

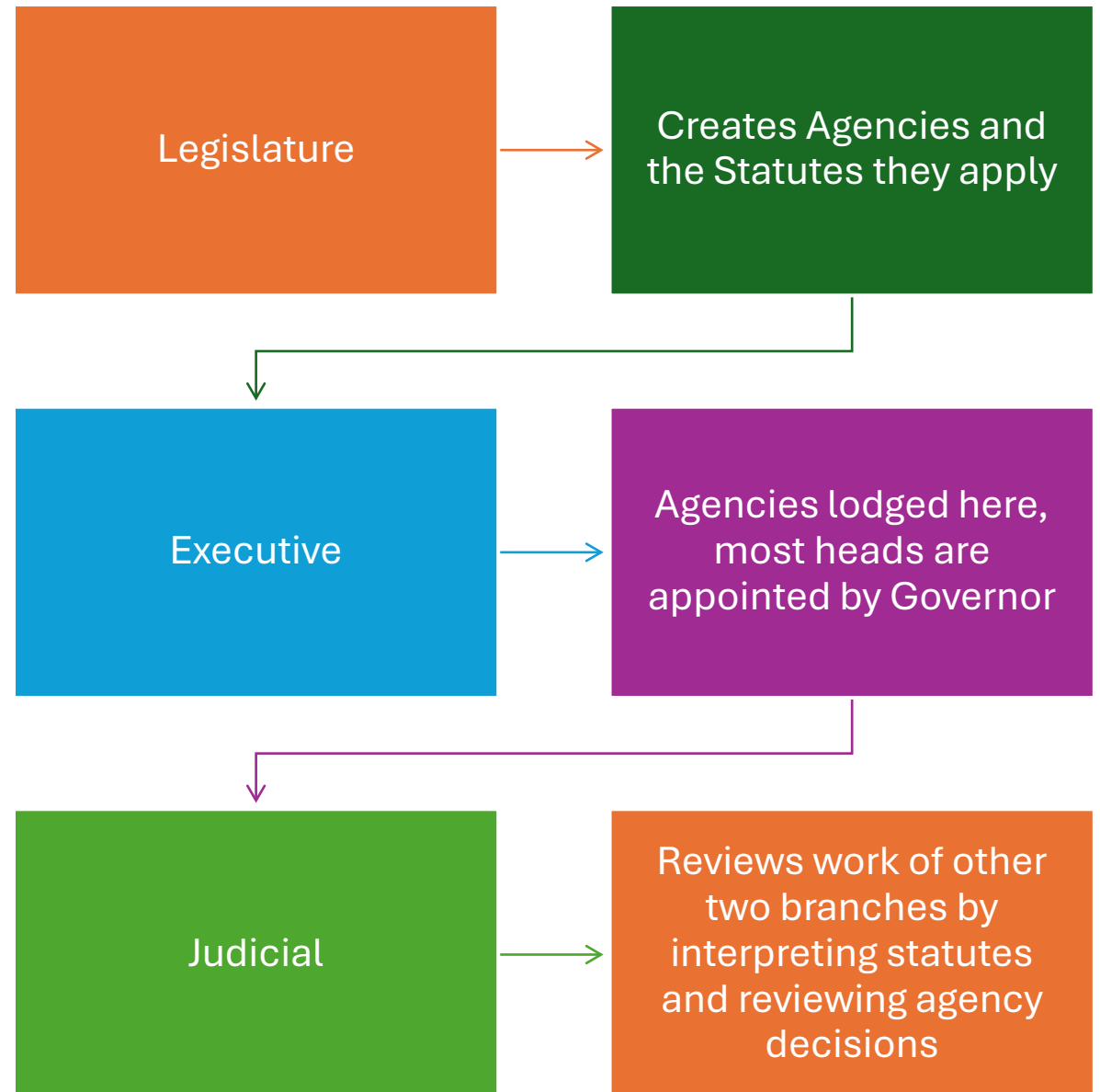
Waterkeeper: How we got here

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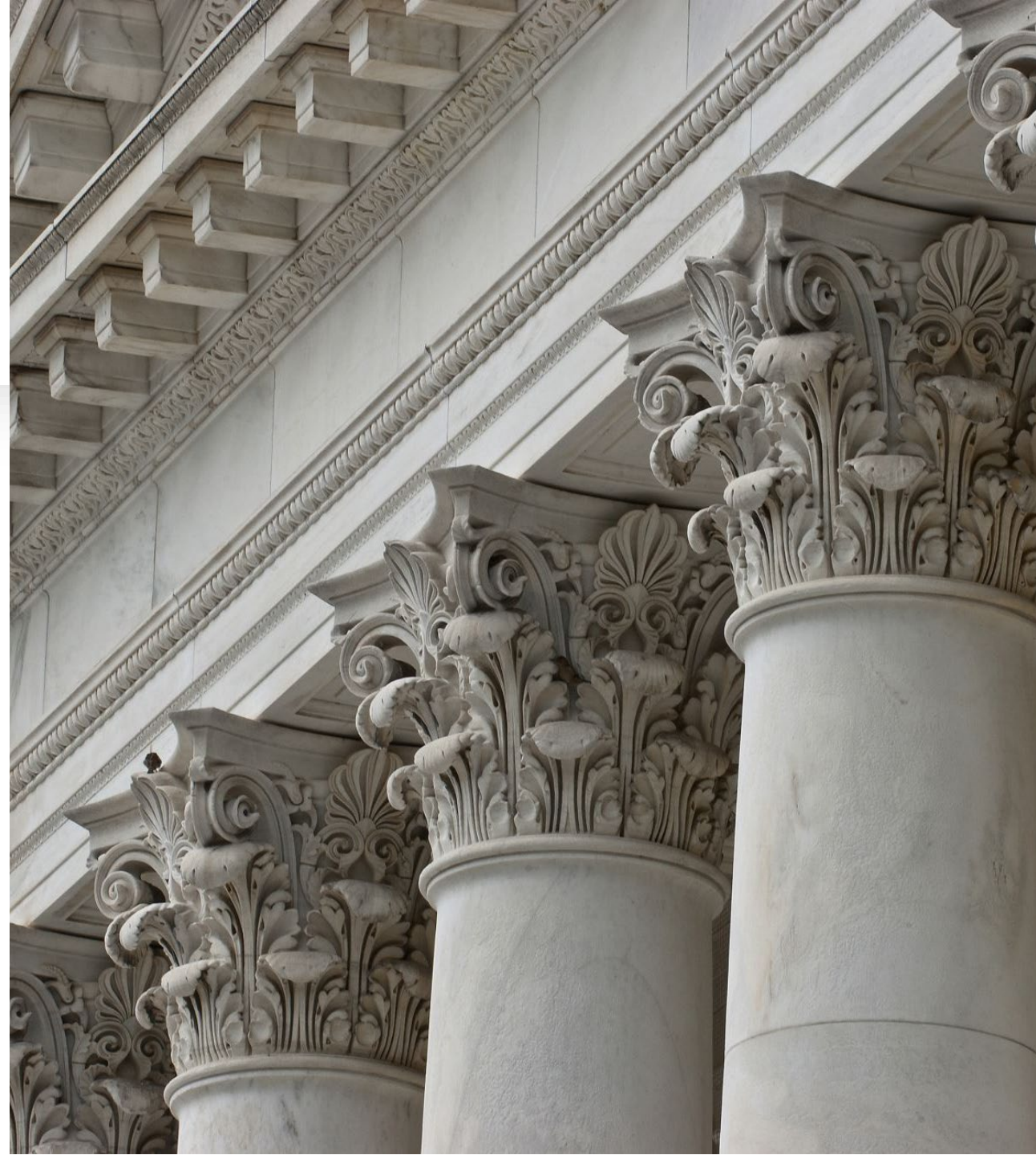
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Three Branches of Government



Legislature can move jurisdiction
from courts to agencies. Tex.
Const. art V, section 8

- District Courts have exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies
- EXCEPT
- Exclusive, appellate, or original jurisdiction may be conferred by the Constitution or other law on some other court, tribunal, or *administrative body*.



Because of Separation of Powers

Executive Branch

- Agency makes Decision

Decision
crosses to

Judicial
Branch for
Review

State Agencies have been around a loooooong time



- The Railroad Commission of Texas was the first Texas agency, Const. art. X section 2 (1890), established by the Legislature in 1891
- Third Court of Appeals established in 1892
- Fifteenth Court of Appeals established in 2023

Pre- APA: Reviewing court does not reweigh the evidence

- *Shupee v. RR Comm'n of Tex.*, 73 S.W.2d 505, 508 (Tex. 1934)
- “The court cannot substitute its judgment for that of the commission, unless it be shown that said judgment of the commission was without foundation in fact, or was unreasonable or arbitrary.”

Gulf Land Co. v. Atlantic Refining Company,
131 S.W.2d 73, 82 (Tex. 1939)

- In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence

Thomas v. Stanolind Oil & Gas Company,
198 S.W.2d 420, 421 (Tex. 1946)

- Agency proceedings are not like civil suits in which a reviewing court can set aside a jury's finding of fact on insufficiency of the evidence grounds
- The preponderance of the evidence is not involved in reviewing the agency's fact findings
- The question is one of law: is there substantial evidence to support the agency findings and order?

85 years after Railroad Commission created

- Administrative Procedure Act passed by 64th Legislature
- Effective January 1, 1976
- Codified as chapter 2001 of the Texas Government code, 1993
- Incorporated pre-existing concepts of judicial review

Substantial evidence is tricky because it means two things

It is a *standard of review* that has many threads, as codified in APA section 2001.174's list of reversible error

- (A) Violates constitution or statute
- (B) In excess of agency's statutory authority
- (C) Made via unlawful procedure
- (D) affected by other error of law

(E) Not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole

- (F) Arbitrary, capricious, abuse of discretion, unwarranted exercise of discretion

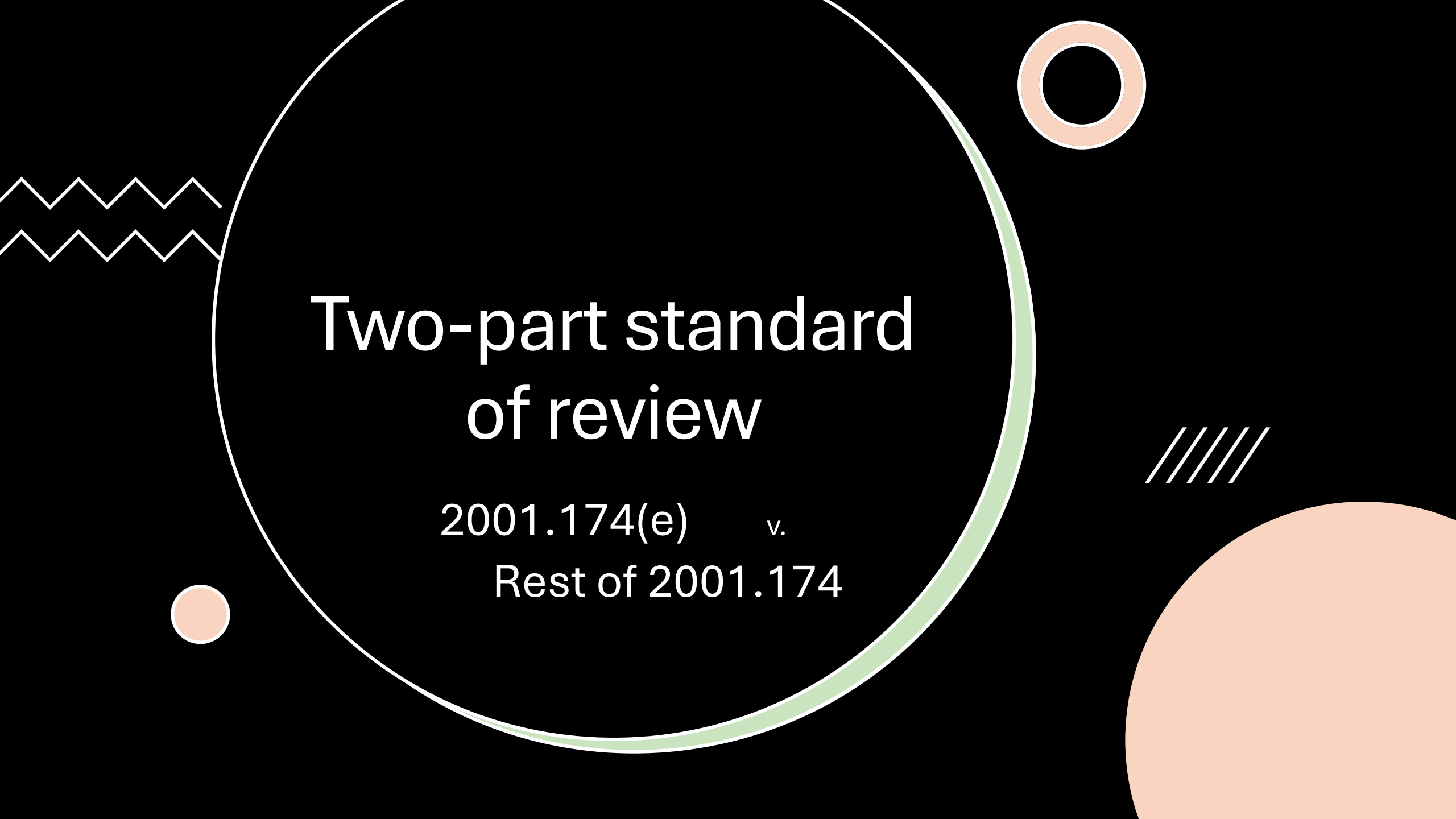
Charter Medical, the modern articulation of the substantial evidence standard of review

- Reviewing court does not substitute its judgment for the agency's
- Evidence may preponderate against agency decision and still be “substantial evidence” in view of the reliable and probative evidence in the record as a whole (more than a scintilla)
- Could reasonable minds have reached the conclusion that the agency must have in order to justify its action?

665 S.W.2d 446 (Tex. 1984)

Charter Medical addressed all of 2001.174

- The court focused not just on 2001.174(e)
- The rest of 2001.174 are part of arbitrary and capricious review
- Not two sides of the same coin, rather
- “it is clear that the legislature intended to distinguish between agency action that is not supported by substantial evidence and agency action that is arbitrary and capricious”



Two-part standard of review

2001.174(e) v.
Rest of 2001.174

City of Waco: Texas Supreme Court

- “We conclude that there is evidence in the record to support the Commission’s determination”
- “The Commission therefore did not abuse its discretion in denying the City’s request for a contested case hearing”
- Court of Appeals’ remand to Commission for a contested case hearing reversed, judgment affirming Commission’s denial of hearing request

So what's the big deal?

The real show was at the Court of Appeals

City of Waco: Two cases at Court of Appeals

- *City of Waco v. TCEQ*, 346 S.W.3d 781 (Tex. App.--Austin 2011), *rev'd* 413 S.W.3d 409 (Tex. 2013) [Pemberton (writing), Puryear, and Patterson (not participating)]
- *Bosque River Coalition v. TCEQ*, 347 S.W.3d 366 (Tex. App.—Austin 2011), *rev'd* 413 S.W.3d 403 (Tex. 2013) [Jones(writing), Henson, and Goodwin]

City of Waco/Bosque: Court of Appeals

- No contested case held, so substantial evidence review inapplicable and unavailable
- Failure to create a record that could overcome the substantial evidence standard may also be a due process violation and therefore arbitrary
- Both panels reversed TCEQ decision as arbitrary, an abuse of discretion, affected by error of law

So what went wrong?

- Judicial review under the APA applies only to contested cases
- No contested case here
- So, no judicial review
- Order must return to agency for a contested case
- Then there can be judicial review

What's wrong with that?

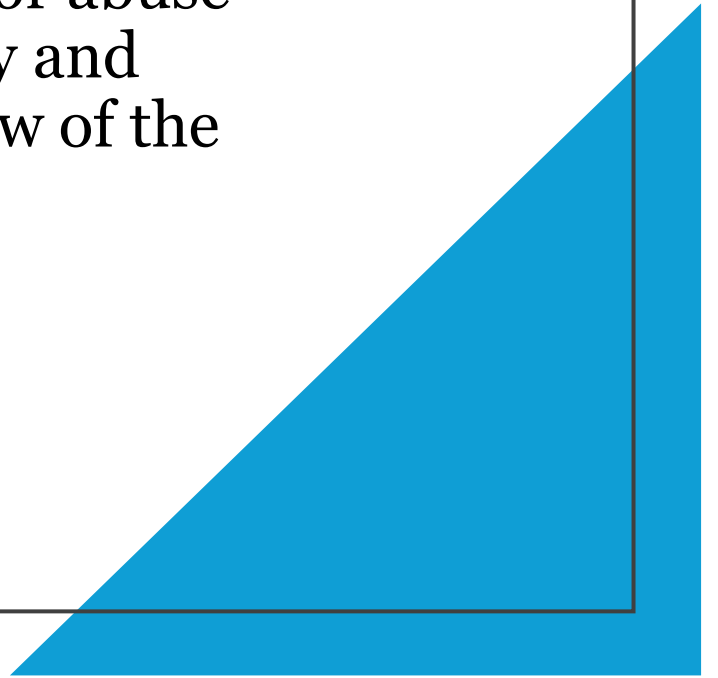
- It puts the cart before the horse
- Judicial review older than APA
- Deference to agency required by separation of powers

After *City of Waco*

- *Ranna & Co., L.L.C. v. TCEQ*, No. 03-16-00724-CV, 2018 WL 2347009 (Tex. App.—Austin May 24, 2018, no pet.) (mem. op.)
- Even when no contested case held, substantial evidence review may be afforded on the record made at the agency

What's the lesson?

- APA 2001.174 contains multiple strands of judicial review---statutory construction, review for abuse of discretion, arbitrary and capricious, AND review of the record for support by substantial evidence



Current day: November 4, 2026

- In the pending Waterkeeper cases, the parties dispute the applicability of *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013)
- In both Waco and Waterkeeper, the Commission denied protestors' hearing request
- In both Waco and Waterkeeper, the Commission did not consider protestors "affected persons" entitled to a formal contested-case hearing on the merits before SOAH