PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9454

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

IN THE MATTER OF:

RICARDO A. MURILLO **APPELLANT**

THE AUTHORITY'S BOOK OF AUTHORITIES

September 22, 2026

Respectfully submitted,

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PUBLIC

INDEX

TAB 1

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
Jeffrey Poole,	)	Docket No. 9417
	)	
Appellant.	)	

ORDER DENYING MOTION TO DECLARE CIVIL SANCTIONS UNENFORCEABLE

I.

On August 8, 2023, an arbitrator appointed by the Horseracing Integrity Welfare Unit ("HIWU") of the Horseracing Integrity and Safety Authority ("HISA") issued a decision finding that Jeffrey Poole ("Poole" or "Appellant") violated Rule 3214(a) of HISA's Anti-Doping Medication Control Program ("ADMC") by possessing Levothyroxine, a banned substance, and imposed civil sanctions of a 22-month suspension, a $10,000 fine, and a contribution to the arbitration costs of HIWU in the amount of $8,000 ("Decision").

On August 11, 2023, HIWU issued a Notice of Final Civil Sanctions Under the ADMC Program ("HIWU Notice"). The HIWU Notice enclosed the Decision of the arbitrator and indicates that it was sent via email to the email address Poole provided to HISA, with a "cc:" to Brad J. Beilly, counsel for Poole.

On August 12, 2023, HISA filed a HISA Civil Sanction Notice with the Secretary of the Federal Trade Commission ("FTC"), through electronicfilings@ftc.gov ("HISA Civil Sanction Notice"). The HISA Civil Sanction Notice indicates that it was sent as a "cc:" to Jeffrey Poole.

On September 8, 2023, Appellant filed a Notice of Appeal and Application for Review with the FTC.

On September 25, 2023, Appellant filed a motion to declare the civil sanction unenforceable ("Motion"), based on an alleged failure to properly serve the HISA Civil Sanction Notice in accordance with the applicable rules. HISA filed a response opposing the Motion on September 26, 2023, which HISA amended by a filing submitted on September 27, 2023 ("Opposition").

As set forth below, the Motion is DENIED.

II.

Appellant argues in his Motion that for the civil sanctions to be enforceable, the HISA Civil Sanction Notice must have been served upon him on the same day that the HISA Civil Sanction Notice was filed with the FTC. Although the HISA Civil Sanction Notice indicates that a "cc:" was sent to Poole, Poole avers in an affidavit ("Poole Affidavit") that he did not in fact receive it. Appellant thus argues that HISA failed to comply with the requirements of 16 C.F.R. § 1.145. In addition, Appellant argues that HISA failed to comply with the requirements of 16 C.F.R. § 4.4(b) because service was not also made on the counsel who had appeared on behalf of Poole and because proof of service in the form of a statement of the date and manner of service, certified by the person who made service, was not affixed to the HISA Civil Sanction Notice.

In its Opposition, which HISA supports with an affidavit by HISA counsel, John Forgy, HISA asserts that the HISA Civil Sanction Notice was sent via email on August 12, 2023 to the email address provided by Poole to HISA, which is the same email address that was used to send the August 11, 2023 HIWU Notice and other notices sent by HIWU to Poole. HISA further asserts that Forgy did not receive any notification of the email to Poole being returned back to him or being in any way undeliverable. In addition, HISA asserts that it was not required to serve the HISA Civil Sanction Notice on counsel who had appeared on behalf of Poole. HISA acknowledges that a certificate of service was not included with the HISA Civil Sanction Notice, but argues that such failure did not prejudice Appellant in any way.

III.

Rule 1.145(a) of the Procedures for Review of Final Civil Sanctions Imposed under the Horseracing Integrity and Safety Act requires that if HISA imposes a final civil sanction, the Authority must submit notice of the sanction to the FTC no later than two days after the sanction has been issued for the sanction to be enforceable. 16 C.F.R. § 1.145(a). Rule 1.145(b)(7) requires that the notice of civil sanctions must "[b]e served the same day upon the person aggrieved by the sanction in accordance with 16 CFR 4.4(b) as made applicable to review proceedings under this part." 16 C.F.R. § 1.147(b)(7). The record demonstrates that HISA sent the HISA Civil Sanctions Notice to Poole on August 12, 2023. On its face, the HISA Civil Sanction Notice states that it was sent as a "cc:" to Jeffrey Poole on the same day that it was filed with the FTC. According to the Forgy Affidavit, HISA sent the HISA Civil Sanction Notice via email to the email address provided by Poole to HISA. Attached to the Forgy Affidavit is a copy of the email sent to the email address provided by Poole to HISA, attaching the HISA Civil Sanction Notice. The Forgy Affidavit also attests that the email sent to Poole did not "bounce back" to Forgy, *i.e.*, was not returned to Forgy as undeliverable. Poole's mere assertion in his affidavit that he did not receive a copy of the HISA Civil Sanction Notice does not outweigh the foregoing evidence that the Notice was in fact sent to Poole at a valid email address. Based on the foregoing, Appellant has failed to demonstrate that he was not properly served under Rule 1.145(b)(7). Moreover, Poole acknowledges in his affidavit that he received the August 11, 2023 HIWU notice, which was sent to the same email address as that used for the HISA Civil Sanctions Notice. Furthermore, it is apparent that Poole had actual notice of the HISA Civil

Sanction Notice, as evidenced by his filing of a Notice of Appeal with the FTC on September 8, 2023.

Rule 4.4(b) of the FTC's Rules of Practice, referenced in Rule 1.145(b)(7) above, states that "[i]f the party is an individual or partnership, delivery shall be to such individual or a member of the partnership." 16 C.F.R. § 4.4(b)(ii). The provision in Rule 4.4(c) – stating that when counsel has appeared in a proceeding on behalf of a party, service upon such counsel shall be deemed service upon the party – does not require HISA to serve Poole's counsel in addition to serving Poole. Thus, any failure to serve Poole's counsel with the HISA Civil Sanctions Notice would not render the civil sanctions unenforceable.

Finally, Rule 1.145(b)(7) requires that the notice of civil sanctions be served "in accordance with 16 CFR 4.4(b) . . ." The provision that "documents presented for filing shall contain proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service" is set forth in 16 C.F.R. § 4.4(d), not § 4.4(b). Thus, while HISA failed to comply with this requirement, such failure does not render the civil sanctions unenforceable.

For the above stated reasons, Appellant's Motion is DENIED.

ORDERED:

DM Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: September 28, 2023

TAB 2

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
Dr. Larry Overly, DVM	)	Docket No. 9443
Appellant.	)	

ORDER ON APPLICATION FOR REVIEW

AND APPLICATION FOR STAY

I. Application for Review

This case arises from sanctions imposed against Dr. Larry Overly, a veterinarian, for possession of testosterone and isoxsuprine in violation of rules adopted to implement the Horseracing Integrity and Safety Act of 2020 ("HISA").[1] Dr. Overly has filed a Notice of Appeal and Application for Review of the sanctions before the Federal Trade Commission (the "Review App.").[2] Contemporaneously, Dr. Overly filed an Application for Stay of Final Civil Sanction (the "Stay App.").[3] The Horseracing Integrity and Safety Authority (the "Authority") timely filed its

[1] *See* 15 U.S.C. § 3051 *et seq.* Capitalized terms used, but not defined, in this Order, are from HISA Rule 1020 of the General Provisions and the Protocol. References to a "Rule" are to those promulgated under HISA, unless otherwise identified.

[2] 15 U.S.C. § 3058; 16 C.F.R. § 1.146 (the "FTC Rules").

[3] 15 U.S.C. § 3058(d); FTC Rule 1.148.

response to the Application for Review and opposition to the Stay Application (the "Review Resp." and the "Stay Resp.").

This Order resolves both matters.

A. Summary of the Case and the Arbitrator's Decision

The Authority has adopted, and the FTC has approved, various rules to implement HISA, including those comprising the Anti-Doping and Medication Control ("ADMC") Program. Among other things, the ADMC Program prohibits "Possession of a Banned Substance . . . unless there is compelling justification for such Possession."[4] The Horseracing Integrity & Welfare Unit ("HIWU") enforces these rules on behalf of the Authority.[5]

In July 2024, HIWU discovered testosterone and isoxsuprine, both Banned Substances, during a search of Dr. Overly's veterinary vehicle (a Hummer) at Los Alamitos Race Course in Cypress, California. In consequence, HIWU charged Dr. Overly with two violations of Rule 3214(a). There is no dispute that: (1) testosterone and isoxsuprine are Banned Substances under the Rules; and (2) Dr. Overly was in Possession of both substances at Los Alamitos.

Therefore, the case turns on whether Dr. Overly proved a "compelling justification" for having the two substances at Los Alamitos in July 2024. Dr. Overly based his defense, in part, on the fact that his veterinary practice includes treating horses not subject to HISA's Rules ("non-Covered Horses"). In rounded terms, which

[4] Rule 3214(a).

[5] Rule 3010(e)(1).

suffice for present purposes, approximately 70% of the horses he treats, both at Los Alamitos and off-track, are non-Covered Horses. In addition, Dr. Overly introduced evidence purporting to show that: (1) he treated one specific off-track horse, Cosmo, with testosterone; and (2) he considered but rejected treating another off-track horse, Brownie, with isoxsuprine.

After an evidentiary hearing, the Arbitrator held that Dr. Overly had failed to establish a compelling justification defense.[6] The ADMC Rules also provide that sanctions may be eliminated based on proof of no fault or negligence ("NF") on Dr. Overly's part, or reduced if no significant fault or negligence ("NSF") is proven.[7] The Arbitrator held that Dr. Overly failed to show NF, and that he was entitled only to "a very slight" sanction reduction for NSF.[8]

Accordingly, the Arbitrator awarded the following sanctions:

> Dr. Overly shall:
>
> a. Be suspended for a period of Ineligibility of 23 months, commencing immediately upon on the date of issuance of this Corrected Final Award, less 169 days credit for time served under the prior Period of Ineligibility and subsequent Voluntary Provisional Suspension.
>
> b. Be fined $25,000.00 (twenty five thousand U.S. dollars) to be paid to HIWU by the end of the Period of Ineligibility; and
>
> c. Be required to pay a contribution of $15,000.00 (fifteen thousand U.S. dollars) toward HIWU's share of the arbitration costs of this proceeding by the end of his Period of Ineligibility.[9]

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[6] Review App., Ex. 1 (Corrected Final Decision), at ¶ 7.5.8.

[7] *Id.* at ¶¶ 5.12-.14.

[8] *Id.* at ¶¶ 7.8.3-.18.

[9] *Id.* at ¶ 8.1. *See also* Review App., Ex. 2 (HISA Civil Sanction Notice).

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 4 of 20 * PUBLIC *

B. The Application for Review

1. Dr. Overly's Arguments

Dr. Overly asserts that he proved the compelling justification defense by a preponderance of the evidence. He claims to have relied on public remarks by HIWU's then-Chief of Science, Dr. Mary Scollay, during the period leading up to the ADMC Program taking effect in May 2023. Dr. Scollay stated, in summary, that veterinarians with partially Non-Covered practices are "able to possess a Banned Substance because [HIWU and the Authority] don't have authority to control the medications they administer or carry for Non-Covered Horses . . . ."[10] In addition, Dr. Overly argues that he introduced "records and testimony" to demonstrate he possessed testosterone and isoxsuprine "in his Non-Covered [horse] practice."[11]

Dr. Overly also contends that the Arbitrator's ruling on NF and NSF were erroneous. The evidence adduced, he maintains, showed he "exercised the standard of care" sufficient to establish NF, or "if there is any fault, . . . it is minimal."[12] Accordingly, Dr. Overly maintains that the sanctions awarded were "arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law."[13]

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[10] Review App. at 1 (unnumbered page; internal quotation marks omitted).

[11] *Id.* at 2 (unnumbered page).

[12] *Id.*

[13] *Id.*

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 5 of 20 * PUBLIC *

Finally, Dr. Overly requests an evidentiary hearing "to contest facts that the Arbitrator claimed she found as well as the interpretation of the law that formed the basis for the imposition of the Sanctions."[14]

2. The Authority's Response

In its response to Dr. Overly's Application for Review, the Authority asserts, in summary, that:

(1) The compelling justification defense is fact-specific. According to the Authority, Dr. Overly "failed to show, by a preponderance of the evidence, that he was justified in having Testosterone or Isoxsuprine at Los Alamitos for a legitimate and legal veterinary purpose that was not connected to Covered Horses."[15]

(2) Dr. Overly's claim of "compelling justification" for Possession "based on the composition of his practice is a red herring that would render Rule 3214(a) meaningless . . . ."[16] His argument, the Authority maintains, "is inconsistent with this tribunal's prior ruling that 'compelling justification is the exception' and should 'be interpreted restrictively.'"[17]

(3) Regarding both testosterone and isoxsuprine, the Arbitrator correctly held that, based on the evidence introduced, Dr. Overly failed to show compelling

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[14] *Id.* at 2 (unnumbered page).

[15] Review Resp. at 3 (footnote omitted).

[16] *Id.* at 4.

[17] *Id.*, quoting *Matter of Shell*, FTC No. 9439, 2025 WL 1784696, at *12 (ALJ Mar. 6, 2025).

justification for Possession in order to treat non-Covered Horses that were part of his practice.[18]

(4) The Authority further contends that there is no basis for rejecting the Arbitrator's NF and NSF rulings as "arbitrary, capricious, an abuse of discretion, prejudicial, or not in accordance with the law."[19] To the contrary, the Arbitrator's decision, the Authority asserts, "was rationally connected to the facts and based on the consideration of relevant factors."[20]

(5) Dr. Overly has failed to show grounds for an evidentiary hearing. The Authority argues that Dr. Overly has not identified "any specific facts" that need to be "supplement[ed]" or "contest[ed]."[21] Rather, the evidence before the Arbitrator "can be reassessed or reweighed, as applicable."[22]

Thus, the Authority contends that the sanctions imposed should be upheld.

C. Denial of Dr. Overly's Request for an Evidentiary Hearing

FTC Rule 1.146(c)(2) provides that:

> In reviewing the final civil sanction and decision of the Authority, the Administrative Law Judge may rely in full or in part on the factual record developed before the Authority through the disciplinary process under 15 U.S.C. 3057(c) and disciplinary hearings under Authority Rule Series 8300. The record may be supplemented by an evidentiary hearing conducted by the Administrative Law Judge to ensure each party receives a fair and impartial hearing. Within 20 days of the filing of an application for review, based on the application submitted by the aggrieved party or by the Commission and

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[18] *Id.* at 3-4.

[19] *Id.* at 4.

[20] *Id.* at 5 (footnote omitted).

[21] *Id.*

[22] *Id.* at 6.

on any response by the Authority, the Administrative Law Judge will assess whether:

(i) The parties do not request to supplement or contest the facts found by the Authority;

(ii) The parties do not seek to contest any facts found by the Authority, but at least one party requests to supplement the factual record;

(iii) At least one party seeks to contest any facts found by the Authority; . . . or

(v) In the Administrative Law Judge's view, the factual record is insufficient to adjudicate the merits of the review proceeding.[23]

FTC Rule 1.146(a)(1) further states, in relevant part, that:

> [I]f a hearing is requested, . . . the applicant must provide support for each issue raised, citing to the Authority's record when assignments of error are based on the record, and citing to the principal legal authorities the applicant relies upon . . . .[24]

Dr. Overly's Application for Review does not include any of the information required by Rule 1.146(a)(1), nor any other specifics forming the basis for his request for an evidentiary hearing. He does not assert, for example, any allegedly erroneous exclusion or receipt of evidence, or other failure prejudicing his opportunity to adduce relevant facts or otherwise limiting his defense, at the arbitration hearing. He similarly has not set forth any additional evidence that he would proffer at an evidentiary hearing.

Although Dr. Overly asserts, without elaboration, that he wishes "to contest

[23] 87 Fed. Reg. 60079-80 (Oct. 4, 2022). Inasmuch as "the Authority" does not, under the Rules, find "facts" that form the basis for an ALJ's review, I read Rule 1.146(c)(2) to refer to the "Arbitral Body," which is the fact finder and which may, as here, consist of a single arbitrator. *See* Rules 3261, 7020, 7060.

[24] 87 Fed. Reg. 60079.

facts" the Arbitrator "claimed she found," that is not a basis to require supplementing the record; the *de novo* review standard, applicable here, already affords Dr. Overly the room he seeks.[25] Thus, at bottom, Dr. Overly seeks only to contest the weight given to the evidence in the record before the Arbitrator and to argue the appropriateness of the Arbitrator's sanctions award. But he has not called into question his opportunity for a fair and impartial arbitration to resolve HIWU's charges. He further has not shown that the arbitration record is insufficient to assure a similar full and impartial review.

Rule 1.146(a)(1) authorizes an ALJ, after receiving the Authority's response to an application for review, to determine "whether an evidentiary hearing . . . is either unnecessary or necessary to supplement or to contest facts in the record . . . ."[26] Accordingly, I can, and will, decide this proceeding on the arbitration record and the parties' briefs on this review.

D. Required Filings

1. The parties are **DIRECTED** to concurrently file with the FTC's Office of the Secretary:

a. By **December 15, 2025**, "proposed findings of fact, conclusions of law, and a proposed order, together with a supporting legal brief providing the party's reasoning. Such filings, limited to 7,500 words, must be [contemporaneously]

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[25] *Id*. at 2 (unnumbered page). *See* 15 U.S.C. § 3058(b)(1); FTC Rules 1.146(b)(2) & (3).

[26] *Id. See also* FTC Rule 1.146(c)(1) & (2), 87 Fed. Reg. 60079-80 (conferring administrative hearings and factual review authority on the ALJ).

served on the other party and contain references to the record and authorities on which they rely."

b. "Reply findings of fact, conclusions of law, and briefs, limited to 2,500 words, may be filed by each party within 10 days of service of the initial filings."—here, **December 26, 2025** assuming initial filings are made on the December 15 date.[27]

In this case, these word limits apply to all of the opening filings in the aggregate, and to all of the reply filings in the aggregate. They do **not** apply individually to each filing listed.

The parties are reminded that any individual filing should bear a consecutive page number. A subsequent Order will detail further the requirements for these filings.

2. In addition to service with the Office of the Secretary, the parties must transmit their filings: (a) to the Office of Administrative Law Judges ("OALJ") electronically by email (OALJ@ftc.gov): and (b) deliver by hand or overnight mail one hard copy addressed as follows:

Jay L. Himes
Administrative Law Judge
Federal Trade Commission: Northeast Regional Office
1 Bowling Green
Room 318
New York, NY 10004

[27] FTC Rule 1.146(c)(3), 87 Fed. Reg. 60080 (bracketed matter added for avoidance of doubt).

II. Application for a Stay Pending Review

Dr. Overly also seeks to stay the sanctions imposed by the Authority during the pendency of this review. The Authority opposes stay relief. Under FTC Rule 1.148(c) & (d), an application for a stay of the sanctions imposed "must provide the reasons a stay is . . . warranted by addressing the [following] factors . . . and the facts relied upon":

> (1) The likelihood of the applicant's success on review;
>
> (2) Whether the applicant will suffer irreparable harm if a stay is not granted;
>
> (3) The degree of injury to other parties or third parties if a stay is granted; and
>
> (4) Whether the stay is in the public interest.[28]

Moreover, "[a] stay pending appeal is an intrusion into the ordinary processes of administration and judicial review, so this extraordinary relief is never granted as a matter of right."[29]

A. Summary of the Parties' Positions on the Stay Factors

Likelihood of Success: Dr. Overly asserts he is likely to succeed on *de novo* review because, he contends, he proved "by a preponderance of the evidence, that he . . . had [a] compelling justification for Possession of the Banned Substances at

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[28] 87 Fed. Reg. 60083. *See generally Nken v. Holder*, 556 U.S. 418, 434 (2009) (adopting comparable factors).

[29] *Rhode Island State Council of Churches v. Rollins*, No. 25-2089, 2025 WL 3135862, at *5 (1st Cir. Nov. 9, 2025) (cleaned up), *admin. stay extended*, No. 25A539, 2025 WL 3145875 (U.S. Nov. 11, 2025) (mem.). *See also Media Matters for America v. FTC*, No. 25-5302, 2025 WL 2988966, at *3 (D.C. Cir. Oct. 23, 2025) (A stay "pending appeal is an extraordinary form of relief.") (cleaned up).

issue." Stay Application at 1 (unnumbered page). More specifically, Dr. Overly asserts that:

(1) He relied on public guidance from Dr. Scollay on the ability of veterinarians, such as him, to possess Banned Substances for use in "Non-Covered [horse] practices . . . ."

(2) the HISA Rules do not define "compelling justification";

(3) his "credible testimony" shows "the impracticality of requiring [him] . . . to load and unload [his] truck" on a visit-by-visit basis so as to enable him to treat the "approximately 67% Non-Covered horses" that comprise his practice;

(4) the Arbitrator erred in finding he failed to justify having testosterone and isoxsuprine in his truck at Los Alamitos on July 23, 2024; and

(5) "his fault, if any, was on the lowest end of the spectrum such that the penalties should be expunged and/or limited to the most minimal penalty available."[30]

The Authority responds that the likelihood of Dr. Overly's success on review "is low" for the same reasons, summarized above, set forth in the Authority's Response to Dr. Overly's Application for Review.[31]

Irreparable Harm: Dr. Overly asserts he will suffer irreparable harm absent a stay, as the sanctions, including his Ineligibility period and the publication of the

[30] Stay App. at 1-2 (unnumbered pages).

[31] Stay Resp. at 3-5.

violation on HIWU's website, have injured "his professional reputation and caused loss of business prospects."[32]

The Authority responds that the public disclosure has already occurred, as, Rule 3620 requires HIWU to publicly disclose a final decision made by the Arbitrator within 20 days of the issuance of a decision.[33] Moreover, Dr. Overly "chose to serve a Provisional Suspension on a voluntary basis pursuant to ADMC Program Rule 3247."[34] Finally, harm is "irreparable," the Authority contends, only "where there is no adequate remedy at law, such as monetary damages."[35]

Injury to Others: Dr. Overly asserts there is no risk of injury to other parties or third parties if a stay is granted: "HIWU has no interest in the continued enforcement of Sanctions that are the result of error and cannot withstand *de novo* review."[36] And, in any event any "low" risk of harm is "greatly outweighed" by his "likely success on the merits and irreparable injury." *Id.*

The Authority responds that granting the stay would "undermine the Authority's efforts to protect the integrity of horseracing and will harm other Responsible Persons and the betting public by permitting [Dr. Overly's continued participation in thoroughbred horseracing]. It would also be contrary to the ADMC Program's mission to protect horse welfare."[37]

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[32] Stay App. at 2 (unnumbered page).

[33] Stay Resp. at 5.

[34] *Id.*

[35] *Id.*, quoting *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011).

[36] Stay App. at 2 (unnumbered page).

[37] Stay Resp. at 5 (bracketed matter inserted).

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 13 of 20 * PUBLIC *

"Responsible Person" means "the Trainer of the Covered Horse. If the Covered Horse does not have a Trainer, the Responsible Person shall be the Owner of the Covered Horse."[38] The Authority's point, as I understand it, is that the ADMC Program's Rules are designed not only to protect the health and safety of horses, but also to have the prophylactic effect of impairing the ability of unscrupulous Veterinarians, Owners and Trainers to have available Banned Substances to use to give their horses a perceived competitive racing advantage over those who play by the Rules. By thus promoting fair competition, the betting public's interests are similarly promoted.

The Public Interest: Dr. Overly asserts a stay is in the public interest, which "is served by ensuring that governmental bodies comply with the law" and, in all events, the other stay factors said to favor him, outweigh any harm to the public interest.[39]

The Authority responds that, while the public interest is served by compliance law generally, "it is also served by individual compliance with the rules and regulations validly promulgated by federal agencies."[40] Here, the Authority asserts, a stay "would be antithetical" to HISA's purpose "to improve the integrity and safety of horseracing by requiring a uniform anti-doping and medication control program . . . ."[41]

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[38] Rule 3030.

[39] Stay App. at 2-3 (unnumbered pages; authorities omitted).

[40] Stay Resp. at 6.

[41] *Id.*

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 14 of 20 * PUBLIC *

B. Denial of Dr. Overly's Stay Motion

Dr. Overly had not met the requirements for a stay pending resolution of this review proceeding.

Likelihood of Success and Irreparable Injury: On a stay motion, "[t]he first two factors of the traditional standard are the most critical."[42] Moreover, likely success on the merits must be "better than negligible."[43] Dr. Overly simply has not shown a sufficient likelihood of prevailing on the merits to warrant a stay. Although he disputes the Arbitrator's findings in conclusory terms, he has not pointed to specific parts of the factual record showing possible, much less sufficiently likely, error. This is, however, a finding made solely on the papers submitted on Dr. Overly's stay application and not one based on the all the evidence before the Arbitrator.

Second, Dr. Overly has not shown irreparable injury. As the Authority argues, Rule 3620 requires public disclosure of the Arbitrator's decision. Resulting reputational harm claimed to arise from public disclosure therefore cannot, standing alone, justify a stay; a more probing factual presentation must be offered. Any arguable harm has already occurred and thus would be unaffected by issuing a stay. Thus, for example, in *Lukezic v. FINRA*, the Court declined to find irreparable injury, arising from publication of a pending professional disciplinary proceeding,

[42] *Nken*, 556 U.S. at 434.

[43] *Id. See also Citizens for Resp. & Ethics in Washington v. FEC,* 904 F.3d 1014, 1019 (D.C. Cir. 2018) ("Crossroads' appeal shows little prospect of success—an arguably fatal flaw for a stay application.").

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 15 of 20 * PUBLIC *

where FINRA was required "to make information about 'disciplinary proceedings' available in a 'readily accessible electronic or other process'[]."[44]

Claimed loss of racing opportunities, and the corresponding potential for winning purse money, is also generally insufficient: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."[45] To be sure, there can be fact settings where stay relief is nevertheless warranted, as the Authority's citation to *Janvey* itself recognizes.[46] However, Dr. Overly asserts, without fact elaboration, that the sanctions imposed have "caused loss of business prospects . . . ."[47] That bare assertion is not enough: "speculative injury is not sufficient."[48]

By contrast, in Dr. Overly's only cited authority, the party seeking to demonstrate irreparable injury introduced far more specific supporting facts: "(1) lost sales and lost market share, (2) price erosion, (3) lost reputation and goodwill,

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[44] No. 25-cv-00623 (DLF), 2025 WL 2305859, at *1, 4 (D.D.C. Aug. 10, 2025), quoting 15 U.S.C. § 78o-3(i)(1), (5), *appeal filed*, No. 25-5327 (D.C. Cir. Sept. 11, 2025). *See also Doe v. Ohio State Univ.*, 136 F. Supp. 3d 854, 871 (S.D. Ohio 2016) (police report was "already a matter of public record" and thus "irrelevant to the question of irreparable injury"); *Foster v. Cantil-Sakauye*, No. 17-cv-02122-JSW, 2017 WL 6886326 at *4 (N.D. Cal. Aug. 21, 2017) (no irreparable injury where professional discipline had previously been publicly disclosed). *Cf. Roudachevski v. All-American Care Cters, Inc.,* 648 F.3d 701, 703, 706-07 (8th Cir. 2011) (although healthcare facility notified its residents that plaintiff, a physician, was terminated as a facility provider, no irreparable injury was proven).

[45] *Sampson v. Murray*, 415 U.S. 61, 90 (1974), quoting with approval *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See also Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("alleged [monetary] injury . . . does not usually constitute irreparable injury") (cleaned up).

[46] *See Janvey*, 647 F.3d at 600 (noting, as exceptions, avoidance of multiplicity of suits or dissipation of assets needed for relief).*See also Lukezic*, 2025 WL 2305859, at *3 (to constitute irreparable injury, monetary loss must be "so severe as to cause extreme hardship to the business or threaten its very existence.") (cleaned up).

[47] Stay App. at 2 (unnumbered page).

[48] *Janvey*, 647 F.3d at 600 (cleaned up).

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 11/20/2025 OSCAR NO. 614284 -PAGE Page 18 of 20 * PUBLIC *

and (4) lost research and development ("R&D") and investments."[49] The Federal Circuit held the proof insufficient nonetheless.[50]

Furthermore, Dr. Overly faces no current risk of monetary loss from the sanctions themselves. The Arbitrator determined that Dr. Overly need only pay the fine imposed and his cost contribution "by the end of his Period of Ineligibility."[51] At that point, "[t]o be reinstated after commission" of the Possession violations, Dr. Overly "must have . . . paid any fines and . . . costs . . . unless an installment plan was established . . . ."[52] Strictly speaking, in formally imposing the sanctions the Arbitrator awarded, the Authority itself omitted express reference to payment no later than the Ineligibility period's end. This omission—permitting payment of a monetary sanction to be deferred— is immaterial, however. The Authority has stated publicly that it lacks authority to vary the sanctions awarded:

> The [arbitrator's] decision is 'final and binding . . . . The Authority is legally bound to impose civil sanctions determined through arbitration. There is nothing in [HISA] or the rules comprising the ADMC Program that gives the Authority the discretion to modify [an arbitrator's] final decision."[53]

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[49] *SmartSky Networks, LLC v. Gogo Bus. Aviation, LLC*, No. 2023-1058, 2024 WL 358136, at *3 (Fed. Cir. Jan. 31, 2024).

[50] *Id.* at *3-7.

[51] Review App., Ex. 1, at ¶¶ 8.1(b) & (c).

[52] Rule 3232(a).

[53] *Matter of Shell*, 2024 WL 5078329, The Authority's Response to October 29, 2024 Order at *4-5 (Nov. 12, 2024) (cleaned up). *See also Matter of Shell*, 2024 WL 5078331, HIWU's Response to the Order Directing Briefing at *3 (Nov. 12, 2024) ("[T]he Rules make clear that both HIWU and the Authority are bound by an [arbitrator's] Final Decision. . . . [A] final decision . . . that a violation . . . has taken place and imposing . . . sanctions . . . shall be automatically and immediately recognized, respected, enforced and given full force and effect by the Authority. . . . Both [the Authority and HIWU] are . . . legally bound to impose the resulting sanctions and have no discretion otherwise.") (cleaned up).

Equally important, in imposing sanctions, the Authority negated any suggestion that it took issue with Dr. Overly deferring payment. The Authority expressly stated that the fine "[has] been imposed . . . in accordance with ADMC Program Rule 3223."[54] This "in accordance" addition reflects the Authority's practical, publicly stated construction of the relevant Rule: "[u]nder Rule 3232(a), [the Covered Person] is *not* required to pay these [fine and cost] amounts in full until the end of his period of Ineligibility . . . ."[55] Thus, deferral apparently is the Authority's "normal practice."[56] Since Dr. Overly's need to pay the fine imposed is more than a year away, the second stay factor "weighs against granting the stay request."[57]

One further point. The Authority asserts that Dr. Overly's claimed irreparable injury is weakened, at least in part, by his acceptance of a Voluntary Provisional Suspension.[58] However, the Authority has not offered material supporting its factual contentions, and these matters are not otherwise part of the record on Dr. Overly's stay application. Accordingly, I disregard the Authority's argument.

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[54] *See* Review App., Ex. 2.

[55] *See Matter of Lewis*, FTC No. 9434, 2024 WL 3618632, The Authority's Response to Appellant's Application for a Stay, at *1 (July 12 [sic, 15], 2024) (emphasis added).

[56] *Serpe v. FTC*, No. 0:24-cv-61939-DSL, Plaintiff's Response to Defendant Federal Trade Commission's Notice of Further Development at 2, ECF No. 61 (S.D. Fla. Sept. 17, 2025), citing *HIWU v. Parbhoo*, JAMS No. 15010001079, at ¶ 9.1(4) (Aug. 26, 2025).

[57] *Matter of Shell*, FTC No. 9435, 2024 WL 3824055, at *5 (ALJ Aug. 5, 2024) and *Matter of Lewis*, 2024 WL 3618639, at *3 (ALJ July 19, 2024) (both denying a stay where the fine did not have to be paid "until the end of the period of ineligibility").

[58] *See* Stay Resp. at 5; Rule 3247.

Injury to Others and the Public Interest: The third and fourth stay factors also weigh against granting a stay. Stay relief pending review is "extraordinary"—the exception, not the rule.[59] The ADMC Program protects the safety and integrity of horseracing and the confidence of its stakeholders—including not only the public but rivals themselves—in the fairness of thoroughbred racing competition.[60] Recent comments by a once-elite human athlete on the overarching benefit of antidoping rules in competitive sports are instructive. They apply to thoroughbred racing as well:

> I believe the use of performance enhancing substances destroys the experience associated with extraordinary athletic achievement-ultimately ruining the reason why people love to watch competitive sports in the first place. . . . The use of performance enhancing substances cheapens this experience.
>
> Moreover, normalizing the use of performance enhancing substances communicates the wrong values to young athletes . . . . A world where the widespread use of performance enhancing substances is accepted is one where the foundational values of good sportsmanship—honor, integrity, valor, and pride—are lost and forgotten.[61]

Dr. Overly has the burden of offering facts that inform the Court's exercise of discretion in his favor despite these weighty considerations. Instead, he asserts, in substance, that no legitimate interest is served by permitting an allegedly erroneous sanctions award to stand. But that argument could be made in any case

[59] *See, e.g., KalshiEX LLC v. CFTC*, 119 F.4th 58, 63 (D.C. Cir. 2024).

[60] *See* Rule 3010(d)(7); Stay Resp. at 5.

[61] *Enhanced US LLC v. World Aquatics*, No. 1:25-cv-07096-JMF, Declaration of Michael Phelps at ¶¶ 8, 9, ECF No. 69 (S.D.N.Y. Sept. 26, 2025). *See also Enhanced US LLC*, Declaration of Richard W. Pound at ¶ 12, ECF No. 65 (Sept. 26, 2025) (If doping becomes "commonplace . . . [s]port loses everything that it represents and encourages. The integrity of competitions and sport itself is compromised."). Pound is a "former Olympic swimmer." *Id.* at ¶ 2.

where review of sanctions imposed under the ADMC Program Rules is sought. It is, therefore, insufficient to grant a stay.

Finally, in another HISA proceeding, I issued a decision that awarded a $25,000 fine for a proven ADMC Program violation, even though the arbitrator had not directed a fine. The Federal Trade Commission issued a *sua sponte* Order that, among other things, stayed the fine pending the Commission's further review.[62] I understand that Order to be based on the particular facts of the *Serpe* case, and not to establish that a fine imposed in a HISA case must, as a matter of law, be stayed whenever the sanctioned party seeks ALJ or FTC review. Any such ruling would upend the well-established stay principle, noted above, that loss of money or business opportunity "weighs heavily against a claim of irreparable harm."[63] That sort of change generally would not be made by implication.[64]

A stay of a fine award further would be unnecessary in most HISA cases since the Authority's practical construction of Rule 3232(a), also noted above, recognizes that payment is not required until the related Ineligibility period ends. Depending on the length of the Ineligibility, FTC review proceedings could often be concluded first, thereby obviating any need to stay the fine.

* * *

[62] Order Partially Staying Administrative Law Judge's Decision, Granting Review, and Ordering Briefing Schedule at 1, 2, *Matter of Serpe*, No. 9441 (FTC Sept. 15, 2025).

[63] *Sampson*, 415 U.S. at 90.

[64] *Cf. Shalala v. Illinois Council On Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

For these reasons, Dr. Overly has not met the burden set forth in FTC Rule 1.148 to grant a stay during the pendency of this review proceeding. His application for a stay is **DENIED**.

ORDERED:

Jay L. Himes
Jay L. Himes
Administrative Law Judge

Date: November 20, 2025

TAB 3

Janvey v. Alguire

United States Court of Appeals for the Fifth Circuit

July 22, 2011, Filed

No. 10-10617

Reporter
647 F.3d 585 *; 2011 U.S. App. LEXIS 15262 **

RALPH S. JANVEY, Plaintiff-Appellee v. JAMES R. ALGUIRE; VICTORIA ANCTIL; TIFFANY ANGELLE; SYLVIA AQUINO; JONATHAN BARRACK; ET AL. 1; TERAL BENNETT, SUSANA CISNEROS; RON CLAYTON; JAMES FONTENOT; MARK GROESBECK; ET AL. 2; and JASON GREEN, Defendants-Appellants

Subsequent History: On remand at, Motion denied by *Janvey v. Alguire, 2011 U.S. Dist. LEXIS 157538 (N.D. Tex., Aug. 26, 2011)*

Prior History: [1]** Appeals from the United States District Court for the Northern District of Texas.

Janvey v. Alguire, 628 F.3d 164, 2010 U.S. App. LEXIS 25526 (5th Cir. Tex., 2010)

Disposition: AFFIRMED and REMANDED.

Counsel: For RALPH S. JANVEY, Plaintiff - Appellee: Kevin M. Sadler, David Todd Arlington, Baker Botts, L.L.P., Austin, TX; Timothy Stuart Durst, Esq., Baker Botts, L.L.P., Dallas, TX; Ben L. Krage, Esq., Krage & Janvey, L.L.P., Dallas, TX.

For JAMES R. ALGUIRE, VICTORIA ANCTIL, TIFFANY ANGELLE, SYLVIA AQUINO, JONATHAN BARRACK, ET AL 1, Defendants - Appellants: Bradley Wayne Foster, Esq., Counsel, Matthew Griffith Nielsen, Esq., Andrews Kurth, L.L.P., Dallas, TX.

For TERAL BENNETT, SUSANA CISNEROS, RON CLAYTON, JAMES FONTENOT, MARK GROESBECK, ET AL 2, Defendants - Appellants: Michael John Stanley, Stanley, Frank & Rose, L.L.P., Houston, TX.

For JASON GREEN, Defendant - Appellant: John Patrick Kincade, Esq., Winstead, P.C., Dallas, TX.

For SECURITIES AND EXCHANGE COMMISSION, Amicus Curiae: Michael Laurence Post, Esq., Senior Litigation Counsel, U.S. Securities & Exchange Commission, Washington, DC.

Judges: Before STEWART, PRADO, and ELROD, Circuit Judges.

Opinion by: EDWARD C. PRADO

Opinion

[*589] EDWARD C. PRADO, Circuit Judge:

We withdraw our prior opinion, *Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010)*, and substitute the opinion **[**2]** that follows:[1]

The Securities Exchange Commission ("SEC") brought suit against Stanford Group Company ("SGC"), along with various other Stanford corporate entities, including Stanford International Bank ("SIB"), for allegedly perpetrating a massive Ponzi scheme.[2] The district court appointed Robert Janvey (the "Receiver") to marshal the Stanford estate. In November, this Court heard *Janvey v. Adams, 588 F.3d 831 (5th Cir. 2009)*,[3]

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[1] There are no substantive changes to our previous conclusions and reasoning concerning whether the district court had the power to grant a preliminary injunction; whether the district court abused its discretion when it granted the preliminary injunction; whether the district court's preliminary injunction was overbroad; and whether the district court properly granted a preliminary injunction rather than a writ of attachment. We find, however, that we do not have jurisdiction to decide the motion to compel arbitration. We substitute the entire opinion, although our conclusions in Parts II.B—II.E remain the same.

[2] The alleged Ponzi scheme concerned more than 100 corporate entities controlled by R. Allen Stanford. The Receiver obtained a preliminary injunction maintaining a freeze on accounts that belong to 117 of the defendants. Where the distinction is of no moment, we will refer to the corporate entities collectively as "Stanford."

[3] Judge Dennis authored the opinion, joined by Judge Garwood and Judge Prado.

a case concerning the frozen accounts of Stanford investors. Although the Fifth Circuit ordered the district court to thaw the accounts of the Stanford **[**3]** investors, the Receiver subsequently obtained a preliminary injunction against numerous former financial advisors and employees of SGC, freezing the accounts of those individuals pending the outcome of trial.[4]

In **[**4]** this interlocutory appeal, the Employee Defendants contend that the district court should have granted their motion to compel arbitration, and that the district court had no power to grant the preliminary injunction when the motion to compel arbitration was pending. Additionally, the Employee Defendants claim that the district court abused its discretion when it granted the preliminary injunction, and that the Receiver's calculation of the amounts subject to the injunction was overly broad. The Bennett Defendants appeal separately, claiming that the district court erroneously found that SGC operated as a Ponzi scheme.

We hold that (1) the district court had the power to decide the motion for preliminary injunction before deciding the motion to compel arbitration; (2) the district court did not abuse its discretion in granting a preliminary injunction; (3) the preliminary injunction was not overbroad; and (4) the district court acted within its power to grant a Texas Uniform Fraudulent Transfer Act ("TUFTA") injunction rather than an attachment. We further hold that we do not have jurisdiction to rule on the motion to compel arbitration.

[*590] I. FACTUAL AND PROCEDURAL BACKGROUND

A. Stanford, [**5] the Receiver, and *Adams*

This appeal shares its background facts with this Court's prior *Adams* opinion:

> This case arises out of an alleged multi-billion-dollar Ponzi scheme perpetrated by the Stanford companies . . . . According to the SEC, the companies' core objective was to sell certificates of deposit ("CDs") issued by [SIB]. Stanford achieved and maintained a high volume of CD sales by promising above-market returns and falsely assuring investors that the CDs were backed by safe, liquid investments. For almost 15 years, [SIB] represented that it consistently earned high returns on its investment of CD sales proceeds, ranging from 12.7% in 2007 to 13.93% in 1994. In fact, however, [SIB] had to use new CD sales proceeds to make interest and redemption payments on pre-existing CDs, because it did not have sufficient assets, reserves and investments to cover its liabilities.
>
> The SEC filed suit against R. Allen Stanford, [SIB], and related companies on February 16, 2009. At the SEC's request, the district court issued a temporary order restraining the payment or expenditure of funds belonging to the Stanford parties. The district court also appointed [the Receiver] for the Stanford interests **[**6]** and granted him the power to conserve, hold, manage, and preserve the value of the receivership estate.

588 F.3d at 833. At the time the SEC filed suit, Stanford should have held assets of greater than $7 billion, but actually held assets of less than $1 billion.

Post-appointment, the Receiver froze millions of dollars in assets. These frozen accounts allegedly contained funds dispersed by Stanford as purported interest on CDs, reimbursement of CD principal, or compensation to former Stanford employees. After time for review and assessment, the district court set a date to thaw the frozen assets and ordered the Receiver to complete his review. *Id*. The Receiver subsequently filed a series of claims, naming hundreds of CD investors and the Employee Defendants as "relief defendants," and seeking to recover funds from the frozen accounts. The district court severed the investor defendants from the Employee Defendants.

The Receiver sought a preliminary injunction to continue the freeze as to the investor defendants, which the district court granted in part and denied in part, maintaining the freeze of the accounts of various CD investors who had received payments of interest on their CDs. **[**7]** In *Adams*, the Fifth Circuit vacated the district court's grant of a preliminary injunction. *Id. at*

[4] There are numerous appellants, represented by various counsel. The district court describes the approximately 330 former Stanford employees collectively as "Employee Defendants." We will continue this practice for the appellants in this proceeding. When we have need to refer to the specific arguments by a particular group of defendants or a single defendant, we will refer to the seventy-six financial advisor defendants who together filed a brief as "FA Defendants," to the defendants who filed the Teral Bennett *et al*. brief as the "Bennett Defendants," and to Jason Green as "Green."

835. The *Adams* Court found that the CD investors could not be properly named as "relief defendants" because the CD investors had actual ownership interests in the CDs and any proceeds of the CDs. *Id. at 834-35*. This Court did not address the Employee Defendants' frozen accounts.

B. Post-*Adams* Developments, the Employee Defendants, and the Instant Appeal

The remaining frozen accounts represent accounts held at Pershing LLC and JP Morgan Clearing Corp. by the Employee Defendants. After *Adams*, the Receiver amended his complaint against the Employee Defendants, leaving claims only for fraudulent transfer or unjust enrichment.

The Receiver subsequently reached a series of compromises with the Employee Defendants, allowing for partial releases of their frozen assets. The district court **[*591]** eventually entered an agreed order (the "April 6th Order"), releasing all but "(1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation."

With the account freeze due to expire, the Receiver moved for a preliminary injunction to continue the **[**8]** freeze as to the funds named in the April 6th Order. The Receiver claimed that the three named classes of funds represented payments by Stanford to the Employee Defendants from the proceeds of the Ponzi scheme and therefore constituted fraudulent transfers, entitling the Receiver to disgorgement of those assets.

The Employee Defendants opposed the preliminary injunction and moved to compel arbitration. They based their motion to compel on the existence of Promissory Notes between the Employee Defendants and SGC. The Promissory Notes concerned upfront loan payments that SGC paid to the Employee Defendants when they joined Stanford. The Promissory Notes contained a broad arbitration clause, which provided that any dispute "arising out of or relating to this Note . . . would be submitted and settled by arbitration pursuant to the constitution, bylaws, rules, and regulations of the Financial Industry Regulation Authority (FINRA)" or the National Association of Securities Dealers ("NASD"), FINRA's predecessor. The Employee Defendants argued that because the Receiver "stood in the shoes" of SGC, the Receiver was also bound by the arbitration clause between the Employee Defendants and SGC.

The **[**9]** district court granted a temporary restraining order, and then granted the preliminary injunction. The district court did not decide the merits of the motion to compel arbitration, finding that it had the power to issue a preliminary injunction pending resolution of that matter. Additionally, the district court distinguished between a preliminary injunction under TUFTA and a writ of attachment, expressly granting the former. In granting the preliminary injunction, the district court continued the account freeze as to the amounts named in the April 6th Order. Various Employee Defendants appealed.

II. DISCUSSION

Various groups of the Employee Defendants have set forth five issues on appeal: (1) whether the district court had the power to grant a preliminary injunction before deciding the motion to compel arbitration; (2) whether the district court abused its discretion when it granted the preliminary injunction; (3) whether the district court's preliminary injunction is overbroad; (4) whether the district court properly granted a preliminary injunction rather than a writ of attachment; and (5) whether the Receiver's claims against the Employee Defendants are subject to arbitration. We **[**10]** address the five issues in turn.

A. Jurisdiction and Standard of Review for the Preliminary Injunction Order

We have jurisdiction over the appeal of the district court's preliminary injunction under *28 U.S.C. § 1292(a)(1)*.[5]

While "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of **[*592]** the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)*. Despite this deferential standard, "a decision grounded in erroneous legal principles is reviewed de novo." *Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)* (citations and quotation marks omitted). As to each

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[5] The parties dispute whether the district court retained the power to grant the preliminary injunction while the motion to compel arbitration was pending. We address this dispute below.

element of the district court's preliminary-injunction analysis, the district court's findings of fact "are subject to a clearly-erroneous standard of review," while conclusions of law "are subject to broad review and will **[**11]** be reversed if incorrect." *White v. Carlucci, 862 F.2d 1209, 1211 (5th Cir. 1989)* (citations and quotation omitted).

B. Power to Grant Preliminary Injunction

1. The Parties' Arguments

The Employee Defendants argue that the district court lacked power to issue a preliminary injunction because the Receiver's claims against them are subject to arbitration. The Receiver argues that case law, the FINRA rules, and common sense allows the district court to issue a preliminary injunction pending its resolution of a motion to compel arbitration. The district court found that it had power to grant preliminary injunctive relief before deciding whether to compel arbitration. We agree with the district court.

While the Employee Defendants acknowledge that the grant of a preliminary injunction lies within a district court's discretion, they posit that a motion to compel arbitration strips the district court of its power to grant an injunction. The Employee Defendants contend that (1) SGC is and was subject to arbitration for this dispute at all relevant times because it is a member of FINRA and it is bound under the broad arbitration clause of each Promissory Note, which requires that any controversy **[**12]** arising out of or related to the Note be submitted to arbitration pursuant to FINRA rules; (2) the dispute in this action is arbitrable because the Receiver became subject to the FINRA rules and the arbitration clauses when he stepped into the shoes of the received entity he represents; and (3) the FINRA rules do not contemplate pre-arbitration injunctive relief nor allow court-ordered injunctions lasting longer than 15 days. The Employee Defendants argue that because the dispute is arbitrable and subject to the FINRA rules, the district court did not have the discretion to issue injunctive relief; it only had the power to decide the motion to compel arbitration. *See* *Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)* ("By its terms, the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

The Employee Defendants also argue that cases from both sides of a circuit split support their contention that the district court does not have power to enter an injunction. The circuit split concerns the power of **[**13]** a district court to issue an injunction while arbitration is pending. The Fifth Circuit acknowledged the circuit split in *RGI, Inc. v. Tucker & Associates, Inc., 858 F.2d 227, 229 (5th Cir. 1988)*, but did not enter the fray.[6] The Employee Defendants contend that once again we may avoid the fray and still decide the issue in **[*593]** their favor because both the Eighth Circuit, on one side of the split, and the Seventh Circuit, on the other side of the split, would not permit an injunction here. The Eighth Circuit held that "where the [Federal Arbitration Act ("FAA")] is applicable to the dispute between the parties and no qualifying language has been alleged, the district court errs in granting injunctive relief" because the judicial inquiry required to determine "the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984)*. The Seventh Circuit held that the district court may only issue injunctive relief that is effective only until the arbitration panel is able to address whether the equitable relief should remain in effect. **[**14]** *See* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215-16 (7th Cir. 1993)*.

The Receiver responds that the district court's broad power to preserve the status quo is well-established and supported by case law, FINRA rules, and common sense. The Receiver notes that "even after a district court decides that a case is subject to arbitration, most federal authority permits the district court to issue a preliminary injunction to maintain the status quo pending arbitration." Further, the Receiver points out that under FINRA Rule 13804, (1) parties can seek court-ordered temporary injunctive relief even where the case is subject to mandatory arbitration, and (2) if a court issues a temporary injunction in a dispute subject to arbitration, an arbitration panel will hold a hearing within 15 days to determine whether to continue the injunctive relief. The Receiver argues that if **[**15]** FINRA rules allow court-ordered injunctive relief when a party loses on the motion to compel arbitration, then he is entitled to such

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[6] In *RGI*, we found that we need not decide whether a district court may issue a preliminary injunction while arbitration is pending because the agreement in that case clearly provided for preliminary injunctions. *Id. at 230*. The parties do not attempt to establish or distinguish similar facts here.

relief while the motion is still pending. Finally, the Receiver notes that a rule that would prohibit the district court from preserving the status quo when a motion to compel arbitration is filed would enable any party "to strip the trial court of its authority to enjoin the party's conduct simply by filing a motion to compel arbitration."

2. Analysis

In its order, the district court relied on its equitable powers to preserve the status quo, and expressly reserved the question of whether the Receiver's claims were subject to arbitration. In so doing, the district court noted that the cases in the circuit split did not specifically address the issue in this case: whether a court may preserve the status quo *pending its resolution of a motion to compel arbitration*, not pending the actual arbitration itself. We agree with the district court that it court can grant preliminary relief before deciding whether to compel arbitration.

The language of the FAA does not touch on the ancillary power of the federal court to act before it decides whether the dispute is **[**16]** arbitrable. The federal law of arbitration is governed by the FAA. 9 U.S.C. §§ 1-16. As the Employee Defendants note, the Supreme Court has consistently expressed a strong preference for arbitration. *See* Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration . . . ."). However, these sections do not provide guidance on the issue of whether a court may issue a preliminary injunction before deciding whether the dispute is arbitrable. Section 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States **[*594]** upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement*, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Similarly, § 4 provides:

> A party aggrieved by the **[**17]** alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). Section 3 only speaks to what the court should do once it is satisfied that the issue is referable to arbitration. Similarly, § 4 mandates that the court must direct the parties to proceed to arbitration *only after it is satisfied* that there is no issue as to whether a party failed to comply with the arbitration agreement. Both of these sections speak only to situations after the court has decided arbitration must ensue.

Here, the district court has yet to make up its mind as to arbitrability. The district court relied on its equitable powers to preserve the status quo, but expressly reserved the issue of whether the Receiver's **[**18]** claims were subject to arbitration for resolution at a later date. Nothing in the FAA controls a district court's approach to its docket. While the Supreme Court has stated that "Congress'[s] clear intent, in the [FAA], [was] to move the parties to an *arbitrable* dispute out of court and into arbitration as quickly and easily as possible[,]" there is nothing to control the district court's expeditious determination of arbitrability. Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (emphasis added).

The cases cited by the Employee Defendants also do not bar the exercise of the district court's equitable powers here. The *RGI* Court found that "[t]he crux of the problem [in the circuit split] is whether the commands of the [FAA] require that a federal court immediately divest itself of any power to act to maintain the status quo *once it decides that the case before it is arbitrable*." RGI, 858 F.2d at 228-29 (emphasis added). Here, however, the district court has not yet decided whether the case is arbitrable and thus the circuit-split cases are not applicable. The Receiver's request for a preliminary injunction was entered before the motion to compel arbitration. We agree **[**19]** with the district court that if we were to reverse and hold that the district court must stop everything and consider the motion to compel arbitration, such a holding

> would create a harsh procedural rule: in order to avoid irreparable injury, motions to compel arbitration where a request for injunctive relief is involved must be resolved before any temporary restraining order expires. Such a rule would be both burdensome for district courts and impracticable, given the time it takes motions to compel arbitration to become ripe for ruling, even if no discovery is required.

[*595] *Janvey v. Alguire*, No. 3:09-CV-724-N, at 6 n.5 (N.D. Tex June 6, 2010) (order granting preliminary injunction).

Though the circuit-split cases do not apply here, the reasoning of those circuits holding that a court may issue an injunction pending arbitration applies here.[7] As explained by the First Circuit, "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process." *Teradyne v. Mostek Corp., 797 F.2d 43, 51 (1st Cir.1986)*. **[**20]** Here, the district court merely sought to preserve the status quo *before* deciding the motion to compel arbitration, and by doing so they sought to preserve the meaningfulness of any arbitration that might take place.

Even if applicable to the facts here, the Seventh Circuit case cited by the Employee Defendants would not bar the preliminary injunction issued by the district court. In *Salvano*, the Seventh Circuit held that the district court may issue injunctive relief only until the arbitration panel is able to address whether the equitable relief should remain in effect. *999 F.2d at 215-16*. In the instant case, the district court expressly stated that if it decides to compel arbitration, the defendants may ask the district court to reconsider the preliminary injunction in light of Fifth Circuit precedent and the terms of the contracts.

The matter of arbitrability has not yet been **[**21]** decided, and the district court did not overreach when it decided the preliminary injunction motion.

C. Decision to Grant Preliminary Injunction

The four elements a plaintiff must establish to secure a preliminary injunction are:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum, 566 F.3d at 445 (quotation marks omitted). The Receiver bore the burden of establishing each element. *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss., 577 F.3d 250, 253 (5th Cir. 2009)*. The district court analyzed each of the elements in its grant of the preliminary injunction to the Receiver. The Employee Defendants challenge all aspects of the district court's analysis. We disagree with the Employee Defendants that the district court abused its discretion in issuing the preliminary injunction. We address each element in turn, reviewing the district court's ultimate decision to grant the preliminary injunction **[**22]** and its findings of fact for abuse of discretion and its legal determinations de novo. *Byrum, 566 F.3d at 445*.

1. Likelihood of Success on the Merits

The district court did not err in finding that the Receiver carried his burden of proving likelihood of success on the merits. To satisfy the first element of likelihood of success on the merits, the Receiver's evidence in the preliminary injunction proceeding "is not required to prove **[*596]** [his] entitlement to summary judgment." *Byrum, 566 F.3d at 446*; *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, 11A FEDERAL PRACTICE & PROCEDURE § 2948.3 (2d ed. 1995) ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win." (footnote omitted)). To assess the likelihood of success on the merits, we look to "standards provided by the substantive law." *Roho, Inc. v. Marquis, 902 F.2d 356, 358 (5th Cir. 1990)* (citation omitted). Here, the Receiver contends that there is liability under TUFTA. Under TUFTA, the trial court may find substantial likelihood of success on the merits when it is "presented with evidence of intent to defraud the creditor." *See Tanguy v. Laux, 259 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.)* **[**23]** (citing *Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601, 609 (Tex.App.—Houston [1st Dist.] 2002, no pet.))*.

[7] Given that the facts at issue here do not require us to enter the circuit split, we reserve for another day the issues of whether a district court divests itself of the discretion to maintain the status quo once it decides the case before it is arbitrable and, if not, what the limits of that discretion may be.

The Receiver and the Employee Defendants offer competing versions of what evidence is necessary to satisfy TUFTA's requirements. The Bennett Defendants contend that the Receiver failed to establish that Stanford operated as a Ponzi scheme.[8] The FA Defendants argue that because they received their compensation from SGC and not SIB, they did not receive compensation from the Ponzi scheme. The Employee Defendants contend that the district court erred by allowing the Receiver to group all the former employees of Stanford together rather than requiring the Receiver to prove that each individual Defendant received fraudulent transfers of money from the Stanford scheme. Finally, the Employee Defendants also contend that the Receiver failed to follow the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. The Receiver responds that (1) there is sufficient evidence to prove Stanford operated as a Ponzi scheme from the very beginning; (2) the Receiver has presented sufficient evidence to prove that each individual Defendant received transfers of **[**24]** money from the Stanford Ponzi scheme; and (3) this Court does not need to decide whether the Receiver's pleading satisfies the rules, and even if it did, *Rule 9(b)* does not apply to fraudulent transfer cases.

The district court agreed with the Receiver. It found that there was a Ponzi scheme and held that "'transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception.'" *Janvey v. Alguire*, No. 3:09-CV-724-N, at 10 (N.D. Tex June 6, 2010) (order granting preliminary injunction) (quoting *Quilling v. Schonsky, 247 F. App'x 583, 586 (5th Cir. 2007)* (unpublished) (citing *Warfield v. Byron, 436 F.3d 551, 559 (5th Cir. 2006))*). Therefore, the district court found that the Receiver satisfied his obligation to show an actual intent **[**25]** to defraud under TUFTA. The district court further found that the Receiver presented sufficient evidence that the assets implicated by the injunction request "represented transfers of Stanford CD proceeds."

We address first whether the Receiver presented sufficient evidence that Stanford operated as a Ponzi scheme, then discuss whether the Receiver adequately established that the Employee Defendants received **[*597]** proceeds of a fraudulent transfer, and finally address whether this satisfies the requirements of this element.

a. Whether Stanford Operated as a Ponzi Scheme

The Bennett Defendants spend the bulk of their brief disputing whether Stanford operated as a Ponzi scheme *ab initio*. The FA Defendants separate SGC from SIB, and claim that the Receiver failed to establish that SGC, the entity that provided compensation to the FA Defendants, was a Ponzi scheme. In large part, the Receiver relies upon the guilty plea of James Davis (the "Davis Plea"), the former Chief Financial Officer of SIB, to demonstrate that the Stanford enterprise operated as a Ponzi scheme. The district court relied upon the Davis Plea in its order, along with the declarations of the Receiver's forensic accountant, Karyl **[**26]** Van Tassel, to find that a Ponzi scheme existed. We find that the district court did not err in finding that the Stanford enterprise operated as a Ponzi scheme.

A Ponzi scheme is a "fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." BLACK'S LAW DICTIONARY 1198 (8th ed. 2004); *see also U.S. v. Setser, 568 F.3d 482, 486 (5th Cir. 2009)* ("[I]n a classic Ponzi scheme, as new investments [come] in . . . , some of the new money [is] used to pay earlier investors."). The Second Circuit also provides a good description of a Ponzi scheme:

> A [P]onzi scheme is a scheme whereby a corporation operates and continues to operate at a loss. The corporation gives the appearance of being profitable by obtaining new investors and using those investments to pay for the high premiums promised to earlier investors. The effect of such a scheme is to put the corporation farther and farther into debt by incurring more and more liability and to give the corporation the false appearance of profitability in order to obtain new investors.

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088 n.3 (2d Cir. 1995). **[**27]** This Circuit has found that a Ponzi scheme "is, as a matter of law, insolvent from its inception." *Warfield, 436 F.3d at 558* (citing *Cunningham v. Brown, 265 U.S. 1, 7-8, 44 S. Ct. 424,*

[8] The Bennett Defendants do not tie this argument to any element of the preliminary injunction standard, instead lodging a general objection to the district court's determination that Stanford operated as a Ponzi scheme. Because the Ponzi scheme determination has the greatest impact on the likelihood of success element, we address the Bennett Defendants' argument in this section.

68 L. Ed. 873 (1924)).

The Davis Plea and the Van Tassel Declarations provide sufficient evidence to support a conclusion that there is a substantial likelihood of success on the merits that the Stanford enterprise operated as Ponzi scheme. In his plea, Davis, who is singularly positioned to provide insight into the workings of Stanford, admitted that the "continued routine false reporting . . . upon which CD investors routinely relied in making their investment decisions, in effect, created an ever-widening hole between reported assets and actual liabilities, causing the creation of a massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds." This statement reflects a classic Ponzi scheme and directly contradicts the Bennett Defendants' assertion that the district court relied upon a novel definition of a Ponzi scheme in its order. The Van Tassel Declarations also provide clear, numerical support for the creative reverse engineering undertaken by Stanford executives to **[**28]** accomplish the Ponzi scheme:

> We found within SIB's accounting records worksheets used to derive fictitious SIB revenues back to 2004. The Ponzi scheme conspirators would simply determine what level of revenues SIB needed to report in order to both look good to investors and regulators and to purport **[*598]** to cover CD obligations and other expenses. They would then back into that total amount by assigning equally fictitious revenue amounts to each category (equity, fixed income, precious metals, alternative) of a fictitious investment allocation.

Van Tassel then goes on to specifically itemize how specific returns were based on fictitious asset totals.

The Bennett Defendants' argument that the Receiver failed to establish, and that the district court incorrectly assumed, that the Stanford entities constituted a Ponzi scheme *ab initio* is unavailing. The Davis Plea, when read as a whole, provides sufficient evidence for the district court to assume that the Stanford enterprise constituted a Ponzi scheme *ab initio*. In outlining the factual basis for the guilty plea, the Davis Plea describes how in 1988, Stanford directed Davis to "make false entries into the general ledger for the purpose of reporting **[**29]** false revenues and false investment portfolio balances to the banking regulators" shortly after opening Guardian International Bank, as SIB was then known, in Montserrat. The Plea further states that Stanford closed Guardian's operations in Montserrat in 1989 and moved the banking operations to Antigua under the name of SIB to avoid heightened scrutiny from bank regulators in Montserrat.

Finally, the FA Defendants' position that SGC should be separated from SIB is of no moment. As made clear by the Van Tassel Declarations, SGC received the bulk of its revenue from commissions for the sale of the SIB CDs and fees for other services it provided to SIB related to the CD investment portfolio. The Receiver seeks to recoup those proceeds because they were the assets of the alleged Ponzi scheme. The district court did not err when it found, for the purposes of this preliminary injunction proceeding, that Stanford operated as a Ponzi scheme.

b. Whether the Receiver Offered Sufficient Proof of the Source of the Frozen Accounts.

The Employee Defendants also argue that the district court erred in grouping all the transactions rather than examining evidence of claims against individuals. Contrary **[**30]** to the Employee Defendants' assertion, the district court found that the Receiver came forward with "competent evidence that each individual [Employee Defendant] received transfers of money representing CD sale proceeds from the Stanford Ponzi scheme." We agree. The Receiver's evidence is a spreadsheet in the Van Tassel Declarations that lists each former employee, the form of compensation (loan, commission, or quarterly bonus), and the amount that Stanford paid each employee. The Van Tassel Declarations sufficiently establish that Stanford paid the Employee Defendants from the alleged Ponzi scheme for the purposes of the preliminary injunction proceeding.

c. Likelihood of Success on the Merits

The district court did not err in finding the Receiver carried his burden of proving a substantial likelihood of success on the merits for his TUFTA claim. TUFTA requires that the debtor *transferor* make the transfer "with actual intent to . . . defraud any creditor of the debtor." Tex. Bus. & Com. Code Ann. § 24.005(a)(1). "In this circuit, proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." SEC v. Res. Dev. Int'l, LLC, 487 F.3d 295, 301 (5th Cir. 2007) **[**31]** (citing Warfield, 436 F.3d at 558). In other words, "'the transferees' knowing participation is irrelevant under the statute' for purposes **[*599]** of establishing the premise (as opposed to liability for) a fraudulent transfer." *Id*. (analyzing TUFTA) (quoting *Warfield, 436 F.3d at 559* (analyzing Washington state law)). The Receiver carried his burden of proving that he is likely to succeed in his prima facie case by providing sufficient evidence that a Ponzi scheme existed—thereby obviating the need to prove fraudulent intent of the *transferees*—and sufficient proof that each individual received transfers of money from the Ponzi scheme. The Defendants did not refute this by showing that they are likely to succeed in proving a TUFTA statutory affirmative defense. Consequently, the district court did not err in finding a substantial likelihood of success.

The parties dispute whether *Rule 9(b)* applies to this case and whether this affects the district court's finding of a substantial likelihood of success. The Employee Defendants argue that the Receiver was obligated to abide by *Rule 9(b)*'s heightened pleading standards for his fraud claims, and that he failed to meet this standard when he "lump[ed] **[**32]** together" the claims against all former Stanford employees. The Receiver asserts that *Rule 9(b)* does not apply to fraudulent transfer cases. We need not and do not address the issue of whether heightened pleading is required. As the district court noted in its Preliminary Injunction Order, it has not yet ruled on the defendants' pending motions to dismiss. The only question that the district court had to decide on this element in the preliminary injunction proceeding was whether the Receiver had shown a substantial likelihood of *ultimately* succeeding on the merits, *see Doe v. Marshall, 622 F.2d 118, 119 n.2 (5th Cir. 1980)*, potential procedural hurdles notwithstanding. The Receiver carried this burden.

2. Threat of Irreparable Harm

The Employee Defendants argue that the Receiver did not carry his burden of proving the second element of the preliminary injunction standard: threat of irreparable harm. The Employee Defendants argue that because the Receiver merely seeks a return of the fraudulently transferred CD proceeds, there is no threat of irreparable harm. The Employee Defendants contend that difficulty securing economic damages is insufficient to demonstrate irreparable harm. The **[**33]** Employee Defendants further argue that the Receiver was required to establish a likelihood that each individual defendant would remove or dissipate the frozen assets but for a preliminary injunction. The Receiver replies that TUFTA itself creates a presumption of dissipation. The Receiver then argues that its inability to collect a money judgment should the Employee Defendants dissipate the frozen accounts is sufficient to show a threat of irreparable harm. Finally, the Receiver agrees with the district court that he is not required to make an individualized showing of likely dissipation.

The district court found that "dissipation of the assets that are the subject of this suit . . . would impair the Court's ability to grant an effective remedy," particularly because much of the relief the Receiver seeks under TUFTA is "equitable in nature and involves the assets that are . . . frozen." The district court further held that the Receiver need not show that each individual defendant would dissipate the frozen assets absent an injunction. The court reasoned that the Receiver was entitled to a presumption that the Employee Defendants would dissipate the frozen assets absent a preliminary **[**34]** injunction because the assets were fraudulently transferred as part of a Ponzi scheme. We find **[*600]** that the Receiver carried his burden of proving this element.

To satisfy the second element of the preliminary injunction standard, the Receiver must demonstrate that if the district court denied the grant of a preliminary injunction, irreparable harm would result. *Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985)*.[9] In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages. *Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981)*; *Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975)*. However, the mere fact that economic damages may be available does not always mean that a remedy at law is "adequate." For example, some courts have found that a remedy at law is inadequate if legal redress may be obtained only by pursuing a multiplicity of actions. *See, e.g., Lee v. Bickell, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337 (1934)* ("we are not in doubt, the multiplicity of actions necessary for redress at law [is] sufficient . . . to uphold the remedy by injunction"). We have

[9] The Receiver argues that TUFTA effectively creates a statutory presumption of irreparable harm. We disagree. TUFTA specifically provides that the claimant may obtain "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred." *Tex. Bus. & Com. Code § 24.008(a)(3)(A)*. However, the statute explicitly states that this remedy is "subject to applicable principles of equity and in accordance with applicable rules **[**36]** of civil procedure." *Id*. Clearly, TUFTA contemplates the application of equitable standards, encompassing the usual elements necessary to obtain a preliminary injunction.

previously stated that where a district court has **[**35]** determined that a meaningful decision on the merits would be impossible without an injunction, the district court may maintain the status quo and issue a preliminary injunction to protect a remedy, including a damages remedy, when the freezing of the assets is limited to the property in dispute or its direct, traceable proceeds. *See* *Productos Carnic, S.A. v. Cent. Amer. Beef & Seafood Trading Co., 621 F.2d 683, 686-87 (5th Cir. 1980)* ("[E]ven were [plaintiff's] remedy limited to damages, an injunction may issue to protect that remedy."). Finally, a showing of "[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Id*. (citing *Carter v. Heard, 593 F.2d 10, 12 (5th Cir.1979))*.

We agree with the district court that the Receiver carried his burden of proving this element. First, we agree with the district court that the "Receiver successfully show[ed] that the threatened harm—dissipation of the assets that are the subject of this suit—would impair the [district court's] ability to grant an effective remedy." The relief that the Receiver ultimately seeks is equitable in nature; the Receiver seeks "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." *Tex. Bus. & Com. Code § 24.008(a)(1)*. In his complaint, the Receiver asks the court for an order (1) establishing that the CD proceeds received by the Employee Defendants are property of the Receivership Estate held pursuant to a constructive trust for the benefit of the creditors, and (2) allowing him to withdraw proceeds from the segregated escrow account and add them to the Receivership Estate. He does not seek damages for breach of contract or tort. If the defendants were to dissipate or transfer **[**37]** these assets out of the jurisdiction, the district court would not be able to grant the effective remedy, either in equity or in law, that the Receiver seeks. The assets that the Receiver requests stay frozen are assets that are directly traceable to the **[*601]** Stanford Ponzi scheme and are the subject of this dispute. The Receiver merely asks that those assets continue to be held immovable while his case proceeds to judgment. We do not find that the district court erred in determining that a preliminary injunction was appropriate to protect against monetary asset dissipation.

The party seeking a preliminary injunction must also show that the threatened harm is more than mere speculation. *Succession of Roy, 777 F.2d at 997*. Here, the Receiver provided evidence of a massive Ponzi scheme and proof that each individual received proceeds from the fraudulent scheme. This is sufficient to prove the likelihood of each individual removing or dissipating the frozen assets but for the preliminary injunction. Accordingly, we find that the district court did not err in finding that irreparable harm would result in the absence of a preliminary injunction.

3. [**38] Balance of Harms and Service of the Public Interest

On these elements, the district court weighed the interests of the Employee Defendants against the interests represented by the Receiver (*i.e.*, the interests of the creditors) and looked to the broader ramifications of any potential recovery by the Receiver. The district court noted the extremely limited array of assets remaining to provide compensation to Stanford Ponzi scheme victims. The record supports the fact that Stanford, when it entered receivership, was grossly undercapitalized. Additionally, the Receiver and the Employee Defendants reached consent agreements to thaw all but certain discrete categories of compensation. These last elements of the district court's preliminary injunction analysis implicate the discretion of that court to craft a remedy and weigh the evidence. We do not believe that the district court abused its discretion when it found that these elements weighed in favor of the Receiver.

D. Scope of District Court's Grant of Preliminary Injunction

The Employee Defendants also challenge the breadth of the injunction. On appeal, the Employee Defendants renew a number of arguments that they brought before the district **[**39]** court. First, the Employee Defendants contend that any frozen IRA account is exempt from the Receiver's claim. Second, the FA Defendants argue that the account freeze improperly extends to pre-tax amounts because they already paid taxes on those earnings. Third, the FA Defendants argue that they are entitled to an offset of amounts they lost on their personal investments in Stanford CDs. We address each of the Employee Defendants' arguments in turn.

1. Frozen IRA Accounts

According to Texas law, IRA accounts are exempt from seizure. *Tex. Prop. Code § 42.0021(a)*. However, the party claiming the exemption must establish that she has a legal right to the funds in the IRA to be entitled to the exemption. Jones v. Am. Airlines, Inc., 131 S.W.3d 261, 270 (Tex. App.—Fort Worth 2004, no pet.). It is undisputed that some of the frozen accounts are IRA accounts. The Employee Defendants had the burden of proving that they have a right to the funds in the accounts, particularly in light of the Receiver's extensive evidence that the Employee Defendants received these funds as a fraudulent transfer from the Stanford Ponzi scheme. The mere fact that an account is an IRA account does not automatically **[**40]** entitle the Employee Defendants to the exemption; it does not relieve the Employee Defendants of carrying the burden of proving they have a legal right to the **[*602]** account. Consequently, the district court did not err when it kept the IRA accounts frozen under the preliminary injunction.

2. Tax Matters

The FA Defendants argue that the Receiver improperly calculated the amounts represented by the account freeze because the Receiver did not account for taxes paid by the Employee Defendants on the compensation. The district court rejected this argument, relying heavily on *Donell v. Kowell*, in which the Ninth Circuit declined to offset for taxes paid. 533 F.3d 762, 779 (9th Cir. 2008). The Ninth Circuit first reasoned that if it allowed offsets for amounts paid in good faith as taxes, logic would suggest that the court also permits offsets for bank transfer fees, other fund management fees, and a myriad of other expenses. The court went on to state, "There is simply no principle by which to limit such offsets . . . . If each net winner could shield his gains in their entirety in this manner, the purpose of UFTA would be defeated, and the multitude of victims who lost their entire investment would **[**41]** receive no recovery." Id. at 779. Second, the court found that allowing offsets in even a few areas like taxes paid would "introduce complex problems of proof and tracing into each case," thereby "severely reduc[ing] the receiver's ability to gather what few assets can be located in the wake of a failed Ponzi scheme." *Id*.

Although, as the FA Defendants note, the *Donell* case involved taxes paid by an investor after receiving fraudulent funds, id. at 778, we find the Donell reasoning persuasive, particularly because there is no basis for this offset in TUFTA. We do not find the district court erred in declining to offset the prepaid tax amounts with respect to the preliminary injunction.

3. Losses on Personal Investments

The **[**42]** FA Defendants also argue that the Receiver's figures do not account for the Defendants' losses on their own investments in Stanford CDs. The defendants have not offered any case law or statutory language on point, nor did we find any authority entitling the Employee Defendants to offsets for their personal losses on Stanford investments. We agree with the district court that the Defendants must seek these amounts through the Receiver's claims process like other creditors.

E. Type of Equitable Relief Granted

The Employee Defendants also renew their contention that the Receiver obtained, in essence, a writ of attachment, arguing that the "substance" of the Receiver's suit was a request to hold assets "in order to satisfy a money judgment." While the Receiver also requested an attachment, the district court did not consider this request and expressly granted an injunction. In doing so, the district court differentiated between a TUFTA injunction and a writ of attachment.

As the district court noted, TUFTA provides for both injunctions and attachments. *See* Tex. Bus. & Com. Code § 24.008(a)(2) (attachment); *id*. § 24.008(a)(3)(A) (injunction). The district court relied upon *Telephone Equipment* ***[**43]*** *Network, Inc. v. TA/Westchase Place, Ltd*. for the proposition that a claim for fraudulent transfer under Texas law contemplates the issuance of a preliminary injunction. 80 S.W.3d at 610.[10] The district court's reliance was well placed. TUFTA provides that the **[*603]** claimant "may obtain an injunction against further disposition of 'the asset transferred or of other property.'" *Id*. (quoting Tex. Bus. & Com. Code Ann. § 24.008(a)(3)). Furthermore, the district court's order granting the preliminary injunction lacks the hallmarks of an attachment: namely, a "seizure" or "lien."

The Receiver claims that Stanford fraudulently transferred proceeds from the alleged Ponzi scheme to the Employee Defendants and sought an injunction to prevent the dissipation of those proceeds, now held in

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[10] Although the *Telephone Equipment* court used the acronym "UFTA," it is apparent that the court cited to and analyzed provisions of TUFTA. Id. at 607 ("UFTA lists 11, non-exhaustive 'badges of fraud' to assist in determining whether the debtor made the transfer with the requisite fraudulent intent.") (citing Tex. Bus. & Com. Code Ann. § 24.005(a)(1)).

the frozen accounts. TUFTA expressly provides for an injunction **[**44]** and the district court exercised its discretion to grant that injunction.

F. Motion to Compel Arbitration

The parties also dispute whether the Receiver's claims against the Employee Defendants are subject to arbitration. The district court did not decide the motion to compel arbitration. Both parties ask this Court to decide the motion in the first instance. "We have appellate jurisdiction where an order is final, [the order] falls within a specific class of interlocutory orders made appealable by statute, or the issue falls within some jurisprudential exception." *Silver Star Enters., Inc. v. M/V Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994)*. As there was no final or interlocutory order, and we could find no jurisprudential exception, we do not have jurisdiction to decide the motion to compel arbitration. WRIGHT, MILLER & COOPER, FED. PRACTICE & PROCEDURE: JURISDICTION 2D § 3291.1 (2011) ("Ordinarily the scope of appellate review under *§ 1292(a)(1)* is confined to the issues necessary to determine the propriety of the interlocutory order itself. The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, most **[**45]** obviously as to issues that have not yet been decided by the trial court . . . ."); *see also Equal Emp't Opportunity Comm'n v. Recruit U.S.A., Inc., 939 F.2d 746, 757 (9th Cir. 1991)* (declining to rule on sanctions motion on an interlocutory appeal of a preliminary injunction where the district court had yet to rule on the sanctions motion).

There is no final order here. There is no ruling on the motion to compel arbitration. Further, even if there were a ruling on the motion to compel arbitration, such a ruling is not a final judgment ending litigation on the merits and leaving nothing for the court to do but execute judgment. *Silver Star Enters., 19 F.3d at 1013*. Thus, even if the district court had ruled on the motion and issued an order, it would not be a final order.

Because there is no order, there is also no statutory basis for interlocutory appellate review. *Section 1292(a)* provides appellate jurisdiction for the appeal of the grant of the preliminary injunction, but it does not provide appellate jurisdiction for the motion to compel arbitration. *See 28 U.S.C. § 1292*. *Section 16* of the FAA also does not give this Court appellate jurisdiction to rule on the motion to compel arbitration. **[**46]** *9 U.S.C. § 16*. *Section 16* describes when a party may appeal an arbitrability determination. Here, the district court did not decide or issue an order on the motion to compel arbitration. Consequently, it does not fall under any of the enumerated *§ 16* situations in which an immediate appeal of an arbitrability determination is allowed. There is no *order* denying a petition under *section 4* of FAA to order arbitration to proceed, nor is there a *final decision* with respect to an arbitration. *See 9 U.S.C. § 16(a)(1)*, *(3)* (stating when an appeal may be taken from an arbitrability determination).

Finally, we cannot find any case that sets forth a jurisprudential exception with **[*604]** facts similar to the instant case that would allow us to exercise appellate jurisdiction.[11] There is language, however, in *In re Lease Oil Antitrust Litigation* (*No. II*), that potentially could be applicable here. *200 F.3d 317 (5th Cir. 2000)*. In that case, we stated that it was permissible to decide "certain related issues that have been sufficiently developed so as not to require further development at the trial court level." *Id. at 319-20*. In that case, we considered an interlocutory appeal of a preliminary injunction **[**47]** prohibiting the defendant from settling federal claims in other cases without the court's approval. *Id. at 319*. In the same interlocutory appeal, we also considered the district court's denial of the defendant's motion to dismiss, which had been pending at the time of the district court's preliminary injunction decision. *Id. at 319-20*.

The instant case, however, is distinguishable from *In re Lease Oil*. First, by the time we considered the appeal in *In re Lease Oil*, the lower court had already come to a decision on the motion to dismiss. Here, the district **[**48]** court has not decided the motion to compel arbitration. If we decided the motion to compel arbitration, we would not be acting as an appellate court, but as a trial court.

Second, in *In re Lease Oil*, we reviewed the

[11] The 76 FA Defendants cite *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*. for the proposition that the Supreme Court had expressly approved an appellate court *sua sponte* determination that the underlying dispute is arbitrable. (76 FA Defendant Br. at 35 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983))*.) *Moses H. Cone*, however, was decided before *Section 16* of the FAA was enacted in 1988. *Section 16* delineates when the courts of appeals may review arbitrability determinations. *9 U.S.C. § 16*. As we note above, the current procedural posture does not fall under any of the enumerated *§ 16* situations.

nonappealable order because the defendant only became a party to the preliminary injunction because its motion to dismiss was denied. *200 F.3d at 319* ("The court subsequently denied the motion, thereby including Mobil in the injunction.") Thus, the two issues were so entangled that they both merited decision on interlocutory appeal. *See* *Byrum, 566 F.3d at 449* (holding that this Court may only exercise pendent appellate jurisdiction in "rare and exceptional circumstances" where "an appellate order is inextricably intertwined with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order" (internal quotation marks and citation omitted)).

Here, even if the district court had subsequently decided the motion to compel arbitration in the Employee Defendants' favor, the Employee Defendants would still be subject to the preliminary injunction until the district court or the arbitration panel reconsidered the preliminary **[**49]** injunction. Meaningful review of the main issues on appeal—the district court's power to issue a preliminary injunction and whether the district court abused its discretion in granting the preliminary injunction—are not dependent upon the outcome of the motion to compel arbitration or vice versa. Thus, the motion to compel arbitration is not inextricably intertwined with the preliminary injunction. We do not find that this issue falls within a jurisprudential exception, and we refuse to carve out a new exception here.

Because we do not have appellate jurisdiction under any of the criteria set forth in *Silver Star Enterprises*, we remand this issue back to the district court for a ruling in the first instance.

[*605] CONCLUSION

The Receiver is in an unenviable position: although the Stanford estate has many thousands of claimants, there are startlingly few assets to disperse to the Stanford victims. In this appeal concerning the Receiver's attempt to marshal estate assets, we hold: (1) The district court acted within its power when it considered and decided the motion for preliminary injunction before deciding the outstanding motion to compel arbitration; (2) The district court did not abuse its **[**50]** discretion in issuing the preliminary injunction; and (3) The preliminary injunction was not an attachment, nor was it overly broad. We remand the motion to compel arbitration for a ruling in the first instance.

AFFIRMED and REMANDED.

End of Document

TAB 4

Sampson v. Murray

Supreme Court of the United States

November 14, 1973, Argued ; February 19, 1974, Decided

No. 72-403

Reporter
415 U.S. 61 *; 94 S. Ct. 937 **; 39 L. Ed. 2d 166 ***; 1974 U.S. LEXIS 7 ****

SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. v. MURRAY

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

Disposition: *149 U. S. App. D. C. 256, 462 F.2d 871*, reversed.

Syllabus

Upon being notified that she was going to be discharged on a specific date from her position as a probationary Government employee, respondent filed this action claiming that the applicable Civil Service regulations for discharge of probationary employees had not been followed, and seeking a temporary injunction against her dismissal pending an administrative appeal to the Civil Service Commission (CSC). The District Court granted a temporary restraining order, and after an adversary hearing at which the Government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, ordered the temporary injunctive relief continued. The Court of Appeals affirmed, rejecting the Government's contention that the District Court had no authority to grant temporary injunctive relief in this class of cases, and holding that the relief granted was within **[****2]** the permissible bounds of the District Court's discretion. *Held*: While the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, nevertheless under the standards that must govern the issuance of such relief the District Court's issuance of the temporary injunctive relief here cannot be sustained. Pp. 68-92.

(a) The District Court's authority to review agency action, *Service v. Dulles, 354 U.S. 363*, does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to the applicable regulations, and until administrative action has become final, no court is in a position to say that such action did or did not conform to the regulations. Here the District Court authorized, on an interim basis, relief that the CSC had neither considered nor authorized -- the mandatory reinstatement of respondent in her Government position. *Scripps-Howard Radio v. FCC, 316 U.S. 4*; *FTC v. Dean Foods Co., 384 U.S. 597*, distinguished. Pp. 71-78.

(b) Considering the disruptive effect that **[****3]** the grant of temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well-established rule that the Government be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors. Pp. 78-84.

(c) Viewing the order at issue as a preliminary injunction, the Court of Appeals erred in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury, and in intimating that, as alleged in respondent's unverified complaint, either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury. Pp. 84-92.

Counsel: Keith A. Jones argued the cause for petitioners. With him on the briefs were Solicitor General Bork, Assistant **[****4]** Attorney General Wood, Acting Assistant Attorney General Jaffe, Samuel Huntington, and Walter H. Fleischer.

Thomas J. McGrew argued the cause for respondent pro hac vice. With him on the brief was James A. Dobkin.

Judges: Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, and Powell, JJ., joined. Douglas, J., filed a dissenting opinion, post, p. 92. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined, post, p. 97.

Opinion by: REHNQUIST

Opinion

[*62] [*172] [**940]** MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent is a probationary employee in the Public Buildings Service of the General Services Administration (GSA). In May 1971, approximately four months **[*63]** after her employment with GSA began, she was advised in writing by the Acting Commissioner of the Public Buildings Service, W. H. Sanders, that she would be discharged from her position on May 29, 1971. She then filed this action in the United States District Court for the District of Columbia, seeking to temporarily enjoin her dismissal pending her pursuit of an administrative appeal to the Civil Service Commission. **[****5]** The District Court granted a temporary restraining order, and after an adversary hearing extended the interim injunctive relief in favor of respondent until the Acting Commissioner of the Public Buildings Service testified about the reasons for respondent's dismissal.

[1A]A divided Court of Appeals for the District of Columbia Circuit affirmed, [1] rejecting the Government's contention that the District Court had no authority whatever to grant temporary injunctive relief in this class of cases, and holding that the relief granted by the District Court in this particular case was within the permissible bounds of its discretion. We granted certiorari, *sub nom. Kunzig v. Murray, 410 U.S. 981 (1973)*. We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief by the District Court in this case cannot be sustained.

[**6]** I

Respondent was hired as a program analyst by the Public Buildings Service after previous employment in the Defense Intelligence Agency. Under the regulations **[*64]** of the Civil Service Commission, this career conditional appointment was subject to a one-year probationary period. [2] Applicable regulations provided that respondent, during this initial term of probation, could be dismissed without being afforded the greater procedural advantages available to permanent employees in the competitive service. [3] The underlying dispute between the parties arises over whether the more limited procedural requirements applicable to probationary employees were satisfied by petitioners in this case.

The procedural protections which the regulations **[****7]** accord to most dismissed probationary employees are limited. Commonly a Government agency may dismiss a probationary employee found unqualified for continued employment simply "by notifying him in writing as to why he is being separated and the effective date of the action." [4] **[****8]** More elaborate procedures are specified when the ground for terminating a probationary **[***173]** employee is "for conditions arising before appointment." [5] In such cases the regulations require that the employee receive "an advance written notice stating the reasons, specifically and in detail, for the proposed action"; that the employee be given an opportunity to respond in writing and to furnish affidavits in support of his response; that the agency "consider" any answer filed by the employee in reaching its decision; and that the employee be notified of the agency's decision at the earliest practicable date. [6] Respondent contends that **[**941]**

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[1] *Murray v. Kunzig, 149 U. S. App. D. C. 256, 462 F.2d 871 (1972)*. For a discussion of the Court of Appeals' jurisdiction, and the jurisdiction of this Court, see *infra*, at 86-88.

[2] 5 CFR § 315.801.

[3] Compare 5 CFR §§ 315.801-315.807 with *5 CFR § 752.101 et seq*.

[4] 5 CFR § 315.804.

[5] 5 CFR § 315.805.

[6] Section 315.805 reads in full:

"§ 315.805 Termination of probationers for conditions arising before appointment.

"When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the her termination **[*65]** was based in part on her activities while in the course of her previous employment in the Defense Intelligence Agency, and that therefore she was entitled to an opportunity to file an answer under this latter provision.

[**9]** The letter which respondent received from the Acting Commissioner, notifying her of the date of her discharge, stated that the reason for her discharge was her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors." After receipt of the letter, respondent's counsel met with a GSA personnel officer to discuss her situation and, in the course of the meeting, was shown a memorandum prepared by an officer of the Public Buildings Service upon which Sanders apparently based his decision to terminate respondent's employment. The memorandum contained both a discussion of respondent's conduct in her job with the Public Buildings Service and a discussion of her conduct during her previous employment at the Defense **[*66]** Intelligence Agency. Relying upon the inclusion of the information concerning her previous employment, respondent's counsel requested that she be given a detailed statement of the charges against her and an opportunity to reply -- the procedures to which she would be entitled under the regulations if in fact the basis of her discharge had been conduct during her previous employment. This request was denied.

Respondent then **[****10]** filed an administrative appeal with the Civil Service Commission pursuant to the provisions of 5 CFR § 315.806 (c), alleging that her termination was subject to § 315.805 and was not effected in accordance with the procedural requirements of that section. [7] While **[***174]** her administrative appeal was pending undecided, she filed this action. Her complaint alleged that the agency had failed to follow the appropriate Civil Service regulations, alleged that her prospective discharge would deprive her of income and cause her to suffer the embarrassment of being wrongfully discharged, and requested a temporary restraining order and interim injunctive relief against her removal from employment pending agency determination of her appeal. The District Court granted the temporary restraining order at the time of the filing of respondent's complaint, and set a hearing on the application for a temporary injunction for the following week.

[**11]** At the hearing on the temporary injunction, the District Court expressed its desire to hear the testimony of Sanders in person, and refused to resolve the controversy on the basis of his affidavit which the Government offered to furnish. When the Government declined **[*67]** to produce Sanders, the court ordered the temporary injunctive relief continued, stating that "Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim." [8] **[**942]** The Government, desiring to test the authority of the District Court to enter such an order, has not produced Sanders, and the interim relief awarded respondent continues in effect at this time.

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employee is entitled to the following:

"(a) *Notice of proposed adverse action*. The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

"(b) *Employee's answer*. The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

"(c) *Notice of adverse decision*. The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806 (d)."

[7] Section 315.806 (c) reads:

"A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section."

[8] The order of the District Court stated in full:

"It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

"NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

"IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith."

[**12]** On the Government's appeal to the Court of Appeals for the District of Columbia Circuit, the order of the District Court was affirmed. Although recognizing that "Congress presumably could remove the jurisdiction of the District Courts to grant such equitable interim relief, in light of the remedies available," [9] the court found that the District Court had the power to grant relief in the absence of an explicit prohibition from Congress. The Court of Appeals decided that the District Court acted within the bounds of permissible discretion in requiring Sanders to appear and testify, [10] and in continuing the temporary injunctive relief until he was produced as a witness by the Government.

[*68] II

While it would doubtless be intellectually neater to completely separate the question whether a District Court has authority to issue any temporary injunctive relief **[****13]** at the behest of a discharged Government employee from the question whether the relief granted in this case was proper, we do not believe the questions may be thus bifurcated into two watertight compartments. **[***175]** We believe the basis for our decision can best be illuminated by taking up the various arguments which the parties urge upon us.

[2A]Petitioners point out, and the Court of Appeals below apparently recognized, that Congress has given the District Courts no express statutory authorization to issue temporary "stays" in Civil Service cases. Although Congress has often specifically conferred such authority when it so desired -- for example, in the enabling statutes establishing the NLRB, [11] **[****14]** the FTC, [12] the FPC, [13] and the SEC [14] -- the statutes governing the Civil Service Commission are silent on the question. [15] The rules and regulations **[*69]** promulgated pursuant to a broad grant of statutory authority likewise make no provision for interlocutory judicial intervention.

[**15]** The Court of Appeals nevertheless found that the district courts had traditional **[**943]** power to grant stays in such personnel cases. Commenting upon the Government's arguments for reversal below, the court stated:

"It is asserted that the Civil Service Commission has been given exclusive review jurisdiction. But, as noted initially, there is no statutory power in the Civil Service Commission to grant a temporary stay of discharge. Prior to the Civil Service Act a United States District Court would certainly have had jurisdiction and power to grant such temporary relief. The statute did not explicitly take it away, nor implicitly by conferring such jurisdiction and power on the CSC; we hold the District Court still has jurisdiction and may exercise the power under established standards in appropriate circumstances." [16]

[3A]If the **[****16]** issue were to turn solely on the earlier decisions of this Court examining the authority of federal courts to intervene in disputes about governmental employment, we think this assumption of the Court of Appeals is wrong. In *Keim v. United States, 177 U.S. 290 (1900)*, this Court held that the Court of Claims had no authority to award damages to an employee who claimed he **[*70]** had been wrongfully

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[9] *149 U. S. App. D. C., at 262 n. 21, 462 F.2d, at 877 n. 21*.

[10] *Id., at 263-264, 462 F.2d, at 878-879*.

[11] *29 U. S. C. §§ 160 (j)*, (*l*).

[12] *15 U. S. C. § 53 (a)*.

[13] *16 U. S. C. § 825m (a)*.

[14] *15 U. S. C. §§ 77t (b)*, *78u (e)*.

[15] [2B]

Respondent does suggest that *5 U. S. C. § 705* may confer authority to grant relief in this case. That section reads:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

The relevant legislative history of that section, however, indicates that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine, discussed *infra*, and not to fashion new rules of intervention for District Courts. See S. Rep. No. 752, 79th Cong., 1st Sess., 27, 44 (1945). Thus respondent's various contentions may be grouped under her primary theory discussed in the text.

[16] *149 U. S. App. D. C., at 265, 462 F.2d, at 880* (footnotes omitted).

discharged by his federal employer. [17] **[****18]** In *White v. Berry, 171 U.S. 366 (1898)*, **[***176]** a Government employee had sought to enjoin his employer from dismissing him from office, alleging that the removal would violate both the Civil Service Act and the applicable regulations. [18] The Circuit Court assumed jurisdiction and issued an order prohibiting the defendant from interfering **[*71]** with the plaintiff's discharge of his duty "'until he shall be removed therefrom by proper proceedings had under the Civil Service Act and the rules and regulations made thereunder or by judicial proceedings at law. . . .'" [19] This Court reversed. Discussing the apparently well-established principle that "'a court of equity will not, by injunction, **[****17]** restrain an executive officer from making a wrongful removal of a subordinate appointee,'" [20] the **[**944]** Court held that "the Circuit Court, sitting in equity, was without jurisdiction to grant the relief asked." [21]

[4]Respondent's case, then, must succeed, if at all, despite earlier established principles regarding equitable intervention **[****19]** in disputes over tenure of governmental employees, and not because of them. Much water has flowed over the dam since 1898, and cases such as *Service v. Dulles, 354 U.S. 363 (1957)*, cited by the District Court in its memorandum opinion in this case, establish that federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations. [22] **[****20]** In that case, however, judicial **[***177]** proceedings **[*72]** were not commenced until the administrative remedy had been unsuccessfully pursued. [23] The fact that Government personnel decisions are now ultimately subject to the type of judicial review sought in *Service v. Dulles, supra*, does not, without more, create the authority to issue interim injunctive relief which was held lacking in cases such as *White v. Berry, supra.*

The Court of Appeals found support for its affirmance of the District Court's grant of injunctive relief in *Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942)*. In *Scripps-Howard* the licensee of a Cincinnati radio station petitioned the FCC to vacate an order permitting a

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[17] The Court there expressed the traditional judicial deference to administrative processes in the following terms:

"The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

"In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' *In re Hennen*, 13 Pet. 230, 259; *Parsons v. United States, 167 U.S. 324*. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." *177 U.S., at 293-294*.

[18] [3B]

The plaintiff in *White* protested that he was being discharged because of his political affiliation, a basis for discharge specifically prohibited under the Civil Service rules. *171 U.S., at 367-368*. Such a contention obviously went to the heart of the Civil Service legislation, since a primary purpose of that system was to remove large sectors of Government employment from the political "spoils system" which had previously played a large part in the selection and discharge of Government employees. See generally H. Kaplan, The Law of Civil Service 1-22 (1958).

[19] *171 U.S., at 374-375*.

[20] The Court quoted from *Morgan v. Nunn, 84 F. 551 (CCMD Tenn. 1898)*, and noted that "similar decisions have been made in other Circuit Courts of the United States." *171 U.S., at 377-378*.

[21] *Id., at 378*.

[22] In *Service* an employee discharged under the provisions of the McCarran Rider, 65 Stat. 581, contended that the Secretary of State had not followed departmental regulations in effecting his dismissal. This Court agreed with plaintiff's position and decided that his "dismissal cannot stand." *354 U.S., at 388*. However, the employee in that case had made a full effort to secure administrative review of his discharge prior to filing suit in the District Court. These efforts, as the Court noted, *id., at 370*, had "proved unsuccessful." In the present case respondent has petitioned the court before ascertaining whether administrative relief will be granted.

[23] See n. 22, *supra*.

Columbus radio station to change its frequency and to increase its broadcasting power. The licensee also requested a hearing. When the Commission denied the petition, the licensee filed a statutory appeal in the Court of Appeals for the District of Columbia and, in conjunction with the docketing of the appeal, asked the court to stay the FCC order pending its decision. The Court of Appeals, apparently departing from a longstanding policy of issuing such stays, [24] **[****21]** declined to do so in this case and ultimately certified the question of its power to this Court. [25]

[*73] This Court held that the Court of Appeals had power to issue the stay, analogizing it to the traditional stay granted by an appellate court pending review of an inferior court's decision:

"It has always been held, therefore, that as part of its traditional equipment for the administration of justice, [*] a federal court can stay **[****22]** the enforcement of a judgment pending the outcome of an appeal." [26] **[****23]**

[945]** But in *Scripps-Howard* the losing party before the agency sought an interim stay of final agency action pending statutory judicial review. [27] A long progression of cases in this **[***178]** Court had established the authority of a court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction. [28] The All Writs Act, first enacted as a part of the Judiciary Act of 1789, provided statutory confirmation of this **[*74]** authority. [29] This Court in *Scripps-Howard* held that the same principles governed the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court even though not expressly conferred by the statute which confers appellate jurisdiction.

[1B] *Scripps-Howard, supra*, of course, is not the instant case. The authority of the District Court to review agency action under *Service v. Dulles, supra*, does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to applicable regulations. [30] Until administrative **[****24]** action has become final, no court is in a position to say that such action did or did not conform to applicable regulations. Here respondent had obtained no administrative determination of her appeal at the time she brought the action in the District Court. She was in effect asking that court to grant her, on an interim basis, relief which the administrative agency charged with review of her employer's action could grant her only after it had made a determination on the merits.

While both the District Court and the Court of Appeals

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[24] The Court pointed out that "even though the Radio Act of 1927 contained no provisions dealing with the authority for the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission." *Scripps-Howard Radio v. FCC, 316 U.S. 4, 13 (1942)*.

[25] The precise question certified was:

"'Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?'" *Id., at 6*.

The wording of the question certified makes clear that the Court was faced only with the situation in which an appeal has been filed seeking review of completed agency action.

[26] *Id., at 9-10*. In the Court's opinion a footnote, herein designated with an asterisk, referred to the All Writs Act, *28 U. S. C. § 1651 (a)*, which reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The reliance of the Court on this provision was noted by the Court of Appeals in its opinion in this case. *149 U. S. App. D. C., at 261 n. 17, 462 F.2d, at 876 n. 17*.

[27] See n. 25, *supra*.

[28] For example, the two cases cited by the Court in *Scripps-Howard* involved situations in which a court accepted appeal jurisdiction and, in connection with that acceptance, issued a stay of the decision below. See *In re Claasen, 140 U.S. 200 (1891)* (writ of error to this Court); *In re McKenzie, 180 U.S. 536 (1901)* (appeal taken to the Circuit Court of Appeals). The All Writs Act, n. 26, *supra*, provided the authority in each case.

[29] See n. 26, *supra*.

[30] See n. 22, *supra*. As noted above, the employee in *Service* sought to have the Secretary's action declared invalid within the administrative system. He sought judicial relief only after it became evident that no administrative relief would be forthcoming.

characterized the District Court's intervention as a "stay," the mandatory retention of respondent in the position from which she was dismissed actually served to provide the most extensive relief which she might conceivably **[****25]** obtain from the agency after its review on the merits. It may well be that the Civil Service Commission, should it have agreed with respondent's version of the basis for her dismissal, would prohibit the final **[*75]** separation of respondent unless and until proper procedures had been followed. But this is not to say that it would hold respondent to be entitled to full reinstatement with the attendant tension with her superiors that the agency intended to avoid by dismissing her. Congress has provided that a wrongfully dismissed employee shall receive full payment and benefits for any time during which the employee was wrongfully discharged from employment.[31] The Civil Service Commission **[***179]** **[**946]** could conceivably accommodate the conflicting claims in this case by directing respondent's superiors to provide her with an opportunity to reply by affidavit, and by ordering that she receive backpay for any period of her dismissal prior to the completion of the type of dismissal procedure required by the regulations.

[**26]** The Court in *Scripps-Howard* recognized that certain forms of equitable relief could not properly be granted by federal courts. The Court specifically contrasted the stay of a license grant and the stay of a license denial, finding that the latter would have no effect:

"Of course, no court can grant an applicant an authorization which the Commission has refused. **[*76]** No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize."[32]

Surely that conclusion would not vary depending upon whether the radio station had started broadcasting on its own initiative and sought to stay a Commission order directing it to cease. Yet here the District Court did authorize, on an interim basis, relief which the Civil Service Commission had neither considered nor authorized -- the mandatory reinstatement of respondent in her Government position. We are satisfied that *Scripps-Howard*, involving as **[****27]** it did the traditional authority of reviewing courts to grant stays, provides scant support for the injunction issued here.

The Court of Appeals also relied upon *FTC v. Dean Foods Co., 384 U.S. 597 (1966)*, in reaching its decision. There a closely divided Court held that a Court of Appeals having ultimate jurisdiction to review orders of the Federal Trade Commission might, upon the Commission's application,[33] grant a **[*77]** temporary injunction to preserve the controversy before the agency. The Commission's application alleged,

[31] The Back Pay Act is found at *5 U. S. C. § 5596*. The pertinent provisions read:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee --

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . ."

[32] *316 U.S., at 14*.

[33] A preliminary question of importance in *Dean Foods* was whether the Commission, in the absence of express statutory authorization, could petition the Court of Appeals for preliminary relief. This Court said:

"The Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act." *384 U.S., at 606*.

A contrary decision, the Court felt, would have made it virtually impossible for the Commission itself to undertake review of the proposed merger. The congressional grant of authority to the FTC in Clayton Act cases thus could have been frustrated.

[34] **[****29]** **[***180]** and the court accepted, [35] that refusal to grant the injunction **[**947]** would result in the practical disappearance of one of the entities whose merger the Commission sought to challenge. The disappearance, in turn, would mean that the agency, and the court entrusted by statute with authority to review the agency's decision, would be incapable of implementing their statutory duties by fashioning effective **[****28]** relief. Thus invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate.

Neither the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be similarly frustrated by a decision of the District Court remitting respondent to her administrative remedy. Certainly the Civil Service Commission will be able to weigh respondent's contentions and to order necessary relief without the aid of the District Court injunction. In direct contrast to the claim of the FTC in *Dean Foods* that its jurisdiction would be effectively defeated by **[*78]** denial of relief, the Commission here has argued that judicial action interferes with the normal agency processes. [36] And we see nothing in the record to suggest that any judicial review available under the doctrine of *Service* v. *Dulles* would be defeated in the same manner as review in *Dean Foods*.

[**30]** We are therefore unpersuaded that the temporary injunction granted by the District Court in this case was justified either by our prior decisions dealing with the availability of injunctive relief to discharged federal employees, or by those dealing with the authority of reviewing courts to grant temporary stays or injunctions pending full appellate review. If the order of the District Court in this case is to be upheld, the authority must be found elsewhere.

III

This Court observed in *Scripps-Howard* that "the search for significance in the silence of Congress is too often the pursuit of a mirage," *316 U.S., at 11*, and this observation carries particular force when a statutory scheme grants broad regulatory latitude to an administrative agency. In *Scripps-Howard* a careful review of the relevant statutory provisions and legislative history persuaded this Court that Congress had not intended to nullify the power of an appellate court, [37] having assumed jurisdiction after an agency decision, to issue stays in aid of its jurisdiction. The Court noted, in **[*79]** particular, that stays were allowed in other cases processed through the FCC [38] **[****32]** and that **[***181]** **[****31]** the Court of Appeals had routinely issued stays in similar cases before undertaking an unexpected shift in policy. [39] But, at the other end of the spectrum, in *Arrow Transportation Co.* v. *Southern R. Co., 372 U.S. 658 (1963)*, this Court held that a specific congressional grant of power to the ICC to suspend proposed rate modifications precluded the District Court from extending the suspension by temporary injunction. This was true despite arguments that district courts traditionally had **[**948]** such power and that Congress did not explicitly revoke the power by statute. [40] The Court there said:

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[34] *Id., at 599-600*. The complaint charged that one of the parties to the merger "'as an entity will no longer exist,'" *id., at 599*, and that "consummation of the agreement would 'prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits.'" *Id., at 600*. The Commission therefore was affirmatively asserting that the administrative remedy which it was authorized to fashion was inadequate.

[35] *Id., at 601*.

[36] In *Dean Foods* the Commission confessed its inability to fashion effective administrative relief. But petitioners here admit no such thing. Rather they strongly assert that the Back Pay Act, n. 31, *supra*, provides a complete remedy for any procedural irregularities which may have occurred in this case.

[37] *316 U.S., at 11-13*.

[38] The Court compared the provisions of §§ 402 (a) and 402 (b) of the Communications Act of 1934, 48 Stat. 1064. The former section specifically authorized temporary stays, through application of the Urgent Deficiencies Appropriation Act of Oct. 22, 1913, 38 Stat. 208, of orders of the Federal Communications Commission which were under review -- with certain exceptions. Those exceptions, which included the order there at issue, were treated under § 402 (b) which made no specific provision for such stays. The Court thus was required to consider whether Congress deliberately sought to deprive courts of a power in those cases not governed by the Urgent Deficiencies Act which had been expressly authorized for those cases which were governed by the Act.

[39] See n. 24, *supra*.

[40] Although acknowledging that the legislative history did not clearly establish "a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates," the Court concluded: "We cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole

"The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be **[*80]** out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." [41]

The overall scheme governing employees of the Federal Government falls neatly within neither of these precedents. Unlike *Scripps-Howard*, traditional stay practice lends little support to the sort of relief which the District Court granted respondent here, and the precedents dealing with the availability of equitable relief to discharged Government employees are quite unfavorable to respondent. Unlike *Arrow Transportation, supra*, the administrative structure is far more a creature of agency regulations than of statute. We are thus not prepared **[****33]** to conclude that Congress in this class of cases has wholly divested the district courts of their customary authority to grant temporary injunctive relief, and to that extent we agree with the Court of Appeals. But merely because the factors relied upon by the Government do not establish that the district courts are wholly bereft of the authority claimed for them here does not mean, as the Court of Appeals appeared to believe, that temporary injunctive relief in this class of cases is to be dispensed without regard to those factors. While considerations similar to those found sufficient in *Arrow Transportation* to totally deprive the district courts of equitable authority do not have that force here, they nonetheless are entitled to great weight in the equitable balancing process which attends the grant of injunctive relief.

[5]We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive **[***182]** and procedural protections, [42] **[****35]** but with a probationary employee, a class which Congress **[*81]** has specifically recognized as entitled **[****34]** to less comprehensive procedures. Title *5 U. S. C. § 3321*, derived from the original Pendleton Act, [43] requires the creation of this classification:

"The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."

It is also clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles, [44] commonly veterans, are entitled to hearing procedures extended to persons in the competitive service *only after they have completed* "a probationary or trial period." [45] Persons suspended **[**949]** for national security reasons are given expanded protection *provided they have completed a trial or probationary period*. [46]

[6]The Civil Service regulations are consistent with these statutes. These regulations are promulgated **[****36]** by the Civil Service Commission as authorized by Congress in **[*82]** *5 U. S. C. §§ 1301-1302*. [47] **[****37]** Part 752, the regulations governing adverse agency actions, provides certain procedural safeguards for employees but, as did the statutes cited above, exempts "employee[s] currently serving a probationary or trial period." [48] Such employees are remitted to the procedures specified in subpart H of Part

problem to a head." ***372 U.S., at 664***.

[41] ***Id., at 668***. (Emphasis in original.)

[42] See *5 U. S. C. § 7501*.

[43] 22 Stat. 404.

[44] See *5 U. S. C. § 2108 (3)*.

[45] *5 U. S. C. §§ 7511-7512*. *Section 7511* defines a "preference eligible employee" as "a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia . . . ," subject to certain exceptions. Section 7512 provides that such an employee must receive written notice of the reasons for proposed adverse action, a chance to reply in writing and by affidavit, and notice of an adverse decision. A probationary employee, under the regulations, has more limited rights. See 5 CFR § 315.801 *et seq*.

[46] *5 U. S. C. § 7532 (c)(2)*.

[47] Title *5 U. S. C. § 3301 et seq.* grants to the President authority to promulgate rules and regulations governing the Civil Service. Title *5 U. S. C. § 1301* provides that "the Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." Title *5 U. S. C. § 1302* empowers the Commission to prescribe regulations, "subject to the rules prescribed by the President . . . ."

[48] *5 CFR § 752.103 (a)(5)*.

315, [49] the procedures at issue here. Under *§ 752.202* of the regulations permanent competitive service employees are to be retained in an active-duty status only during the required 30-day-notice period, and the Commission is given no authority to issue additional stays. [50] It cannot prevent the dismissal of an employee or order his reinstatement prior to hearing and determining his **[***183]** appeal on the merits. Reasonably, a probationary employee could be entitled to no more than retention on active duty for the period preceding the effective date of his discharge.

Congress has also provided a broad remedy for cases of improper suspension or dismissal. The Back Pay Act of 1948 [51] supplemented the basic Lloyd-LaFollette Act **[*83]** of 1912 and provided that any person in the competitive Civil Service who was unjustifiably discharged and later restored to his position was entitled to full backpay for the time he was out of work. The benefits of this Act were extended to additional employees, including probationary employees, in 1966. [52] Respondent was eligible for full compensation **[****38]** for any period of improper discharge under this section.

As we have noted, respondent's only substantive claim, either before the District Court or in her administrative appeal, was that petitioners had violated the regulations promulgated by the Civil Service Commission. Those same regulations provided for an appeal to the agency which promulgated the regulations and further provided that until that appeal had been heard on the merits, the employer's discharge of the employee was to remain in effect. Respondent, however, sought judicial intervention before fully utilizing the administrative scheme.

[7A]The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical **[****39]** denial of all equitable relief by the federal courts in cases such as *White v. Berry, 171 U.S. 366 (1898)*,the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," **[**950]** *Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961)*, and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee, 5A A. Corbin, Contracts § 1204 (1964), we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional **[*84]** standards governing more orthodox "stays." See *Virginia Petroleum Jobbers Assn.* v. *FPC, 104 U. S. App. D. C. 106, 259 F.2d 921 (1958)*.[53] Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against **[****40]** the general availability of preliminary injunctions in Government personnel cases. We now turn to the showing made to the District Court on that issue, and to the Court of Appeals' treatment of it.

IV

The Court of Appeals said in its opinion:

[*184]** "Without passing on the merits of Mrs. Murray's contention that she will suffer irreparable harm if the sought-for-relief is not granted (a task for the District Court here), we note that there was a determination that such a loss of employment could be 'irreparable harm' in Reeber v. Rossell **[****41]** (1950), a case quite similar to that at bar. We agree with the

[49] 5 CFR § 315.801 *et seq*.

[50] Title *5 CFR § 752.202 (d)* reads in part:

"Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period."

Section 752.202 (a)(1) provides that "at least 30 full days' advance written notice" is required.

[51] See n. 31. *supra*.

[52] 80 Stat. 94, 95.

[53] These considerations were set forth by the majority below as follows:

"(1) Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?" *149 U. S. App. D. C., at 263, 462 F.2d, at 878*.

Reeber court that such a loss of employment *can* amount to irreparable harm, and that injunctive relief *may* be a proper remedy pending the final administrative determination of the validity of the discharge by the Civil Service Commission." [54] **[****42]**

[*85] At another point in its opinion, the Court of Appeals said:

"As the District Court here felt that the hearing on the motion for the preliminary injunction could not be completed until Mr. Sanders was produced to testify, it was proper for him to continue the stay, in order to preserve the *status quo* pending the completion of the hearing." [55]

The court in its supplemental opinion filed after the Government's petition for rehearing further expanded its view of this aspect of the case:

"The court's opinion does not hold, and the trial judge has not yet held, that interim relief *is proper* in Mrs. Murray's case, but we do hold that the trial judge may consider granting such relief, as this is inherent in his historical equitable role." [56]

In form the order entered by the District Court now before us is a continuation of the temporary restraining order originally issued by that court. [57] It is clear from the Court of Appeals' opinion that that court so construed it. But since the order finally settled upon by the District Court was in no way limited in time, the provisions of *Fed. Rule Civ. Proc. 65* come into play. That Rule states, in part:

"(b) A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it **[**951]** clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before **[*86]** the adverse party or his attorney can be heard in opposition . . . . Every temporary restraining order granted without notice . **[****43]** . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

[8]The Court of Appeals whose judgment we are reviewing has held that a temporary restraining order continued beyond the time permissible under *Rule 65* must be treated as a preliminary injunction, and must conform to the standards applicable **[***185]** to preliminary injunctions. *National Mediation Board v. Airline Pilots Assn., 116 U. S. App. D. C. 300, 323 F.2d 305 (1963)*. We believe **[****44]** that this analysis is correct, at least in the type of situation presented here, and comports with general principles imposing strict limitations on the scope of temporary restraining orders. [58] A district **[*87]** court, if it were able to shield its

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[54] *Id., at 262, 462 F.2d, at 877* (emphasis in original).

[55] *Id., at 265, 462 F.2d, at 880*.

[56] *Id., at 270, 462 F.2d, at 885* (emphasis in original).

[57] See n. 8, *supra*.

[58] The Court of Appeals for the Second Circuit, in an opinion cited by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board v. Airline Pilots Assn., 116 U. S. App. D. C. 300, 323 F.2d 305 (1963)*, described these principles as follows:

"It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in *Rule 65 (b)* by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

"It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions. *28 U. S. C. § 1292 (a)(1)*. To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued *without* a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision.

"We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of *28 U. S. C. § 1292 (a)(1)*." *Pan American World Airways v. Flight Engineers' Assn., 306 F.2d 840, 843 (1962)*. (Citations omitted; emphasis in original.)

orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore we **[*88]** view the order at issue here as a preliminary injunction.

[**45]** [7B] [9] [10]We believe that the Court of Appeals was quite wrong in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable **[**952]** injury. [59] **[****47]** This Court has stated that "the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," *Beacon Theatres, Inc*. v. Westover, 359 U.S. 500, 506-507 (1959), and the Court of Appeals itself in *Virginia Petroleum Jobbers Assn*. v. FPC, 104 U. S. App. D. C. 106, ***[***186]*** 259 F.2d 921 (1958), has recognized as much. Yet the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations **[****46]** relevant to irreparable injury. [60] We are therefore somewhat puzzled **[*89]** about the basis for the District Court's conclusion that respondent "may suffer immediate and irreparable injury." The Government has not specifically urged this procedural issue here, however, and the Court of Appeals in its opinion discussed the elements upon which it held that the District Court might base a conclusion of irreparable injury. Respondent's unverified complaint alleged that she might be deprived of her income for an indefinite period of time, that spurious and unrebutted charges against her might remain on the record, and that she would suffer the embarrassment of being wrongfully discharged in the presence of her coworkers. [61] The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief. [62] We disagree. [63]

Our Brother MARSHALL, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed. Rule Civ. Proc. 52 (a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief. As discussed below, nothing in the pleadings or affidavits, or in the testimony at the hearing before the District Court, demonstrates that this is an extraordinary case supporting the award of judicial relief. See n. 68, *infra*.

[59] We note that Rule 65 requires a showing of irreparable injury for the issuance of a temporary restraining order as well. Therefore, for the purposes of this part of the discussion, it would make no difference that the order was styled a temporary restraining order, rather than a preliminary injunction.

[60] The affidavit in its entirety states:

"JEANNE M. MURRAY, being first duly sworn, deposes as follows:

"1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS-13.

"2. On May 20, 1971, at approximately five p. m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971.

"3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there.

"4. I worked for slightly over a year at the DIA, and I have been informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me.

"5. In recent weeks, I was informed by Mr. William Mulroney, a DIA employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there."

[61] Complaint, par. 12.

[62] *149 U. S. App. D. C., at 262, 462 F.2d, at 877*.

[63] The Court of Appeals held that the Government's failure to produce witness Sanders, after the District Court chose to hear him orally, rather than to rely on his affidavit, allowed the District Court to continue the temporary restraining order until Sanders appeared. We have no doubt that a district court in appropriate circumstances may be justified in resolving against a party refusing to produce a witness under his control the relevant issues upon which that witness' testimony might have touched. But it is clear from the record that the testimony of the witness Sanders was desired to test the basis

[**48] [*90]** Even under the traditional standards of *Virginia Petroleum Jobbers, supra*, it seems clear that the temporary loss of **[**953]** income, ultimately to be recovered, does not usually constitute **[***187]** irreparable injury. [64] **[****50]** In that case the court stated:

"The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." [65]

This premise is fortified by the Back Pay Act discussed above. [66] This Act not only affords monetary relief which will prevent the loss of earnings on a periodic basis from being "irreparable injury" in this type of case, but **[*91]** its legislative history suggests that Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge. The manager of the bill on the floor of the **[****49]** Senate, Senator Langer, commented on the bill at the time of its passage:

"[It] . . . provides that an agency or department of the Government may remove any employee at any time, but that the employee shall then have a right of appeal. When he is removed, he is of course off the pay roll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended." [67]

Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge.

[11A]Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, **[****51]** we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the **[*92]** issuance of a temporary injunction in this type of case. [68] We therefore reverse the decision **[**954]** of the Court of Appeals which

upon which respondent was discharged, testimony which, of course, would go to the issue of respondent's ultimate chances for success on the merits. While the District Court may well have been entitled to resolve *that* issue against the Government at that stage of the proceeding, this conclusion in no way dispenses with the necessity for a conclusion that irreparable injury will occur, since that is a separate issue that must be proved to the satisfaction of the Court by the person seeking equitable relief.

[64] It should be noted that *Virginia Petroleum Jobbers* dealt with a fact situation quite dissimilar to this one. There the Federal Power Commission had denied petitioner leave to intervene in proceedings before the Commission. In conjunction with appeal of that decision the petitioner had filed a "motion for a stay of further proceedings pending completion of [the Court's] review of the Commission's orders denying intervention or rehearing." *104 U. S. App. D. C., at 109, 259 F.2d, at 924*. Such a fact situation was far closer to the traditional situation in which equity powers have been employed to grant a stay pending appeal than is the situation involved in the instant case.

[65] *Id., at 110, 259 F.2d, at 925* (emphasis in original).

[66] N. 31, *supra*.

[67] 94 Cong. Rec. 6681 (1948).

[68] [11B]

We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case. See also *Wettre v. Hague, 74 F.Supp. 396 (Mass. 1947)*; vacated and remanded on other grounds, ***168 F.2d 825 (CA1 1948)***.

approved the action of the District Court.

[**52]** *It is so ordered*.

Dissent by: DOUGLAS; MARSHALL

Dissent

[*188]** MR. JUSTICE DOUGLAS, dissenting.

I think with all respect that while the narrow isolated issue involved in this litigation is exposed in the opinion of the Court the nature of the problem is not.

Respondent, a probationary employee, claims that her discharge was not based exclusively on her work as a probationary employee. If it were based on her work as a probationary employee, the procedure is quite summary and her right of appeal to the Civil Service Commission is limited to only a few grounds such as discrimination based on race, color, religion, sex, or national origin, 5 CFR § 315.806. But her claim is that her discharge was based, at least in part, on conduct prior to her federal employment. In case that prior conduct is the basis of the discharge, the employee is entitled to advance notice of proposed termination, an opportunity **[*93]** to respond in writing with supporting affidavits, and notice of any adverse decisions on or prior to the effective date of the termination, 5 CFR § 315.805.

The Congress in 1966 provided that all wrongfully discharged **[****53]** federal employees, including probationary employees are entitled to backpay, *5 U. S. C. § 5596*, and the Court concludes that that is the employee's exclusive remedy.

But where an agency has terminated employment and the employee appeals to the Civil Service Commission, the Commission has no power to issue a stay of the agency's action. This is, therefore, not a case where the employee has gone to the courts for relief which the Commission could have granted but refused to do so. Nor is respondent challenging the Civil Service law; nor is she asking for a ruling on the merits of her claim; nor did the District Court, whose judgment was affirmed by the Court of Appeals, act in derogation of the administrative process. Rather, it protected that process by staying the discharge until the Commission had ruled on the appeal.

The power to issue a stay is inherent in judicial power and as indicated by the Court rests on the exercise of an informed discretion on a showing of irreparable injury to the applicant or to the public interest, *Scripps-Howard Radio v. FCC, 316 U.S. 4, 14*. That doctrine is not limited, as the Department of Justice **[****54]** suggests, to issuance of stays by a court only after an appeal has been taken. We held in *FTC v. Dean Foods Co., 384 U.S. 597, 603-604*, that the All Writs Act, *28 U. S. C. § 1651*, which empowers federal courts to "'issue all writs necessary or **[***189]** appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,'" extends to "potential jurisdiction of the appellate court where an **[*94]** appeal is not then pending but may be later perfected." The District Court has at least a limited review of the Commission, *Norton v. Macy, 135 U. S. App. D. C. 214, 217, 417 F.2d 1161, 1164*; *Dozier v. United States, 473 F.2d 866*. Hence the All Writs Act justified its power to grant a stay.

We have, therefore, a case where a stay supplements and does not curtail administrative power, the Commission having no authority to grant that relief. The District Court power preserves the status quo, does not pass on the merits of the controversy, and limits its stay to the date when the merits of the discharge are adjudicated by the Commission. I agree with the Court **[****55]** that that order was appealable.

A point is made that respondent has not shown irreparable injury. That misstates the issue. The District Court issued a stay pending a hearing on whether a temporary injunction should issue. The hearing, if held, would encompass two issues: (1) whether the grounds for respondent's discharge antedated her present employment (see *149 U. S. App. D. C. 256, 269, 462 F.2d 871, 884)* and were not restricted to her record as **[**955]** a probationary employee; [1] and (2) whether she would suffer irreparable injury. As stated by the Court of Appeals, respondent "may show . . . irreparable damage, if the hearing before Judge Gasch is allowed to proceed to a decision." *Id., at 269, 462 F.2d, at 884*. The stay was issued by the District Court only because the federal **[*95]** agency involved refused to produce

[1] Where, as here, conduct prior to appointment as a probationary employee as well as conduct during the period of employment is alleged to be the basis of the discharge, the requirements of procedural due process are obvious. We said in *Wieman v. Updegraff, 344 U.S. 183, 192*, "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." And see *Schwartz v. Covington, 341 F.2d 537, 538*.

as a witness the officer who had decided to discharge respondent. Both the District Court and the Court of Appeals were alert to the necessity to show irreparable injury before an injunction issues.

[**56]** On that issue there is more than meets the eye.

Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available. And the harm is not eliminated by the possibility of reinstatement, for in many cases the ultimate absolution never catches up with the stigma of the accusation. Thus the court in *Schwartz v. Covington, 341 F.2d 537, 538*, issued a stay upon a finding of irreparable injury where a serviceman was to be discharged for alleged homosexual activity: "Appellee has shown that he will suffer irreparable damage if the stay is not granted. Irrespective of the government's recent assurance that the appellee would be reinstated if he prevails upon review of his discharge, the injury and the stigma attached to an undesirable discharge are clear." Unlike a layoff or discharge due to fortuitous circumstances such as the so-called energy crisis, a discharge on the basis of **[***190]** an employee's lifetime record or on the basis of captious **[****57]** or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life. And we cannot denigrate the importance of one's social standing or the status of social stigma as legally recognized harm. In *Ah Kow v. Nuan, 5 Sawy. 552*, the Circuit Court, speaking through Mr. Justice Field, held that a Chinese prisoner could recover damages from the sheriff who cut off his queue, the injury causing great mental anguish, disgrace **[*96]** in the eyes of friends and relatives, and ostracism from association with members of his own race.

There is no frontier where the employee may go to get a new start. We live today in a society that is closely monitored. All of our important acts, our setbacks, the accusations made against us go into data banks and are instantly retrievable by the computer. [2] **[****59]** An arrest goes into the data bank even though it turns out to be unconstitutional or based on mistaken identity. There is no federal procedure for erasing arrests. While they arise in 50 States as well as in the federal area, only a few States have procedures for erasing them; and that entails a long and laborious **[**956]** procedure.[3] Moreover, **[****58]** **[*97]** this generation grew up in the age where millions of people were screened for "loyalty" and "security"; and many were discharged from the federal service; many resigned rather than face the ordeal of the "witch hunt" that was laid upon them. Discharge from the federal service or resignation under fire became telltale signs of undesirability. Therefore, the case of irreparable injury for an unexplained discharge from federal employment may be plain enough on a hearing.

The District Court and the Court of Appeals were well within the limits of the law in granting a stay so that the issue of irreparable injury might be determined. It hardly comports **[****60]** with any standard for the expenditure of judicial energies to spend our time trying to find error in the exercise of the lower court's discretion to protect federal employees by giving them at least a chance to prove irreparable injury.

[*191]** MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In my view no appealable order has been entered in this

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[2] With dossiers being compiled by commercial credit bureaus, state and local law enforcement agencies, the CIA, the FBI, the IRS, the Armed Services, and the Census Bureau, we live in an Orwellian age in which the computer has become "the heart of a surveillance system that will turn society into a transparent world." Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Col. Human Rights L. Rev. 1, 2 (1972). Although the subject of congressional concern, the problem is one which has thus far avoided legislative correction. See Federal Data Banks, Computers and the *Bill of Rights*, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). See also A. Miller, The Assault on Privacy (1971).

[3] Illinois provides that photographs, fingerprints, etc., be returned to unconvicted arrestees upon acquittal or release and further provides that the arrestee may petition a local court to have the record expunged by the arresting authorities. There is, however, no method for retrieving records which have been distributed to other law enforcement authorities or to private individuals. Ill. Rev. Stat., c. 38, § 206-5 (1973). Connecticut has a statute with similar shortcomings. *Conn. Gen. Stat. Ann. § 54-90* (Supp. 1971); see Satter & Kalom, False Arrest: Compensation and Deterrence, 43 Conn. B. J. 598, 612-613. New York's former Penal Law provided that all fingerprints, photographs, etc., of those acquitted of criminal charges had to be returned to the individual *if* no other criminal proceedings were pending against the individual and he had no prior convictions. N. Y. Penal Law § 516 (1909).

case, and both the Court of Appeals and this Court accordingly lack jurisdiction.

The orders issued by the District Court are both temporary restraining orders. The first, issued on May 28 and captioned "Temporary Restraining Order," enjoined Mrs. Murray's dismissal until the determination of her application for an injunction. The second, issued on June 4 and also captioned "Temporary Restraining Order," provides "that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders." At no time did the District Court indicate it was issuing anything but a temporary restraining order. During the hearing on the application for a preliminary injunction, after the court indicated **[*98]** it wanted to hear from Mr. Sanders **[****61]** in person, the Government informed the court that Mr. Sanders was then out of town on vacation. The court replied: "Let me know when he can be available." Counsel for the Government responded: "Very well." And the District Court then said: "The T. R. O. will be continued until he shows up. . . . Tell the agency I will continue the temporary restraining order until the witness appears." Tr. 10.

It is well settled that the grant or denial of a temporary restraining order is not appealable, except in extraordinary circumstances, not present here, where the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the suit. See generally 11 C. Wright & A. Miller, Federal Practice & Procedure § 2962, pp. 616-617 (1973), and cases there cited.

The Court holds, however, that since the temporary restraining order was extended by the District Court beyond the time limitation imposed by *Fed. Rule Civ. Proc. 65 (b)*, it became an appealable preliminary injunction. I cannot agree. *Federal Rule Civ. Proc. 52 (a)* expressly provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings **[****62]** of fact and conclusions of law which constitute the grounds of its action." This Rule applies to preliminary injunctions, **[**957]** and as no findings of fact and conclusions of law have yet been filed in this case, no valid preliminary injunction was ever issued. See *National Mediation Board v. Air Line Pilots Assn., 116 U. S. App. D. C. 300, 323 F.2d 305 (1963)*; *Sims v. Greene, 160 F.2d 512 (CA3 1947)*.

Nor would it make sense for this Court to review the District Court's order in this case as the grant of a preliminary injunction. Where the District Court has not entered findings of fact and conclusions of law under **[*99]** *Rule 52 (a)*, meaningful review is well-nigh impossible. "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with *Rule 52 (a)* of the Rules of Civil Procedure." *Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940)*.

It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority **[****63]** over the **[***192]** parties in an injunctive action. At the outset, this cannot justify this Court's reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with *Rule 52 (a)*. This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board, supra*, on which the majority relies. See also *Sims v. Greene, supra.*

In addition, the Government had other courses it could have taken in this case. In view of the District Court's error in granting a restraining order of unlimited duration without complying with the requirements for a preliminary injunction, the Government could have moved the District Court to dissolve its order indefinitely continuing the temporary restraining order. *Rule 65 (b)* expressly provides for such a motion. [1] Had the Government followed this course, the District Court could have **[*100]** corrected its error and gone on to resolve the issues presented by the application for a preliminary injunction. **[****64]** The end result would have been the grant or denial of a preliminary injunction, with findings of fact and conclusions of law, which we could meaningfully review.

Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a preliminary injunction, when neither the District Court nor the Court of Appeals has yet

[1] "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." *Fed. Rule Civ. Proc. 65 (b)*.

confronted the latter issue. [2] I do not believe this makes for sound law.

[**65]** Since the majority persists in considering the merits of Mrs. Murray's claim for injunctive relief, some additional comment is in order. I agree with the majority's conclusion that Congress did not divest federal courts of their long-exercised authority to issue temporary injunctive relief pending the exhaustion of both administrative and judicial review of an employee's claim of wrongful dismissal. I cannot accept, however, the way in which the majority opinion then proceeds to take away with the left hand what it has just given with the right, by **[**958]** precluding injunctive relief in all but so-called "extraordinary cases," whatever they may be.

At the outset, I see no basis for applying any different standards for granting equitable relief in the context of a discharged probationary employee than the long-recognized principles of equity applied in all other situations. See *Virginia Petroleum Jobbers Assn*. v. *FPC, 104 U. S. App. D. C. 106, 259 F.2d 921 (1958)*. Indeed, it appears that the factors which the **[*101]** majority would have courts weigh before granting injunctive relief are all encompassed within the traditional formulations. **[***193]** **[****66]** The adequacy of backpay as a remedy, for example, is relevant in determining whether the party seeking relief has shown that "without such relief, it will be irreparably injured." *Id., at 110, 259 F.2d, at 925*. Likewise, the possible disruptive effect which temporary injunctive relief might have on the office where respondent was employed or on the administrative review process itself relates to whether "the issuance of a stay [will] substantially harm other parties interested in the proceedings." *Ibid*.

However one articulates the standards for granting temporary injunctive relief, I take it to be well settled that a prerequisite for such relief is a demonstrated likelihood of irreparable injury for which there is no adequate legal remedy. But I cannot accept the majority's apparent holding, buried deep in a footnote, that because of the Back Pay Act, a temporary loss in income can never support a finding of irreparable injury, no matter how severely it may affect a particular individual. See *ante*, at 92 n. 68. Many employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide **[****67]** themselves with the essentials of life -- *e. g*., to buy food, meet mortgage or rent payments, or procure medical services. Cf. *Goldberg v. Kelly, 397 U.S. 254, 264 (1970)*. Government employees might have skills not readily marketable outside the Government, making it difficult for them to find temporary employment elsewhere to tide themselves over until the lawfulness of their dismissal is finally determined. In some instances, the likelihood of finding alternative employment may be further reduced by the presence on the employee's records of the very dismissal at issue. Moreover, few employers will be willing to hire and train a new employee knowing **[*102]** he will return to his former Government position if his appeal is successful. Finally, the loss of income may be "temporary" in only the broadest sense of that word. Not infrequently, dismissed federal employees must wait several years before the wrongful nature of their dismissal is finally settled and their right to backpay established. See, *e. g., Paroczay v. United States, 177 Ct. Cl. 754, 369 F.2d 720 (1966)*; *Paterson v. United States, 162 Ct. Cl. 675, 319 F.2d 882 (1963)*. **[****68]**

The availability of a backpay award several years after a dismissal is scant justice for a Government employee who may have long since been evicted from his home and found himself forced to resort to public assistance in order to support his family. And it is little solace to those who are so injured to be told that their plight is "normal" and "routine." Whether common or not, such consequences amount to irreparable injury which a court of equity has power to prevent.

Nor can I agree with the majority's analysis of Mrs. Murray's claim of damaged reputation. It is argued that Mrs. Murray can suffer no significant loss of reputation by procedural irregularities in effectuating her discharge because her claim is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural **[**959]** safeguards in effectuating the discharge. *Ante*, at 91. In my view, this analysis not only reflects a total misunderstanding of the gist **[***194]** of Mrs. Murray's complaint, but also fails to comprehend the purposes behind the Civil Service Commission regulations at issue here.

The Commission provides a special **[****69]** pretermination procedure where a probationary employee is to be terminated "for conditions arising

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[2] The Court of Appeals expressly stated that it was not evaluating Mrs. Murray's claim of irreparable injury because "any such finding . . . is for the trial judge, who has not yet [decided (and may never decide)] this point in favor of Mrs. Murray." *149 U. S. App. D. C. 256, 262 n. 21, 462 F.2d 871, 877 n. 21 (1972)*.

before appointment," not as an empty gesture, but rather because the employing agency might be mistaken about these preappointment conditions, and might decide not to dismiss the employee **[*103]** if he is given an opportunity to present his side of the story. Mrs. Murray does not seek a hearing as an end in itself, but rather to correct what she believes is a mistaken impression the agency had about her conduct in her prior job, in the hope that with the record straight, the agency would not discharge her. She seeks to save her job and to avoid the blot on her employment record that a dismissal entails, and it is in this sense that she claims her dismissal would injure her reputation.

Whether the likelihood of irreparable injury to Mrs. Murray if she is not allowed to retain her job pending her administrative appeal, when balanced against the Government's interests in having her out of the office during this period, supports equitable relief in the present case is a question I would leave for the District Court. Because of Mr. Sanders' absence, the District Court cut short its **[****70]** hearing on the application for a preliminary injunction before either the Government or Mrs. Murray had an opportunity to present witnesses or other evidence. Mrs. Murray still has not had her day in court to present evidence supporting her allegation of irreparable injury, and what that evidence would be were she given that opportunity we can only speculate.

References

15 Am Jur 2d, Civil Service 33- 40, *47*

5 Am Jur Pl & Pr Forms (Rev ed), Civil Service, Forms 11 et seq.

US L Ed Digest, Civil Service 5; Injunction 149

ALR Digests, Civil Service 10.9; Injunction 208

L Ed Index to Annos, Civil Service; Injunction; Officers

ALR Quick Index, Civil Service; Injunctions; Public Officers and Employees

Federal Quick Index, Civil Service; Injunctions; Public Officers and Employees

Annotation References:

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. *19 ALR3d 403*.

Pre-employment conduct as ground for discharge of civil service employee having permanent status. *4 ALR3d 488*.

Validity, construction, **[****71]** and application of probationary provisions of civil service statutes or regulations. 131 ALR 383.

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TAB 5

R.I. State Council of Churches v. Rollins

United States Court of Appeals for the First Circuit

November 9, 2025, Decided

No. 25-2089

Reporter

158 F.4th 304 *; 2025 U.S. App. LEXIS 29431 **; 2025 LX 599594; 2025 WL 3135862

RHODE ISLAND STATE COUNCIL OF CHURCHES; NATIONAL COUNCIL OF NONPROFITS; SERVICE EMPLOYEES INTERNATIONAL UNION; MAIN STREET ALLIANCE; CITY OF CENTRAL FALLS; CITY OF PAWTUCKET; CITY OF PROVIDENCE; CITY OF ALBUQUERQUE; CITY OF BALTIMORE; CITY OF COLUMBUS; CITY OF DURHAM; CITY OF NEW HAVEN; AMOS HOUSE; DR. MARTIN LUTHER KING, JR. COMMUNITY CENTER; EAST BAY COMMUNITY ACTION PROGRAM; FEDERAL HILL HOUSE ASSOCIATION; THE MILAGROS PROJECT; UNITED WAY OF RHODE ISLAND; NEW YORK LEGAL ASSISTANCE GROUP; BLACK SHEEP MARKET, Plaintiffs, Appellees, v. BROOKE L. ROLLINS, in her official capacity as Secretary of the United States Department of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; RUSSELL T. VOUGHT, in his official capacity as Director of the United States Office of Management and Budget; UNITED STATES OFFICE OF MANAGEMENT AND BUDGET; SCOTT BESSENT, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES, Defendants, Appellants.

Subsequent History: Later proceeding at *Rollins v. R.I. State Council of Churches, 223 L. Ed. 2d 220, 2025 U.S. LEXIS 4022 (Nov. 10, 2025)*

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. John J. McConnell, Jr., U.S. District Judge.

R.I. State Council of Churches v. Rollins, 808 F. Supp. 3d 370, 2025 U.S. Dist. LEXIS 218802, 2025 WL 3137496 (Nov. 6, 2025)

Counsel: Brett A. Shumate, Assistant Attorney General, Eric D. McArthur, Deputy Assistant Attorney General, Michael S. Raab, and Laura E. Myron, Attorneys, Appellate Staff Civil Division, U.S. Department of Justice, on brief for appellants.

Amy R. Romero, Kevin Love Hubbard, DeLuca, Weizenbaum, Barry & Revens, Ltd., Kristin Bateman, Catherine M.A. Carroll, Jyoti Jasrasaria, Michael J. Torcello, Andrew Liang Bookbinder, Adnan Perwez, Robin F. Thurston, Skye L. Perryman, and Democracy Forward Foundation, on brief for appellees.

Jonathan Miller, Jenny Ma, Jean Larsen, and Public Rights Project, on brief for local governments and local government leaders as amici curiae in support of appellees.

Andrea Joy Campbell, Attorney General of Massachusetts, Anna Lumelsky, Deputy State Solicitor, Michelle Pascucci, Vanessa Arslanian, State Trial Counsel, Liza Hirsch, Chief, Children's Justice Unit, Cassandra Thomson, Rauvin Johl, Peter Walkingshaw, Jak Kundl, Assistant Attorneys General, Katherine Dirks, Chief State Trial Counsel, Kristin K. Mayes, Attorney General of Arizona, Rob **[**2]** Bonta, Attorney General of California, Philip J. Weiser, Attorney General of Colorado, William Tong, Attorney General of Connecticut, Kathleen Jennings, Attorney General of Delaware, Brian L. Schwalb, Attorney General of the District of Columbia, Anne E. Lopez, Attorney General of Hawai'i, Kwame Raoul, Attorney General of Illinois, Laura Kelly, in her official capacity as Governor of Kansas, Andy Beshear, in his official capacity as Governor of Kentucky, Aaron M. Frey, Attorney General of Maine, Anthony G. Brown, Attorney General of Maryland, Dana Nessel, Attorney General of Michigan, Keith Ellison, Attorney General of Minnesota, Aaron D. Ford, Attorney General of Nevada, Matthew J. Platkin, Attorney General of New Jersey, Raúl Torrez, Attorney General of New Mexico, Letitia James, Attorney General of New York, Jeff Jackson, Attorney General of North Carolina, Dan Rayfield, Attorney General of Oregon, Josh Shapiro, in his official capacity as Governor of Pennsylvania, Peter F. Neronha, Attorney General of Rhode Island, Charity R. Clark, Attorney General of Vermont, Nicholas W. Brown, Attorney General of Washington, and Joshua L. Kaul, Attorney General of

Wisconsin, on brief for Massachusetts, **[**3]** et al., as amici curiae in support of appellees.

Elizabeth B. Deutsch, Laurel A. Raymond, Brian Hauck, Jenner & Block LLP, Julia Spiegel, Emily Kirby, Allegra Chapman, Carlos Guevara, Inbar Pe'er, and Governors Action Alliance, on brief for bipartisan former governors as amici curiae in support of appellees.

Judges: Before Barron, Chief Judge, Gelpí and Rikelman, Circuit Judges.

Opinion by: RIKELMAN

Opinion

[*307] **RIKELMAN, Circuit Judge**. Forty-two million people, one out of every eight Americans, use monthly benefits from the federal Supplemental Nutrition Assistance Program (SNAP) to buy food for themselves and their families. On October 24, 2025, a few weeks into the current government shutdown, the United States Department of Agriculture (USDA), which administers SNAP on behalf of the federal government, announced it would not provide any funds for November SNAP benefits. The plaintiffs in this case -- nonprofits, local governments, a union, and a food retailer -- sued to require USDA to provide full November benefits using SNAP contingency funds Congress had appropriated for this very purpose, as well as other funds available to USDA. The district court granted a temporary restraining order requiring the government **[**4]** to provide either full SNAP payments by November 3 or partial payments by November 5. The government elected to provide partial benefits. On Thursday, November 6, the district court determined that the government had failed to comply with the order because it did not provide partial payments in a timely manner; it thus ordered the full payment of SNAP funds for November. The government now asks us to stay that order in its entirety pending its appeal. We deny that request.

I. BACKGROUND

A. Relevant Facts

SNAP provides monthly benefits to around one in eight Americans, including fourteen million children and eight million elderly individuals. Beneficiaries receive funds through an electronic debit card that they use to buy food at grocery stores and other food retailers. Although the federal government pays for SNAP benefits, state governments administer them, including by determining who is eligible and the amount of benefits that eligible individuals and families should receive. See *7 U.S.C. § 2020(a)*. Under federal law, SNAP benefits "shall be furnished to all eligible households" that apply. Id. *§ 2014(a)*.

For low-income Americans, SNAP is a vital bulwark against hunger and food insecurity. Access to food is, **[**5]** of course, a basic human need. Further, food security is a critical factor in health and well-being, the ability to stay in stable housing, and children's physical and educational development. Without SNAP, tens of millions would go hungry -- the first among a cascade of other health and financial harms that would befall those forced to go without enough food, particularly in the months leading up to winter.

Congress appropriates federal funding for SNAP on an annual basis. See id. *§ 2013(a)*. The latest annual appropriation for SNAP expired on September 30, 2025. To take into account emergencies, however, Congress has provided for additional funds to "be placed in reserve for use only in such amounts and at such times as may become necessary to carry out program operations" ("contingency funds"). *Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25, 93*; see also *Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, §§ 1101(a)*, *1103*, *1109(a), 139 Stat. 9, 10*. At the beginning of October 2025, the contingency funds amounted to about $6 billion.

The current lapse in congressional appropriations -- the government shutdown -- began on October 1, 2025. On October 10, **[*308]** USDA sent a memorandum to state officials stating that "if the current lapse in appropriations continues, there will be insufficient funds to pay full November SNAP benefits for approximately **[**6]** 42 million individuals across the [n]ation." Memorandum from U.S. Dep't of Agric. on Supplemental Nutrition Assistance Program (SNAP) Benefit and Administrative Expense Update for November 2025 (Oct. 10, 2025) (emphasis added), https://perma.cc/LDG4-DQMC.

Statutes governing SNAP provide for how the government should manage shortfalls in funding. The statutes indicate that USDA "shall limit the value of [SNAP payments] issued to an amount not in excess of the appropriation" for a given fiscal year. *7 U.S.C. §*

2027(b). USDA regulations then set forth procedures for making those reduced payments. See 7 C.F.R. § 271.7. The regulations require, for example, that once USDA decides to make reduced payments, it "shall notify State agencies of the date the reduction is to take effect and by what percentage maximum SNAP allotments amounts are to be reduced." Id. § 271.7(d)(1)(i). According to the record here, USDA did not take any steps to prepare to make partial payments either before or after the shutdown started. Instead, it only acted after it was ordered to do so by the district court on October 31, during this litigation. The record reflects that, before early November, USDA did not even perform the calculation to determine what percentage of **[**7]** November benefits could be paid with the contingency funds.

On October 24, as the shutdown continued, USDA announced that it would "suspend[] all November 2025 benefit allotments until such time as sufficient federal funding is provided, or until [it] directs State agencies otherwise." Memorandum from U.S. Dep't of Agric., Supplemental Nutrition Assistance Program (SNAP) Benefit and Administrative Expense Update for November 2025 (Oct. 24, 2025). Thus, one week before November SNAP benefits should have kicked in, the government communicated that it would not provide any benefits. USDA also announced that it would not use the $6 billion in contingency funds that Congress had previously appropriated to make up for a shortfall. See Memorandum from U.S. Dep't of Agric., Impact of the Government Lapse on November Supplemental Nutrition Assistance Program (SNAP) Household Benefits (Oct. 24, 2025), https://perma.cc/L343-L7YA. As USDA explained its view at the time, those contingency funds were available only to supplement benefits for which an appropriation existed, so the funds could not be used once an appropriation lapsed.[1] On October 27, USDA posted to its website a banner stating that **[**8]** "there will be no [SNAP] benefits issued November 01" because "the well has run dry" in light of the shutdown. Food & Nutrition Serv., U.S. Dep't of Agric. (Oct. 27, 2025), https://perma.cc/BL88-8QU6.

B. Procedural History

The plaintiffs are nonprofit organizations, local governments, a union, and a food retailer that represent and serve people who rely on SNAP benefits. On October 30, they filed a lawsuit alleging that USDA and other government entities and officials ("the government") had violated the Administrative Procedure Act (APA) through their October 24 directive suspending November SNAP benefits. They **[*309]** claimed that suspending benefits was arbitrary and capricious and contrary to law, and that the government had "unlawfully withheld" SNAP payments.[2] See 5 U.S.C. § 706(1), (2)(A).

On the same day the plaintiffs filed this lawsuit, they moved for a temporary restraining order (TRO). Specifically, they asked the district court to preliminarily enjoin USDA's October 10 and 24 directives. They also asked the district court to require the government to "release the withheld funding for SNAP benefits insofar as funds are available under the contingency funds . . . [or] under 7 U.S.C. § 2257." Section 2257 is a statute providing that **[**9]** seven percent of the annual appropriations "for the miscellaneous expenses of the work of any bureau, division, or office of [USDA] shall be available interchangeably for expenditures on the objects included within the general expenses of such bureau, division, or office." 7 U.S.C. § 2257 (emphasis added). It further states that USDA may not add more than that amount (seven percent) "to any one item of appropriation except in cases of extraordinary emergency." Id. (emphasis added).

At a hearing on October 31, the district court granted the plaintiffs' motion for a TRO. In a November 1 written order, it ordered the government to use the contingency funds to supplement SNAP benefits. The court also acknowledged that those contingency funds would be insufficient to fully cover SNAP benefit payments for November.

In light of the shortfall in funds, the district court presented the government with two options to comply with its TRO. First, the government could, "within its discretion, find the additional funds necessary (beyond the contingency funds) to fully fund the November SNAP payments." (Emphasis added.) The court explained that the government could do so by using its § 2257 authority to transfer money from **[**10]** a fund

[1] The district court noted that in the past, including in 2019 during President Trump's previous term in office, the government had acknowledged that it could use these contingency funds to cover SNAP benefits in the event of a government shutdown.

[2] The plaintiffs also brought claims arising from the government's handling of work requirements related to the SNAP program. Those claims are not at issue in this appeal, so we do not discuss them further.

established by section 32 of the Agricultural Adjustment Act of 1935, 7 U.S.C. § 612c ("Section 32 fund"). The government conceded during the October 31 TRO hearing that it had the authority to fund November SNAP payments in this way. The court further ordered that, should the government select this option, it must make the SNAP payments by Monday, November 3.

Second, and alternatively, the district court permitted the government to make "partial payments" of November SNAP benefits, including by using the contingency funds (but not the Section 32 fund). The court specified that in doing so, however, the government "must expeditiously resolve the administrative and clerical burdens [associated with the partial payments that] it described in its" prior filings. The court explained that this option would require the government to "come up with a plan" to distribute the partial payments "to all entitled beneficiaries." And "under no circumstances," the TRO stated, "shall the partial payments be made later than Wednesday, November 5, 2025." Finally, the court specified that if the government selected this second option and chose, in its discretion, "not [to] use other funds in addition to the contingency funds to make a full payment," any decision to use such discretion **[**11]** "cannot be arbitrary or capricious."

At no point did the government challenge the October 31 TRO after the district court issued it or request that the court modify it in any way. Instead, on **[*310]** Monday, November 3, the government submitted a report to the district court that it had chosen the second option and had "worked diligently to comply with the Court's order." It stated that by the end of the day on November 3, the government would have "made the necessary funds available" and "generat[ed] the table required for [s]tates to calculate the [partial] benefits available for each eligible household," given that full payments would not be forthcoming. An accompanying declaration by a USDA official explained, however, that even once the funds were made available and the table circulated, at least some states would have to implement technical changes to their SNAP systems that "w[ould] take anywhere from a few weeks to up to several months."

The following day, November 4, the plaintiffs asked the district court to enforce the October 31 TRO by requiring the government to provide full SNAP benefits in November. They argued that, given the government's representation that it had elected to **[**12]** make partial payments despite acknowledging that those partial payments were unlikely to reach many SNAP recipients during November, it had not complied with the court's original TRO. The plaintiffs also asked, "in the alternative," for the district court to "grant additional preliminary relief on the ground that the decision to deny full benefits is arbitrary and capricious."

Following a November 6 hearing, the district court granted both parts of the plaintiffs' November 4 motion -- that is, it decided to enforce its October 31 TRO and to enter a new TRO. It ruled first that the government had failed to comply with the October 31 TRO, both by not resolving the administrative burdens of making partial payments and by failing to ensure that partial payments were actually disbursed to needy individuals by November 5. The court explained that despite the government's admission that partial payments would mean no SNAP payments in November for many individuals, the government chose that option anyway. Given the foreseeability of the problems that the government's chosen path would entail, the court concluded that the government's noncompliance with the October 31 TRO was inexcusable. In **[**13]** order to effectuate its October 31 TRO, the court thus required the government to make full November SNAP payments by November 7.

As to the plaintiffs' alternative request for a new TRO, the district court agreed that the government's decision not to make full SNAP payments was likely arbitrary and capricious. It concluded that the plaintiffs' APA claim was likely to succeed on four grounds: the government's failure to account for the practical consequences of trying to make partial payments, the government's legal misunderstanding of its § 2257 authority, the government's implausible reasoning for refusing to access the Section 32 fund, and the pretextual nature of that reasoning in light of the government's shifting positions. Because of the plaintiffs' likelihood of success on the merits, along with the weight of the equities in their favor, the court issued a second TRO. That new TRO required the government to make full SNAP payments by November 7, "by utilizing available Section 32 funds in combination with the contingency funds."

On November 6, the government filed a notice of appeal of the district court's orders. On November 7, it moved this court for a stay pending appeal and an immediate administrative **[**14]** stay.

In the early evening of November 7, we denied the request for an administrative stay and noted that the government's request for a stay pending appeal remained pending. Shortly before our order issued,

[*311] the government filed an emergency motion in the U.S. Supreme Court, also requesting a stay pending appeal and an administrative stay. Justice Jackson granted an administrative stay pending our disposition of the government's stay motion. That administrative stay is set to expire forty-eight hours after we issue our decision on the government's stay request.

We conclude that the government has not met its burden under the applicable stay factors and thus deny its request to stay the district court's order granting the motion to enforce.

II. DISCUSSION

A. Jurisdiction

Before turning to the merits of the government's stay motion, we address whether we have jurisdiction to consider it. Generally, a TRO is not immediately reviewable on appeal. See *28 U.S.C. § 1292(a)(1)*. But we do have statutory jurisdiction to review a TRO that has the "'practical effect' of granting or denying an injunction." *Abbott v. Perez, 585 U.S. 579, 594, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018)* (quoting *Carson v. Am. Brands, Inc., 450 U.S. 79, 83, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)*).

The government argues, and the plaintiffs do not dispute, that the November 6 orders amount to a preliminary **[**15]** injunction. We agree. Regardless of how we resolve this appeal, the consequences are substantial and immediate. If we grant the stay, millions of Americans will not receive their SNAP benefits. If we deny the stay, the district court's orders require the transfer and disbursement of billions of dollars. Further, the district court entered the orders after adversarial briefing and a hearing. See *Sampson v. Murray, 415 U.S. 61, 87, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)*. Thus, the "practical effect" of the orders is a preliminary injunction. Accordingly, we have jurisdiction under *§ 1292(a)(1)* to consider this motion.

B. The Government's Motion

"A stay pending appeal is an 'intrusion into the ordinary processes of administration and judicial review,'" so this "'extraordinary' relief" is never "granted as 'a matter of right.'" *Rhode Island v. Trump, 155 F.4th 35, 41 (1st Cir. 2025)* (first quoting *New York v. Trump, 133 F.4th 51, 65 (1st Cir. 2025)*; and then quoting *Somerville Pub. Sch. v. McMahon, 139 F.4th 63, 68 (1st Cir. 2025)*). "As the party seeking a stay pending appeal, the [government] bears the burden of justifying the extraordinary relief it requests." *Am. Pub. Health Ass'n v. Nat'l Insts. of Health, 145 F.4th 39, 47 (1st Cir. 2025)* (citing *Nken v. Holder, 556 U.S. 418, 433-34, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)*).

To meet its burden for a stay, the government must satisfy four well-established requirements. It must make: "(1) a strong showing that [it] is likely to succeed on the merits; (2) a showing that it will be irreparably injured absent a stay; (3) a showing that the issuance **[**16]** of the stay will [not] substantially injure the other parties interested in the proceeding; and (4) a showing that the public interest lies with [it], not the plaintiffs." Id. (first two alterations in original) (internal quotation marks omitted) (quoting *Doe 1-3 v. Mills, 39 F.4th 20, 24 (1st Cir. 2022)*). When we consider a stay motion, "[w]e rely on the parties to frame the issues for decision." *Rhode Island, 155 F.4th at 41* (internal quotation marks omitted) (quoting *New York, 133 F.4th at 66*).

The government has asked us to stay two orders entered by the district court on November 6: the enforcement order and **[*312]** the second TRO.[3] Both of these orders granted the same relief -- full payment of November SNAP benefits, including through the use of the *Section 32* fund, by November 7.

In its stay papers, the government largely ignores the enforcement order. Instead, it focuses on why it is likely to succeed in showing that the district court lacked authority under the APA to require it to expend funds to fully cover November SNAP benefits. It claims that there are no legal standards against which the district court could review its decision under *§ 2257* not to draw on *Section 32* fund and that Congress left that discretionary decision entirely up to the agency. In so contending, the government makes a serious argument **[**17]** that, under *Lincoln v. Vigil, 508 U.S. 182, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)*, the district court could not review that purely discretionary decision to decline to transfer money in the *Section 32* fund to cover SNAP.

But the district court did not order the government to use the *Section 32* fund until November 6. It did so after it concluded that the government had failed to comply with

[3] The government also asks us to stay the October 31 TRO "[t]o the extent [that it] require[s] USDA to expend funds beyond the SNAP contingency fund."

its October 31 TRO. As a remedy for that noncompliance, the court ordered the government to make the full payment of November SNAP benefits by November 7. Thus, even if we were to stay the second TRO, the government could not obtain the relief that it seeks unless it also meets its burden under the stay factors as to the enforcement order.

For the reasons that follow, we conclude that the government has failed to meet the stay factors as to the enforcement order, and we deny a stay of that order.

1. Likelihood of Success on the Merits

"The most important" of the stay factors is the "likelihood of success on the merits." *Akebia Therapeutics, Inc. v. Azar, 976 F.3d 86, 92 (1st Cir. 2020)*. If the government fails to make a strong showing that it is likely to succeed on the merits, "the remaining elements are of little consequence." Id.

We review an order to enforce a judgment for abuse of discretion, and we see no reason not to apply the same standard to the **[**18]** analogous order here. See *Harvey v. Johanns, 494 F.3d 237, 240 (1st Cir. 2007)*. Nor does the government argue for a different standard in its stay papers. We review the district court's underlying findings of fact in support of its enforcement order for clear error. See, e.g., *Becky's Broncos, LLC v. Town of Nantucket, 138 F.4th 73, 78 (1st Cir. 2025)*. In light of the record and the arguments before us, we conclude that the government has not met its burden to show that the district court abused its discretion in issuing the enforcement order.

To begin, we emphasize what the parties do not dispute. First, the government agrees that it can use the contingency funds to provide partial November SNAP benefits (despite its initial position that those funds were inaccessible). Indeed, in its stay papers to us, the government requests a stay only "[t]o the extent [that the district court's orders] require USDA to expend funds beyond the SNAP contingency fund." (Emphasis added.) Second, the government agrees that it has the authority, under governing statutes including *§ 2257*, to transfer money from the *Section 32* fund and use it to pay November SNAP benefits in full. In fact, when the district court posed this question directly to the **[*313]** government at the October 31 hearing by asking, "You would agree under [a] statutory reading that **[**19]** the agency could use *Section 32* to pay benefits?", the government responded, "Yes." The *Section 32* fund contains more than $23 billion. Thus, there is no dispute that the government could -- as both a legal and practical matter -- pay November SNAP benefits in full by transferring about $4 billion from that fund. There is also no dispute that if the government were to do so, it would avoid the considerable and time-consuming technical difficulties that come with making partial payments.

The parties' disagreement centers on the government's decision not to make the transfer from the *Section 32* fund. The government argues that the decision is committed to agency discretion by law and that, in any event, the district court erred in concluding that the decision was arbitrary and capricious. See *5 U.S.C. §§ 701(a)(2)*, *706(2)(A)*.

But neither of those arguments by the government address the November 6 enforcement order, which directed the government to fully fund November SNAP benefits because of the government's failure to comply with the October 31 TRO. In its stay papers, the government devotes, at most, three sentences to addressing that order.

Specifically, as to the enforcement order, the government states:

> USDA complied with the district court's **[**20]** original injunction by depleting the multi-year contingency fund to make a partial payment of November SNAP benefits but declined to transfer billions of dollars from other food-security programs, like the Child Nutrition Programs. That choice is not reviewable under the APA. Even assuming that USDA has some discretionary authority to transfer funds to support SNAP benefits in the absence of an appropriation for SNAP, the determination of whether to use that authority to deplete funds from one congressionally mandated program to pay for another program with an insufficient appropriation falls squarely within the APA exception for decisions committed to agency discretion by law. *5 U.S.C. § 701(a)(2)*.

This limited argument is not persuasive, as the district court's enforcement order was not based on an analysis of the APA. To the contrary, the court made clear that the enforcement order was based on the government's noncompliance with its October 31 TRO. That TRO, it recounted, presented the government with two options: either "use *Section 32* funds, contingency funds, or both to make a full payment of SNAP benefits," or "use contingency funds to make a partial payment of SNAP benefits." If the government chose the **[**21]** latter option, the district court explained, it was required to "expeditiously resolve the administrative and clerical burdens" and "under no circumstances shall the partial payments be made later than" November 5. The district court granted the motion to enforce because it determined that the government "did neither."

Of course, the government argued to the district court that it did comply with the October 31 TRO because it exhausted the contingency funds to issue partial payments. But the district court disagreed. And the government's bare assertion in its stay motion, which we quote above, falls far short of a strong showing that it is likely to succeed in demonstrating that the district court erred in finding otherwise.

As the district court properly considered in issuing the enforcement order, USDA knew at the very latest by October 10 -- the day it sent its first memorandum to the states -- that normal appropriations would be unavailable to cover November **[*314]** benefits. It also knew full well that making partial payments would be technically difficult, as it had never been done before. But it proceeded to do nothing to attempt to solve that problem over the following three weeks. It **[**22]** made no calculations, prepared no tables, and took no other logistical steps to prepare for a shortfall.

Instead, in an unexplained reversal from its 2019 position, the government announced that it would make no November SNAP payments at all because it lacked the authority to use the contingency funds. Once this litigation began, the government then changed its position again -- it agreed that it could access the backup funding sources. But it was, in the government's telling, essentially too late at that point. Making partial payments that would actually reach individuals in any reasonable time period was too difficult, and the government decided that accessing the *Section 32* fund to make full payments was imprudent. Yet, even after the October 31 TRO issued, and knowing all this, the government chose the partial funding of November SNAP benefits that the order permitted only if those partial benefits would be available expeditiously and by a certain date.

The district court concluded that the government's actions "undermined both the intent and the effectiveness" of its October 31 TRO. As it explained, the government "knew that, at the time [it] chose [to issue partial payments], [it] would **[**23]** be prolonging implementation and frustrating the very purpose of the TRO." The stay motion at no point addresses this basis for the district court's finding that the government did not comply with the October 31 TRO.

The government does assert at one point that "[t]he district court also erred by concluding it was unreasonable for USDA to 'choose to go down this path [of a partial payment] in light of the difficulties and delays attendant to making a partial payment.'" And, in support of that argument, the government points out that "in the separate case in Massachusetts, the [s]tates have admitted that some of them are technologically prepared to implement partial benefits immediately." It then contends that "[a]ny delays on the part of the [s]tates, who are not party to this suit, [and] that are not so prepared are beyond the control of USDA."

But even if we treat the government's argument on this point as disputing the finding that it did not comply with the October 31 TRO, we do not see how the government has made a strong showing that it is likely to succeed in challenging that finding. The district court held that the government undermined its October 31 order by proceeding down **[**24]** the partial funding path while knowing that doing so would not result in satisfying the conditions established in that order. The government simply does not address that basis for the district court's finding of noncompliance.

"[F]ederal courts are not reduced to issuing injunctions . . . and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v. Finney, 437 U.S. 678, 690, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978)*, abrogation on other grounds recognized by, *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 56, 144 S. Ct. 457, 217 L. Ed. 2d 361 (2024)*. "[T]he question whether a party adequately has complied with a court order is a matter peculiarly within the ken of the judge who issued the order." *Faigin v. Kelly, 184 F.3d 67, 84 (1st Cir. 1999)*. And a court has "great discretion when deciding how to enforce violations of its own orders." *Eagle Comtronics, Inc. v. Arrow Commc'n Lab'ys, Inc., 305 F.3d 1303, 1314 (Fed. Cir. 2002)*; see also *Kemp v. Peterson, **[*315]** 940 F.2d 110, 113 (4th Cir. 1991)* ("[T]he general rule [is] that a court is authorized to issue all orders necessary to enforce orders it has previously issued in the exercise of its jurisdiction.").

Here, the district court fashioned a remedy to ensure that its October 31 TRO was followed, after considering the government's noncompliance and concluding that the obstacles it claimed existed were in fact "the foreseeable result of [the government's] own choices." That remedy -- requiring the government to "make full SNAP payments . . . by utilizing available Section 32 funds **[**25]** in combination with the contingency funds" -- directly relates to the court's October 31 TRO. And the government does not argue in its stay motion that the enforcement order was an improper remedy for its noncompliance with the October 31 TRO to the extent that it failed to comply with that order.

In sum, the government fails to meaningfully challenge the district court's determination that it failed to comply with the October 31 TRO. Nor does the government advance any argument that the district court lacked authority to order the full funding of November SNAP benefits as a means of addressing any such noncompliance. The government has thus failed to make a "strong showing" that it is likely to succeed on the merits -- that is, to show that the district court abused its discretion in granting the motion to enforce.

To be sure, the government does argue that the district court lacked authority to issue the October 31 TRO to the extent that order requires the government to fully fund the November SNAP benefits. It contends that "Congress clearly contemplated that USDA would reduce allotments when faced with a shortfall in annual appropriations." To support this point, it emphasizes that **[**26]** the governing statute instructs that USDA "shall" make partial payments. Nevertheless, the government does not contest that it did not even begin to follow the regulatory process for making partial payments until the district court ordered it to do so. That is apparently why the government had to correct its own mathematical calculations mid-stream, by informing the states on November 4 that contingency funds could cover 65 percent of November payments, as opposed to 50 percent of such payments, as the government had indicated on the previous day.

In any event, the district court has now found that the government failed to comply with that October 31 TRO, from which no stay was sought and no appeal was taken that would have prevented the order from taking effect during the period of alleged noncompliance. Thus, for present purposes, the question that the government's motion to stay the enforcement order presents is this: Has the government made a strong showing that it is likely to succeed in establishing either (a) that the district court erred in finding noncompliance with the October 31 TRO or (b) that, insofar as it did not err in that regard, it could not order full funding in **[**27]** consequence of that noncompliance?

As we have explained, the answer is no. In the single paragraph it devotes in its stay motion to addressing the enforcement order, the government does not make a strong showing of likely success in either respect. And in the only other passage of the stay motion that could be read to address the finding of noncompliance, the government fails to grapple with the actual basis for that finding.

2. The Remaining Stay Factors

Having determined that the government has failed to make a strong showing of success on the merits, we turn to the remaining **[*316]** three stay factors. The government's arguments as to these factors fail to establish it is entitled to the "'extraordinary' relief" it seeks. *Rhode Island, 155 F.4th at 41* (quoting Somerville Pub. Schs., *139 F.4th at 68*).

We begin by considering the risk of irreparable harm to the government in the absence of a stay. See *id. at 47*. The government makes one argument: Dipping into the Section 32 fund, it contends, will disrupt other federal nutrition benefits -- the Child Nutrition Programs (CNP) -- that draw primarily from that fund. According to the government, if $4 billion is drawn from the Section 32 fund and Congress does not make any supplemental appropriations for the fund or the CNP in Fiscal Year 2026, **[**28]** those programs will run out of money sometime next calendar year.[4] The loss of federal funds can be irreparable harm.[5] See *Dep't of Educ. v. California, 604 U.S. 650, 651-52, 145 S. Ct. 966, 221 L. Ed. 2d 515 (2025)* (per curiam). As the plaintiffs point out, however, the government bears the burden of demonstrating that it "will be irreparably injured absent a stay," *Rhode Island, 155 F.4th at 41* (emphasis added) (quoting *Nken, 556 U.S. at 434*), and we cannot see how these speculative predictions amount to making that showing, see *New York, 133 F.4th at 72*.

[4] The district court credited the plaintiffs' assertion that, if $4 billion were transferred to SNAP, the CNP would still be fully funded at least through May 2026 because CNP benefits amount to about $3 billion per month.

[5] That said, we do not credit the government's argument that "[t]his concern will be paramount particularly if the district court were to conclude that USDA should be required to tap these funds again in December." The orders before us include no such requirement.

The third and fourth stay factors, which the government does not address in any meaningful way, require us to consider any substantial injuries to other parties from a stay and where the public interest lies. The harm from a stay would be immense. The government, understandably, makes no attempt to argue otherwise. As we have already noted, tens of millions of Americans rely on monthly SNAP benefits to pay for food. In support of their motion for a TRO, the plaintiffs provided overwhelming evidence of the harms that even a short suspension of benefits would cause, including numerous declarations from SNAP beneficiaries and those who serve them. Those declarations describe a pregnant mother in Georgia forced to skip meals to feed her son; a working grandfather in Massachusetts who would eat twice **[**29]** instead of three times a day to feed his family; a mother in North Carolina who worries about how feeding her three children less will affect their health; and a nonprofit leader in Rhode Island whose clients will be forced to choose whether to "heat or eat" as the holidays approach and winter bears down on New England. These immediate, predictable, and unchallenged harms facing forty-two million Americans who rely on SNAP benefits -- including fourteen million children -- weigh heavily against a stay.

In reviewing the district court's balancing of the equities, we also cannot ignore the particular events preceding this litigation. As the district court found, "this is a problem that could have been avoided." The record here shows that the government sat on its hands for nearly a month, unprepared to make partial payments, while people who rely on SNAP received no benefits a week into November and counting. In light of these unique facts, we cannot conclude that the district court abused its discretion in requiring full payment **[*317]** of November SNAP benefits to effectuate the October 31 TRO after the government had failed to comply with it. See *Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944)* (explaining that courts sitting in equity **[**30]** "mould each decree to the necessities of the particular case").

Taking the four stay factors together, the government has failed to show it is entitled to the extraordinary relief of a stay. It has not made a strong showing that it is likely to succeed on the merits. Nor does it refute the extensive record evidence of the enormous injury to individuals around the country that a stay would cause. We do not take lightly the government's concern that money used to fund November SNAP payments will be unavailable for other important nutrition assistance programs. But we cannot conclude that the district court abused its discretion in determining that the overwhelming evidence of widespread harm that a stay would cause right now, by leaving tens of millions of Americans without food as winter approaches, outweighed the potential monetary harm to the government and CNP, months into the future. Thus, we reject the government's stay request as to the order granting the motion to enforce based on noncompliance with the October 31 TRO.

C. Second TRO

That leaves the second TRO, issued on November 6. That order granted the same relief as the enforcement order, and plaintiffs requested the second TRO **[**31]** only in the alternative, if the district court denied the motion to enforce. Thus, we stay the second TRO so long as the enforcement order remains in full force and effect.

III. Conclusion

For all these reasons, the government's motion for a stay pending appeal is **denied in part**.[6]

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[6] A number of local governments, states, and former governors have moved for leave to file amicus curiae briefs in support of the plaintiffs-appellees. We grant the motions, and the proposed briefs are accepted as filed. We consider these briefs only insofar as they concern legal issues and positions raised by the parties. See ***Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 33 n.10 (1st Cir. 2020)**.