision to rescind the requirement. That decision remains subject to the "arbitrary and capricious" standard. Pp. 44-46.

[**6]** (c) The first reason for finding NHTSA's rescission of Modified Standard 208 was arbitrary and capricious is that it apparently gave no consideration to modifying the Standard to require that airbag technology be utilized. Even if NHTSA's conclusion that detachable automatic seatbelts will not attain anticipated safety benefits because so many individuals will detach the mechanism were acceptable in its entirety, standing alone it would not justify any more than an amendment of the Standard to disallow compliance by means of one technology which will not provide effective passenger protection. It does not cast doubt on the need for a passive restraint requirement or upon the efficacy of airbag technology. The airbag is more than a policy alternative to the passive restraint requirement; it is a technology alternative within the ambit of the existing standard. Pp. 46-51.

(d) NHTSA was too quick to dismiss the safety benefits of automatic seatbelts. Its explanation for rescission of the passive restraint requirement is not sufficient to enable this Court to conclude that the rescission was the product of reasoned decisionmaking. The agency took no account of the critical difference **[****7]** between detachable automatic seatbelts and current manual seatbelts, failed to articulate a basis for not requiring nondetachable belts, and thus failed to offer the rational connection between facts and judgment required to pass muster under the "arbitrary and capricious" standard. Pp. 51-57.

Counsel: Solicitor General Lee argued the cause for petitioners in No. 82-398. With him on the briefs were Assistant Attorney General McGrath, Deputy Solicitor General Geller, Edwin S. Kneedler, Robert E. Kopp, Michael F. Hertz, Frank Berndt, David W. Allen, Enid Rubenstein, and Eileen T. Leahy. Lloyd N. Cutler argued the cause for petitioners in No. 82-354. With him on the briefs were John H. Pickering, William R. Perlik, Andrew B. Weissman, William R. Richardson, Jr., Milton D. Andrews, Lance E. Tunick, William H. Crabtree, Edward P. Good, Henry R. Nolte, Jr., Otis M. Smith, Charles R. Sharp, and William L. Weber, Jr. Raymond M. Momboisse, Sam Kazman, and Ronald A. Zumbrun filed briefs for petitioners in No. 82-355.

James F. Fitzpatrick argued the cause for respondents in all cases. With him on the brief for respondents State Farm Mutual Automobile Insurance Co. et al. were Michael N. **[****8]** Sohn, John M. Quinn, and Merrick B. Garland. Robert Abrams, Attorney General of New York, Robert S. Hammer, Assistant Attorney General, Peter H. Schiff, Martin Minkowitz, and Milton L. Freedman filed a brief for respondent Superintendent of Insurance of the State of New York. Raymond J. Rasenberger, Lawrence C. Merthan, Jerry W. Cox, and Lowell R. Beck filed a brief for respondents National Association of Independent Insurers et al. [+]

Judges: WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in all but Parts V-B and VI of which BURGER, C. J. **[****9]** , and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined, post, p. 57.

Opinion by: WHITE

Opinion

[*32] [*451] [**2861]** JUSTICE WHITE delivered the opinion of the Court.

The development of the automobile gave Americans unprecedented freedom to travel, but exacted a high price for **[*33]** enhanced mobility. Since 1929, motor vehicles have been the leading cause of accidental deaths and injuries in the United States. In 1982, 46,300 Americans died in motor vehicle accidents and hundreds of thousands more were maimed and injured. [1] **[****11]** While a consensus exists that the current loss of life on our highways is unacceptably high, improving safety does not admit to easy solution. In 1966, Congress decided that at least part of the answer lies in

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[+] Briefs of amici curiae urging affirmance were filed by Dennis J. Barbour for the American College of Preventive Medicine et al.; by Nathan Lewin for the American Insurance Association; by Philip R. Collins and Thomas C. McGrath, Jr., for the Automotive Occupant Protection Association; by Alexandra K. Finucane for the Epilepsy Foundation of America et al.; by Katherine I. Hall for the Center for Auto Safety et al.; by Simon Lazarus III for Mothers Against Drunk Drivers; and by John H. Quinn, Jr., and John Hardin Young for the National Association of Insurance Commissioners.

[1] National Safety Council, 1982 Motor Vehicle Deaths By States (May 16, 1983).

improving the design and safety features of the vehicle itself. [2] But much of the technology for building safer cars was undeveloped or untested. Before changes in automobile design could be mandated, the effectiveness of these changes had to be studied, their costs examined, and public acceptance **[**2862]** **[****10]** considered. This task called for considerable expertise and Congress responded by enacting the National Traffic and Motor Vehicle Safety Act of 1966 (Act), 80 Stat. 718, as amended, *15 U. S. C. § 1381 et seq. (1976 ed. and Supp. V)*. The Act, created for the purpose of "[reducing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," *15 U. S. C. § 1381*, directs the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *15 U. S. C. § 1392(a) (1976 ed., Supp. V)*. In issuing these standards, the Secretary is **[***452]** directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which **[*34]** such standards will contribute to carrying out the purposes" of the Act. *15 U. S. C. §§ 1392(f)(1), (3), (4)*. [3]

LEdHN[1A] [1A]The Act also authorizes judicial review under the provisions of the Administrative Procedure Act (APA), *5 U. S. C. § 706*, of all "orders establishing, amending, or revoking a Federal motor vehicle safety standard, **[****12]** " *15 U. S. C. § 1392(b)*. Under this authority, we review today whether NHTSA acted arbitrarily and capriciously in revoking the requirement in Motor Vehicle Safety Standard 208 that new motor vehicles produced after September 1982 be equipped with passive restraints to protect the safety of the occupants of the vehicle in the event of a collision. Briefly summarized, we hold that the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.

I

The regulation whose rescission is at issue bears a complex and convoluted history. Over the course of approximately 60 rulemaking notices, the requirement has been imposed, amended, rescinded, reimposed, and now rescinded again.

As originally issued by the Department of Transportation in 1967, Standard 208 simply required the installation of seatbelts in all automobiles. *32 Fed. Reg. 2415*. It soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. The Department **[****13]** therefore began consideration of "passive occupant restraint systems" -- devices that do not depend for their effectiveness **[*35]** upon any action taken by the occupant except that necessary to operate the vehicle. Two types of automatic crash protection emerged: automatic seatbelts and airbags. The automatic seatbelt is a traditional safety belt, which when fastened to the interior of the door remains attached without impeding entry or exit from the vehicle, and deploys automatically without any action on the part of the passenger. The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by NHTSA that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. *42 Fed. Reg. 34298*.

[*453]** In 1969, the Department formally proposed a standard requiring the installation **[****14]** of passive restraints, *34 Fed. Reg. 11148*, thereby commencing a lengthy series of proceedings. In 1970, the agency revised **[**2863]** Standard 208 to include passive protection requirements, *35 Fed. Reg. 16927*, and in 1972, the agency amended the Standard to require full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. *37 Fed. Reg. 3911*. In the interim, vehicles built between August 1973 and August 1975 were to carry either passive

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[2] The Senate Committee on Commerce reported:

"The promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." S. Rep. No. 1301, 89th Cong., 2d Sess., 4 (1966).

[3] The Secretary's general authority to promulgate safety standards under the Act has been delegated to the Administrator of the National Highway Traffic Safety Administration (NHTSA). *49 CFR § 1.50(a) (1982)*. This opinion will use the terms NHTSA and agency interchangeably when referring to the National Highway Traffic Safety Administration, the Department of Transportation, and the Secretary of Transportation.

restraints or lap and shoulder belts coupled with an "ignition interlock" that would prevent starting the vehicle if the belts were not connected. [4] **[****15]** On review, the **[*36]** agency's decision to require passive restraints was found to be supported by "substantial evidence" and upheld. *Chrysler Corp.* v. *Department of Transportation, 472 F.2d 659 (CA6 1972)*. [5]

In preparing for the upcoming model year, most car makers chose the "ignition interlock" option, a decision which was highly unpopular, and led Congress to amend the Act to prohibit a motor vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts were not in use. Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. 93-492, § 109, 88 Stat. 1482, *15 U. S. C. § 1410b(b)*. The 1974 Amendments also provided that any safety standard that could be satisfied by a system other than seatbelts would have to be submitted to Congress where it could be vetoed by concurrent resolution of both Houses. *15 U. S. C. § 1410b(b)(2)*. [6]

[**16]** The effective date for mandatory passive restraint systems was extended for a year until August 31, 1976. *40 Fed. Reg. 16217 (1975)*; *id.*, at 33977. But in June 1976, Secretary of Transportation William T. Coleman, Jr., initiated a new rulemaking on the issue, *41 Fed. Reg. 24070*. After hearing testimony and reviewing written comments, Coleman extended the optional alternatives indefinitely and suspended the passive restraint requirement. Although he found passive **[*37]** restraints technologically and economically feasible, the Secretary based his decision on the expectation that there **[***454]** would be widespread public resistance to the new systems. He instead proposed a demonstration project involving up to 500,000 cars installed with passive restraints, in order to smooth the way for public acceptance of mandatory passive restraints at a later date. Department of Transportation, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection (Dec. 6, 1976), App. 2068.

Coleman's successor as Secretary of Transportation disagreed. Within months of assuming office, Secretary Brock Adams decided that the demonstration project **[****17]** was unnecessary. He issued a new mandatory passive restraint regulation, known as Modified Standard 208. *42 Fed. Reg. 34289 (1977)*; *49 CFR § 571.208 (1978)*. The Modified Standard mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy the Standard were airbags and passive belts; the choice of which system to install was left to the manufacturers. In *Pacific Legal Foundation v. Department of Transportation, 193 U. S. App. D. C. 184, 593 F.2d 1338*, **[**2864]** cert. denied, *444 U.S. 830 (1979)*, the Court of Appeals upheld Modified Standard 208 as a rational, nonarbitrary regulation consistent with the agency's mandate under the Act. The Standard also survived scrutiny by Congress, which did not exercise its authority under the legislative veto provision of the 1974 Amendments. [7]

[**18]** Over the next several years, the automobile industry geared up to comply with Modified Standard 208. As late as July 1980, NHTSA reported:

[*38] "On the road experience in thousands of vehicles equipped with air bags and automatic safety belts has confirmed agency estimates of the life-saving and injury-

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[4] Early in the process, it was assumed that passive occupant protection meant the installation of inflatable airbag restraint systems. See ***34 Fed. Reg. 11148 (1969)***. In 1971, however, the agency observed that "[some] belt-based concepts have been advanced that appear to be capable of meeting the complete passive protection options," leading it to add a new section to the proposed standard "[to] deal expressly with passive belts." *36 Fed. Reg. 12859*.

[5] The court did hold that the testing procedures required of passive belts did not satisfy the Act's requirement that standards be "objective." *472 F.2d. at 675*.

[6] Because such a passive restraint standard was not technically in effect at this time due to the Sixth Circuit's invalidation of the testing requirements, see n. 5, *supra*, the issue was not submitted to Congress until a passive restraint requirement was reimposed by Secretary Adams in 1977. To comply with the Amendments, NHTSA proposed new warning systems to replace the prohibited continuous buzzers. *39 Fed. Reg. 42692 (1974)*. More significantly, NHTSA was forced to rethink an earlier decision which contemplated use of the interlocks in tandem with detachable belts. See n. 13, *infra*.

[7] No action was taken by the full House of Representatives. The Senate Committee with jurisdiction over NHTSA affirmatively endorsed the Standard, S. Rep. No. 95-481 (1977), and a resolution of disapproval was tabled by the Senate. 123 Cong. Rec. 33332 (1977).

preventing benefits of such systems. When all cars are equipped with automatic crash protection systems, each year an estimated 9,000 more lives will be saved, and tens of thousands of serious injuries will be prevented." NHTSA, Automobile Occupant Crash Protection, Progress Report No. 3, p. 4; App. in No. 81-2220 (CADC), p. 1627 (hereinafter App.).

In February 1981, however, Secretary of Transportation Andrew Lewis reopened the rulemaking due to changed economic circumstances and, in particular, the difficulties of the automobile industry. 46 Fed. Reg. 12033. Two months later, the agency ordered a one-year delay in the application of the Standard to large cars, extending the deadline to September 1982, *id.*, at 21172, and at the same time, proposed the possible rescission of the entire Standard. *Id.*, at 21205. After receiving written comments **[****19]** and holding public hearings, NHTSA issued a final rule (Notice 25) that rescinded the passive restraint requirement contained in Modified Standard 208.

[*455]** II

In a statement explaining the rescission, NHTSA maintained that it was no longer able to find, as it had in 1977, that the automatic restraint requirement would produce significant safety benefits. Notice 25, *id.*, at 53419. This judgment reflected not a change of opinion on the effectiveness of the technology, but a change in plans by the automobile industry. In 1977, the agency had assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. By 1981 it became apparent that automobile manufacturers planned to install the automatic seatbelts in approximately 99% of the new cars. For this reason, the lifesaving potential of airbags would not be realized. Moreover, it now appeared that the overwhelming majority of passive belts **[*39]** planned to be installed by manufacturers could be detached easily and left that way permanently. Passive belts, once detached, then required "the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual **[****20]** belts." *Id.*, at 53421. For this reason, the agency concluded that there was no longer a basis for reliably predicting that the Standard would lead to any significant increased usage of restraints at all.

In view of the possibly minimal safety benefits, the automatic restraint requirement no longer was reasonable or practicable in the agency's view. The requirement would require approximately $ 1 billion to implement and the agency did not believe it would be reasonable to impose such substantial costs on manufacturers and consumers without more adequate assurance that sufficient safety benefits would accrue. In addition, NHTSA concluded that automatic restraints might have an adverse effect on the public's attitude toward safety. Given the high expense and limited benefits of detachable belts, NHTSA feared that many consumers would regard the Standard as an instance of ineffective regulation, adversely affecting the public's view of safety regulation and, in particular, "poisoning . . . popular sentiment toward **[**2865]** efforts to improve occupant restraint systems in the future." *Id.*, at 53424.

State Farm Mutual Automobile Insurance Co. and the National Association **[****21]** of Independent Insurers filed petitions for review of NHTSA's rescission of the passive restraint Standard. The United States Court of Appeals for the District of Columbia Circuit held that the agency's rescission of the passive restraint requirement was arbitrary and capricious. 220 U. S. App. D. C. 170, 680 F.2d 206 (1982). While observing that rescission is not unrelated to an agency's refusal to take action in the first instance, the court concluded that, in this case, NHTSA's discretion to rescind the passive restraint requirement had been restricted by various forms of congressional "reaction" to the passive restraint issue. It then **[*40]** proceeded to find that the rescission of Standard 208 was arbitrary and capricious for three reasons. First, the court found insufficient as a basis for rescission NHTSA's conclusion that it could not reliably predict an increase in belt usage under the Standard. The court held that there was insufficient evidence in the record to sustain NHTSA's position on this issue, and **[***456]** that, "only a well justified refusal to seek more evidence could render rescission non-arbitrary." *Id., at 196, 680 F.2d, at 232*. **[****22]** Second, a majority of the panel [8] concluded that NHTSA inadequately considered the possibility of requiring manufacturers to install nondetachable rather than detachable passive belts. Third, the majority found that the agency acted arbitrarily and capriciously by failing to give any consideration whatever to requiring compliance with Modified Standard 208 by the installation of airbags.

The court allowed NHTSA 30 days in which to submit a schedule for "resolving the questions raised in [the] opinion." *Id., at 206, 680 F.2d, at 242*. Subsequently, the agency filed a Notice of Proposed Supplemental Rulemaking setting forth a schedule for complying with

[8] Judge Edwards did not join the majority's reasoning on these points.

the court's mandate. On August 4, 1982, the Court of Appeals issued an order staying the compliance date for the passive restraint requirement until September 1, 1983, and requested NHTSA to inform the court whether that compliance date was achievable. NHTSA informed the **[****23]** court on October 1, 1982, that based on representations by manufacturers, it did not appear that practicable compliance could be achieved before September 1985. On November 8, 1982, we granted certiorari, *459 U.S. 987*, and on November 18, the Court of Appeals entered an order recalling its mandate.

III

LEdHN[2] [2]LEdHN[3] [3]Unlike the Court of Appeals, we do not find the appropriate scope of judicial review to be the "most troublesome **[*41]** question" in these cases. HN1 Both the Act and the 1974 Amendments concerning occupant crash protection standards indicate that motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of the Administrative Procedure Act. 5 U. S. C. § 553. The agency's action in promulgating such standards therefore may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 **[****24]** (2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971);*Bowman Transportation, Inc.* v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).We believe that the rescission or modification of an occupant-protection standard is subject to the same test. HN2 Section 103(b) of the Act, 15 U. S. C. § 1392(b), states that the procedural and judicial review provisions of the Administrative Procedure Act "shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard," and suggests no difference in the scope of judicial review depending upon the nature of the agency's action.

[2866]** LEdHN[4] [4]Petitioner Motor Vehicle Manufacturers Association (MVMA) disagrees, contending that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place -- a standard petitioner believes **[***457]** considerably narrower **[****25]** than the traditional arbitrary-and-capricious test. We reject this view. The Act expressly equates orders "revoking" and "establishing" safety standards; neither that Act nor the APA suggests that revocations are to be treated as refusals to promulgate standards. Petitioner's view would render meaningless Congress' authorization for judicial review of orders revoking safety rules. Moreover, the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. HN3 A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies **[*42]** committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. R. Co.* v. Wichita Bd. of Trade, 412 U.S. 800, 807-808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that **[****26]** which may be required when an agency does not act in the first instance.

LEdHN[5] [5]In so holding, we fully recognize that "[regulatory] agencies HN4 do not establish rules of conduct to last forever," *American Trucking Assns., Inc.* v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416 (1967), and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).But the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption -- contrary to petitioners' views -- is not *against* safety regulation, but *against* changes in current policy that are not justified by **[****27]** the rulemaking record. While the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review established by law.

LEdHN[6A] [6A] LEdHN[7] [7] LEdHN[8] [8] LEdHN[9] [9] LEdHN[10] [10]The Department of Transportation accepts the applicability of the "arbitrary and capricious" standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. We do not disagree with **[*43]**

this **[****28]** formulation. [9] HN5 The scope of review **[***458]** under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States, 371 U.S. 156, 168 (1962)*. In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant **[**2867]** factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra, at 285*; *Citizens to Preserve Overton Park v. Volpe, supra, at 416*. HN6 Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important **[****29]** aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)*. We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra, at 286*. See also *Camp v. Pitts, 411 U.S. 138, 142-143 (1973) (per curiam)*. For purposes of these cases, it is also relevant that Congress required a record of the rulemaking proceedings to be compiled **[*44]** and submitted to a reviewing court, *15 U. S. C. § 1394*, and intended that agency findings under the Act would be supported by "substantial evidence on the record considered as a whole." S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966); H. R. Rep. No. 1776, 89th **[****30]** Cong., 2d Sess., 21 (1966).

IV

LEdHN[11] [11]The Court of Appeals correctly found that the arbitrary-and-capricious test applied to rescissions of prior agency regulations, but then erred in intensifying the scope of its review based upon its reading of legislative events. It held that congressional reaction to various versions of Standard 208 "[raised] doubts" that NHTSA's rescission "necessarily demonstrates an effort to fulfill its statutory mandate, **[****31]** " and therefore the agency was obligated to provide "increasingly clear and convincing reasons" for its action. *220 U. S. App. D. C., at 186, 193, 680 F.2d, at 222, 229*. Specifically, the Court of Appeals found significance in three legislative occurrences:

"In 1974, Congress banned the ignition interlock but did not foreclose NHTSA's pursuit of a passive restraint standard. In 1977, Congress allowed the standard to take effect when neither of the concurrent resolutions needed for disapproval was passed. In 1980, a majority of each house indicated support for the concept of mandatory passive restraints and a majority of each house supported the unprecedented attempt to require **[***459]** some installation of airbags." *Id., at 192, 680 F.2d, at 228*.

From these legislative acts and nonacts the Court of Appeals derived a "congressional commitment to the concept of automatic crash protection devices for vehicle occupants." *Ibid*.

LEdHN[12] [12]This path of analysis was misguided and the inferences it produced are questionable. It is noteworthy that in this Court respondent **[****32]** State Farm expressly agrees that the postenactment legislative history of the Act does not heighten the **[*45]** standard of review of NHTSA's actions. Brief for Respondent State Farm Mutual Automobile Insurance Co. 13. State Farm's concession is well taken for this Court has never suggested that the *standard* of review is enlarged or diminished by subsequent congressional action. While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation, *Bob Jones University v. United States, 461 U.S. 574, 599-602 (1983)*; *Haig v. Agee, 453 U.S. 280, 291-300 (1981)*, in the cases before us, even an unequivocal ratification -- short of statutory **[**2868]** incorporation --

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[9] LEdHN[6B] [6B]The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.

of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation. That decision remains subject to the arbitrary-and-capricious standard.

That we should not be so quick to infer a congressional mandate for passive restraints is confirmed by examining the postenactment legislative events cited by the Court of Appeals. Even were we **[****33]** inclined to rely on inchoate legislative action, the inferences to be drawn fail to suggest that NHTSA acted improperly in rescinding Standard 208. First, in 1974 a mandatory passive restraint standard was technically not in effect, see n. 6, *supra*; Congress had no reason to foreclose that course. Moreover, one can hardly infer support for a mandatory standard from Congress' decision to provide that such a regulation would be subject to disapproval by resolutions of disapproval in both Houses. Similarly, no mandate can be divined from the tabling of resolutions of disapproval which were introduced in 1977. The failure of Congress to exercise its veto might reflect legislative deference to the agency's expertise and does not indicate that Congress would disapprove of the agency's action in 1981. And even if Congress favored the Standard in 1977, it -- like NHTSA -- may well reach a different judgment, given changed circumstances four years later. Finally, the Court of Appeals read too much into floor action on the 1980 authorization bill, a bill which was not enacted into law. Other **[*46]** contemporaneous events could be read as showing equal congressional hostility to **[****34]** passive restraints. [10]

V

LEdHN[1B] [1B]The ultimate question before us is whether NHTSA's rescission of **[***460]** the passive restraint requirement of Standard 208 was arbitrary and capricious. We conclude, as did the Court of Appeals, that it was. We also conclude, but for somewhat different reasons, that further consideration of the issue by the agency is therefore required. We deal separately with the rescission as it applies to airbags and as it applies to seatbelts.

A

The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever **[****35]** to modifying the Standard to require that airbag technology be utilized. Standard 208 sought to achieve automatic crash protection by requiring automobile manufacturers to install either of two passive restraint devices: airbags or automatic seatbelts. There was no suggestion in the long rulemaking process that led to Standard 208 that if only one of these options were feasible, no passive restraint standard should be promulgated. Indeed, the agency's original proposed Standard contemplated the installation of inflatable restraints in all cars. [11] Automatic belts **[*47]** were added as a means of complying with the Standard because they were believed to be as effective as airbags in achieving the goal of occupant crash protection. 36 Fed. Reg. 12859 (1971). At that time, the passive belt approved by the agency could not be detached. [12] Only later, **[**2869]** at a manufacturer's behest, did the agency approve of the detach-ability feature -- and only after assurances that the feature would not compromise the safety benefits of the restraint. [13] Although it was then foreseen that 60% of the new cars would contain airbags and 40% would have automatic seatbelts, **[****36]** the ratio between the two was not significant as long as the passive belt would also assure greater passenger safety.

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[10] For example, an overwhelming majority of the Members of the House of Representatives voted in favor of a proposal to bar NHTSA from spending funds to administer an occupant restraint standard unless the standard permitted the purchaser of the vehicle to select manual rather than passive restraints. 125 Cong. Rec. 36926 (1979).

[11] While NHTSA's 1970 passive restraint requirement permitted compliance by means other than the airbag, ***35 Fed. Reg. 16927***, "[this] rule was a de facto air bag mandate since no other technologies were available to comply with the standard." Graham & Gorham, NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation, 35 Ad. L. Rev. 193, 197 (1983). See n. 4, *supra*.

[12] Although the agency suggested that passive restraint systems contain an emergency release mechanism to allow easy extrication of passengers in the event of an accident, the agency cautioned that "[in] the case of passive safety belts, it would be required that the release not cause belt separation, and that the system be self-restoring after operation of the release." ***36 Fed. Reg. 12866 (1971)***.

[13] In April 1974, NHTSA adopted the suggestion of an automobile manufacturer that emergency release of passive belts be accomplished by a conventional latch -- provided the restraint system was guarded by an ignition interlock and warning buzzer to encourage reattachment of the passive belt. ***39 Fed. Reg. 14593***. When the 1974 Amendments prohibited these devices, the agency simply eliminated the interlock and buzzer requirements, but continued to allow compliance by a detachable passive belt.

[**37]** LEdHN[1C] [1C] LEdHN[13] [13]The agency has now determined that the detachable automatic belts will not attain anticipated safety benefits because so many individuals will detach the mechanism. Even if this conclusion were acceptable in its entirety, see *infra*, at 51-54, standing alone it would not justify any more than an amendment of Standard 208 to disallow compliance by means of the one technology which will not **[***461]** provide effective passenger protection. It does not cast doubt on the need for a passive restraint standard or upon the efficacy of airbag technology. In its most recent rulemaking, the agency again acknowledged the lifesaving potential of the airbag:

[*48] "The agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use . . . ." NHTSA Final Regulatory Impact Analysis (RIA) XI-4 (Oct. 1981), App. 264.

Given the effectiveness ascribed to airbag technology **[****38]** by the agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment. But the agency not only did not require compliance through airbags, it also did not even consider the possibility in its 1981 rulemaking. Not one sentence of its rulemaking statement discusses the airbags-only option. Because, as the Court of Appeals stated, "NHTSA's . . . analysis of airbags was nonexistent," 220 U. S. App. D. C., at 200, 680 F.2d, at 236, what we said in *Burlington Truck Lines, Inc.* v. United States, 371 U.S., at 167, is apropos here:

"There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but 'unless **[****39]** we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' New York v. United States, 342 U.S. 882, 884 (dissenting opinion)" (footnote omitted).

We have frequently reiterated that HN7 an agency must cogently explain why it has exercised its discretion in a given manner, **[*49]** *Atchison, T. & S. F. R. Co.* v. Wichita Bd. of Trade, 412 U.S., at 806; FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249 (1972); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443 (1965); and we reaffirm this principle again today.

The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade, the automobile industry waged the regulatory equivalent **[**2870]** of war against the airbag [14] and lost -- the inflatable restraint was proved sufficiently effective. Now **[****40]** the automobile **[***462]** industry has decided to employ a seatbelt system which will not meet the safety objectives of Standard 208. This hardly constitutes cause to revoke the Standard itself. Indeed, the Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be "technology-forcing" in the sense of inducing the development of superior safety design. See *Chrysler Corp.* v. Department of Transportation, 472 F.2d, at 672-673. If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a fortiori* it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design.

[**41]** LEdHN[14] [14]LEdHN[15A] [15A]LEdHN[16A] [16A]Although the agency did not address the mandatory airbag option and the Court of Appeals noted that "airbags seem to have none of the problems that NHTSA identified in passive seatbelts," 220 U. S. App. D. C., at 201, 680 F.2d, at 237, petitioners recite a number of difficulties that they **[*50]** believe would be posed by a mandatory airbag

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[14] See, *e. g.*, Comments of Chrysler Corp., Docket No. 69-07, Notice 11 (Aug. 5, 1971) (App. 2491); Chrysler Corp. Memorandum on Proposed Alternative Changes to FMVSS 208, Docket No. 44, Notice 76-8 (1976) (App. 2241); General Motors Corp. Response to the Dept. of Transportation Proposal on Occupant Crash Protection, Docket No. 74-14, Notice 08 (May 27, 1977) (App. 1745). See also *Chrysler Corp.* v. Department of Transportation, 472 F.2d 659 (CA6 1972).

standard. These range from questions concerning the installation of airbags in small cars to that of adverse public reaction. But these are not the agency's reasons for rejecting a mandatory airbag standard. Not having discussed the possibility, the agency submitted no reasons at all. The short -- and sufficient -- answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. *Burlington Truck Lines, Inc.* v. *United States, 371 U.S., at 168*. **[****42]** HN8 It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Ibid.*; *SEC v. Chenery Corp., 332 U.S., at 196*; *American Textile Mfrs. Institute, Inc.* v. *Donovan, 452 U.S. 490, 539 (1981)*. [15]

[**43]** LEdHN[1D] [1D]LEdHN[17] [17]LEdHN[18] [18]Petitioners also invoke our decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)*, as though it were a talisman under which any agency decision is by definition unimpeachable. Specifically, it is submitted that to require an agency to consider an airbags-only alternative is, in essence, to dictate to the agency the procedures it is to follow. Petitioners both misread *Vermont Yankee* and misconstrue the nature of the remand that is in order. In *Vermont Yankee*, we held that a court may not impose additional procedural requirements upon an agency. We do not require today any specific procedures **[*51]** which NHTSA must follow. Nor do we broadly require an agency to consider **[***463]** all policy alternatives in reaching decision. It is true that rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and **[****44]** **[**2871]** thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . ." *Id., at 551*. But the airbag is more than a policy alternative to the passive restraint Standard; it is a technological alternative within the ambit of the existing Standard. We hold only that given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.

B

LEdHN[1E] [1E]Although the issue is closer, we also find that the agency was too quick to dismiss the safety benefits of automatic seatbelts. NHTSA's critical finding was that, in light of the industry's plans to install readily detachable passive belts, it could not reliably predict "even a 5 percentage point increase as the minimum level of expected usage increase." *46 Fed. Reg. 53423 (1981)*. The Court of Appeals rejected this finding because there is "not one iota" of evidence that Modified Standard 208 will fail to increase **[****45]** nationwide seatbelt use by at least 13 percentage points, the level of increased usage necessary for the Standard to justify its cost. Given the lack of probative evidence, the court held that "only a well justified refusal to seek more evidence could render rescission non-arbitrary." *220 U. S. App. D. C., at 196, 680 F.2d, at 232*.

LEdHN[19] [19]Petitioners object to this conclusion. In their view, "substantial uncertainty" that a regulation will accomplish its intended purpose is sufficient reason, without more, to rescind a regulation. We agree with petitioners that just as an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy, an agency may also revoke a **[*52]** standard on the basis of serious uncertainties if supported by the record and reasonably explained. Rescission of the passive restraint requirement would not be arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion. It is not infrequent that **[****46]** the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. HN9 Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. As previously noted, the

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[15] LEdHN[15B] [15B] LEdHN[16B] [16B]The Department of Transportation expresses concern that adoption of an airbags-only requirement would have required a new notice of proposed rulemaking. Even if this were so, and we need not decide the question, it would not constitute sufficient cause to rescind the passive restraint requirement. The Department also asserts that it was reasonable to withdraw the requirement as written to avoid forcing manufacturers to spend resources to comply with an ineffective safety initiative. We think that it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied. But, as we explain in text, that option had to be considered before the passive restraint requirement could be revoked.

agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States, supra, at 168*. Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence.

LEdHN[1F] [1F] **LEdHN[20]** [20]In these cases, the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking. To reach **[***464]** this **[****47]** conclusion, we do not upset the agency's view of the facts, but we do appreciate the limitations of this record in supporting the agency's decision. We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries. Unlike recent regulatory decisions we have reviewed, *Industrial Union Dept.* v. *American Petroleum Institute, 448 U.S. 607 (1980)*; *American Textile Mfrs. Institute, Inc.* v. *Donovan, 452 U.S. 490 (1981)*, the safety benefits of wearing seatbelts are not in doubt, and it is not challenged that were those benefits to accrue, the monetary costs of implementing the Standard would be easily justified. We move next to the fact that there is no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted **[*53]** to yield a substantial increase in **[**2872]** usage. The empirical evidence on the record, consisting of surveys of drivers of automobiles equipped with passive belts, reveals more than a doubling of the usage rate experienced with manual belts. [16] **[****49]** Much of the agency's rulemaking **[****48]** statement -- and much of the controversy in these cases -- centers on the conclusions that should be drawn from these studies. The agency maintained that the doubling of seatbelt usage in these studies could not be extrapolated to an across-the-board mandatory standard because the passive seatbelts were guarded by ignition interlocks and purchasers of the tested cars are somewhat atypical. [17] Respondents insist these studies demonstrate that Modified Standard 208 will substantially increase seatbelt usage. We believe that it is within the agency's discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude.

LEdHN[21] [21]But accepting the agency's view of the field tests on passive restraints indicates only that there is no reliable real-world experience that usage rates will substantially increase. To be sure, NHTSA opines that "it cannot reliably predict even a 5 percentage point increase as the minimum level of **[*54]** expected increased usage." Notice 25, *46 Fed. Reg. 53423 (1981)*. But this and other statements that passive belts will not yield substantial increases in seatbelt usage apparently take no account of the critical difference between detachable automatic belts and current manual belts. A detached passive belt does require an affirmative act to reconnect it, but -- unlike **[***465]** a manual seatbelt -- the passive belt, once **[****50]** reattached, will continue to function automatically unless again disconnected. Thus, inertia -- a factor which the agency's own studies have found significant in explaining the current low usage rates for seatbelts [18] **[****51]** -- works in *favor* of, not *against*, use of the protective device. Since 20% to 50% of motorists

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[16] Between 1975 and 1980, Volkswagen sold approximately 350,000 Rabbits equipped with detachable passive seatbelts that were guarded by an ignition interlock. General Motors sold 8,000 1978 and 1979 Chevettes with a similar system, but eliminated the ignition interlock on the 13,000 Chevettes sold in 1980. NHTSA found that belt usage in the Rabbits averaged 34% for manual belts and 84% for passive belts. RIA, at IV-52, App. 108. For the 1978-1979 Chevettes, NHTSA calculated 34% usage for manual belts and 72% for passive belts. On 1980 Chevettes, the agency found these figures to be 31% for manual belts and 70% for passive belts. *Ibid.*

[17] "NHTSA believes that the usage of automatic belts in Rabbits and Chevettes would have been substantially lower if the automatic belts in those cars were not equipped with a use-inducing device inhibiting detachment." Notice 25, *46 Fed. Reg. 53422 (1981)*.

[18] NHTSA commissioned a number of surveys of public attitudes in an effort to better understand why people were not using manual belts and to determine how they would react to passive restraints. The surveys reveal that while 20% to 40% of the public is opposed to wearing manual belts, the larger proportion of the population does not wear belts because they forgot or found manual belts inconvenient or bothersome. RIA, at IV-25, App. 81. In another survey, 38% of the surveyed group responded that they would welcome automatic belts, and 25% would "tolerate" them. See RIA, at IV-37, App. 93. NHTSA did not comment upon these attitude surveys in its explanation accompanying the rescission of the passive restraint requirement.

currently wear seatbelts on some occasions, [19] there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts. Whether this is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question.

LEdHN[22] [22]The agency is correct to look at the costs as well as the benefits of Standard 208. The agency's conclusion that the incremental costs of the requirements were no longer reasonable was predicated on its prediction that the safety benefits of the regulation **[**2873]** might be minimal. Specifically, the **[*55]** agency's fears that the public may resent paying more for the automatic belt systems is expressly dependent on the assumption that detachable automatic belts will not produce more than "negligible safety benefits." *Id., at 53424*.When the agency reexamines its findings as to the likely increase in seatbelt usage, it must also reconsider its judgment of the reasonableness of the monetary and other costs associated with the Standard. In reaching its judgment, NHTSA should **[****52]** bear in mind that Congress intended safety to be the pre-eminent factor under the Act:

"The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The Committee recognizes . . . that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime." S. Rep. No. 1301, 89th Cong., 2d Sess., 6 (1966).

"In establishing standards the Secretary must conform to the requirement that the standard be practicable. This would require consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors.

"Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto." H. R. Rep. No. 1776, 89th Cong., 2d Sess., 16 (1966).

The agency also failed to articulate a basis for not requiring nondetachable belts under Standard 208. It is argued that the concern of the agency with the easy detachability **[***466]** of the currently favored design would be readily solved by a continuous passive belt, which allows the occupant to "spool out" the belt and create the necessary slack **[****53]** for easy extrication from the vehicle. The agency did not separately consider the continuous belt option, but treated it together with the ignition interlock device in a category it titled "Option of Adopting Use-Compelling Features." *46 Fed. Reg. 53424 [*56] (1981)*. The agency was concerned that use-compelling devices would "complicate the extrication of [an] occupant from his or her car." *Ibid*. "[To] require that passive belts contain use-compelling features," the agency observed, "could be counterproductive [, given] . . . widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash." *Ibid*. In addition, based on the experience with the ignition interlock, the agency feared that use-compelling features might trigger adverse public reaction.

LEdHN[1G] [1G]LEdHN[23] [23]By failing to analyze the continuous seatbelts option in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under **[****54]** the arbitrary-and-capricious standard. We agree with the Court of Appeals that NHTSA did not suggest that the emergency release mechanisms used in nondetachable belts are any less effective for emergency egress than the buckle release system used in detachable belts. In 1978, when General Motors obtained the agency's approval to install a continuous passive belt, it assured the agency that nondetachable belts with spool releases were as safe as detachable belts with buckle releases. *43 Fed. Reg. 21912, 21913-21914 (1978)*. NHTSA was satisfied that this belt design assured easy extricability: "[the] agency does not believe that the use of [such] release mechanisms will cause serious occupant egress problems . . . ." *Id.*, at 52493, 52494. While the agency is entitled to change its view on the acceptability of continuous passive belts, it is obligated to explain its reasons for doing so.

LEdHN[24] [24]The agency also failed to offer any explanation why a continuous passive belt would engender the same adverse public reaction as the ignition interlock, and, as the Court of Appeals concluded, "every **[****55]** indication in the record points the other way." *220 U. S. App. D. C., at 198, 680*

[19] Four surveys of manual belt usage were conducted for NHTSA between 1978 and 1980, leading the agency to report that 40% to 50% of the people use their belts at least some of the time. RIA, at IV-25, App. 81.

F.2d, at 234.[20] **[*57]** We **[**2874]** see no basis for equating the two devices: the continuous belt, unlike the ignition interlock, does not interfere with the operation of the vehicle. More importantly, it is the agency's responsibility, not this Court's, to explain its decision.

VI

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LEdHN[1H] [1H]LEdHN[25] [25]LEdHN[26A] [26A]HN10 An agency's view of what is in the public interest may change, either with or **[****56]** without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . ." *Greater Boston Television Corp.* v. FCC, 143 U. S. App. D. C. 383, 394, 444 F.2d 841, 852 (1970) (footnote omitted), cert. denied, *403 U.S. 923 (1971)*. We do not accept all of the reasoning of **[***467]** the Court of Appeals but we do conclude that the agency has failed to supply the requisite "reasoned analysis" in this case. Accordingly, we vacate the judgment of the Court of Appeals and remand the cases to that court with directions to remand the matter to the NHTSA for further consideration consistent with this opinion. [21]

[**57]** *So ordered.*

Concur by: REHNQUIST (In Part)

Dissent by: REHNQUIST (In Part)

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[20] The Court of Appeals noted previous agency statements distinguishing interlocks from passive restraints. 42 Fed. Reg. 34290 (1977); ***36 Fed. Reg. 8296 (1971)***; RIA, at II-4, App. 30.

[21]

LEdHN[26B] [26B]Petitioners construe the Court of Appeals' order of August 4, 1982, as setting an implementation date for Standard 208, in violation of *Vermont Yankee*'s injunction against imposing such time constraints. *Vermont Yankee Nuclear Power Corp.* v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544-545 (1978). Respondents maintain that the Court of Appeals simply stayed the effective date of Standard 208, which, not having been validly rescinded, would have required mandatory passive restraints for new cars after September 1, 1982. We need not choose between these views because the agency had sufficient justification to suspend, although not to rescind, Standard 208, pending the further consideration required by the Court of Appeals, and now, by us.

Dissent

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE **POWELL**, and JUSTICE **O'CONNOR** join, concurring in part and dissenting in part.

I join Parts I, II, III, IV, and V-A of the Court's opinion. In particular, I agree that, since the airbag and continuous **[*58]** spool automatic seatbelt were explicitly approved in the Standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire Standard.

I do not believe, however, that NHTSA's view of detachable automatic seatbelts was arbitrary and capricious. The agency adequately explained its decision to rescind the Standard insofar as it was satisfied by detachable belts.

The statute that requires the Secretary of Transportation to issue motor vehicle safety standards also requires that "[each] such . . . standard shall be practicable [and] shall meet the need for motor vehicle safety." 15 U. S. C. § 1392(a) (1976 **[****58]** ed., Supp. V). The Court rejects the agency's explanation for its conclusion that there is substantial uncertainty whether requiring installation of detachable automatic belts would substantially increase seatbelt usage. The agency chose not to rely on a study showing a substantial increase in seatbelt usage in cars equipped with automatic seatbelts *and* an ignition interlock to prevent the car from being operated when the belts were not in place *and* which were voluntarily purchased with this equipment by consumers. See *ante*, at 53, n. 16. It is reasonable for the agency to decide that this study does not support any conclusion concerning the effect of automatic seatbelts that are installed in all cars whether the consumer wants them or not and are not linked to an ignition interlock system.

The Court rejects this explanation because "there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts," *ante*, at 54, **[***468]** and the agency did not adequately explain its rejection of these grounds. It seems to me that the agency's explanation, while by **[**2875]** no means a model, is **[****59]** adequate. The agency acknowledged that there would

probably be some increase in belt usage, but concluded that the increase would be small and not worth the cost of mandatory **[*59]** detachable automatic belts. 46 Fed. Reg. 53421-53423 (1981). The agency's obligation is to articulate a "'rational connection between the facts found and the choice made.'" *Ante*, at 42, 52, quoting *Burlington Truck Lines, Inc.* v. United States, 371 U.S. 156, 168 (1962). I believe it has met this standard.

The agency explicitly stated that it will increase its educational efforts in an attempt to promote public understanding, acceptance, and use of passenger restraint systems. 46 Fed. Reg. 53425 (1981). It also stated that it will "initiate efforts with automobile manufacturers to ensure that the public will have [automatic crash protection] technology available. If this does not succeed, the agency will consider regulatory action to assure that the last decade's enormous advances in crash protection technology will not be lost." Id., at 53426.

The agency's changed view of the standard seems to be related to the election of **[****60]** a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, * it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

References

*2 Am Jur **[****61]** 2d, Administrative Law 310*, 610, 612; 614, 619-621, 633, 678-691; *7A Am Jur 2d, Automobiles and Highway Traffic 171-173*, 180

2 Federal Procedure, L Ed, Administrative Procedure 2:59, 2:66-2:68, 2:232, 2:233

1 Federal Procedural Forms, L Ed, Administrative Procedure 2:21

1 Am Jur Pl & Pr Forms (Rev), Administrative Law, Forms 32-35, 42, 187, 236

16 Am Jur Proof of Facts 1, Automobile Design Hazards; 16 Am Jur Proof of Facts 351, Seat Belt Accidents

5 USCS 553, 706(2)(A); 15 USCS 1381 et seq., 1392(b)

US L Ed Digest, Administrative Law 77, 89, 250

L Ed Index to Annos, Administrative Law; Motor Vehicles and Carriers; Safety

ALR Quick Index ,Administrative Law; Automobiles and Highway Traffic; National Traffic and Motor Vehicle Safety Act ;Safety Codes or Standards; Safety Precautions or Devices; Seat Belts

Federal Quick Index, Administrative Law; Automobiles and Highway Traffic; Safety Codes and Regulations; Safety Equipment; Seat Belts

Annotation References:

Construction and application of federal Administrative Procedure Act. 94 L Ed 631, 95 L Ed 473, 97 L Ed 884.

[**62]** Judicial review of orders under National Traffic and Motor Vehicle Safety Act of 1966 (15 USCS 1381 et seq.). 18 ALR Fed 610.

Validity and construction of safety standards issued under National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 USCS 1381 et seq.). 6 ALR Fed 988.

End of Document

* Of course, a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions. But in this case, as the Court correctly concludes, *ante*, at 44-46, Congress has not required the agency to require passive restraints.

TAB 7

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 1066. Argued January 11, 1971—Decided March 2, 1971

Under § 4 (f) of the Department of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968, the Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, he may approve construction only if there has been "all possible planning to minimize harm" to the park. Petitioners contend that the Secretary has violated these statutes by authorizing a six-lane interstate highway through a Memphis public park. In April 1968 the Secretary announced that he agreed with the local officials that the highway go through the park; in September 1969 the State acquired the right-of-way inside the park; and in November 1969 the Secretary announced final approval, including the design, of the road. Neither announcement of the Secretary was accompanied by factual findings. Respondents introduced affidavits in the District Court, indicating that the Secretary had made the decision and that it was supportable. Petitioners filed counter affidavits and sought to take the deposition of a former federal highway administrator. The District Court and the Court of Appeals found that formal findings were not required and refused to order the deposition of the former administrator. Both courts held that the affidavits afforded no basis for determining that the Secretary exceeded his authority. *Held:*

1. The Secretary's action is subject to judicial review pursuant to § 701 of the Administrative Procedure Act. Pp. 409–413.

(a) There is no indication here that Congress sought to limit or prohibit judicial review. P. 410.

(b) The exemption for action "committed to agency discretion" does not apply as the Secretary does have "law to apply," rather than wide-ranging discretion. Pp. 410–413.

2. Although under § 706 of the Act *de novo* review is not required here and the Secretary's approval of the route need not

meet the substantial-evidence test, the reviewing court must conduct a substantial inquiry and determine whether the Secretary acted within the scope of his authority, whether his decision was within the small range of available choices, and whether he could have reasonably believed that there were no feasible alternatives. The court must find that the actual choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and that the Secretary followed the necessary procedural requirements. Pp. 413–416.

3. Formal findings by the Secretary are not required in this case. Pp. 417–419.

(a) The relevant statutes do not require formal findings, and there is no ambiguity in the Secretary's action. P. 417.

(b) Although a regulation requiring formal findings was issued after the Secretary had approved the route, a remand to him is not necessary as there is an administrative record facilitating full and prompt review of the Secretary's action. Pp. 417–419.

4. The case is remanded to the District Court for plenary review of the Secretary's decision. Pp. 419–420.

(a) The lower courts' review was based on litigation affidavits, which are not the whole record and are an inadequate basis for review. P. 419.

(b) In view of the lack of formal findings, the court may require the administrative officials who participated in the decision to give testimony explaining their action or require the Secretary to make formal findings. P. 420.

432 F. 2d 1307, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., filed a separate opinion, in which BRENNAN, J., joined, *post*, p. 421. BLACKMUN, J., filed a separate statement, *post*, p. 422. DOUGLAS, J., took no part in the consideration or decision of this case.

John W. Vardaman, Jr., argued the cause for petitioners. With him on the briefs was *Edward Bennett Williams*.

Solicitor General Griswold argued the cause for respondent Volpe. With him on the brief were *Assistant*

Attorney General Gray, Alan S. Rosenthal, and *Daniel Joseph. J. Alan Hanover* argued the cause for respondent Speight. With him on the brief were *David M. Pack,* Attorney General of Tennessee, *Lurton C. Goodpasture,* Assistant Attorney General, and *James B. Jalenak.*

Briefs of *amici curiae* were filed by *James M. Manire* and *Jack Petree* for the city of Memphis et al., and by *Roberts B. Owen* and *Gerald P. Norton* for the Committee of 100 on the Federal City, Inc., et al.

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE STEWART.

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation [1] designed to curb the accelerating destruction of our country's natural beauty. We are concerned in this case with § 4 (f) of the Department of Transportation Act of 1966, as amended,[2] and § 18 (a) of

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[1] See, *e. g.,* The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.* (1964 ed., Supp. V); Environmental Education Act, 84 Stat. 1312, 20 U. S. C. § 1531 *et seq.* (1970 ed.); Air Quality Act of 1967, 81 Stat. 485, 42 U. S. C. § 1857 *et seq.* (1964 ed., Supp. V); Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U. S. C. §§ 4371–4374 (1970 ed.).

[2] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or

the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U. S. C. § 138 (1964 ed., Supp. V) (hereafter § 138).[3] These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent"[4] alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been "all possible planning to minimize harm"[5] to the park.

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local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 82 Stat. 824, 49 U. S. C. § 1653 (f) (1964 ed., Supp. V).

[3] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U. S. C. § 138 (1964 ed., Supp. V).

[4] 49 U. S. C. § 1653 (f) (1964 ed., Supp. V); 23 U. S. C. § 138 (1964 ed., Supp. V).

[5] *Ibid.*

Petitioners, private citizens as well as local and national conservation organizations, contend that the Secretary has violated these statutes by authorizing the expenditure of federal funds [6] for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. Their claim was rejected by the District Court,[7] which granted the Secretary's motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed.[8] After oral argument, this Court granted a stay that halted construction and, treating the application for the stay as a petition for certiorari, granted review.[9] 400 U. S. 939. We now reverse the judgment below and remand for further proceedings in the District Court.

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway,[10] will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed. The highway is to be a segment of Interstate Highway I–40, part of the National System of Interstate and

[6] See 23 U. S. C. § 103.

[7] The case originated in the United States District Court for the District of Columbia. On application of the Secretary of Transportation it was transferred to the United States District Court for the Western District of Tennessee, which entered the summary judgment.

[8] 432 F. 2d 1307 (CA6 1970).

[9] This Court ordered the case to be heard on an expedited schedule.

[10] The proposed right-of-way will be 250 to 450 feet wide and will follow the route of a presently existing, nonaccess bus route, which carries occasional bus traffic along a 40- to 50-foot right-of-way.

Defense Highways.[11] I–40 will provide Memphis with a major east-west expressway which will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.[12]

Although the route through the park was approved by the Bureau of Public Roads in 1956 [13] and by the Federal Highway Administrator in 1966, the enactment of § 4 (f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4 (f) had been met. Federal funding for the rest of the project was, however, available; and the state acquired a right-of-way on both sides of the park.[14] In April 1968, the Secretary announced that he concurred in the judgment of local officials that I–40 should be built through the park. And in September 1969 the State acquired the right-of-way inside Overton Park from the city.[15] Final approval for the project—the route as well as the design—was not announced until November 1969, after Congress had reiterated in § 138 of the Federal-Aid Highway Act

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[11] See 23 U. S. C. § 103 (d) (1964 ed., Supp. V).

[12] I–40 will also provide an express bypass for east-west traffic through Memphis.

[13] At that time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act, 49 U. S. C. § 1651 *et seq.* (1964 ed., Supp. V), which became effective on April 1, 1967, transferred the Bureau to the new Department of Transportation.

[14] The Secretary approved these acquisitions in 1967 shortly after the effective date of § 4 (f).

[15] The State paid the City $2,000,000 for the 26-acre right-of-way and $206,000 to the Memphis Park Commission to replace park facilities that were to be destroyed by the highway. The city of Memphis has used $1,000,000 of these funds to pay for a new 160-acre park and it is anticipated that additional parkland will be acquired with the remaining money.

that highway construction through public parks was to be restricted. Neither announcement approving the route and design of I–40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Petitioners contend that the Secretary's action is invalid without such formal findings [16] and that the Secretary did not make an independent determination but merely relied on the judgment of the Memphis City Council.[17] They also contend that it would be "feasible and prudent" to route I–40 around Overton Park either to the north or to the south. And they argue that if these alternative routes are not "feasible and prudent," the present plan does not include "all possible" methods for reducing harm to the park. Petitioners claim that I–40 could be built under the park by using either of two possible tunneling methods,[18] and they claim that, at a

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[16] Respondents argue that the only issue raised by petitioners' pleadings is the failure of the Secretary to make formal findings. But when petitioners' complaint is read in the revealing light of *Conley* v. *Gibson*, 355 U. S. 41 (1957), it is clear that petitioners have also challenged the merits of the Secretary's decision.

[17] Petitioners contend that former Federal Highway Administrator Bridwell's account of an April 3, 1968, meeting with the Memphis City Council given to the Senate Subcommittee on Roads of the Senate Committee on Public Works supports this charge. See Hearings on Urban Highway Planning, Location, and Design before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong., 1st and 2d Sess., pt. 2, pp. 478–480 (1968).

[18] Petitioners argue that either a bored tunnel or a cut-and-cover tunnel, which is a fully depressed route covered after construction, could be built. Respondents contend that the construction of a tunnel by either method would greatly increase the cost of the project, would create safety hazards, and because of increases in air pollution would not reduce harm to the park.

minimum, by using advanced drainage techniques [19] the expressway could be depressed below ground level along the entire route through the park including the section that crosses the small creek.

Respondents argue that it was unnecessary for the Secretary to make formal findings, and that he did, in fact, exercise his own independent judgment which was supported by the facts. In the District Court, respondents introduced affidavits, prepared specifically for this litigation, which indicated that the Secretary had made the decision and that the decision was supportable. These affidavits were contradicted by affidavits introduced by petitioners, who also sought to take the deposition of a former Federal Highway Administrator [20] who had participated in the decision to route I–40 through Overton Park.

The District Court and the Court of Appeals found that formal findings by the Secretary were not necessary and refused to order the deposition of the former Federal Highway Administrator because those courts believed that probing of the mental processes of an administrative decisionmaker was prohibited. And, believing that the Secretary's authority was wide and reviewing courts' authority narrow in the approval of highway routes, the lower courts held that the affidavits contained no basis for a determination that the Secretary had exceeded his authority.

We agree that formal findings were not required. But we do not believe that in this case judicial review based solely on litigation affidavits was adequate.

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[19] Petitioners contend that adequate drainage could be provided by using mechanical pumps or some form of inverted siphon. They claim that such devices are often used in expressway construction.

[20] Petitioners wanted to question former Highway Administrator Bridwell. See n. 17, *supra*.

A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. V), provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation,[21] is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). *Brownell* v. *We Shung*, 352 U. S. 180, 185 (1956).[22]

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception.[23] Berger, Administrative Arbitrariness and Judicial Review, 65 Col. L. Rev. 55 (1965). The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

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[21] In addition, the Department of Transportation Act makes the Administrative Procedure Act applicable to proceedings of the Department of Transportation. 49 U. S. C. § 1655 (h) (1964 ed., Supp. V).

[22] See also *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962).

[23] The scope of this exception has been the subject of extensive commentary. See, *e. g.*, Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965 (1969); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968); Davis, Administrative Arbitrariness is Not Always Reviewable, 51 Minn. L. Rev. 643 (1967); Berger, Administrative Arbitrariness: A Sequel, 51 Minn. L. Rev. 601 (1967).

Section 4 (f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and specific directives. Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary "shall not approve any program or project" that requires the use of any public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.[24] Respondents argue, however, that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent."

But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction

[24] See 114 Cong. Rec. 19915 (statement by Rep. Holifield).

whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another,[25] there will always be a smaller outlay required from the public purse [26] when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Congress clearly did not intend that cost and disruption of the community were to be ignored [27] by the Secretary.[28] But the very existence of the statutes [29] indicates that protection of parkland was to be given para-

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[25] See n. 15, *supra*.

[26] See 114 Cong. Rec. 24037 (statement by Sen. Yarborough).

[27] See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 18–19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12.

[28] The legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision. 114 Cong. Rec. 24036–24037.

[29] The legislative history of both § 4 (f) of the Department of Transportation Act, 49 U. S. C. § 1653 (f) (1964 ed., Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U. S. C. § 138 (1964 ed., Supp. V), is ambiguous. The legislative committee reports tend to support respondents' view that the statutes are merely general directives to the Secretary requiring him to consider the importance of parkland as well as cost, community disruption, and other factors. See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12. Statements by proponents of the statutes as well as the Senate committee report on § 4 (f) indicate, however, that the Secretary was to have limited authority. See, *e. g.*, 114 Cong. Rec. 24033–24037; S. Rep. No. 1659, 89th Cong., 2d Sess., 22. See also H. R. Conf. Rep. No. 2236, 89th Cong., 2d Sess., 25. Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.

mount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Plainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. But the existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, 5 U. S. C. § 706 (1964 ed., Supp. V), which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards.[30] In all cases

[30] "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the

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agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U. S. C. §§ 706 (2)(A), (B), (C), (D) (1964 ed., Supp. V). In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by "substantial evidence." And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it was "unwarranted by the facts." 5 U. S. C. §§ 706 (2)(E), (F) (1964 ed., Supp. V).

Petitioners argue that the Secretary's approval of the construction of I–40 through Overton Park is subject to one or the other of these latter two standards of limited applicability. First, they contend that the "substantial evidence" standard of § 706 (2)(E) must be applied. In the alternative, they claim that § 706 (2)(F) applies and that there must be a *de novo* review to determine if the Secretary's action was "unwarranted by the facts." Neither of these standards is, however, applicable.

Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U. S. C. § 553 (1964 ed., Supp. V), or when the agency action is based on a public adjudicatory hearing. See 5 U. S. C. §§ 556, 557 (1964 ed., Supp. V). The Secretary's decision to allow the expenditure of federal funds to build I–40 through Overton Park was plainly not an exercise of a rulemaking function. See 1 K. Davis, Administrative Law Treatise § 5.01 (1958). And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the dis-

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whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U. S. C. § 706 (1964 ed., Supp. V).

tribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. 23 U. S. C. § 128 (1964 ed., Supp. V). The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review. See H. R. Rep. No. 1980, 79th Cong., 2d Sess.

Petitioners' alternative argument also fails. *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H. R. Rep. No. 1980, 79th Cong., 2d Sess. Neither situation exists here.

Even though there is no *de novo* review in this case and the Secretary's approval of the route of I–40 does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. See, *e. g., Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185 (1935); *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15 (1926). But that presumption is not to shield his action from a thorough, probing, in-depth review.

The court is first required to decide whether the Secretary acted within the scope of his authority. *Schilling* v. *Rogers,* 363 U. S. 666, 676–677 (1960). This determination naturally begins with a delineation of the scope of

the Secretary's authority and discretion. L. Jaffe, Judicial Control of Administrative Action 359 (1965). As has been shown, Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jaffe, *supra*, at 182. See *McBee* v. *Bomar*, 296 F. 2d 235, 237 (CA6 1961); *In re Josephson*, 218 F. 2d 174, 182 (CA1 1954); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (ND Cal. 1968). See also *Wong Wing Hang* v. *Immigration and Naturalization Serv.*, 360 F. 2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Here the only procedural error alleged is the failure of the Secretary to make formal findings and state his reason for allowing the highway to be built through the park.

Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act requires such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U. S. C. §§ 553 (a)(2), 554 (a) (1964 ed., Supp. V). And, although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See *City of Yonkers* v. *United States*, 320 U. S. 685 (1944); *American Trucking Assns.* v. *United States*, 344 U. S. 298, 320 (1953). Plainly, there is no ambiguity here; the Secretary has approved the construction of I–40 through Overton Park and has approved a specific design for the project.

Petitioners contend that although there may not be a statutory requirement that the Secretary make formal findings and even though this may not be a case for the reviewing court to impose a requirement that findings be made, Department of Transportation regulations require them. This argument is based on DOT Order 5610.1,[31] which requires the Secretary to make formal

[31] The regulation was promulgated pursuant to Executive Order 11514, dated March 5, 1970, 35 Fed. Reg. 4247, which instructed all federal agencies to initiate procedures needed to direct their policies and programs toward meeting national environmental goals.

findings when he approves the use of parkland for highway construction but which was issued after the route for I–40 was approved.[32] Petitioners argue that even though the order was not in effect at the time approval was given to the Overton Park project and even though the order was not intended to have retrospective effect the order represents the law at the time of this Court's decision and under *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281–282 (1969), should be applied to this case.

The *Thorpe* litigation resulted from an attempt to evict a tenant from a federally funded housing project under circumstances that suggested that the eviction was prompted by the tenant's objections to the management of the project. Despite repeated requests, the Housing Authority would not give an explanation for its action. The tenant claimed that the eviction interfered with her exercise of First Amendment rights and that the failure to state the reasons for the eviction and to afford her a hearing denied her due process. After denial of relief in the state courts, this Court granted certiorari "to consider whether [the tenant] was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons." 393 U. S., at 272.

While the case was pending in this Court, the Department of Housing and Urban Development issued regulations requiring Housing Authority officials to inform tenants of the reasons for an eviction and to give a tenant the opportunity to reply. The case was then remanded to the state courts to determine if the HUD regulations were applicable to that case. The state court held them not to be applicable and this Court reversed on the

[32] DOT Order 5610.1 was issued on October 7, 1970.

ground that the general rule is "that an appellate court must apply the law in effect at the time it renders its decision." 393 U. S., at 281.

While we do not question that DOT Order 5610.1 constitutes the law in effect at the time of our decision, we do not believe that *Thorpe* compels us to remand for the Secretary to make formal findings.[33] Here, unlike the situation in *Thorpe,* there has been a change in circumstances—additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. Moreover, there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.

That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely *"post hoc"* rationalizations, *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168–169 (1962), which have traditionally been found to be an inadequate basis for review. *Burlington Truck Lines* v. *United States, supra; SEC* v. *Chenery Corp.,* 318 U. S. 80, 87 (1943). And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. See n. 30, *supra.*

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[33] Even if formal findings by the Secretary were mandatory, the proper course would be to remand the case to the District Court directing that court to order the Secretary to make formal findings. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 446, p. 929 (R. Wolfson & P. Kurland ed. 1951). Of course, the District Court is not prohibited from remanding the case to the Secretary. See *infra,* at 420.

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.[34] But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States* v. *Morgan*, 313 U. S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See *Shaughnessy* v. *Accardi*, 349 U. S. 280 (1955).

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "*post hoc* rationalization" and thus must be viewed critically. If the District Court decides

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[34] The Solicitor General now urges that in order to avoid additional delay the proper course is to remand the case to the District Court for review of the full administrative record.

that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. The Act of Congress in connection with other federal highway aid legislation,[1] it seems to me,

[1] See 23 U. S. C. § 128 (1964 ed., Supp. V) and regulations promulgated thereunder, 34 Fed. Reg. 727–730 (1969).

calls for hearings—hearings that a court can review, hearings that demonstrate more than mere arbitrary defiance by the Secretary. Whether the findings growing out of such hearings are labeled "formal" or "informal" appears to me to be no more than an exercise in semantics. Whatever the hearing requirements might be, the Department of Transportation failed to meet them in this case. I regret that I am compelled to conclude for myself that, except for some too-late formulations, apparently coming from the Solicitor General's office, this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress. It is our duty, I believe, to remand this whole matter back to the Secretary of Transportation for him to give this matter the hearing it deserves in full good-faith obedience to the Act of Congress. That Act was obviously passed to protect our public parks from forays by road builders except in the most extraordinary and imperative circumstances.[2] This record does not demonstrate the existence of such circumstances. I dissent from the Court's failure to send the case back to the Secretary, whose duty has not yet been performed.

MR. JUSTICE BLACKMUN.

I fully join the Court in its opinion and in its judgment. I merely wish to state the obvious: (1) The case comes to this Court as the end product of more than a decade of endeavor to solve the interstate highway problem at Memphis. (2) The administrative decisions under attack here are not those of a single Secretary; some were made by the present Secretary's predecessor and, before him, by the Department of Commerce's Bureau of Public

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[2] See also *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 400 U. S. 968, 972 (1970) (dissents from the denial of certiorari).

Roads. (3) The 1966 Act and the 1968 Act have cut across former methods and here have imposed new standards and conditions upon a situation that already was largely developed.

This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after the passage of the 1966 Act.

TAB 8

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.

United States Court of Appeals for the Ninth Circuit

July 13, 2005, Argued and Submitted ; September 1, 2005, Decided ; July 26, 2005, Filed

No. 05-35569, No. 05-35646, No. 05-35570

Reporter
422 F.3d 782 *; 2005 U.S. App. LEXIS 15318 **; 60 ERC (BNA) 1929

NATIONAL WILDLIFE FEDERATION; IDAHO WILDLIFE FEDERATION; WASHINGTON WILDLIFE FEDERATION; SIERRA CLUB; TROUT UNLIMITED; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; IDAHO RIVERS UNITED; IDAHO STEELHEAD AND SALMON UNITED; NORTHWEST SPORT FISHING INDUSTRY ASSOCIATION, SALMON FOR ALL; COLUMBIA RIVERKEEPER; NW ENERGY COALITION; FEDERATION OF FLY FISHERS; AMERICAN RIVERS, INC., Plaintiffs-Appellees, v. NATIONAL MARINE FISHERIES SERVICE; UNITED STATES ARMY CORPS OF ENGINEERS; U.S. BUREAU OF RECLAMATION, Defendants, FRANKLIN COUNTY FARM BUREAU FEDERATION; GRANT COUNTY FARM BOARD FEDERATION; WASHINGTON FARM BUREAU FEDERATION; STATE OF IDAHO; CLARKSON GOLF & COUNTRY CLUB, Defendants-Intervenors, and NORTHWEST IRRIGATION UTILITIES; PUBLIC POWER COUNCIL; PACIFIC NORTHWEST GENERATING COOPERATIVE; BPA CUSTOMER GROUP, Defendants-Intervenors-Appellants, v. STATE OF OREGON, Plaintiff-Intervenor-Appellee. NATIONAL WILDLIFE FEDERATION; IDAHO WILDLIFE FEDERATION; WASHINGTON WILDLIFE FEDERATION; SIERRA CLUB; TROUT UNLIMITED; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; IDAHO RIVERS UNITED; IDAHO STEELHEAD AND SALMON UNITED; NORTHWEST SPORT FISHING INDUSTRY ASSOCIATION, SALMON FOR ALL; COLUMBIA RIVERKEEPER; NW ENERGY COALITION; FEDERATION OF FLY FISHERS; AMERICAN RIVERS, INC., Plaintiffs-Appellees, v. NATIONAL MARINE FISHERIES SERVICE; UNITED STATES ARMY CORPS OF ENGINEERS; U.S. BUREAU OF RECLAMATION, Defendants, NORTHWEST IRRIGATION UTILITIES; PUBLIC POWER COUNCIL; PACIFIC NORTHWEST GENERATING COOPERATIVE; BPA CUSTOMER GROUP; FRANKLIN COUNTY FARM BUREAU FEDERATION; GRANT COUNTY FARM BOARD FEDERATION; WASHINGTON FARM BUREAU FEDERATION; CLARKSON GOLF & COUNTRY CLUB, Defendants-Intervenors, and STATE OF IDAHO, Defendant-Intervenor-Appellant, v. STATE OF OREGON, Plaintiff-Intervenor-Appellee. NATIONAL WILDLIFE FEDERATION; IDAHO WILDLIFE FEDERATION; WASHINGTON WILDLIFE FEDERATION; SIERRA CLUB; TROUT UNLIMITED; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; IDAHO RIVERS UNITED; IDAHO STEELHEAD AND SALMON UNITED; NORTHWEST SPORT FISHING INDUSTRY ASSOCIATION, SALMON FOR ALL; COLUMBIA RIVERKEEPER; NW ENERGY COALITION; FEDERATION OF FLY FISHERS; AMERICAN RIVERS, INC., Plaintiffs-Appellees, v. NATIONAL MARINE FISHERIES SERVICE; UNITED STATES ARMY CORPS OF ENGINEERS; U.S. BUREAU OF RECLAMATION, Defendants-Appellants, and NORTHWEST IRRIGATION UTILITIES; PUBLIC POWER COUNCIL; PACIFIC NORTHWEST GENERATING COOPERATIVE; BPA CUSTOMER GROUP; FRANKLIN COUNTY FARM BUREAU FEDERATION; GRANT COUNTY FARM BOARD FEDERATION; WASHINGTON FARM BUREAU FEDERATION; STATE OF IDAHO; CLARKSON GOLF & COUNTRY CLUB, Defendants-Intervenors, v. STATE OF OREGON, Plaintiff-Intervenor-Appellee.

Subsequent History: Remanded by *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2005 U.S. Dist. LEXIS 48580 (D. Or., Oct. 7, 2005)*

Prior History: [1]** Appeal from the United States District Court for the District of Oregon. James A. Redden, District Judge, Presiding.

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 418 F.3d 971, 2005 U.S. App. LEXIS 24268 (9th Cir. Or., 2005)
Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2004

U.S. Dist. LEXIS 15239 (D. Or., July 29, 2004)

Disposition: AFFIRMED AND REMANDED.

Counsel: Mark Eames, NOAA Office of General Counsel, Seattle, Washington; Gayle Lear, Assistant Division Counsel, Northwestern Division, U.S. Army Corps of Engineers, Portland, Oregon; Kelly A. Johnson, Acting Assistant Attorney General, Fred Disheroon, Ruth Ann Lowery, Ellen J. Durkee, and Jennifer L. Scheller, Attorneys, Environment & Natural Resources Division, U.S. Department of Justice, Washington, D.C., for the federal defendants-appellants.

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Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, David E. Leith, Assistant Attorney General, and Stephen K. Bushong, State of Oregon, Salem, Oregon, for plaintiff-intervenor-appellee State of Oregon.

Koward G. Arnett, Karnopp Petersen, LLP, Bend, Oregon; David J. Cummings, Nez Perce Tribe, Lapwai, Idaho; Christopher B. Leahy, Fredericks, Pelcyger & Hester, LLC, Louisville, Colorado; Tim Weaver, Law Offices of Tim Weaver, Yakima, Washington, for amici curiae Treaty Tribes.

Robert D. Thornton and Paul S. Weiland, Nossaman, Guthner, Knox & Elliott, LLP, Irvine, California, for amicus curiae National Association of Homebuilders.

Rob McKenna, Attorney General, and Michael S. Grossman, Assistant Attorney General, State of Washington, Olympia, Washington, for amicus curiae State of Washington.

John C. Bruning, Attorney General, David D. Cookson, Assistant Attorney General, State of Nebraska, Lincoln, Nebraska; Thomas R. Wilmoth, Special Assistant Attorney General, Fennemore Craig, P.C., Lincoln, Nebraska, for amicus curiae State of Nebraska.

Judges: Before: A. Wallace Tashima, Sidney R. Thomas, and **[**3]** Richard A. Paez, Circuit Judges.

Opinion

[*787] AMENDED OPINION

PER CURIAM:

The defendants appeal the district court's grant of a preliminary injunction, based on a violation of the Endangered Species Act (or "ESA"), *16 U.S.C. §§ 1531-1544*, **[*788]** requiring the United States to pass a specified amount of water through the spillgates of four dams on the Snake River, and one dam on the Columbia River during the summer months of 2005, rather than passing the water through turbines for power generation. We affirm in part and remand in part.

I

The Columbia River is the fourth largest river on the North American continent. It drains approximately 259,000 square miles, including territory in seven states and one Canadian province. It flows for more than 1,200 miles from the base of the Canadian Rockies to the Pacific Ocean. As part of the cycle of life in the Columbia River system, every year hundreds of thousands of salmon and steelhead travel up and down the river and its tributaries, hatching in fresh water, migrating downstream to the sea to achieve adulthood, and then returning upstream to spawn. The Snake River is the Columbia River's main **[**4]** tributary.

As part of the modern cycle of life in the Columbia River System, each year brings litigation to the federal courts of the Northwest over the operation of the Federal Columbia River Power System ("FCRPS" or "Columbia River System") [1] and, in particular, the effects of system operation on the anadromous salmon and steelhead protected by the Endangered Species Act.

No one disputes that the wild Pacific salmon population

[1] The FCRPS consists of 14 sets of dams and related facilities: Bonneville, The Dales, John Day, and McNary dams in the lower Columbia River Basin; Chief Joseph, Grand Coulee, Libby, Hungry Horse, and Albeni Falls dams in the upper Columbia River Basin; and Ice Harbor, Lower Monumental, Little Goose, Lower Granite, and Dworshak Dams in the lower Snake River Basin. The United States Bureau of Reclamation manages the Grand Coulee and Hungry Horse dams; the remainder are managed by the United States Army Corps of Engineers.

has significantly decreased; indeed, in recent years, salmon **[**5]** runs have declined to a small percentage of their historic abundance. There are now thirteen species of Columbia, Snake, and Willamette River salmon and steelhead that are protected by the Endangered Species Act. [2] The district court found in this case that "the listed species are in serious decline and not evidencing signs of recovery." Each of the thirteen affected stocks migrate at different times of the year to different parts of the Columbia Basin. For example, Upper Columbia spring Chinook adults return to their spawning grounds in the spring of each year; Snake River fall Chinook adults return to the Snake River Basin in the fall. Juveniles of these stocks generally migrate seaward between mid-April and early September. The spring and summer Chinook, steelhead, and sockeye salmon migrate as yearling juveniles in the spring. Subyearling fall Chinook migrate down the river during the mid-to-late summer. Some salmon migrate downstream after spending a year in fresh water; others migrate the same year.

[6]** The primary focus of the present lawsuit is the survival of the fall juvenile Chinook salmon and steelhead migrating downstream to the Pacific Ocean. These fish **[*789]** must pass a number of FCRPS dams on their journey to the sea and suffer a very high mortality rate in doing so, sometimes as high as 92%. As the fish migrate downstream, they first encounter reservoirs behind the dams, which slows their progress and exposes them to predatory fish, such as the northern pikeminnow. After passage through each dam's reservoir, the juvenile salmon and steelhead must pass each dam. There are four main methods by which salmon may navigate the Columbia and Snake River hydroelectric projects while migrating from upriver areas to the ocean: (1) spill over the dams; (2) passage through turbines; (3) in-river bypass systems; and (4) transportation bypass systems. Of these options, passage through turbines unquestionably causes the highest mortality rate. Historically, spill has been considered to cause the lowest mortality. However, spill must be carefully managed to avoid gas supersaturation, which is harmful to the fish. [3]

[7]** Each dam in the migration corridor of the mainstream Snake and Columbia rivers has a bypass system. At some dams, the bypass consists of screens in front of the turbine intakes that divert the salmon and steelhead into a passageway through the dam and downstream. At others, the bypass system diverts the fish into barges for transportation around the dam.

The operation of the Columbia River System is complex. The Army Corps of Engineers and the Bureau of Reclamation manage the dams for multi-purpose operations; the Bonneville Power Administration manages federal power generated from the dams; and the Federal Energy Regulatory Commission plays a number of roles, including licensing of non-federal hydro-power projects. Although the focus of this litigation is the effect of Columbia River System operation on endangered species, in the day-to-day operation, federal agencies must manage the system to deliver needed power and water to Northwest consumers.

States also have an influence on the Columbia River System, directly in their governance of water diversions from the river, and indirectly through their own fish and wildlife conservation programs. The operation of the Columbia River **[**8]** System is also impacted by treaties with a number of federally recognized Indian Tribes, which reserve to the tribes certain fishing rights that are affected by the management of the FCRPS. [4]

In the last several decades, the management of the Columbia River System has been strongly influenced by the Endangered Species Act, which requires federal agencies to, in consultation with what is known as the

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[2] Snake River Chinook salmon (fall-run); Snake River Chinook salmon (spring/summer-run); Snake River sockeye salmon; Upper Columbia River steelhead; Snake River Basin steelhead; Lower Columbia River coho salmon; Lower Columbia River steelhead; Middle Columbia River steelhead; Upper Willamette River steelhead; Lower Columbia River Chinook salmon; Upper Willamette River Chinook salmon; Upper Columbia River Chinook salmon (spring-run); and Columbia River chum salmon.

[3] Falling water over the dam increases the amount of atmospheric gases that are dissolved in the water. If the level of dissolved atmospheric gases is too high, fish can experience "gas bubble trauma," which is similar to the "bends" experienced by human divers who return to the surface too quickly.

[4] *See, e.g.*Treaty with the Nez Perces, 12 Stat. 957, Art. 3 (June 11, 1855); ***Treaty with the Tribes of the Middle Oregon (Confederated Tribes of the Warm Springs Reservation of Oregon), 12 Stat. 963 (June 25, 1855)***; ***Treaty with the Yakima, 12 Stat. 951 (June 9, 1855)***; ***Treaty with the Wallawalla, Cayuse, et. al. (Confederated Tribes of the Umatilla Indian Reservation), 12 Stat. 945 (June 9, 1855)***. In their amici brief, the treaty tribes support the position of the National Wildlife Federation in this action.

"consulting agency," conserve species listed under the ESA. **[**9]** The ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat. . . ." **[*790]** *16 U.S.C. § 1536(a)(2)*. To ensure that the agency would meet its substantive ESA duties, the ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species. *Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985)*. To that end, the agency planning the action, usually known as the "action agency," must consult with the consulting agency. This process is known as a "*Section 7*" consultation. The process is usually initiated by a formal written request by the action agency to the consulting agency. After consultation and analysis, the consulting agency then prepares a biological opinion. *See generally Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229, 1239 (9th Cir. 2001)*.

[10]** The consulting agency evaluates the effects of the proposed action on the survival of species and any potential destruction or adverse modification of critical habitat in a biological opinion, *16 U.S.C. § 1536(b)*, based on "the best scientific and commercial data available," *id.* at *§ 1536(a)(2)*. The biological opinion includes a summary of the information upon which the opinion is based, a discussion of the effects of the action on listed species or critical habitat, and the consulting agency's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. . . ." *50 C.F.R. § 402.14(h)*. In making its jeopardy determination, the consulting agency evaluates "the current status of the listed species or critical habitat," the "effects of the action," and "cumulative effects." *50 C.F.R. § 402.14(g)(2)-(3)*. "Effects of the action" include both direct and indirect effects of an action that will be added to the "environmental baseline." *50 C.F.R. § 402.02* **[**11]** . The environmental baseline includes "the past and present impacts of all Federal, State or private actions and other human activities in the action area" and "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early *section 7* consultation." *Id.*

If the biological opinion concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a "reasonable and prudent alternative" to the agency action that avoids jeopardy and adverse modification and that the incidental taking of endangered or threatened species will not violate *section 7(a)(2)*, the consulting agency can issue an "Incidental Take Statement" which, if followed, exempts the action agency from the prohibition on takings [5] found in *Section 9 of the ESA*. *16 U.S.C. § 1536(b)(4)*; *Aluminum Co. of America v. Administrator, Bonneville Power Administration, 175 F.3d 1156, 1159 (9th Cir. 1999)*.

[12]** If the consulting agency concludes that an action agency's action may jeopardize the survival of species protected by the ESA, or adversely modify a species' critical habitat, the action must be modified. *Id.* The consulting agency may recommend a "reasonable and prudent alternative" to the agency's proposed action. *Id.* at *§ 1536(b)(3)(A)*.

The issuance of a biological opinion is considered a final agency action, and therefore subject to judicial review. *Bennett v. Spear, 520 U.S. 154, 178, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997)*; *Ariz. Cattle Growers' Ass'n, 273 F.3d at 1235*.

The Endangered Species Act, as it applies here to protection of anadromous fish, requires action agencies to consult the **[*791]** agency formerly known as the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NMFS"), [6] to ensure that an agency's actions do not jeopardize an ESA-protected species or adversely modify their critical habitat. *16 U.S.C. § 1536(a)-(b)*.

[13]** Snake River fall Chinook salmon were listed as threatened species in 1992. In 1993, NMFS issued a biological opinion concluding that FCRPS operations would not jeopardize the listed species. The district court held that NMFS's action in issuing the 1993 biological opinion was arbitrary and capricious. *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994)*. The district court found that NMFS had failed to give an adequate explanation for several of the key assumptions that went

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[5] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *16 U.S.C. § 1532(19)*.

[6] The agency has now been renamed "NOAA Fisheries." Because many of the documents refer to the agency by its former name, it shall be referenced as "NMFS" throughout this opinion for convenience of reference.

into its jeopardy analysis. This decision was vacated on appeal as moot because NMFS had issued a subsequent biological opinion. *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv., 56 F.3d 1071, 1075 (9th Cir. 1995)*. After further litigation and agency action not directly relevant to this case, NMFS issued a new biological opinion on December 21, 2000, (the "2000 BiOp") that superseded the previous biological opinions.

In its 2000 BiOp, NMFS determined that the continued operation of FCRPS as proposed by the action agencies would jeopardize eight listed salmon and steelhead species; specifically, NMFS found that the "effects **[**14]** of the proposed or continuing action, the effects of the environmental baseline, and any cumulative effects, and considering measures for survival and recovery specific to other life stages" would leave the eight species with too low a likelihood of survival and potential for population recovery. NMFS thus developed reasonable and prudent alternatives to the proposed operation and analyzed whether these alternatives, in conjunction with the environmental baseline and cumulative effects, would avoid jeopardizing the species. NMFS found these alternatives insufficient. NMFS therefore assessed whether the additional impact of off-site mitigation activities unrelated to FCRPS operations, including hatchery and habitat initiatives, would avoid jeopardy, and found that it did.

Plaintiff National Wildlife Federation ("NWF") brought this present action challenging the 2000 BiOp in U.S. District Court for the District of Oregon. The district court concluded that the 2000 BiOp was invalid because to reach its jeopardy determination, NMFS improperly relied on off-site federal mitigation actions that had not undergone Section 7 consultation, and thus were not properly included in the environmental **[**15]** baseline, [7] and on non-federal mitigation actions that were not reasonably certain to occur, and thus were not properly included in cumulative effects. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Servs., 254 F. Supp. 2d 1196, 1211-12 (D. Or. 2003)*. The district court remanded to provide NMFS an opportunity to correct the 2000 BiOp. *Id. at 1215*.

[*792] Rather than correct the 2000 BiOp, NMFS issued an entirely new biological opinion on November 30, 2004 (the "2004 BiOp"), which formed the basis of the federal agencies' operating plans for the FCRPS during **[**16]** the summer of 2005. In the 2004 BiOp, NMFS conducted a jeopardy analysis which utilized the novel approach of including in the environmental baseline the existing FCRPS, the nondiscretionary dam operations, and all past and present impacts from discretionary operations. As opposed to assessing whether the salmon and steelhead would be jeopardized by the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species, NMFS instead evaluated whether the proposed agency action, consisting of only the proposed discretionary operation of the FCRPS, would have no net effect on a species when compared to the environmental baseline. By using this comparative approach rather than the aggregate approach, NMFS was able to conclude that the proposed action would not jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat for three of these species.

NWF and the State of Oregon challenged the following aspects of 2004 BiOp, specifically and as relevant to this appeal: (1) the segregation of the existing FCRPS, the non-discretionary dam operations, and all past and present impacts of discretionary **[**17]** operations from the proposed discretionary operations; (2) the basic analytical framework NMFS employed to come to its no-jeopardy and critical habitat determinations; and (3) the critical habitat determinations which plaintiffs alleged did not analyze what habitat conditions are necessary for recovery. [8]

The district court granted summary judgment for NWF and Oregon, holding that NMFS had violated the ESA in the issuance of its 2004 BiOp. The district court found the 2004 BiOp legally insufficient for four independent reasons:

. The opinion failed to conduct a jeopardy analysis

[7] The 2004 BiOp concluded that NMFS could not distinguish the effects of the discretionary and nondiscretionary FCRPS operations, and therefore created a hypothetical "reference operation" to which it compared the discretionary proposed action. The reference operation was developed to "maximize fish benefits" and it "overestimates the beneficial effects that the Action Agencies can actually achieve." 2004 BiOp at 5-6.

[8] The State of Oregon supports the substantive position of NWF, but takes no position on the preliminary injunction. The State of Washington supports NWF's position that the 2004 BiOp is invalid, but opposes the preliminary injunction remedy. The States of Idaho and Nebraska support the federal government's position on both the merits and the preliminary injunction remedy.

on the basis of all elements of the proposed action, **[**18]** including the so-called non-discretionary operations of the dams;

. The opinion failed to use an aggregation of the impacts from the proposed action, the environmental baseline, and the cumulative impacts as the basis for the jeopardy analysis;

. The opinion's critical habitat determination was flawed because it failed to determine separately whether the proposed action would destroy or adversely modify critical habitat necessary for the recovery as well as survival of the listed species; and

. The opinion's jeopardy analysis failed to address both recovery and survival of the listed species.

The order granting summary judgment to the plaintiffs "invalidated" the 2004 BiOp. However, the district court specified that its summary judgment order was not final or appealable. Following the district court's decision to invalidate the 2004 BiOp, NWF moved for a preliminary injunction requiring NMFS to: (1) withdraw the 2004 BiOp; (2) comply with and implement all of the reasonable and prudent alternative mitigation actions described in the 2000 BiOp (with certain exceptions); **[*793]** (3) as to the 2005 summer flow, decrease the water particle travel time by 10% in specified **[**19]** areas; and (4) provide water spill over specified dams during the summer of 2005.

The district court, based on its determination that the 2004 BiOp was procedurally and substantively flawed and its finding that the operations of FCRPS strongly contribute to the endangerment of the listed species and will cause irreparable injury if not changed, granted in part the motion for a preliminary injunction. The district court announced its intention to order the withdrawal of the 2004 BiOp, but declined to do so until after a fall status conference. The court denied the request to order the decrease of water particle travel time by at least 10% in the specified areas. The court granted the request to order summer spills at specified areas in order to avoid irreparable harm to juvenile fall chinook and other listed species. Specifically, the district court ordered the affected agencies to: (1) provide spill from June 20, 2005, through August 31, 2005, of all water in excess of that required for station service, on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and (2) provide spill from July 1, 2005, through August 31, 2005, of **[**20]** all flows above 50,000 cubic feet per second, on a 24-hour basis, at the McNary Dam on the Columbia River.

The district court also held in its order that the respective Records of Consultation and Statements of Decision issued by the Army Corps of Engineers on January 3, 2005, and by the Bureau of Reclamation on January 12, 2005, violated the ESA because they were based on the invalid 2004 BiOp.

The defendants filed an emergency motion for a stay of the injunction order pending appeal. A motions panel denied the defendants' stay motion, but ordered an expedited hearing on the preliminary injunction appeal. Oral argument on the preliminary injunction appeal was held July 13, 2005. The panel expresses its appreciation to the parties for providing extensive briefing on short notice and on an accelerated time schedule.

II

A district court's order with respect to preliminary injunctive relief is subject to limited appellate review, and we will reverse only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002)* **[**21]** . "Our review is limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003)* (en banc). In considering a preliminary injunction appeal, we ordinarily do not decide the ultimate merits of the case, but only the temporal rights of the parties until the district court renders judgment on the merits of the case based on a fully developed record. *Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991)*. Mere disagreement with the district court's conclusions is not sufficient reason for us to reverse the district court's decision regarding a preliminary injunction. *Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982)*; *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric. ("R-CALF"), 415 F.3d 1078, 2005 U.S. App. LEXIS 15148, *28, No. 05-35264 (9th Cir. Jul. 25 2005)* (setting forth standard of review).

The traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA. *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1510 (9th Cir. 1994)* **[**22]** . "In **[*794]** cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests." *Id. at*

1511 (citing Friends of the Earth v. United States Navy, 841 F.2d 927, 933 (9th Cir. 1988)). As the Supreme Court has noted, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." TVA v. Hill, 437 U.S. 153, 194, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). Accordingly, courts "may not use equity's scales to strike a different balance." Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987); *see also* Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.").

A

Given this clear authority, we must at the onset reject the argument of the federal appellants that the district court erred as a matter of law by failing to conduct a traditional preliminary **[**23]** injunction analysis and, in particular, by failing to weigh economic harm to the public in reaching its conclusion. As the Supreme Court has instructed, such an analysis does not apply to ESA cases because Congress has already struck the balance. *Id.* Therefore, we conclude that the district court did not apply an incorrect legal standard in this case.

We decline to address the legal issues raised by the district court's summary judgment order. We review the merits only in the very confined context of determining whether the district court abused its discretion in granting the preliminary injunction. To establish a substantial likelihood of success on the merits sufficient to pass appellate review of a district court's grant of a preliminary injunction, the plaintiffs were only obligated to show "a fair chance of success." Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc). Based on our review of the record and briefs in this emergency appeal, we conclude that the plaintiffs have met this burden by raising substantial questions as to whether the agencies have violated Section 7 of the ESA **[**24]** by improperly circumscribing the scope of the consultation or failing to aggregate the impacts of the proposed action. However, in making this threshold determination, we express no opinion on the ultimate merits of the district court's summary judgment decision, leaving that final determination to the district court in the first instance.

B

We also conclude that the district court's grant of a preliminary injunction was not based on clearly erroneous findings of fact. Although the facts and scientific analysis underlying the district court's decision are hotly contested by the parties, our review in the preliminary injunction context is very deferential. On appellate review in this context, we consider a finding of fact to be clearly erroneous if it is implausible in light of the record, viewed in its entirety, Serv. Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1317 n.7 (9th Cir. 1992), or if the record contains no evidence to support it, *Oregon Natural Resources Council v. Marsh, 52 F.3d 1485, 1492 (9th Cir. 1995)*. Having reviewed the extensive, albeit incomplete, record provided to us by the parties in this expedited **[**25]** proceeding, we find no reversible error in the factual findings made by the district court.

[*795] One of the important factual findings made by the district court was that the federal operation of the Columbia and Snake River dams "strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made." The federal appellants contest this finding, arguing that the data show that returns of fall chinook salmon have increased. The district court concluded otherwise in its orders, finding in a 2004 order that the "predicted survival improvement for fall chinook juveniles has not materialized." The government's own recent data show that between 78-92% of juvenile fall chinook salmon that remain in-river for their migration are killed by operation of the dams even with use of mitigating measures, with a mean estimated kill of 86% of the salmon migrating in-river. [9] NWF strongly argues that the government's assertion of recovery is based on a single, scientifically flawed, study. NWF also claims, through expert testimony, that the increased returns were due to large releases of hatchery fish, rather than successful fish transport **[**26]** over dams, and that the mortality rate for migrating juvenile salmon is actually increasing. The federal agencies dispute this, and offer counter-testimony. The record is replete with differing opinions by various experts. One of the few undisputed points, however, is that the fall chinook salmon remain a species listed under the ESA as "likely to become endangered in the foreseeable future."

Our task in reviewing a district court's preliminary injunction decision is not to resolve these controversies. "Clear error is not demonstrated by pointing to

[9] Although a non-trivial level of mortality would likely occur under free-flowing river conditions, FCRPS operations account for most of the mortality.

conflicting evidence in the record." *United States v. Frank, 956 F.2d 872, 875 (9th Cir. 1991)*. Rather, "as long as findings are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result." *Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel, 841 F.2d 259, 262 n.1 (9th Cir.1988)* **[**27]** (citing *Anderson v. Bessemer City, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985))*. Viewing the record as a whole with our deferential standard of review, we cannot say that the district court's factual finding concerning irreparable harm was clearly erroneous.

III

Having determined that the district court did not use an incorrect legal standard in its preliminary injunction analysis and did not make clearly erroneous factual findings, we must decide whether the district court abused its discretion in granting the preliminary injunction.

A

As we have discussed, the district court's preliminary injunction order was premised on its finding that the agencies had violated both the substantive and procedural requirements of *ESA § 7*. Thus, the question before the district court was what interim remedy was appropriate to redress the ESA violations.

Although not every statutory violation leads to the "automatic" issuance of an injunction, in the context of the ESA, "the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute." *Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002)* **[**28]** (citing *TVA, 437 U.S. at 194*). We therefore have **[*796]** held that injunctive relief was necessary to effectuate Congress's clear intent by requiring compliance with the substantive and procedural provisions of the ESA. *Id. at 1177* (holding that the district court was "compelled" to grant injunctive relief to remedy a violation of the ESA); *Sierra Club, 816 F.2d at 1384* (holding that the Sierra Club was entitled to injunctive relief if the agency violated substantive or procedural provisions of the ESA).

Given this legal backdrop, we conclude that the district court did not abuse its discretion in granting a preliminary injunction. It had rejected the biological opinion upon which the summer operations were premised, and it had concluded that continuation of the status quo could result in irreparable harm to a threatened species. Those are precisely the circumstances in which our precedent indicates that the issuance of an injunction is appropriate.

This case is unlike the circumstances presented in our recent decision in *R-CALF*. In *R-CALF,* we concluded that the district court had misread the governing statute. *R-CALF, 2005 U.S. App. LEXIS 15148 at *33* **[**29]** . We also concluded that the agency had acted in conformity with the governing statute. *415 F.3d 1078, 2005 U.S. App. LEXIS 15148 at *32-33*. We further concluded that none of the reasons listed by the district court supported its conclusion that the agency's adoption of the final rule at issue was arbitrary and capricious. *415 F.3d 1078, 2005 U.S. App. LEXIS 15148 at *34*.

Here, in contrast, the district court's conclusions were well grounded in the governing statute; the agency had altered its own interpretation of the statute significantly; and the record supported the district court's reasoning in declaring the 2004 BiOp to be invalid. Further, the operations involved in this case have had a long history. The district court has monitored the situation carefully over the past few years and has found that the status quo will not lead to recovery of the listed species. Thus, although we do not reach the merits of the summary judgment order, the record supports the district court's analysis that the plaintiffs are likely to prevail on the merits of their claim that the 2004 BiOp violates *Section 7 of the ESA* and is arbitrary and capricious **[**30]** under the *Administrative Procedures Act*. Finally, as we have discussed, the standard for injunctive relief under the ESA is far different from the usual standard governing preliminary injunctions that applied in the *R-CALF* case. In ESA cases such as the one at bar, "the balance has been struck in favor of affording endangered species the highest of priorities." *TVA, 437 U.S. at 194*. For these reasons, this case is quite distinguishable from *RCALF*, and we conclude that the district court did not commit reversible error in deciding to grant a preliminary injunction.

B

Having concluded that the district court did not err in deciding to grant preliminary injunctive relief, we must also examine the nature and scope of relief ordered by the district court. One of the primary complications of this case is that the operations in question are, by necessity, ongoing. Thus, our situation is unlike that of a timber sale, which can be postponed in order to permit the agency to correct the ESA violations before the

planned operation commences. *See, e.g.*, *Native Ecosystems Council v. Dombeck, 304 F.3d 886, 900-03 (9th Cir. 2002)* **[**31]** (enjoining timber sale for ESA and NEPA violations). Here, the district court was faced with a continuing operation that it had concluded would cause irreparable harm to threatened species. Thus, the district court was confronted with two choices: (1) continue the status quo, the **[*797]** foundation of which the court had rejected as violative of the ESA and the continuation of which it had concluded could irreparably harm listed species, or (2) order modifications. After considering the positions of the parties, the district court adopted one of the plaintiffs' suggestions: mandatory summer spills over selected dams. It rejected the plaintiffs' other major request, namely that the court order a decrease in the water particle travel time by 10% in specified areas. [10]

The district court's selection **[**32]** of a remedy of selected spills was based on expert opinion tendered by the plaintiffs and evidence in the historical record. Frederick Olney, a former fishery biologist for the U.S. Fish and Wildlife Service with thirty-five years of experience in the field, testified by affidavit that spilling water for fish passage was a "cornerstone of protection and mitigation programs" in the area and that there was "regional agreement that spill is the safest passage route through mainstream hydroelectric projects." He testified that "recent information indicates that transportation [of fish] is not providing the benefits previously assumed," citing the 2004 BiOp statement that "it is uncertain whether transport provides a benefit or a detriment for Snake River fall Chinook." Olney concluded that the plaintiffs' request for summer spills would pose less risk for migrating fish than the proposed operations.

The plaintiffs also tendered the opinion of Stephen Pettit, a former fisheries research biologist for the Idaho Department of Fish and Game, who similarly concluded that the plaintiffs' proposed spills would "reduce significantly, even substantially, the harmful effects ESA-listed salmon **[**33]** and steelhead would otherwise experience under the 2004 BiOp."

In addition to the opinions of these experts, and others, the district court considered the previous positive results of the prior use of spills for assisting salmon migrating during the summer months. The 2000 BiOp concluded that "relative to other passage routes currently available, direct juvenile survival is highest through spillbays." In reaching this conclusion, the agency took into consideration the possibility of gas bubble trauma and elevated temperatures. The agency also concluded that spillway passage "should be the baseline against which other passage methods are measured." Because "juvenile survival is generally highest through this passage route," the 2000 BiOp recommended that "measures that increase juvenile fish passage over FCRPS project spillways are the highest priority unless it can be shown that alternative passage improvements would provide comparable survival." The district court's action was in accord with the consulting agency's findings and recommendations in its 2000 BiOp, which was the only operative document at the time, and was in conformance with the historical belief that spillway passage **[**34]** produced the highest survival of the species. This historical assumption was not contested in the 2004 BiOp; rather, it asserted that alternative transportation could provide comparable, but not necessarily better, survival rates.

In short, without summarizing all of the voluminous evidence in the record, the district court had a more than sufficient basis upon which to conclude that summer spills would provide the best and safest alternative to the planned operations contemplated **[*798]** in the 2004 BiOp that was rejected by the court.

The federal appellants and other defendants vigorously contest the conclusions of the experts tendered by the plaintiffs. The defendants offered substantial expert counter-testimony in opposition to the proposed spills, with experts opining that:

> . Because the migratory patterns and river conditions are so different, it is inappropriate to extrapolate the experience from previous spills involving adult salmon at different locations and times to the summer spills proposed by the plaintiffs to assist juvenile migrating salmon.
>
> . Although passage over a spillway may result in higher survival, the falling water over the dam increases **[**35]** the amount of atmospheric gases that are dissolved in the water, which may cause "gas bubble trauma" and damage fish. In addition, spills may expose the fish to potentially dangerous high water temperatures.
>
> . Research indicates that there is no apparent difference in adult return rates between fish that are

[10] The district court also appointed a technical advisor, Dr. Howard Horton, to aid it in understanding the various reports, studies and opinions regarding the status of the listed species and effects of FCRPS.

transported and those that remain in the river. New research also indicates that a significant number of salmon hold over in freshwater and migrate to the ocean during their second year of life, which may mean that hastening the transportation of salmon downstream may not necessarily be beneficial.

. The total number of adult Snake River Chinook Salmon that migrated upriver has increased significantly.

. It is highly imprudent and highly risky to try an untested operation in a critically low water year. Transportation rather than spillage is the safest means of passage in a low water year.

. Ordering spills at certain locations will adversely affect other endangered species.

These are significant and serious concerns. However, it is not our task to weigh the evidence presented to the district court; rather we must decide whether the district court abused **[**36]** its discretion. An abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Wing v. Asarco, Inc., 114 F.3d 986, 988 (9th Cir. 1997)* (quoting*Int'l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993))* (internal quotation marks omitted). The abuse of discretion standard requires that we "not reverse a district court's exercise of its discretion unless we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached. " *SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001)*.

The federal appellants argue that the district court was required to defer to agency expertise. Courts, as a general matter, ought to defer to an agency's scientific or technical expertise. "Deference to the informed discretion of the responsible federal agencies is especially important, where, as here, the agency's decision involves a high level of technical expertise." *R-CALF, 2005 U.S. App. LEXIS 15148 at *32*. However, "the deference accorded **[**37]** an agency's scientific or technical expertise is not unlimited." *Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001)* (citing *Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 679 (D.D.C. 1997))*. Deference is not owed when "'the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.'" *Id.* (quoting *Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993)* (internal **[*799]** citations omitted)). Here, the district court had already invalidated the agency biological opinion upon which the operations were based, in large part because it omitted factors essential to the analysis. As the district court noted, NMFS had completely reversed course in its 2004 BiOp, particularly in its statutory interpretation of the environmental baseline. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." *INS v. Cardoza-Fonseca, 480 U.S. 421, 446, n. 30, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987)* **[**38]** (quoting *Watt v. Alaska, 451 U.S. 259, 273, 68 L. Ed. 2d 80, 101 S. Ct. 1673 (1981))*. The district court had rejected the underlying premise of the agency's methodology and the 2004 BiOp. Therefore, there was no formal agency finding to which deference might arguably be owed. Rather, the government chose to present its case through expert affidavit.

Throughout the course of these proceedings, the government has adhered to its position that it would not alter its planned summer dam operations which the district court had determined could cause irreparable harm. Indeed, the government's own 2000 BiOp had concluded that the present operations of the Columbia River System would jeopardize eight of the listed species. In its summary judgment order, the district court had made the factual finding that the listed species were "in serious decline and not evidencing signs of recovery." Therefore, in the absence of an approved, final biological opinion, the district court did not abuse its discretion in considering the record evidence. We conclude that the district court did not abuse its discretion in ordering preliminary injunctive relief.

C

The federal appellants also **[**39]** suggest that, even if preliminary injunctive relief were appropriate, the district court's order must be vacated because it is not narrowly tailored. The appellants did not present this argument to the district court, nor have they sought modification of the injunction. On appeal, the appellants have declined to identify how the injunction should be narrowly tailored, even under questioning. There is also some tension between appellants' argument on appeal that the district court is micromanaging the Columbia River System and its argument that the district court was not specific or detailed enough in its order. The gist of the federal appellants' argument seems to be that the purported lack of narrow tailoring should result in a

vacation of the entire injunction, rather than any modification designed to achieve narrow tailoring.

That being said, all sides agree that modifications to the district court's order have been required. Indeed, the district court anticipated this by encouraging the parties "to engage in discussions to reach a consensus on issues of spill." The federal appellants have requested that we allow them to supplement the appellate record with declarations identifying **[**40]** specific problems with the district court's injunction. The plaintiffs have opposed the motion; however, in the alternative, they have tendered supplemental declarations.

Without reviewing the tendered evidence or outlining the evidence in the record indicating that specific issues at certain sites may require modification of the preliminary injunction, we conclude that there are issues that have arisen after the issuance of the preliminary injunction that may require modification of the district court order. It is inappropriate for us to decide those questions for the first time on **[*800]** appeal, and we therefore deny the parties' motions to supplement the record. Although we conclude that the district court did not abuse its discretion in granting the preliminary injunction, we remand the question of whether modification or "narrow tailoring" of the order is required to the district court for its consideration in the first instance.

The BPA Customer Group has also argued that the district court's order should be vacated as not narrowly tailored. The basis of the BPA Customer Group's argument is different. It argues that the order insufficiently relates the remedy to the alleged **[**41]** ESA violation. Although the BPA Customer Group raised this issue in their memorandum in opposition to the preliminary injunction, the district court did not explicitly address this issue in its preliminary injunction order. In light of our decision to remand for consideration of modifications to the preliminary injunction, we also remand this question to the district court for its consideration in the first instance. We urge the parties and the district court to resolve these remanded issues as expeditiously as possible.

IV

In sum, we affirm the district court's issuance of a preliminary injunction, but remand to the district court the question of whether the injunction should be more narrowly tailored or modified.

AFFIRMED AND REMANDED.

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