PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9453

ADMINISTRATIVE LAW JUDGE: DANIA L. AYOUBI

IN THE MATTER OF:

ERIN THOMPSON **APPELLANT**

THE AUTHORITY'S BOOK OF AUTHORITIES

August 10, 2026

Respectfully submitted,

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TAB 1

FEI
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 2

CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale
CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale

ARBITRAL AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Graeme Mew, Barrister in Toronto, Canada and London, United Kingdom

in the arbitration between

KHALED ABDULLAZIZ AL EID & ABDULLAH WALEED SHARBATLY
Represented by Mr Jeremy Dickerson, Mr James Pheasant and Miss Georgina Shaw of Burges Salmon, Bristol, United Kingdom

- Appellants -

and

FEDERATION EQUESTRE INTERNATIONALE, Lausanne, Switzerland
Represented by Mr Jonathan Taylor and Ms Anna-Marie Blakeley of Bird & Bird LLP in London, United Kingdom and Ms Lisa Lazarus, FEI General Counsel

- Respondent -

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.

<u>Al-Eid v FEI</u>

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.

<u>Sharbatly v FEI</u>

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.

<u>Sanctions Under the *ECM Rules*</u>

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.*

<u>FEI Tribunal Decisions</u>

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:

(e) 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;

(f) Accordingly, an ECM Rule violation had been established;

(g) 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;

(h) 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;

(i) A period of suspension of eight months would be applied;

(j) A fine of CHF 1,000 would be paid;

(k) 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:

<u>Al Eid</u>

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 *Squizzato v. FINA* (CAS 2005/A/830) and *Puerta v. ITF* (CAS 2006/A/1025), which require examination of all of the circumstances of the case, always having regard to the overarching doctrine of proportionality.

<u>Sharbatly</u>

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.

<u>Both Appellants</u>

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 (*WADA v Stauber & Swiss Olympic Committee* (CAS 2006/A/1133); *Squizzato v FINA* (CAS 2005/A/830); *Hipperdinger v ATP* (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 *Kendrick v. ITF* (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 *WADA v. Hardy & USADA* (CAS 2009/A/1870) and *Wawrzyniak v. Hellenic Football Federation* (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 *Kendrick v. ITF* (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 *Bucci v. FEI* (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 *International Wheelchair Basketball Federation v. UK Anti-Doping & Gibbs* (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 *FIFA v. STJDF & CBF & Dodô* (CAS 2007/A/1370) and *NADA v. STJDF & CBF & Dodô* (CAS 2007/A/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.

11. COSTS

11.1 Article R64.4 of the CAS Code provides:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties".*

11.2 Article R64.5 of the CAS Code provides:

> *"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel*

shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties".

11.3 Having taken into consideration the outcome of the arbitration, and with the concurrence of the parties, the Panel is of the view that there shall be no costs associated with this award, save that the CAS Court Office fees of CHF 1,000 paid by each of the Appellants shall be retained by the Court.

DECISION

The Court of Arbitration for Sport rules that:

A. CAS 2012/A/2807 Al Eid v. FEI

1. The appeal filed by Khaled Abdullaziz Al Eid on 24 May 2012 against the decision of the Fédération Equestre Internationale Tribunal ("FEI Tribunal") dated 23 May 2012 is partially upheld.

2. Paragraph 52(1) of the decision of the FEI Tribunal dated 23 May 2012 is set aside and replaced with the following:

   Khaled Abdullaziz Al Eid is sanctioned with a period of ineligibility of two months, commencing on 24 February 2012.

3. The remainder of the FEI Tribunal's decision dated 23 May 2012 is confirmed.

4. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Khaled Abdullaziz Al Eid which shall be retained by the CAS.

5. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

6. All other or further claims are dismissed.

B. CAS 2012/A/2808 Sharbatly v. FEI

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.

4. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Abdullah Waleed Sharbatly which shall be retained by the CAS.

5. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

6. All other or further claims are dismissed.

Operative part of the award issued on 11 June 2012
Lausanne, 17 July 2012

THE COURT OF ARBITRATION FOR SPORT

Graeme Mew
Sole Arbitrator

TAB 3

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.

Core Terms

alien, deport, marriage, spouse, interview, levy, immigrate, hardship, attend, pro se, application for adjustment, detain, deportation proceedings, fair hearing, travel, visa, bipolar disorder, good cause, eligibility, immigration judge, suspension, due process, application for relief, majority opinion, filing fee, notice, novo, telephone, pauperis, elicit

Case Summary

Procedural Posture

Petitioner immigrant petitioned for review of an order of the Board of Immigration Appeals, denying his request for suspension of deportation pursuant to *8 U.S.C.S. § 1254(a)(1)*, and adjustment of status pursuant to *8 U.S.C.S. § 1255*.

Overview

The immigrant claimed 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 because the denial of his request for adjustment of status was predicated on his inability to procure his wife's attendance at his deportation hearing to testify on his behalf due to her frequent hospitalization for bipolar disorder and her residence thousands of miles from the site of the proceedings. The court held that the immigration judge (IJ) erred in denying the immigrant's requests because the IJ and the Board of Immigration Appeals failed to acknowledge the role that the immigrant's wife's illness played in her inability to attend an original bona fide interview, and the immigrant's hearing, and that the immigrant was prejudiced by this failure. The court found that the IJ failed its duty to apprise the immigrant that other types of evidence could be submitted to demonstrated the validity of his marriage. The court further held that the immigrant was not required to pay filing fees under *28 U.S.C.S. § 1915(b)*, as the fees did not apply to Immigration and Naturalization detainees.

Outcome

The Board of Immigration Appeals' decision was vacated and remanded.

LexisNexis® Headnotes

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN1 A petition for review of an order of the Board of Immigration Appeals is governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Immigration Law > Constitutional Foundations > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN2 The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear a petitioner's due process claims pursuant to 8 U.S.C.S. § 1105a(a), as amended by section 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Immigration Law > Constitutional Foundations > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN3 The appellate court reviews claims of due process violations in deportation proceedings de novo.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN4 The appellate court reviews de novo legal interpretations of the Immigration and Nationality Act's requirements. Because the standard of review is de novo, the appellate court conducts an independent examination of the entire record.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN5 When the Board of Immigration Appeals (BIA) reviews the immigration judge's (IJ) decision de novo, the appellate coutr's review is limited to the BIA's decision, except to the extent that the BIA adopted the IJ's opinion.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Immigration Law > Constitutional Foundations > Due Process

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > Right to Confrontation

HN6 The Fifth Amendment guarantees individuals who are subject to deportation due process in Immigration and Naturalization Service proceedings. 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. In addition, aliens in deportation proceedings are entitled by statute and regulation to certain procedural protections.

Immigration Law > Deportation & Removal > Administrative Proceedings > Hearing Procedures

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN7 An alien must be afforded a reasonable opportunity to present evidence on his behalf. 8 U.S.C.S. § 1229a(b)(4); 8 C.F.R. § 240.10(4) (2001).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Immigration Law > Constitutional Foundations > General Overview

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN8 If an alien is prejudiced by a denial of any of the applicable procedural protections, he is denied his constitutional guarantee of due process.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Authority of Immigration Judges

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN9 One of the components of a full and fair hearing is that the immigration judge (IJ) must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief. In addition, when the alien appears pro se, it is the IJ's duty to fully develop the record. 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.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > Exhaustion of Remedies

Immigration Law > Judicial Proceedings > Judicial Review > Scope of Review

HN10 While the appellate court retains jurisdiction to review due process challenges to immigration decisions, it may not entertain due process claims based on correctable procedural errors unless the alien raised them below. The exhaustion requirement applies to claims that an alien was denied a full and fair hearing.

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN11 Where a petitioner raises his claims pro se, the appellate court construes them liberally.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Adjustment of Status > Eligibility for Adjustment of Status

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

HN12 Section 245 of the Immigration and Nationality Act, codified at *8 U.S.C.S. § 1255*, 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 immigration judge has exclusive jurisdiction to decide the adjustment of status application. *8 C.F.R. § 245.2(a)(1) (2001)*. However, only the Immigration and Naturalization Service may adjudicate the underlying I-130 visa petition. *8 C.F.R. § 204.1(e) (2001)*.

Family Law > Marriage > Validity > General Overview

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Adjustment of Status > Eligibility for Adjustment of Status

HN13 Under Section 245 of the Immigration and Nationality Act, codified at *8 U.S.C.S. § 1255*, an alien may be eligible for adjustment of status if, among other prerequisites, an immigrant visa is immediately available. *8 U.S.C.S. § 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. *8 U.S.C.S. § 1151(b)*. An approved I-130 filed by the spouse satisfies the requirement that a visa is immediately available. Once approved, the I-130 remains valid for the legal duration of the marriage. *8 C.F.R. § 204.2(h)(1) (2001)*.

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Adjustment of Status > Eligibility for Adjustment of Status

HN14 Approval of an I-130 petition does not automatically entitle the alien to adjustment of status as an immediate relative of a United States citizen. While an I-130 establishes eligibility for status, the Attorney General, or in the context of deportation proceedings, the immigration judge, must still decide to accord the status.

Family Law > Marriage > Proof of Marriage > General Overview

Immigration Law > Types of Immigrants > Family Sponsored Immigrants

HN15 For a marriage to confer immigration benefits, it must satisfy three criteria. First, it must be legally valid. Second, the couple must have married out of a bona fide desire to establish a life together, not to evade immigration laws. Third, the marriage must not be against public policy.

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Adjustment of Status > Eligibility for Adjustment of Status

HN16 An approved I-130 provides prima facie evidence that the alien is eligible for adjustment as an immediate relative of a United States citizen. While the I-130 may suffice in many cases, in cases 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.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Hearing Procedures

HN17 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 Immigration and Naturalization Service often requests the attendance of both the alien and the spouse at the initial adjustment interview. 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 immigration judge in deportation proceedings; however, he may issue subpoenas for the attendance of witnesses and presentation of evidence. *8 U.S.C.S. § 1229a(b)(1)*.

Immigration Law > Adjustment of Status > General Overview

HN18 If the alien's marriage is less than two years old, adjustment of status is granted on a conditional basis pursuant to section 216 of the Immigration and Nationality Act (section 216), codified at *8 U.S.C.S. § 1186a*. *8 U.S.C.S. § 1186a(g)(1)*. The conditional status remains in effect 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. *8 U.S.C.S. § 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)*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Immigration Law > Adjustment of Status > General Overview

HN19 While both the alien and the spouse must ordinarily appear for an interview at a local Immigration and Naturalization Service (INS) office, this requirement may be waived for good cause. *8 U.S.C.S. §§ 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.

Family Law > Marriage > Validity > Fraudulent Marriages

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Types of Immigrants > Family Sponsored Immigrants

HN20 Under the Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986), 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. *8 U.S.C.S. § 1186a(g)(1)*.

Immigration Law > Adjustment of Status > General Overview

HN21 Under the statutory and regulatory scheme governing Immigration and Naturalization Service (INS) interviews, a good cause waiver may apply. For example, if the INS requests an appearance by an applicant or petitioner, the interview may be rescheduled upon a showing of good cause. *8 C.F.R. §*

103.2(b)(9) (2001). In addition, the regulations pertaining to section 216 of the Immigration and Nationality Act's, codified at 8 U.S.C.S. § 1186a, 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. 8 U.S.C.S. § 1186a(c)(2)(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.

Immigration Law > Adjustment of Status > General Overview

HN22 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, the provision does not exclude such a possibility because to do so would raise serious due process concerns.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Family Law > Marriage > Validity > General Overview

Immigration Law > Types of Immigrants > Family Sponsored Immigrants

Insurance Law > ... > Coverage > Compulsory Coverage > Rental Vehicles

Insurance Law > ... > Motor Vehicle Insurance > Vehicle Ownership > Leases & Rental Vehicles

HN23 For immigration purposes, evidence of a 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 ownership of a car or other property; medical records showing the other spouse as the person to contact; telephone bills showing frequent communication between the spouses; and testimony or other evidence regarding the couple's courtship, wedding ceremony, honeymoon, correspondences, and shared experiences.

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Types of Immigrants > Family Sponsored Immigrants

HN24 An immigrant's marriage to a citizen must be found bone fide for purposes of adjustment of status if it was not sham or fraudulent from its inception. The key issue is: did the petitioner and his wife intend to establish a life together at the time of their marriage? 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.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Immigration Law > Asylum, Refugees & Related Relief > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Authority of Immigration Judges

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > General Overview

HN25 It is important for the immigration judge (IJ) to explain to an alien what evidence will demonstrate their eligibility for relief from deportation. Moreover, it is critical when the alien appears pro se that the IJ develop the record by eliciting all relevant facts. 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. Sensitivity to what evidence the alien can reasonably be expected to produce is especially critical when the alien is in the Immigration and Naturalization Service'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.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Authority of Immigration Judges

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN26 The immigration judge has an obligation to assist a pro se applicant in determining what evidence is relevant and by what means he can prove his claims.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Authority of Immigration Judges

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN27 The immigration judge (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 hearing when the IJ misinforms him about the forms of evidence that are permissible to prove his eligibility for relief.

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > General Overview

HN28 To merit relief, an alien must also show prejudice. Prejudice is shown if the violation potentially affects the outcome of the proceedings. Prejudice may be shown where the immigration judge's inadequate explanation of the hearing procedures and failure to elicit pertinent facts prevented the alien from presenting evidence relevant to his claim.

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > General Overview

HN29 A court may infer prejudice in the absence of any specific allegation as to what evidence an alien would have presented had the immigration judge adequately explained what he needed to prove to demonstrate his eligibility for relief and had he been provided the opportunity to present that evidence.

Civil Procedure > Appeals > In Forma Pauperis

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > General Overview

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Filing Fees

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN30 The filing fee provisions of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), do not apply to an alien detainee who proceeds in forma pauperis to petition for review from a Board of Immigration Appeals decision, so long as he does not also face criminal charges.

Civil Procedure > ... > Pleadings > In Forma Pauperis > General Overview

Civil Procedure > ... > In Forma Pauperis > Prisoners > General Overview

Civil Procedure > ... > In Forma Pauperis > Prisoners > Petitions

Civil Procedure > Appeals > In Forma Pauperis

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > General Overview

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Filing Fees

HN31 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 Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996). *28 U.S.C.S. § 1915(b)(1)*. 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.S. § 1915(b)*.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > General Overview

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN32 As defined in the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), 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.S. § 1915(h). 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. Thus, the term "prisoner" does not encompass a civil detainee for purposes of the PLRA.

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

HN33 Deportation proceedings are civil, rather than criminal, in nature. The order of deportation is not a punishment for crime. Deportation, however severe its consequences, is consistently classified as a civil rather than a criminal procedure.

Civil Procedure > Appeals > In Forma Pauperis

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > General Overview

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Filing Fees

Immigration Law > ... > Administrative Proceedings > Rights of Respondent > General Overview

HN34 An alien detained by the Immigration and Naturalization Service pending deportation is not a "prisoner" within the meaning of the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996). Thus, the filing fee requirements of the PLRA do not apply to an alien detainee proceeding in forma pauperis to petition for review of a Board of Immigration Appeals decision.

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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

HN1 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)*. ***HN2*** 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

HN3 We review claims of due process violations in deportation proceedings de novo. *Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001)*. ***HN4*** 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)*. ***HN5*** 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

HN6 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

[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).

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, ***HN7*** 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 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). ***HN8*** 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*.

HN9 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. ***HN10*** 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."

HN11 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

HN12 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)*.

HN13 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, ***HN14*** 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]** ***HN17*** 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

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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. ***HN15*** 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)*.

HN16 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.

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 of witnesses and presentation of evidence." INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).

HN18 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). **HN19** 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**

HN21 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

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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). **HN20** 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 **HN22** 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.

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 § 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

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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 record **[**23]** regarding whether Levy actually attempted to attend the hearing is further demonstrated by Agyeman's explanation of her absence in his notice 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. ***HN23*** 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, ***HN24*** 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

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been allowed telephone, visiting hours. I tried to -

(emphasis added).

[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 …."

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).

We have previously emphasized ***HN25*** 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, ***HN26*** 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*, ***HN27*** 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

HN28 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, ***HN29*** 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 ***HN30*** 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.

HN31 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.

HN32 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 ***HN33*** 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

[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.

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 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 ***HN34*** 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

[1] *Jacinto v. INS, 208 F.3d 725, 734 (9th Cir. 2000)*.

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 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

[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)*].

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 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

[3] Majority at 10359.

[4] Majority at 10359.

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 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

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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*.

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 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

[11] *8 CFR § 245.5*.

TAB 4

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.

Core Terms

staff, reappointment, license, burden of proof, medical staff, operating room, contested case, patient, recommend, staff privileges, medicine, medical license, substantial evidence, capricious, disruptive, preponderance of evidence, hospital privileges, practitioner, care facility, arbitrary and capricious, ad hoc committee, convincing, suspension, bylaws, medical staff member, revocation, deference, promulgate, notice, revoke

Case Summary

Procedural Posture

Appellant physician sought review of an order from the District Court of **Teton** **County** (Wyoming), which upheld a decision from appellee hospital's board of trustees revoking his medical staff privileges.

Overview

During his tenure, the physician, an orthopedic surgeon, exhibited disruptive behavior in the operating room on multiple occasions. The operating staff at the hospital refused to work with him due to his behavior. The hospital's board of trustees revoked his medical staff privileges. The trial court upheld the decision. On appeal, the court found that the hospital's decision to place the burden of proof on the physician, and to require that the burden be met by a preponderance of the evidence, was not unreasonable. The record contained ample evidence of the physician's inability to work cooperatively with others, to relate to others in a civil, collegial, and courteous manner, and to refrain from disruptive conduct. All six incidents of misconduct involved anger, mistreatment of staff, and disruptive behavior. There was thus substantial evidence supporting the board's decision under *Wyo. Stat. Ann. § 35-2-113* (2009). The physician had received notice of the charges against him, a hearing before an impartial tribunal, representation by counsel, the opportunity to cross-examine witnesses and to present evidence, and the opportunity to inspect documentary evidence against him.

Outcome

The court affirmed the judgment of the trial court.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

HN1 When an appellate court considers an appeal from a trial court's review of an administrative agency's decision, it reviews the case as though it had come directly from the administrative agency. The appellate court's review of the agency decision is limited to those considerations specified in *Wyo. Stat. Ann. § 16-3-114(c)* (2009).

Administrative Law > Judicial Review > Standards of Review > General Overview

HN2 See *Wyo. Stat. Ann. § 16-3-114(c)* (2009).

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN3 An appellate court affirms an agency's findings of fact if they are supported by substantial evidence. An administrative agency's conclusions of law are not entitled to the same deference as its factual findings. An appellate court reviews an agency's conclusions of law de novo, and it will affirm an agency's legal conclusion only if it is in accordance with the law. An appellate court employs the arbitrary and capricious standard as a safety net against administrative agency action that is contrary to law but not readily correctable under the other applicable standards of review.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN4 It is well-established that a hospital board may prescribe reasonable rules and regulations to be followed by physicians using the hospital facilities.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN5 See *Wyo. Stat. Ann. § 35-2-113* (2009).

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Healthcare Law > Business Administration & Organization > Hospital Privileges > Judicial Review

HN6 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. However, a physician may not be excluded by rules, regulations, or acts of a hospital's governing authorities which are unreasonable, arbitrary, capricious, or discriminatory.

Administrative Law > Judicial Review > Standards of Review > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Judicial Review

HN7 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 a trial court or in an appellate court, the applicable standard of review is one which accords great deference to the 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, arbitrary, or capricious.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Evidence > Burdens of Proof > Allocation

HN8 The proper allocation of the burden of proof is a matter of law and is reviewed de novo.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > State & Territorial Governments > Licenses

HN9 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. 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 nonexistence. The preponderance of the evidence standard generally does not adequately protect the property interest one has in a professional license, and courts instead require a licensing board to prove its disciplinary cases by clear and convincing evidence.

Governments > State & Territorial Governments > Licenses

HN10 A "license" is defined in the Wyoming Administrative Procedure Act as any agency permit, certificate, approval, registration, charter, or similar form of permission required by law. *Wyo. Stat. Ann. § 16-3-*

101(b)(iii).

Governments > State & Territorial Governments > Licenses

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN11 Medical staff privileges allow a physician to use hospital facilities and be assisted by hospital staff. This includes the authority to admit and treat patients. A medical license, however, confers a general 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.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN12 Medical staff privileges 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. 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* (2009). Staff privileges, in contrast to medical licenses, are specific to individual hospitals, and decisions regarding staff privileges are within the discretion of hospital management.

Governments > State & Territorial Governments > Licenses

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN13 Under *Wyo. Stat. Ann. § 33-26-303(d)*, the Wyoming 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 30 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.

Healthcare Law > Business Administration & Organization > Hospital Privileges > Judicial Review

HN14 *Wyo. Stat. Ann. § 35-2-113* (2009) provides broad discretion to a hospital in determining requirements for the ability to practice at a particular hospital. A hospital is entitled to great deference in the management of its facility and a court affords great deference to the hospital's determination of standards relating to hospital privileges.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN15 Substantial evidence is relevant evidence which a reasonable mind might accept in support of an agency's conclusions.

Administrative Law > ... > Evidence > Admissibility of Evidence > Hearsay

Evidence > ... > Hearsay > Rule Components > General Overview

HN16 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*.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN17 The arbitrary and capricious standard is a "safety net" to catch agency action that prejudices a party's substantial rights or that may be contrary to the other Wyoming Administrative Procedure Act review standards yet is not easily categorized or fit to any one particular standard.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN18 Underlying the often repeated statement that in determining whether the action of an agency is arbitrary, capricious, or an abuse of discretion, a court ascertains 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.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN19 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.

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 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.

[*] Chief Justice at time of oral argument.

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 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

[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."

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)*. ***HN1*** 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) ***HN2*** 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] ***HN3*** 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] ***HN4*** 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:

> ***HN5*** 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 ***HN6*** 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:

> ***HN7*** 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 ***HN8*** 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 ***HN9*** 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] **HN10** 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. **HN11** 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] **HN12** 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] ***HN13*** 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. ***HN14*** *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. ***HN15*** 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.
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> 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, ***HN16*** 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. ***HN17*** 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*.

> ***HN18*** 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] ***HN19*** "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 5

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

* 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

[+] 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

[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-

[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 --

[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

[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

[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

"

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)

[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 6

Citizens to Preserve Overton Park, Inc. v. Volpe

Supreme Court of the United States

January 11, 1971, Argued ; March 2, 1971, Decided

No. 1066

Reporter
401 U.S. 402 *; 91 S. Ct. 814 **; 28 L. Ed. 2d 136 ***; 1971 U.S. LEXIS 96 ****; 1 ELR 20110; 2 ERC (BNA) 1250

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. v. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

Subsequent History: On remand at *Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 1972 U.S. Dist. LEXIS 15709 (W.D. Tenn., 1972)*

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307, 1970 U.S. App. LEXIS 7164 (6th Cir. Tenn., 1970)

Disposition: *432 F.2d 1307*, reversed and remanded.

Core Terms

highway, transport, route, agency's action, formal finding, feasible, judicial review, parkland, prudent, federal funds, reviewing court, alternative route, public park, highway construction, tenant, evict, agency discretion, de novo, substantial-evidence, adjudicatory, fact finding, right-of-way, unwarranted

Case Summary

Procedural Posture

Petitioners sought review of a decision from the United States Court of Appeals for the Sixth Circuit, which affirmed summary judgment for respondent Secretary of Transportation in suit alleging respondent violated § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C.S. § 1653(f), and § 18(a) of the Federal-Aid Highway Act of 1968, *23 U.S.C.S. § 138*, by approving construction of an interstate highway through a public park.

Overview

Petitioners, private citizens and conservation organizations, claimed that respondent Secretary of Transportation violated § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C.S. § 1653(f), and § 18(a) of the Federal-Aid Highway Act of 1968, *23 U.S.C.S. § 138*, by authorizing expenditure of federal funds for construction of an interstate highway through a public park. Petitioners argued, inter alia, that respondent's action was invalid without formal factual findings and that he failed to make an independent determination but merely relied on the judgment of a local city council. In evidence of the independence of and basis for his decisionmaking, respondent introduced litigation affidavits at trial. Petitioners offered rebuttal affidavits. The district court granted summary judgment for respondent, and the court of appeals affirmed. On certiorari, the Court reversed and remanded to the district court, holding that respondent was not required to make formal findings, but judicial review based solely on litigation affidavits was inadequate under *§ 706* of the Administrative Procedure Act, *5 U.S.C.S. § 706*, which required an agency's "whole record" as the basis for review.

Outcome

The Court reversed the judgment below, and remanded for further proceedings in the district court, because, although respondent was not required to make formal findings, judicial review based solely on litigation affidavits was inadequate.

LexisNexis® Headnotes

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Governments > Public Improvements > Financing

Transportation Law > Bridges & Roads > General Overview

HN1 Natural Resources & Public Lands, National Environmental Policy Act

Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C.S. § 1653(f), and § 18(a) of the Federal-Aid Highway Act of 1968, *23 U.S.C.S. § 138*, 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 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 to the park.

Transportation Law > Bridges & Roads > General Overview

HN2 Transportation Law, Bridges & Roads

See 49 U.S.C.S. § 1653(f).

Transportation Law > Bridges & Roads > General Overview

HN3 Transportation Law, Bridges & Roads

See *23 U.S.C.S. § 138*.

Administrative Law > Judicial Review > Reviewability > Preclusion

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

HN4 Reviewability, Preclusion

Section 701 of the Administrative Procedure Act, *5 U.S.C.S. § 701*, provides that the action of each authority of the Government of the United States, which includes the Department of Transportation, 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.

Administrative Law > Judicial Review > Reviewability > Preclusion

HN5 Reviewability, Preclusion

Where there is no indication that Congress sought to prohibit judicial review and there is no showing of "clear and convincing evidence" of a legislative intent to restrict access to judicial review, the exception to *§ 701* of the Administrative Procedure Act, *5 U.S.C.S. § 701*, does not apply.

Administrative Law > Judicial Review > Reviewability > Preclusion

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN6 Reviewability, Preclusion

The exception for action "committed to agency discretion" in *§ 701* of the Administrative Procedure Act, *5 U.S.C.S. § 701*, is a very narrow exception. 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.

Administrative Law > Judicial Review > Reviewability > Preclusion

Governments > Public Improvements > Financing

Transportation Law > Bridges & Roads > Funding

Transportation Law > Bridges & Roads > General Overview

HN7 Reviewability, Preclusion

Section 4(f) of the Department of Transportation Act, 49 U.S.C.S. § 1653 (f), and § 138 of the Federal-Aid Highway Act, *23 U.S.C.S. § 138*, 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. 49 U.S.C.S. § 1653 (f); 23 U.S.C.S. § 138. 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.

Transportation Law > Bridges & Roads > General Overview

HN8 Transportation Law, Bridges & Roads

If § 4(f) of the Department of Transportation Act, 49 U.S.C.S. § 1653 (f), and § 138 of the Federal-Aid Highway Act, 23 U.S.C.S. § 138, are to have any meaning, the Secretary of Transportation cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > Appeals > Standards of Review > De Novo Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

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

HN9 Standards of Review, Substantial Evidence

Section 706 of the Administrative Procedure Act, 5 U.S.C.S. § 706 provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found not to meet six separate standards. In all cases 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.S. §§ 706(2)(A), (B), (C), (D). 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.S. §§ 706(2)(E), (F).

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN10 Judicial Review, Standards of Review

See 5 U.S.C.S. § 706.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN11 Agency Rulemaking, Formal Rulemaking

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.S. § 553, or when the agency action is based on a public adjudicatory hearing.

Administrative Law > ... > Hearings > Right to Hearing > Statutory Rights

Governments > Public Improvements > Financing

Transportation Law > Bridges & Roads > General Overview

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Administrative Law > ... > Hearings > Right to Hearing > General Overview

HN12 Right to Hearing, Statutory Rights

The only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution 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.S. § 128. 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.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Administrative Law > Judicial Review > Standards of Review > General Overview

HN13 Standards of Review, De Novo Standard of Review

De novo review of whether a Secretary's decision was "unwarranted by the facts" is authorized by § 706(2)(F) of the Administrative Procedure Act, 5 U.S.C.S. § 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.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN14 Judicial Review, Standards of Review

A decision by the Secretary of Transportation is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN15 Standards of Review, Abuse of Discretion

Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C.S. § 706(2)(A), requires a finding that the actual choice made by the Secretary was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 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. 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.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN16 Judicial Review, Standards of Review

The final inquiry under § 706 of the Administrative Procedure Act, 5 U.S.C.S. § 706, is whether the Secretary's action followed the necessary procedural requirements.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Adjudication > Review of Initial Decisions

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Informal Rulemaking

HN17 **Agency Rulemaking, Formal Rulemaking**

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.

Governments > Legislation > Effect & Operation > Prospective Operation

HN18 **Effect & Operation, Prospective Operation**

The general rule is that an appellate court must apply the law in effect at the time it renders its decision.

Administrative Law > Judicial Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN19 **Judicial Review, Administrative Record**

Litigation affidavits are merely "post hoc" rationalizations, which have traditionally been found to be an inadequate basis for review.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN20 **Judicial Review, Standards of Review**

The "whole record" compiled by the agency is the basis for review required by § 706 of the Administrative Procedure Act, 5 U.S.C.S. § 706.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > General Overview

HN21 **Judicial Review, Standards of Review**

Inquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But where there are no such formal findings, it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Lawyers' Edition Display

Summary

In 1956, the Bureau of Public Roads approved a route for construction of an interstate highway in Memphis, Tennessee, which route would have destroyed 26 acres of a 342-acre park located near the center of Memphis and which would have severed that portion of the park containing the zoo from the remainder of the park, which contained a golf course, an art academy, 170 acres of forest, and other recreational areas. This route was again approved in 1966 by the Federal Highway Administrator. However, in 1966, Congress passed the Department of Transportation Act, 4(f) of which declared it to be the national policy that special effort should be made to preserve, inter alia, public park and recreation lands and which ordered the Secretary of Transportation not to approve any program or project which required the use of any publicly owned land from a public park or recreation area unless (1) there was no feasible and prudent alternative to the use of such land, and (2) there was included in any such program all possible planning to minimize harm to any park or recreational area used for such purposes. The state continued to acquire rights of way on both sides of the park, and, after the Secretary of Transportation announced in 1968 that he concurred in the judgment of local officials that the highway should be built through the park, the state in 1969 acquired the right of way inside the park from the city. Final approval of the route and design for the road was not announced until late in 1969 after Congress had reiterated in 138 of the Federal- Aid Highway Act of 1968 that highway construction through public parks was to be restricted. The announcements approving the route and design of the highway were not accompanied by formal findings of fact, nor did the Secretary state why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce harm to the park. Petitioners, a group of private citizens and local and national conservation organizations, brought suit in the United States District

Court for the Western District of Tennessee, seeking to halt construction of the highway through the park and arguing that (1) the Secretary's action in approving the route and design was invalid without formal findings, (2) the Secretary made no independent determination but relied on the judgment of local officials as to the route selected, (3) there were feasible and prudent alternative routes for the highway both north and south of the park, and (4) the design plans did not include "all possible" methods for reducing harm to the park. The District Court held that the statutes did not require the Secretary to file formal findings, and, construing its review powers narrowly, decided that the Secretary had not exceeded his authority in approving the route. Therefore, it granted defendants' motion for summary judgment and dismissed the action (*309 F Supp 1189*). The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the *District Court (432 F2d 1307)*.

On certiorari, the United States Supreme Court reversed and remanded the case to the United States District Court for the Western District of Tennessee with instructions to review the Secretary of Transportation's decision. In an opinion by Marshall, J., announced by Stewart, J. and expressing the views of six members of the court, it was held that (1) the Secretary of Transportation was not required to file formal findings, under either 4(f) of the Department of Transportation Act of 1966 or 138 of the Federal-Aid Highway Act of 1968, that there were no feasible and prudent alternatives to routing the highway through the park prior to his approving the design and route, (2) judicial review of the Secretary's action was inadequate, however, because it was based solely on litigation affidavits, (3) petitioners were entitled to seek judicial review of the Secretary's action, (4) Congress had not sought to prohibit judicial review nor to restrict judicial review of the Secretary's action, (5) the Secretary's action did not fall within the exception in 701 of the Administrative Procedure Act prohibiting judicial review of agency actions committed to agency discretion by law, (6) the use of federal funds for the construction of highways through parks was barred, except in the most unusual circumstances, by the language of 4(f) of the Department of Transportation Act of 1966 and by 138 of the Federal-Aid Highway Act of 1968, (7) Congress intended by those Acts to give the protection of parklands paramount importance and preference over such other factors as cost and community disruption, (8) although a de novo review was not required, the reviewing court should engage in a substantial inquiry as to whether the Secretary acted within the scope of his authority, whether he considered the relevant factors in reaching his decision, whether there had been a clear error of judgment, and whether the necessary procedural requirements were followed, (9) judicial review should be based on the full administrative record before the Secretary at the time he made his decision, and (10) while inquiry into the mental processes of administrative decisionmakers should usually be avoided, the District Court, on remand, could make such an inquiry if that should prove to be the only way effective judicial review could be had.

Black, J., joined by Brennan, J., filed a separate opinion in which he agreed that the judgment of the Court of Appeals was wrong and should be reversed, but stated that inasmuch as the Secretary of Transportation had failed to comply with the duty imposed on him not to permit the construction of highways through public parks except where no feasible and prudent alternatives exist, the case should be remanded to the Secretary rather than to the District Court so that the Secretary could hold a hearing in the matter in obedience to Congress' command.

Blackmun, J., while joining in the opinion and judgment, filed a separate statement noting that the controversy involving this particular interstate highway spanned a decade and that the imposition by the 1966 and 1968 federal statutes of new standards and conditions upon a situation that already was largely developed undoubtedly accounted for the sketchiness of the record before the court.

Douglas, J., did not participate.

Headnotes

LAW §155 > COMMONS §1 > STREETS §1 > necessity for formal findings -- construction of highway through park -- > Headnote:

LEdHN[1] [1]

Formal findings by the Secretary of Transportation that there are no feasible and prudent alternative routes that can be used and that all possible planning to minimize harm to a park has been made, prior to his approving the construction of a highway through a public park, are not required by either 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) or 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), both of which declare it to be the national policy that special efforts should be made to protect park-lands and which direct the Secretary of Transportation not to approve any program or project which requires the use of any publicly owned land from 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 from such use.

LAW §236 > EVIDENCE §495 > STREETS §1 > adequacy of judicial review -- decision to build highway through park -- use of litigation affidavits -- > Headnote:
LEdHN[2] [2]

Judicial review of a decision of the Secretary of Transportation approving construction of an interstate highway through a public park, in spite of the directives in 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and 138 of the Federal-Aid Highway Act of 1968 (23 USC 138) that the Secretary shall not approve any program or project which requires the use of any publicly owned land from 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 from such use, is not adequate when the judicial review is based solely on litigation affidavits prepared specifically for the litigation, which indicate that the Secretary has made the decision and that the decision is supportable.

LAW §219 > COMMONS §1 > right to review -- decision to build highway through park -- > Headnote:
LEdHN[3] [3]

Petitioners opposing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park are entitled to judicial review of the Secretary's decision under 701 of the Administrative Procedure Act (5 USC 701), which provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation, 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."

LAW §206 > STATUTES §161 > decision to build highway through park -- restrictions on judicial review -- applicability of statutory exception -- > Headnote:
LEdHN[4] [4]

There is no indication that Congress sought to prohibit judicial review and no showing of clear and convincing evidence of a legislative intent to restrict access to judicial review of a decision of the Secretary of Transportation to allow construction of an interstate highway through a public park, made pursuant to the authority given to the Secretary by 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) or by 138 of the Federal-Aid Highway Act of 1968 (23 USC 138) to approve such construction only where (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 from such use, so that the exception in 701 of the Administrative Procedure Act (5 USC 701) prohibiting judicial review of actions taken by an "authority of the Government of the United States" where there is a statutory prohibition on review is inapplicable to judicial review of such a decision.

LAW §207 > COMMONS §1 > discretion of administrative agency -- prohibition of judicial review -- > Headnote:
LEdHN[5] [5]

A decision by the Secretary of Transportation to allow construction of an interstate highway through a public park, made pursuant to the authority given to the Secretary by 4 (f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and by 138 of the Federal-Aid Highway Act of 1968 (23 USC 138) to approve such construction only where (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 from such use, does not fall within the exception in 701 of the Administrative Procedure Act (5 USC 701) prohibiting judicial review of actions taken by an "authority of the Government of the United States" where "agency action is committed to agency discretion by law."

STREETS §1 > COMMONS §1 > STATUTES §100
> construction of highway through park -- purpose of statute

barring use of federal funds -- > Headnote:
LEdHN[6] [6]

The language in 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and in 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), which directs the Secretary of Transportation not to approve programs or projects, including the construction of highways, which require the use of any publicly owned land from a public park, except where (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 from such use, is clear and specific, and it constitutes a plain and explicit bar to the use of federal funds for construction of highways through parks; and only the most unusual situations are exempted.

LAW §157 > STREETS §1 > STATUTES §161 > constructing highway through park -- feasibility of other routes -- use of public lands -- > Headnote:
LEdHN[7] [7]

In order for the Secretary of Transportation to conclude, under either 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) or 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), which provide, inter alia, that the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park unless there is no feasible and prudent alternative to the use of such land, that there is no feasible and prudent alternative to constructing an interstate highway through a public park, the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.

LAW §154 > STREETS §1 > STATUTES §100 > balancing competing interests -- highway through parkland -- > Headnote:
LEdHN[8] [8]

The directives in 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*) that the Secretary of Transportation should not approve any program or project which requires the use of any publicly owned land from a public park unless there is no feasible and prudent alternative to the use of such land does not mean that the Secretary must or should engage in a wide-ranging balancing of competing interests, for 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 whenever possible; and thus, since such factors are common to substantially all highway construction, there would have been no need for the statutes if Congress had intended that those factors should be on an equal footing with the preservation of parklands.

LAW §154 > STATUTES §100 > cost of highway construction -- community disruption -- protection of parklands as primary purpose of statute -- > Headnote:
LEdHN[9] [9]

Congress did not intend that cost and disruption of the community are to be ignored by the Secretary of Transportation in making a determination, under 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) or under 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), prior to approving the construction of an interstate highway through a public park, that there is no feasible and prudent alternative to constructing the road through the park; but the very existence of the statutes, which provide, inter alia, that the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park unless there is no feasible and prudent alternative to the use of such land, indicates that protection of parkland was to be given paramount importance.

LAW §100 > COMMONS §1 > STATUTES §100 > destruction of parklands for highway purposes -- necessity for unique factors -- > Headnote:
LEdHN[10] [10]

If 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), which provide, inter alia, that the Secretary of Transportation must determine, prior to approving the construction of a program or project which requires the use of publicly owned land in a public park, that there is no feasible and prudent alternative to constructing an interstate highway through a public park, are to have any meaning, then the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems, inasmuch as Congress does not intend that public parks are to be lost unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach extraordinary magnitudes requiring the use of parkland for such a project.

LAW §207 > STATUTES §145.4 > discretion of administrative agency -- prohibition of judicial review -- applicable law -- > Headnote:
LEdHN[11] [11]

While the legislative history of the exception, in 701 of the Administrative Procedure Act (*5 USC 701*), which prohibits judicial review of action taken by authorities of the United States Government in those cases where "agency action is committed to agency discretion by law," indicates that the exception is applicable in those instances where statutes are drawn in such broad terms that in a given case there is no law to apply, nevertheless where there is "law to apply," the exemption for action "committed to agency discretion" is inapplicable.

LAW §245 > decision to construct highway through park -- standard for judicial review -- > Headnote:
LEdHN[12] [12]

The standard for judicial review of the Secretary of Transportation's action in approving the construction of an interstate highway through a public park, in spite of the directives in 4(f) of the Department of Transportation Act of 1966 (49 USC 1653 (f)) and 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*) that approval not be given to such a project 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 the park from such use, is to be found in 706 of the Administrative Procedure Act (*5 USC 706*), which provides that a reviewing court shall hold unlawful and set aside an agency's action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, (4) without observance of procedure required by law, (5) unsupported by substantial evidence or otherwise reviewed on the record of an agency hearing provided by statute, or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

LAW §244 > court review of decision to build highway through park -- applicable standards -- > Headnote:
LEdHN[13] [13]

Neither the standard of judicial review contained in 706(2)(E) of the Administrative Procedure Act (*5 USC 706(2)(E)*), requiring a court reviewing a government agency's action to set aside such action where it is found to be unsupported by substantial evidence, nor that standard contained in 706(2)(F) of the Act (*5 USC 706(2)(F)*), requiring a court reviewing a government agency's action to set aside such action where it is found to be unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court, is the proper standard to be applied by a court reviewing a decision of the Secretary of Transportation approving the construction of an interstate highway through a public park.

LAW §206 > "substantial evidence" test for judicial review -- rulemaking -- public adjudicatory hearings -- > Headnote:
LEdHN[14] [14]

Under the "substantial evidence" test contained in 706(2)(E) of the Administrative Procedure Act (*5 USC 706(2)(E)*), judicial review of a government agency's action is authorized only when the agency's action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself (*5 USC 553*), or when the agency's action is based on a public adjudicatory hearing conducted in accordance with the standards set forth in 556-557 of the Act (5 USC 556-557).

LAW §23 > decision to build highway through park -- exercise of rulemaking function -- > Headnote:
LEdHN[15] [15]

A decision of the Secretary of Transportation to allow the expenditure of federal funds to build an interstate highway through a public park is plainly not an exercise of a rulemaking function under 553 of the Administrative Procedure Act (*5 USC 553*).

LAW §132 > constructing highway through park -- hearing required -- officials involved -- > Headnote:
LEdHN[16] [16]

The only hearing that is required either by 556 of the Administrative Procedure Act (*5 USC 556*) or by the statutes regulating the distribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed highway construction project and eliciting community views on the design and route; and such a hearing, being nonadjudicatory, quasi-legislative in nature, and not designed to produce a record that is to be the basis of agency action, does not meet the basic requirement, found in 706(2)(E) of the Administrative Procedure Act (*5 USC 706(2)(E)*), for an agency's action to be set aside by a reviewing court, that the action be found to be unsupported by substantial evidence.

LAW §238 > de novo review of agency action -- inadequacy of factfinding procedures -- raising new issues -- > Headnote:
LEdHN[17] [17]

De novo review of whether a government agency's decision is unwarranted by the facts is authorized by 706(2)(F) of the Administrative Procedure Act (*5 USC 706(2)(F)*) in only two circumstances: the first is when the action is adjudicatory in nature and when the agency's factfinding procedures are inadequate, and the second is when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action; and neither circumstance is present where a decision by the Secretary of Transportation to permit the construction of an interstate highway through a public park was not an action adjudicatory in nature, where the Secretary's decision was not the result of inadequate agency factfinding procedures, and where the petitioners, a group of private citizens and local and national conservation organizations seeking to stop construction of the highway through the park, raised no issues in a review proceeding in a Federal District Court which were not raised before the Department of Transportation.

LAW §236 > scope of judicial review -- substantial court inquiry -- decision to construct highway through park -- > Headnote:
LEdHN[18] [18]

Even though there is no de novo review in a case involving a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park and even though the Secretary's approval of the interstate highway route through the park does not ultimately have to meet the substantial evidence test found in 706(2)(E) of the Administrative Procedure Act (*5 USC 706(2)(E)*), the generally applicable standards of 706 of the Act (*5 USC 706*) require the reviewing court to engage in a substantial inquiry.

LAW §236 > administrative decision -- presumption of regularity -- thorough review of decision by court -- > Headnote:
LEdHN[19] [19]

While a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park is entitled to a presumption of regularity, that presumption is not to shield his action from a thorough, probing, in-depth review of his decision by a reviewing court.

LAW §246 > judicial review -- scope of agency's authority and discretion -- > Headnote:
LEdHN[20] [20]

A court reviewing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park is first required to decide whether the Secretary acted within the scope of his authority; and such a determination begins with a delineation of the scope of the Secretary's authority and discretion.

LAW §246 > judicial review -- range of choices agency permitted to make -- > Headnote:
LEdHN[21] [21]

A court reviewing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park must determine whether the Secretary's decision can reasonably be said to be within the small range of choices which the Secretary has been permitted to make by Congress, under both 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) and 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*), which provide that the Secretary may not approve the construction of programs or projects which require the use of any publicly owned land from a public park unless he determines that there is no feasible and prudent alternative to the use of such land and unless he determines that all possible planning has been done to minimize harm to such park from such use.

LAW §246 > judicial review -- construing agency's authority -- highway through park -- > Headnote:
LEdHN[22] [22]

A court reviewing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park 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.

LAW §268 > judicial review -- highway through park -- feasible alternatives -- > Headnote:
LEdHN[23] [23]

A court reviewing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park must be able to find that the Secretary could have reasonably believed that there are no feasible alternatives to the route selected or that the alternatives, if there are any, involve unique problems.

LAW §250 > judicial review -- scope of agency's authority -- abuse of discretion -- > Headnote:
LEdHN[24] [24]

Scrutiny of the facts involved in a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park does not end with a determination that the Secretary has acted within the scope of his statutory authority, for 706(2)(A) of the Administrative Procedure Act (*5 USC 706(2)(A)*) requires a finding that the actual choice made by the Secretary not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," and in order 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.

LAW §236 > scope of judicial review -- no substitution of court's judgment -- > Headnote:
LEdHN[25] [25]

Although an inquiry by a Federal District Court into the facts involved in a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park is to be searching and careful, the ultimate standard of review is a narrow one and the court is not empowered to substitute its judgment for that of the Secretary.

LAW §236 > judicial review -- compliance with procedural requirements -- > Headnote:
LEdHN[26] [26]

The final inquiry to be made by a Federal District Court reviewing a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park is whether the Secretary's action followed the necessary procedural requirements.

LAW §155 > absence of formal findings -- necessity for remand to administrative agency -- > Headnote:
LEdHN[27] [27]

While court review of a decision of the Secretary of Transportation to permit the construction of an interstate highway through a public park is hampered by the Secretary's failure to make formal findings that there are no feasible alternatives to the route selected or that the alternatives, if there are any, involve unique problems, and by his failure to state his reasons for allowing the highway to be built through the park, the absence of formal findings does not necessarily require that the case be remanded to the Secretary, for neither 4(f) of the Department of Transportation Act of 1966 (49 USC 1653(f)) nor 138 of the Federal-Aid Highway Act of 1968 (*23 USC 138*) requires such formal findings to be made.

LAW §155 > necessity for formal findings -- rulemaking and adjudicatory proceedings -- > Headnote:
LEdHN[28] [28]

The Administrative Procedure Act requirements, contained in 553 and 554 of the Act (5 USC 553-554), that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to a decision of the Secretary of Transportation to approve the construction of an interstate highway through a public park, because 553(a)(2) of the Act (*5 USC 553(a)(2)*) excludes from the rulemaking process all matters relating to government agency management or personnel, or matters relating to public property, loans, grants, benefits, or contracts, and 554(a) of the Act (*5 USC 554(a)*) exempts from the adjudicatory process all matters involving, inter alia, proceedings in which decisions rest solely on inspections, tests, or elections, and matters subject to a subsequent trial of the law and the facts de novo in a court.

LAW §155 > necessity for formal findings -- ambiguous agency actions -- approval of highway construction plans -- > Headnote:
LEdHN[29] [29]

Although formal findings by a governmental agency may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, such situations are rare; and there is plainly no ambiguity where the Secretary of Transportation has approved the construction of an interstate highway through a public park and has approved a specific design for the project.

LAW §316 > ERROR §1660 > intervening regulation -- change in circumstances -- sufficient record -- > Headnote:
LEdHN[30] [30]

After the Secretary of Transportation has already approved the construction of an interstate highway through a public park without making any formal findings that there are no feasible alternatives to the route selected or that the alternatives, if there are any, involve unique problems, the issuance, by the Department of Transportation, of a regulation requiring the Secretary to make formal findings when he approves the use of parkland for highway construction does not compel the United States Supreme Court to remand a case challenging the decision to construct the highway through the park to the Secretary so that he can make formal findings as required by the regulation, where there has been a change of circumstances since approval of the route involving the purchase and clearing of rights of way and where there is an administrative record which will allow a full and prompt review of the Secretary's action without the additional delay which would result from remanding the case to the Secretary.

LAW §155 > ERROR §1714 > necessity for formal findings -- procedure on remand -- > Headnote:
LEdHN[31] [31]

Even where formal findings by the Secretary of Transportation, in a case involving the construction of an interstate highway through a public park, are mandatory, the proper course for the United States Supreme Court to take is to remand the case to a Federal District Court, directing that court to order the Secretary to make formal findings; and a Federal District

Court, in such a case, is not prohibited from remanding the case to the Secretary.

LAW §302 > EVIDENCE §495 > litigation affidavits -- inadequate record for review -- > Headnote:
LEdHN[32] [32]

Litigation affidavits, which are nothing more than post hoc rationalizations, have traditionally been found to be an inadequate basis for court review of administrative decisions; and such affidavits clearly do not constitute the "whole record" compiled by the administrative agency, which 706 of the Administrative Procedure Act (5 USC 706) requires courts to use as the basis for reviewing the agency's decisions.

LAW §310 > ERROR §1693 > judicial review -- highway through park -- whole administrative record -- > Headnote:
LEdHN[33] [33]

Where the United States Supreme Court remands a case to a Federal District Court for plenary review of a decision of the Secretary of Transportation approving the construction of an interstate highway through a public park, such plenary review is to be based on the full administrative record that was before the Secretary at the time he made his decision; and where the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence, the Federal District Court may require some further explanation from the Secretary in order to determine if the Secretary acted within the scope of his authority and if his action was justifiable under the applicable standard.

LAW §310 > judicial review -- highway through park -- examination of deciding officer -- > Headnote:
LEdHN[34] [34]

A Federal District Court, in a plenary review of a decision of the Secretary of Transportation approving the construction of an interstate highway through a public park, may require the administrative officials who participated in the decision to route the highway through the park to give testimony explaining their actions.

LAW §310 > court inquiry -- mental processes of administrative decisionmakers -- > Headnote:
LEdHN[35] [35]

Inquiry by a court into the mental processes of administrative decisionmakers is usually to be avoided.

LAW §310 > judicial review -- mental processes of deciding officers -- > Headnote:
LEdHN[36] [36]

Where there are administrative findings that were made at the same time as an administrative decision, there must be a strong showing of bad faith or improper behavior before a Federal District Court, considering the administrative decision on plenary review, may make an inquiry into the mental processes of the administrative decisionmakers.

LAW §310 > examination of deciding officer -- effective judicial review -- > Headnote:
LEdHN[37] [37]

Where there are no formal findings made at the same time as an administrative decision, a Federal District Court, considering the administrative decision on plenary review, may examine the decisionmakers themselves if that is the only way there can be an effective judicial review of the administrative decision.

LAW §310 > judicial review -- mental processes of deciding officer -- > Headnote:
LEdHN[38] [38]

A Federal District Court, considering on plenary review a decision of the Secretary of Transportation approving the construction of an interstate highway through a public park, which decision was made without the Secretary issuing any formal findings stating his reasons for approving the route, is not required to inquire into the mental processes of those persons who participated in making the decision or to examine the decisionmakers themselves, if the court concludes that the Secretary can prepare formal findings that will provide an adequate explanation for his action.

Syllabus

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 **[****2]** 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, **[****3]** 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 **[****4]** in the decision to give testimony explaining their action or require the Secretary to make formal findings. P. 420.

Counsel: 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.

Judges: 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.

Opinion by: MARSHALL

Opinion

[*404] [*146] [****5] [**817]** 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] **[****6]** designed **[***147]** 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] **[****7]** and § 18 (a) of **[*405]** the Federal-Aid **[**818]** Highway Act of 1968, 82 Stat. 823, 23 U. S. C. § 138 (1964 ed., Supp. V) (hereafter § 138). [3] **[****8]** ***HN1*** 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.

[*406] 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] **[****9]** which granted the Secretary's

[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] ***HN2*** "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 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] ***HN3*** "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*.

[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

motion for summary judgment, and the Court of Appeals for the Sixth Circuit **[***148]** 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] **[****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 **[**819]** of Interstate Highway I-40, part of the National System of Interstate and **[*407]** 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 **[****11]** Highway Act **[*408]** 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.

[**12]** Petitioners **[***149]** contend that the Secretary's action is invalid without such formal findings [16] **[****13]** 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

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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.

[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.

[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).

the park by using either of two possible tunneling methods, [18] and they claim that, at a **[*409]** **[**820]** 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, **[****14]** 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 **[****15]** 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.

LEdHN[1] [1] ***LEdHN[2]*** [2]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.

[*410] ***LEdHN[3]*** [3]***LEdHN[4]*** [4]A threshold question -- whether petitioners are entitled to **[***150]** any judicial review -- is easily answered. *Section 701* of the Administrative Procedure Act, *5 U. S. C. § 701 (1964 ed., Supp. V)*, ***HN4*** 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 **[****16]** "agency action is committed to agency discretion by law." ***HN5*** 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]

LEdHN[5] [5]Similarly, the Secretary's decision here does not fall within **[****17]** ***HN6*** 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 **[**821]** 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).

[**18]**

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[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.

[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*.

[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).

[*411] ***LEdHN[6]*** [6]Section 4 (f) of the Department of Transportation Act and *§ 138* of the Federal-Aid Highway Act ***HN7*** 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.

LEdHN[7] [7]Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement **[****19]** 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 **[***151]** 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."

LEdHN[8] [8]But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness **[****20]** of route, and community disruption will indicate that parkland should be used for highway construction **[*412]** 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.

LEdHN[9] [9] ***LEdHN[10]*** [10]Congress clearly **[****21]** 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 **[**822]** of parkland was to be given paramount **[*413]** 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. ***HN8*** 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.

[**22]** ***LEdHN[11]*** [11] ***LEdHN[12]*** [12]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)*, ***HN9*** which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions

[24] See 114 Cong. Rec. 19915 (statement by Rep. Holifield).

[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.

found" not to meet six separate standards. [30] In all cases **[*414]** agency action must be **[***152]** 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 **[****23]** 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)*.

[**24]** ***LEdHN[13]*** [13]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.

LEdHN[14] [14] ***LEdHN[15]*** [15] ***LEdHN[16]*** [16]***HN11*** 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 **[**823]** action **[****25]** 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). ***HN12*** And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution **[*415]** 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.

LEdHN[17] [17]Petitioners' alternative **[****26]** argument also fails. ***HN13*** *De novo* review of **[***153]** 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.

LEdHN[18] [18]***LEdHN[19]*** [19]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. ***HN14*** Certainly, **[****27]** 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

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[30] ***HN10*** "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 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)*.

action from a thorough, probing, in-depth review.

LEdHN[20] [20]**LEdHN[21]** [21]**LEdHN[22]** [22]**LEdHN[23]** [23]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 **[*416]** 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 **[****28]** 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.

LEdHN[24] [24] **LEdHN[25]** [25]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)* **HN15** requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance **[****29]** with law." *5 U. S. C. § 706 (2)(A) (1964 ed., Supp. V)*. To make this finding the court must consider **[**824]** 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.

[*417] **[***154]** **LEdHN[26]** [26]**HN16** The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Here the only procedural error alleged is the **[****30]** failure of the Secretary to make formal findings and state his reason for allowing the highway to be built through the park.

LEdHN[27] [27] **LEdHN[28]** [28] **LEdHN[29]** [29]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)*. **HN17** And, although formal findings may be required in some cases in **[****31]** 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 **[*418]** 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 **[****32]** 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

[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.

[32] DOT Order 5610.1 was issued on October 7, 1970.

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 **[****33]** denial of relief in the state courts, this Court granted certiorari "to consider whether [the tenant] was denied due process by the **[**825]** Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the **[***155]** 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 **[*419]** ground that ***HN18*** 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*.

LEdHN[30] [30]***LEdHN[31]*** [31] **[****34]** 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.

[**35]** ***LEdHN[32]*** [32]That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. ***HN19*** 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)*.***HN20*** 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*.

[*420] ***LEdHN[33]*** [33]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 **[****36]** 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.

LEdHN[34] [34]***LEdHN[35]*** [35]***LEdHN[36]*** [36]***LEdHN[37]*** [37]The court may require the administrative officials who participated **[****37]** in the decision to give testimony explaining their action. Of course, such ***HN21*** inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan, 313 U.S. 409, 422 (1941)*. **[***156]** 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 **[**826]** is by examining the decisionmakers themselves. See *Shaughnessy v. Accardi, 349 U.S. 280 (1955)*.

LEdHN[38] [38]The District Court is not, however, required to make such an inquiry. It may be that the

[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.

[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.

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* **[****38]** *hoc* rationalization" and thus must be viewed critically. If the District Court decides **[*421]** 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.

Concur by: BLACK; BLACKMUN

Concur

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* ***[****39]*** *(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, **[*422]** 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 **[***157]** coming from the Solicitor General's office, this record contains not one word **[****40]** 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.

[827]** MR. JUSTICE BLACKMUN.

I fully **[****41]** 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 **[*423]** 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.

References

1 Am Jur 2d, Administrative Law 92- 186; *2 Am Jur 2d, Administrative Law 188- 192*, *434- 458*, *553- 775*; 39 Am Jur 2d, Highways, Streets, and Bridges 49; Am Jur,

[1] See *23 U. S. C. § 128 (1964 ed., Supp. V)* and regulations promulgated thereunder, *34 Fed. Reg. 727-730 (1969)*.

[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).

Parks, Squares, and Playgrounds (1st ed 25).

1 Am Jur Pl & Pr Forms (Rev ed), Administrative Law, Forms 161 et seq.; 11 Am Jur Pl & Pr Forms (Rev ed), Federal Practice and Procedure, Form 2161

11 **[****42]** Am Jur Trials 189, Condemnation of Urban Property 8-24

US L Ed Digest, Administrative Law 23, 33, 46, 74, 85, 100, 132, 144.5, 154-155, 157, 206-208, 219, 236, 238, 244-247, 249-251, 262-266, 268, 272, 275-276, 288, 310, 316-317; Evidence 495; Highways and Streets 1; Parks, Squares, and Commons 1; Statutes 100-101, 145.4, 161

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L Ed Index to Anno, Administrative Law; Constitutional Law; Eminent Domain; Highways; Parks; Public Lands

ALR Quick Index, Administrative Law; Conservation; Eminent Domain; Highways and Streets; Parks and Playgrounds

Federal Quick Index, Administrative Law; Conservation; Eminent Domain; Federal-Aid Highway Act; Highways and Streets; Parks; Public Lands

Annotation References:

Construction and application of *Administrative Procedure Act. 94 L Ed 631, 95 L Ed 473, 97 L Ed 884*.

End of Document

TAB 7

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.

Core Terms

district court, species, preliminary injunction, salmon, dam, habitat, endangered species, injunction, spill, biological, migrate, modify, fish, survival, jeopardize, base line, jeopardy, juvenile, snake, agency's action, injunctive relief, steelhead, threatened species, proposed action, transport, modify, irreparable, scientific, deference, issuance

Case Summary

Procedural Posture

Defendants, National Marine Fisheries Service (NMFS) and the Army Corps of Engineers, appealed from an order of the United States District Court for the District of Oregon that granted a preliminary injunction to the National Wildlife Foundation (NWF), based on a violation of the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531-1544*, requiring them to pass a specified amount of water through the spill gates of dams to benefit fish populations.

Overview

Thirteen species of Columbia, Snake, and Willamette River salmon and steelhead were protected by the ESA. NMFS operated the Federal Columbia River Power System (FCRPS), which involved the dams and power plants on those rivers. The district court granted summary judgment for NWF, holding that NMFS had violated the ESA in the issuance of its 2004 biological opinion, which formed the basis of the federal agencies' operating plans for the FCRPS. The court found that the 2004 biological opinion was legally insufficient for several reasons, and was not entitled to deference because it represented a complete reversal from the prior 2000 opinion. 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 court specified that its summary judgment order was not final or appealable, but also granted an injunction requiring a greater number of fish to be allowed through the spill gates, where their chances of survival were increased. The court of appeals affirmed the injunction, finding the district court's conclusions were well grounded in the ESA.

Outcome

The district court's issuance of a preliminary injunction was affirmed, but the question of whether the injunction should be more narrowly tailored or modified was remanded to the district court. The court expressed no opinion on the ultimate merits of the summary judgment decision before the district court.

LexisNexis® Headnotes

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Critical Habitats

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Species Lists

Environmental Law > Natural Resources & Public Lands > Fish & Wildlife Protection

Governments > Federal Government > Claims By & Against

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN1 The Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*, 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. *16 U.S.C.S. § 1536(a)(2)*.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

Environmental Law > Natural Resources & Public

Lands > Endangered Species Act > Species Lists

Governments > Federal Government > Claims By & Against

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN2 To ensure that a federal agency meets its substantive duties under the Endangered Species Act (ESA), 16 U.S.C.S. §§ 1531-1544, the ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species. To that end, the agency planning the action, usually known as the "action agency," must consult with any consulting agency. That 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.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Critical Habitats

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

HN3 A 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.S. § 1536(b), based on the best scientific and commercial data available, 16 U.S.C.S. § 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. 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.

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Critical Habitats

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Takings

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

Real Property Law > Inverse Condemnation > General Overview

HN4 Where a biological opinion concludes that jeopardy to an endangered species 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 § 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C.S. §§ 1531-1544, the consulting agency can issue an "Incidental Take Statement" which, if followed, exempts the action agency from the prohibition on takings found in § 9 of the ESA. 16 U.S.C.S. § 1536(b)(4).

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Takings

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN5 The term "take" as used in the Endangered Species Act, 16 U.S.C.S. §§ 1531-1544, 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.S. § 1532(19).

Administrative Law > Agency Rulemaking > Formal Rulemaking

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Critical Habitats

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN6 Where a consulting agency under the Endangered Species Act (ESA), 16 U.S.C.S. §§ 1531-1544, 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. The consulting agency may recommend a reasonable and prudent alternative to the agency's proposed action. 16 U.S.C.S. § 1536(b)(3)(A).

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN7 The issuance of a biological opinion under the Endangered Species Act, 16 U.S.C.S. §§ 1531-1544, is considered a final agency action, and therefore subject to judicial review.

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Critical Habitats

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > Federal Agencies

Environmental Law > Natural Resources & Public Lands > Fish & Wildlife Protection

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

International Trade Law > Trade Agreements > Environmental Provisions > Fish & Fishing Rights

HN8 The Endangered Species Act (ESA), 16 U.S.C.S. §§ 1531-1544, as it applies to protection of anadromous fish, requires action agencies to consult the agency formerly known as the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (since renamed NOAA Fisheries), to ensure that an agency's actions do not jeopardize an ESA-protected species or adversely modify their critical habitat. 16 U.S.C.S. § 1536(a)-(b).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN9 A district court's order with respect to preliminary injunctive relief is subject to limited appellate review, and an appellate court 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. Such review is limited and deferential. In considering a preliminary injunction appeal, a reviewing court ordinarily does 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. 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.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN10 The traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the

Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531-1544*. In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. 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. Accordingly, courts may not use equity's scale's to strike a different balance. Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN11 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, plaintiffs under the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544* are only obligated to show a fair chance of success.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN12 On appellate review in the context of a district court's grant of a preliminary injunction, a reviewing court considers a finding of fact to be clearly erroneous if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN13 An appellate court's task in reviewing a district court's preliminary injunction decision is not to resolve the factual controversies before the district court. Clear error is not demonstrated by pointing to conflicting evidence in the record. 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.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Environmental Law > Natural Resources & Public Lands > Endangered Species Act > General Overview

Governments > Federal Government > US Congress

International Trade Law > Trade Agreements > Environmental Provisions > Endangered Species

HN14 Although not every statutory violation leads to the automatic issuance of an injunction, in the context of the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531-1544*, the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute. A court therefore holds that injunctive relief was necessary to effectuate Congress's clear intent by requiring compliance with the substantive and procedural provisions of the ESA.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN15 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. However, the deference accorded an agency's scientific or technical expertise is not unlimited. Deference is not owed when the agency has completely failed to address some factor consideration of which was essential to making an informed decision.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN16 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.

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Matthew A. Love and Sam Kalen, Van Ness Feldman, P.C., Seattle, Washington, for defendants-appellants BPA Customer Group. Lawrence G. Wasden, Attorney General, Clive J. Strong, Deputy Attorney General, and Clay R. Smith, Deputy Attorney General, State of Idaho, Boise, Idaho, for defendant-intervenor-appellant State of Idaho.

Todd D. True and Stephen D. Mashuda, Earthjustice, Seattle, Washington; Daniel J. Rohlf, Pacific Environmental Advocacy Center, Portland, Oregon, for **[**2]** plaintiffs-appellees National Wildlife Federation.

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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.

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[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.

No one disputes that the wild Pacific salmon population 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

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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.

agencies to, in consultation with what is known as the "consulting agency," conserve species listed under the ESA. **[**9]** ***HN1*** 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)*. ***HN2*** 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]** ***HN3*** 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.*

HN4 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]** ***HN6*** 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)*.

HN7 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*.

HN8 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

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[5] ***HN5*** "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.

explanation for several of the key assumptions that went 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:

[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.

. The opinion failed to conduct a jeopardy analysis 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

HN9 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).

HN10 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. ***HN11*** 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. ***HN12*** 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."

HN13 Our task in reviewing a district court's preliminary injunction decision is not to resolve these controversies.

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[9] Although a non-trivial level of mortality would likely occur under free-flowing river conditions, FCRPS operations account for most of the mortality.

"Clear error is not demonstrated by pointing to 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.

HN14 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

[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.

difference in adult return rates between fish that are 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. ***HN15*** 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. ***HN16*** "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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TAB 8

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL

ADMINISTERED BY JAMS, CASE NO. 1501001058

In the Matter of the Arbitration Between:

HORSE RACING INTEGRITY WELFARE UNIT,
Claimant

v.

JUAN CANO,
Respondent.

CORRECTED FINAL DECISION

I, the undersigned Arbitrator, having been designated, authorized, and duly sworn, and having heard and considered the arguments, allegations, submissions, proofs, testimony, and evidence submitted by the Parties, and after a full evidentiary hearing occurring by agreement of the Parties on August 27, 2025 in person in Chicago, Illinois, and via Zoom, pursuant to the Horseracing Integrity and Safety Act of 2020 and its implementing regulations, do hereby Find and Decide as follows:

I. INTRODUCTION

1.1 Claimant is the Horseracing Integrity & Welfare Unit (the "Agency"), which is responsible for sample collection and results management in the anti-doping testing of thoroughbred racehorses in the United States, pursuant to the Horseracing Integrity Act of 2020, 15 U.S.C. §§ 3051-3060. During this Arbitration, the Agency has been represented by attorneys Allison Farrell of the Agency and Paul Greene of Global Sports Advocates.

1.2 Respondent is Juan Cano. Mr. Cano, referred to herein as "Trainer Cano," is a trainer of thoroughbred racehorses based in Kentucky. It is undisputed that Trainer Cano is a "Covered Person" under the law and rules applicable to this Arbitration. During this Arbitration, Trainer Cano has been represented by attorneys Leah Bernhard and Katy Freeman of the Law Office of Howard L. Jacobs. To ensure due process, Trainer Cano was provided an interpreter pursuant to Rule 7240.

1.3 Trainer Cano has been charged with seven separate Anti-Doping Rule Violations ("ADRV") of the Anti-Doping Medication Control Program ("ADMC Program"), each, as explained in more detail below, involving the presence of a banned substance, in violation of Rule 3212 of the ADMC Program (collectively, the "Presence charges").

1.4 In this Final Decision, the Agency and Trainer Cano will be referred to individually as "Party" and collectively as "Parties."

II. THE FACTS

2.1 This section summarizes basic facts and allegations based on the Parties' written submissions and pleadings, and the evidence adduced at the August 27, 2025 Hearing before the Arbitrator. Additional facts and allegations found in the Parties' written submissions and pleadings and the evidence are set forth, where relevant, in connection with the discussion elsewhere in this Final Decision. Although the Parties did not dispute certain facts, the legal effect and the nature of many of the facts were disputed, as explained, more fully below.

2.2 The Arbitrator has considered all of the facts, allegations, legal arguments, evidence, and testimony submitted by the Parties in this Arbitration. When explaining the reasons supporting this Final Decision, the Arbitrator refers only to the submissions and evidence deemed necessary.

2.3 Under the ADMC Program, clenbuterol can only be administered to a Covered Horse when prescribed by a veterinarian (in the context of a valid veterinarian-client-patient relationship) for its therapeutic use for a maximum of 30 days. Clenbuterol is otherwise deemed an S3 Banned Substance. *See* Rule 4114(b).

2.4 Trainer Cano became the Responsible Person for La Bukana on June 21, 2024.

2.5 On October 31, 2024, Sample Collection Personnel collected an Out-of-Competition hair sample from La Bukana's mane, #H101211951. Analytical testing of hair Sample #H101211951 was conducted by Industrial Laboratories ("Industrial") and returned an Adverse Analytical Finding ("AAF") for clenbuterol.

2.6 Industrial conducted segmental analysis on hair Sample #H101211951, with each of the six 1-inch hair segments testing positive for clenbuterol at the following estimated concentrations:

(i) Segment 1 – 56.5 ng/g
(ii) Segment 2 – 74.5 ng/g
(iii) Segment 3 – 92.8 ng/g
(iv) Segment 4 – 37.7 ng/g
(v) Segment 5 – 5.5 ng/g
(vi) Segment 6 – 3.39 ng/g

2.7 Trainer Cano initially waived analysis of the B Sample and provided an explanation for the AAF that clenbuterol had been prescribed for La Bukana "in early 2024". Further investigation revealed that a veterinarian had prescribed La Bukana a medicine containing clenbuterol on December 28, 2023, to be used for up to 14 days.

2.8 Trainer Cano subsequently requested analysis of La Bukana's B Sample. Analytical testing on the B Sample was conducted by the Kenneth L. Maddy Equine Analytical Chemistry Laboratory at UC Davis ("UC Davis Lab") and confirmed the presence of clenbuterol.

2.9 Trainer Cano became the Responsible Person for Outofnothingatall on October 26, 2024.

2.10 On November 20, 2024, Sample Collection Personnel collected an Out-of-Competition blood sample and hair sample from Outofnothingatall's mane, #H101213502. Analytical testing of the blood sample conducted by Industrial detected no prohibited substances. Analysis of hair Sample #H101213502 returned an AAF for clenbuterol.

2.11 Industrial conducted segmental analysis on hair Sample #H101213502, with each of the six 1-inch hair segments testing positive for clenbuterol at the following estimated concentrations:

(i) Segment 1 – 73.8 ng/g
(ii) Segment 2 – 15.6 ng/g
(iii) Segment 3 – 1.2 ng/g
(iv) Segment 4 – 0.911 ng/g
(v) Segment 5 – 1.33 ng/g
(vi) Segment 6 – 1.53 ng/g

2.12 Trainer Cano requested analysis of Outofnothingatall's B Sample. Analytical testing on the B Sample was conducted by the UC Davis Lab and confirmed the presence of clenbuterol.

2.13 Trainer Cano became the Responsible Person for Solidify on April 1, 2023.

2.14 On November 20, 2024, Sample Collection Personnel collected a post-race blood, urine, and hair sample from Solidify. The hair sample, taken from Solidify's mane, was identified as #H101213569. Analytical testing on the blood, urine, and hair samples was conducted by Industrial. Analysis of the blood and urine samples detected no prohibited substances. Analysis of hair Sample #H101213569 returned an AAF for clenbuterol at an estimated concentration of 30.25 ng/g in the 4 inches of mane hair cut from the root. No segmental analysis was done on hair Sample #H101213569.

2.15 Trainer Cano requested analysis of Solidify's B Sample. Analytical testing on the B Sample was conducted by the UC Davis Lab and confirmed the presence of clenbuterol.

2.16 Trainer Cano became the Responsible Person for True Jedi on May 19, 2024.

2.17 On November 21, 2024, Sample Collection Personnel collected Out-of-Competition blood and hair samples from True Jedi. The hair sample, taken from True Jedi's mane, was identified as #H101094803. Analytical testing on the blood and hair samples was conducted by Industrial. Analysis of the blood sample detected no prohibited substances. Analysis of hair Sample #H101094803 returned an AAF for clenbuterol.

2.18 Industrial conducted segmental analysis on hair Sample #H101094803, with each of the six 1-inch hair segments testing positive for clenbuterol at the following estimated concentrations:

(i) Segment 1 – 7.86 ng/g
(ii) Segment 2 – 14.5 ng/g
(iii) Segment 3 – 13.0 ng/g

(iv) Segment 4 – 20.8 ng/g
(v) Segment 5 – 29.3 ng/g
(vi) Segment 6 – 21.8 ng/g

2.19 Trainer Cano requested analysis of True Jedi's B Sample. Analytical testing on the B Sample was conducted by the UC Davis Lab and confirmed the presence of clenbuterol.

2.20 Trainer Cano became the Responsible Person for Global Sensation on March 22, 2024.

2.21 On November 21, 2024, Sample Collection Personnel collected Out-of-Competition blood and hair samples from Global Sensation. The hair sample, taken from Global Sensation's mane, was identified as #H101094787. Analytical testing of the blood and hair samples was conducted by Industrial. Analysis of the blood sample detected no prohibited substances. Analysis of hair Sample #H101094787 returned an AAF for clenbuterol at an estimated concentration of 71.3 ng/g in the 4 inches of mane hair cut from the root. No segmental analysis was done on hair Sample #H101094787.

2.22 Trainer Cano requested analysis of Global Sensation's B Sample. Analytical testing on the B Sample was conducted by the UC Davis Lab and confirmed the presence of clenbuterol.

2.23 Trainer Cano became the Responsible Person for Protomagic on December 22, 2023.

2.24 On November 21, 2024, Sample Collection Personnel collected Out-of-Competition blood and hair samples from Protomagic. The hair sample, taken from Protomagic's mane, was identified as #H101094779. Analytical testing of the blood and hair samples was conducted by Industrial. Analysis of the blood sample detected no prohibited substances. Analysis of hair Sample #H101094779 returned an AAF for clenbuterol at an estimated concentration of 23.75 ng/g in the 4 inches of mane hair cut from the root. No segmental analysis was done on hair Sample #H101094779.

2.25 Trainer Cano requested analysis of Protomagic's B Sample. Analytical testing on the B Sample was conducted by UC Davis Lab and confirmed the presence of clenbuterol.

2.26 On the same day that samples were collected from True Jedi, Global Sensation, and Protomagic, HIWU investigators conducted a search of Trainer Cano's barn, including his tack room, office, and truck. During the search, a brown bottle with a small amount of liquid was seized identified as "Medicated with Antibiotics Head wash w/Steroid" with a label from Dr. Rick Pelphrey. No other suspicious or prohibited items were found or seized during the search. Trainer Cano was cooperative throughout the search.

2.27 On November 22, 2024, HIWU Investigator Bennett interviewed Dr. Pelphrey. Dr. Pelphrey advised that the bottle that had been seized should not contain clenbuterol. Dr. Pelphrey informed Investigator Bennett that he believed La Bukana may have been administered clenbuterol before the horse was in the care of Trainer Cano.

2.28 On November 26, 2024, Dr. Pelphrey provided Investigator Bennett with billing and prescription information dated December 28, 2023, for a medication with clenbuterol for La

Bukana.

2.29 On December 4, 2024, Investigator Bennett conducted another interview of Dr. Pelphrey, who confirmed he had prescribed La Bukana a medication with clenbuterol on December 28, 2023, which would have been used for a period not to exceed 14 days.

2.30 Trainer Cano became the Responsible Person for Beer With Ice on May 25, 2024.

2.31 On January 15, 2025, Sample Collection Personnel collected Out-of-Competition blood and hair samples from Beer With Ice. The hair sample, taken from Beer With Ice's mane, was identified as #H101092302. Analytical testing of the blood and hair samples was done by Industrial. Analysis of the blood sample detected no prohibited substances. Analysis of hair Sample #H1010902302 returned an AAF for clenbuterol.

2.32 Industrial conducted segmental analysis on hair Sample #H101092302, with each of the five 1-inch hair segments testing positive for clenbuterol at the following estimated concentrations:

(i) Segment 1 – 0.284 ng/g
(ii) Segment 2 – 6.29 ng/g
(iii) Segment 3 – 0.669 ng/g
(iv) Segment 4 – 0.547 ng/g
(v) Segment 5 – 5.08 ng/g

2.33 Trainer Cano requested analysis of Beer With Ice's B Sample. Analytical testing on the B Sample was conducted by UC Davis Lab and confirmed the presence of clenbuterol.

III. PROCEDURAL HISTORY

3.1 On November 21, 2024, the Agency served Trainer Cano with an EAD Notice stating that the October 31, 2024 Out-of-Competition hair sample, designated as #H101211951, from the Covered Horse La Bukana had returned an AAF for clenbuterol, a category S3 Banned Substance.

3.2 On December 30, 2024, the Agency served Trainer Cano with an EAD Notice stating that the November 21, 2024 Out-of-Competition hair sample, designated as #H101094779, from the Covered Horse Protomagic had returned an AAF for clenbuterol.

3.3 The same day, the Agency served Trainer Cano with an EAD Notice stating that the November 20, 2024 post-race hair sample, designated as #H101213569, from the Covered Horse Solidify had returned an AAF for clenbuterol; the November 21, 2024 Out-of-Competition hair sample, designated as #H101094803, from the Covered Horse True Jedi had returned an AAF for clenbuterol; and the November 21, 2024 Out-of-Competition hair sample, designated as #H101094787, from the Covered Horse Global Sensation had returned an AAF for clenbuterol.

3.4 On February 12, 2025, the Agency served Trainer Cano with an EAD Notice stating that the November 20, 2024 Out-of-Competition hair sample, designated as #H101213502, from the Covered Horse Outofnothingatall had returned an AAF for clenbuterol.

3.5 Also on February 12, 2025, the Agency served Trainer Cano with an EAD Notice stating that the January 15, 2025 Out-of-Competition hair sample, designated as #H101092302, from the Covered Horse Beer With Ice had returned an AAF for clenbuterol.

3.6 On April 2, 2025, following testing of the B Samples, the Agency notified Trainer Cano that it was charging him with violations of Rule 3212 for the presence of clenbuterol in the following samples:

- La Bukana's hair sample #H101211951 collected on October 31, 2024, at Churchill Downs in Lexington, Kentucky;

-Outofnothingatall's hair sample #H101213502 collected on November 20, 2024, at Churchill Downs in Lexington, Kentucky;

-Protomagic's hair sample #H101094779 collected on November 21, 2024, at Churchill Downs in Lexington, Kentucky;

-Solidify's hair sample #H101213569 collected on November 20, 2024, at Churchill Downs in Lexington, Kentucky;

-True Jedi's hair sample #H101094803 collected on November 21, 2024, at Churchill Downs in Lexington, Kentucky;

-Global Sensation's hair sample #H101094787 collected on November 21, 2024, at Churchill Downs in Lexington, Kentucky;

-Beer With Ice's hair sample #H101092302 collected on January 15, 2025, at Turfway Park in Florence, Kentucky.

3.7 On April 11, 2025, the Agency initiated this arbitration against Trainer Cano pursuant to Rule 7060(a) on the above-referenced charges, "not[ing] there are multiple cases at issue and the parties jointly request that all cases be consolidated for hearing in the interest of efficiency for all parties."

3.8 On May 20, 2025, the Arbitrator held a preliminary conference hearing. At the hearing, the Agency was represented by attorneys Allison Farrell and Paul Greene, and Trainer Cano was represented by attorneys Katy Freeman and Leah Bernard.

3.9 At the preliminary hearing, the Parties agreed to a hearing date and location as well as to dates for the pre-hearing briefs. Thereafter, the parties requested, and the Arbitrator approved, a modified briefing schedule.

3.10 As memorialized in Modified Procedural Order No. 1, dated May 21, 2025, the Arbitrator confirmed the hearing date of August 27, 2025 (and August 28, 2025 if needed) at 9:30 a.m. CST at the JAMS Chicago Office, and set a pre-hearing briefing schedule consistent with the nature of the charges: (1) Trainer Cano's pre-hearing brief relating to the Presence charges was due by August 6, 2025; (2) the Agency's brief relating to the Presence charges was due by August 20, 2025.

3.11 On August 6, 2025, Trainer Cano filed his pre-hearing brief, exhibit list, and exhibits regarding the Presence charges.

3.12 On August 20, 2025, the Agency filed its pre-hearing brief, book of evidence, and book of authorities regarding the Presence charges.

3.13 Counsel for the Parties appeared for the hearing on August 27, 2025, at JAMS, 71 South Wacker Dr., Suite 2400, Chicago IL, 60606.

3.14 At the hearing, the Arbitrator admitted all of the submitted exhibits, and heard the testimony of five witnesses: Trainer Cano; Petra Hartmann, the laboratory director for drug testing services at Industrial; Brian Bennett, an investigator employed by the Agency; Dr. Daniel Eichner, an expert witness for HIWU; and Dr. Pascal Kintz, an expert witness for Trainer Cano. With the exception of Investigator Bennett, the witnesses all testified virtually. Each Party had a full and fair opportunity to examine or cross-examine each of the witnesses.

3.15 Throughout the hearing, Trainer Cano had the assistance of two registered interpreters, Carla Crocker and Mario Castagola of Day Translations. The interpreters confirmed they had no prior relationship with Trainer Cano.

3.16 Also present virtually at the hearing was Sam Reinhardt from the Horseracing Integrity and Safety Authority ("HISA" or the "Authority").

3.17 The Parties agreed, given the nature of this case, to allow the Arbitrator thirty (30) days to issue a Final Decision in accordance with Rule 7340.

3.18 Additional exhibits from the hearing as well as a recording of the hearing was received by the Arbitrator on September 2, 2025. The evidence was thus deemed closed as of September 3, 2025.

3.19 Upon the adjournment of the hearing and the closing of the evidence, the Arbitrator proceeded to draft this Final Decision, which was timely issued.

IV. JURISDICTION

General Overview

4.1 The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060 (the "Act") recognizes HISA, a private non-profit organization for "purposes of developing and implementing a horseracing anti-doping medication and control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3052(a). The program contemplated by the Act is commonly referred to as the "ADMC Program."

4.2 The ADMC Program, initially proposed by the Authority under the Act, was approved by the Federal Trade Commission on March 27, 2023, and implemented on May 22, 2023.

4.3 The ADMC Program sets out the applicable rules ("Rules") that govern this Arbitration and the jurisdictional grounds of the Panel over all participants. For example, Rule Series 1000 contains general provisions, including Rules relating to interpretation and definitions. Rule Series 3000 establishes the Equine Anti-Doping and Controlled Medication Protocol. And Rule Series 7000–Arbitration Procedures—establishes a disciplinary process for hearing and adjudicating violations of the rules and related offenses.

4.4 Pursuant to its authority under the Act, the Authority entered into an agreement with the Agency "to act as the anti-doping and medication control enforcement agency . . . for services consistent with the [ADMC Program]." 15 U.S.C. § 3054(e)(1)(B).

<u>Jurisdiction</u>

4.5 Rule 3020 provides, in pertinent part, that the anti-doping rules set out in the ADMC Program apply to and are binding on Covered Persons.

4.6 Covered Persons are defined under Rule 1020 as follows:

> . . . all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses.

4.7 Pursuant to Section 3054 of the Act, "Covered Persons" must register with the Authority. However, they are bound by the Protocol by undertaking the activity (or activities) that make(s) them a Covered Person, whether or not they register with the Authority.

4.8 ADMC Program Rule 3030(a) defines a "Responsible Person" to mean: "the Trainer of the Covered Horse."

4.9 In this matter, there is no dispute that Mr. Juan Cano is a trainer who is required to be—and is—registered with the HISA. As such, Trainer Cano is both a "Responsible Person" and a "Covered Person" bound by and subject to the ADMC Program. There is further no dispute that La Bukana, Outofnothingatall, Protomagic, Solidify, True Jedi, Global Sensation, and Beer With Ice are each a "Covered Horse."

4.10 The Rule 7000 Series sets out the arbitration procedures governing a charged violation of the ADMC Program, providing as follows:

> Rule 7010 Applicability
>
> The Arbitration Procedures set forth in this Rule 7000 Series shall apply to all adjudications arising out of the Rule 3000 Series.
>
> Rule 7020. Delegation of Duties

(a) Subject to Rule 3249, Anti-Doping Rule Violations arising out of the Rule 3000 Series and violations of Rule 3229 (together, "EAD Violations") shall be adjudicated by an independent arbitral body (the "Arbitral Body") in accordance with the Rule 3000 Series and these Arbitration Procedures. The Arbitral Body may also adjudicate any other matter referred to it under the Protocol, and any other matter that might arise from time to time under the Protocol that the Agency considers should be determined by the Arbitral Body. . . .

4.11 Where the Agency issues a Charge Letter effecting charges on a Covered Person, arbitral proceedings are initiated pursuant to Rule 7060:

Rule 7060. Initiation by the Agency

(a) EAD Violations. Unless Rule 3249 applies, if the Agency charges a Covered Person with an EAD Violation, the Agency shall initiate proceedings with the Arbitral Body. If a Covered Person is charged with both an EAD Violation and an ECM or Other Violation, the procedures for EAD Violations apply. The parties to the proceeding shall be the Agency and the Covered Person(s) charged. The Owner and the Authority shall be invited to join in the proceedings as observers and, if accepted as such, receive copies of the filings in the case. In the context of EAD Violation cases, the Owner may be permitted to intervene and make written or oral submissions.

4.12 In this case, arbitration proceedings were commenced before JAMS, the designated arbitration provider. Trainer Cano had notice of all charges against him. The Parties have fully participated in this Arbitration without any objection to the Arbitrator's jurisdiction or the arbitrability of any issues raised in this arbitration, including all issues related to the Presence charges.

4.13 The Arbitrator concludes, without objection, that the Arbitrator has jurisdiction over the seven charges at issue in this matter. *See* Rule 7090 (arbitrator has authority to rule on her jurisdiction; party must object to challenge jurisdiction).

V. <u>RELEVANT LEGAL STANDARDS</u>

5.1 This Arbitration involves seven separate ADRV charges. As detailed above, it is undisputed that under the ADMC Program, Trainer Cano is a Covered Person and a Responsible Person. What follows is a summary of the relevant legal standards, but additional authority may be set out, where relevant, in connection with the legal discussion elsewhere in this Final Decision.

5.2 The burden of proof depends on the nature of the alleged ADRV. Rule 3121 provides as follows:

Rule 3121. Burden and Standard of Proof

(a) The Agency shall have the burden of establishing that a violation of the Protocol has occurred to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability (*i.e.*, a preponderance of the evidence) but less than clear and convincing evidence or proof beyond a reasonable doubt.

(b) Where the Protocol places the burden of proof on a Covered Person to rebut a presumption or to establish specified facts or circumstances, the standard of proof shall be by a balance of probability (*i.e.*, a preponderance of the evidence), except as provided in Rules 3122(c) and 3122(d).

5.3 Regarding interpreting the Protocol, Rule 3070 provides in pertinent part:

(b) Subject to Rule 3070(d), the Protocol shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. . . .

(d) The World Anti-Doping Code and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the WADA Code Program, may be considered when adjudicating cases relating to the Protocol, where appropriate.

5.4 Rule 3040 sets out certain obligations of a trainer, such as Trainer Cano, as both a Covered Person and a Responsible Person, in pertinent part as follows:

(a) Responsibilities of All Covered Persons

It is the personal responsibility of each Covered Person: (1) to be knowledgeable of and to comply with the Protocol and related rules at all times. All Covered Persons shall be bound by the Protocol and related rules, and any revisions thereto, from the date they go into effect, without further formality. It is the responsibility of all Covered Persons to familiarize themselves with the most up-to-date version of the Protocol and related rules and all revisions thereto; . . .

5.5 Rule 3212, Presence of a Banned Substance, states:

(a) It is the personal and non-delegable duty of the Responsible Person to ensure that no Banned Substance is present in the body of his or her Covered Horse(s). The Responsible Person is therefore strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s). Accordingly, it is not necessary to demonstrate intent, Fault, negligence, or knowing Use on the part of the Responsible Person in order to establish that the Responsible Person has committed a Rule 3212 Anti-Doping Rule Violation.

(b) Sufficient proof of a Rule 3212 Anti-Doping Rule Violation is established by any of the following:

(1) the presence of a Banned Substance or its Metabolites or Markers in the Covered Horse's A Sample where the Responsible Person waives analysis of the B Sample and the B Sample is not analyzed;

(2) the Covered Horse's B Sample is analyzed and the analysis of the B Sample confirms the presence of the Banned Substance or its Metabolites or Markers found in the A Sample; or

(3) where, in exceptional circumstances, the Laboratory (on instruction from the Agency) further splits the A or B Sample into two parts in accordance with the Laboratory Standards, the analysis of the second part of the resulting split Sample confirms the presence of the same Banned Substance or its Metabolites or Markers as were found in the first part of the split Sample, or the Responsible Person waives analysis of the second part of the split Sample.

(c) The general rule is that the presence of any amount of a Banned Substance or its Metabolites or Markers in a Sample collected from a Covered Horse constitutes an Anti-Doping Rule Violation by the Responsible Person of that Covered Horse.

(d) As an exception to the general rule of Rule 3212(c), the Prohibited List, Standards, or Technical Documents may establish special criteria for the reporting or the evaluation of certain Banned Substances, including a Minimum Reporting Level, Screening Limit, Threshold, or Decision Limit.

5.6 Under Rule 3223, the consequences for a first ADRV related to Rule 3212 (presence) include two years of ineligibility, a fine up to $25,000 or 25% of the purse (whichever is greater), and payment of some or all of the adjudication costs and the Agency's legal costs.

5.7 Rule 3223 further provides that "[t]he periods of Ineligibility and financial penalties set out in this Rule 3223 apply to the Covered Person's first doping offense. Where an offense is not the Covered Person's first doping offense, Rule 3228 applies."

5.8 Rule 3228 provides for increased sanctions for repeat offenders. Rule 3228(c)(1) states:

(1) Multiple violations for the same Banned Substance/Method incurred by a Covered Person in relation to the same Covered Horse prior to delivery of an EAD Notice may (at the Agency's discretion) be treated together as a single Anti-Doping Rule Violation, unless the facts demonstrate that there was more than one administration. Multiple violations for the same Banned Substance/Method incurred by a Covered

Person in relation to different Covered Horses prior to delivery of an EAD Notice may (at the Agency's discretion) each be treated as a first Anti-Doping Rule Violation. Where multiple Banned Substances are detected in a single Post-Race Sample or Post-Work Sample, each Banned Substance may (at the Agency's discretion) be treated as a separate violation.

5.9 Where a Violation of the ADMC Program is established, the respondent may be entitled to a mitigation of the applicable consequences if the respondent establishes, on a balance of probabilities, that he acted with either No Fault or Negligence or No Significant Fault or Negligence.

5.10 Fault, in Rule 1020, is defined as:

> . . . any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. With respect to supervision, factors to be taken into consideration are the degree to which the Covered Person conducted appropriate due diligence, educated, supervised, and monitored Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, and created and maintained systems to ensure compliance with the Protocol. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault.

5.11 "No Fault or Negligence" is governed by Rule 3224, which provides:

> Rule 3224. Elimination of the Period of Ineligibility Where There is No Fault or Negligence
>
> (a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620). . . .
>
> (b) Rule 3224 only applies in exceptional circumstances. In particular, it will not apply where the Banned Substance found to be present in a Sample: (1) came

from a mislabelled or contaminated supplement; or (2) was administered to the Covered Horse by veterinary or other support personnel without the knowledge of the Responsible Person.

(c) A finding that the Covered Person bears No Fault or Negligence for an Anti-Doping Rule Violation shall not affect the Consequences of that violation that apply to the Covered Horse (i.e., Ineligibility in accordance with Rule 3222(a) and Disqualification of results in accordance with Rule 3221).

5.12 Under Rule 1020, "No Fault or Negligence" means "[t]he Covered Person 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 administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. For any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Fault or Negligence."

5.13 "No Significant Fault or Negligence" is governed by Rule 3225, which provides:

Rule 3225. Reduction of the Period of Ineligibility Where There is No Significant Fault or Negligence

Reductions under this Rule 3225 are mutually exclusive and not cumulative, *i.e.*, no more than one of them may be applied in a particular case.

(a) General rule. Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then . . . the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault. . . .

5.14 Under Rule 1020, "No Significant Fault or Negligence" means "the Covered Person establishing that his or her 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 or Controlled Medication Rule Violation in question. For any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Significant Fault or Negligence."

VI. <u>THE PARTIES' CONTENTIONS AND CLAIMS FOR RELIEF</u>

6.1 In their pre-hearing briefs and during the hearing, the Parties presented various arguments regarding their respective positions in this Arbitration, including each Party's expert's opinion and testimony regarding environmental contamination and other issues. The below summarizes the

Parties' basic positions.

6.2 The Agency claims that Trainer Cano has committed seven separate violations of Rule 3212 based on the presence of clenbuterol in the samples of seven horses for which he was the Responsible Person, as confirmed by both the A Sample and B Sample for each of the seven horses. The Agency argues that under Rule 6313(e), Trainer Cano's argument that negative blood and urine tests from his horses negate the positive hair results must be rejected. Additionally, the Agency contends that, because Trainer Cano is unable to meet the pre-condition of identifying how the clenbuterol entered into each Covered Horse's system, he cannot establish source by a balance of probabilities and thus is not entitled to a reduction in sanction for No Fault or Negligence or No Significant Fault or Negligence. Based on Trainer Cano's charged violations of Rule 3212, the Agency asks that the Arbitrator impose on Trainer Cano a period of ineligibility of 2 years for each ADRV to run consecutively for a total of 14 years and a fine of $25,000 for each violation for a total of $175,000. The Agency also asks that the Arbitrator order the disqualification of the following results:

6.2.1 La Bukana's results obtained on October 31, 2024 in Race 1 at Churchill Downs, including forfeiture of compensation, prizes, purses, trophies, points, and rankings;

6.2.2 Solidify's results obtained on November 20, 2024 in Race 7 at Churchill Downs; in Race 6 on December 6, 2024 at Turfway Park; and in Race 3 on December 27, 2024, at Turfway Park, including forfeiture of compensation, prizes, purses, trophies, points, and rankings;

6.2.3 True Jedi's results obtained on December 18, 2024 in Race 4 at Turfway Park, including forfeiture of compensation, prizes, purses, trophies, points, and rankings; and

6.2.4 Global Sensation's results obtained on December 1, 2024 in Race 12 at Churchill Downs, including forfeiture of compensation, prizes, purses, trophies, points, and rankings.

6.3 Trainer Cano contends:

6.3.1 The Agency has failed to establish that he was the Responsible Person for the horse Outofnothingatall at the time that clenbuterol was administered, and thus Trainer Cano has not committed a Rule 3212 ADRV with respect to Outofnothingatall.

6.3.2 While Trainer Cano has committed Rule 3212 ADRVs with respect to True Jedi, Solidify, Global Sensation, Protomagic, La Bukana, and Beer With Ice, he bears No Significant Fault or Negligence for the violations as evident from the following:

6.3.2.1 Trainer Cano testified that he never administered clenbuterol to any of his horses.

6.3.2.2 The levels of clenbuterol in True Jedi's hair sample, particularly given the progressive reduction in clenbuterol detected in the hair segments coupled with the relatively low amounts detected, is consistent with contamination.

6.3.2.3 The Agency's failure to perform segmental analysis on the hair samples for Protomagic, Solidify and Global Sensation effectively denied Trainer Cano the ability to prove contamination with respect to those three horses.

6.3.2.4 The historical negative blood and urine samples coupled with the race history for most of the horses is inconsistent with the argument that Trainer Cano intentionally administered Clenbuterol to his horses.

6.3.3 Any sanctions imposed should be served concurrently or, alternatively, the seven charges should be treated as a single violation. The appropriate sanction for the ADRVs is 12-16 months served concurrently.

6.3.3.1 No financial penalty should be imposed beyond the forfeiture of purse mandated by ADMC Rule 3221.

VII. TESTIMONY OF WITNESSES AND EXPERTS

7.1 The following is a summary of the testimony of the witnesses called in the present arbitration.

7.2 For Claimant:

(a) Brian Bennett, HIWU Investigator

- Investigator Bennett served Trainer Cano with an EAD Notice on November 21, 2024, and conducted a search of Trainer Cano's barn. During the search, a bottle identified as "Medicated with Antibiotics Head Wash w/ Steroids," but containing no trainer, horse or date information, was located. The bottle indicated it had been prescribed by Dr. Rick Pelphrey. The bottle was subsequently sent out for testing and no banned substances were detected. Neither clenbuterol nor any other banned substance was found during the search.

- Investigator Bennett spoke with Dr. Pelphrey who confirmed that he had prescribed clenbuterol to La Bukana on December 28, 2023 before La Bukana, who was identified as Golden State 22 at the time, was a Covered Horse. Dr. Pelphrey advised that the medication would have been prescribed for use for a period not to exceed 14 days, ending on approximately January 11, 2024.

(b) Petra Hartmann, Director of Industrial

- Ms. Hartmann was responsible for reviewing and signing off on the lab documentation packets for the seven A Samples at issue in this case.

- The "Sample Check-In Form" in the lab packet applies to the entire shipment of samples received by Industrial and does not identify whether a urine sample was collected for a specific horse.

- The "Work Order Summary" for Outofnothingatall reflects that blood and hair samples were received, but not a urine sample.

- The "Work Order Summary" for Global Sensation reflects that blood and hair samples were received, but not a urine sample.

- No information related to the samples at issue in this case was redacted from the lab documentation.

(c) Daniel Eichner, Ph.D., President and Laboratory Director of the Sports Medicine Research and Testing Laboratory in Salt Lake City, Utah ("SMRTL"). Dr. Eichner submitted an expert report and testified that:

- Clenbuterol can be detected in horses through hair, blood, and urine tests, with varying windows of detection. Clenbuterol becomes undetectable in blood samples after 4-7 days and in urine after 21-28 days, while in hair it can be detected as early as 5 days after administration and for up to one year.

- Clenbuterol is generally administered to horses as a syrup and not a powder. As a result, clenbuterol is not "messy" and not as likely to result in advertent exposure as powdery substances. In the Barker study (2008), researchers specifically looked at what contaminant substances are found on the backside of a horseracing track and noted that clenbuterol was not detected even though it is a commonly used bronchodilator in Louisiana where the study was conducted.

- Horse mane and tail hair grows at a rate of approximately 1 inch per month.

- The concentrations of clenbuterol detected in each of the seven horses is consistent with therapeutic administration as reflected in the Schlupp et al. study (2004), not environmental contamination.

- La Bukana had exposure to clenbuterol, and possible multiple exposures to clenbuterol, within 90 days of sample collection, likely in August 2024. Based on the estimated concentrations and the properties of clenbuterol, the AAF is unlikely to have been caused by contamination.

- Outofnothingatall had exposure to clenbuterol in late October or November 2024, likely between October 21 and November 15, 2024. Based on the estimated concentrations and the properties of clenbuterol, the AAF is unlikely to have been caused by contamination.

- True Jedi had exposure to clenbuterol between late June and August 2024. Based on the estimated concentrations and the properties of clenbuterol, the AAF is unlikely to have been caused by contamination.

- Beer With Ice had at least two exposures to clenbuterol, likely between November and mid-December 2024 and between August and mid-September 2024. Based on the estimated concentrations and the properties of clenbuterol, the AAF is unlikely to have been caused by contamination.

- Protomagic, Solidify, and Global Sensation each had exposure to clenbuterol at some point within four months prior to sample collection. For Global Sensation, given the negative urine test on December 1, 2024, the horse could have been exposed to a dose or doses of clenbuterol between October 12 and November 10, 2024. The average concentrations in their hair samples are consistent with average concentrations detected in horses exposed to therapeutic levels or greater of clenbuterol, not contamination.

7.3 For Respondent:

(a) Trainer Cano testified that:

- He never knowingly or intentionally administered clenbuterol to any of the horses, nor does he keep clenbuterol in his barn. He is not familiar with what clenbuterol does or how long it takes to clear clenbuterol from a horse's blood or urine.

- After receiving the EAD Notice regarding La Bukana, he contacted his veterinarian Dr. Pelphrey to request all of his invoices. None of the invoices reflected a prescription for clenbuterol.

- He does not know how his horses could have tested positive for clenbuterol or where it came from.

- Prior to the positive tests for clenbuterol, his horses would share food and water buckets, bridles, and tongue ties. Following the positive tests, the horses now have designated food and water buckets, and the bits are sterilized after use.

(b) Pascal Kintz, Ph.D., X-Pertise Consulting, Professor of Legal Medicine at the University of Strasbourg. Dr. Kintz submitted an expert report and testified that:

- Equine hair is an increasingly popular biological matrix for doping control of horse sports because of the significantly longer detection window hair can offer. Hair analysis allows for longitudinal monitoring of drug exposure which would not be possible with the more traditional and common biological matrices, such as urine and blood.

- The window of detection of clenbuterol is approximately 4-7 days in plasma or blood; 21-28 days in urine; a long period in hair.

- Average hair growth rate for horses is 1 inch per month.

- In hair testing science, the maximal concentration in a segment corresponds to the period of exposure(s).

- Outofnothingatall's hair specimen collected on November 20, 2024 had a maximal concentration of clenbuterol in segment 1, roughly corresponding to early October to early November 2024. Blood and urine were collected on November 20, 2024, with negative results. This demonstrates that the last exposure to clenbuterol was at least 21-28 days before November 20, 2024. Given the concentration in hair in comparison to what has been reported in the literature, the doses administered to the horse should be massive (pending the scenario of voluntary administration is privileged but contamination remains an option). It is therefore appropriate to use a window of detection in urine of 28 days rather than 21 days. The last exposure of the horse to clenbuterol was therefore before October 20-22, 2024. The horse was obtained by Trainer Cano on October 26, 2024. The concentration of clenbuterol in segment 1 is too high to account for a short period (Oct. 26 to early Nov) and therefore these results are more in favor of exposures to clenbuterol before October 26, 2024. At the hearing, Dr. Kintz testified that if no urine was collected on November 20, 2024, then the horse's last exposure to clenbuterol would instead have been sometime before November 13, 2024.

- Global Sensation's hair specimen was collected on November 21, 2024 and 4 inches from the root were tested, corresponding to a period of early July to early November 2024. Given the high concentration in comparison with what has been reported in the literature, the doses administered to the horse should be massive (pending the scenario of voluntary administration is privileged but contamination remains an option). It is therefore appropriate to use a window of detection of 28 days rather than 21 days. Accounting for the negative urine findings on November 21, October 12, September 18 and 7, there are only two periods not covered by the blood and urine tests versus the hair tests: July 7 to August 21 and October 12 to 24, 2024. The concentration of 71.3 pg/mg is too high to account for only two limited periods of exposure. Based on these findings, the negative urine and blood tests are inconsistent with a doping regimen for the horse. At the hearing, Dr. Kintz testified that if no urine was collected on November 21, then the two periods of hair not covered by urine or blood samples would be July 15 to August 21 and October 12 to November 3, 2024. In either event, the detected concentration is too high to be scientifically acceptable.

- True Jedi's hair specimen was collected on November 21, 2024, and the segmental analysis covers the period from early May to early November 2024. The pattern of clenbuterol distribution shows a regular increase of clenbuterol from the proximal segment (root) to the distal segment. The results are consistent with possible external contamination, given the pattern of clenbuterol concentrations in the segmented hair. In addition, external contamination would be consistent with negative blood and urine tests on June 16 and November 9, 2024.

- Beer With Ice's hair specimen was collected on January 15, 2025, as was a blood specimen that was negative, demonstrating that the last exposure to clenbuterol was at least 4-7 days before. The pattern of clenbuterol distribution in the segmental analysis shows two maximal concentrations in segment 2, roughly corresponding to November 2024, and in segment 5, roughly corresponding to August 2024. It is possible that no clenbuterol was administered after November 21, 2024.

VIII. ANALYSIS

8.1 The analysis that follows addresses the seven separate charges for presence violations under Rule 3212.

8.2 As discussed above, the Agency requests that the Arbitrator impose on Trainer Cano, for each of the charged ADRVs, a fine of $25,000 and a two-year suspension to be imposed consecutively.

8.3 While all evidence and legal authorities submitted were considered by the Arbitrator, this section necessarily refers only to the evidence and law that the Arbitrator relied upon in reaching this Final Decision.

The Agency Has Proven Presence Violations with Respect to La Bukana, Solidify, True Jedi, Global Sensation, Protomagic, and Beer With Ice, But Not Outofnothingatall

8.4 Rule 3212(a) sets forth a strict liability standard for a Covered Person, like Trainer Cano, to ensure that no banned substances are present in a Covered Horse:

> (a) It is the personal and non-delegable duty of the Responsible Person to ensure that no Banned Substance is present in the body of his or her Covered Horse(s). The Responsible Person is therefore strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s). Accordingly, it is not necessary to demonstrate intent, Fault, negligence, or knowing Use on the part of the Responsible Person in order to establish that the Responsible Person has committed a Rule 3212 Anti-Doping Rule Violation.
>
> (b) Sufficient proof of a Rule 3212 Anti-Doping Rule Violation is established by . . . (2) the Covered Horse's B Sample is analyzed and the analysis of the B Sample confirms the presence of the Banned Substance or its Metabolites or Markers found in the A Sample.

8.5 Under Rule 3122(c), "[l]aboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards." Trainer Cano has not raised any challenge to rebut this presumption. Indeed, Professor Kintz testified that he took no issue with the laboratory analyses done in this case.

8.6 The burden is on the Agency to establish a violation of Rule 3212 to the comfortable satisfaction of the Arbitrator.

8.7 Although the language of Rule 3212 does not expressly so state, at the hearing the Parties seemingly agreed that Trainer Cano had to have been the Responsible Person for the Covered Horse at the time the horse was exposed to or administered clenbuterol to have committed a Rule 3212 violation.

8.8 Both experts agree that maximal concentration in a hair segment corresponds to the period of exposure.

8.9 La Bukana's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. La Buchana's hair sample was taken on October 31, 2024, with the maximal concentration appearing in Segment 3, which Dr. Eichner testified corresponds to approximately August 2024. Trainer Cano became the Responsible Person for La Bukana on June 21, 2024. La Bukana's December 28, 2023 prescription for medication containing clenbuterol was to be used for a period not to exceed 14 days, ending approximately on January 11, 2024, and did not cover the period of exposure. I thus find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to La Bukana.

8.10 Outofnothingatall's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. Outofnothingatall's hair sample was taken on November 20, 2024, with the maximal concentration appearing in Segment 1. Dr. Eichner opines that Outofnothingatall was exposed to clenbuterol in late October or November 2024, likely between October 21 and November 15, 2024, accounting for the negative blood test on November 20, 2024. Dr. Kintz opines that exposure occurred in early October to early November, with the exposure occurring before November 13, 2024. Trainer Cano became the Responsible Person for Outofnothingatall on October 26, 2024. Even accepting, *arguendo*, Dr. Eichner's opinion that exposure occurred between October 21-November 15, 2024, there is a five-day period in Dr. Eichner's window of likely exposure when Trainer Cano was not the Responsible Person for Outofnothingatall. Under such circumstances, I find that the Agency has failed to meet its burden of establishing to the comfortable satisfaction of the Arbitrator that Trainer Cano was the Responsible Person for Outofnothingatall at the time of exposure to establish a violation of Rule 3212.[1]

8.11 Solidify's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. Solidify's hair sample was taken on November 20, 2024. The estimated concentration of clenbuterol in the hair sample was 30.25 ng/g for the 4-inch hair sample pulled from the root, which Dr. Eichner testified corresponds to a date range of clenbuterol exposure of approximately late July to November 2024. Trainer Cano became the Responsible Person for Solidify on April 1, 2023. Based on the foregoing, I find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to Solidify.

8.12 True Jedi's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. True Jedi's hair sample was taken on November 21, 2024, with a maximal concentration in Segment 5 of 29.3 ng/g. Dr. Eichner opines that True Jedi was exposed to clenbuterol between late June and August 2024. While Dr. Kintz does not provide an express opinion regarding the likely window of exposure, he does opine that the six-inch hair segment corresponds to the time period from early May to early November 2024. Because the maximal concentration appears in Segment 5, even accepting, *arguendo*, Dr. Kintz's dates, True Jedi was

[1] If, contrary to the Parties' statements at the hearing, Trainer Cano should be found to have committed an ADRV under Rule 3212 even if Outofnothingatall was exposed to clenbuterol before Trainer Cano became the Responsible Person for the horse, the Arbitrator would find, under the facts of this case, that Trainer Cano has met his burden of establishing No Fault or Negligence for the charged ADRV relating to Outofnothingatall.

exposed to clenbuterol no earlier than June 2024. Trainer Cano became the Responsible Person for True Jedi on May 19, 2024. Accordingly, I find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to True Jedi.

8.13 Global Sensation's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. Global Sensation's hair sample was taken on November 21, 2024. The estimated concentration of clenbuterol in the hair sample was 71.3 ng/g for the 4-inch hair sample pulled from the root. Dr. Eichner testified that this corresponds to a date range of clenbuterol exposure of late July to November 2024, while Dr. Kintz testified that the hair sample covers the period of early July to early November 2024. Trainer Cano became the Responsible Person for Global Sensation on March 22, 2024. Although Dr. Kintz opines the detected concentration is "too high to be scientifically acceptable" given that there are only two limited periods of time covered by the hair sample not covered by negative blood and urine tests, he raised no issue with the laboratory analysis. The A and B Samples confirmed the presence of clenbuterol and Trainer Cano was the Responsible Person for Global Sensation for the entire period covered by the hair analysis. I therefore find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to Global Sensation.

8.14 Protomagic's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. Protomagic's hair sample was collected on November 21, 2024. The estimated concentration of clenbuterol in the hair sample was 23.75 ng/g for the 4-inch hair sample taken from the root, which Dr. Eicher testified corresponds to a date range of clenbuterol exposure of late July to November 2024. Trainer Cano became the Responsible Person for Protomagic on December 22, 2023. The A and B Samples confirmed the presence of clenbuterol and Trainer Cano was the Responsible Person for Protomagic for the entire period covered by the hair analysis. I therefore find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to Protomagic.

8.15 Beer With Ice's A Sample and confirmatory B Sample resulted in an AAF for clenbuterol, a prohibited substance. Beer With Ice's hair sample was collected on January 15, 2025. The maximal concentration for clenbuterol appears in segment 2 and 5. Dr. Eichner testified that Beer With Ice had at least two exposures to clenbuterol, likely between November to mid-December 2024 and between August to mid-September 2024. Dr. Kintz testified that the two maximal concentrations correspond to roughly November 2024 and August 2024. Trainer Cano became the Responsible Person for Beer with Ice on May 25, 2024. Although the reported concentrations are lower for Beer With Ice than the other Covered Horses, clenbuterol is not a threshold substance and thus the amount of the substance is of little moment, *see* Rule 3212(c) ("any amount"). The A and B Samples confirmed the presence of clenbuterol and Trainer Cano was the Responsible Person for Protomagic for the entire period covered by the hair analysis. I therefore find that the Agency has met its burden of establishing that Trainer Cano has committed a Rule 3212 violation with respect to Beer With Ice.

8.16 Trainer Cano contests the ADRVs on the basis of negative results in blood and urine samples that he submits "do not support a narrative that [he] intentionally administered Clenbuterol to his horses." Trainer Cano's position must be rejected. First, the ADMC Program is a single-matrix regime. Under Rule 1020, an AAF "means a report from a Laboratory that, consistent with the Laboratory Standards, establishes in a Sample the presence of a Prohibited Substance. . . ." A

"Sample" is defined as "any biological material collected for the purposes of Doping Control or Medication Control, including urine, blood, and hair." No supplemental testing in another matrix is required. Where, as here, the AAF reported in an A Sample of hair is confirmed in the B Sample, the ADRV is established under Rule 3212(b)(2) regardless of the results of testing in other matrices. While Dr. Kintz opines that hair results should not be used in isolation, his opinion is inconsistent with the Rules that the Arbitrator is bound to follow.

8.17 Second, Rule 6313(e) expressly prohibits negative results in urine or blood from overriding an AAF in hair: "Alternative biological matrices. Any negative Analytical Testing results obtained from hair, hoof, saliva or other biological material shall not be used to counter Adverse Analytical Findings or Atypical Findings from urine, blood (including whole blood, plasma, or serum) or hair."

8.18 Third, Trainer Cano's argument attempts to import an element of intent into a Presence ADRV. But under Rule 3212, a "Responsible Person is . . . strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s)." The Rules leave the Arbitrator with no discretion in this regard; hair is expressly identified as a Sample type under the Rules and the Responsible Person is strictly liable for any Banned Substances in a Sample of his Covered Horse.

8.19 Accordingly, I conclude that HIWU has met its burden of establishing that Trainer Cano has committed six (6) Rule 3212 violations.

Term of Ineligibility

8.20 Clenbuterol is a category S3 Banned Substance. Pursuant to ADMC Program Rule 3223, the presumptive period of ineligibility for a first ADRV under ADMC Program Rule 3212 (Presence) is two (2) years of Ineligibility.

8.21 In the present case, I have found that HIWU has established six (6) ADRVs, each carrying a period of ineligibility of two (2) years.

8.22 Trainer Cano contends that any sanctions imposed on him should be served concurrently, or, alternatively, that the charges should be treated as a single violation, while HIWU contends the sanction for each separate violation should be served consecutively.

8.23 Under Rule 3223(c)(2), "[w]here a Covered Person is already serving a period of Ineligibility for another violation of the Protocol, any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends."

8.24 Rule 3228(c) provides "[a]dditional rules for certain multiple violations." Specifically, Rule 3228(c)(1) states:

> Multiple violations for the same Banned Substance/Method incurred by a Covered Person in relation to the same Covered Horse prior to delivery of an EAD Notice may (at the Agency's discretion) be treated together as a single Anti-Doping Rule

> Violation, unless the facts demonstrate that there was more than one administration. Multiple violations for the same Banned Substance/Method incurred by a Covered Person in relation to different Covered Horses prior to delivery of an EAD Notice may (at the Agency's discretion) each be treated as a first Anti-Doping Rule Violation. Where multiple Banned Substances are detected in a single Post-Race Sample or Post-Work Sample, each Banned Substance may (at the Agency's discretion) be treated as a separate violation.

8.25 In the present case, at least some of the ADRVs occurred prior to delivery of the first EAD Notice on November 21, 2025. HIWU has exercised its discretion to treat each of the alleged ADRVs, six of which HIWU has met its burden of proving as discussed above, as first ADRVs.

8.26 While Trainer Cano argues that Rule 3223(c)(2) does not support consecutive sanctions for first-time offenders as it makes explicit reference to a Covered Person who is "already serving a period of ineligibility for another violation of the Protocol," Rule 3223(c)(2) must be read in context with the other rules, including Rule 3228, and effect must be given to all the Rules. The Rules make clear that the Agency has discretion to treat multiple violations in relation to different Covered Horses as separate first ADRVs, which would be rendered meaningless if the sanction for such violations ran concurrently. If the Rules had intended for sanctions to run concurrently or for multiple violations involving different Covered Horses to be treated as a single ADRV, it would have so stated as it did with respect to multiple violations for the same Banned Substance in a single Covered Horse.

8.27 In prior cases, arbitrators have ruled that consecutive sanctioning is mandatory when a first-time offender commits multiple Presence ADRVs involving multiple horses. In *HIWU v. Pineda*, when sanctioning a first-time offender for multiple Presence violations with the same Banned Substance in seven different horses, the arbitrator concluded that "[t]he ADMC Rules do not give the Arbitrator any discretion with regard to the consecutive nature of the ADRVs," and thus imposed a 14-year period of ineligibility. Likewise, in *HIWU v. Ruiz*, a case involving three Presence ADRVs involving three different horses by a first-time offender, the arbitrator held that "[u]nder Rule 3223(c)(2) periods of ineligibility shall be served consecutively."

8.28 Trainer Cano relies on *HIWU v. Puype* as support for his argument that the periods of ineligibility should run consecutively, but *Puype* is plainly distinguishable. *Puype* involved a trainer who was found to have committed two Possession ADRVs arising from a single search. The arbitrator concluded that "Rule 3223(c)(2) does not support consecutive sanctions for a first time offender who is charged with two violations that arose from the same investigation." Here, Trainer Cano has committed six ADRVs involving six different horses, whose samples were taken on four days over the course of approximately 2.5 months. In such circumstances, the Rules require the sanctions for the six ADRVs be served consecutively.

Trainer Cano Failed to Meet His Burden to Avoid the Presence ADRVs or Receive Any Reduced Consequences Stemming from the Presence ADRVs

8.29 Because the Agency has met its burden of establishing six ADRVs under Rule 3212, the Arbitrator next considers whether Trainer Cano is entitled to a reduction in sanctions under Rule

3224 or 3225. As a threshold matter, the Arbitrator finds that Trainer Cano has failed to show, by a balance of probabilities, "how the Prohibited Substance entered the Covered Horse's system," and that, specifically, that it entered, as he claims, by way of contamination.

8.30 The Rules expressly place the burden on the Covered Person to establish how the Prohibited Substance entered the horse's system. While Trainer Cano suggests that clenbuterol entered the horses' systems through contamination, he fails to provide evidence of any specific contamination scenario through which any of the horses could have been exposed to clenbuterol.

8.31 The only theory of contamination even suggested by Trainer Cano is that the horses in his stable share food and water buckets, as well as bridles, bits and tongue ties. But Trainer Cano has proffered no explanation, other than pure speculation, how sharing food and water buckets and other equipment might somehow have caused the AAFs for the presence of clenbuterol, particularly at the high estimated concentrations detected in the samples of the horses at issue. The evidence adduced by Trainer Cano falls well short of establishing on a balance of probabilities the source of clenbuterol.

8.32 Trainer Cano's expert, Dr. Kintz, does not provide any affirmative evidence of contamination either. Dr. Kintz's Report suggests the possibility of contamination and opines that (i) for Global Sensation, "the scenario of voluntary administration is privileged but contamination remains an option"; (ii) for True Jedi, "[r]esults are consistent with possible external contamination, given the pattern of clenbuterol concentrations in the segmented hair"; and (iii) for Beer With Ice, the lower reported concentrations reflect that the horse was exposed to a limited amount of clenbuterol. But Dr. Kintz provides no opinion that there is any specific fact in this case that renders inadvertent exposure the likely explanation for the AAFs. And notably, for the other three horses for which the Agency has established an ADRV, Dr. Kintz provides no opinion at all.

8.33 Dr. Eichner opines that inadvertent exposure or contamination is not the source of the clenbuterol identified in the Covered Horses based on both the estimated concentrations and the physical nature of clenbuterol compared to other substances that are more prone to contamination.

8.34 Dr. Eichner relies on the Schlupp study (2004), which analyzed the mean clenbuterol concentrations in successive 20 mm segments of mane hair from horses before and after a 10-day oral treatment of clenbuterol hydrochloride. Dr. Eichner opines that the concentrations of clenbuterol detected in each of the Covered Horses is consistent with therapeutic administration in the Schlupp study, and not with environmental contamination. Dr. Kintz disagrees with Dr. Eichner's opinions that the concentrations of clenbuterol in the Covered Horses are too high to have been caused by contamination.

8.35 Dr. Eichner also opines that since clenbuterol is generally administered to horses as a syrup and not a powder, clenbuterol is not "messy" and not as likely to result in inadvertent exposure as powdery substances. The Barker study (2008) specifically looked at what contaminant substances are found on the backside of a horseracing track, and noted that clenbuterol was not detected even though it is a commonly used bronchodilator in Louisiana where the study was conducted. Dr. Kintz does not offer any opinion regarding the Barker study or, more generally, whether the properties of clenbuterol render it susceptible to environmental contamination.

8.36 The fact that contamination of clenbuterol "remains an option" or that "results are consistent with possible external contamination" does not mean that it is likely, or even probable, particularly in light of the evidence that the properties of clenbuterol do not render it readily susceptible to environmental contamination. Trainer Cano has failed to present any evidence supporting his theory of contamination as the source of clenbuterol in his Covered Horses, and thus he has not met his burden of proving source by a balance of probabilities.

8.37 Trainer Cano's argument that the Agency's failure to conduct segmental analysis on the hair samples of several of the horses has prevented him from proving how clenbuterol entered those horses' systems fails. Of the six horses for which the Agency has proven an ADRV, segmental analysis was conducted on the samples of three. For the other three Covered Horses, there is no dispute that a 4-inch hair segment was collected, that Trainer Cano was the Responsible Person for the entire period covered by the hair sample, and that the hair sample for each tested positive for clenbuterol. The Rules impose no requirement that HIWU conduct segmental analysis on all hair samples. While Trainer Cano suggests segmental analysis would have been useful to help him identify source, it is Trainer Cano, not HIWU, who bears the burden of establishing the source of the Prohibited Substance.

8.38 Trainer Cano cites to the Elizabeth Banks matter to suggest that, despite being unable to identify the source of the ADRV, a finding of No Fault or Negligence or No Significant Fault or Negligence can still be made. But shortly before the hearing in this matter, the CAS Panel upheld WADA's appeal and annulled the lower tribunal's decision in that matter. *WADA v. UKAD & Elizabeth Banks*, CAS 2024/A/10647. The CAS Panel held that "use of the word 'must' in the definition of No Fault or Negligence in the ADR positively requires the Athlete to prove 'how the Prohibited Substance entered the Athlete's system,' namely to prove the source of the AAF. Therefore, to be entitled to rely on Article 10.5 of the ADR to state that he/she bore No Fault or Negligence, an athlete must meet the threshold requirement to prove the source of the AAF. Such requirement is specifically and expressly mandated in the rules, unlike the requirement to prove source as evidence of non-intentional use which is a requirement established by CAS case law but is not specifically stated in the ADR."

8.39 Likewise here, under the ADMC Program, the definition of No Fault or Negligence and No Significant Fault or Negligence state that, "[f]or any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system." The Rules thus require that Trainer Cano establish, by a balance of probabilities, "how the Prohibited Substance entered the Covered Horse's system" to receive any reduction in sanction based on degree of fault. Where, as here, source has not been established by a balance of probabilities, the ADMC Program requires the imposition of a two (2) year period of Ineligibility.

8.40 Accordingly, I conclude that Trainer Cano cannot benefit from mitigated consequences since he has failed to prove how clenbuterol entered the Covered Horses' systems. Therefore, his sanction for the six ADRVs stands at twelve (12) years of Ineligibility.

Fine, Payment Toward Legal Fees and Arbitration Costs

8.41 Under the ADMC Program, the punishment for a first offense ADRV includes, in addition to a period of Ineligibility, a "Fine of up to $25,000 . . . and Payment of some or all of the adjudication costs and the Agency's legal costs." Rule 3223(b).

8.42 HIWU requests that the Arbitrator impose a fine of $25,000 per violation. Trainer Cano requests that no fine be imposed beyond the forfeiture of purse mandated by Rule 3221.

8.43 Trainer Cano argues that "the historical testing results coupled with the race history for most of the horses is inconsistent with any argument that Mr. Cano intentionally administered Clenbuterol to his horses. While lack of intentional administration may not reduce the sanction length, it is an important fact that should be considered in determining the appropriate financial penalty in this case."

8.44 Trainer Cano relies on another decision of this Arbitral Body—*HIWU v. Serpe*—as supporting his position that no financial penalty should be imposed for the Presence violations beyond the forfeiture of purse mandated by ADMC Rule 3221. But Respondent's reliance on *Serpe* is misplaced. In *Serpe*, HIWU declined to seek the statutory fine provided in Rule 3223(b), whereas here HIWU has requested that the Arbitrator impose a fine of $25,000 per violation. Also, on appeal, the Administrative Law Judge in *Serpe* held that the Arbitrator's failure to award a fine was both an abuse of discretion and not in accordance with Rule 3223(b), while noting that an arbitrator in a HIWU-initiated case has discretion to determine the amount of any fine awarded, which, could conceivably be as low as $0. The Administrative Law Judge concluded that because clenbuterol is widely used and can build muscle in racehorses, Serpe had failed to prove source and thus could not show he bore No Fault or No Significant Fault, and none of the other test results were inconsistent with intentional or inadvertent doping, a fine of $25,000, the maximum amount authorized by Rule 3223(b), was appropriate.

8.45 The Arbitrator determines based on the specific facts and circumstances of this case, including the number of ADRVs that have been established and Trainer Cano's failure to meet the threshold requirement of establishing the source of the AAFs to be eligible to potentially receive a reduction in sanction based on degree of fault, the fine should be set at $25,000 per violation, to be paid by the end of the period of Ineligibility.

8.46 The Agency is not seeking to recover a contribution to its adjudication costs or legal costs. The Arbitrator declines, in the Arbitrator's discretion and consistent with the intent and spirit of the Rules and the ADMC Program, to engage in fee-shifting of any adjudication or legal costs. The Arbitrator concludes that the consequences so ordered are sufficient, adequate and appropriate given the circumstances and nature of the ADRVs in this case.

8.47 All other arguments by the Parties have been considered and rejected.

IX. AWARD

9.1 Based on the foregoing facts, legal analysis, and conclusions of fact, the Arbitrator renders the following decision:

a. Trainer Cano is found to have committed six (6) first-offense Rule 3212 Presence ADRVs, as described above. As a result:

   i. Trainer Cano shall be suspended for a period of Ineligibility of twelve (12) years, commencing on the date the Notice of Sanction is served on Trainer Cano.

   ii. Trainer Cano shall be fined $150,000 to be paid to the Agency by the end of the period of Ineligibility described above;

   iii. The following results are disqualified, and Trainer Cano shall forfeit and return to the Race Organizer all distributed purses, prizes, trophies, or other compensation arising from:

      1. La Bukana's results obtained on October 31, 2024 in Race 1 at Churchill Downs;

      2. Solidify's results obtained on November 20, 2024 in Race 7 at Churchill Downs; in Race 6 on December 6, 2024, at Turfway Park; and in Race 3 on December 27, 2024, at Turfway Park;

b. This Decision shall be in full and final resolution of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED.

Dated: September 30, 2025

Bernetta D Bush

Hon. Bernetta D. Bush (Ret.)
Arbitrator