

**UNITED STATES COURT OF APPEALS  
SIXTH CIRCUIT**

PAUL H. VOLKMAN, MD, PhD,	:	
PETITIONER,	:	
	:	CASE NO.
v.	:	
	:	
ALBERTO R. GONZALES, IN HIS	:	
OFFICIAL CAPACITY AS ATTORNEY	:	
GENERAL, UNITED STATES	:	
DEPARTMENT OF JUSTICE, AND	:	
KAREN TANDY, IN HER OFFICIAL	:	
CAPACITY AS ADMINISTRATOR	:	
OF THE UNITED STATES DRUG	:	
ENFORCEMENT ADMINISTRATION,	:	
AND MICHELE LEONHART, IN HER	:	
OFFICIAL CAPACITY AS DEPUTY	:	
ADMINISTRATOR OF THE UNITED	:	
STATES DRUG ENFORCEMENT	:	
ADMINISTRATION,	:	
RESPONDENTS.	:	

PETITIONER'S VERIFIED PETITION FOR REVIEW OF  
THE FEBRUARY 13, 2006, IMMEDIATE SUSPENSION  
OF PETITIONER'S DEA REGISTRATION  
PURSUANT TO 5 USC §701 ET SEQ., WITH PRAYERS FOR  
DECLARATORY AND INJUNCTIVE RELIEF

Petitioner Paul H. Volkman, MD, PhD, hereby moves for relief as outlined *infra*.

I. THE PARTIES

Petitioner is a duly licensed physician who was a registrant of the Drug Enforcement Administration (DEA) until a summary suspension of his registration was levied on February 13, 2006. Since that time Petitioner has been unable to practice medicine because his specialty, pain management, requires that he utilize controlled substances to treat the many and diverse painful conditions, symptoms, and diseases

of his patients in Ohio. It is unlawful to prescribe controlled substances without an active DEA registration. Thus, because of the February 13, 2006, immediate suspension of his DEA registration, Petitioner was rendered wholly unable to treat his patients. Consequently, petitioner has been forced to close his medical practice in Chillicothe, Ohio, as a direct and foreseeable result of the government action in summarily suspending his DEA registration.

Respondent United States Attorney General (AG) Alberto R. Gonzales is the chief law enforcement officer of the United States. As such, he is in charge of the Department of Justice (DOJ), including regulation of controlled substances pursuant to the Controlled Substances Act (CSA), 21 USC §801, *et seq.* The Drug Enforcement Administration (DEA) is an agency component of the DOJ within Mr. Gonzales' oversight and control. Based upon information and belief, Respondent Karen Tandy is the Administrator of the DEA and serves as the top official of that agency and is the AG's designee to exercise his authority under the CSA, 21 USC 871(a); 28 CFR §0.100(b). Based upon information and belief, Respondent Michele Leonhart is a Deputy Administrator of the DEA and is the Administrator's designee under 21 USC §824 and 28 CFR §§0.100 and 0.104 who renders final appealable orders pertaining to DEA registrants.

## II. JURISDICTION

Jurisdiction in this dispute is predicated upon 5 USC §702 which affords one aggrieved by a government action recourse to the judiciary for relief. Petitioner was practicing medicine within the jurisdictional boundaries of this Court when the government summarily withdrew his ability to prescribe controlled substances. As a

pain management specialist, this effectively foreclosed further practice of his profession. Dr. Volkman is aggrieved by the government's summary suspension of his authority to prescribe medication to his patients.

The government will certainly answer by alleging that Dr. Volkman must await a "final" determination from the Deputy Administrator and then appeal that under 21 USC §877. However, 5 USC §703 provides that "inadequacy" of an established process for judicial review will justify "any applicable form of legal action" to seek a timely remedy. As outlined *infra*, and as more fully anticipated in future briefs and argument, Petitioner asserts that the "remedy" available by awaiting further notification from the Deputy Administrator is illusory and wholly inadequate given the facts and history of this particular case. Furthermore, 21 USC §824(d) specifically provides that a summary suspension levied by the DEA may be dissolved by a court of competent jurisdiction. A federal district court is not a court of competent jurisdiction to contest DEA determinations under the CSA. *John Doe, Inc. v. Gonzalez* (sic), 443 F. Supp. 2d 1 (DC Cir. 2006). Moreover, 21 USC §877 and Fed. R. App. Pro. 15, each direct that an appeal from an agency action is taken directly to the appropriate circuit court. Thus, locus in quo for this action is this circuit, the federal appellate court of Dr. Volkman's place of business.

### III. RECORD CERTIFICATION AND TRANSMITTAL

Fed. R. of App. Pro. 16 and 17 direct that the agency must certify and transmit the record to the court of appeals within forty days of service of this petition.

#### IV. CONDENSED FACTUAL SUMMARY

It is beyond the scope of this initial pleading to comprehensively articulate all of the relevant facts, evidence, and prejudicial errors committed by the government in the course of this administrative action and its preceding investigation. However, in order to properly frame a complaint for review and dissolution of the agency's February 2006 immediate suspension order, Petitioner respectfully offers the following litany of events, and the significance thereof, relative to the Constitutional infringements which he has suffered.

Dr. Volkman was a duly-licensed Ohio medical practitioner, practicing pain management in Ohio from 2003 to February 2006. He is certified by the American Academy of Pain Management, was a Board Certified emergency physician for twenty years, and is still a Board Certified pediatrician. Dr. Volkman has never before been the subject of any type of investigation or prosecution by any medical licensing authority or governmental agency. He is a clinically-trained PhD Pharmacologist with six years experience in clinical research trials for neurological medications as well as five additional years of intensive work with clinical neurology. At the time Dr. Volkman's clinic was raided by the DEA in February 2006 he was in the process of setting up a research protocol through the University of Utah Center for Human Toxicology (Dr. Andrenyak) to more accurately assess and measure narcotic metabolites in his patient population. The goal of this research is to more effectively monitor patient compliance with various pain treatment regimens by developing a refined and specific testing protocol. The long-term view is to publish the eventual findings in the most widely-read and prestigious American medical journal, the New England Journal of Medicine.

Dr. Volkman had practiced medicine for nearly thirty years before he accepted a position in a pain management clinic in Portsmouth, Ohio. Eventually, this clinic, Tristate Health Care Clinic, was investigated by the DEA, although no criminal charges have ever been made known to Dr. Volkman. Dr. Volkman terminated his employment at this clinic in September 2005 and set up his solo pain management practice, initially in Portsmouth, but shortly thereafter he moved to a more suitable location near Chillicothe, Ohio, in October 2005.

On February 10, 2006, Dr. Volkman's clinic was raided at gunpoint by the DEA along with a variety of other agencies. Property, patient charts, and miscellaneous items were seized by the authorities. The following Monday, February 13, 2006, the DEA again visited -- this time to deliver a show cause order and immediate suspension which effectively terminated Dr. Volkman's practice of medicine. The government also seized two bank accounts and initiated a forfeiture *an in rem* action.<sup>1</sup> The DEA action in seizing the bank accounts was supported by some sort of affidavit or sworn declaration from DEA Agent Jerrell Smith. This declaration has never been revealed to Dr. Volkman or his counsel, although Agent Smith did testify about the affidavit in December 2006 before the DEA Administrative Law Judge (ALJ).<sup>2</sup>

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<sup>1</sup> *United States v. Contents* \*\*\*, 1:06CV445 (SD Ohio). The DEA also seized a bank account belonging solely to Mrs. Volkman, a school librarian with no connection to her husband's medical practice. This account is also the subject of the pending *in rem* action. Inexplicably, not all properties seized by the DEA are named as defendants via the *in rem* action, yet nor have they been returned to Dr. Volkman. That is an issue for a separate judicial proceeding.

<sup>2</sup> The cross-examination of Agent Smith was poignant in revealing what Agent Smith did not disclose to the magistrate judge issuing the search and seizure warrants. Agent Smith did not tell the judicial officer that Dr. Volkman referred patients to the Cleveland Clinic; he did not reveal that Dr. Volkman commonly prescribed medications for blood pressure, gastric distress, peripheral blood disease, circulation disorders, and topical creams as well as pain medications; he did not reveal that Dr. Volkman only saw about thirty patients per day; he did not reveal that Dr. Volkman utilized written contracts with his pain patients to facilitate monitoring, control, and effective

The day after the DEA removed Dr. Volkman from the practice of medicine, February 14, 2006, his then-counsel filed a written hearing request with the agency. In this notice, Petitioner’s counsel requested an expedited hearing and also explicitly asked for “\*\*\* full access to his records immediately \*\*\*.” This “expedited” hearing convened on December 5, 2006 – ten months after the immediate suspension and was continued into January 2007. The administrative hearing did not conclude until February 27, 2007, the deadline for the submission of proposed findings of facts, conclusions of law, and argument thereon.

There has not yet been a report issued by the presiding ALJ. Importantly, Petitioner has no basis to believe, anticipate, or even hope, that a report would be issued by the ALJ in less than one year. Furthermore, Petitioner has no basis to believe that a review of the ALJ’s report would be completed by Respondent Deputy Administrator Leonhart in less than one additional year. This is because the agency has a dubious record of delay in rendering adjudications, even in uncontested cases.<sup>3</sup> Thus, a “remedy” in the form of a standard 21 USC §877 appeal to circuit court, two years or more from now, is no remedy at all. An agency delay which constitutes an

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treatment; he did not reveal that Dr. Volkman often ordered drug screens on his patients to ensure compliance with his dosing instructions; he did not reveal that Dr. Volkman terminated non-compliant patients from the practice; nor did he reveal that Dr. Volkman had been fully cooperating with the DEA. Tr. 884-887. It must be presumed that the Deputy Administrator also relied on some or all of Agent Smith’s erroneous and incomplete information when she decided to levy an immediate suspension of the registration in February 2006.

<sup>3</sup> Recent examples of timelines from DEA show cause proceedings are illuminating: *In re: Krishna-Iyer*, 71 Fed. Reg. 52148 (Time from show cause to final order was 46.5 months); *In re: Prakasam*, 70 Fed. Reg. 33203 (Time from show cause to final order was 40 months); *In re: Brockbank*, 71 Fed. Reg. 71101 (Time from show cause AND IMMEDIATE SUSPENSION to final order was 19.5 months and, there was no hearing request so this was essentially a default proceeding before the agency deputy administrator without an evidentiary hearing); *In re: Lockridge*, 71 Fed. Reg. 77791 (Time from show cause AND IMMEDIATE SUSPENSION to final order was 31.5 months); *In re Morrall*, 69 Fed. Reg. 59956 (Time from show cause to final order was 36 months.) Copies attached as Exhibit A.

impairment to a legal right may be judicially deemed a final action subject to appeal. *Deering Milliken, Inc. V. Johnston*, 295 F.2d 856 (4<sup>th</sup> Cir. 1961), disapproved on other grounds in *Califano v. Sanders*, 420 US 99 (1977). Moreover, unlawful or unreasonable delay can establish court jurisdiction even in the absence of a final agency order. *International Ass'n. Of Machinists and Aerospace Workers v. Nat'l Mediation Bd.*, 425 F.2d 527 (DC Cir. 1970).

During the anticipated (minimum) twenty-four month delay by the agency, Dr. Volkman will continue to be unemployable as a pain specialist or even as a general practitioner. He will also continue to incur everyday living expenses; will continue to drastically deplete his savings in order to survive; will continue to suffer reputational injury daily; and will continue to suffer irreparable harm. The present absence of a report from the ALJ and a consequent "final" order from Deputy Administrator Leonhart are discussed *infra*.

#### V. FINALITY – EXHAUSTION OF ADMINISTRATIVE REMEDIES

Typically, after the DEA suspends a registration, appeal to a circuit court is available pursuant to 21 USC §877. Eg., *Morrall v. DEA*, 412 F.3d 165 (DC Cir. 2006). This is so even in the case of an immediate suspension which obviously inflicts harm to a registrant before a hearing on the allegations and long before a final, appealable order is issued by the Deputy Administrator.

The government will likely respond to the petition with a motion to dismiss premised upon Dr. Volkman's purported failure to state a claim and/or that subject matter jurisdiction is lacking, each an affirmative defense under Fed. R. Civ. Pro. 12.

These defenses will presumably be based upon a supposed failure to exhaust administrative remedies, or relatedly, a lack of finality. These positions may appear facially appealing, however, with full briefing and argument before this Court, Petitioner asserts that a purported failure to exhaust administrative remedies or lack of finality will not support either defense. As explained *infra*, there is no realistic, timely legal relief available through any other route available to Dr. Volkman. Moreover, the methodology for relief, as proposed herein, is expressly set forth in statute, rule, and caselaw. Further, the government action at this point may properly be characterized as “final” or fraught with such obvious futility that this Court may assume jurisdiction regardless of any absence of a typically appealable agency order.

#### A. Finality

“Finality” is determined by the application of a relatively simple two-part analysis enunciated recently. *Bennett v. Spear*, 520 US 154 (1997). The first prong requires that the agency action must represent the consummation of the agency’s decisionmaking process. In other words, it cannot be an interlocutory or tentative decision. Secondly, the action must have determined rights or obligations or be one from which “legal consequences flow.” *Id.* at 178.

The action of the DEA here, immediately suspending Dr. Volkman’s registration prior to even offering a chance for defense or mitigation, has presented, and continues to present each and every day, an insurmountable barrier to practicing medicine. As such, the immediate suspension represents the consummation of the agency decisionmaking. Further on this point, Petitioner’s counsel has found no case, ever, in the history of the DEA, where an immediate suspension of a physician’s registration

was eventually dissolved by the agency after the hearing process was completed. This is significant because it clearly tells us that once the DEA levies an immediate suspension it is the law of the case – *stare decisis* -- no turning back. Thus, any further intra-agency review or paperwork issuance is meaningless as a “final” action.

While it is inarguable that the ALJ has yet to issue her report, and the Deputy Administrator has yet to pound it with her rubber-stamp, this detail is but an inconsequential non-event. Everyone involved in this process can foretell precisely where this is headed – and, everyone involved in this process realizes that the DEA’s “usual” way of doing this will result in Dr. Volkman being out of practice for at least another two years before he even has a typical “final” appealable order in hand. It is this unconscionable delay which mandates an immediate review by this Court. Otherwise, the due process infringements, resulting in the denial of his property interest in a government-issued registration necessary to practice his profession, will continue to Dr. Volkman’s detriment every day while he awaits a “final” order.

When the DEA levied an immediate suspension of Dr. Volkman’s registration on February 13, 2006, it initiated the adversarial proceedings against Dr. Volkman. In good faith reliance on the impartiality of the government and its expected conformity with due process guarantees, Dr. Volkman proceeded to participate in the adjudicatory process. However, at the hearing before the ALJ, when Dr. Volkman’s Constitutional due process rights to fair notice and a meaningful hearing were absolutely trampled, it became painfully apparent that the suspension decision would be consummated at the close of the hearing, February 27, 2007. There is simply neither a legal nor a factual need to await a pronouncement from the ALJ or Respondent Deputy Administrator

which affirms each and every allegation levied in the show cause. The DEA has made its stand and the action against Dr. Volkman is a fully consummated act, subject to review by the Court pursuant to *Bennett*.

The second prong under *Bennett* requires that the action must have determined rights or obligations or be one from which legal consequences will flow. It is beyond cavil that the decision to withdraw Dr. Volkman's capacity to practice his profession is an act that both determines legal rights and also from which legal consequences flow. Dr. Volkman has been forcefully ripped from his medical practice, his reputation has been destroyed, his property has been seized, and he has been, in good faith, a party to a legal proceeding regarding his DEA registration. Clearly, legal rights and obligations have been determined by the agency and legal consequences flow therefrom. As such, the proceeding is at a stage where it is a consummated act of the agency which determined legal rights and from which flow legal consequences.

#### B. Exhaustion of administrative remedies

It has been observed that while "[e]xhaustion is directed to the steps a litigant must take, finality looks to the conclusion of activity by the agency." *Ticor Title Ins. Co. v. Fed'l. Trade Comm'n.*, 814 F.2d 731, 746 (DC Cir. 1987). As explained *supra*, all meaningful activity at the agency level has ceased and finality of agency action is evident. The essence of the decision has been made and there is no historical evidence indicating any realistic possibility that the immediate suspension will be dissolved by the agency.

Related to the issue of finality is the concept of exhaustion of administrative

remedies. Dr. Volkman participated in the only evidentiary hearing possible – the one held before the DEA ALJ. As such he has exhausted his administrative remedy, and importantly, created a record for judicial review. While Dr. Volkman could proffer objections to the future ALJ report, this is not a mandated step in litigation at the agency level. Moreover, because the agency’s history is clear that there will be no timely further action on Dr. Volkman’s case, his interests in meaningful and timely judicial review subsume any argument that he must still suffer through “exhaustion” in the form of awaiting a final decree from Respondent Deputy Administrator Leonhart.

“Administrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.” *West v. Bergland* , 611 F.2d 710, 715 (8<sup>th</sup> Cir. 1979), *cert. denied*, 449 US 821. Or, as this Court has opined, exhaustion of administrative remedies may not be required where petitioner has asserted non-frivolous Constitutional challenges to the agency’s procedures. *Southern Ohio Coal Co. v. Office of Surface, Mining, Reclamation and Enforcement*, 20 F.3d 1418, 1425 (6<sup>th</sup> Cir. 1994).

As explained *infra*, Petitioner asserts a number of Constitutional challenges to the process employed by the agency thus far. These claims are discussed as “colorable” later in this petition. However, under the Court’s scrutiny of “non-frivolous” claims, Petitioner respectfully asserts that a “colorable” claim is one which is automatically non-frivolous. As such, the law of this circuit indicates that technical exhaustion of administrative remedies is not required before judicial review should be

commenced at this point.

Furthermore, 5 USC §704 mandates that a petitioner must exhaust administrative remedies only when a statute or rule makes the remedy mandatory. *Darby v. Cisneros*, 509 US 137, 146-147 (1993); *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006). Under the language of 21 USC §824, the hearing which Dr. Volkman requested was merely optional. The show cause notice noted that Dr. Volkman “may” request a hearing on the allegations. Had Dr. Volkman failed to timely demand a hearing, the agency would have rendered a final order without a hearing – essentially it would have levied a default judgment, which, in and of itself, should result in a much speedier “final” order than the process employed thus far. However, in good faith, Dr. Volkman engaged the administrative hearing process and from that machinery there is now a record which is susceptible to judicial review.

21 CFR 1301.36(h) specifically provides that any DEA suspension of a registration may be withdrawn by the Administrator or “\*\*\* dissolved by a court of competent jurisdiction.” This Court is clearly of competent jurisdiction by virtue of Dr. Volkman’s status as a licensed medical practitioner in the state of Ohio when the subject action was commenced against him. While the judiciary will typically require a final action before permitting an appeal, what the agency itself characterizes as a “final” order is not necessarily determinative. *John Doe*, 443 F. Supp. 2d at 11 (DC Cir. 2006).

## VI. FUTILITY

Alternatively, this Court could find that the agency action is technically non-final, but still subject to judicial scrutiny. *Ass’n. of Nat’l. Advertisers, Inc. v. Fed’l. Trade Comm’n.*, 627 F.2d 1151, 1180 (DC Cir. 1981). When there is apparent a “clear right”

at issue, then the court may assume jurisdiction. Such clear rights are endangered when there is an agency violation of a “clear statutory provision” or “violation of basic rights established by a structural flaw, and not requiring in any way a consideration of interrelated aspects of the merits.” (Emphasis added.) *Id.* Because a determinative feature of the instant appeal is Petitioner’s assertion of significant due process violations, the Court can and should accept the matter for review at this point because Dr. Volkman’s clear right to due process has been compromised. Moreover, the merits of the case need not, and should not, be considered because of the structural flaws evident in the hearing process. Specifically, those structural flaws are the failure of due process by virtue of the ephemeral and ever-expanding scope of the allegations as well as the government’s refusal to provide full and timely access to the evidence which it provided to its own expert witness.

Other courts have also allowed appeals from “preliminary” agency orders when further involvement with the agency would be futile. Such futility would be evident when an agency record indicates that it has predetermined the issue. *Gibson v. Berryhill*, 411 US 575, 576, fn. 14 (1973). Another example of such futility may be found where rules applicable to prisoners were administratively attacked and it was held that requiring petitioners to pursue a final review by the Attorney General, the promulgator of the rules, “would be to demand a futile act.” *Houghton v. Shafer*, 392 US 639, 640 (1968).

Here, requiring Dr. Volkman to await interminably while his case grinds through the DEA internal review, only to end up on the desk of the person who already determined the issue by levying an immediate suspension, would be “to demand a futile act.”

Given the state of this record, the state of the law regarding the futility doctrine, and the state of the DEA's history in delaying the publication of "final" appealable orders, Dr. Volkman respectfully asserts that requiring him to await some further type of formal pronouncement from the agency constitutes an act of sheer and utter futility.

## VII. WITHHELD WAIVER BY AGENCY

An agency can waive the exhaustion requirement when it agrees that further administrative proceedings would serve no purpose. *Bowen v. City of New York*, 476 US 467, 484 (1986). There is no such agreement in this record. Absent a waiver by the agency, a reviewing court may deem that the withholding of the waiver is improper where the petitioner's interest in prompt resolution is so extreme that the agency receives no deference regarding waiver. *Mathews v. Eldridge*, 424 US 312, 330 (1976). Since the DEA has not waived the exhaustion doctrine, this Court may look to see if the waiver has been improperly withheld. Three factors are important in conducting this analysis: First, petitioner has asserted a colorable constitutional claim which is collateral to the substantive issues of the administrative proceeding; Secondly, petitioner will suffer irreparable harm by being forced to await full exhaustion of administrative remedies, and, Third; exhaustion would be futile. *Id.* at 330-32.

### A. Colorable Due Process Claim

Petitioner indisputably holds a protected property interest in the DEA registration issued by the government. *Board of Regents v. Roth*, 408 US 564, 577 (1972); *Cleveland Bd. of Educ. V. Loudermill*, 470 US 532 (1985). Yet, mere allegation of a Constitutional claim will not suffice to support a finding that a petitioner's claim is

colorable. *Holloway v. Schweiker* (1984), 724 F.2d 1102, 1105 (4<sup>th</sup> Cir. 1984), *cert. denied*, 467 US 1217. The merits of the Constitutional claim must be examined to determine if it is colorable and supportive of judicial intervention. *Koerpel v. Heckler*, 797 F.2d 858, 863 (10<sup>th</sup> Cir. 1986). Interestingly, a claim without merit is not necessarily one which is not colorable. *Id.*, relying upon *Boettcher v. Sec’y of Health and Human Services*, 759 F.2d 719, 722 (9<sup>th</sup> Cir. 1985). A Constitutional claim that is not colorable is one which is “\*\*\* so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.” *Oneida Indian Nation v. County of Oneida*, 414 US 661, 666 (1974).

One of Petitioner’s colorable Constitutional claims is premised upon due process. As noted by this Court over thirty years ago, at the administrative level, due process requires that two essential elements be provided by the agency: 1) Fair notice, and; 2) An opportunity to be heard. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6<sup>th</sup> Cir. 1971). This mandate for administrative procedural due process was clearly articulated by the Supreme Court fifty-six years ago. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 US 306, 313 (1950). The standard has since also been codified in the Administrative Procedure Act, 5 USC §554 which requires that “\*\*\* [p]ersons entitled to notice of an agency hearing shall be timely informed of the \*\*\* matters of fact and law asserted.”

Fair notice includes that the agency must give the charged party a clear statement as to the theory of the case. *Bendix* at 542. Significant to the instant case is the directive that “\*\*\* an agency may not change theories in midstream without giving

respondents notice of the change. \*\*\* By substituting an issue \*\*\* for the one framed in the pleading, \*\*\* the Commission has deprived petitioners of both notice and hearing on the substituted issue.” *Id.* quoting *Rodale Press, Inc. v. FTC* , 407 F.2d 1252,1256-1257 (DC Cir. 1968).

The Court will find that the record from the agency proceeding below exhibits a shocking litany of new charges, new and/or unidentified patients, new evidence, rampant speculation, and wholly irrelevant and prejudicial testimony and documentation. Dr. Volkman’s counsel protested repeatedly regarding evidence which grossly exceeded the scope of the February 2006 show cause order. Objections to the apparent ongoing and never-ending expansion of the allegations were overruled and the specific allegations were never fully exposed even at the close of the government’s case. One revealingly frightening example is this:

The show cause order of February 2006 listed eleven unnamed patients as pertinent to the allegations against Petitioner. These individuals were subsequently identified via a DEA prehearing statement in March 2006. However, at hearing, over numerous objections, the DEA was all told, permitted to put in testimony about more than twenty-five specific patients. The government also asked Dr. Volkman about many more patients by reading names from a spreadsheet. In overruling Petitioner’s objection based upon deficient notice, the ALJ stated that “\*\*\* the order to show cause is not a document which limits the government’s scope of case presentation for this matter.” Tr. at 1082. Petitioner’s counsel vigorously objected to no avail. Eg., Tr. at 1078-79; 1253-1258. Thus, the

allegations against Dr. Volkman were expanded, numerous times before and during the six-day hearing, without notice or any realistic chance to defend.

This is but one example of the biased, unfair “hearing” process which was utilized contrary to Constitutional Due Process guarantees.

It can be said no clearer than this:

**A party is entitled, of course, to be apprised of the factual material on which the agency relies for a decision so that he may rebut it. Indeed, the Due Process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.**

*Bowman v. Arkansas Best Transp. Co.*, 419 US 281, 289, fn. 4 (1974).

Petitioner was apprised of the vast majority of factual material regarding the boundary-less allegations only as the material and testimony were brought forth during the hearing itself. This government conduct, lulling Petitioner “into a false sense of security” that he actually had been notified of the full scope of allegations, is not in conformity with due process. *Id.*

Moreover, the government’s use of patient charts to prepare its own expert witnesses, after denying Petitioner timely access to these charts, is directly counter to the teaching of *Bowman* since the government clearly used the “\*\*\*” evidence in a way that forecloses an opportunity to offer a contrary presentation.” The government seized the charts, shut down Dr. Volkman’s office, and never returned the charts to him. Earlier chart seizures were purportedly returned to the TriState Clinic around June 2006, but Dr. Volkman had no access those charts since he had left his employment

there over nine months earlier. Nor would he even have known of their supposed return to TriState. Thus, it was essential to a meaningful hearing that Dr. Volkman receive copies of the very same charts the government used in order to procure expert opinion testimony from their own witnesses. Petitioner asked for the charts and was told they would not be provided since the government had decided not to put them into evidence. In the last fifteen years Petitioner's counsel has defended hundreds of physicians and has never seen a government agency directly, frontally, and unequivocally attack the medical care and judgment of a physician by citing specific patients but then refuse to utilize the relevant charts as evidence (and timely share them with the defense). Petitioner respectfully submits that the boundary-less allegations and the withholding of evidence standing alone are bold indications of the monumentally "colorable" due process infringements foisted upon Petitioner.

A First Amendment claim will also be developed in future briefs and argument as permitted by the Court. This particular claim finds its origin in a very unusual move by the government in introducing a printed copy of an electronic transmission (e-mail) sent by Dr. Volkman to an apparent non-participant (of course, unnamed) in the administrative process. This e-mail was sent during the course of the hearing, presumably in December 2006. In this e-mail Petitioner expresses some opinions about the DEA, the ALJ, and the prosecuting DEA attorney. These opinions are not flattering. Tr. at 1503-1510. Petitioner's counsel objected based upon relevance, prejudice, and intentional inflammation of the factfinder. Any possible relevance to the factual issues in dispute was specious at best. More importantly, Petitioner's counsel also specifically relied upon the First Amendment as a basis for excluding the evidence

since it would tend to result in punishment to Petitioner for merely expressing his Constitutionally protected opinions. Tr. 1579-1584. Predictably, the objections were overruled and this inflammatory, irrelevant, Constitutionally-protected opinion evidence is now in this record.

Petitioner respectfully asserts that the colorable Constitutional claims which are collateral to the substantive issues of the administrative proceeding, *Matthews* at 330, demand judicial review at this point in time.

#### B. Irreparable Harm

The harm suffered by Petitioner thus far is patent and undeniable. He has been unable to practice his profession for more than one year. He had to forfeit his clinic and all the accouterments attendant thereto. He laid off his employees and he has accumulated legal fees. His reputation has been thoroughly and irreparably besmirched. The State Medical Board of Ohio has given notice of an intent to discipline his license premised exclusively upon the DEA immediate suspension. Petitioner's mental health has suffered considerably from stress, anxiety, humiliation, anger, and frustration. His physical well-being has suffered as well by virtue of the extreme action by the agency. The injury inflicted thus far will only continue should the agency action be determined to be unreviewable at this point.

#### C. Futility

The comments, argument, and observations made earlier at Section VI are incorporated herein as if fully rewritten.

## VIII. DUE PROCESS – “HIDE THE BALL”

**The right to prior notice and a hearing is central to the Constitution’s command of due process. “The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property \*\*\*.”**

*US v. Good*, 510 US 43, 53 (1993), quoting from *Fuentes v. Shevin*, 407 US 67, 80-81 (1972).

In the February 2006 Show Cause order, the DEA listed eleven unnamed patients relative to Dr. Volkman’s purported substandard medical care. In March 2006 the government filed a detailed prehearing statement which identified these patients. This prehearing statement also noted that the charts for each of these eleven patients would be produced for hearing. By November 17, 2006, three weeks prior to hearing, when an ordered exchange of documents occurred, the DEA still had not produced copies of any patient charts for Dr. Volkman’s hearing preparation. In a November 22, 2006, motion, Petitioner moved for disclosure and observed that the absence of the pertinent patient charts:

\*\*\* will indisputably prove to be a virtually insurmountable hindrance to meaningful preparation for hearing in this adversarial proceeding. If the seized charts or accurate copies are not released to Respondent, it would appear that any viable opportunity for explaining and supporting Respondent’s medical considerations and clinical judgments will be quashed even before the first day of hearing.

The ALJ deferred ruling on the motion since the government, in a November 29, 2006, written response indicated (for the first time, one week before hearing) that it did

not intend to introduce patient charts into evidence. Moreover, the government agreed to produce nine patient charts,<sup>4</sup> even though eleven patients were initially listed in the show cause. Moreover, the government had also slipped into its November 17, 2006, Supplemental Prehearing Statement that it would be putting into evidence “[a]dditional patient files” without naming the patients and, of course, without providing the charts to Dr. Volkman. Finally, at the hearing itself, the government witnesses brought forth information, without a single chart in evidence, about at least twenty-five patients of Petitioner. Throughout preparation and the hearing itself, Petitioner could never be certain how many patients were at issue, who the specific patients were, what their charts showed or did not show, and what criticisms were being leveled at him.

The second prong of administrative procedural due process requires an opportunity to be heard. This is not a rote exercise in plodding through an administrative hearing where few rules abide – rather, it must be a true “meaningful opportunity to be heard.” *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 359 (6<sup>th</sup> Cir. 1992). Deficient notice alone will support a finding that the second due process guarantee, one of a meaningful hearing, has also been compromised since a “meaningful” hearing is one which addresses all issues. If the notice is deficient, then the subsequent hearing cannot logically be meaningful. *Id.* In other words, a “meaningful” hearing is one where the respondent has the opportunity to respond to every essential element of the allegations pressed against them. *Loudermill*, 470 US 532, 547 (1985). This record

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<sup>4</sup> These nine charts were actually delivered to Petitioner’s counsel on Friday, December 1, 2006, and the hearing convened on Tuesday, December 5, 2006 – hardly enough time to conduct an inhouse chart review, let alone retain, consult, and prepare with an expert witness. Eight of the charts were for patient identities disclosed by the DEA in March 2006. However, only five of the charts were listed as being part of any review by the government’s primary expert, Dr. Kennedy.

vividly demonstrates that Petitioner was denied a meaningful opportunity to be heard in his own defense.

The government seized patient charts, used them to prepare their own witnesses, then as a “litigation decision,” Tr. at 1062; 1124, chose not to produce them as evidence. Via this exercise the government was stunningly successful at preventing Petitioner from obtaining his own, independent chart reviews and testimony from expert witnesses. Certainly, such a game of “hide the ball” cannot comport with the Constitutional guarantee of a meaningful opportunity to be heard. As such, this egregious departure from fairness represents but another colorable Constitutional claim supporting – indeed, demanding – immediate review by this Court.

#### IX. NO OTHER ADEQUATE REMEDY

The 5 USC §704 requirement “that there be no other ‘adequate remedy in court’ insures that the APA’s general grant of jurisdiction to review agency decisions is not duplicative of more specific statutory procedures for judicial review.” *Bangura*, 434 F.2d at 501, relying upon *Bowen v. Massachusetts*, 487 US 879, 903 (1988). The focus of this analysis is the availability of federal court remedies, not on existing administrative remedies. *Id.* at 502. Although, as explained *supra*, a review under 21 USC §877 could be sought, the circumstances of the expected delay before a “final” agency order, the Constitutional infringements evident, and the fact the Petitioner has been punished prior to hearing for a period now into thirteen months, all point to the patent inadequacy of seeking judicial review in two or three years from now.

## X. CONFORMITY WITH OHIO LAW AS A SAFE HARBOR

Once this Court has the benefit of the administrative record, a further issue of Constitutional import will be perceived. In *Gonzales v. Oregon*, 546 US 243 (2006), it was determined that the Attorney General, through the DEA, cannot set a national medical standard of care. Moreover, the *Gonzales* Court clearly and firmly held that the individual states, under their respective police powers, were the proper arbiters of appropriate medical care. *Id.* The fact that the agency utilized a physician as an “expert” witness is strikingly clear evidence that the DEA unequivocally sought to pass judgment upon the medical care rendered by Petitioner – in direct contravention of the law of *Gonzales*.

This record will show that Dr. Volkman conformed his medical care to the specific, promulgated prevailing state standard, Ohio Administrative Code 4731-21-01, *et seq.* Further briefing and argument will expand and clarify this point, but at this early juncture, it appears that the federal encroachment into an arena which is exclusively the state’s domain has indeed worked a separate and distinct substantive due process infringement. Much, much more can be said as it relates to the *Gonzales* decision and Dr. Volkman’s conformity with Ohio law. However, that discussion requires a focus on the merits of the underlying action – a matter presently not before the Court.

## XI. 5 USC §706 FACTORS

5 USC §706 sets forth six bases for a reviewing court to “\*\*\* hold unlawful and set aside agency action \*\*\*.” It would be premature (and given the status of this record, should be wholly unnecessary) to argue the merits of the agency action. However, as a

preliminary matter, Petitioner asserts that each of the six criteria under 5 USC §706 are applicable in this matter and jointly and severally require a reversal if the merits are ever reached. Moreover, the ALJ's refusal to consider recommending relief via Petitioner's Motion to Dismiss, Tr. at 1253-1261, was an arbitrary, capricious abuse of discretion reviewable under 5 USC §706(2)(A). Further argument on these points will be submitted as directed by this Court.

## XII. RELIEF REQUESTED

Petitioner prays for review of the February 13, 2006, DEA "Order to Show Cause and Immediate Suspension of Registration." Further, such judicial review will reveal significant, prejudicial factual and legal errors, necessitating the dissolution of the February 2006 immediate suspension pursuant to 21 USC §824(d) and 21 CFR §1301.36(h).

In order to facilitate proper judicial review of the agency action, Petitioner respectfully requests the implementation of an expedited briefing schedule as allowed under 6 Cir. R. 27(f). Petitioner also prays for an order under Fed. R. App. Pro. 16 and 17 requiring the agency to certify and transmit its complete record to the Court within forty days of the service of this petition. Petitioner also prays for oral argument as deemed appropriate by this Court.

Petitioner moreover respectfully prays for a permanent injunction prohibiting further administrative action by the DEA against Petitioner. Finally, Petitioner respectfully prays for a declaration that the DEA administrative prosecution of Petitioner was violative of the doctrine of *Gonzales* in that the regulation of medical practice is

uniquely a state concern. Thus, Petitioner further prays for a declaration that the administrative action was commenced against Petitioner without reasonable cause.

Respectfully Submitted,

KEVIN P. BYERS CO., LPA

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Kevin P. Byers 0040253  
*The 107 Building*  
107 South High Street, Suite 400  
Columbus, Ohio 43215-3456  
614.228.6283  
614.228.6425 Facsimile  
[Kevin@KPByersLaw.com](mailto:Kevin@KPByersLaw.com)

Trial attorney for Petitioner,  
Paul H. Volkman, MD, PhD

28 USC §1746 VERIFICATION

I verify under penalty of perjury that the foregoing Petition for Court Review is true and correct based upon knowledge, information, and belief.

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Paul H. Volkman, MD, PhD

Certificate of Service

I certify that true copies of this document were deposited in first class US prepaid mail this \_\_\_\_\_ day of March, 2007, addressed to Robert W. Walker, Esq., Attorney-Advisor, Office of the Chief Counsel, Drug Enforcement Administration, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC 20537 and United States Attorney General Alberto Gonzales, UNITED STATES DEPARTMENT OF JUSTICE, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001.

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Kevin P. Byers