

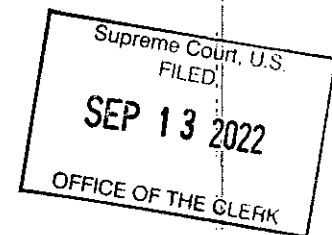
No. 22-479

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ONYSKO,
Petitioner,

v.

MARTIN J. WALSH, SECRETARY OF LABOR
ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR
Respondents.



On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth District

PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER 12, 2022

PETITIONER PRO SE

QUESTIONS PRESENTED

With Administrative Procedure Act (APA) jurisdiction, the Tenth Circuit Court of Appeals affirmed U.S. Department of Labor, Administrative Review Board (ARB) affirmation of Office of Administrative Law Judges dismissal at summary decision of the Petitioner's "Safe Drinking Water Act" (SDWA) whistleblower claims against the State of Utah.

Congress prescribes, in U.S. Code, direction to two different Standards of Review, in the Administrative Procedure Act (APA), for the Circuit Courts' review of final ARB orders on whistleblower complaints. This includes the 29 CFR § 24.100(a) six environmental statutes plus ERA. Employee protections at CWA (33 U.S.C. § 1367(e)), SWDA (42 U.S.C. § 6971(e)), and CERCLA (42 U.S.C. § 9610(b)) look to APA 5 U.S. Code § 554, Adjudications. Employee protections at SDWA (42 U.S.C. § 300j-9(i)(3)(A)), TSCA (15 U.S.C. § 2622(c)(1)), and CAA (42 U.S.C. § 7622(c)(1)) look to APA 5 U.S. Code § 706, Scope of Review.

For the Circuit Courts, APA 5 U.S. Code § 706(2) articulates six standards of review, and de facto seventh standard of review at coda. Historically, the Tenth Circuit and most other Circuit Courts have eviscerated sua sponte Congress's prescribed standards of review at 5 U.S. Code § 706(2) in applying these Circuits' articulated

Standards of Review. The Circuits' conflicted holdings are shown. Petitioner's questions follow.

5 U.S. Code

§ 706(2)

Std. Review

Circuits

§ 706(2)(A) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, D.C.,

§ 706(2)(B)

§ 706(2)(C)

2

§ 706(2)(D)

§ 706(2)(E)

1, 6, 10

§ 706(2)(F)

§ 706(2) Coda

First, in reviewing Onysko's appeals, did the Tenth Circuit apply wrong standard of review—§ 706(2)(A). i.e., wrongly liberalized § 706(2)(A)—to accord unwarranted deference to ARB interpretation of statute (SDWA) which it does not administer, unwarranted deference to ARB interpretation of statute (APA) it does not solely administer, but does administer with other agencies, and unwarranted deference to ARB interpretation of Supreme Court decisions from well-settled summary judgment case law?

Second, in reviewing Onysko's appeals, did the Tenth Circuit apply wrong standard of review, 5 U.S.C. § 706(2)(E), and did the Tenth Circuit make impossible finding there of supporting substantial evidence in phantom record of nonexistent agency hearing provided by statute?

Third, in reviewing Onysko's appeals, did the Tenth Circuit apply wrong standard of review, in omitting, from its applied Standard of Review, § 706(2)(B), § 706(2)(C), § 706(2)(D), § 706(2)(F), and § 706(2) coda?

Fourth, should the Court grant certiorari to resolve the conflicts and confusion in the Circuit Courts' holdings, none of which pay homage to the plain language of the seven standards of review at § 706(2)(A)-(F), and § 706(2) coda, for the Circuit Courts' review of final orders of the ARB and other agencies, as Congress intended ?

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TABLE OF INITIALIZATIONS AND ACRONYMS

ALJ	Administrative Law Judge
APA	Administrative Procedures Act
ARB	Administrative Review Board
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CWA	Clean Water Act (Water Pollution Control Act)
EPA	U.S. Environmental Protection Agency
ERA	Energy Reorganization Act
FRCP	Federal Rule of Civil Procedure
OALJ	Office of Administrative Law Judges
OSHA	Occupational Safety and Health Administration
SDWA	Safe Drinking Water Act

**TABLE OF INITIALIZATIONS AND
ACRONYMS (CONT'D)**

STA	Surface Transportation Assistance Act
SWDA	Solid Waste Disposal Act
TSCA	Toxic Substances Control Act
U.S.C	United States Code

I. PETITION FOR WRIT OF CERTIORARI

Steven Onysko petitions the Court for a Writ of Certiorari to the United States Court of Appeals for the Tenth District for this Court's review on certiorari of the judgment of the United States Court of Appeals for the Tenth Circuit, *Steven Onysko, Petitioner, v. Martin J. Walsh, Secretary of Labor, Administrative Review Board, United States Department of Labor, Respondents*. Docket Nos. 21-9529, 21-9530,

II. OPINIONS BELOW

- *Steven Onysko, Complainant, v. State of Utah, Department of Environmental Quality*, ALJ Case Nos. 2017-SDW-00002, 2018-SDW-00003, Office of Administrative Law Judges, ALJ's Decision and Order, Granting Summary Decision, Judgment entered February 19, 2019. [Appendix 1, p. A-4].
- *Steven Onysko, Complainant, v. State of Utah, Department of Environmental Quality*, ARB Case No. 2019-0042, ALJ Case Nos. 2017-SDW-00002, 2018-SDW-00003, Decision and Order. Administrative Review Board. Judgment entered December 16, 2020. [Appendix 2, p. A-125].
- *Steven Onysko, Complainant, v. State of Utah, Department of Environmental Quality*, ARB Case No. 2019-0042, ALJ Case Nos. 2017-SDW-00002, 2018-SDW-00003, Order Denying Reconsideration, Administrative Review Board. Judgment entered February 4, 2021. [Appendix 3, p. A-132].
- *Onysko v. Martin J. Walsh, Secretary of Labor, Administrative Review Board, United States Department of Labor*, Order and Judgment, Tenth Circuit' Court of Appeals. Docket Nos. 21-9529, 21-9530. Judgment entered April 28, 2022. [Appendix 4, p. A-140].

- *Onysko v. Martin J. Walsh, Secretary of Labor, Administrative Review Board, United States Department of Labor*, Order Denying Rehearing, Tenth Circuit Court of Appeals. Docket Nos. 21-9529, 21-9530. Judgment entered June 15, 2022. [Appendix 5, p. A-155].
- *Onysko v. Martin J. Walsh, Secretary of Labor, Administrative Review Board, United States Department of Labor*, Decision Issuance. Tenth Circuit Court of Appeals. Docket Nos. 21-9529, 21-9530. Judgment entered June 23, 2022. [Appendix 6, p. A-157].

III. JURISDICTION

The Tenth Circuit entered judgment on June 23, 2022 [*Appendix 6, p. A-157*; Docket Nos. 21-9529, 21-9530]. This Petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

5 U.S. Code

5 U.S. Code Chapter 5 - Administrative
Procedure

5 U.S. Code § 500 *et seq.* Administrative
Procedures Act

5 U.S. Code § 554 - Adjudications

5 U.S. Code Chapter 7 - Judicial Review

5 U.S. Code. § 706(1) Scope of Review

42 U.S. Code

42 U.S. Code Chapter 6A - Public Health Service

42 U.S. Code Subchapter XII - Safety of Public
Water Systems

42 U.S. Code Part E - General Provisions

42 U.S.C. § 300j-9 General Provisions

42 U.S.C. § 300j-9(i) Discrimination Prohibition

42 U.S.C. § 300j-9(i)(3)(A)

V. STATEMENT OF THE CASE

A. Statement of the issues

1. Whether or not the Tenth Circuit, in its 42 U.S.C. § 300j-9(i)(3)(A) SDWA employee protections duties in this matter ("Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred.) applied the wrong standards of review.
2. Whether or not the Tenth Circuit, in its 42 U.S.C. § 300j-9(i)(3)(A) SDWA employee protections duties in this matter ("Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred"), should have applied each and every one of the following standards of review: 5 U.S. Code § 706(2)(A), § 706(2)(B), § 706(2)(C), § 706(2)(D), § 706(2)(E), and § 706(2)(F), and § 706(2) coda, instead of only applying § 706(2)(A), and § 706(2)(E).

B. Nature and course of the proceedings.

This case arises under the 42 U.S.C. § 300j-9(i)(3)(A) employee protection provisions of the Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9 *et seq.* Onysko filed complaints of employee discrimination by the Utah Department of Environmental Quality (DEQ) through the U.S. Department of Labor Secretary, and the Secretary's designee, Occupational Health and Safety Administration (OSHA), in accordance with 42 U.S.C. 300j-9(i)(2)(A), and 29 C.F.R. 24.103(d)(1).

The Secretary of Labor dismissed Onysko's U.S. Occupational Safety and Health Administration (OSHA) complaint. Onysko successfully petitioned the Office of Administrative Law Judges (OALJ) for CFR 24.104, Investigations, [Appx. 8, p. A-163] investigation commencement. An Administrative Law Judge (ALJ) dismissed Onysko's claims in granting 29 CFR § 18.72, Summary Decision [Appx. 9, p. A-167], summary summary decision for Respondent DEQ [Appx. 1, p. A-4].

Onysko petitioned the Administrative Review Board (ARB) for review of the ALJ Decision and Order granting summary decision. The ARB affirmed [Appx. 2, p. A-125] the ALJ's granting of summary decision. Onysko then petitioned the ARB with Petition for Reconsideration. The ARB denied [Appx. 3, p. A-132] the Petition.

Onysko appealed the ARB Decision and Order [*Appx. 2, p. A-125*], and the Order Denying Reconsideration [*Appx. 3, p. A-132*] to the Tenth Circuit Court of Appeals, which assigned Case Nos. 21-9529, and 21-9530, respectively. The Tenth Circuit consolidated the cases for briefing and argument in an Order entered on April 22, 2021. In single Order and Judgment, the Tenth Circuit denied Onysko's appeals [*Appx. 4, p. A-140*]. Onysko petitioned for panel rehearing. The Tenth Circuit denied the petition [*Appx. 5, p. A-155*].

C. Onysko's whistleblower complaint's merits are not what the Petition is about.

Onysko's whistle blower complaint was dismissed at summary dismissal, pursuant to CFR 29 Chapter 7, Disposition without a Hearing (§§ 18.70 - 18.72), including § 18.72, Summary Decision. The OALJ never conducted any hearing that rose to 5 U.S. Code § 706(2)(E) "agency hearing provided by statute." This case is about the Tenth Circuit's applying the wrong Standard of Review to review the ARB's Decision and Order affirming the ALJ's granting of summary decision to dismiss Onysko's whistleblower complaint without a hearing. Onysko was never accorded due process of the right to testify under oath, the right to present and examine witnesses, and the right to

be heard in a meaningful manner.

This Petition is not about the merits of Onysko's whistleblower complaint. It is about the Tenth Circuit wrongly reviewing the merits of Onysko's whistleblower claims instead of reviewing the ARB's affirmation of Onysko's non-survival of ALJ summary decision. The Tenth Circuit applied the wrong Standard of Review. The Tenth Circuit's Order and Judgment reviewed the wrong case. The Tenth Circuit reviewed ARB-affirmed ALJ decision and order without a 29 C.F.R. § 24.104 ALJ investigative hearing, which never occurred. Instead, the ALJ with aforethought at summary decision made unlawful rulings relying on unlawful ALJ evidence weighing, and unlawful ALJ credibility determinations, including unlawful disregard of Onysko's non-movant affidavit. The Tenth Circuit expressly affirmed that Onysko did not suffer hostile work environment, and expressly affirmed Onysko's employer's affirmative defense. Both of these are findings that seminal Supreme Court cases hold are unlawful at summary decision.

" [T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986); see also *Celotex* (1986). It therefore follows that, in

entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. []. *Liberty Lobby, Inc., supra.*" *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000).

D. Statement of Facts

1. The Tenth Circuit Order and Judgment never mentions 5 U.S.C. § 706(2)(B) standard of review.
2. The Tenth Circuit Order and Judgment never mentions 5 U.S.C. § 706(2)(C) standard of review.
3. The Tenth Circuit Order and Judgment never mentions 5 U.S.C. § 706(2)(D) standard of review.
4. The Tenth Circuit Order and Judgment never mentions 5 U.S.C. § 706(2)(F) standard of review.
5. The Tenth Circuit Order and Judgment never mentions 5 U.S.C. § 706(2) coda standard of review.

E. Summary of Argument

Petitioner petitions for certiorari so that this Court may make determination if the Tenth Circuit applied the wrong Standard of Review to its review of the ARB affirmation of the ALJ's granting of summary decision. That is the purview of this Court. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 US 574, 1986. ("[W]e review only the standard applied by the Court of Appeals in deciding this case[.]"). Petitioner's argument can be summarized as follows.

1. In Order and Judgment, the Tenth Circuit applied wrong Standard of Review premised on the misinterpretation at *Hall* that 5 U.S. Code § 706(2)(A) is the **only** standard of review that a Circuit Court shall apply to determine if an agency order should be set aside. *Hall v. U.S. Department of Labor*, 476 F.3d 847, 850 (10th Cir. 2007). ("[T]he Court will reverse the Final Order **only** if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' 5 U.S.C. § 706(2)(A).") [*Emphasis added.*]. [See Appx. 4, p. A-148]. [See argument herein at Section VI.A.2.].
2. In Order and Judgment, the Tenth Circuit applied wrong Standard of Review, namely, a misinterpreted 5 U.S. Code § 706(2)(A) standard of review. The Tenth Circuit wrongly interpreted that

standard of review. Then the Tenth Circuit applied that wrong standard of review, to justify the Tenth Circuit's looking beyond the two-page ARB Decision and Order itself to judge whether or not that two-page Order should be set aside for its being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S. Code § 706(2)(A). [*App. 13, p. A-187*]. "An agency's action must be upheld, if at all, on the basis articulated by the agency itself[.] *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)." *Texas v. United States*, (2022) (5th Cir. 2022). [*See argument herein at Section VI.A.3.*]. The Tenth Circuit applied wrong Standard of Review, and wrongly applied it far afield of the ARB two-page decision.

3. In Order and Judgment, the Tenth Circuit applied wrong standard of review, 5 U.S. Code § 706(2)(E) [*App. 13, p. A-187*], which is wrong/inapplicable test for whether or not an agency order has supporting substantial evidence in the record of "an agency hearing provided by statute." Here, summary decision was granted by the ALJ without Onysko ever having been accorded an agency hearing provided by statute. Shame on the Tenth Circuit for finding supporting evidence in nonexistent record from a nonexistent "agency hearing provided by statute." [*See argument herein at Section VI.A.4.*].

4. The Tenth Circuit's application of a Standard of Review that does not include four of the six specific 5 U.S. Code § 706(2) standards of review—missing are § 706(2)(B), § 706(2)(C), § 706(2)(D), and § 706(2)(F), as well as § 706(2) coda—rises to Tenth Circuit application of wrong Standard of Review. [See argument herein at Section VI.A.5.].

5. The 5 U.S. Code § 706(2) coda is de facto required seventh standard of review at 5 U.S. Code § 706(2). ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."). The Tenth Circuit's application of Standard of Review that does not include § 706(2) coda rises to Tenth Circuit application of wrong Standard of Review. [See argument herein at Section VI.B.].

For these various reasons, this Court should grant certiorari and make warranted determination that the Tenth Circuit applied wrong Standard of Review in the Tenth Circuit's review of ARB Order affirming the ALJ's granting of summary decision to dismiss Onysko's SDWA whistleblower complaints.

VI. REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit applied wrong Standard of Review [Appx. 4, p. A-148].

A.1 The Tenth Circuit's articulated Standard of Review [Appx. 4, p. A-148].

The Tenth Circuit's Order and Judgment articulated the wrong standard of review—expressly identifying only one relevant standard of review from 5 U.S.C. § 706(2)(A)-(F), and identifying nonsensical § 706(2)(E), given that Onysko was never accorded "agency hearing provided by statute."

" We review the Board's final decision and order under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Under the APA, we must sustain the Board's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or "unsupported by substantial evidence." § 706(2)(A), (E), *see Hall v. U.S. Dep't of Lab.*, 476 F.3d 847, 850 (10th Cir. 2007) (same). We review the Board's legal determinations de novo. *Trimmer v. U.S. Dep't of Lab.*, 174 F.3d 1098, 1102 (10th Cir.1999)."

A.2 Wrong Standard of Review: *Hall v. U.S. Department of Labor*, 476 F.3d 847, 850 (10th Cir.2007).

"We review the ARB's decision under the standard established by the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173 (10th Cir.2005). Thus, **the Court will reverse the Final Order only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'** 5 U.S.C. § 706(2)(A)." *Hall v. U.S. Department of Labor*, 476 F.3d 847, 850 (10th Cir. 2007). [***Emphasis added.***].

Well-settled rules of construction persuade that the six 5 U.S. Code § 706(2)(A)-(F) provisions are independent clauses,^{[1], [2]} each describing an alternative, stand-alone cause for the Circuits to set aside an agency order.

^[1] "Clauses separated by a semicolon 'are presumed to be independent clauses.' *In re Owsley*, 384 B.R. 739, 748 (Bankr., N.D. Tex. 2008); see also *McLeod v. Nagle*, 48 F.2d 189, 191 (9th Cir.1931)." *Elgin Nursing and Rehab, v. U.S. Dept. of Health*, 718 F.3d 488 (2013) (5th Cir. 2013).

Hall (Supra) wrongly interprets 5 U.S. Code § 706(2)(A)-(F) to mean that so long as an agency order does not exhibit all six agency order defects, § 706(2)(A)-(F), the Circuit Court must sustain the agency order. Per the faulty reasoning at *Hall (Supra)*, an agency order which exhibits defects at as many as all other five standards § 706(2)(B)-(F), should still be sustained by the Courts because at least § 706(2)(A) defect is absent. *Hall's* Standard of Review is nonsensical. i.e., one standard survived makes for an agency order's survival regardless of non-survival of any of the other 5 standards. But the § 706(2)(A)-(F) independent clauses should be interpreted consistent with how courts interpret statutes with similarly independent clauses of relief, choices, or even crimes, joined by the disjunctive "or," [3]. [4] These precedents convince that *Hall*

[2] "Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient [.]" *Horne v. Flores*, 557 U.S. 433 (2009).

[3] "This court has subscribed to the obvious proposition that because the three subsections of [Bankruptcy Code, 11 U.S. Code] § 1129(b)(2)(A) are joined by the disjunctive 'or,' they are alternatives. *Matter of Briscoe Enterprises, Ltd., II*, 994 F.2d 1160 (1993) (5th Cir. 1993). *In re Pacific Lumber Company, LLC*, 584 F.3d 229 (2009) (5th Cir. 2009).

[4] "When Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes." *United States v. Rigas*, 605 F.3d 194 (2010) (3rd Cir. 2010).

(*Supra*) is error, and that correct interpretation is, "even one strike at 5 U.S. Code § 706(2)(A)-(F) and the Order is out," for a challenged agency order.

For decades, most Circuits, including the Tenth Circuit, have perverted 5 U.S. Code 706(2)(A)-(F) to mean that any agency order passing just single 5 U.S. Code 706(2)(A)—(i.e., the agency order is not found "arbitrary or capricious"—shall be sustained by the Circuit Court. Not a single Circuit has precedent citing to 5 U.S. Code 706(2)(B), (D), or (F). The Circuits' sustaining of agency orders for passing merely 706(2)(A) standard of review, with no consideration of the orders' failing at 5 U.S. Code 706(2)(B), (C), (D), (E), or (F), is contrary to Congress's intent.

In the matter at hand, the Tenth Circuit for second time ever {see also *Anderson* (2005, *Infra*)) did look to § 706(2)(E) but ironically in error (i.e., the Tenth Circuit shamefully purported to find supporting evidence for the ARB Order in the record of a hearing that never occurred). The silver lining is that the Tenth Circuit again joins—albeit erroneously—the Seventh Circuit (see *Brousil*, 7th. Cir. 2021, *Infra*) in conflict with other Circuits that never look to § 706(2)(E), which newly begs again this Court's resolution of the conflict.

A.3 Wrong Standard of Review: When it applied standard of review U.S. Code § 706(2)(A) (i.e., arbitrariness, or capriciousness, or abuse of discretion, in agency order), the Tenth Circuit looked beyond the ARB's Orders.

The Tenth Circuit's Judgment and Order Standard of Review [*Appx. 4, p. A-148*] identifies 5 U.S. Code § 706(2)(A). This standard of review requires that the reviewing court shall set aside agency action found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"

The ARB Decision and Order [*Appx. 2, p. A-125*] is less than two pages, and contains mere 559 words at discussion and two footnotes. The Secretary's response brief (not exhibited) to the Tenth Circuit has 23 pages of discussion and contains 11,600 words. The Tenth Circuit's Order and Judgment has 10 pages with 2600 words of discussion and findings.

Motor Vehicle Mfrs., (Infra) is dispositive that the ARB's Order, if upheld at all by the Tenth Circuit, had to be upheld on the basis of only the 559 words at that Order. Instead, it was wrongly upheld with Tenth Circuits citations to the a priori rationalizations in the 56-page, 22,000-word, ALJ Decision and Order, and to the ad hoc rationalizations in the Secretary's brief.

"Courts are compelled to 'hold unlawful and set aside agency action[s]' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2). 'An agency's action must be upheld, if at all, on the basis articulated by the agency itself[.]' *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)." *Texas v. United States*, (2022) (5th Cir. 2022).

The Tenth Circuit applied a wrong standard of review that perverted the correct standard of review. The 559-word ARB Order by itself should not have survived Tenth Circuit correctly applied 5 U.S. Code § 706(2)(A) standard of review. It is indisputable that the Tenth Circuit's Order and Judgment blatantly relies upon the ALJ's Decision and Order, and on the Secretary's briefing to the Tenth Circuit, to absolve the naked ARB Order of § 70,6(2)(A) arbitrariness and capriciousness.

The indisputability lies in the two-page ARB's Order content—specifically, it's lack of content. The two-page ARB Order is not the source of the Tenth Circuit Order and Judgment's extensive content on the purported failed merits of Petitioner's whistleblower complaint. For example,

the Tenth Circuit wrongfully looked beyond the ARB's Order to the ALJ's Decision and Order for the issue of Onysko's 2007 whistleblower complaint, which the 559-word ARB order never mentioned. The Tenth Circuit credited the ARB Order for not being arbitrary and capricious because somebody else—the ALJ—provided background that the ARB Order did not. That proves ARB Order failure at 5 U.S. Code § 706(2)(A).

A.4 Wrong Standard of Review: Tenth Circuit 5 U.S. Code § 706(2)(E) nonsensical finding of supporting substantial evidence in phantom agency hearing record given that no hearing was held and no record exists.

The Tenth Circuit in its applied Standard of Review [*Appx. 4, p. A-148*] applied wrong standard of review in applying standard of review at 5 U.S. Code § 706(2)(E). None of the provision's conditions for relevant application are present in this matter. (" [] in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; "). Neither referenced 5 U.S. Code § 556, or § 557, is applicable here in this matter. And, there has been no "agency hearing provided by statute" in this matter. No 29 CFR § 24.104 OALJ hearing ever took place.

Onysko was never accorded 29 CFR § 24.104, OALJ hearing. [See App. 12, p. A-183, 29 CFR § 18.81, Formal Hearing]. The ALJ's summary decision was not an "agency hearing provided by statute." 5 U.S. Code § 706(2)(E). The Tenth Circuit applied wrong standard of review in applying § 706(2)(E). Representation by the Tenth Circuit that it found supporting substantial evidence in a hearing record that does not even exist is shameful. The Tenth Circuit was appallingly oblivious that its duty was to review ARB affirmation of ALJ summary decision, not ARB affirmation of ALJ findings from nonexistent ALJ hearing on the merits of Onysko's whistleblower claims.

A.5 Wrong Standard of Review: Absence of 5 U.S. Code § 706(2) standards of review: § 706(2)((B), (C), (D), and (F), missing.

The Tenth Circuit's applied Standard of Review wrongly omitting standards of review 5 U.S. Code § 706(2)(B), § 706(2)(C), § 706(2)(D), and § 706(2)(F). In omitting these standards of review from its Standard of Review, the Tenth Circuit applied wrong Standard of Review.

Standards of Review 5 U.S. Code § 706(2)(A)-(F) constitute six stand-alone, separate, alternative bases upon which the ARB Orders could have been necessarily set-aside by the Tenth Circuit for any

single failed standard. The Tenth Circuit wrongfully failed to review if the ARB Order was contrary to constitutional right, power, privilege, or immunity, (§ 706(2)(B)); was in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (§ 706(2)(C)); was without observance of procedure that is required by law (§ 706(2)(D)); or was unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court (§ 706(2)(F)). [See 5 U.S.C. 706(2) at *Appx. 13*, p. A-186].

It is not credible that the 559-word, two-page, stand-alone, ARB Order had sufficient content to survive review pursuant to the four 5 U.S. Code § 706(2) standards which the Tenth Circuit failed to apply. Failed application of required standards of review is tantamount to application of wrong Standard of Review.

B. The Tenth Circuit's errors were not harmless.

The coda to 5 U.S. Code § 706(2) is de facto seventh standard of review at U.S. Code § 706(2), Scope of Review. The coda states, "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." *Calcutt (Infra)* explains the meaning of the coda.

" This language applies the federal harmless-error standard from civil cases. See *Shinseki v. Sanders*, 556 U.S. 396 (2009). We employ a 'case-specific application of judgment, based upon examination of the record,' *id.* at 407, 129 S.Ct. 1696, to determine whether the error 'affect[ed] the substantial rights of the parties,' 28 U.S.C. § 2111. An error is not harmless when, for example, an agency violates its own procedural rules and the petitioner shows that he 'has been prejudiced on the merits or deprived of substantial rights because of the agency's procedural lapses.' *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) (quotation marks, emphasis omitted)." *Calcutt v. FDIC*, 37 F.4th 293 (2022) (6th Cir. 2022).

In the matter at hand, the ARB violated its own procedural rules at 29 CFR § 18.72, Summary Decision [*App. 9, p. A-167*], and the rule governing its resolution of any uncertainty as to interpretation of 29 CFR § 18.72, namely 29 CFR §18.1, Scope of Rules, § 18.1a:

"(a) General application. These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor. []. **The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."** [*Emphasis added*].

Not once in the ARB Orders did the ARB follow 29 CFR §18.1(a) procedural rule to look to the Federal Rules of Civil Procedure, e.g., Fed. R. Civ. Proc., 56, Summary Judgment, [*App. 10, p. A-174*] to resolve situation not provided for, or controlled by, 29 CFR § 18.72, Summary Decision. [*App. 9, p. A-167*]. The Tenth Circuit's wrong standard of review that countenanced ARB violation of ARB's own procedural rules was not harmless Tenth Circuit error. *Calcutt (Supra)*. Onysko was deprived of substantial rights, first by the ALJ, and then the ARB, and now the Tenth Circuit for its applied wrong Standard of Review omitting 5 U.S. Code § 706(2) coda, and countenancing ARB's procedural lapses. *Wilson (Supra)*,

C. The Tenth Circuit has again created conflict with the other Circuits.

Petitioner does not dismiss the Tenth Circuit Order and Judgment's Standard of Review as simply careless articulation. [*Appx. 4, p. A-148*].

"We review the Board's final decision and order under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Under the APA, we must sustain the Board's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' or 'unsupported by substantial evidence.' § 706(2)(A), (E), *see Hall v. U.S. Dep't of Lab.*, 476 F.3d 847, 850 (10th Cir. 2007) (same). We review the Board's legal determinations de novo. *Trimmer v. U.S. Dep't of Lab.*, 174 F.3d 098, 1102 (10th Cir.1999)."

Rather, Petitioner notes that there is real conflict among the Circuits as to how many "land mines" an agency order must navigate in any given Circuit's articulated "minefield" of 5 U.S. Code § 706(2)(A)-(F), plus § 706(2) coda, Standard of Review.

Eight Circuits flat-out erroneously hold that 5. U.S. Code § 706(2)(A) is the only standard of review at U.S. Code § 706(2)(A)-(F) that a Circuit Court shall apply to set aside, or not, an agency order. No whistleblower can ever receive fair and impartial treatment in these Circuits. [See below, Cir. 3, 4, 5, 7, 8, 9, 10, and 11.] The Circuits are wrong. [See case holdings below, Cir. 1, 2, 6, D.C.].

**"We will overturn the ARB's decision only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' 5 U.S.C. § 706(2)(A). *Doyle v. United States Sec'y of Labor*, 285 F.3d 243, 249 (2002) (3d Cir. 2002)."
Hasan v. U.S. Dept. of Labor, 2008 (3rd Cir. 2008). [*Emphasis added*].**

**"A reviewing court may overturn a decision of the Secretary only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A);^[6] see *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 111 (1997) (3d Cir. 1997)."
Doyle v. U.S. Sec'y of Labor, 285 F.3d 243, 249 (3d Cir. 2002). [*Emphasis added*].**

"The ARB's determinations are "the agency's final decision and [are] reviewable in federal court under the standards stated in the Administrative Procedure Act, 5 U.S.C. § 706." *Lawson v. FMRLLC*, 571 U.S. at 437, 134 S.Ct. 1158. **Under the Administrative Procedure Act, an appellate court 'may only disturb the ARB's decision if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'** *Welch v. Chao*, 536 F.3d 269 (2008) (4th Cir. 2008), at 275-76 (quoting 5 U.S.C. § 706(2)(A))." *Northrop Grumman Systems v. U.S. Dept. of Labor*, 927 F.3d 226 (2019) (4th Cir. 2019). [*Emphasis added.*].

"Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) — which governs our review here, see 49 U.S.C. § 42121(b)(4)(A) — **we may only disturb the ARB's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."** *Welch v. Chao*, 536 F.3d 269 (2008) (4th Cir. 2008). [*Emphasis added.*].

"We will sustain the ARB's decision unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." *Leiva v. ARB, U.S. Dept. of Labor*, (2020) (5th Cir. 2020), [*Emphasis added.*].

"We review the ARB's decision under the Administrative Procedure Act standards in 5 U.S.C. § 706. 49 U.S.C. § 20109(d)(4). We will uphold the ARB's legal conclusions unless they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' *Roadway Exp., Inc. v. U.S. Dep't of Lab.*, 612 F.3d 660, 664 (7th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A))." *Brousil v. U.S. Dept. of Labor, ARB*, (2021) (7th Cir. 2021). [*Emphasis added.*].

"Our review of the ARB's decision is guided by the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706. See 49 U.S.C. § 31105(d). **We may overturn the ARB's legal conclusions only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'** 5 U.S.C. § 706(2)(A)." *Roadway Exp., Inc. v. U.S. Dep't of Lab.*, 612 F.3d 660, 664 (7th Cir. 2010), [*Emphasis added*].

"We review the ARB's decision under the deferential standard articulated in the Administrative Procedure Act, 5 U.S.C. § 706(2). 49 U.S.C. § 31105(d). Under this standard **we must affirm the ARB's conclusions of law unless the same are arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.** 5 U.S.C. § 706(2)(A)." *Maverick Transp., LLC v. U.S. Dep't of Labor*, 739 F.3d 1149, 1153 (8th Cir. 2014). [*Emphasis added*].

"We may set aside the ARB's order if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." *Seuring v. Delta Airlines, Inc.*, (2020) (9th Cir., 2020; Not for Publication). [*Emphasis added*].

"We review the ARB's decision under the standard established by the Administrative Procedure Act, 5 U.S.C. §§ 701-06. See *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173 (10th Cir. 2005). Thus, the Court will reverse the Final Order **only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'** 5 U.S.C. § 706(2)(A)." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 850 (10th Cir. 2007). [*Emphasis added*].

"We will only overturn the ARB's findings if they are arbitrary, capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706(2)(A); *Stone & Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012). [*Emphasis added*].

The other Circuits' less incomplete standards of review are wrong, too. [See case holdings below, Cir. 1, 2, 7, D.C.].

"We review the Board's final order according to the standards of the Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.* **We must affirm the Board's decision unless its legal conclusions are arbitrary, capricious, or otherwise not in accordance with law, or if its factual findings are unsupported by substantial evidence.** See 5 U.S.C. § 706(2); *Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998). [*Emphasis added*].

"We overturn the [ARB] Agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). We set aside the ARB's factual findings 'only if unsupported by substantial evidence on the record as a whole.' *Chippewa Dialysis Servs. v. Leavitt*, 511 F.3d 172, 176 (D.C. Cir. 2007)."
Kaufman v. Perez, 745 F.3d 521 (2014) (D.C. Cir. 2014), [*Emphasis added*].

" 'The APA requires reviewing courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be,' among other things, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or 'in excess of statutory jurisdiction, authority, or limitations.' 5 U.S.C. § 706(2)(A),(C)." *Aleutian Capital Partners, LLC v. Scalia*, 975 F.3d 220 (2nd Cir. 2020). [**Emphasis added**].

"Our review of the ARB's decision is guided by the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706. See 49 U.S.C. § 31105(d). **We may overturn** the ARB's legal conclusions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The ARB's findings of fact must be upheld if supported by substantial evidence. 5 U.S.C. § 706(2)(E); *Roadway I*, 495 F.3d at 483 (7th Cir. 2007)." *Roadway Exp., Inc. v. U.S. Dep't of Lab.*, 612 F.3d 660, 664 (7th Cir. 2010). [**Emphasis added**].

VII. CONCLUSION AND PRAYER FOR RELIEF

The Circuits need guidance as to how to reconcile conflicts between respective precedents establishing Standard of Review for Circuit Courts' APA 5 U.S. Code § 706(2)(A)-(F) review of agency order. Ideally, this Court will determine on certiorari which standards of review are law.

In the matter at hand, it is evident [*Appx. 4, p. A-148*] that the Tenth Circuit wrongly applied standard of review 5 U.S. Code § 706(2)(E). This standard is nonsensical in the Circuit Court at review of agency ARB affirmation of ALJ summary decision without hearing. The Circuit Court cannot look for supporting substantial evidence in a hearing record that does not exist. Summary decision is not hearing.

The Tenth Circuit has also created confusion as to the deference a Circuit Court should accord an agency decision at standard of review 5 U.S. Code § 706(2)(A). In the matter at hand, the Tenth Circuit accorded the ARB deference for its interpretation of statute (SDWA) not administered by Department of Labor. And the Tenth Circuit, contrary to much case law, showed deference to ARB's interpretation of Supreme Court precedent.

In the matter at hand, it is evident that the Tenth Circuit wrongly applied standard of review

5 U.S. Code § 706(2) in disregarding standards at 5 U.S. Code clauses § 706(2)(B), § 706(2)(C), § 706(2)(D), and § 706(2)(F), and § 706(2) coda, for the Tenth Circuit's review of the ARB Orders.

Petitioner prays that this Court grant certiorari so it may review the Tenth Circuit's Order and Judgment, and Order Denying Rehearing, for application of wrong standard of review, and consequent wrong findings of fact and wrong conclusions of law.

Petitioner prays for relief in the form of a real OALJ hearing on the merits of his case as redress of the ALJ sham summary decision, after nothing but biased telephone conference without any indicia of due process. [*Appx. 14, p. A-192, #4*].

Petitioner prays for relief from wrongful employment termination by the Utah Department of Environmental Quality in retaliation for SDWA protected activities.

Petitioner prays for relief that Utah citizens suffering ongoing public health consequences from Utah Department of Environmental Quality's corrupt administration of the federal Safe Drinking Water Act, and the Utah Safe Drinking Water Act, be delivered from evil.

Amen.

CERTIFICATE OF COMPLIANCE

STEVEN ONYSKO,
Petitioner,

v.

MARTIN J. WALSH, SECRETARY OF LABOR
ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR
Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 6,322 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of September 2022.

Steven J. Onysko

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