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.
_____/

MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

Preliminary Statement

Plaintiff Institute for Hazardous Materials Packaging and Certification Testing, Inc. ("IHMPACT" or "Plaintiff"), is a trade association with its principal place of business in Waxahachie, Texas. IHMPACT's members are small businesses that manufacture, test and certify packaging products that are regulated by the U.S. Department of Transportation (the "Department" or "DOT"). IHMPACT's membership includes, among others, Polyweave Packaging, Inc. ("Polyweave"), Pro-Pack Testing Laboratories, Inc. ("Pro-Pack), and gh Packaging, Inc. ("ghP").

The Department, employing more than fifty-five thousand administrators and bureaucrats, regulates automobiles, boats, highways, airlines, pipelines, mass transit, railroads, trucks, shipping

materials, and the Saint Lawrence Seaway, among other things.[1] It employs nearly five hundred lawyers and thousands of contractors to support its work.[2] The Department's FY2021 budget was over $ 89,000,000,000.00.[3]

In 2019, pursuant to 49 U.S.C. § 322(a), the Department's Office of the Secretary promulgated binding rules to provide regulated persons "appropriate due process in all enforcement actions." *See* 49 CFR Part 5 Subpart D – Enforcement Procedures; *Dep't of Transp., Administrative Rulemaking, Guidance, and Enforcement Procedures,* 84 Fed. Reg. 71714 (Dec. 27, 2019) ("Subpart D") (Appendix at 1–21). Among other things, Subpart D compelled the Department to disclose exculpatory evidence in compliance with the principle of *Brady v. Maryland*, 373 U.S. 83 (1963); prohibited DOT "fishing expedition" investigations to find potential violations of law absent sufficient evidence in hand to support the assertion of a violation; mandated the prompt adjudication of enforcement matters; and required civil penalties to be supported by clear statutory authority and sufficient findings of fact, 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, when imposed, fully transparent in their calculation. *See, e.g.,* 49 CFR §§ 5.65, 83, 89, 97 (Appendix at 17–19). In short, Subpart D fundamentally reordered the Department's relationship with IHMPACT members and the public in critical and substantive ways.

The Department's Pipeline and Hazardous Material Safety Administration (PHMSA) has ordered IHMPACT members to pay substantial fines and/or cancelled their certification as testing laboratories. Cmpl. at ¶¶ 39–76. These are enforcement actions subject to Subpart D's provisions.

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[1] *See* Dep't of Transp., "Who We Are", https://www.transportation.gov/administrations.
[2] *See* Dep't of Transp., "Office of the General Counsel", https://www.transportation.gov/administrations/office-general-counsel.
[3] *See* Dep't of Transp., "FY 2021 Budget Highlights", https://www.transportation.gov/sites/dot.gov/files/2020-02/BudgetHightlightFeb2021.pdf.

49 CFR §§ 5.57 (Appendix at 16). At all times relevant, IHMPACT members subject to enforcement actions had a reasonable reliance interest in the due-process rights and procedural protections recognized and provided under Subpart D. However, on April 2, 2021, Defendants rescinded Subpart D without public comment, without a reasoned explanation for rescission, and without considering IHMPACT members' reliance interests, all in violation of the Administrative Procedure Act ("APA"). *See* Dep't of Transportation, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17292, 17293 (Apr. 2, 2021) (Appendix at 22–26). IHMPACT is challenging the rescission of Subpart D on behalf of its affected members and seeks a preliminary injunction.

As demonstrated below, IHMPACT has a strong likelihood of success on the merits, its members will suffer irreparable injury without an injunction, and an injunction restoring due-process rights and procedural protections under Subpart B is in the public interest. Consequently, this court should grant IHMPACT a preliminary injunction and order other appropriate relief. Because Defendants' APA violations deny facially binding due-process and procedural protections from every Department-regulated individual and business in the United States, such relief should include a nationwide injunction.

Facts

On February 15, 2019, the Department issued a memorandum expanding the due-process rights and procedural protections it recognized and afforded for regulated persons, including IHMPACT's members, facing enforcement action. Among other things, Department personnel were directed to follow *Brady v. Maryland,* 373 U.S. 83 (1963), and disclose "as a matter of course" exculpatory evidence; and to stop using "its enforcement authority effectively to convert agency guidance documents into binding rules;" stop allowing cases to "to linger unduly;" and stop imposing penalties that do not "reflect due regard for fairness, the scale of the violation [and] the violator's knowledge and intent." Dep't of Transp., *"Procedural Requirements for DOT Enforcement Actions"* at 1, 9-

11 (Feb. 15, 2019) https:// www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-general-counsel/331596/c1-mem-enforcement-actions-signed21519.pdf. (Feb. 15, 2019) (the "Bradbury Memo") (Appendix at 27–40).

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. 15, 2019) (Appendix at 41–45). In relevant part, Executive Order 13892 directed the Department to "act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication" and to "afford regulated parties the safeguards described in this order, 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 41). Executive Order 13892 also prescribed standards for the Department's notice, guidance document, inspection, and information collection practices. *Id.* at 55239–41 (Appendix at 41–43).

On December 27, 2019, the Department published 49 CFR Part 5 Subpart D. It promised:

> This final rule ensures that DOT 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.

84 Fed. Reg. at 71716 (Appendix at 3). To make good on this promise, Subpart D contained substantive rules affecting and expanding important individual rights and imposing new and binding obligations on the Department's employees.[4]

[4] Subpart D also contained procedural rules of agency organization, procedure, or practice. These include 49 CFR §§ 5.55 ("Enforcement attorney responsibilities"); 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").

- For the first time, the Department in 49 CFR § 5.86 specifically acknowledged, affirmed, and codified that IHMPACT members and others similarly situated have an entitlement and lawful right to disclosure of exculpatory evidence under the principle of *Brady v. Maryland,* 373 U.S. 83 (1963), and then required Department personnel to comply accordingly.

- For the first time, the Department in 49 CFR § 5.59 specifically acknowledged, affirmed, and codified that IHMPACT members and others similarly situated shall not "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."

- For the first time, the Department in 49 CFR § 5.61 specifically acknowledged, affirmed, and codified the requirement for its employees, to the maximum extent consistent with protecting the integrity of the investigation to, "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."

- For the first time, the Department in 49 CFR § 5.65 specifically acknowledged, affirmed, and codified the rule its employees "*must not adopt or rely* upon overly broad or unduly expansive interpretations of the governing statutes or regulations" in exercising their discretion to initiate and pursue enforcement action and promised the Department "*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."(Emphasis added).

- For the first time, the Department in 49 CFR § 5.67 affirmed, acknowledged, and codified that IHMPACT members and others similarly situated have the right to be free from Department "enforcement actions," defined § 5.57 as "an action taken by the Department upon its own initiative or at the request of an affected party in furtherance of its statutory authority and responsibility to execute and ensure compliance with applicable laws", without the Department having at least some prior evidence (i.e., "probable cause") to support assertion of a violation. Specifically, "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). This mandatory and binding section prohibits Department personnel from subjecting regulated persons, including IHMPACT 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.

- For the first time, the Department in 49 CFR § 5.69 guaranteed and entitled IHMPACT members and others similarly situated an enforcement action notice containing *all* "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."

- For the first time, the Department in 49 CFR § 5.85 specifically prohibited Department personnel from using guidance documents to target IHMPACT members and others similarly situated for enforcement action. "[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." (Emphasis added).

- For the first time, the Department in 49 CFR § 5.97 codified binding limits on its employees' discretion to seek civil penalties from IHMPACT members and others similarly situated. Specifically: "*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." Additionally, the Department affirmed, acknowledged, and codified the rights of IHMPACT members and others similarly situated to have robust procedural transparency rights with respect to civil penalty assessments, and prohibited Department employees from "hiding the ball" on penalty calculations. Specifically: "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."

- For the first time, the Department in 49 CFR § 5.107 ("Small Business Regulatory Enforcement Fairness Act Compliance") codified its obligation and guarantee to IHMPACT members and other regulated persons that it would 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). It further prescriptively affirmed 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." (Emphasis added).

Cmpl. at ¶ 35 (Appendix at 16–20). By its own terms, Subpart D applied 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; 84 Fed. Reg. at 71729 (Appendix at 16).

IHMPACT members Polyweave, Pro-Pack, and ghP, among others, are regulated by the PHMSA and are subject to pending enforcement actions:

- For reasons unknown, PHMSA waited until March 2021 before serving Polyweave with an order to pay a civil penalty for an alleged violation in 2015.[5] On March 25, 2021, pursuant to 49 CFR § 107.325(b), Polyweave appealed this order to the PHMSA Administrator. This appeal is an "informal enforcement adjudication" under 49 CFR § 5.57 and subject to Subpart D. Cmpl. at ¶¶ 39–50.

- Also in March 2021, PHMSA decertified Pro-Pack's approval to test packaging systems and components based on a laundry list of unproven allegations dating to 2011, including alleged violation of federal criminal law. With few exceptions, PHMSA's allegations lacked any foundation in fact, were based on requirements that never existed in applicable regulations, or were based on individual inspectors' arbitrary and unlawful interpretations of such regulations. Pro-Pack is preparing an appeal. PHMSA further served on Pro-Pack a subpoena in 2020 demanding unfettered access to records relating to a certain customer. Pro-Pack objected that the subpoena was overbroad, overly burdensome, and otherwise unlawful. Cmpl. at ¶¶ 51–57.

- PHMSA served a similar subpoena on ghP in 2020 seeking unfettered access to records relating to a certain customer. After ghP objected to that overbroad subpoena, PHMSA retaliated by decertifying ghP as a testing laboratory in April 2021. ghP is preparing an appeal. Cmpl. at ¶¶ 58–61.

At all times relevant, IHMPACT members Polyweave, Pro-Pack, and ghP relied on Subpart D as a source of rights and protections in DOT enforcement proceedings, fully expecting they would be entitled to all due-process rights and protections provided thereunder, including the right to *Brady* disclosures under 49 CFR § 5.83. Cmpl. at ¶¶ 76–81.

On April 2, 2021, Defendants rescinded Subpart D in its entirety, and with it the binding due-process rights and protections provided thereunder. Rescission occurred without notice and comment, a reasoned explanation, or any consideration of the legitimate reliance interests IHMPACT members and other regulated persons might have. 86 Fed. Reg. at 17292, 17293 (Appendix at 22–23). It is noteworthy that rescission occurred within weeks of DOT subjecting IHMPACT members to enforcement actions. Defendants surely knew or expected that Subpart D's rights and protection would be stripped away when they decided to enforce penalties on IHMPACT's members.

[5] The Department may not commence any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture after five years from the date when the claim first accrued. 28 U.S.C. § 2462.

Defendants' justification appears to have been that "many" (*not* "all") of Subpart D's rights are merely "derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective." *Id.* at 17293 (Appendix at 23). Thus, they say Subpart D is unnecessary because application "of the APA and these decisions to enforcement matters can be accomplished by internal directives as the Department deems necessary and appropriate." *Id.*

Defendants apparently also relied on the Biden Administration's Executive Order 13992, directing rescission of rules or regulations implementing Executive Order 13892 that 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," as justification for their action with respect to Subpart D. *Id.* (Appendix at 23) (citing Executive Order 13992, *"Revocation of Certain Executive Orders Concerning Federal Regulation"* 86 Fed. Reg. 7049 (Jan. 25, 2021) (Appendix at 46–47)). However, Defendants did not explain how or why Subpart D might "threaten to frustrate" the Department's ability to confront the "coronavirus disease 2019 pandemic," "economic recovery," "racial justice," or "climate change."

Standing

For Article III standing, a plaintiff must allege: (1) an injury in fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). To establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quotation marks and citation omitted). To establish a traceable injury,

there must be "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). Finally, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id.* at 561 (quotation marks and citation omitted). If a plaintiff is seeking injunctive or declaratory relief, the plaintiff must demonstrate "a sufficient likelihood that [they] will again be wronged in a similar way." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). An association has standing to bring suit on behalf of its members if: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 166 (5th Cir. 2012) (quoting *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir.2000)).

IHMPACT has standing. First, its members have standing to sue in their own right. For example, PHMSA, taking an "enforcement action" subject to Subpart D, has ordered Polyweave to pay civil fines and has decertified Pro-Pack and ghP. *See* Cmpl. at ¶¶ 39–60. Subpart D's rescission without notice and comment causes each of IHMPACT's members substantive and procedural injury, depriving them of due-process rights and procedural protections in the Department's regulatory enforcement actions, including the right to exculpatory evidence under *Brady*. Such rescission also makes it more expensive for IHMPACT members to resolve pending and future enforcement actions. The loss of rights, along with deprivation of a critical procedural tool for protecting those rights (notice and comment), is particularized to individual IHMPACT members and constitutes cognizable injury. *See, e.g., Nat'l Fed'n of the Blind v. United States Dep't of Educ.,* 407 F. Supp. 3d 524, 533 (D. Md. 2019) (finding cognizable injury based on "need to expend more resources than usual" and "obstacles to a successful [administrative] complaint"). IHMPACT's members further meet the causation and

redressability requirements for standing because loss of their rights and protections is directly caused by rescission of Subpart D and would be redressed by relief sought in this lawsuit. *Second*, IHMPACT was created expressly to advocate for the interests of its members, Cmpl. at ¶ 26, and this litigation is germane to that purpose. *Finally*, the participation of individual IHMPACT members is not needed to proceed. Because neither the claims nor relief sought in this case "requires individualized proof," they "are thus properly resolved in a group context." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 344 (1977). IHPMACT therefore meets all three standing requirements to bring this suit on behalf of its members.

Standard of Review

A preliminary injunction is a stopgap measure, generally limited as to time, and intended to maintain a status quo or to preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

A party is entitled to a preliminary injunction if: "(1) it is substantially likely to succeed on the merits of its claim; (2) it will suffer irreparable injury in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) the public interest is served by the injunction." *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523, 528 (5th Cir. 2020). To preserve the status quo, federal courts regularly enjoin federal agencies from implementing and enforcing new regulations pending litigation challenging them. *See, e.g.*, *Texas v. United States*, 95 F. Supp. 3d 965, 983 (N.D. Tex. 2015). Section 705 of the APA further authorizes "the reviewing court" to stay "the effective date of an agency action" pending judicial review "to prevent irreparable injury." 5 U.S.C. § 705. The factors governing issuance of a preliminary injunction also govern issuance of a § 705 stay. *See, e.g., Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016); *Humane Soc'y of United States v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009); *Cuomo v. United States Nuclear Regulatory Com.*, 772 F.2d 972, 974 (D.C. Cir. 1985).

As set forth below, Plaintiff's likelihood of success on the merits, irreparable harm, balance of equities, and the public interest all strongly favor the issuance of a preliminary injunction. Defendant's brazenly unlawful rescission of Subpart D has taken away critical due-process rights and procedural protections from IHMPACT members, and from the tens or hundreds of thousands of other individuals and businesses regulated by the Department. Therefore, the injunction should be nationwide in scope. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir.) *aff'd by divided vote,* 136 S. Ct. 2271 (2016).

Argument

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

A. Defendants Unlawfully Denied Plaintiff's Members an Opportunity to Comment on Subpart D's Rescission

The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice" on the other. 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 314 (1979). Substantive rules may be issued only after the agency publishes a notice of proposed rulemaking and considers public comments on its proposal, while procedural rules are exempt from this notice-and-comment requirement.

"Substantive rules" and "procedural rules" are not defined in the APA. But in *Chrysler Corp.,* and in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Supreme Court noted a characteristic inherent in the concept of a "substantive rule." A substantive rule is one "affecting individual rights and obligations." *Chrysler Corp.,* 441 U.S. at 301–302; *Morton,* 415 U.S. at 236. This characteristic is an important touchstone for distinguishing rules that may be "binding" or have the "force of law." *Id.* at 235, 236. Therefore, an agency rule modifying substantive rights and interests can only be nominally procedural, and the APA's notice-and-comment exemption for "rules of agency procedure" does not

apply. *Texas*, 809 F.3d at 171, 176 (notice-and-comment exemption is narrowly construed); *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989).[6]

Defendants claims they may rescind Subpart D by fiat because "this is a rule of agency procedure for which notice and comment are not required." 86 Fed. Reg. at 17293 (Appendix at 23). But they may not avoid notice-and-comment by mislabeling. "On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (emphasis in original). If a rule affects individual rights and agency obligations, then it is substantive and the full panoply of notice-and-comment requirements must be adhered to "scrupulously." *Texas*, 809 F.3d at 171; *see also Chrysler Corp.*, 441 U.S. at 301–302.

Courts have held a rule to be substantive "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted). Subpart D meets both criteria because "from beginning to end … [i]t commands, it requires, it orders, it dictates." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). For example:

- "The authority to prosecute the asserted violation and the authority to impose monetary penalties, if sought, *must be* clear in the text of the statute." 49 CFR § 5.63 (emphasis added).

- "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." § 5.65 (emphasis added).

[6] Accordingly, courts have held rules altering the rights or affecting the interests of regulated parties, encoding "a substantive value judgment," trenching on substantial private rights and interests, or expressing a change in substantive law or policy which the agency intends to make binding or administers with binding effect, are substantive and subject to APA notice and comment. *See Texas*, 809 F.3d at 176; *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 349 (4th Cir. 2001); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 376 (D.C. Cir.), *vacated as moot per curiam,* 933 F.2d 1043 (D.C. Cir. 1991); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989); *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

- "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." § 5.67 (emphasis added).

- "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." § 5.69 (emphasis added).

- "[E]ach responsible OA or component of OST *will voluntarily follow* in its civil enforcement actions the principle articulated in *Brady v. Maryland*…." § 5.83 (emphasis added).

- "[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." § 5.85 (emphases added).

(Appendix at 16–19).

Encoding a substantive value judgment favoring due process and transparency and disfavoring uncabined discretion, Subpart D recognized and expanded IHMPACT members' rights, and through its many and detailed mandates, directives, and commands, imposed new binding obligations on DOT. *See, e.g.,* Cmpl. ¶¶ 35–36; 84 Fed. Reg. at 71715–16 (Appendix at 2–3); 49 CFR §§ 5.67, 83, 97 (Appendix at 17–19). Therefore, Subpart D's rules are not mere "internal processes" exempt from APA notice-and-comment. *Texas*, 809 F.3d at 176 ("An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply.").

Defendants conceded as much. Their justification for rescission was:

> [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*. Therefore, 49 CFR part 5, subpart D—Enforcement Procedures is rescinded in its entirety.

86 Fed. Reg. at 17293 (Appendix at 23) (emphasis added). In other words, Defendants acknowledged Subpart D affected IHMPACT members' statutory and due-process rights. But they just decided those rights "need not be adopted by regulation in order to be effective" and protection by "internal directives as the Department deems necessary and appropriate" was quite enough for IHMPACT members and everyone else. Yet, Defendants' rescission of Subpart D's published, binding prescriptive rules and replacement with a regulatory regime in which IHMPACT members' rights are determined by unidentified "internal directives" issued at the Department's sufferance, is the paradigmatic sort of policy and legal shift for which notice and comment is required. *See Texas*, 809 F.3d at 176; *Pickus v. U.S. Bd of Parole*, 507 F.2d 1107, 1114 (1974).

A binding rule of substantive law "will be taken for what it is." *Azar,* 139 S. Ct. at 1812 (citations omitted). Subpart D was such a rule. Accordingly, Defendants' rescission without notice and comment was unlawful.

B. Defendants Unlawfully Failed to Explain or Acknowledge Its Change in Policy

The APA requires agencies to engage in "reasoned decisionmaking," *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020); *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015). Agency action must be set aside if, as here, it is arbitrary or capricious. 5 U.S.C. § 706(2)(A).

To lawfully rescind Subpart D, Defendants were obligated to give adequate reasons for its decisions. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Their decision had to be "based on consideration of the relevant factors," and may not have failed "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). They were required to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* And this requirement was satisfied only if Defendants' "path may reasonably be discerned." *Encino*, 136 S. Ct. at 2125 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

Also, in rescinding Subpart D, Defendants were obligated to "display awareness that [they were] changing position" and "show that there [were] good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). In addition to explaining the mere fact of a policy change, "a reasoned explanation [was] needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 516; *Regents*, 140 S. Ct. 1891, 1910–1911.

Here, Defendants said "many" (notably not *all*) of the rights provided by Subpart D are already provided by the APA and judicial decisions, which the Department may implement through "internal directives" as it "deems necessary and appropriate." 86 Fed. Reg. at 17293 (Appendix at 23). Yet, they did not identify a single APA requirement or judicial decision that would make redundant any given Subpart D provision. Nor did they explain or describe the conditions under which the Department might deem it "necessary and appropriate" to provide Subpart D-type protection. As such, it is impossible to follow, let alone judge, their explanation. This alone renders rescission unlawful. *Encino*, 136 S. Ct. at 2125.

Critically, Defendants failed to acknowledge, let alone explain away, DOT's justification for promulgating Subpart D in the first place. Subpart D was promulgated to address and cure Department employees' systemic violation of due-process and procedural rights. Binding rules were promulgated to ensure "DOT provides affected parties appropriate due process in all enforcement actions, that the Department's conduct is fair …, 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." 84 Fed. Reg. 71716 (Appendix at 3). Any attempt to rescind Subpart D required a reasoned explanation of why prior concerns over due process and procedural abuse have now abated or are somehow outweighed by new considerations. *See Fox*, 556 U.S. at 516 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"). However, no such reasoned explanation was provided.

Perhaps Defendants relied on Executive Order 13992's instruction to "rescind any rules or regulations, or portions thereof, implementing revoked" Executive Order 13892 to rescind Subpart D. *See* 86 Fed. Reg. at 17293. But most of Subpart D, including its *Brady* disclosure guarantee, codified the Bradbury Memo, not Executive Order 13892. 84 Fed. Reg. at 71716 n.7; *compare, e.g.,* Bradbury Memo ¶¶ 13, 14, 20 (Appendix at 35–37) with 49 CFR §§ 5.83, 5.85, 5.87 (Appendix at 18–19). Also, Executive Order 13992 requires consistency "with applicable law, including the Administrative Procedure Act." *See* 86 Fed. Reg. at 7049 (Appendix at 46). It assuredly did not authorize Defendants to evade the APA's reasoned-explanation requirement. Nor could it.

Alternatively, perhaps Defendants invoked Executive Order 13992 because they concluded 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.*; *see also* 86 Fed. Reg. at 17293 (Appendix at 23). However, Defendants never explained how Subpart D might threaten, or is even related to, the Department's ability to address the "2019 pandemic," "economic recovery," "racial justice," or "climate change." Their explanation is simply impossible to follow.

In fact, Defendants' explanation is so lacking that it amounts to a failure to "display awareness that [they are] changing position." *Fox*, 556 U.S. at 515. To be sure, they acknowledge deleting regulatory text. But they insist the Department policy has not changed because the text at issue merely provides things "derived from the Administrative Procedure Act (APA) and significant judicial decisions" that "need not be adopted by regulation in order to be effective." 86 Fed. Reg. at 17293 (Appendix at 23).

In other words, Defendants seem to be saying that post-rescission, IHMPACT members and other regulated parties will have precisely the same rights and the Department precisely the same obligations as under Subpart D. But this is not true. Subpart D expanded IHMPACT members'

rights and imposed new obligations on DOT. Rescission reduces IHMPACT members' rights and expands agency discretion and power. Defendants' irrational insistence that rescission changes nothing suggests only a distressing lack of "awareness that [they are] changing position." *Fox*, 556 U.S. at 515.

For example, 49 CFR § 5.83 is the first time the Department has codified and acknowledged a duty to disclose exculpatory evidence in civil-enforcement proceedings under *Brady v. Maryland*, 373 U.S. 83 (1963). 84 Fed. Reg. at 71731 (Appendix at 18). While IHMPACT and several federal agencies believe *Brady* disclosures are required in civil-enforcement proceedings to ensure basic fairness,[7] the Department has never before agreed. Indeed, DOT promulgated 49 CFR § 5.83 requiring *Brady* disclosures precisely because the Department did not previously do so.

As a second example, 49 CFR § 5.65 concerns "[p]roper exercise of prosecutorial and enforcement discretion" and prohibits enforcement based on ambiguous constructions of statutes or regulations in reliance on judge-made deference doctrines. *Id.* at 71730 (Appendix at 17). Again, IHMPACT believes due-process and fair-notice prohibit enforcement actions based on a tortured interpretation of statutory or regulatory requirements.[8] But prior to promulgating 49 CFR § 5.65, the Department never agreed. Instead, DOT routinely relied on deference doctrines to support

[7] Some independent agencies have adopted truncated *Brady* disclosure requirements. *See* Federal Election Commission, Agency Procedure for Document and Information Disclosure During Enforcement, 2011, available at https://www.fec.gov/updates/agency-procedure-for-document-and-information-disclosure-during-enforcement/; FERC Policy Statement on Disclosure of Exculpatory material, PL10-1-000 (Dec. 17, 2009), available at https://www.ferc.gov/legal/major-orders-regulations/policy-statements; Securities and Exchange Commission's Rules of Practice 230, 17 CFR 201.230(b)(3); *First Guar. Metals, Co.*, Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980)); *see also* Kara Rollins, It's Time For Agencies to Adopt the Brady Rule in Civil Enforcement Actions, Feb 6, 2020, available at https://nclalegal.org/2020/02/its-time-for-agencies-to-adopt-the-brady-rule-in-civil-enforcement-actions/.

[8] *See, e.g., Sessions v Dimaya,* 138 S. Ct. 1204, 1228 (2018) (Gorsuch J., concurring) (In the criminal context this Court has generally insisted that the law must afford ordinary people fair notice of the conduct it punishes. "And I cannot see how the Due Process Clause might often require any less than that in the civil context either.").

enforcement actions based on strained legal interpretations, even as some courts refused to grant deference out of a concern for fairness. *See, e.g., ExxonMobil Pipeline Co. v. United States Dep't of Transportation*, 867 F.3d 564, 579 (5th Cir. 2017) (holding that granting *Auer* deference to PHMSA's interpretation of its own regulations "in this enforcement action would constitute unfair surprise and deprive ExxonMobil of the fair notice to which it is entitled.").

As a third example, 49 CFR § 5.67 provides in relevant part: "The Department will not initiate enforcement actions[9] 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." 84 Fed. Reg. at 71730 (Appendix at 17). This is a substantive rule providing rights beyond judicial decisions seemingly authorizing "fishing expeditions" without *any* evidence in hand to support the assertion of a violation. *Compare United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (agencies have a "power of inquisition, if one chooses to call it that," and therefore, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 215–16 (1947) ("Congress has made no requirements in terms of any showing of 'probable cause,' and … any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case … that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose.").

IHMPACT believes *Morton Salt* and *Walling* were wrongly decided and the Court today is more likely to take a more constrained view of agency authority. *See Citizens United v. FEC,* 558 U.S. 310, 342 (2010); *see also Sessions v. Dimaya,* 138 S. Ct. 1204, 1229 (2018) (Gorsuch J., concurring); *Fox*, 556 U.S. at 516; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("we must take care

[9] Subpart D defines "enforcement actions" as actions "taken by the Department upon its own initiative or at the request of an affected party in furtherance of its statutory authority and responsibility to execute and ensure compliance with applicable laws." 49 CFR § 5.59; 84 Fed. Reg. at 71729.

not to extend the scope of the statute beyond the point where Congress indicated it would stop."). Regardless, in Subpart D the Department turned in its fishing license, rendering § 5.67 a substantive rule. *Chrysler Corp.*, 441 U.S. at 301. This belies the Defendant's claim Subpart D did nothing to expand IHMPACT members' rights or to impose new obligations on the Department. Therefore, Defendants must at least explain this policy shift. *Fox,* 556 U.S. at 516; *Regents*, 140 S. Ct. 1891, 1910 – 1911.

The same is true of other rights and protections in Subpart D, particularly those imposing binding limits on the Department's enforcement discretion, which is not regulated by other legal authorities. For example, Defendants said rescinding Subpart D has no policy effect because the rights and protections it conferred "can be accomplished by internal directives as the Department *deems necessary and appropriate*." 86 Fed. Reg. at 17293 (Appendix at 23) (emphasis added). But Subpart D indisputably used binding language regarding what DOT personnel "must," "must not," "shall," or "shall not" do and set clear standards for the permissible exercise of civil enforcement authority. *See, e.g.,* 49 CFR §§ 5.65–69 (Appendix at 17).

C. Defendants Unlawfully Failed to Consider IHMPACT Members' Legitimate Reliance Interests

Defendants unlawfully failed to consider and address whether IHMPACT members (and others similarly situated, for that matter) had a legitimate reliance interest in Subpart D. *Regents,* 140 S. Ct. at 1913 (citation omitted). When an agency changes course, it must be cognizant of the possibility it has engendered serious reliance interests that must be accounted for. "It would be arbitrary and capricious to ignore such matters." *Id.* (citations omitted). Yet that is what Defendants have done here.

Regents is instructive and controlling. The Court held:

> For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites

> any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Id. at 1913 (citations omitted).

Subpart D's substantive provisions, including *Brady* rights, freedom from "fishing expeditions," an end to "tortured" interpretations of statutory or regulatory requirements in enforcement actions, transparent penalty procedures, robust anti-bias provisions, and the host of binding limits on the Department's enforcement discretion left much for the Defendants to consider. IHMPACT members' reliance interests, and the reliance interests of all others regulated by DOT in Subpart D rights, as well as the public's self-evident "good government" reliance interests in the Department's "carry[ing] out its enforcement responsibilities in a fair and just manner," 84 Fed. Reg. at 71716 (Appendix at 3), required acknowledgement and consideration, *Regents*, 140 S. Ct. at 1913.

II. RESCISSION OF SUBPART D IRREPARABLY INJURES PLAINTIFF'S MEMBERS

If Subpart D is rescinded in violation of the APA, then IHMPACT members will lose the benefit of its critical due-process and procedural rights, and of their APA right to participate in notice-and-comment procedures. This is irreparable injury. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("[A] denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001) ("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"); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, U.S. Dist. LEXIS 241732, *31 (D. Md. 2020) (citations omitted).

For example, in March 2021, pursuant to 49 CFR § 107.317(d), the PHMSA's Chief Counsel served an Order on IHPMACT member Polyweave to pay a substantial fine for regulatory violations that allegedly occurred in 2015.[10] On March 22, 2021, Polyweave asked PHMSA's Administrator to conduct a *de novo* review, under 49 CFR § 107.325(d), of the enforcement action against it. Because Subpart D was in force, Polyweave reasonably expected the Department's adversarial personnel would, as a matter of course, reveal any exculpatory evidence bearing on its culpability or the proper extent of any punishment the agency intends to mete out, even if Polyweave does not know such evidence exists or otherwise does not request access to it.

However, Defendants' rescission of 49 CFR § 5.83 effectively extinguishes Polyweave's *Brady* rights in this case and any other that might arise. Without *Brady* rights, Polyweave (and similarly situated others) will never know whether PHMSA suppressed material exculpatory evidence. As such, Polyweave could not use any withheld evidence in its pending enforcement action before PHMSA. 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). In short, because the *Brady* rights at issue pertain to voluntary and timely disclosure of information, the loss of such rights is by definition irreparable.

The same is true with respect to IHPMACT members Pro-Pack and ghP. They are unable access, let alone use, withheld evidence in contesting pending enforcement actions against them. And any review by a federal court of appeals of PHMSA's final decisions regarding their respective

[10] Such late order was prohibited by 49 CFR § 5.63's requirement that all DOT enforcement actions be founded on a clear legal authority. *See* 28 U.S.C. § 2462 (prohibiting enforcement of civil fines for alleged conduct that occurred over five years ago). The Department nonetheless proceeded because it knew or expected that 49 CFR § 5.63 was to be rescinded with the rest of Subpart D.

decertification as testing laboratories is limited to the record developed by the agency. If the Department has suppressed exculpatory evidence, Pro-Pack and ghP will be unable to raise any objection or make any use of such evidence in their judicial appeals.

Rescission of Subpart D means Plaintiff's members will lose other important substantive protections as well, each of which constitutes irreparable harm. For example, without Subpart D:

- Plaintiff's members will no longer be protected from the Department's adversarial personnel having *ex parte* communication with the PHMSA Administrator who decides those members' appeals. *See* 49 CFR § 5.71 (Appendix at 17-18).
- Plaintiff's members will no longer be protected from adversarial personnel using nonbinding guidance documents to prove a violation. *See* 49 CFR § 5.85 (Appendix at 18).
- Plaintiff's members will no longer be protected from unfair penalty calculations that do not reflect the scale and willfulness of the violation, or mitigating factors, such as the fact that Plaintiff is a small business. *See* 49 CFR § 5.97 (Appendix at 19) ("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")).

At bottom, one set of enforcement rules applied in March 2021 when Department launched enforcement actions against Plaintiff's member. Defendants' rescission of Subpart D in April 2021 means the rules have changed to those members' detriment.[11]

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION

The final two preliminary-injunction factors—balance of equities and public interest—"overlap considerably" and may be considered together when the government is the opposing party. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 n.36 (N.D. Tex. 2016) (citing *Texas*, 809 F.3d at 187)). Here, an injunction would prevent significant and irreparable injuries that would otherwise befall Plaintiff's members. At the same time, any burden on the Department would be minimal—an

[11] Improper *ex parte* communications, using guidance to prove a violation, and unfair civil penalties are all reasons for IHMPACT members to sue the Department. But practically speaking, a small, regulated business simply lacks the means or the resources to protect its rights from overreaching federal regulators. The regulators know this, and the business knows this. Systemic incentives drive regulated parties to buy peace at the cost of their constitutional and procedural rights.

injunction would merely require DOT to follow basic fairness requirements in enforcement actions that have been in place since December 2019. Indeed, DOT itself maintains that "many" of those requirements would be effective regardless of Subpart D. 86 Fed. Reg. at 17293 (Appendix at 23). Thus, "the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted." *Texas*, 809 F.3d at 186.

Further, an injunction against an unlawful agency action does not harm the government because it furthers the public interest that the government must promote. Where, as here, the government is the opposing party, Plaintiff's likelihood of success on the merits is a strong indicator that a preliminary injunction serves the public interest because there is a public interest in halting unlawful agency action. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021). Rescission is contrary to the APA, as explained above. On that ground alone Plaintiff is entitled to injunctive relief. But this case is not about mere procedural foot-faults.

The Bradbury Memo tacitly acknowledged a persistent pattern of due-process abuse. Subpart D, in turn, was promulgated to cure significant and longstanding problems of substantive bureaucratic due-process violations by expanding regulated persons' rights and reducing the bureaucracy's discretion. Returning to a regime in which rights are granted at the Department's whim, as Defendants intend to do, guarantees abuse.

One of Subpart D's most noteworthy provisions is *Brady* disclosure. 49 CFR § 5.83 (Appendix at 18). Never before has the Department acknowledged or agreed regulated persons subject to its enforcement authorities have *Brady* rights, nor has it provided them with *Brady* disclosure. As the Supreme Court recognized in *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. While *Brady* concerned a criminal rather than a civil case, the requirements of a fair adjudication do

not change simply because the potential punishment is different. Indeed, the criminal-civil distinction matters less and less as "[o]urs is a world filled with more and more civil laws bearing more and more extravagant punishments." *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J. concurring) ("Any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.").

Recognizing *Brady* is necessary for fair adjudication, some independent agencies have embraced its disclosure principles (albeit in truncated form) in civil enforcement proceedings.[12] DOT finally followed suit in 2019. But Defendants have been directed by the White House to abandon *Brady* and Subpart D, and they mechanically obeyed. If the rescission stands, then IHMPACT members' due-process rights, and the due-process rights of every other person regulated by the Department, will be harmed and diminished. And at the same time, the fundamental integrity and legitimacy of the Department's enforcement activities will be materially impaired. Regardless, APA compliance and ensuring fairness in enforcement actions is always in the public interest. Therefore, Plaintiff's request for a preliminary injunction should be granted.

[12] *See* 17 CFR 201.230(b)(3); *FERC Policy Statement on Disclosure of Exculpatory Material*, PL10-1-000 (Dec. 17, 2009), available at https://www.ferc.gov/legal/major-orders-regulations/policy-statements; *First Guar. Metals, Co.*, Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980)(since *Brady* is premised upon due process grounds, "we hold that its principles are applicable to administrative enforcement actions.") The Federal Election Commission applies "the principles of the due process clause set forth in *Brady v. Maryland* (373 U.S. 83)" to its investigations and civil enforcement actions to "promote fairness in the enforcement process, promote administrative efficiency and certainty and contribute to the Commission's goal of fair and open investigations." Federal Election Commission, *Agency Procedure for Document and Information Disclosure During Enforcement* (July 1, 2011), available at https://www.fec.gov/updates/agency-procedure-for-document-and-information-disclosure-during-enforcement/.

IV. A NATIONWIDE INJUNCTION IS APPROPRIATE

"It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas*, 809 F.3d at 188. As this Court has repeatedly recognized, "[a] nationwide injunction is appropriate when a party brings a facial challenge to agency action under the APA." *Franciscan Alliance*, 227 F. Supp. 3d at 695; *accord Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (same); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852330, at *3 (N.D. Tex. Nov. 20, 2016). This principle flows directly from the APA's text: Section 706 states that reviewing courts "shall" "set aside" unlawful agency actions. 5 U.S.C. § 706. Thus, when "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283 (9th Cir. 2020).[13]

This Court has repeatedly issued nationwide injunctions against invalid rules that would otherwise have a nationwide effect. In *Perez*, for example, the Court held that a nationwide preliminary injunction was appropriate "[b]ecause the scope of the irreparable injury is national, and because the [challenged] Rule is facially invalid." 2016 WL 3766121 at *46. The Court reached the same conclusion in *Franciscan Alliance*, granting a nationwide preliminary injunction because "the Rule's

[13] An often-cited statement of the same principle is Justice Blackmun's view, "in dissent but apparently expressing the view of all nine Justices," *Nat'l Min. Ass'n*, 145 F.3d at 1409, that when a plaintiff "prevails" on a challenge under the APA to "a rule of broad applicability," "the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual," *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting); *see also id.* at 890 n.2 (majority opinion) (recognizing that "a person adversely affected" can bring suit to alter a whole agency program). In awarding a preliminary injunction a court must also consider the overall public interest. *Winter*, 555 U.S. at 26; *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) *per curim*. Nationwide preliminary injunctive relief guarantees that an agency action that is likely to be proven unlawful does not become effective, providing complete relief to the plaintiff while APA legality is finally adjudicated. *See Pennsylvania v. President of the United States*, 930 F.3d 543, 575 (3d Cir. 2019).

harm is felt … across the country." 227 F. Supp. 3d at 695. Here, the injury caused by Defendants' unlawful rescission of Subpart D is likewise nationwide—it deprives every regulated person in the country of substantive rights and protection in enforcement actions. This nationwide threat merits nationwide preliminary relief. *Id.*

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiff's request for a preliminary injunction and enjoin rescission of Subpart D. To mitigate the nationwide impact of Defendants' unlawful rescission, the injunction should be nationwide in scope.

Respectfully,

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May 28, 2021

CERTIFICATE OF CONFERENCE

I certify that attorneys for Plaintiff and Defendants conferred on May 26, 2021, and determined this motion is opposed.

/s/Sheng Li

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021, an electronic copy of the foregoing motion for preliminary injunction and supporting memorandum were filed with the Clerk of Court for the United States District Court for the Northern District of Texas using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/*s*/Sheng Li