IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

INSTITUTE FOR HAZARDOUS MATERIALS
PACKAGING AND CERTIFICATION TESTING, INC.,
A nonprofit association,

Plaintiff,

v.

PETER PAUL MONTGOMERY BUTTIGIEG,
Secretary of the Department of Transportation, in his official capacity,

and

THE UNITED STATES DEPARTMENT OF
TRANSPORTATION, an Executive Branch Agency,

Defendants.

---/

VERIFIED COMPLAINT
(For Violation of the Administrative Procedure Act,
Pattern and Practice Violation of Due Process,
and for Declaratory and Injunctive Relief)

Nature of the Case

1. This case is about the administrative state's systematic assault on due process and on the principle that our citizens and small businesses should be free from endless federal investigations and abusive enforcement actions.

2. Plaintiff is a not-for-profit association of American small businesses regulated by the U.S. Department of Transportation (the "Department" or "DOT").

3. Defendant Peter Paul Montgomery Buttigieg is the Secretary of Transportation. He is named in his official capacity.

4. Defendant United States Department of Transportation is a department within the Executive Branch of the United States Government and an "agency" under 5 U.S.C. § 552(f).

5. On February 15, 2019, the Department tacitly acknowledged a longstanding pattern and practice of due-process and procedural violations in its civil investigations, regulatory enforcement actions, and adjudications. *See* Dep't of Transp., *General Counsel's Mem. to Secretarial Officers and Heads of Operating Administrations: Procedural Requirements for DOT Enforcement Actions* (Feb. 15, 2019) (the "Bradbury Memo") (Appendix at 1–14).

6. Fairly read, the Bradbury Memo suggested the Department's investigative process is "a game of 'gotcha'"; its enforcement actions rely on "overly broad or unduly expansive interpretations of the governing statutes or regulations"; it conducts "'fishing expeditions' to find potential violations absent sufficient evidence to support assertion of a violation; it acts without fair notice of prohibited and permitted conduct; its adjudications are interminable; and its investigative and enforcement activities are sometimes tainted by enforcement personnel's "personal animus against a party." *Id.* at 5–7.

7. To remedy the Department's historical abuses, the Bradbury Memo ordered all agency enforcement personnel to follow *Brady v. Maryland* and disclose exculpatory evidence "as a matter of course;" to stop using "enforcement authority effectively to convert agency guidance documents into binding rules;" to stop allowing cases "to linger unduly;" and to stop imposing opaquely calculated penalties that do not "reflect due regard for fairness, the scale of the violation [and] the violator's knowledge and intent." *Id.* at 9–11.

8. On October 9, 2019, President Trump issued Executive Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55239 (Oct. 9, 2019) (Appendix at 15–19).

9. Citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), Executive Order 13892 affirmed the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, was enacted to provide that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain

stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." 84 Fed. Reg. at 55239, Appendix at 15.

10. Executive Order 13892 declared that DOT and all other federal agencies must act transparently and fairly with respect to all affected parties when engaged in civil administrative enforcement or adjudication; subject no person to a civil administrative enforcement action or adjudication absent prior public notice of both its jurisdiction over particular conduct and the legal standards applicable thereto; and afford regulated parties all the safeguards described in the Order, even above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose. *Id.* at 55239, Appendix at 15.

11. Executive Order 13892's specific directives included:

a. Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law. 84 Fed. Reg. at 55240, Appendix at 16

b. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has substantive legal consequence for a regulated person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law. 84 Fed. Reg. at 55241, Appendix at 17.

c. Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction—such as a claim to regulate a new subject matter or an explanation of a new basis for liability—must be published, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) before the conduct over which jurisdiction is sought occurs. *Id.* at 55241, Appendix at 17.

d. Each agency conducting civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a regulation did not already exist. *Id.*

e. Each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website. *Id.* at 55242, Appendix at 18.

12. On December 27, 2019, DOT published 49 CFR Part 5 Subpart D – "Enforcement Procedures," 49 CFR § 5.53 *et seq*. To Plaintiff's members it pledged:

> [T]he Department provides affected parties appropriate due process in all enforcement actions, that the Department's conduct is fair and free of bias and concludes with a well-documented decision as to violations alleged and any violations found to have been committed, that the penalties or corrective actions imposed for such violations are reasonable, and that proper steps needed to ensure future compliance were undertaken by the regulated party.

Dep't of Transp., *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71714, 71716 (Dec. 27, 2019) (Appendix at 20–40).

13. Among other things, Subpart D affirmed the Department's legal obligation to comply with the principle of *Brady v. Maryland,* 373 U.S. 83 (1963), requiring, consistent with the Fifth Amendment, agency employees to disclose any exculpatory evidence in the Department's possession. 49 CFR § 5.83, Appendix at 37.

14. It also prohibited "fishing expedition" investigations absent sufficient evidence in hand to support the assertion of a violation. 49 CFR § 5.67, Appendix at 36.

15. It also prohibited administrative penalties except when and as supported by clear statutory authority and sufficient findings of fact and with due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business); and guaranteed transparent penalty calculations. 49 CFR § 5.97, Appendix at 38.

16. Many of Plaintiff's members have suffered due-process and procedural violations at the Department's hand, uncured by available post-deprivation process, and all share the fear of retaliation and punishment for complaining about unlawful abuses of the Department's power. Therefore, each has a strong reliance interest in the Constitutional, due-process, and procedural rights protected or created by Subpart D.

17. On January 20, 2021, President Biden revoked Executive Order 13892 and ordered all agencies to "rescind any orders, rules regulations, guidelines or policies" implementing it. Executive

Order No. 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049 (Jan. 20, 2021).

18. He characterized Executive Order 13892, with its emphasis on due process and government transparency in civil enforcement, as "harmful" policy and a "harmful" directive that threatens "to frustrate the Federal Government's ability to confront" the pandemic, economic recovery, racial justice, and climate change. 86 Fed. Reg. at 7409. However, President Biden did not explain or cite any facts demonstrating how Executive Order 13892 might impair these efforts.

19. On April 2, 2021, without notice and comment, a reasoned explanation, or acknowledgement and consideration of the reliance interest Plaintiff's members and others similarly situated might have in the 2019 rule, Defendant Peter Paul Montgomery Buttigieg revoked Subpart D to deny due-process rights and procedural protections guaranteed thereunder. *See* Dep't of Transp., *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17292, 17293 (Apr. 2, 2021) (Appendix at 41–45).

20. Without further explanation, his justification was that Subpart D's rules are "derived from the APA and significant judicial decisions" and their application to enforcement matters "can be accomplished by internal directives *as the Department deems necessary and appropriate*." 86 Fed. Reg. at 17293, Appendix at 42 (emphasis added).

21. Although his Federal Register Notice is unclear, it seems he relied on Executive Order 13992 as the reason for rescission without any explanation why Subpart D might "threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." *Id.*

22. Plaintiff seeks permanent injunctive relief restoring the status quo and prohibiting Subpart D's rescission. It also seeks declaratory relief requiring the Department to comply with the Administrative Procedure Act and engage in notice-and-comment rulemaking prior to rescinding or

otherwise modifying Subpart D. It also seeks permanent injunctive and declaratory relief requiring the Department to continue providing its members the due-process rights and procedural protections recognized, guaranteed, or created by Subpart D.

23. Finally, for many years, the Department has engaged in a pattern and practice of due-process violations with respect to its civil investigations, enforcement actions, and adjudications. Post-deprivation process and remedies have proven inadequate to protect Plaintiff 's members or to deter Department employees and officials from such violations, or to prevent the retaliation and targeting of persons who object to unlawful conduct.

24. Consequently, Plaintiff requests appointment of a Special Master under Fed. R. Civ. P. 53 to monitor Defendant's civil investigations, enforcement actions, and adjudications to ensure compliance with this Court's orders, to protect its members' due process and procedural rights, and to prevent unlawful regulatory retaliation and abuse.

Parties

25. Plaintiff Institute for Hazardous Materials Packaging and Certification Testing, Inc. ("IHMPACT"), is a Virginia nonprofit corporation with its principal place of business at 6200 N. Interstate Highway 35 East, Waxahachie, Texas.

26. IHMPACT is a charitable and educational association whose members include family-owned, small businesses regulated by the Department's Pipeline and Hazardous Materials Safety Administration ("PHMSA"). IHMPACT's members manufacture, test and certify packaging products to meet federal standards for safely transporting hazardous materials.

27. Defendant Peter Paul Montgomery Buttigieg is named Defendant in his official capacity as the Secretary of Transportation.

28. Defendant DOT is a department within the Executive Branch of the United States Government and an "agency" under 5 U.S.C. § 552(f).

Jurisdiction

29. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 2201(a).

Venue

30. Venue in this District is proper under 28 U.S.C. § 1391(b)(2) because this is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, and 28 U.S.C. § 1391(e)(1)(C) because this is a civil action against an officer of the United States. Plaintiff resides in this District, and no real property is involved.

Facts

I. BACKGROUND

31. On December 27, 2019, the Department of Transportation promulgated 49 CFR Part 5 Subpart D – Enforcement Procedures, 49 CFR § 5.53 *et seq*. Dep't of Transp., *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71714, 71729 (Dec. 27, 2019), Appendix at 35.

32. Subpart D was promulgated to expand and protect the due-process rights and procedural protections afforded regulated persons, including IHMPACT's members, subject to DOT's civil enforcement actions.

33. Subpart D promises the Department will provide "appropriate due process in all enforcement actions, that the Department's conduct is fair and free of bias and concludes with a well-documented decision as to violations alleged and any violations found to have been committed, and that the penalties or corrective actions imposed for such violations are reasonable." 84 Fed. Reg. at 71716, Appendix at 22.

34. Subpart D applies to "*all* enforcement actions taken by *each* Department operating administration and *each* component of the Office of the Secretary of Transportation with enforcement

authority," including Administrative Law Judges. 49 CFR § 5.53 (emphases added); 84 Fed. Reg. at 71729, Appendix at 35.

35. Subpart D contains both procedural rules of agency organization, procedure, or practice, and substantive rules affecting IHMPACT members' legal rights.

36. The procedural rules include 49 CFR §§ 5.55 ("Enforcement attorney responsibilities"); 5.65 ("Proper exercise of prosecutorial and enforcement discretion"); 5.79 ("The hearing record"); 5.87 ("Alternative Dispute Resolution (ADR)"); 5.99 ("Publication of decisions"); 5.101 ("Coordination with the Office of Inspector General on criminal matters"); 5.93 ("Settlements"); 5.95 ("OGC approval required for certain settlement terms"); 5.103 ("Standard operating procedures"); 5.105 ("Cooperative Information Sharing"); and 5.109 ("Referral of matters for judicial enforcement"). Appendix at 35–39.

37. The substantive rules include:

a. 49 CFR § 5.59. It provides in relevant part: "No person should be subject to an administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."

b. 49 CFR § 5.61. It provides in relevant part: "[T]o the maximum extent consistent with protecting the integrity of the investigation, the representatives of DOT should promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review."

c. 49 CFR § 5.65. It provides in relevant part: "[A]gency counsel must not rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations." It further provides: "DOT will not rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority. All decisions by DOT to prosecute or not to prosecute an enforcement action should be based on a reasonable interpretation of the law about which the public has received fair notice[.]"

d. 49 CFR § 5.67. It provides in relevant part: "The Department will not initiate enforcement actions as a 'fishing expedition' to find potential violations of law *in the absence of sufficient evidence in hand to support the assertion of a violation*." (Emphasis added.) In other words, no longer would the Department subject regulated persons, including IHMPACT's members, to administrative investigations, inquiries, and subpoenas

simply on suspicion that the law is being violated, or even just because it wants assurance that it is not, without reasonable prior evidence of a violation.

e. 49 CFR § 5.69. It provides in relevant part: "All documents initiating an enforcement action shall ensure notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken to allow an opportunity to challenge the action and to avoid unfair surprise. The notice should include legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review."

f. 49 CFR § 5.71. It provides in relevant part: "[A]ny agency personnel who have taken an active part in investigating, prosecuting, or advocating in the enforcement action should not serve as a decision maker and should not advise or assist the decision maker in that same or a related case. In such proceedings, the agency's adversarial personnel should not furnish *ex parte* advice or factual materials to decisional personnel."

g. 49 CFR § 5.83. It provides in relevant part: "[T]he Department … will voluntarily follow in its civil enforcement actions the principle articulated in *Brady v. Maryland*, in which the Supreme Court held that the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence 'material to guilt or punishment' known to the government … This policy *requires the agency's adversarial personnel to disclose materially exculpatory evidence in the agency's possession to the representatives of the regulated entity* whose conduct is the subject of the enforcement action. These affirmative disclosures should include *any material evidence known to the Department's adversarial personnel that may be favorable to the regulated entity in the enforcement action*—including evidence that tends to negate or diminish the party's responsibility for a violation or that could be relied upon to reduce the potential fine or other penalties. *The regulated entity need not request such favorable information; it should be disclosed as a matter of course*." The Department had never previously recognized or acknowledged the existence of any sort of a *Brady* right in its civil enforcement activities, much less disclosed exculpatory evidence.

h. 49 CFR § 5.85. It provides in relevant part: "[T]he Department may not use its enforcement authority to convert agency guidance documents into binding rules. Likewise, enforcement attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law."

i. 49 CFR § 5.97. It provides in relevant part: "No civil penalties will be sought in any DOT enforcement action except when and as supported by clear statutory authority and sufficient findings of fact." It further provides: "Where applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business). The assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties. In addition, the agency shall voluntarily share penalty calculation worksheets, manuals,

charts, or other appropriate materials that shed light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible."

j. 49 CFR § 5.107. It provides in relevant part: "The Department shall comply with the terms of SBREFA when conducting administrative inspections and adjudications, including section 223 of SBREFA (reduction or waivers of civil penalties, where appropriate). The Department will also cooperate with the Small Business Administration (SBA) when a small business files a comment or complaint related to DOT's inspection authority and when requested to answer SBREFA compliance requests."

38. Subpart D repeated verbatim key provisions of the Bradbury Memo. *Compare, e.g.,* Bradbury Memo ¶¶ 13, 14, 20, Appendix at 9–11 *with* 49 CFR §§ 5.83, 5.85, 5.87, Appendix at 37–38. It also incorporated Executive Order 13892's cooperative information sharing, Small Business Regulatory Enforcement Fairness (SBREFA) Act, and reasonable administrative inspections provisions. *See* 84 Fed. Reg. at 71716 n.7, Appendix at 22.

II. IHMPACT'S MEMBERS HAVE SUFFERED FROM THE CONDUCT TARGETED BY SUBPART D

39. As described below, IHMPACT's members have suffered the sort of deprivations and practices Subpart D was promulgated to address.

A. Polyweave Packaging, Inc.

40. IHMPACT member Polyweave Packaging, Inc. ("Polyweave"), manufactures a hazardous materials packaging product in Madisonville, KY. It employs seven people at this plant and has a payroll of nearly $300,000 per year. Affidavit of Neil. J. Werthmann, Jr. (Appendix at 46–47).

41. In March 2015, agency investigator Edward Rastetter saw one of Polyweave's customers using its hazardous materials packaging products. A few weeks later, Rastetter paid an unannounced visit to Polyweave's Madisonville, Kentucky facility. The company's President, who maintains the facility's compliance records, was away, so Rastetter was invited to visit at some other reasonable time. Appendix at 46.

42. Instead of returning to Madisonville, Rastetter travelled to Ohio with another investigator, Theodore Turner, III, where a Polyweave customer, Hilltop Energy, was using its product, a bag for the safe transportation of hazardous materials. Appendix at 46.

43. Hilltop employees reported Rastetter ran through the facility, screaming at them and declaring erroneously that the bags were not lawfully certified for use. Without legal authority, Rastetter ordered Hilltop to stop using Polyweave's bag immediately. Appendix at 46.

44. In June 2015, Rastetter completed and signed what the agency calls an "Exit Briefing Report" ("EBR"), which PHMSA investigators ordinarily leave at a regulated business when they complete a field inspection. The EBR made five separate allegations that Polyweave had violated federal safety regulations. Appendix at 46.

45. After he signed the EBR in June 2015, Rastetter chose to wait another five months, until November 2015, before he visited Polyweave's manufacturing facility. Rastetter kept the already-executed EBR in his briefcase for eleven hours while he interrogated Mr. Neill Werthmann, Jr., Polyweave's president. Appendix at 46.

46. On December 30, 2016, PHMSA attorneys signed a Notice of Probable Violation ("NOPV"), alleging that Polyweave committed four violations of federal regulations prior to November 2015. PHMSA counsel mailed the NOPV to an address they knew or should have known was incorrect. Appendix at 46.

47. Polyweave finally learned about the NOPV in February 2017. It responded to the allegations and asked PHMSA's Office of Chief Counsel to adjudicate the matter. Appendix at 46.

48. PHMSA's Chief Counsel issued an Order on July 20, 2020, finding Polyweave liable for the alleged violations and assessed a substantial fine, even though Polyweave had no history of violations before or after those alleged in the NOPV. Appendix at 46.

49. PHMSA once again mailed the Order to an address it knew or should have known to be incorrect. In fact, the agency did not properly serve Polyweave until March 2021. Upon information and belief, this action occurred with the knowledge and/or expectation Subpart D was imminently to be rescinded. As allowed by PHMSA rules, 49 CFR § 107.325(d), the Polyweave timely filed an appeal with the agency's Administrator and asked him to recognize and enforce Polyweave's *Brady* rights. Appendix at 46.

50. PHMSA has insisted on pursuing its seemingly endless attacks on Polyweave even though federal law bars any action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture unless commenced within five years from the date when the claim first accrued. 28 U.S.C. § 2462. In Polyweave's case, PHMSA's claim accrued when the company took the last allegedly noncompliant action in 2015, nearly six years ago. Upon information and belief, but for the impending rescission of Subpart D, the Department would not, and indeed could not, have served a penalty against Polyweave in March 2021. Appendix at 46.

51. Polyweave, after years of engagement with the Department's enforcement bureaucracy, has no reason to believe post-deprivation proceedings will cure the abuse or stop the drain on its time and resources. Appendix at 46.

B. Pro-Pack Testing Laboratory, Inc.

52. For the past 40 years, IHMPACT member Pro-Pack Testing Laboratory, Inc. ("Pro-Pack") has independently tested packaging systems and components for manufacturers and, where appropriate, certified their compliance with pertinent transportation safety regulations. Its facility is located in Belleville, Illinois. Affidavit of Manuel Rosa, Jr. (Appendix at 48–49).

53. In 1991, PHMSA issued a Competent Authority Approval, which specifically authorized Pro-Pack to provide such services and to make such certifications. Appendix at 48.

54. Beginning in 2011, PHMSA began issuing a series of formal allegations that Pro-Pack failed to comply with a laundry list of administrative test-report requirements related to their approval but not required according to DOT regulations. Some of the allegations were based on issues that were not clearly defined or explained by the agency even though Pro-Pack had requested guidance. Appendix at 48.

55. The agency, however, did not attempt to work with Pro-Pack in a positive, non-punitive manner to improve report quality and never took steps to bring any of those allegations before an ALJ or other enforcement adjudicator for a merits determination. Appendix at 48.

56. Many of PHMSA's allegations were based on requirements that never existed in applicable regulations, lacked any foundation in fact, or were based on individual inspectors' arbitrary and unlawful interpretations of such regulations. Appendix at 48.

57. In December 2019, by way of intimidation and punishment, PHMSA accused Pro-Pack of at least one violation of 18 U.S.C. § 1001 and of numerous civil violations of requirements in the hazardous materials regulations. Without a rational basis, PHMSA threatened fines that would bankrupt the company several times over. Appendix at 48.

58. In a subpoena PHMSA served in 2020, the agency demanded unfettered access to all Pro-Pack's records relating to a certain customer. Pro-Pack objected that the subpoena was overbroad, overly burdensome, and otherwise unlawful. Appendix at 48.

59. In March 2021, based on unproven allegations dating to 2011 and with no other notice or process, PHMSA provided notice that it would terminate Pro-Pack's certification approval. Upon information and belief, this action occurred with the knowledge and/or expectation that Subpart D was imminently to be rescinded. Appendix at 48.

60. Pro-Pack is preparing an appeal but, after years of engagement with the Department's enforcement bureaucracy, it has no reason to believe post-deprivation proceedings will cure the abuse or stop the drain on its time and resources. Appendix at 48.

C. gh Packaging & Product Testing and Consulting, Inc.

61. IHMPACT member gh Packaging, Inc. ("ghP"), is a family-owned small business in Fairfield, Ohio, with an additional facility in Phoenix, Arizona. Affidavit of Perry Hock (Appendix at 50–51).

62. ghP independently tests packaging systems and components for manufacturers and, where appropriate, certifies their compliance with pertinent hazardous materials transportation safety regulations. Appendix at 50.

63. In a subpoena PHMSA served in 2020, the agency demanded unfettered access to all ghP's records relating to a certain customer. ghP objected that the subpoena was overbroad, unduly burdensome, and otherwise unlawful. Appendix at 50.

64. PHMSA inspected ghP in December 2020 but did not indicate whether it would renew ghP's approval as a testing lab. This left the company in limbo, undermined its ability to serve its customers and caused significant economic loss. In April 2021, in partial retribution for ghP's objections to the subpoena, PHMSA notified ghP that it would not renew ghP's approval as a testing lab. This action occurred with the knowledge that Subpart D was to be rescinded. Appendix at 50.

65. ghP is preparing an appeal. Appendix at 50.

66. Upon information and belief, but for Subpart D's rescission, DOT could not and would not have refused to renew ghP's approval as a testing lab as retaliation for objecting to an overly broad and unduly burdensome subpoena. Appendix at 50.

D. Other Packaging Manufacturers

67. Many of IHMPACT's other members have also suffered enforcement action and process abuse at DOT's hands.

68. Beginning in July 2011, PHMSA investigator Anthony Lima began targeting one manufacturer of premium-quality industrial containers. Affidavit of Jerry W. Cox, Esq. (Appendix at 52–53).

69. After Lima made a series of groundless allegations against the company, the manufacturer asked PHMSA lawyers to attend a July 2011 demonstration of tests that the company performed on some of its products. Two agency lawyers and a technical expert attended a meeting at which Lima wrenched a confidential company document out of the hands of a company executive over its lawyer's vociferous objections. Appendix at 52.

70. PHMSA lawyers who witnessed the seizure also objected and instructed Lima to return the document. However, these lawyers were told to "stand down" by their supervisor and to allow the investigator to seize the document without giving its owner any opportunity to request confidential treatment, as provided in applicable regulations. Appendix at 52.

71. Two years later, another PHMSA investigator hand-wrote a "confession" that the company committed several regulatory violations, then insisted that a lower-level company manager sign it without an opportunity for the manager or anyone else to review it. Agency attorney Tyler Patterson presented the document to one of the Department's Administrative Law Judges in support of a complaint for civil penalty without revealing that it had been drafted by the PHMSA inspector, not a company employee. Appendix at 52.

E. Other Regulated Businesses

72. In 2015, after an audit of a company that ships hazardous materials, a PHMSA investigator insisted that a company employee acknowledge receipt of an EBR on the results of an inspection. The document prominently and expressly stated that the employee's signature did not

constitute agreement with any information or allegations in the report. However, a PHMSA lawyer later prosecuted the case and expressly characterized the acknowledgment of receipt as a confession to the violations alleged therein. Appendix at 52.

73. The Department's Federal Aviation Administration ("FAA") sought a civil fine of $266,000 against a small, California-based family-owned business that shipped hazardous materials. Appendix at 52.

74. In discovery during a civil-penalty prosecution before an Administrative Law Judge, FAA produced a heavily redacted report. Part II of that report, entitled "Factors Affecting Sanction," contained six apparently lengthy entries that could have supported the accused's assertion that the proposed sanction was excessive. Those entries almost surely included or referred to *Brady* evidence that FAA was obligated to share with the accused. Appendix at 52.

75. For example, the listed topics included "Nature, Circumstances Extent and Gravity of the Violation," "Degree of Culpability" and "Ability to Pay and Effect on Ability to Continue in Business," the last of which apparently consisted of more than 150 words. Part III of the report included three additional entries on "Reliability of Evidence," "Conflicting Evidence" and "Mitigating . . . Factors." Appendix at 52.

76. The Department blacked out every word in all nine entries, in direct violation of the accused's *Brady* rights. Respondent's counsel demanded production of the redacted entries, but the Department kept them hidden. Then, the Department based the proposed fine on previously revoked agency guidance. Appendix at 52.

III. IHMPACT MEMBERS' RELIANCE INTERESTS

77. IHMPACT's members have a strong reliance interest in Subpart D because they directly benefit from the due-process and procedural protections provided by its rules.

78. For example, the conduct described *supra* at paragraphs 40–76 would have violated or now violates, as applicable, 49 CFR §§ 5.59, 5.61, 5.63, 5.71, 5.73, 5.81, 5.83, 5.85, 5.89, 5.97, and/or 5.107.

79. These critical due-process rights and procedural protections will be irreparably lost if Subpart D is rescinded.

80. For example, the rescission of 49 CFR § 5.83 would extinguish Polyweave's *Brady* rights in its pending enforcement action before the PHMSA administrator. Without those rights, Polyweave (and similarly situated others) will never know whether PHMSA suppressed exculpatory evidence. As such, Polyweave could not use any withheld evidence in the enforcement action. Nor could it present that evidence if it appeals an adverse decision by the PHMSA administrator to a federal court of appeals. *See* 49 U.S.C. § 5127(a). Even if Polyweave were to later learn that PHMSA withheld material exculpatory evidence, it cannot present that evidence in a federal appeal because that appellate review is limited to the administrative record created by the Department. *Id.* § 5127(b).

81. Also, PHMSA's termination of Pro-Pack's and ghP's certifications in violation of Subpart D will have a devastating impact on both companies' ability to continue in business, much less compete effectively in the market for hazardous materials packaging testing and certification services. Post-deprivation process cannot repair this damage.

82. Without the due-process rights and procedural protections provided by the rules in Subpart D, IHMPACT's members lack effective means or standards to check bureaucratic overreach and face significantly more burdensome and expensive administrative process. For example, instead of being provided exculpatory evidence "as a matter of course" under 49 CFR § 5.83, these businesses will have to devote significant additional management time and incur expenses to obtain such information, whether by filing Freedom of Information Act requests or hiring legal representation. Polyweave did exactly that on May 6, 2021, when its representative in the pending enforcement action demanded exculpatory evidence. In fact, if Subpart D had been left alone it is likely Polyweave would

not have needed to devote any resources to this matter at all because DOT would have been prohibited from imposing civil penalties based on expired allegations in the first place. *See* 49 CFR § 5.63; 28 U.S.C. § 2462. Given the cost, delay, and prospects of retaliation attendant to DOT enforcement challenges, IHMPACT's members lack constitutionally sufficient post-deprivation relief.

IV. SUBPART D'S UNLAWFUL RESCISSION

83. On April 2, 2021, Defendant Peter Paul Montgomery Buttigieg rescinded Subpart D.

84. He took this action without providing IHMPACT's members or the public any notice or opportunity to comment on it.

85. He took this action without offering a reasoned basis or sufficient explanation for it.

86. For example, Secretary Buttigieg justified rescission this way:

> [W]ith regard to the regulations on enforcement matters, many of these provisions are derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective. Application of the APA and these decisions to enforcement matters can be accomplished by internal directives as the Department deems necessary and appropriate.

86 Fed. Reg. at 17293, Appendix at 42.

87. However, Secretary Buttigieg failed to connect specific Subpart D rules with specific "corresponding sections of the APA or judicial decisions."

88. He also failed to explain when and under what conditions the Department would deem it "necessary and appropriate" to issue "internal directives."

89. He also failed to describe or explain the form such "internal directives" might take, or how such "directives" would be operationalized to protect or give effect to the due-process rights and procedural protections promulgated under Subpart D.

90. He also failed to specify how regulated persons, including IHMPACT's members, would know when and how the Department would give effect to the "derived" provisions formerly promulgated in Subpart D's rules.

91. He also failed to acknowledge Subpart D finally recognized and/or provided IHMPACT's members critical new and/or expanded due-process and procedural protections (*e.g.*, *Brady* rights, the prohibition on "fishing expedition" investigations, and the limits on and transparency requirements for administrative penalties), and that such rights and procedural protections are rooted not only in "sections of the APA and judicial decisions" but also in the U.S. Constitution's Fourth, Fifth, and Eighth Amendments.

92. He also failed to affirm the Department will continue to recognize and protect these new and/or expanded due-process and procedural protections.

93. He also failed to acknowledge or account for IHMPACT members' reliance interests in Subpart D.

94. Although his Federal Register Notice is unclear, it seems Secretary Buttigieg rescinded Subpart D because President Biden's Executive Order 13992 requires him to "take prompt action to rescind any rules or regulations, or portions thereof" implementing Executive Order 13892. 86 Fed. Reg. at 17293, Appendix at 42.

95. Yet Subpart D was primarily to make binding the February 2019 memorandum and only incidentally to implement Executive Order 13892, which was not issued until October of that year. 84 Fed. Reg. at 71714 n.7, Appendix at 20. Therefore, the Biden Executive Order terminating due-process rights and procedural protections against agency abuse should not have been cited as justification for Buttigieg's Subpart D rescission.

96. But even if Subpart D was promulgated solely to implement Executive Order 13892, Secretary Buttigieg's Federal Register Notice is inadequate because he fails to explain how Subpart D might threaten "to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change" or how, if Subpart D's due-process rights and procedural protections indeed

"threaten" coronavirus pandemic response, economic recovery, racial justice, or climate change, such rights and protections might lawfully be discarded.

V. DEFENDANTS HAVE HARMED IHMPACT AND ITS MEMBERS

97. Regulated persons, including IHMPACT's members, were the beneficiaries of Subpart D and are the subject of Defendant Buttigieg's rescission.

98. Defendants have harmed IHMPACT and its members by denying them the opportunity to participate in notice-and-comment rulemaking with respect to Subpart D's rescission and to influence Secretary Buttigieg's decision making at an early stage when he was more likely to seriously consider alternative ideas.

99. This harm will be redressed by injunctive relief requiring Defendants to comply with the APA and provide notice-and-comment rulemaking.

100. Also, Subpart D's rescission means regulated persons, including IHMPACT's members, are deprived of due-process rights and procedural protections in DOT enforcement actions.

101. Among other things, these due-process rights and procedural protections require exculpatory evidence to be provided voluntarily, as a matter of course, shield IHMPACT's members from abusive and inappropriate enforcement actions, including excessive or unfair fines and penalties, and prevent fishing expedition investigations.

102. Accordingly, Subpart D saves regulated persons, including IHMPACT's members, time and money lost when dealing with abusive, overreaching, opaque, retaliatory, or otherwise unlawful civil enforcement action. Subpart D also saves regulated persons, including IHMPACT's members, from potential criminal jeopardy arising from DOT's reliance on 18 U.S.C. § 1001 to compel cooperation.

103. This harm will be redressed by injunctive and declaratory relief against Defendants.

104. Also, post-deprivation process and remedies historically have proven inadequate to cure the Department's violations of IHMPACT members' rights and to deter Defendant from engaging in systemic pattern and practice due-process violations.

105. IHMPACT's members have a well-founded fear that they will suffer targeting and retaliation for challenging unlawful Department conduct. This well-founded fear of agency reprisal, as well as the delay, economic and other costs imposed by the Department's enforcement actions, substantially chills IHMPACT members' ability to assert and vindicate their due-process and procedural rights.

106. Particularly for IHMPACT's small business members, Defendant's flawed civil investigation, enforcement, and adjudication process itself is the punishment.

107. This harm will be redressed by an injunction and declaratory relief against Defendants, and by appointment of a Special Master to oversee their enforcement activities.

Claims for Relief

First Claim: For Violation of the Administrative Procedure Act

108. IHMPACT repeats paragraphs 1–107.

109. 5 U.S.C. § 706(2) provides the Court "shall" hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; and/or without observance of procedure required by law.

110. Accordingly, Secretary Buttigieg's rescission of Subpart D should be held unlawful and set aside for, *inter alia*, the following reasons.

a. Failing to provide IHMPACT and its members with notice-and-comment rulemaking with respect to the rescission of Subpart D.

b. Failing to provide a reasoned explanation for the Department's change in position with respect to the due-process rights and procedural protections expanded, provided, or recognized under Subpart D, including the rights and protections derived from the APA and judicial decisions, as well the rights and protections rooted in the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution.

c. Failing to consider IHMPACT members' reliance interests.

d. Failing to explain how DOT will protect the due-process and procedural rights of regulated persons, including IHMPACT's members, through "internal directives as the Department deems necessary and appropriate" and to specify the standards it will use to determine the timing, content, and legal force thereof.

111. Enjoining Defendant's rescission of Subpart D and requiring notice-and-comment in accordance with 5 U.S.C. § 553 will redress the harm suffered by IHMPACT and its members.

112. Also, in rescinding Subpart D without a proper basis, and by substituting inchoate "internal directives" issued solely at the Department's sufferance for binding rules, Defendant has acted arbitrarily and capriciously, abused his discretion, acted contrary to law and constitutional right, exceeded his statutory authority, and failed to observe lawful procedures.

113. Also, Defendants' failure to acknowledge and protect the rights of regulated persons, including IHMPACT's members, ranging from *Brady* disclosure of exculpatory evidence, to freedom from "fishing expedition" civil investigations, to the prompt investigation and resolution of enforcement action and notice when an investigation has been closed, to fair and transparent civil penalties, are contrary to their constitutional right, power, and privilege.

114. Also, Defendants' pattern and practice of systemic due-process violations in their enforcement actions are contrary to their constitutional right, power, and privilege.

115. Injunctive and declaratory relief terminating such conduct will redress the harm suffered by IHMPACT's members as a result thereof.

Second Claim: For Violation of Due Process (Pattern and Practice)

116. IHMPACT repeats paragraphs 1–115.

117. Defendants' administration of its investigative, enforcement, and adjudicative authorities deprives IHMPACT members and other regulated persons of their fundamental rights to liberty and property without due process because of the Department's pattern and practice of:

e. Subjecting regulated persons to administrative enforcement action or adjudication absent prior public notice of both the Department's jurisdiction over given conduct and the legal standards applicable thereto.

f. Failing to promptly disclose to affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course thereof.

g. Initiating investigations and enforcement actions as "fishing expeditions" to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation.

h. Failing to provide in the documents initiating an enforcement action notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken, specifically: The legal authorities, statutes or regulations allegedly violated, the key facts supporting the alleged violation; a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to challenge the agency action, including appropriate procedure for seeking administrative and judicial review.

i. Allowing agency personnel who have taken an active part in investigating, prosecuting, or advocating in an enforcement action to serve as a decision maker, advise or assist the decision maker in that same or a related case, and/or furnish *ex parte* advice or factual materials to decisional personnel.

j. Denying IHMPACT members and others similarly situated their *Brady* rights. *Brady* requires the Department to disclose as a matter of course and without the need for a request all exculpatory evidence in its possession. This includes, *inter alia*, any material evidence known to the Department that may be favorable to the regulated person, including information tending to negate or diminish responsibility for a violation or that could be relied upon to reduce potential fines or other penalties.

k. Failing to ensure the Department does not use its enforcement authority to convert agency guidance documents into binding rules or to use noncompliance with guidance documents as a basis for proving violations of applicable law.

l. Imposing civil penalties that do not reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business), and/or failing to communicate a full explanation of the basis for the calculation of asserted penalties, including penalty calculation worksheets, manuals, charts, or other appropriate materials, to a regulated person.

m. Systematically failing to comply with section 223 of SBREFA when conducting administrative inspections and adjudications.

n. Failing to either prosecute or close investigations and enforcement matters in a reasonably timely manner and/or failing to timely inform a target of the closure of such an investigation.

o. Targeting and retaliating against persons who object to unlawful Department conduct.

118. Post-deprivation process and remedies have proven inadequate to protect IHMPACT's members, or to deter Department employees and officials from such violations, or to prevent the retaliation and targeting of persons who object to unlawful conduct.

Third Claim: For Declaratory Judgment

119. IHMPACT repeats paragraphs 1–118.

120. 28 U.S.C. § 2201(a) provides in a case of actual controversy within its jurisdiction, "any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

121. Secretary Buttigieg said regarding Subpart D "many of these provisions are derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective. Application of the APA and these decisions to

enforcement matters can be accomplished by internal directives as the Department deems necessary and appropriate." 86 Fed. Reg. at 17293, Appendix at 42.

122. He did not elaborate and so it is not clear what APA provisions and "significant" judicial decisions he was referring to, what provisions of Subpart D are *not* derived from these provisions and decisions, and what will happen to these "non-derived" rules.

123. 49 CFR § 5.65, among other things, prohibits enforcement action based on interpretations of statutory or regulatory requirements about which the public has not received fair notice.

124. 49 CFR § 5.67, among other things, prohibits "fishing expeditions" to investigate violations absent sufficient evidence in hand to support assertion of a violation.

125. 49 CFR § 5.69 requires that the Department provide regulated persons with fair notice of an enforcement action, including relevant documents, the basis for the enforcement action, legal authorities, key facts alleged, and a reference to applicable procedural rights and protections.

126. 49 CFR § 5.83 requires the Department to comply with the principle of *Brady v. Maryland* and disclose exculpatory evidence.

127. 49 CFR § 5.97 requires that civil penalties be transparent and reflect due regard for fairness.

128. Defendants intend to rescind these provisions along with the rest of Subpart D.

129. Historically, however, the Department has launched enforcement actions based on interpretations of statutes and regulations about which the public has not received fair notice; engaged in "fishing expedition" investigations without sufficient evidence in hand to support assertion of a violation; failed to provide regulated persons with fair notice of enforcement actions; declined to comply with *Brady* and voluntarily disclose exculpatory evidence; and issued unfair and opaque civil penalties.

130. Such conduct, however, violates the Fourth, Fifth, and Eighth Amendment rights of regulated persons, including IHMPACT's members.

131. Consequently, IHMPACT seeks a declaration under 28 U.S.C. § 2201(a) that the protections for the rights recognized and provided under certain Subpart D provisions remain binding on the Department because they are derived from the United States Constitution. These provisions include, *inter alia*:

a. 49 CFR § 5.65.

b. 49 CFR § 5.67.

c. 49 CFR § 5.69.

d. 49 CFR § 5.83.

e. 49 CFR § 5.97.

132. A declaration that Subpart D's protection for these rights survives rescission will redress the harm suffered by IHMPACT's members due to rescission.

Relief Requested

WHEREFORE, Plaintiff respectfully requests the following relief.

a. A preliminary injunction prohibiting Defendants from rescinding Subpart D.

b. A permanent injunction prohibiting rescission of Subpart D without notice-and-comment rulemaking pursuant to 5 U.S.C. § 553.

c. An Enforcement Order requiring Defendants to respect and give effect to the legal rights recognized and/or specified in Subpart D, and to provide IHMPACT's members with effective post-deprivation process and remedies, free from threat or risk of retaliation.

d. A declaration that the due-process rights and procedural protections in Subpart D's substantive rules survive rescission.

e. An Order under Fed. R. Civ. P. 53 appointing a special master to monitor Defendants' compliance with the Enforcement Order and with their obligation to provide and ensure due process in their civil investigations, enforcement actions, and adjudications.

f. All costs, expenses, and attorney fees allowed under the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412.

g. Such other relief as this Court deems just.

Dated this 18th day of May, 2021.

Respectfully,

/s/ Karen Cook

NEW CIVIL LIBERTIES ALLIANCE
Reed Rubenstein
Sheng Li (*pro hac vice pending*)
1225 19th Street NW, Suite 450
Washington, DC 20036
Phone: (202) 869-5210
reed.rubenstein@ncla.legal
sheng.li@ncla.legal

KAREN COOK, PLLC
Karen Cook (TX Bar No. 12696860)
S. MICHAEL MCCOLLOCH, PLLC
S. Michael McColloch (TX Bar No. 13431950)
6060 N. Central Expressway Suite 500
Dallas, TX 75206
Phone (214) 643-6055
Fax (214) 593-6410
karen@karencooklaw.com
smm@mccolloch-law.com