ORAL ARGUMENT – NOT YET SCHEDULED
PETITION FOR REVIEW
Case No. 23-1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REBECCA SNYDER, et. al.[1]

Petitioners,

v.

MERRICK B. GARLAND, Attorney General, et. al.

Respondents.

Petition for Review from the
Final decision of DEA Trial Judge – Docket No. 23-5
Before the Honorable Teresa A. Wallbaum (TAW)

PETITIONERS' OPENING BRIEF SEEKING TO INTERVENE IN THE SEALED DEA ADMINSTRATIVE PROCEEDING

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[1] Rebecca Snyder died in recent days; we shall shortly file a motion for substitution of Ms. Snyder by a representative family member.

TABLE OF CONTENTS

Cases

Statutes

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(a) Parties (updated)[2] The Petitioners in the above captioned case are chronic pain patients who sought to intervene in the DEA Administrative Proceeding below, after DEA summarily suspended their doctor's authority to prescribe pain medication and sought to revoke his DEA certificate of registration (COR); the patients sought to inform the DEA Administrative trial judge that their doctor's continued authority to prescribe pain medication was consistent with their personal interest and critical to their health and survival; 11 patients joined the original motion to intervene; two patients died who were not intervenors; one patient died since we filed.

The petitioners are:

(1) Rebecca Snyder, **recently deceased**, awaiting a family member's substitution,

(2) Gemi Spaulding,

(3) Wilbert Louis Ogden,

(4) Clarissa Knopf,

(5) Dustin Parker,

(6) Michelle Gubbay-Snyder,

(7) Lera Anne Fuqua,

(8) Regina Dolan,

[2] References to Exhibits, Documents, etc in this version of submission will be replaced by references to the Joint Appendix, presently deferred, when we file the Opening and Reply Brief in final..

(9) Jessica Fujimaki, - **deceased before filing w/ this court, and withdrawn as a party petitioner**,

(10) Piper McKee-Wright, and

(11) Rodney Summers.[3]

(b) Respondents. The respondents in this matter are comprised of the Attorney General of the United States, the DEA Administrator, and the Chief Counsel DEA.

(c) Intervenors. Petitioners are not aware of any other intervenors in this matter.

(d) Amici. Petitioners are not aware of any amici in this matter.

(e) Ruling under review. The petitioners sought to intervene in the proceedings below, in *In re David Bockoff, MD* v. DOJ, DEA, Docket No. 23-5; the administrative trial judge, however, denied the motion on December 22, 2022, and that decision was filed with this Court on February 15, 2023.

(f) Subsequent Ruling. The administrative trial judge's memorandum opinion followed on May 2, 2023, and there was no mention of the patients' petition to intervene.[4]

[3] Each of these patients, seeking to intervene, have signed an extensive HIPPA waiver as to the disclosure of their identities, their medical records, and any privacy or discussion of this information.

[4] The Memorandum was titled, *"Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge"* (hereinafter "The May 2023 Memorandum," stating, in relevant part, at p. 2, that: "The issue in these proceedings is whether Respondent's COR (Certificate of Registration) should be revoked because his

(g) Related cases. The ruling that is the subject of this petition for review has not previously been before this Court or any other court.

JURISDICTIONAL STATEMENT

Title 21, United States Code, Section 877 provides that "any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia …upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision…."

Rule 15 of the Federal Rules of Appellate Procedure provides that the "review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of the court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order."

Eleven (11) pain patients sought to intervene in the administrative trial court, an agency proceeding, to inform the DEA Administrative trial judge that their doctor's continued registration as a doctor, and his authority to prescribe pain medication, was consistent with their personal interest; the same petitioners below filed a timely petition for review in this Circuit Court.

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registration is inconsistent with the public interest …": the 44-page May Memorandum makes no mention of petitioners' "interest," though their interest was substantial – involving life or death questions..

Title 5 USC Section 704 states that "agency action made reviewable by statute and final action for which there is no other adequate remedy in a court are subject to judicial review."

Title 5, USC, Section 555(b) provides for the opportunity to intervene, "so far as the orderly conduct of public business permits, an interested person may appear before an agency … for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function (underscoring supplied)."

21 CFR Section 1316.41) provides in relevant part that procedures in any administrative hearing held under the Administrative Procedure Act (5 USC 551-559) are governed generally by the rule making and/or adjudication procedures; there are no exceptions to this Rule in the CSA.

The Administrative trial judge's decision was a "final" decision, conforming with the express terms of 21 USC Section 877, because the question before the administrative proceeding was limited to either granting Petitioners' motion to intervene, or not; the administrative tribunal denied any participation by Petitioners to intervene; nothing remained to be done; thus this petition to review.[5]

ISSUES PRESENTED

[5] DEA has contested whether the decision is final; Petitioners discuss this matter further in "standing" – interested persons.

1. Whether the presiding DEA administrative trial judge in the sealed proceeding below abused her discretion, acted in an arbitrary and capricious manner, and not in accordance with the applicable law, when she denied the "personal interest" of the chronic pain patients (*see* 5 USC Section 555(b)) to intervene to consider the medical treatment and pain medication that DEA summarily cut off, endangering their health and their survival.
2. Whether the presiding DEA administrative trial judge acted, contrary to the constitutional right of due process, power, privilege, or immunity, due and owing Petitioners, by denying Petitioners' motion to intervene to challenge DEA's summary "Order to Show Cause and Immediate Suspension Order," immediately suspending the issuance of any treatment or pain medication, previously authorized under Dr. Bockoff's DEA Certificate of Registration, No. BB4591839, of David Bockoff, MD; the Administrative Law Judge stated she lacked the jurisdictional competence to recommend to the Administrator to vacate or suspend the suspension order denying the physician's authority to prescribe pain medication, and the DEA Administrator's summary finding was not subject to dispute.
3. Whether the presiding DEA administrative trial judge made an unwarranted and specious finding of fact that it made no difference, when considering the revocation of Dr. Bockoff's authority to prescribe, how few instances of

questionable prescriptions DEA may have found, in this case, five out of 240 patients.

4. Whether the presiding DEA administrative trial judge acted, contrary to the constitutional right, power, privilege, or immunity, due and owing Petitioners, when insisting petitioners had to have some cognizable "property right" to move to intervene in the DEA proceeding, and, if that is a legitimate predicate, whether the DEA's interference with the pain patients' contract with their physician satisfied that "property" claim. (See *Lujan v. G&G Fire Sprinklers, Inc.*, 532 US 189, 196 (2001)(The case authority cited a due process requirement when the state withheld contract payments to contractors.)).
5. Whether this Court shall hold unlawful and set aside the DEA agency action, findings and conclusions to date.
6. Whether this Court shall compel agency action unlawfully withheld and unreasonably delayed, namely, the authority for petitioners to intervene, and remand the matter to the DEA Administrative Tribunal, authorizing Petitioners' motion to intervene upon remand.

STANDARD OF REVIEW

Title 5, USC, Section 706(2) provides, in relevant part, that, "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 `(underscoring supplied)."

Section 706 is mandatory, not permissive, it provides that "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; … or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court (underscoring supplied)."

SUMMARY OF ARGUMENT

ABUSE OF DISCRETION. The overarching question is whether the presiding DEA administrative trial judge below abused her discretion, acting in an arbitrary and capricious manner, and contrary to law and the material facts, by denying the (then) eleven (11) pain patients' motion to intervene in the pending DEA license revocation proceeding of their doctor when the patient petitioners herein, both individually and collectively, had a legally sufficient "personal interest" to intervene (in conformance with Title 5, United States Code, Section 555(b)), as they relied on Dr. Bockoff's treatment and prescriptions for their chronic pain.

CONSTITUTIONAL VIOLATION. On October 25, 2022, the DEA Administrator first cut off the chronic pain patients' medication in a summary fashion, by immediately suspending Dr. Bockoff's authority to prescribe pain medication; this was accomplished by the Administrator's *ex parte* Order to Show Cause and its Immediate Suspension Order (OSC/ISO). *Id.*

The DEA Administrator next proposed to revoke Dr. Bockoff's DEA Certificate of Registration (COR) No. BB4591839.

As for the summary order, the necessary statutory predicate is evidence of "an imminent danger to the public health and safety." See 21 USC Section 824(d)(2)

There was in fact no such danger before the Administrator's summary order; indeed, it was only after that order, that patients, denied treatment and pain medication suffered ill health and death and suicide. The DEA Administrator's uncontradicted unilateral finding, denied Dr. Bockoff's authority to prescribe to the patients herein who sought to intervene.

The Code provides, in relevant part, that "A suspension [of the physician's authority to prescribe] under this subsection shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner [a] withdrawn by the Attorney General or [b] dissolved by a court of competent jurisdiction." See 21 USC Section 824(d)(1).

The administrative trial judge stated she had no authority to redress the suspension of Dr. Bockoff's authority to prescribe. It appears, however, that the Administrative trial judge could have recommended that there was an evidential shortfall of the Administrator's summary order, wrongly finding there was a public emergency. After all, the statute provides that the Administrator's order may be "withdrawn." There appears to be no prohibition against the Administrative trial judge making this "recommendation;" the Administrative Trial Judge, however, denied the patients' motion to intervene, had no intention of making such a recommendation. *Id.*

By the express terms of the statute the order could be "dissolved by a court of competent jurisdiction."

PROCEEDING TO REVOKE DR. BOCKOFF'S COR. A sealed administrative trial proceeding followed, according to the trial judge, for the Government's effort "to revoke Respondent's COR [the DEA Certificate of Registration](the subject of these proceedings) … based on the government's view that Respondent's continued registration is inconsistent with the public interest …"

On November 23, 2022, 11 patients sought to intervene in the administrative proceeding below; the Court authorized a response by DEA; none was forthcoming from Dr. Bockoff's trial counsel; the Trial Judge entered an order denying the motion to intervene, but failed to send it to patient-intervenors for 20 days, until December 22, 2023.

DEATHLY COMBINATION. The combined one-two punch of (1) a statute denying any opportunity to contravene the summary finding by the Administrator, and (2) a sealed administrative proceeding to withdraw Dr. Bockoff's COR, meant the petitioners were put at peril to sustain their health and life and avoid suicide.

1st AMENDMENT ACCESS. These DEA proceedings are conducted like the secret Star Chamber proceedings of old in violation of basic constitutional due

process,[6] fundamental fairness, providing for notice and an opportunity to be heard; in addition, a citizen has 1st amendment constitutional right of access to public proceedings, only the physician and DEA counsel had access to the pleadings and discovery and participated in the DEA Administrative trial proceedings.

DUE PROCESS NOTICE. DEA gave no notice to the pain patients that they were cut off after the summary order issued, had no authority to be heard; rather the DEA forced Dr. Bockoff to abandon his patients; every state in the nation provides that a patient may not be abandoned, and that is what DEA did in violation of civil statutes that require a process when a patient is dismissed.

DEA INTERFERED. DEA thus interfered in the doctor-patient relationship, breaching and ripping it asunder, prompting the patients to seek to intervene, to inform the discretion of the DEA Administrative Judge.

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[6] The term *star chamber* refers pejoratively to any secret or closed meeting held by a judicial or executive body, or to a court proceeding that seems grossly unfair. "[B]ecause it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights." *Faretta v. Cal*, 422 US 806, 822 (1975). The Supreme Court has generally emphasized the importance of the common-law right of access to public proceedings and records, including judicial proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Nixon v. Warner Comm. Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). This general right of public access to the courts, while not absolute, extends to both criminal and civil proceedings.

THE MATTER WAS RIPE. The 11 persons who sought to intervene are *bona fide* patients. So are the 5 patients that DEA identified in their papers as suspect. Petitioners refuted DEA's characterization that there was anything irregular about those 5 patients; but DEA appears entirely unaware of the fact that these pain patients suffer a condition that won't improve and will have high levels of pain. See Exs., at pp. 7-24.

DEA's ADMISSION BEFORE THE ADMINISTRATOR'S ORDER. DEA early on admitted in the affidavit in support of the search warrant of Dr. Bockoff's medical office that they did not know much about Dr. Bockoff's medical practice, and DEA gave back the files that they seized; DEA admitted that they would return the patients' files that they seized "of any patients who may appear to be lawfully treated by [David] Bockoff [MD](underscoring supplied)." Exs., p. 7-8, 50-63. In the end, DEA returned all 240 of Dr. Bockoff's patient files.

EACH PATIENT HAS A "PERSONAL INTEREST" TO SEEK TO INTERVENE DEA's reckless overreaching, by its Administrator, and the Administrative Trial Judge's tortured finding that the Intervenors did not have any "personal interest" prompted an abrupt denial of medical treatment and prescriptions for the patients, causing them extreme anxiety, physical suffering, the risk of worsening health, and possible death, even suicide.

The DEA's summary suspension and this revocation proceeding put Dr. Bockoff's patients in "imminent danger;" this is not speculative; there were two suicides by revolver shortly before we sought to intervene in DEA's Administrative Trial.. *See* Keegan Hamilton, "This Couple Died by Suicide After the DEA Shut Down Their Pain Doctor," Vice News (November 30, 2022) - **https://www.vice.com/en/article/wxnyb9/dea-fentanyl-doctor-patient-suicide .** In addition, days before we filed the petition to review in this circuit, there was another death, Jessica Fujimaki; we have now lost Rebecca Snyder, our lead petitioner, and we hope Rebecca's husband will substitute on a representative basis.

FINDING A SUBSTITUTE PHYSICIAN IS NEAR IMPOSSIBLE.

DEA suggests the patients should find another physician. But DEA targets physicians who prescribe pain medication – and the patients are therefore hard pressed to find a physician to take on their cases after DEA shut down Dr. Bockoff's practice; we have 100 million or more persons across the nation with serious pain and those "with chronic pain suffer from the chilling effect [on physicians] of such prosecutions." See e.g., Diane Hoffman, "Erroneous Prosecutions have a chilling effect on physicians who treat chronic pain," NEW YORK TIMES (February 17, 2016) - https://www.nytimes.com/roomfordebate/2016/02/17/ ; Taylor Knopf, "Hundreds

of NC Doctors say they've stopped prescribing opioids," NC Health News - https://www.northcarolinahealthnews.org/2018/10/15/nc-doctors-stop-prescribe-opioids/ There are studies and monographs that confirm "the chill." Lynn R. Webster, "The Chilling Effect: Opioids and Law Enforcement," OXFORD MEDICINE (Nov. 2016)https://academic.oup.com/book/24794/chapter-abstract/188386618?redirectedFrom=fulltext

DISCUSSION

I. "STANDING" – PETITIONERS ARE "INTERESTED PERSONS"

A. THE FINAL DECISION.

1. This case rightly involves the review of an agency action, a "final"decision, and Petitioners are enabled to seek to intervene as "interested persons" under the APA; the term of art, "standing," is more appropriate and more strictly construed when the proceeding considering "standing" is a Title III proceeding.
2. Respondents have confused in past exchanges the notion of standing under Rule 24 of the Federal Rules of Civil Procedure, rather than the lesser burden to intervene under 5 USC Section 555 for "interested persons."
3. DEA has in earlier exchanges challenged whether the decision denying intervention was a "final decision" in conformance with the express terms of Title 21 USC Section 877.

4. To state the matter simply, the motion to request to intervene, or not, was the end of the matter before the Administrative Trial Judge.
5. Nor was the motion to intervene discussed in the Administrative Trial Judge's decision of May 2, 2023, encompassing the final recommendations.
6. Respondents have previously conflated the elements of a license suspension proceeding, necessarily requiring many more steps, as if the decision as to intervention could not be "final" until the trial judge made her decision on Dr. Bockoff's license suspension proceeding.
7. The Administrative trial judge denied the following:

    (a) the Pain Patients' request to intervene, See Petitioners' Response Exs., at pp. 6-33 [herein "Exs, at p. _"], with backup, Exs, pp. 34-80;

    (b) the Pain Patients request to participate in the hearing on 11/29/22, Ex., at pp. 81-86, 103-104.

    (c) the Pain Patients renewed motion to stay the DEA suspension order, Exs. at pp. 122-129, and

    (d) the Pain Patients request to stay the proceedings below pending the 30 day petition to the D.C. Circuit Court to review the administrative court's various denials, Exs, at pp. 142-147.

The trial judge's "final" order was not sent to Petitioner for 20 days after the court entered the order, distributing it to DEA but not us, not until December 22,

2022; the Court admitted the Pain Patients were "inadvertently" overlooked. See Exs, at pp. 130-141.

8. *John Doe, Inc. v. DEA*, 484 F.3d 561, 565 (DC Cir. 2007) enunciates a two-part test to assess "finality":

> "First, the action under review must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature."

9. This first prong of the test is met – there's nothing tentative about the trial judge's repeated denials, as final as final can be, disposing of all issues affecting petitioners.

10. Title 5, USC, Section 555(b) provides that "so far as the orderly conduct of public business permits, an interested person may appear before an agency … for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function (underscoring supplied)."

11. The trial judge denied to Petitioners any of the many access points it could have considered, namely, the "presentation, adjustment, or determination of an issue, request or controversy in a proceeding."

12. When the statute says, "each agency shall proceed to conclude a matter presented to it," Title 5, USC, Section 555(b), the construction is mandatory, the statute says "shall," so it is contemplated to conclude Petitioners'

"matter," by one or more of the means identified, that is, by "presentation, adjustment, or determination of an issue, request, or controversy in [this] proceeding,"

13. The administrative trial judge could have crafted any number of ways to allow Petitioners to participate.

14. Second, the action [to be final] must be one by which rights or obligations have been determined, or from which legal consequences will flow (emphasis supplied)." See *Bennet v. Spear*, 520 US 154, 177-178 (1997).

15. The Respondents may not peremptorily suspend a physician's license unless "there is a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance." 21 USC 824(d)(2).

16. It is instructive to compare *Bates Drug Stores, Inc. v. Holder*, 2011 US Dist. Lexis. 52404 (ED Washington 2011) that found the suspension order "impacts the lives of countless human beings." In our case, those affected are not "countless" but there were 240 patients.

17. The CSA provides that DEA should consider, among other factors, what is "relevant" and "consistent with the public health and safety." 21 USC Section 823(f).

18. There was "no other adequate remedy" for the pain patients to rebut DEA's suspension of their abandonment forced by DEA but by this petition for review.

19. 5 USC Section 704 states that "agency action may be reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review(underscoring supplied)." There was no other "adequate remedy." The section states further that "agency action otherwise final is final for th

20. e purposes of this section …"

21. Respondents claim that Petitioners had to wait until "the presiding officer has certified the record to the Administrator" and "published in the Federal Register [her] final order," and wait for that order to take effect no sooner than 30 days after the orders publication in the Federal Register See 21 CFR Section 1316.67.

22. "The presiding officer" rendered an opinion on May 2, 2023 but there is no "publicly" known date when the Administrator will respond and affirm or disapprove that decision; as stated, there is no reference in the May 2nd opinion about patients' motion to intervene.

B. PETITIONERS' "PERSONAL INTEREST" WAS SUFFICIENT

23. The Pain Petitioners had a "personal interest" similar to the authority cited in the *Animal Legal Defense Fund* case, a standard that DEA Respondents earlier cited approvingly "for the humane care and treatment of animals;"

24. Respondents have claimed that there is no public policy comparable in this case; however, there is a similar policy concern, given the suspension, namely, that DEA must avoid "imminent danger" to humans, not animals.

25. In *Animal Legal Def. Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15*, 2017 U.S. Dist. LEXIS 20995**, 2017 WL 627379 (DC 2017), the administrative enforcement action, by the administrative law judge, in the decision before appeal, wrongly stated that the third party's "stated interests were beyond the scope of the proceeding."

26. The challenge was that the judicial officer's decision was contrary to Section 555(b) of the APA, which allows "interested persons" to participate in agency proceedings "so far as the orderly conduct of public business permits."

27. The *ALDF* Court concluded that the demonstrated interest of the intervenors was "squarely within the scope of the USDA enforcement proceeding." We have a parallel case here.

28. The administrative trial judge's decision was "arbitrary and capricious under the APA. APA provides that "[t]he reviewing court [the DC Circuit Court]

shall … hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law…" 5 USC Section 706(2)(A).

29. This Circuit "has held that beneficiaries in a plan qualifying under ERISA unquestionably possess an "interest" in agency deliberations that might reduce their retirement benefits. Nichols was thus qualified as an "interested person" who could intervene. *Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896 (DC Cir. 1987).

30. In *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F. 3d 72, 74, 338 U.S. App. DC 282 (DC Cir 1999), a panel of this Court concerned with a provision of the Endangered Species Act, invoked Title 5, United States Code, Section 706(2)(A), to emphasize the fact that "[a]gencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to federal courts. The criteria for establishing 'administrative standing' therefore may permissibly be less demanding than the criteria for 'judicial standing.'"

31. The *Envirocare* court concluded that, with regard to administrative law, "[judicial] discretion as to the substance of an ultimate decision does not confer discretion to ignore the required procedures of decision-making." Id.

32. There is absolutely nothing in the record to demonstrate that the 5 patients identified in DEA's suspension of Dr. Bockoff, or in the profiles of the Pain Patient Petitioners, that any of these patients has been harmed or injured by alleged prescription violations. Compare *Bates Drug Stores, Inc. v. Holder*, No. 11-0167, 2011 U.S. Dist LEXIS 52404 (ED Wash. 2011).

33. This Circuit Court must determine whether there is a rational function between the underlying facts and the Agency's decision. See *Burlington Truck Lines, Inc. v. US*, 371 US 156, 168 (1962). The Court's review of the facts is limited to the record before it at the time of the agency decision. *Benno v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994).

C. THERE WAS NO OTHER ADEQUATE REPRESENTATIVE

34. Respondents insist that Pain Petitioners' "interests could be adequately represented by Dr. Bockoff [the object of the DEA proceeding]," but nothing is further from the truth. The Physician's counsel refused to talk with us. The Physician's counsel ignored the motion to intervene in the Administrative Trial Proceeding. The Physician's counsel called no patient or any other witness to testify at the abridged hearing below. The Physician's counsel presented no expert witness for Dr. Bockoff, to rebut the DEA expert, despite his client's request that counsel call two experts.

D. RESPONDENTS INTERFERED IN THE DOCTOR PATIENT RELATIONSHIP, A DUE PROCESS VIOLATION

35. Every one of Dr. Bockoff's patients had a contract for continuing medical treatment and specific agreements enumerating the obligations of the patients when being treated with pain medication.

36. Dr. Bockoff and the patients had agreements for treatment in writing, and oral, and implied in fact. The case authority of these relationships are quite ample and long standing. DEA interfered with those contracts, without notice or any hearing, before interfering.

37. DEA forced the unlawful abandonment of Dr. Bockoff's patients without any notice or any hearing.

38. DEA insisted that they had given notice of where the Petitioners could be treated by enumerating local emergency rooms, ignoring the fact that no emergency room will prescribe pain medication. Exs. p. 80. This notice was not provided to the Petitioners. The notice provided to Dr. Bockoff identified addiction treatment sources, not pain physicians.

39. It is a constitutional due process violation to deny notice and an opportunity to be heard when interfering with the patient's 14th Amendment constitutional right to life and liberty.

40. The Supreme Court has identified the term "liberty" as encompassing the "right to contract."

41. In *Board of Regents v. Roth*, 408 US 564 (1972), the Supreme Court, by Associate Justice Stewart, recognized that the Fourteenth amendment right to due process encompassed the protection of liberty and property and a right to contract came within the definition of "liberty."

42. Justice Stewart stated that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Id., at 571-572.

43. The court explained: "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Liberty denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men [and women]. *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad

indeed. See, e. g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645."

44. Of course, a Petitioner "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it." Id., at 577.

45. There is nothing "abstract" or a mere "desire" by Petitioners. Petitioners have a legitimate claim of entitlement.

46. Interfering with Petitioners' long standing contracts for medical treatment, DEA unilaterally cut off the contract for treatment, and abandoned the patients without treatment or a continuing plan of treatment, and this was done without notice or an opportunity for a hearing to argue that this was a constitutional violation of due process.

II. PRESCRIPTIONS FOR CHRONIC PAIN PATIENTS

47. The issue in the sealed administrative proceeding, according to the trial judge, in her recommendations to the DEA Administrator stated it was the Government's effort "to revoke Respondent's COR [the DEA Certificate of Registration](the subject of these proceedings) … based on the government's view that Respondent's continued registration is inconsistent with the public interest …"

48. There is that hackneyed expression that for a hammer, everything is a nail. When it comes to doctors, DEA acts like every prescription for pain medication is suspect. Despite the DEA agency's bias, most physicians are busy healing, not dealing.

A. Profiles of Several Patients.

49. The patients' profiles make clear why these patients are legitimately "interested persons" and why they've sought to intervene in the DEA proceedings.

50. **Patient - Lera Anne Fuqua**'s medications were due to be filed the same day that the DEA issued the ISO against Dr. Bockoff's DEA registration.

51. Lera said:

> "The only methadone clinic accepting new patients was also the furthest away (avg $70 roundtrip per day / 7 days per week). The methadone did not seem to do a ton for pain (or relieve the dystonia symptoms like the transdermal fentanyl and oral oxycodone did), but it did stop withdrawal and seemed to bring my blood pressure down slightly (220's /130's to 180-200/120's).
>
> "I began having episodes of paroxysmal a-fib during Spring 2022 when no pharmacy was able to get oxycodone in stock. Up to this point, my "a-fib burden," the percentage of time heart is in a-fib, was around 5% (considered pretty low) but even after withdrawal symptoms were subdued by methadone, it seemed like my heart was staying in a-fib 24/7. My Apple Watch backed this up, reporting an a-fib burden of 94%-97%.

"Around the 3rd week of December, my feet began to swell. At first, I blamed this on multiple attempts to start IV's in both feet."

52. **Patient - Dustin L Parker**, 08/05/23, suffered:

"The loss of continuity of my medical care since Dr. Bockoff was ordered to cease practicing Pain Management created an environment of suffering, increased blood pressure, loss of mobility, and productivity. I suffered injury from loss of continuity of care, not being properly treated, unable to walk or go to work, while not being able to locate another pain management provider who would treat my diagnosis, Adhesive Arachnoiditis, within California.

"I spoke to literally hundreds of well-qualified Medical Doctors and was repeatedly told, 'Sorry, I believe you need opioid pain treatment suffering from Severe Intractable Pain with the underline cause being Adhesive Arachnoiditis; but I will not go to prison for treating you.' Injured and desperate to locate proper medical care, I started contacting Pain Management Doctors outside California. I eventually located a Medical Provider in Phoenix Arizona who agreed to treat me for Adhesive Arachnoiditis.

"Every month my wife drives as far as she can, rents a hotel room, and gets up the next morning driving the remainder of the trip. Appointments out of State have consumed our savings and a second loan on the family home. I have not been able to achieve the same level of activity since the loss of continuity of medical care.

"Can a price be put on maintaining the continuity of Severe Intractable Pain care as a means to survival? To be able to live my life not in constant tormenting agony?

"The care Dr. Bockoff provides in specialized pain treatment, which other well-qualified providers agree is necessary but will not provide due to fear of the Drug Enforcement Agency (DEA) reprisal."

53. **Patient Regina Dolan**'s Husband said:

"The stress and anxiety related to current DEA over-reach and the reality of such an uncertain future with regard to Regina's pain management and care has taken a huge emotional toll, and has greatly exacerbated her pain symptoms and fear. This has led to her trying to conserve pain medications by stretching out doses, and minimizing daily activities that may cause a pain flare-up. The result has been a very decreased quality of life and a much more depressive state of mind.

"We also received a letter from Medicare stating that they would no longer pay for any Rx (controlled or uncontrolled) written by Dr. Bockoff because he is on their "preclusion list". Just another stark reminder of the reality that the doors are closing for pain management specialists, and help for those who suffer will be no more.

"The feeling for me, and my belief has become, that the DEA and other regulatory entities truly wish to eradicate pain management practices (that prescribe opioids) from our culture/society. Severe pain patients thus will be systematically eliminated (exterminated) from society as well, as they will soon succumb to their illnesses or untreated pain.

"It's a harsh reality of life in the USA today as I currently see it, and I can't understand how we got here as a society, yet we are here."

B. <u>Prescribing Practices.</u>

54. At the heart of the prescription debate are several prescribing practices not understood or appreciated by DEA and found necessary for these patients.

55. COMBINING OPIOIDS AND BENZODIAZEPINES. FDA and CDC have warned against prescribing opioids and benzodiazepines together. In some cases, however these two classes of medication must be prescribed together to control medical complications such as blood pressure, seizures, muscle spasm, tremors, severe anxiety, tachycardia, or irritable colon. Adequate sleep may depend on the combination of these two drug classes. There are long-term patients who take both drug classes and do not show any sedation, respiratory depression, abuse, or diversion.

56. TREATMENT WITH FENTANYL. FDA is concerned when a treatment regimen involves fentanyl (non-injection or patch) that is acceptable when prescribed for cancer breakthrough pain. Breakthrough pain from a non-cancerous condition can certainly be as dangerous as breakthrough pain (e.g. flare) from cancer pain. It can cause elevated pulse rate, and blood pressure, and, on rare occasions, seizures. But fentanyl taken in the mouth (under tongue, buccal) is well known to be a fast, effective agent for breakthrough pain regardless of the cause of the baseline pain.

57. THE RATIONALE MAY BE FOUND IN THE PRESCRIPTION. DEA concerns itself whether the reason is found in the patient's medical records but, even if not found, it is usually stated in the prescription (something like "600 mcg ever 4 to 6 hours prn breakthrough pain.")

58. PATIENTS MAY HAVE INTRACTABLE PAIN. DEA insists that certain combinations of medications don't reduce pain or function (for example, morphine sulfate 100 mg, oxycodone 30 mg, and methadone 10 mg). This ignores the fact that the combination of drugs is for intractable, palliative care patients. In other words, the pain is persistent, unrelenting and remains undiminished. Function doesn't necessarily improve. The prescription is therefore palliative – to treat for comfort and lack of suffering.

59. OXYCODONE AND METHADONE. DEA is concerned if oxycodone is prescribed with methadone, a combination for baseline pain (methadone) and a short-acting opioid such as oxycodone for breakthrough pain.

C. Statutes approve these prescriptions for intractable pain.

60. Dr. Bockoff practices in California, and California has a "Pain Patient's Bill of Rights" and it provides for the treatment of intractable pain (no known cure) and the objective of treatment is entirely palliative.

"A patient who suffers from severe chronic intractable pain has the option to choose opiate medications to relieve that pain without first having to submit to an invasive medical procedure, which is defined as surgery,

destruction of a nerve or other body tissue by manipulation, or the implantation of a drug delivery system or device, as long as the prescribing physician acts in conformance with the California Intractable Pain Treatment Act, Section 2241.5 of the Business and Professions Code." See California Health & Safety Code § 124961

61. There is a similar provision found in California's Intractable Pain Statute:

"A physician and surgeon may prescribe for, or dispense or administer to, a person under their treatment for a medical condition dangerous drugs or prescription controlled substances for the treatment of pain or a condition causing pain, including, but not limited to, intractable pain,". See California Health & Safety Code § 2241.5.

62. The new 2023 CA guidelines support the intent of both the Pain Patients' Bill of Rights and the Intractable Pain Treatment Act. See Medical Board of California Guidelines for Prescribing Controlled Substances for Pain, July 2023, pp. 3, and 18-19

63. The new 2023 CA guidelines make it clear that they don't apply to physicians engaged in caring for end-of-life and intractable pain patients. Id.

64. The following statement appears in bold on page 19 in the section about Cancer Pain/End-of-Life Pain:

"The Guidelines for Prescribing Controlled Substances for Pain are not meant to be used in the treatment of patients with "end of life" or

intractable pain and are not intended to limit treatment where improved function is not anticipated and pain relief is the primary goal." Id.

65. The prologue to the 2023 CA guidelines is apologetic, stating that "the [2016] CDC guidelines might have also inadvertently contributed to patient harm due to the under-treatment of pain..." Id., p. 2

66. CDC acknowledged that the "misinterpretation of their [earlier] guidelines most likely led to the unintended consequence of untreated and undertreated pain, serious withdrawal symptoms, worsening pain outcomes, psychological distress, overdose through use of illegal drugs, and suicidal ideation and behavior." Id.

III. THE DEA ADMISSION AND RELATED PROCEDURE

A. THE DEA SEARCH

67. Before the Administrator's summary order, on September 9, 2021, at 2:50 pm, AUSA Marina A. Torres, applied for a search warrant in the District Court, Central District of California, purportedly to investigate the medical practice of David B. Bockoff, M. D. as to the care, treatment and prescriptions issued by Dr. Bockoff in and for chronic pain patients. See Search Warrant.

68. In the DEA Warrant, "Attachment B," III. Par. 7, at pg. ix, AUSA Torres said "we believe" that Dr. Bockoff's practice is "illegitimate." Id.

69. The Controlled Substance Act (CSA) says a physician must act "knowing or intentionally." 21 USC Section 841(a)(1).

70. It has been long and well established that one must demonstrate "a vicious will" if you hope "to establish a crime." See *Staples v. United States*, 511 US 600, 616-617 (1994). Each element of a crime must be knowing or intentional. The Supreme Court stated a long time ago "that consciousness of wrongdoing is a principle 'as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Morissette v. United States*, 342 U.S. 246, 250 (1952). In the recent Supreme Court decision, *Ziulu Ruan v. United States*, 142 S.Ct. 2370 (June 27, 2022), all justices concurring, 9-0, Justice Breyer delivered the opinion, stating, that it's not enough to say that "a prescription was not authorized;" rather, the Government must instead "prove that the doctor knew or intended that the prescription was unauthorized."

71. The prescriptions at issue suggest they were properly authorized. The *Ruan* Court stated further,

"We would not view such dispensations [of prescriptions] as inherently illegitimate; we expect, and indeed usually want, doctors to prescribe the medications that their patients need." *Id.*

72. More than that, the Court criticized the fact that, at the time of the *Ruan* decision, that "the regulatory language defining an authorized prescription is, we [the Court] have said, 'ambiguous,' written in 'generalit[ies], susceptible to more precise definition and open to varying constructions (underscoring added)," citing *Gonzales v. Oregon*, 546 US 243, 258 (2006). DEA's conduct in this matter teaches we haven't cured DEA's preference for "ambiguity."

73. The DEA's search warrant was cast in such overbroad terms, it could not be said to be anything but a "general warrant," a constitutionally impermissible "fishing expedition."

74. The Fourth Amendment requires that a search warrant "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. In *Marron v. United States*, 275 U.S. 192, 196 (1927), the U.S. Supreme Court held that the Fourth Amendment "particularity" requirement "makes general searches under [a warrant] impossible and prevents the seizure of one thing under a warrant describing another."

75. DEA, however, sought a warrant to seize every conceivable form of document or record without limitation in Dr. Bockoff's office, whether hard copy or digital, including any digital device.

76. When nothing is excluded, nothing is "particular," and the DEA Agent searching Dr. Bockoff's practice was therefore impermissibly "licensed" to seize anything and everything – and that's what DEA did.

77. A "general warrant" authorizes a "general exploratory rummaging through a person's belongings," and this is strictly prohibited by the Fourth Amendment's "particularity requirement." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Any search conducted under a general warrant is unconstitutional. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004).

78. In *Stanford v. Texas,* 379 U.S. 476 (1965), the Supreme Court struck down a warrant for being a general warrant which authorized a search for "evidence of books, records, pamphlets, cards, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas."

79. In the DEA Warrant (Ex. 2), "Attachment B," we find the broadest of directions for the "searching" agents "investigating" Dr. Bockoff's medical practice, reduced to the vaguely stated conclusion that "[Dr.] Bockoff does not legally practice medicine" –particularly when it is not unlawful for a physician to possess or distribute (directly or by prescription) certain scheduled controlled substances for medical conditions within the

contemplation of the congressional authorization that legislated such uses as lawful. See 21, USC, Section 841.

80. Having questioned the "legitimacy" of Dr. Bockoff's medical practices, Justice's DEA said, "in an abundance of caution, the following procedures will be followed in order to minimize disruption to the legitimate medical needs of lawfully-treated patients (if any) (underscoring supplied)." Search Warrant (Ex. 2), Attachment B, III. Par. 8, at pg. ix.

81. The gist of the DEA's "procedures" to avoid "disruption" was to return the patient file of "of any patients who may appear to be lawfully treated by [David] BOCKOFF [M.D.]" and to "provide to the patient making the request [for his or her file] a copy of any medical information [the government] has regarding the patient within five days (excluding weekends and holidays) of receiving the request." Attachment B, III. Par. 8, at pg. ix – x.

82. On the Department's return on the search warrant, in its inventory of the patient files seized during the search, they identified 240 patient files.

83. After the search, without any patient's request, entirely on its own, the DEA returned digital copies of the files for all 240 patients.

84. On or about the first week of November 2022, the DEA then issued a subpoena for 5 of the 240 patients from the search that occurred about a year earlier in September 2021.

85. In and around early November 2022, before the subpoenas were satisfied, DEA issued an order to show cause and an immediate suspension of Dr. Bockoff's registration. Id.

86. The DEA cited as a basis for its summary suspension Dr. Bockoff's prescriptions for the same 5 patient files that DEA was simultaneously subpoenaing, without any idea what was to be found in those 5 files from the intervening period. Id.

87. The five patients were identified by name in the DEA subpoena (Ex. 2) and by their initials in the show cause order:

    a. Brant Brumer (BB),

    b. Erica Chavez (EC),

    c. Philip Jimenez (PJ),

    d. Faizi Lee (FL), and

    e. Andrew Walla (AW).

88. These five patients, statistically, represent only 2% of the 240 patients in Dr. Bockoff's medical practice seized in the search a year ago.

89. Intervenors questioned how can so few medical files serve as a sufficient factual predicate to charge that Dr. Bockoff's prescription practices across the array of 235 other patients was somehow not legitimate.

90. When DEA served Dr. Bockoff the show cause suspension order (Ex. 4), they gave Dr. Bockoff a contact list to refer Dr. Bockoff's patients if they suffered (Ex. 5), but none of these contact references that DEA provided, administered pain medication; the DEA only identified contacts for "substance abuse."

B. DEA FORCES THE UNLAWFUL ABANDONMENT OF PATIENTS

91. DEA interfered in contracts between 240 patients and their physician in the case of every one of our intervening patients, and every other one of Dr. Bockoff's 240 patients,,

92. Under Virginia law, where the Administrative Law Court sits, and California law, where Dr. Rockoff makes his practice, a doctor may not abandon a patient; it is unlawful.

93. To prove abandonment, it must occur when the patient needs medical attention, that is, at a critical stage of the treatment.

94. That is exactly what DEA forced in this case. Abandonment must take effect so abruptly that the patient has little or no time or resources to find a suitable replacement.

95. As a general proposition, "a physician who abandons a patient may do so 'only. . . after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' *Payton v. Weaver*, 131Cal.App.3d 38, 45 [182 Cal.Rptr. 225](1982).) *Compare* California Code Annotated, Article 4 Enforcement, Section 4955 k.

96. In California, when terminating the relationship, there must be notice and there must be time to continue treatment so as to provide time to assure competent medical care to follow.

97. DEA forced the abandonment of these 240 patients suddenly, abruptly, and without providing for competent medical care under the law, indeed by denying the patients the competent medical care they were receiving.

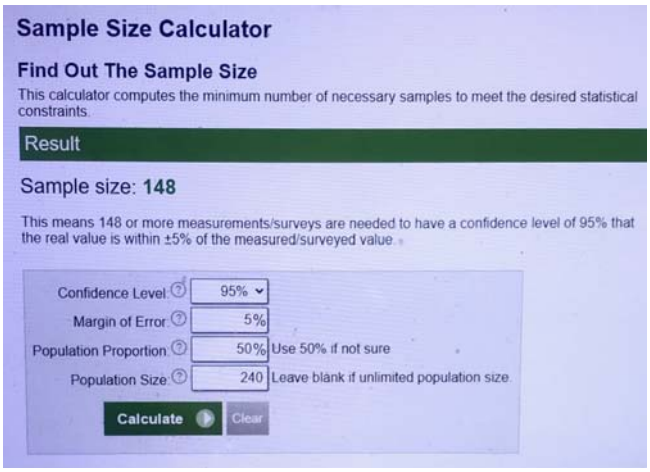
C. THE COURT'S NEW MATH – FIVE IS NOT ENOUGH

98. The Administrative Court admitted that there was a small sample of alleged inapt prescriptions to five patients, without any evidence of intent to issue unauthorized prescriptions to any one of these five patients.

99. In the recent Supreme Court decision, *Ziulu Ruan v. United States*, 142 S.Ct. 2370 (June 27, 2022), all justices concurring, 9-0, Justice Breyer delivered the opinion, stating, that it's not enough to say that "a prescription was not authorized;" rather, the Government must instead "prove that the doctor knew or intended that the prescription was unauthorized." While the burden of persuasion may be less for a civil proceeding, how may the analysis ignore this element of "intent" when considering summary action or a COR proceeding. The *Ruan* Court criticized the fact that, at the time of the *Ruan* decision, that "the regulatory language defining an authorized prescription is, we [the Court] have said, 'ambiguous,' written in 'generalit[ies], susceptible to more precise definition and open to varying constructions (underscoring added)," citing *Gonzales v. Oregon*, 546 US 243, 258 (2006). Nor has DEA yet cured its preference for "ambiguity."

100. The math is simple. 5 out of 240 patients is 2 %. The difficulty in making an inference from this sample size of 240 patients is that the population size (240) is limited.

An online app (https://www.calculator.net/sample-size-calculator.html) suggests a sample size of 148 is necessary to have a 95% confidence level when drawing inferences about a finite population as small as 240 patients.



101. The Administrative Court stated it gave no mind to the contrary evidential heft even when thousands of other patients were properly treated; five suspect patients, according to this Agendy determination, are a fair sample; of course, "believing it" doesn't make it so. (This argument is made in the Trial Judge's final order, denying patients emergency motion to Intervene, at p. 6, fn 10).

D. NO ACCESS TO THE PLEADINGS.

102. On or about November 22, 2022, the DEA Administrative Trial Judge set dates for the presentation of argument by DEA and by Dr. Bockoff.

103. The intervenors had no access to the administrative trial proceedings including any of the DEA submissions or Dr. Bockoff's submissions.

104. Dr. Bockoff's submissions were due November 22, 2022, by 2pm. The intervenors had no access to DEA's earlier filing, nor Dr. Bockoff's submission.

105. On November 18, 2022, Intervenors asked the court clerk for information on behalf of the patients affected by the DEA suspension order and subpoena.

106. The court clerk for this administrative tribunal confirmed that the filings in the proceeding involving Dr. Bockoff were not publicly available except to parties. Compare 21 CFR Section 1316.46.

E.THE FINAL DECISION

107. By December 22, 2022, Judge Wallbaum issued her final decision. The Trial Judge said that petitioner's claim was to "have a right to obtain medical treatment." Trial Judge COR Decision, at p.2 (hereinafter "COR Dec. at p__").

108. A more accurate statement, however, is that DEA had no right to cut off the physician's treatment and prescriptions without any concern for the health emergency that DEA's summary cut off occasioned.

109. The Trial Judge confounded the difference between the standard to intervene in an agency decision, and a Title III court.

110. The Trial Judge treated the CSA as some variation of a cabined off legislative construct that barred intervention by "interested persons."

111. The Trial Judge refused to consider the admissions in the affidavit in support of the search warrant that, to be colloquial, showed that DEA didn't have the goods for its summary proceeding.

112. The Trial Judge cited *Nichols v. Board of Trustees*, 835 F. 2d 881, 996 (DC Cir. 1987) for the proposition that "intervention typically requires that the prospective intervenors have standing." OCR Dec. at p. 2.

113. But that is inapposite to the actual holding that found *Nichols* satisfied the "interested persons" standard in the APA in that case. The Circuit in *Nichols* spoke in terms of the APA's "interested person," and not "standing" as that term is defined in a Title III proceeding.

114. Of course, when the *Nichols* court was discussing these questions in 1987, the Court was noted that the "interested person" concept "resists precise legislation or judicial delineation."

115. Still, this rule favoring "interested persons stems from judicial recognition that intervention in administrative proceedings often greatly facilitates meaningful judicial review." *Id.*, fns 107, and 108.

116. The trial judge cited *Komag Inc. v. Andrus*, 580 F.2d 601, 614 (DC Cir. 1978), an even earlier judicial endorsement for recognizing "interested persons" in the context of a dispute over Alaska public land sections.

117. The trial judge claimed that "patients make no argument that under the CSA and its attendant DEA regulations, they qualify as interested parties' and have standing."

118. This is a curious and striking error for the actual test is "interested persons," not "interested parties," and this case, given its origin in an agency, is not bound by an Article III formulation of "standing."

119. It's not understandable for what authority the Trial Judge cited *Gonzales v. Raich*, 545 U.S. 1, 12 (2005), when it held the CSA did apply to medical marijuana. Id., p. 3. (On and off the court this was a controversial call to resist the medical science that suggested marijuana had a role to play in a variety of treatments.)

120. The trial judge emphasized CSA's enforcement function, as if that function was to the exclusion of all other purposes of the statute; we can't overlook the fact that it is the CSA that also authorizes prescriptions for narcotic substances in order to treat patients; it appears that treatment is a part of the issue at hand for the patients, for the public, and a core concern of the COR admin hearing.

121. The Trial Judge said the standard for the proceeding was "whether [Dr. Boskoff's] COR should be revoked because his registration is inconsistent with "the public interest."

122. We respectfully insist that the patients concern is consistent with the factor concerned with "the public health and safety." 21 USC Section 823 (f)(5).

123. The trial judge leans on her characterization that the CSA was a complex and independent entity that bears only with sufferance a comparison with any other legislative construct.

124. Yet the trial judge cited *Lujan v. G&G Fire Sprinklers Inc.*, 532 U.S. 189, 196(2001), having nothing whatsoever to do with the CSA or the "interested persons" in the APA.

125. In *Lujan*, the California Labor Code authorizes the state to withhold payments due a contractor but without notice or an opportunity to be heard on the withholding of those funds.

126. This is precisely what we've charged regarding the cut off of all prescriptions, the abandonment of the patients, the interference in the contractual relationship between patient and physician, without prior notice or an opportunity for the patients to be heard.

127. The trial judge repeats what the patients are not – they are not registrants.

128. On the other hand, the trial judge says the patients must have a property right. There is no such limitation to be found in the APA. We

disagree that's a constraint but, if it were required, the DEA's interference in the doctor-patient contractual relationship may be relied on as denial of a "property" right and a personal right, for the freedom to contract with another..

129. The trial judge cited *Bonds v. Tandy*, 457 F.3d 409, 414 (5th Cir. 2006) involving an "aggrieved person," not an "interested person." As to the term at issue, "aggrieved person," the Courts were still "address[ing] the scope of the term, "person aggrieved."

130. The trial judge said she could not dissolve the ISO, but patients asked that the trial judge recommend the immediate suspension or dissolution of the DEA Order, to the DEA Administrator, something the trial judge could have recommended. COR dec., at p. 4.

IV. THE QUESTIONS RAISED AND RELIEF REQUESTED

A. THE ISSUES RAISED – standard for review.

1. *Abuse of discretion in an arbitrary and capricious manner when denying the "personal interest" of the chronic pain patients*.

The presiding DEA administrative trial judge in the sealed proceeding below abused her discretion, acted in an arbitrary and capricious manner, and not in accordance with the applicable law, when she failed to appreciate

the distinction between an "interested person" and an "interested party" and an "aggrieved person." See paragraphs 1-32, and 106-129, supra.

The trial judge proposed the physician and his counsel as an adequate substitute for the petitioners. But it was not possible. The physician's counsel would not even talk to us. See paragraphs 33-34, supra.

The trial judge denied the "personal interest" of the chronic pain patients (*see* 5 USC Section 555(b)) to intervene to consider the medical treatment and pain medication that DEA summarily cut off, endangering their health and their survival. See paragraphs 34-45, supra.

The trial judge did not appreciate the need for the prescriptions for the patients, the practices when prescribing to a patient with intractable pain, and the California authority that appreciated the distinction. See paragraphs 46-65, supra.

The trial court did not distinguish between a motion to suppress a search warrant, and the admissions that DEA made in that warrant, and by their conduct, that demonstrated that DEA did not know what to expect when they searched Dr. Bockoff's medical office, admitting that there was or could be "legitimate medical needs of lawfully-treated patients" and if they found this to be the case, they would return all the seized files; as it

turned out, DEA did just that, returned all the medical files of all 240 patients. See paragraphs 66-89, supra.

Nor did the five patients identified "make the case" that there was any danger to the community; the only danger was to the patients that were denied treatment and the medicine they needed to function and to survive. See paragraphs 85 -89, 97-105, supra.

The Trial Judge insisted that petitioners had to have a property interest even as DEA forced their abandonment without notice or an opportunity to be heard. See paragraphs 90 -105, supra. The statute makes no such demand, nor the case law. But, to the extent, there is a due process property claim, it is the DEA's interference in the relationship between patient and doctor.

There is good and sufficient reason to remand this matter for further consideration. Even now as we file this brief, the COR proceeding is the subject of a recommendation, and the Administrator has not reviewed, approved, revised or released the matter.

2. *The presiding DEA administrative trial judge acted, contrary to the constitutional right of due process, power, privilege, or immunity, due and owing Petitioners* - by denying Petitioners' motion to intervene to challenge DEA's summary "Order to Show Cause and Immediate Suspension Order,"

immediately suspending the issuance of any treatment or pain medication, previously authorized under Dr. Bockoff's DEA Certificate of Registration, No. BB4591839, of David Bockoff, MD; the Administrative Law Judge stated she lacked the jurisdictional competence even to recommend to the Administrator to vacate or suspend the suspension order denying the physician's authority to prescribe pain medication, and the DEA Administrator's summary finding was not subject to dispute; there was no such prohibition; presumably, it would be a recommendation to the Administrator that would prompt her to withdraw the suspension order. See paragraphs 105-129, supra.

3. *The trial judge made an unwarranted and specious finding of fact* - The presiding DEA administrative trial judge made an unwarranted and specious finding of fact that it made no difference, when considering the revocation of Dr. Bockoff's authority to prescribe, how few instances of questionable prescriptions DEA may have found, in this case, five out of 240 patients. See paragraphs 85-105.

4. *The presiding DEA administrative trial judge acted, contrary to the constitutional right of due process, power, privilege, or immunity, due and owing Petitioners* - The presiding DEA administrative trial judge acted, contrary to the constitutional right, power, privilege, or immunity, due and

owing Petitioners, when insisting petitioners had to have some cognizable "property right" to move to intervene in the DEA proceeding, and, if that is a legitimate predicate, whether the DEA's interference with the pain patients' contract with their physician satisfied that "property" claim for plainly there was an interference that was cognizable. (See *Lujan v. G&G Fire Sprinklers, Inc.*, 532 US 189, 196 (2001)(The case authority cited a due process requirement when the state withheld contract payments to contractors.)). See paragraphs 106-129, supra.

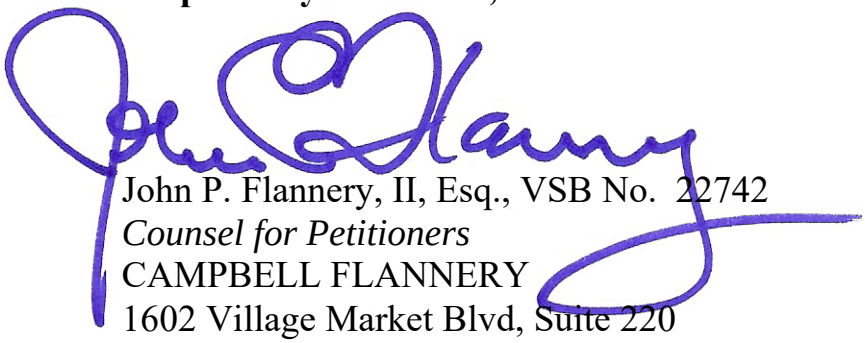
B. RELIEF REQUESTED – standard for review.

5. That this Court hold unlawful and set aside the DEA agency action, findings and conclusions to date. As the Trial Judge and the DEA Administrator seem to have no urgency in the matter, it should work no burden on the government.

6. That this Court compel, the agency action unlawfully withheld and unreasonably delayed, namely, the authority for petitioners to intervene, and remand the matter to the DEA Administrative Tribunal, authorizing Petitioners' motion to intervene upon remand. As this is the remedy cited in

the statute, we respectfully submit it is just and right to remand so that it's clear that the APA provision means something when a third party has a contribution to make to the matter pending.

Respectfully submitted,



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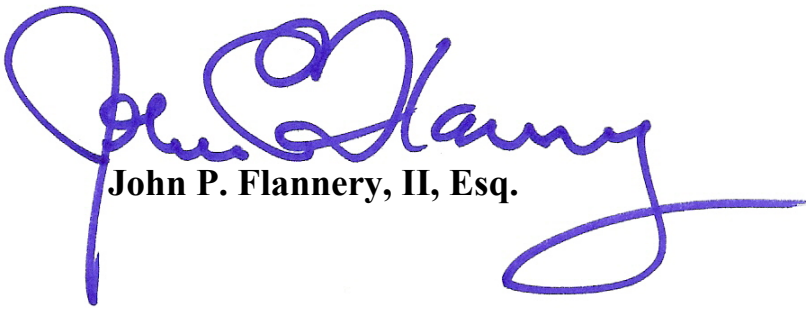
CERTIFICATE OF COMPLIANCE WITH TYPE AND VOLUME LIMITATIONS

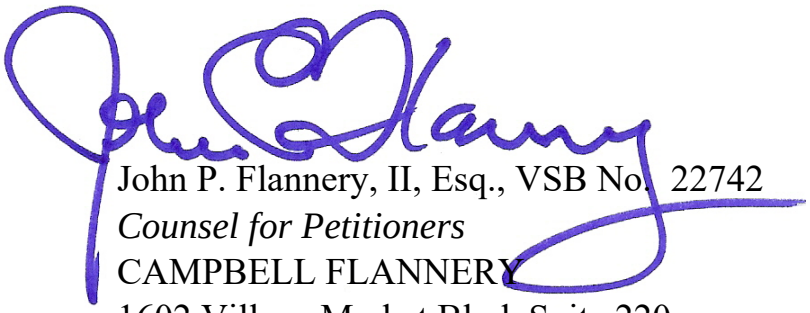
I hereby certify that the foregoing Opening Brief was prepared in 14 point proportionally spaced Times New Roman Type in Microsoft Word 2013 and contains 10,296 words. The number of words for the opening brief may not exceed 13,000 words. The Opening Brief for Petitioners complies with the requirements of Federal Rules of Appellate Procedure 32(a)(2)(7) and 32(a)(5).



John P. Flannery, II, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a copy of the foregoing with the Clerk of Court, United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on August 7, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.



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