IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

gh PACKAGE PRODUCT TESTING AND CONSULTING, INC.,

Plaintiff,

v.

PETER M. BUTTIGIEG, Secretary, U.S. Department of Transportation, in his official capacity

-and-

TRISTAN BROWN, Acting Administrator, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation

-and-

U.S. DEPARTMENT OF TRANSPORTATION,

Defendants.

Civil Case No. 1:23-cv-00403-MRB

Hon. Michael R. Barrett
U.S. District Court Judge

Hon. Karen L. Litkovitz
U.S. Magistrate Judge

PLAINTIFFS' COMBINED MOTION FOR A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF THE MOTION

MOTION FOR A PRELIMINARY INJUNCTION

The U.S. Department of Transportation ("DOT") has brought an unconstitutional and illegitimate administrative enforcement proceeding against Plaintiff gh Package Product Testing & Consulting, Inc. Plaintiff respectfully moves under Federal Rule of Civil Procedure 65 for an order preliminarily enjoining DOT from subjecting it to that illegitimate proceeding. Plaintiff requests a ruling on this motion by November 1, 2023.

August 28, 2023

Respectfully submitted,

/s/ David T. Bules

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INTRODUCTION

Plaintiff gh Package Product Testing & Consulting, Inc. respectfully moves for a preliminary injunction to stop Defendants from subjecting it to an illegitimate administrative proceeding.

In November 2022, Defendant Department of Transportation ("DOT") brought an administrative enforcement proceeding to assess a civil penalty against Plaintiff under 49 U.S.C. § 5123(a) for submitting test reports that allegedly were inaccurate in respects that violated DOT regulations. It did not, however, allege that Plaintiff knew or should have known about the alleged inaccuracies, even though § 5123(a) authorizes the assessment of a civil penalty only against a person who "knowingly violates" a regulation. And at least some of DOT's allegations are clearly time-barred under 28 U.S.C. § 2462's five-year statute of limitations.[1]

DOT brought facially meritless claims because it knows it will prevail in its in-house administrative proceeding, where the deck is decisively and unconstitutionally stacked in its favor. In the past, DOT could trap accused persons in drawn-out and fundamentally illegitimate agency proceedings, eventually bullying them into capitulation. No longer. The unanimous Supreme Court ruled in April that an accused party can directly challenge the legitimacy of agency proceedings in district court without going through years of expensive and futile proceedings before agency adjudicators. *Axon Enter., Inc. v. FTC* and *SEC v. Cochran*, 143 S. Ct. 890, 906 (2023) ("*Axon/Cochran*"). The Court further made clear that being subject to an illegitimate agency proceeding inflicts a "here-and-now injury," *id.* at 903, so preliminary injunctions are needed to halt such proceedings.

In this case, all factors favor a preliminary injunction against DOT's unlawful administrative proceeding. Plaintiff is likely to succeed on the merits by showing that DOT: (1) violates Article II by using adjudicators who are neither constitutionally appointed nor removable by the President;

[1] For example, some allegations pertain to a test report Plaintiff submitted to DOT on June 30, 2017, more than five years before PHMSA brought the civil-penalty claim in November, 2022. ECF 1-7.

(2) violates Plaintiff's Seventh Amendment right to a trial by jury by attempting to deprive Plaintiff of private property in an agency proceeding; (3) violates Article III of the Constitution by attempting to exercise judicial power to decide this case; and (4) violates the Due Process Clause of the Fifth Amendment by using biased adjudicators. Unless enjoined, Defendants will inflict irreparable injury to Plaintiff's constitutional rights. Finally, subjecting Plaintiff to an unlawful administrative proceeding cannot possibly serve the public interest because "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (quoting *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). The Court should therefore grant Plaintiff's request for a preliminary injunction.

RELEVANT FACTS

I. LEGAL AND REGULATORY BACKGROUND

The Hazardous Materials Transportation Act ("HMTA"), Pub. Law. No. 93-633, 88 Stat. 2156, 2157 (Jan. 3, 1975), authorizes the Secretary of Transportation ("Secretary") to promulgate regulations for "the safe transportation … of hazardous material in … commerce." 49 U.S.C. § 5103(b)(1). Such Hazardous Materials Regulations ("HMR") are codified at 49 C.F.R. Parts 171-180. The HMTA further authorizes the Secretary to seek from any "person that knowingly violates this chapter or a regulation … issued under this chapter … a civil penalty[.]" *Id.* § 5123(a)(1). The Secretary may impose civil penalties for HMR violations only after the accused has been provided notice and an opportunity for a hearing. *Id.* § 5123(b).

The authority to assess civil penalties for HMR violations is delegated to the Administrator of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), an agency within DOT. 49 C.F.R. § 1.97(b). PHMSA initiates a proceeding to assess a civil penalty for HMR violations by serving the accused with a Notice of Probable Violation that sets forth the agency's allegations and the proposed penalty amount. *Id.* § 107.311. The accused may request a formal hearing before an

Administrative Law Judge ("ALJ") who acts as the finder of law and fact. *Id.* § 107.321. DOT's ALJs are "Officers of the United States" who must be appointed by either the President or the Secretary. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). ALJs may be removed from their positions only for good cause as determined by the Merit Systems Protection Board ("MSPB"), whose members themselves can be removed by the President only for good cause. 5 U.S.C. §§ 1202(d), 7521(a). An ALJ's order assessing a civil penalty is enforceable in federal court unless the accused files a timely administrative appeal to the PHMSA Administrator. 49 C.F.R. §§ 107.323; 107.325.

Since at least January 2017, administrative appeals have been decided by PHMSA's Chief Safety Officer ("CSO"), Harold McMillan.[2] CSO McMillan is a member of the Senior Executive Service ("SES") and may be removed only for good cause as determined by the MSPB, whose members themselves may be removed by the President only for good cause. 5 U.S.C. §§ 1202(d), 7543(a), (b), (d). CSO McMillan simultaneously serves as PHMSA's Executive Director and, in that capacity, he "is responsible for the agency's operations and [] oversee[s] consistency of program execution, PHMSA-wide."[3]

On July 22, 2022, DOT's court filings in a Sixth Circuit case conceded that CSO McMillan is an executive officer subject to the Appointments Clause of the Constitution. *See* ECF 1-1. DOT admitted—for the first time publicly—that he "had not been appointed by the President, a court of law, or a head of department," and therefore had been unlawfully adjudicating enforcement actions for years. *Id.* at 2. DOT claims the Secretary "has subsequently appointed the Chief Safety Officer and ratified his prior appointment," *id.,* but it has provided no public evidence of such ratification. Nor has DOT responded to an August 2022 Freedom of Information Act ("FOIA") request for

[2] Since 2017, CSO McMillan has issued at least 18 decisions on appeal; he affirmed the finding of violation against the accused every time. *See* Compl. ¶ 41.

[3] DOT PHMSA, Leadership, Executive Director (last visited August 25, 2023), https://www.phmsa.dot.gov/about-phmsa/leadership/executive-director.

information regarding the appointment and ratification of CSO McMillan and other agency adjudicators. *See* ECF 1-3.

II. DOT'S CIVIL-PENALTY ACTION AGAINST PLAINTIFF

Plaintiff is a laboratory located in Fairfield, Ohio, that performs tests on designs of hazardous materials packages to ensure their compliance with the HMR. Prior to November 2020, it operated under DOT's Competent Authority Approval to test and certify package designs and submitted test reports to DOT. *See* ECF 1-6. DOT reviewed and approved Plaintiff's test reports at the time they were submitted—sometimes requesting revisions and modifications—but it never previously suggested that Plaintiff falsified results or knowingly submitted inaccurate data.

On November 10, 2022, DOT served Plaintiff with a Notice of Probable Violation ("NOPV") assessing a civil penalty of $24,612 based on five reports that Plaintiff submitted between June 2017 and August 2020. The NOPV alleges these five reports contained inaccuracies that violate the HMR. But it does not suggest that Plaintiff knew or reasonably should have known about the alleged inaccuracies, which is a prerequisite for assessing a civil penalty under 49 U.S.C. § 5123(a).[4] DOT has not brought any enforcement actions against companies that manufacture, sell, or use products certified by Plaintiff's allegedly inaccurate test reports.

On May 17, 2023, ALJ Douglas M. Rawald assigned himself to preside over the enforcement action against Plaintiff. ECF 1-8. ALJ Rawald was not appointed to his position by the President or the Secretary. Rather, career civil servants hired him in 2015. There is no public record of a subsequent appointment (or ratification of his prior hiring) by the President or the Secretary. Nor has DOT responded to an August 2022 FOIA request for information regarding his appointment or ratification. *See* ECF 1-3. On July 11, 2023, ALJ Rawald entered a scheduling order that, *inter alia*, requires DOT

[4] The precise allegations against Plaintiff are not relevant for this motion and are outlined in the Complaint. *See* ECF 1 ¶¶ 56-87.

and Plaintiff to complete discovery by December 1, 2023. Prehearing Conference Report, *In the Matter of: gh Package*, PHMSA-2023-0038 (July 11, 2023) (Attached as Exhibit 1).

JURISDICTION

This Court has subject-matter jurisdiction to hear Plaintiff's challenge against the legality of DOT's administrative proceeding because the exclusive-jurisdiction provision at 49 U.S.C. § 5127 does not displace the Court's jurisdiction under 28 U.S.C. § 1331. In *Axon/Cochran*, the Supreme Court unanimously held that challenges against the legitimacy of agency enforcement proceedings "are collateral to any decisions [an agency] could make in individual enforcement proceedings." *Axon/Cochran*, 143 S. Ct. at 906. And "structural constitutional challenges" fall outside [the agency's] "competence and expertise." *Id.* at 905. Accordingly, statutory schemes that confer exclusive jurisdiction on courts of appeal to review the outcomes of the Securities and Exchange Commission's and the Federal Trade Commission's administrative proceedings do not displace a district court's § 1331 jurisdiction to hear challenges against the legitimacy of those proceedings. *Id.* Here, 49 U.S.C. § 5127 confers exclusive jurisdiction on courts of appeal to review outcomes of Defendants' administrative adjudications using materially identical language as the SEC and FTC statutes at issue in *Axon/Cochran*. *Compare* 49 U.S.C. § 5127 *with* 15 U.S.C. § 78y(a)(1) *and id.* § 45(c). Hence, § 5127 likewise does not displace this Court's jurisdiction under 28 U.S.C. § 1331 to hear Plaintiff's challenge to the legitimacy of DOT's in-house tribunal.

ARGUMENT

Courts balance four factors in deciding whether to issue a preliminary injunction: (1) whether the movant is likely to succeed on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the injunction would harm others; and (4) whether the injunction serves the public interest. *Wilson v. Gordon*, 822 F.3d 934, 952 (6th Cir. 2016). The harm-to-others and

public-interest factors "merge when the Government is the opposing party." *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (citation omitted). These factors all favor injunctive relief in this case.

I. PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS

A. DOT's Agency Adjudicators Are Neither Appointed nor Subject to Removal as Article II of the Constitution Requires

The Constitution vests "[t]he executive Power … in a President" who must "take Care that the Laws be faithfully executed." U.S. Const. art. II § 1, cl. 1; *id.* § 3. Because no one person could carry out all the executive's duties, the Constitution allows that "Officers" may assist the President in faithfully executing the laws. *Id.* § 2, cls. 1 & 2. Although Congress may permit "the President alone, [] the Courts of Law, or [] the Heads of Departments" to appoint "inferior Officers," *id.* § 2, cl. 2, the President must appoint "principal Officer[s]" only with the advice and consent of the Senate, *id.* Whether they are "inferior" or "principal," the President is also charged with "oversee[ing] executive officers through removal." *See Free Enter. Fund. v. PCAOB*, 561 U.S. 477, 492 (2010). The dual powers of appointment and removal are necessary for "legitimacy and accountability to the public" of the federal administrative body by creating "a clear and effective chain of command down from the President, on whom all people vote." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). "Without such power, the President could not be held fully accountable … [and] the buck would stop somewhere else." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (citation omitted).

Neither ALJ Rawald nor CSO McMillan satisfies the Constitution's appointment and removal requirements for executive officers who adjudicate agency enforcement actions. They are illegitimate adjudicators, so any proceedings over which they preside are likewise illegitimate.

i. The ALJ and CSO Are Not Constitutionally Appointed

Because they preside over agency adjudications, ALJ Rawald and CSO McMillan are Officers of the United States who must be appointed by the President or the Secretary. *Lucia*, 138 S. Ct. at 2052-54. There is no dispute that neither was originally appointed to his current position in a

constitutionally required manner. ALJ Rawald was hired in 2015 by a panel of federal employees; and DOT admitted in July 2022 that CSO McMillan was not properly appointed. *See* ECF 1-1. To the extent DOT purports to have subsequently ratified either or both of their prior appointments, it has provided no public evidence of ever doing so. Such non-public ratifications do not allow the public to hold a President accountable for appointing ALJ Rawald and CSO McMillan and therefore fail to cure their respective Appointments Clause defects.

"Assigning the nomination power to the President guarantees accountability for the appointees' actions because the 'blame of a bad nomination would fall upon the president singly and absolutely.'" *Arthrex*, 141 S. Ct. at 1979 (quoting The Federalist No. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton)). Thus, agency adjudicators must be appointed by either the President or one of his department heads to "maintain[] clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones." *Lucia*, 138 S. Ct. at 2056 (Thomas, J. concurring). The Appointments Clause's public-accountability purpose can be achieved only if the public is made aware of which *specific* President or department head appoints an agency adjudicator. Otherwise, the public cannot hold a President or his department head accountable. For this reason, the Solicitor General explicitly instructed agencies post-*Lucia* to ratify in-house adjudicators with "an appropriate degree of public ceremony and formality." Memorandum from Solicitor General to Agency Gen. Couns., Guidance on Admin. Law Judges after *Lucia v. SEC* (S. Ct.), at 6, July 23, 2018 ("SG Guidance").[5] While the guidance did not require a specific ceremony, it made clear the ratification should "underscore that the Department Head has satisfied the purposes of the Appointments Clause by *accepting public responsibility for the appointment* of specific persons to the office of ALJ." *Id.* (emphasis added).

[5] https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf (last visited Aug. 28, 2023).

DOT has apparently ignored that instruction. To the extent Secretary Buttigieg ratified ALJ Rawald and CSO McMillan's authority to preside over agency adjudications, he did so without accepting public responsibility for their appointments. DOT has also declined to respond to a simple FOIA request seeking evidence of such ratifications even after being caught red-handed allowing the improperly appointed CSO McMillan to adjudicate administrative appeals for years. *See* ECF 1-1; 1-3. Neither President Trump nor President Biden has accepted public responsibility for the appointments of ALJ Rawald and CSO McMillan. Nor has Secretary Buttigieg or his predecessor. Because the public has no way to hold a specific President or Secretary accountable for ALJ Rawald's and CSO McMillan's actions, DOT has not satisfied the Appointments Clause.

ii. The ALJ and CSO Are Unconstitutionally Protected from Removal

ALJ Rawald and CSO McMillan are also illegitimate because neither is subject to effective presidential control, as required by Article II's "Take Care" Clause. "Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. "[M]ultilevel protection from removal" for executive officers "is contrary to Article II's vesting of the executive power in the President." *Id* at 484. If "the President cannot remove an officer who enjoys more than one level of good-cause protection," and "[t]hat judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him," the President's "constitutional obligation to ensure the faithful execution of the laws" will have been short-circuited. *Id.* (cleaned up).

ALJ Rawald is insulated from Presidential removal by multiple "for cause" provisions. First, he is subject to removal only if the agency initiates proceedings before the MSPB and demonstrates "good cause established and determined by the … Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a), (b). Second, the members of the MSPB "may be removed by

the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). In other words, neither the Secretary nor the President can remove the ALJ without a good-cause finding from a separate body whose members also cannot be removed by the President unless they have been inefficient, neglectful, or malfeasant. Because the ALJ is an Officer of the United States who exercises "significant authority pursuant to the laws of the United States," this arrangement violates the Take Care Clause. *Free Enter. Fund*, 561 U.S. at 506-07; *Jarkesy v. SEC*, 34 F.4th 446, 465 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) ("SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed").

The same is true for CSO McMillan, who is a career SES employee. "Senior executives are high-level federal employees who do not require presidential appointment but who nonetheless exercise significant responsibility—including directing organizational units, supervising work, and determining policy—and who may be held accountable for their projects or programs." *Esparraguera v. Dep't of the Army*, 981 F.3d 1328, 1330 (Fed. Cir. 2020). Like ALJs, SES members enjoy multiple levels of protection from removal. They "may be removed … for 'misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.'" *Id.* (quoting 5 U.S.C. § 7543(a)). Removal under § 7543 "includes procedural protections like those available for covered employees in the competitive and excepted services." *Id.*; *see also* 5 U.S.C. § 7543 (b), (d) (permitting notice of the action, the opportunity to respond, the right to be represented by counsel, a written determination, and appeal to the MSPB).[6] On appeal to the MSPB, the agency's decision "shall be sustained" if it is supported by substantial evidence for unacceptable performance actions or preponderance of the evidence for all other actions. 5 U.S.C. § 7701(c). The

[6] SES members may also be removed "for 'unsatisfactory' or 'less than fully successful' performance" as determined by agency performance review boards. *Esparraguera*, 981 F.3d at 1331. A senior executive "may not appeal any appraisal and rating under any performance appraisal system." *Id.* (quoting 5 U.S.C. § 4312(d)).

President may, in turn, remove members of the MSPB only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

These frameworks granting ALJs and SES members multilevel job protection prevents the President from exercising his Article II removal authority. *See Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring). No President could, for instance, hold ALJ Rawald and CSO McMillan directly accountable for issuing bad decisions and remove them from office unless the MSPB first gave permission. But the President also would be unable to hold the MSPB directly accountable. Thus, the President lacks "full control" over ALJs and SES members and cannot hold them accountable as constitutionally required. *Free Enter. Fund*, 561 U.S at 496.[7] The lack of presidential control renders ALJ Rawald and CSO McMillan illegitimate agency adjudicators. Any administrative proceeding over which they preside is likewise illegitimate.

B. DOT's Adjudication of Private Rights Violates the Seventh Amendment Right to Trial by Jury

DOT's case against Plaintiff under 49 U.S.C. § 5123(a) is a negligence action that seeks a civil penalty. As such, it is analogous to a traditional common-law suit that seeks to deprive Plaintiff of its property in which Plaintiff has a right to a trial by jury under the Seventh Amendment of the U.S.

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[7] The Supreme Court has "recognized only two exceptions to the President's unrestricted removal power." *Seila Law*, 140 S. Ct. at 2192. Neither applies here. The first exception for "expert agencies led by a *group* of principal officers removable by the President only for good cause," does not apply here because ALJs are not a group of principal officers. *See id.* (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). The second exception permitting "tenure protections to certain inferior officers with narrowly defined duties" and "no policymaking or administrative authority," is also inapplicable. *See id.* (discussing *United States v. Perkins*, 116 U.S. 483 (1886) and *Morrison v. Olson*, 487 U.S. 654 (1988)). DOT ALJs and the CSO do not have "limited" duties because they are not "appointed essentially to accomplish a single task" as in *Morrison*, 487 U.S. at 672. Rather, they continue in office from case to case and exercise policymaking or administrative authority by interpreting and enforcing the Agency's regulations during administrative proceedings, while also setting penalties for alleged violations.

Constitution. *Tull v. United States*, 481 U.S. 412, 422 (1987). DOT's administrative procedures do not provide for a trial by jury, so they violate the Seventh Amendment.

Trial by jury is a "fundamental" component of our justice system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9-10 (1957). As Blackstone said, "the most transcendent privilege which any subject can enjoy or wish for [is] that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Id.* (quoting 3 William Blackstone, *Commentaries* 379). "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

The right to trial by jury is preserved in "Suits at common law," U.S. Const. amend. VII. "The [Supreme] Court has construed this language to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'" *Tull*, 481 U.S. at 417. "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency[.]" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). Otherwise, "Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts." *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 457 (1977).

Atlas Roofing held that enforcement actions under the Occupational Safety and Health ("OSH") Act could be resolved administratively without providing the right to a trial by jury because that statute "created a new cause of action, and remedies therefor, unknown to the common law." *Id.*

at 461.[8] By contrast, the Seventh Amendment right to a jury trial applies to statutory causes of actions "that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century[.]" *Granfinanciera,* 492 U.S. at 42. In making this determination, courts "must examine both the nature of the action and of the remedy sought." *Tull*, 481 U.S. at 417. The second inquiry into the nature of the remedy sought "is more important than the first." *Granfinanciera*, 492 U.S. at 42.

Here, the case against Plaintiff rest upon a theory of negligence because the agency must prove that "a reasonable person acting in the circumstances and exercising reasonable care" would have "knowledge of the facts giving rise to the violation." 49 U.S.C. § 5123(a)(1). This straightforward negligence standard asks whether the accused "use[d] such care as a prudent man would use under the circumstances" and thus falls squarely within traditional suits at common law. Oliver Wendell Holmes, Jr., THE COMMON LAW 111 (1881); *see also* D.J. Ibbetson, *The Law of Torts in the Nineteenth Century: The Rise of the Tort of Negligence*, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (Oxford, 2001). DOT's civil-penalty claim against Plaintiff is thus analogous to common-law negligence actions that were brought in English courts of law.[9]

Even *Atlas Roofing* recognized that before (and after) the OSH Act, a person injured by an unsafe workplace condition could still raise an action at common law for negligence in which the right of trial by jury would apply. 430 U.S. at 445. Congress enacted the OSH Act precisely because it

[8] Adjudication of enforcement actions under the OSH Act required factfinders to undertake detailed assessments of workplace safety conditions without regard to the employer's state of mind. The Court held that Congress could reasonably conclude that fact-finding would be most competently performed by an administrative agency "with special competence in the relevant field" and that exclusive reliance on administrative adjudication would lead to "speedy and expert resolutions" of issues arising under these new rights. *Atlas Roofing*, 430 U.S. at 455, 461.

[9] *See, e.g.*, James Oldham, The Law of Negligence as Reported in *The Times*, 1785-1820, Cambridge University Press (2018) ("[W]hat is known about the emergence of the tort of negligence in English law comes almost entirely from the printed reports of civil (plea side) cases tried in the three common law courts (King's Bench, Common Pleas, and Exchequer).").

deemed common-law negligence actions to be inadequate and thus created an entirely new cause of action and "committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Id.* at 450; *see also* Margaret Little, *The SEC's Bleak House of Cards: Some Reflections on* Jarkesy v. SEC *and Judicial Doctrine*, 27 Tex. Rev. L. & Politics 565, 585 (2023) ("The *Atlas Roofing* opinion was not ambiguous about confining its ruling to these new enforcement schemes unknown to the common law[.]"). By contrast, § 5123(a) does not commit such exclusive power to DOT. *See Cont. Courier Servs., Inc. v. Rsch. & Special Programs Admin., U.S. Dep't of Transp.*, 924 F.2d 112, 114 (7th Cir. 1991). In *Contract Currier*, the DOT adjudicator found a violation of the HMR under § 5123(a) but "did not explain why Contract Courier 'should have known' about the [violation] or suggest that failure to acquire this knowledge was negligent. They went straight from the existence of a violation to liability." The Seventh Circuit reversed because "[t]he statute does not permit this equation." *Id.* Unlike in *Atlas Roofing*, the nature of a § 5123(a) enforcement action requires DOT to prove negligence, making it analogous to a common-law suit in which the Seventh Amendment's right to trial by jury applies. Indeed, whether an accused had the requisite state of mind is a quintessential question for a jury to decide.

More importantly, the nature of remedy sought is a civil penalty. Since Magna Carta, monetary penalties had to be "fixed, not arbitrarily by the Crown," but rather by "honest men of the neighbourhood" (*i.e.*, a jury) following judicial proceedings. William S. McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287-88 (2d ed. 1914). "Prior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418. "After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial." *Id.* "Actions by the Government to recover civil penalties under statutory provisions therefore historically have

been viewed as one type of action in debt requiring trial by jury." *Id.* at 418-19. Accordingly, even without "finding a precisely analogous common-law cause of action," statutory actions seeking civil penalties are remedies at common law, which "could only be enforced in courts of law." *Id.* at 421-22; *Jarkesy*, 34 F.4th at 454 (holding that "the jury-trial right applies to the penalties action the SEC brought in this case" because actions "seeking civil penalties under securities statutes are akin to those same traditional actions in debt.").

DOT seeks to impose liability on Plaintiff under 49 U.S.C. § 5123(a)—a legal claim based on negligence. And, as in *Tull*, the agency seeks to levy a civil penalty remedy. *Tull*'s two-part test is readily met, and Plaintiff has a constitutional right to a jury trial to determine its liability. But the agency's adjudication structure permits no pathway to a jury. Rather, the agency makes factual findings, which are entitled to deferential review by circuit courts. Such an arrangement circumvents the Seventh Amendment's mandate that: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Constitutional protection of jury fact-finding into, for example, an accused's state of mind, is rendered meaningless if a single agency adjudicator replaces a jury. Because DOT's adjudicatory scheme denies Plaintiff its constitutional right to a jury trial, it plainly violates the Seventh Amendment.

C. Agency Adjudication of this Civil-Penalty Claim Violates Article III of the Constitution

Even if a jury trial were not mandated, allowing ALJ Rawal, CSO McMillan, or any other executive branch officers to adjudicate Plaintiff's private rights would violate Article III of the Constitution, which establishes an independent judiciary as a "guardian of individual liberty and separation of powers." *Stern v. Marshall*, 564 U.S. 462, 495 (2011). "The judicial Power of the United States" is "vested" in the federal courts, and it secures tenure and salary protection for the judges of those courts. U.S. Const. art. III § 1. These protections ensure the independence of the federal courts

from the political branches, as "there is no liberty, if the power of judging be not separated from the legislative and executive powers." Federalist No. 78, quoting *Montesquieu*, Spirit of Laws. (A. Hamilton) (Rossiter, ed. 1961).

The Supreme Court made clear over two hundred years ago that "Congress couldn't imbue executive officers with judicial authority." *Ruiz v. U.S. Att'y Gen.*, 73 F.4th 852, 864 (11th Cir. 2023) (Newsom, J. concurring) (citing *Hayburn*'s *Case*, 2 U.S. (2 Dall.) 408, 410 (1792)). Hence, ALJ Rawald and CSO McMillan are executive officers who may not exercise "the essential attributes of judicial power [that] are reserved to Article III courts." *Stern*, 564 U.S. at 501 (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (2011)); *see also N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62 (1982). Rather, Congress may authorize executive officers to adjudicate only matters that fall entirely within the federal government's discretion and therefore "from their nature do not require judicial determination." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (citation omitted). For instance, because the government has absolute discretion regarding the expenditure of government funds, an executive officer may resolve factual issues arising from those expenditures, without judicial review. *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. 272, 284-85 (1856). But executive officers may not engage in fact-finding and decide legal issues concerning private rights that belong to an individual, such as the disposition of private property, which instead "must be adjudicated by an Article III court." *Stern*, 564 U.S. at 492 (quoting *Granfinanciera*, 492 U.S. at 55).

While the Supreme Court has not "definitively explained" the outer bounds of private rights that require Article III judicial power to resolve, *Oil States*, 138 S. Ct. at 1373 (quoting *N. Pipeline*, 458 U.S. at 69)), it has made clear that such rights include "any matter which, from its nature, is the subject of a suit at the common law," *Stern*, 564 U.S. at 488 (quoting *Murray's Lessee*, 59 U.S. at 284). Private rights also encompass government action that historically would not have been exclusively undertaken by the executive branch, and that instead is "inherently … judicial." *N. Pipeline*, 458 U.S. at 68-70.

Under these guideposts, this case indisputably involves Plaintiff's private rights. To start, this case is essentially a negligence action that alleges Plaintiff was not "exercising reasonable care." 49 U.S.C. § 5123(a)(1)(B). Since such a claim falls squarely within traditional suits at common law brought in English courts of law, it impacts Plaintiff's private rights. Hence, only Article III courts may wield judicial power to determine whether Plaintiff violated § 5123(a)'s negligence standard.

More importantly, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422. A statutory action by the government to recover monetary penalties deprives a person of vested property rights and thus requires a judicial determination. The 1789 Judiciary Act, for instance, provided that the Article III courts would have "exclusive original cognizance … of all suits for penalties and forfeitures incurred, under the laws of the United States." Judiciary Act of 1789, 1 Stat. 73, 77 § 9 (Sept. 24, 1789). The civil-penalty claim DOT brought against Plaintiff is therefore "inherently … judicial." *N. Pipeline*, 458 U.S. at 68-70. Determining liability for a civil-penalty claim—and the penalty amount—requires exercise of judicial power to adjudicate private property rights. Such power is forbidden to executive officers such as ALJ Rawald and CSO McMillan. Rather, DOT's civil-penalty claim must be brought in an Article III court.

D. Defendants' Agency Proceedings Fail to Provide Due Process of Law

The Fifth Amendment of the Constitution provides that: "No person shall be … deprived of life, liberty, or property, without due process of law." At a bare minimum, due process requires adequate notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But notice and opportunity alone are not enough because the Constitution requires "not simply due process … but due process of law—meaning judicial decisions following the law, in the courts of law, in accord with their essential traditional procedures." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 254 (2014). DOT fails to guarantee due process *of law* because it employs adjudicators who are unconstitutionally biased in favor of the agency.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The irreducible minimum of a fair tribunal is "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The requirement for a neutral decisionmaker "applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). To ensure fairness, "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). *Withrow* nonetheless held that combining investigative and adjudicative functions within a single agency, "without more," did not violate the due process of law. 421 U.S. 35. at 58. But that holding "does not, of course, preclude a [district] court from determining from special facts and circumstances present … that the risk of unfairness is intolerably high." *Id.* Such circumstances are present here.

To start, *Withrow*'s requirement that a plaintiff "must overcome a presumption of honesty and integrity in those serving as adjudicators," *id.* at 47, is easily met here because policy documents explicitly demand bias in favor of the agency. The ALJ manual issued by the Administrative Conference of the United States makes clear that "[i]t is the ALJ's *duty* to decide all cases in accordance with agency policy." Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges 136-37 (2004) (emphasis added). And the Solicitor General has opined that failure "to follow agency policies, procedures, and instructions" constitutes good cause for removal of an ALJ. *See* SG Guidance at 9. A 2016 study found that 61 percent of ALJs across the federal government report agency interference as a problem, with 26 percent reporting that it was a frequent problem.[10] There

[10] Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1645-46 (2016); *see also* U.S. Gov't Accountability Off., GAO-22-106121, *Patent Trial and Appeal Board: Preliminary Observations on Oversight of Judicial Decision-making* (2022). ("[T]he majority of judges GAO surveyed reported they

obviously would be a due-process violation were federal judges told that they have a duty to decide cases consistent with executive branch policy; and that they may be impeached for not doing so. The Due Process Clause does not tolerate adjudication by an ALJ who faces the same pressure.[11]

The due-process defect is even greater for CSO McMillan because he personally oversees PHMSA's investigation and enforcement actions as its Executive Director. In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the Supreme Court held that due process of law would be violated if a state chief justice sat in a criminal case in which he participated nearly three decades ago as a district attorney because "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 1905. The justice's sole involvement in the underlying case was approving a request to seek the death penalty by a trial prosecutor he supervised. Despite recognizing that he was just one of several attorneys who worked on the case, played only a limited supervisory role, and ended his involvement decades earlier, the Court held that his participating in the proceedings as a justice on the state supreme court violated due process of law. *Id.* at 1908-09.

Since at least February 2021, CSO McMillan has been "responsible for the agency's operations and … consistency of program execution, PHMSA-wide."[12] This "PHMSA-wide" responsibility includes the decisions to investigate Plaintiff and to charge Plaintiff with violations of the HMR. It also includes the ongoing prosecution of Plaintiff in any administrative proceeding. Allowing CSO McMillan to sit in appellate review of a case in which he previously participated presents even greater due-process defects than in *Williams*. Whereas the state chief justice's involvement in the underlying

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experienced pressure to adhere to management comments and to change or modify an aspect of their decision for an America Invents Act (AIA) trial on challenges to the validity of issued patents.").

[11] For instance, PHMSA policy is to assess civil penalties without regard to whether an accused "knowingly violate[d]" the HMR, as 49 U.S.C. § 5123(a) requires. ALJ Rawald is duty-bound to follow that policy and may be removed from office if he does not. So, he cannot possibly give fair hearing to Plaintiff's argument regarding scienter.

[12] *Supra* note 3.

cases ended decades ago, CSO McMillan is *currently* overseeing PHMSA's investigation and prosecution activities in his capacity as Executive Director. And he will continue to be responsible for those functions even when he is deciding any administrative appeal of Plaintiff's case. Moreover, the justice in *Williams* was but one of many voices on the state supreme court. By contrast, CSO McMillan is the sole adjudicator of any administrative appeal, and thus nothing dilutes his bias in favor of the agency's investigative and prosecutorial activities that he personally oversaw.

Allowing ALJ Rawald and CSO McMillan to adjudicate DOT's civil-penalty claim violates the due process of law because they are unavoidably biased in favor of the agency that employs them.

II. INJUNCTIVE RELIEF IS WARRANTED

"When reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky v. McCreary Cnty.*, 354 F.3d 438, 445 (2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Obama for Am. V. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."). Subjecting Plaintiff to a proceeding that violates Article II, Article III, the Seventh Amendment, and the Due Process Clause inflicts "a here-and-now injury." *Axon/Cochran*, 143 S. Ct. at 903. Judicial review of the agency's decision after the illegitimate proceeding has concluded would fail to remedy injury to Plaintiff's right to be free from such a proceeding in the first place. *Id.* at 904. ("A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful."). DOT's proceeding against Plaintiff has already begun and thus it is causing ongoing irreparable injury to Plaintiff's constitutional rights. An injunction to stop DOT's illegitimate proceeding is needed to prevent further irreparable injury.

A preliminary injunction is also necessary to prevent irreparable financial harm. Plaintiff pays its representative hundreds of dollars per hour to defend against DOT's ongoing illegitimate

proceeding. Such financial loss is irreparable because there is no way for Plaintiff to recover damages. *See Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) ("The federal government's sovereign immunity typically makes monetary losses [caused by unlawful agency action] irreparable.").

When the party opposing an injunction is the federal government, the balance-of-harms factor "merge[s]" with the public-interest factor. *Wilson*, 961 F.3d at 844. DOT's unlawful proceeding could not possibly serve the public interest because "the public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022). Even if that were not so, the public interest in DOT's prosecution of Plaintiff for submitting allegedly inaccurate reports many years ago is negligible because there is no allegation of actual harm or ongoing public safety concerns. Nor is there even any allegation of knowing conduct. Tellingly, DOT has not brought any enforcement action against the companies that currently manufacture, sell, and use products that Plaintiff tested and certified. In that posture, any possible public interest in prosecuting Plaintiff is easily outweighed by the irreparable injury to Plaintiff's constitutional rights.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for a preliminary injunction to halt DOT's illegitimate administrative proceeding.

August 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 28, 2023, a true and correct copy of the foregoing was filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system.

/s/ Daivd T. Bules
David T. Bules

LOCAL RULE 65.1(b) CERTIFICATION

I hereby certify that on August 28, 2023, I served a copy of the complaint, this motion, and all other filings in this case by email on the defendants' attorney at the following email address: james.r.powers@usdoj.gov.

/s/ Daivd T. Bules
David T. Bules