IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KEVIN GUBBELS, ET AL.	:	
	:	CIVIL ACTION NO.: 4:20-cv-3060
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SONNY PERDUE, ET AL.	:	
	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants have filed a joint Motion to Dismiss and for Partial Summary Judgment, along with their response to Plaintiffs' Motion for Preliminary Injunction (ECF No. 19), in what appears to be more of an effort to obfuscate rather than enlighten. This latest strategy is yet another step in what an ongoing effort to strip Plaintiffs, Kevin Gubbels and Insure My Honey, Inc. (collectively referred to as "Mr. Gubbels"), of their constitutional rights while avoiding any review of their conduct.

Defendants have summarily imposed a suspension order against Mr. Gubbels and Insure My Honey, Inc., an action that has effectively shuttered Mr. Gubbels's business, based on an insupportable conclusion that he has "a serious lack of business honesty." While admitting that Mr. Gubbels is entitled to a full evidentiary hearing that allows him the opportunity to challenge their predetermination in that regard, they also confirm that they have not provided him with one, and insist that they *will not* do so until some yet-to-be-determined date in the future. It is that refusal to provide him with the process to which he is entitled that has forced Mr. Gubbels to petition this Court for relief. Mr. Gubbels has presented a live and critically important

controversy that only this Court has the authority to remedy. This Court must exercise the power that it has been granted to enjoin Defendants' unlawful conduct. It must start to remedy this wrong by denying Defendants' Motion to Dismiss and for Partial Summary Judgment, while granting Mr. Gubbels's Motion for Preliminary Injunction.

I. COUNTER-STATEMENT OF MATERIAL FACTS

Mr. Gubbels hereby responds to the Defendants' "Statement of Material Facts" as follows:

1. Admitted.
2. For the 2020 reinsurance year, Mr. Gubbels was an agent for five Approved Insurance Providers (AIPs): Farmers Mutual Hail Insurance Company of Iowa, Hudson Insurance Company, Great American, Diversified Crop Insurance and ProAg. Mr. Gubbels had subagents who issued or renewed crop insurance policies on behalf of Insure My Honey. (Declaration of Kevin Gubbels, attached as Exhibit A.)
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Contrary to Defendants' insinuation, the referenced document was not created by Mr. Gubbels, and they have inaccurately described it as "marketing materials." Mr. Gubbels neither reviewed nor approved this document before it was emailed to the Farm Bureau members. *Id.*
8. Mr. Gubbels cannot respond to Ms. Manzano's stated "concern." The materials in question were not created, reviewed, or approved by Mr. Gubbels. The information

set forth in the third paragraph accurately describes the program and presents accurate information. *Id*.

9. Admitted.

10. Mr. Gubbels denies that he "stated PRF insurance was available on land which already had an MPCI policy." Mr. Gubbels did not "mischaracterize[] FCIC procedures." Discovery is necessary on these allegations. *Id*.

11. Mr. Gubbels denies the foundational accusations made in Paragraph 11 of the Defendants' "Statement of facts." Mr. Gubbels must be allowed to conduct discovery related to the basis for these claims. *Id.*

12. Mr. Gubbels denies the foundational accusations made in Paragraph 12 of the Defendants' "Statement of facts." Mr. Gubbels must be allowed to conduct discovery related to the basis for these claims. *Id*.

13. Mr. Gubbels first notes that the allegations contained in Paragraph 13 are incomplete in that the government may in fact make a profit on the policies that are sold. Mr. Gubbels can neither admit nor deny the remaining claims made in Paragraph 13 of the Defendants' "Statement of Facts." Discovery is necessary. *Id*.

14. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 14 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

15. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 15 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

16. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 16 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

17. Mr. Gubbels denies that his conduct warranted either suspension or debarment. Mr. Gubbels denies that any of his conduct can be described as “egregious.” The Notice of Suspension speaks for itself and Defendants’ summary misrepresents the text of the document. *Id*.

18. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 18 of Defendants’ “Statement of Facts.” Discovery is necessary. *Id*.

19. Mr. Gubbels admits that he submitted a response to RMA’s Notice. Mr. Gubbels further states that such response speaks for itself and Defendants’ summary misrepresents the text of the document. *Id*.

20. Mr. Gubbels admits that Mr. Barbre sent him a “clarification” letter on March 13, 2020. Mr. Gubbels further states that such letter speaks for itself and Defendants’ misrepresents the text of the document. *Id*.

21. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 21 of Defendants’ “Statement of Facts.” Discovery is necessary. *Id*.

22. Mr. Gubbels denies the Defendants’ rendition of the purpose of such meeting. Mr. Gubbels admits that such conference took place. *Id*.

23. Mr. Gubbels admits that Mr. Barbre indicated that the Risk Management Agency (RMA) would need an additional 45-60 days for the investigation. Mr. Gubbels denies that it was necessary to take this amount of time to complete such investigation. *Id*.

24. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 25 of Defendants’ “Statement of Facts.” Discovery is necessary. *Id*.

25. Mr. Gubbels admits that he submitted a letter and video to Mr. Barbre. Mr. Gubbels further states that such letter and video speak for themselves and Defendants' summary misrepresents the content of these materials. *Id*.

26. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 27 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

27. Mr. Gubbels admits that Ms. Manzano sent an email to his attorney stating that "RMA's review [was] complete." Mr. Gubbels further states that the email speaks for itself and Defendants' summary misrepresents the text of the document. *Id*.

28. Mr. Gubbels admits that Ms. Manzano sent an email to his attorney stating that "RMA's review [was] complete." Mr. Gubbels further states that the email speaks for itself and Defendants' summary misrepresents the text of the document. *Id*.

29. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 30 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

30. Mr. Gubbels can neither admit nor deny the claims made in Paragraph 31 of Defendants' "Statement of Facts." Discovery is necessary. Upon information and belief, none of these policies have been voided, and FCIC has not denied reinsurance. *Id*.

31. Mr. Gubbels disputes that RMA's administrative process remains open. Discovery is necessary. *Id*.

32. Defendants *have already* failed to provide Mr. Gubbels with the process he is due, including a timely hearing. Mr. Gubbels can neither admit nor deny the remaining claims made in Paragraph 33 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

33. Mr. Gubbels disputes Defendants' claim that they can proceed with the flawed process that has already resulted in deprivation of his constitutional rights. *Id*.

34. Mr. Gubbels can neither admit nor deny the remaining claims made in Paragraph 34 of Defendants' "Statement of Facts." Discovery is necessary. *Id*.

II. ARGUMENT

This Court must reject Defendants' demand to deny Plaintiffs' Motion for Preliminary Injunction and to dismiss this lawsuit. This Court has subject-matter jurisdiction over all of Mr. Gubbels's claims. This Court is in fact imbued with inherent jurisdiction over Mr. Gubbels's constitutional claims, and his administrative law claims have been properly presented to this Court. Not even Defendants can plausibly argue that they have followed their own regulations governing suspension, which in itself exposes the constitutional dimensions of this case under the *Accardi* doctrine. Moreover, to the extent that Defendants attempt to argue compliance with the regulations, they expose their invalidity under even minimal limits of constitutional due process.

This Court must reject Defendants' call for summary judgment and instead grant Mr. Gubbels's request for a preliminary injunction. He has demonstrated not only his likelihood of success on the merits, but he has established that he will suffer irreparable constitutional, economic, and reputational injuries absent entry of such an injunction. The public interest always favors enforcement of constitutional rights—which is all Mr. Gubbels seeks.

A. Defendants' Motion for Summary Judgment Must Be Denied

i. This Court Has Jurisdiction over All of the Counts in Mr. Gubbels's Complaint

This Court has jurisdiction over all counts in Mr. Gubbels's complaint, and Defendants' arguments to the contrary are wrong. Mr. Gubbels's claims under the Administrative Procedure

Act are properly before this Court under the enumerated statutory review provisions. His constitutional claims are properly before this Court as a matter of inherent equitable jurisdiction under the Constitution. Having suffered significant and ongoing harm from Defendants' suspension order, Mr. Gubbels' case is ripe for review.

1. This Court Has Subject-Matter Jurisdiction over Mr. Gubbels's Constitutional Claims

Defendants argue that this Court "lacks subject matter jurisdiction over" Mr. Gubbels's lawsuit, claiming that "[t]he declaratory judgment statute is not an independent basis for jurisdiction, nor does it waive sovereign immunity. It provides [only] a remedy where jurisdiction already exists." (Def.Br. in Support of Mot. For Summ. J., ECF No. 19 at 15-16.) Defendants assert that this lawsuit can *only* be brought under the APA. (ECF No. 19 at 15-16.)

Defendants have conflated the distinct inquiries as to whether this Court has jurisdiction over each of Mr. Gubbels's separate *constitutional* and *administrative* law claims. This Court always has jurisdiction to enjoin unconstitutional conduct undertaken by federal officials, regardless of the APA's specific requirements. Moreover, and as discussed below, Mr. Gubbels's administrative claims *are* ripe for adjudication.

The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … to judicial review thereof." 5 U.S.C. § 702. The Supreme Court has also "long held that federal courts may in some circumstances grant injunctive relief against" federal officials violating federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. Indeed, while a litigant may need to find "private right of action" to justify a request for *damages* for constitutional

violations, federal courts *always* have the power to enjoin federal officials from violating the constitution—even general provisions. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491, n. 2 (2010).

Merely by raising an APA claim a litigant is not foreclosed from raising other constitutional claims. *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019). When a plaintiff raises both APA and constitutional claims, his "constitutional claims [may] proceed without even deciding whether an APA cause of action was available." *Id.*

Mr. Gubbels alleges in his Complaint that he is entitled to relief under several federal constitutional provisions. (*See* Complaint, ECF No. 1 at Count II, Count III.) He specifically alleges that this Court must enjoin Defendants' conduct pursuant to the "Fifth Amendment to the United States Constitution," and the corollary "due process" principles set out in "*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (better known as the *Accardi* doctrine)." (ECF No. 1 at ¶¶ 31, 34.) This Court must therefore have equitable jurisdiction to enter an injunction to prevent Defendants' unconstitutional conduct.

Defendants recognize as much, saying "[28 U.S.C.] Section 1331 confers civil federal question jurisdiction on the district courts to adjudicate cases arising under the Constitution, laws, and treaties of the United States." (ECF No. 19 at 15.) It simply relies on *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) for the proposition that Section 1331 "does not in itself waive the federal government's sovereign immunity." (ECF No. 19 at 15-16.) But *Sabhari* dealt only with APA claims, never even mentioning a constitutional challenge to government action. *See* 197 F.3d at 943.

Defendants' assertion that "[s]overeign immunity is jurisdictional in nature and, absent a waiver, it shields the agency and its employees sued in their official capacities from suit" is

simply inapplicable to this case. (*See* ECF No. 19 at 16 (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)).) The Court in *Meyer* held that particular suits for *damages* were barred by sovereign immunity and would not be implied by the Court. 510 U.S. at 473. That holding says nothing about the Court's inherent equitable power to *enjoin* unconstitutional behavior. This Court's injunctive power has a long and important lineage and cannot be so summarily dismissed on Defendants demand. *See, e.g.*, *Armstrong*, 575 U.S. at 326-27.

2. This Court Has Jurisdiction over Mr. Gubbels's APA Claims

Defendants avoid directly confronting the issue of whether this Court is precluded from addressing Mr. Gubbels's APA claims under the review provision found in 5 U.S.C. § 704. They instead rely on "ripeness" to glibly assert that "Plaintiffs seek this Court's premature intervention into an administrative process that, by everyone's agreement, has not resulted in "final" action." (ECF No. 19 at 20.) Defendants are certainly wrong about "everyone's agreement," and wrong about finality. The suspension order was "final" for purposes of the APA's review provision because it resulted in concrete legal consequences for Mr. Gubbels and was the product of Administrator Barbre's decision-making process. Those facts alone confirm that Mr. Gubbels's APA claims are properly before this Court.

The APA allows review of "final agency action." 5 U.S.C. § 704. In order to be "final," agency action must satisfy two conditions: (1) it "must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Courts take a "pragmatic" and "flexible" approach to determining finality. *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). Initial and temporary

decisions may be deemed final for these purposes and it is not necessary that a plaintiff exhaust all *possible* avenues of protest, with courts looking to whether the agency has "asserted its final position on the factual circumstances underpinning" the action. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004); *see also Sierra Club v. United States Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) ("if the agency has issued a definitive statement of its position, determining the rights and obligations of the parties, that action is final for purposes of judicial review despite the possibility of further proceedings in the agency to resolve subsidiary issues") (citation omitted).

The Eighth Circuit found final agency action when an agency issued a preliminary finding of no significant impact for a levee project because "[t]o deny judicial review of the agency's [statutory] compliance because additional steps are required before the levee can be built would undermine the purpose of judicial review[.]" *Sierra Club*, 446 F.3d at 816. Similarly, an agency taking a "definitive legal position denying the right of [] contractors to continue operating without certification from the agency" constitutes final agency action because the agency's *decision* has become clear. *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011)

With respect to the second factor, if a plaintiff suffers "direct and appreciable" legal consequences from agency action he may challenge the action as being final. *Bennett*, 520 U.S. at 178. The action must have inflicted "an actual, concrete injury" upon the party seeking review. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018) (citation omitted). An action can satisfy the condition if it "prohibits a party from taking otherwise lawful action." *Hawkes Co., Inc. v. U.S. Army Corps of*

Eng'rs, 782 F.3d 994, 1000 (8th Cir. 2015). Being prohibited from contracting with the government qualifies. *See CSI Aviation, Servs., Inc.*, 637 F.3d at 414.

Here the suspension order is "final" for APA purposes because it takes a definite legal position and has resulted in concrete consequences for Mr. Gubbels.

First, the suspension order constitutes Defendants' "final position on the factual circumstances underpinning" the suspension. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 483. Pursuant to the notice of suspension Administrator Barbre "immediately excluded [Mr. Gubbels] from participating as either a participant or a principal in covered transactions under United States non-procurement and procurement programs through the executive branch of the United States Government." (ECF No. 7-3 at 19 (Suspension Order).) He did so after concluding "that adequate evidence exists to support cause for debarment and that immediate action is necessary to protect the public interest[.]" (ECF No. 7-3 at 18)

Mr. Barbre was perfectly clear: Mr. Gubbels was barred from participating in the program from that point forward. Defendants have therefore "issued a definitive statement of its position, determining the rights and obligations of the parties[.]" *See Sierra Club*, 446 F.3d at 813. It does not matter whether they may make additional administrative decisions. *See id.* at 816. Their decision to impose a *suspension* was the final product of their legal and factual determination.

Second, Mr. Gubbels has suffered direct and appreciable consequences from the suspension order. The viability of Mr. Gubbels's business, and the livelihood of his four full-time employees and 60 independent contractor insurance agents, have been completely upended by the summary suspension and proposed debarment order. (ECF No. 7-3 at 2 (Affidavit of Kevin Gubbels).) The suspension prevented Insure My Honey, Inc. from applying for $77,000 in

forgivable Paycheck Protection Program loans to pay the salaries of his full-time employees. (ECF No. 7-3 at 3.) Furthermore, by being suspended, Mr. Gubbels and his independent agents have already lost the opportunity to sell crop insurance policies related to spring corn, which he estimates has cost him more than $1.1 million in lost premiums. (ECF No. 7-3 at 3.) He lost the opportunity to sell crop insurance policies with July 15, 2020 enrollment deadlines, missing out on another $500,000 in insurance premiums. (ECF No. 7-3 at 3.) The suspension order has also devalued Mr. Gubbels's business by approximately $1.6 million. (ECF No. 7-3 at 3) All of these consequences flow directly from Defendants' suspension order. It is therefore absurd and quite misleading to argue that such order was not final agency action. *See CSI Aviation, Servs., Inc.*, 637 F.3d at 414.

3. All of Mr. Gubbels's Claims Are Ripe for Adjudication

Changing tack, Defendants next argue that it is not yet time for this Court to hear Mr. Gubbels's claims. Their argument in this regard continues to conflate the distinction between his constitutional and his APA claims. Defendants do not specifically argue that Mr. Gubbels's constitutional claims are unripe. (*See* ECF No. 19 at 16-17.) They instead discuss ripeness concerns "in an administrative context" to suggest that Mr. Gubbels's APA claims should not yet be reviewed. (ECF No. 19 at 17.) Defendants also say that "this entire matter is not ripe" because reviewing "whether due process violations occurred" "impedes effective agency enforcement." (ECF No. at 16-17.)

All of Mr. Gubbels's claims are ripe. His constitutional claims are ripe because he has suffered and continues to suffer from those concrete constitutional injuries that arise from the Defendants' refusal to follow their own regulations and, independently, to provide Mr. Gubbels with constitutionally adequate due process. This would be so regardless of the "ripeness" of his

administrative law claims. Mr. Gubbels's APA claims, meanwhile, are ripe because Mr. Gubbels is subject to an enforceable suspension order that has summarily terminated his business with the federal government. There is plainly nothing "hypothetical" about his injury; it is concrete, immediate, and dire.

"The ripeness doctrine is grounded in both the jurisdictional limits of Article III of the Constitution and policy considerations of effective court administration." *United States v. Gates*, 915 F.3d 561, 563 (8th Cir. 2019) (citation omitted). Under the constitutional inquiry a claim is not ripe if the alleged injury "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005). The ripeness doctrine's "'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

So-called prudential ripeness considers an "examination of both the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Nebraska Pub. Power Dist.*, 234 F.3d at 1038 (citation omitted). "While courts shy from settling disputes contingent in part on future possibilities, certain cases may warrant review based on their particular disposition. Exception may be had where an issue is largely legal in nature, may be resolved without further factual development, or where judicial resolution will largely settle the parties' dispute." *Id.* (citation omitted). "In addition to being fit for judicial resolution, an issue must be such that delayed review will result in significant harm. 'Harm' includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened

uncertainty and resulting behavior modification that may result from delayed resolution." *Id*. These factors "play off each other" and "operate on a sliding scale." *Id*. at 1039.

Because prudential ripeness is a discretionary doctrine, "to the extent that results of the prudential and constitutional ripeness inquiries yield different answers, such that a case may be constitutionally ripe but prudentially unripe, a court must proceed cautiously." *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 283 (S.D. N.Y. 2019). This is because the "continuing vitality of the prudential ripeness doctrine" has been questioned by the Supreme Court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). Indeed, "prudential ripeness" is in "tension" with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." Id. (citations omitted). In any event, if a litigant has shown both "fitness" and "hardship" then a court *must* adjudicate the matter before it. *See id.* That is the situation here, a fact that Defendants do not dispute.

"The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 797 (8th Cir. 2016) (citation omitted). If a plaintiff's "alleged injury has already occurred and will continue to occur at defined points" then a "ripeness challenge fails." *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011). Indeed, if a plaintiff suffers discrete financial consequences from government action, it can hardly be said that his claim is not ripe. *See id.* Again, that description clearly encompasses the facts of the current dispute.

It is critically important to note that Defendants do not argue that Mr. Gubbels's claims are "too contingent for review" or that he has failed to demonstrate either "fitness" or "hardship." (*See* ECF No.19 at 16-20.) They make no argument to the effect that Mr. Gubbels's claims are too speculative to be considered, that they are anything other than legal issues fit for review, or

that he has *not* suffered significant harm from their actions. (*See* ECF No. 19 at 17-19.) Defendants' refusal to even acknowledge these issues, and their failure to meaningfully engage in the appropriate inquiry, should be sufficient to resolve the question at hand.

Of course, even a cursory examination of the harms facing Mr. Gubbels from Defendants' actions shows that his claims are ripe. There is nothing hypothetical about the consequences of their suspension order—the suspension order has cost Mr. Gubbels's business at least $1.6 million in lost business to date, devaluing his business by that amount in the process. (ECF No. 7-3 at 3.) This circumstance easily clears the constitutional threshold that the injury must not be purely "contingent [on] future events." *See KCCP Trust*, 432 F.3d at 899. It also satisfies the prudential concern that a plaintiff suffer sufficient "harm" for judicial intervention. See *281 Care Comm.*, 638 F.3d at 631. Finally, all of Mr. Gubbels's claims can be resolved now and are fit for review. As stated in the Complaint, Defendants have *already* denied and *presently* continue to deny Mr. Gubbels the process required by agency regulations, subjecting him to a constitutionally-deficient process that fails to protect his rights. (*See* ECF No. 1 at Count I, Count II, Count III.) This Court can determine these legal issues without development of additional or contingent events and Mr. Gubbels's claims are ripe for immediate review.

Defendants have chosen to ignore all of this, seeking instead to expand further the already tenuous doctrine of "prudential ripeness." They argue that even when a litigant brings a claim that *is* fit for review of agency action that causes direct and immediate harm, his claim *still* may be unripe if it does not constitute what they argue is "final agency action" or if pursuing it would somehow impede agency enforcement as they have defined it. (*See* ECF No. 19 at 17, 20.) Even if these arguments were correct, they provide no reason why this would foreclose review as a matter of ripeness on either the APA or constitutional claims.

Defendants' arguments rest on a shallow understanding of the traditional ripeness inquiry peculiar to APA claims. Citing *Lane v. U.S. Dept. of Agriculture*, 187 F.3d 793, 795 (8th Cir. 1999), they insist that this Court should decline jurisdiction simply because they do not believe that the constitutional injuries that they imposed on Mr. Gubbels meet a distinct finality test under the APA. (ECF No. 19 at 17.) This argument conflates several issues, and, in any event, proceeds from a faulty finality analysis.

To be sure "in the administrative context" courts typically assess whether "the issues are based on final agency action" and whether "the litigation is calculated to expedite final resolution rather than delay or impede effective agency enforcement," *in addition* to the other constitutional and prudential ripeness factors. *See Lane*, 187 F.3d at 795. But the absence of one of these considerations does not *mandate* dismissal. Indeed, they are described merely as "discretionary" considerations guiding prudential intervention. *Id*. This Court should be doubly hesitant to find a lack of ripeness *despite* the conceded presence of traditional constitutional considerations *and* traditional prudential considerations. *See Susan B. Anthony List*, 573 U.S. at 167.

Moreover, this argument has no bearing on Mr. Gubbels's constitutional claims. Defendants cite no authority that suggests that concrete constitutional harms arising from agency misconduct are somehow unripe if the agency action fails the unrelated finality test under the APA. That is, of course, because such a rule would be absurd. This Court is not divested of jurisdiction to review ongoing constitutional violations just because Mr. Gubbels has *also* brought APA claims or because he is challenging an agency action. *See Sierra Club*, 929 F.3d at 699.

Regardless, Mr. Gubbels case also complies with these surplus considerations. First, the question of finality here is not co-extensive with the finality question under the APA. *See Lane*,

187 F.3d at 795 (deciding "finality" for ripeness without reference to the APA). "[R]ipeness is not to be confused with exhaustion," and concerns of "administrative finality" do not apply to the ripeness inquiry. *Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 436 (3d Cir. 2003). Instead, the question is simply whether there is "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). "Thus, where a party suffers a concrete injury prior to final administrative disposition, such as fines or unreasonable appeal fees, the claim may be considered sufficiently ripe." *Peachlum*, 333 F.3d at 437.

Of course, Mr. Gubbels has "suffered a concrete injury" from the suspension order even if it was "prior to final administrative disposition." *See id.* It is undisputed that the order has already cost him millions of dollars in lost revenue and business devaluation. (*See* ECF No. 7 at 2.) That is "final" for purposes of ripeness, even if it were not "final" for purposes of the APA. *See Lane*, 187 F.3d at 795. Regardless, and as discussed above, the suspension order was also "final" for purposes of the APA because it was a reasoned agency decision that resulted in demonstrable consequences.

Defendants are on equally shaky footing when arguing that review here "would impede effective agency enforcement." (*See* ECF No. 19 at 20.) This question asks whether "the litigation is calculated to expedite final resolution rather than delay or impede effective agency enforcement." *Lane*, 187 F.3d at 795. Mr. Gubbels, however, has asked for nothing else. Indeed, this case is before the Court because Defendants have *refused* to expedite final resolution of this matter. Even though they agree that Mr. Gubbels "is entitled to a hearing" on his suspension, and has not yet been given even a preliminary opportunity to contest this matter, it incredibly insists that pushing them to move forward with their own process would "impede" enforcement. (*See*

ECF No. 19 at 20, 24.) That argument is absurd and gets things exactly backward. Given Defendants' intransigence and refusal to move forward, despite the passage of almost five months, it is clear that there will be no "final resolution" unless this Court intervenes.

4. Mr. Gubbels's Claims Have All Been Exhausted

Defendants are also wrong when they assert that Mr. Gubbels's "APA claims" have not been administratively exhausted. (ECF No. 19 at 20.)[1] Simply, Mr. Gubbels has exhausted all available administrative remedies, and the *agency* has refused to move forward with the proper process. There is nothing else that Mr. Gubbels *could* do. Moreover, because all of Mr. Gubbels's claims implicate constitutional concerns, they are reviewable even if they have not been exhausted.

Defendants invoke 7 C.F.R. § 400.453, insisting that Mr. Gubbels should have done more to exhaust his available administrative remedies. (ECF No. 19 at 20.) Section 400.453 says, "All administrative remedies contained herein or incorporated herein by reference must be exhausted before Judicial Review in the United States Courts may be sought, unless review is specifically required by statute." And, as clarified by 7 C.F.R. § 400.451, this provision incorporates the suspension and debarment regulations governing RMA programs.

It is important first to note that Defendants do not invoke an absolute *jurisdictional* rule requiring exhaustion. Only "sweeping and direct" jurisdictional bars preclude jurisdiction in federal court, whereas codifications of exhaustion requirements simply reinforce the presumption that available remedies *should* be exhausted. *See Chelette v. Harris*, 229 F.3d 684, 686-87 (8th Cir. 2000) (discussing jurisdictional and statutory exhaustion requirements). The exhaustion requirement invoked by Defendants, 7 C.F.R. § 400.453, is of the latter variety. It does not

[1] By Defendants' own assertion this argument does not apply to Mr. Gubbels's constitutional claims. Thus, even if Defendants were correct about administrative exhaustion, Counts II and III are reviewable by this Court.

prohibit any action without exhaustion, it merely reinforces the presumption of exhaustion. *See id*. Thus, this Court may dispense with the requirement when it would be equitable to do so. *See Chelette*, 229 F.3d at 687.

In any event, Mr. Gubbels complied with Section 400.453 by following all applicable requirements "contained" or "incorporated" into the regulations. While Defendants never directly identify *what* remedies "contained" in the regulations were available to Mr. Gubbels that he failed to pursue, a close reading of the regulations shows that he did all he could under these circumstances

The best clue as to Defendants' theory is an oblique statement that "[c]onsistent with this mandatory language, the Notice [of Proposed Suspension] clearly set forth the procedure to oppose the suspension and proposed debarment." (ECF No. 19 at 21.) Defendants presumably believe Mr. Gubbels failed in his obligation there.

The Notice set forth a section titled "Administrative Process," merely providing a general description of the suspension and debarment regulations. (*See* ECF No. 7-3 at 19.) It notes that Mr. Gubbels would "have an additional opportunity to challenge the facts" underlying the suspension consistent with 2 C.F.R. §§ 180.735(b), 180.830(b). (ECF No. 7-3 at 20.) It then provided, "If you, as a respondent, wish to contest this suspension and proposed debarment, you or your representative must provide the suspending and debarring official with information in opposition to the suspension and proposed debarment." (ECF No. 7-3 at 21.) Further, "If you, as a respondent, wish to contest this suspension and the proposed debarment, you or your representative must either send to the address above, or make arrangements to appear and present, the information and argument to the suspending and debarring official within 30 days of your receipt of this Notice." (ECF No. 7-3 at 21.) In addition, "If you are debarred, you may ask

the debarring official to reconsider the decision," and "You may seek judicial review, pursuant to 5 U.S.C. § 702, only after you have exhausted the options provided for in 2 C.F.R. §§ 180.720, 180.815, and 180.875, to contest the suspension and proposed debarment, and request reconsideration of the final debarment decision." (ECF No. 7-3 at 21-22.)

Mr. Gubbels followed that procedure. The notice and applicable regulations contemplate only one action concerning *suspension*—providing written opposition to the suspension and requesting a hearing under 2 C.F.R. § 180.720. Mr. Gubbels did both. Indeed, he demanded an adversarial hearing and a ruling on the merits, disputed several key factual assertions, and noted that one of the allegations lacked any regulatory or statutory basis. (ECF No. 7-3 at 24-25.) The agency simply ignored him and refused to act or otherwise respond.

The remaining procedures apply only to debarment, which all parties agree has not yet happened. 2 C.F.R. §§ 180.815, and 180.875 relate only to challenges of a proposed debarment order and a request for reconsideration. Because no debarment order has been entered they have no applicability and, more importantly, provide no opportunity for Mr. Gubbels to alert the agency to its legal failings.

Of course, that is the whole point of this lawsuit. Defendants cite to *no* additional action that Mr. Gubbels *can* take to spur them into moving forward with the suspension and debarment process required by the regulations. It cannot be the law that an agency's intransigence is to be interpreted as a failure of the litigant to exhaust his administrative remedies. Mr. Gubbels has exhausted whatever administrative remedies were available to him, which discharges any obligation under 7 C.F.R. § 400.453.

If this Court determines that Mr. Gubbels was obligated to comply with inapplicable and unavailable exhaustion requirements, it should excuse those requirements as a matter of equity.

First, this Court could excuse the requirements as being futile. The "Doctrine[] of … 'exhaustion' contain[s] exceptions, however, which exceptions permit early review when, for example … exhaustion would prove 'futile[.]'" *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). Because "[e]xhaustion is generally required as a matter of preventing premature interference with agency processes," once a person "has presented his or her claim at a sufficiently high level of review to satisfy the [agency's] administrative needs, further exhaustion would not merely be futile … but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975).

Hereno additional process available to Mr. Gubbels. This case presents a challenge not to the determination made by the agency, but to its refusal to provide him with adequate process. He requested that the agency proceed and grant him his required hearing. (ECF No. 7-3 at 24.) Having flat refused, it would serve no interest to require Mr. Gubbels to wait so that he could present his claims anew, *someday*, when Defendants finally decide he may do so. Additional exhaustion here would be futile.

Next, the administrative exhaustion requirement should be excused because all of Mr. Gubbels's claims relate to constitutional issues.

Defendants recognize that administrative exhaustion is excused for cases raising merely "colorable" constitutional challenges to agency action. (ECF No. 19 at 21-22 (citing *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992)).) As the Eighth Circuit explained:

> In *Mathews v. Eldridge*, 424 U.S. 319 [] (1976) … the Supreme Court recognized an exception to the statutory requirement of exhaustion of administrative remedies.
> To assert the exception under *Mathews*, a claimant must: (1) raise a colorable constitutional claim collateral to his substantive claim of entitlement; (2) show that he would be irreparably harmed by enforcement of the exhaustion

> requirement; and (3) show that the purposes of the exhaustion requirement would not be served by requiring further administrative procedures.

Thorbus v. Bowen, 848 F.2d 901, 903 (8th Cir. 1988). A litigant is thus not required to show that his constitutional claim is definitely correct—but simply that it "contains some merit." *Id.* (citation omitted).

Contrary to Defendants' argument the *Mathews* exception applies here. First, there is no doubt that Mr. Gubbels has raised constitutional claims that are collateral to any substantive claim of entitlement. (*See* ECF No. 1, Count II, Count III.) Indeed, the point of this lawsuit is not to directly challenge the suspension order, but to constitutionally challenge the *process* used by Defendants. As discussed below, those claims are more than colorable—they are correct. Mr. Gubbels has suffered and will continue to suffer irreparable harms if he is forced to continue lingering in administrative purgatory indefinitely. These harms take the form of uncompensable constitutional injuries, dire financial losses for which there is no legal remedy, and the destruction of his reputation, again without any recourse against the agency. Finally, Defendants' interest in exhaustion—being given a chance to timely correct their behavior in the administrative proceeding—is inapplicable. Indeed, Defendants *still* insist that they *will not* change the process, despite their obvious constitutional defects.

ii. Mr. Gubbels's Constitutional Claims Warrant Judgment in His Favor, Not Summary Judgment for Defendants

Pursuant to Fed.R.Civ.P. 56(a), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

In ruling on Defendants' motion this Court must review the facts in the light most favorable to Mr. Gubbels, the party opposing the motion, and give him the benefit of any inferences that logically can be drawn from those facts. *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). This Court is required to resolve all conflicts of evidence in favor of Mr. Gubbels. *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976).

Fed.R.Civ.P. 56(d) provides that "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

The purpose of Rule 56(d) is to "provide an additional safeguard against an improvident or premature grant of summary judgment." *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 426 (8th Cir. 2002) (citation omitted). The rule "should be applied with a spirit of liberality." *Id.* Although discovery is not always necessary before summary judgment, summary judgment is improper if the failure to allow discovery prevents the nonmoving party from having a fair opportunity to respond to the motion. *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999).

Reading the facts set out in Mr. Gubbels's Complaint and exhibits to his Motion for Preliminary Injunction in the light most favorable to him, it is clear that Defendants violated his constitutional rights. They failed to adhere to their own regulations and the due process guarantees of the *Accardi* doctrine and, independently, failed to provide him with the constitutional minimums of procedural due process. Summary judgment is therefore appropriate *in his* favor. To the extent that Defendants' claims are premised on factual assertions related to

matters outside of Mr. Gubbels's knowledge, this Court should issue a preliminary injunction, deny Defendants' motion for summary judgment, and grant Mr. Gubbels leave to seek discovery.

1. Defendants Failed to Follow Their Own Regulations, Violating the Due Process Guarantees Set out in the *Accardi* Doctrine

In requesting summary judgment Defendants once again conflates Mr. Gubbels's distinct claims in an effort to sweep them away with the blithe assertion that they provided him with adequate due process through their own regulations. (*See* ECF No. 19 at 22.) What they refuse to address speaks volumes. Their substantive defense of their actions is also unconvincing.

Mr. Gubbels assert three distinct theories of liability in his Complaint. Count I points out, as a matter of simple compliance with the APA, that Defendants failed to follow their own procedures. (ECF No. 1, Count I.) Count II builds on that point, recognizing that, in addition to violating the strictures of the APA, Defendants' failures have an important constitutional dimension under the *Accardi* doctrine. (ECF No. 1, Count II.) Count III alleges that regardless of whether RMA *followed* its own rules (which it did not), those rules fail to afford due process in violation of the constitution. (ECF No. 1, Count III.)

Defendants don't contest that if they violated their own rules they also violate both the APA's limits and the due process protections recognized by the *Accardi* doctrine. (*See* ECF No. 19 at 22-31.) Defendants also apparently agree that the regulations discussed here are meant to ensure procedural protections for the respondent and are thus subject to heightened review under the *Accardi* doctrine. (*See* ECF No. 19 at 22-31; Pl. Br. in Support of Prelim. Inj., ECF No. 7 at 23-26 (discussing *Accardi* doctrine).) These concessions speak volumes. As Mr. Gubbels pointed out in his motion for a preliminary injunction, if Defendants violated even one of the regulations at issue, they would have violated not only the APA, but their violation of the due process

principles described by the *Accardi* doctrine would "void [the] agency action even without a showing of prejudice." (ECF No. 7 at 23 (citing *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959)).)

Defendants now insist that their "conduct has been within the confines and scope of these regulations." (ECF No. 19 at 22.) They are wrong. Not only have they yet to identify a regulatory basis for one ground of suspension, they have refused to grant a suspension hearing that they *concede* is required. To make matters worse, they have force r. Gubbels to linger in suspension since February 21, 2020—almost five months as of this filing—with no decision and no progress on his administrative suspension.

Defendants are doubling down on their failure to provide Mr. Gubbels the required notice of the specific legal basis of at least one grounds for suspension. When a suspension order is issued without notice, the suspension official must "promptly" send the contractor a Notice of Suspension advising him that he has been suspended and "that [his] suspension is based on" the specific "cause(s) upon which the suspending official relied under 180.700 for imposing suspension." 2 C.F.R. § 180.715. The lawful bases for suspension are set out in 2 C.F.R. §§ 180.800(b), 417.800(b).

Defendants do not dispute these rules, they instead bluster and invoke outrage in lieu of describing an actual statutory or regulatory violation. In attempting to explain the "gist" of Mr. Gubbel's alleged obligations they say, "[f]or an agent to be unaware that it is impermissible to represent crop insurance programs as investment tools by utilizing terms such as 'ROI [return on investment]', '93% profit', and '[p]rofit over premium cost has been 3.60 per acre per year over the last 20 years[]'), rather than risk management tools, is incredible." (ECF No. 19 at 23-24.) Yet they *still* refuse to identify a single rule or regulation that Mr. Gubbels violated with his (alleged) choice of words. While they explain that certain agency statements describe the

program as a "risk management tool." (ECF No. 19 at 24.), that hardly means that a participant is somehow *forbidden* from describing risk management in other terms or that Mr. Gubbels violated a *rule* when he accurately explained that PRF programs were a "risk mitigation strategy" that had "paid out" in 8 of 10 previous years and yielded a "profit over premium cost" of $3.60 per acre over the last 20 years. (*See* ECF No. 7-3 at 9, ¶¶ 20-21 (March 11, 2020 Affidavit of Kevin Gubbels).)

To this day, Defendants have *never identified* what provision Mr. Gubbels allegedly violated with his alleged "profits" and "loss" language. The best they can do is declare "incred[ulity]" that Mr. Gubbels would *need* a rule to follow before they could impose a professional death sentence. (*See* ECF No. 19 at 24-25.) That hardly complies with the regulatory requirements.

Defendants' excuse related to their refusal to grant Mr. Gubbels a mandatory suspension hearing is even worse. The regulations guarantee that any contractor who opposes a suspension order "*will* have an opportunity to challenge the facts" supporting the suspension if there are disputed facts. 2 C.F.R. §§ 180.735(a)(3), (b) (emphasis added). Importantly "[d]efendants do not dispute Gubbels is entitled to a hearing." (ECF No. 19 at 25.) This is so because he has challenged the facts underlying the suspension order. (ECF No. 7-3 at 24.) Defendants' concession should end the analysis—clearly Mr. Gubbels was not afforded the process required by the regulations.

Defendants respond, however, by insisting that they "intend[] to provide a hearing" as required, but refuse to say when they will do so. (See ECF No 19 at 25.) That is not good enough. The regulations speak in mandatory terms, that a hearing "*will*" be provided to a respondent. 2 C.F.R. § 180.735(a)(3) (emphasis added). They also provide that suspension is a

"*temporary* status of ineligibility … pending completion of an investigation or legal proceedings." 2 C.F.R. § 180.605(a). Indeed, a contractor "whose economic life may depend on his ability to bid on government contracts" may not be made to "dangle in suspension" indefinitely. *Horne Bros. v. Laird*, 463 F.2d 1268, 1270, 1271 (D.C. Cir. 1972). Defendants' contrary approach is indefensible.

Moreover, if Defendants' future intent but current refusal to provide a hearing bears on the resolution of the legal claim before this Court, it should not be resolved on summary judgment. Mr. Gubbels of course has no idea what Defendants intend to do. He has had no opportunity to conduct discovery on that question either. Counsel has thus submitted an appropriate Declaration identifying the discovery that is needed on this issue. (*See* Declaration of Harriet M. Hageman attached as Exhibit B.) Thus, if Defendants' factual assertions supporting their refusal to provide a such hearing is material to the resolution of the claim, this Court must deny summary judgment, enter the preliminary injunction, and allow discovery to proceed.

Defendants next argue that they have complied with all required timelines for issuing a final suspension order. (ECF No. 19 at 22.) They claim that they have no obligation to provide Mr. Gubbels with *any* process on his suspension order for "up to 18 months, or longer." (ECF No. 19 at 28.) That proposition is not only an affront to constitutional due process limits, but is inconsistent with the regulations. The regulations are unequivocal—a "suspending official *must* make a written decision whether to continue, modify or terminate" a suspension "within 45 days of closing the official record." 2 C.F.R. § 180.755 (emphasis added); *see also* 2 C.F.R. § 417.755 ("The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record.").

Defendants do not dispute their obligation. They instead claim that, as a factual matter, "[t]he 'official record' here remains open as matters pending with [___________] [redacted here] directly relate to Gubbels's suspension and proposed debarment." (ECF No 19 at 25-26 (citing ECF 18-1, Manzano Decl. ¶ 48).) There are several problems with this response. First, there is a difference between the closing of the official record for *suspension* and *debarment*. The regulations at issue apply only to the record of "suspension," and they apply regardless of whether the record for proposed debarment remains open. *See* 2 C.F.R. §§ 180.755, 417.755.

Second, Defendants' factual assertion about the closure of the record cannot be properly resolved here on summary judgment. Mr. Gubbels has alleged facts showing the record is closed. The suspension and proposed debarment order was issued on February 21, 2020, and Mr. Gubbels submitted all of his opposition papers on March 11, 2020. (ECF No. 7-3 at 18, 24.) Although the administrator held an *informal* hearing on March 25, 2020, it was not an evidentiary hearing, and no testimony was taken. Mr. Gubbels nevertheless followed up with an informal supplement to his earlier communications in an April 2, 2020 email. (ECF No. 7-3 at 44.) Thus, the record was closed either on March 11, with Mr. Gubbels's opposition papers, or, at the very latest, April 2. To the extent that Defendants claim otherwise the conflict should be resolved in Mr. Gubbels's favor. *See Robert Johnson Grain Co.*, 541 F.2d at 210. Alternatively, this Court should deny summary judgment, grant the injunction, and allow Mr. Gubbels to proceed to discovery. (*See* Exhibit B.)

If Defendants wish to prove that the record remains open, then they must do so at a later stage of the proceedings. It is simply not relevant to the current motions whether the RMA seeks to continue its *investigation* for its proposed debarment. The suspension record is closed and has

been for well over 45 days. The RMA Administrator's failure to issue a written decision (much less hold a required hearing) violates the applicable regulations.

Finally, instead of addressing Mr. Gubbels's substantive concerns regarding the scope of the suspension order, Defendants confuse the issue even further by yet again revising their understanding of what entities are bound by the order. Mr. Gubbels argued in his motion for a preliminary injunction that his independent contractor insurance agents were improperly directed to stop issuing or renewing "any crop insurance policies on behalf of Mr. Gubbels" because Mr. Gubbels has no management or supervisory responsibilities for his agents. (ECF No. 7 at 21-22.) Because they were not "affiliates" of Mr. Gubbels, they could not be suspended from *anything*. *See* 2 C.F.R. § 180.625(b). Defendants now respond that the agents still can issue and renew *other* crop insurance policies, just not those "associated" with Mr. Gubbels. (ECF No. 19 at 29-30.) The problem, however, is that these agents are not properly deemed affiliates, nor is Mr. Gubbels properly considered to be acting as a "principal" of the agents. The regulations suggest that Mr. Gubbels may not act as a "principal" of a covered transaction, but they say nothing about whether his affiliated independent agents can write and service policies where Mr. Gubbels is not the principal. *See* 2 C.F.R. § 180.995(a). The regulations say only that he is barred from acting with "management or supervisory responsibilities related to a covered transaction." *See id*. But Mr. Gubbels has *no* management or supervisory responsibilities for the agents. (ECF No. 7-3 at 2, ¶ 5.) His agents should therefore not be suspended from issuing new policies associated with him or Insure My Honey, Inc.

Defendants run into a similar problem concerning Insure My Honey, Inc., which was improperly suspended based on the post-hoc determination that Mr. Gubbels was a "principal" in that company. (ECF No. 7 at 21.) Defendants now say that Insure My Honey, Inc. is also

suspended because it is "encompassed" by Mr. Gubbels's "role as a principal in the entities he owns or controls." (ECF No. 19 at 30.) To order such a suspension, however, Defendants were still required to send notice of the suspension to Insure My Honey, Inc. as a respondent. Only a respondent "is prohibited from participating" in federal transactions. 2 C.F.R. § 180.935. This disqualification can only be effective against an "affiliate of a participant" if the affiliate is "(1) Officially name[d] … in the notice; and (2) Give[n] the … opportunity to contest the action." 2 C.F.R. § 180.625(b). If Defendants want to suspend the corporate entity, it must provide it with notice and an opportunity to defend itself. Defendants cannot dispense with this requirement, just because they *think* Mr. Gubbels might "financially profit from his role as a principal of an entity participating in the FCIP pending a determination on his suspension and proposed debarment." (*See* ECF No. 19 at 30.)

Defendants' actions violate at least three distinct aspects of the rules governing suspension. Any of these violations would warrant vacatur of the order as a due process violation under the *Accardi* doctrine. *See Vitarelli*, 359 U.S. at 539. Defendants' request for summary judgment on this point must be denied.

2. If Defendants Complied with the Regulations, Then they Failed to Provide Minimal Due Process Protections

Defendants' attempt to defend the constitutional validity of their lack of a fair process all but proves Mr. Gubbels's point. They argue that because "RMA's conduct has been within the confines and scope of the [applicable] regulations, which set forth '[t]he criteria and minimum due process to be used in nonprocurement debarment and suspension actions'" there can be no due process violation. (ECF No. 19 at 22). This argument ignores constitutional requirements and elevates regulatory considerations above the Constitution. Mr. Gubbels alleged in his Complaint that if Defendants complied with the regulations, they failed to provide Constitutional

due process. (*See* ECF No. 1, Count III.) Their refusal to engage with that argument by pointing to compliance with the regulations misses the point.

As a threshold, Defendants don't challenge the fact that Mr. Gubbels's liberty interests implicate due process protections or that they are of the utmost significance. As he argued in his motion for a preliminary injunction, "Government contracting has become an economic mainstay for a number of commercial enterprises. It goes without saying, therefore, that disqualification from government contracting is a very serious matter for these businesses." (ECF No. 7 at 29 (quoting *Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000)).) Thus, under a due process analysis, the liberty and property interests of a contractor are of the utmost importance in suspension and debarment contexts because "the very economic life of the contractor may be in jeopardy." *Old Dominion Dairy Prod., Inc.*, 631 F.2d 953, 968 (D.C. Cir. 1980).

Defendants also fail to dispute that Mr. Gubbels is due, at least, "the right to be notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit," and a "fair trial in a fair tribunal." (ECF No. 7 at 29, 32 (quoting *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968 and *In re Murchison*, 349 U.S. 133, 136 (1955)).)

Defendants instead insist that they met their minimal due process obligation. (*See* ECF No. 19 at 24-26.) They are wrong.

First, as discussed above, despite suggesting that Mr. Gubbels violated the spirit of some unwritten rule by truthfully using the alleged "profits" and "loss" language, Defendants never identified adequate notice of at least one of the charges lodged against him. Of course, where "a

person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential[.]" *Old Dominion Dairy Prods., Inc.*, 631 F.2d at 963. Administrator Barbre never provided any basis for the allegations concerning the "returns" and "profits" language, yet he considered Mr. Gubbels's alleged use of that language to be a "grave error" showing his and the corporate entity's unfitness for federal contracting. (*See* ECF No. 7-3 at 17, 44.) Even now Defendants have failed to identify a single *rule* or regulatory requirement that the language allegedly violated. Due process, if nothing else, prevents an agency from depriving a person of a liberty interest without even bothering to identify the rule he allegedly violated.

Next, and of great significance, RMA's position that it can suspend Mr. Gubbels without providing him a hearing to contest the order for "up to 18 months, or longer" (ECF No. 19 at 28), cannot be squared with the constitutional minimums required by the due process clause. Defendants mostly argue that their ongoing refusal to give Mr. Gubbels either a hearing or a final suspension order, now almost five months after issuing the original suspension, complies with the applicable regulations. (*See* ECF No. 19 at 25.) If the regulations permit such a deprivation, then they are undoubtedly unconstitutional.

While "conceivably a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation;" such a period should only be "for a short period, not to exceed one month[.]" *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968 (quoting *Horne Bros.*, 463 F.2d at 1270 and *Gonzalez v. Freeman*, 334 F.2d 570, 578-79 (D.C. Cir. 1964)). When suspension extends unreasonably, due process requires a hearing. *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 967. And while each administrative scheme must be examined on its own, the D.C. Circuit has repeatedly recognized that if a government agency can

suspend a contractor without providing him a hearing in which to defend himself, it violates due process protections if the suspension lasts as little as a month, *Horne Bros.*, 463 F.2d at 1270, and certainly if it lasts for something approaching a year. *Old Dominion*, 631 F.2d at 967.

Defendants ignore these mandates, instead choosing to try to distinguish *Old Dominion* and *Horne Bros.* as being "inapposite" because "wherein the suspended individuals were given far less 'due process' than Plaintiffs have been, and will be, afforded." (ECF No. 19 at 26.) With respect to *Horne Bros.,* Defendants argue that the scheme in that case "did not require the suspended individual be given an opportunity to confront his accuser and 'rebut the 'adequate evidence' against him'" yet the contractor was suspended for a month before the court intervened. (ECF No. 19 at 26.) With respect to *Old Dominion,* Defendants says that the court considered a lack of protections "which are absent from the case at bar," including the fact that the "suspension regulations did not provide for specific notice of the charges against the contractor; a hearing may or may not occur; and there had been no hearing despite the contractor being suspended for over one year." (ECF No. 19 at 27 (citing *Old Dominion*, 631 F.2d at 967).)

Defendants' attempt to distinguish these cases does nothing more than indict their own behavior. By their own admission, Defendants have not provided Mr. Gubbels with the hearing to which he is entitled where he could contest the evidentiary support of the suspension order. (*See* ECF No. 19 at 25.) Defendants do not dispute that almost *five months* have passed since the suspension order was entered without any further proceedings. They instead suggest that they will continue the delay, perhaps as long as "18 months, or longer." (*See* ECF No. 19 at 28.) Mr. Gubbels has thus had no opportunity to "confront his accuser and 'rebut the 'adequate evidence' against him.'" (*See* ECF No. 19 at 26 (quoting *Horne Bros.*, 463 F.2d at 1270).) The due process violation is clear: there has been no hearing despite the contractor being suspended for months

on end and a "hearing may or may not occur." and. *See Old Dominion*, 631 F.2d at 967. "While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor, that cannot be sustained for a protracted suspension." *Horne Bros.*, 463 F.2d at 1270. That limit has been violated.

Defendants cannot avoid the courts' conclusions that pending or expected procedural protections do nothing to alleviate the problems of a deprivation that is not timely met with adequate process. They do not seem to get it—still insisting Mr. Gubbels "*will* be, afforded" more "due process" than those discussed in *Horne Bros.* or *Old Dominion*. (*See* ECF No. 19 at 26 (emphasis added).) Of course, the courts heard that argument before and rejected it. *See, e.g.*, *Old Dominion*, 631 F.2d at 967 ("The suspension proceedings, whether adequate or not in their own right, clearly provided no relief for the deprivations in this case" when they were never provided.) This Court must not allow the "temporary" suspension order to linger indefinitely, while the agency refuses to follow its own procedural requirements.

Finally, the adjudicatory structure of the suspension procedures deprives Mr. Gubbels of an impartial decisionmaker. Defendants claim this is an "unsupported attack," a "specious argument," and protest that the investigation "does not give them the *right* to challenge the impartiality of a process they have failed to participate in." (ECF No. 19 at 29-30 (emphasis added).) Rhetoric aside, Defendants do not defend the administrative structure that tasks Administrator Barbre with both investigating *and prosecuting* the case over which he is supposed to be a neutral decisionmaker. As argued in Mr. Gubbels's motion for a preliminary injunction, the regulations provide for an inherently unfair and biased inquisitorial system. (*See* ECF No. 7 at 32 (citing 2 C.F.R. §§ 417.930(b), 417.1010 (suspension and debarment official is head of the agency)).) The agency head *cannot* be deemed impartial if he is also required to

prosecute the matter. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46 (1950) (invalidating hearings conducted by active members of the investigative branch of agency who might be required to examine witnesses and present evidence on behalf of the Government).

While Defendants bristle at the suggestion, Administrator Barbre has demonstrated his lack of impartiality here. He alerted Mr. Gubbels that his "problem isn't just the sales after SCD" that were properly alleged in the suspension and proposed debarment order, "but the way he has presented this program," an allegation which had no legal *or factual* basis. (*See* ECF No. 7-3 at 44.) Despite the lack of any evidentiary hearing, or any action on the proposed debarment, Administrator Barbre has already concluded Mr. Gubbels "has made a grave error" that he has "got to figure out how to deal with." (ECF No. 7-3 at 44.) To be sure, Defendants accurately note that Mr. Gubbels admitted part of the basis for the suspension order. (ECF No. 19 at 30-31.) But that does little to change the fairness of the process used. There has been no hearing and no evidence has been presented. Yet Administrator Barbre has already concluded that Mr. Gubbels "has made a grave error" warranting an additional sanction. (*See* ECF No. 7-3 at 44.) Any process that allows for such pre-hearing determinations does not guarantee an impartial adjudicator. It instead violates due process.

B. This Court Should Preliminarily Enjoin Defendants' Violations of Law

Not only should Defendants' request for partial summary judgment be denied, this Court should enjoin them from continuing their constitutional and statutory violations. Mr. Gubbels has shown he is entitled to a preliminary injunction pending discovery and further proceedings in this Court.

i. Mr. Gubbels Has Demonstrated a Likelihood of Success on the Merits

Mr. Gubbels's statutory and constitutional arguments against Defendants plainly shows the lawlessness of their actions. Indeed, this Court would be well within its authority to issue summary judgment *for* Mr. Gubbels on these claims. For a preliminary injunction, of course, he need only show "a likelihood of success on the merits." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). For the reasons discussed above, he has met his burden.

ii. Mr. Gubbels Will Suffer Irreparable Harm Absent the Injunction

Mr. Gubbels has also shown he will face an irreparable injury in the form of constitutional injuries, economic losses, and reputational harms, none of which can be remedied after the fact. (*See* ECF No. 7 at 33-35.) Any of these harms would warrant an injunction. Together they speak to a compelling need for immediate intervention.

Defendants do not dispute the general proposition that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). They acknowledge that at least one court within the Eighth Circuit has accepted allegations of procedural due process violations as creating a presumption of irreparable harm. (*See* ECF No. 19 at 35 (citing *Hughbanks v. Dooley*, 788 F. Supp. 2d 988, 998 (D. S.D. 2011)).) Defendants now urge this Court to adopt a new rule and hold that the constitutional violations alleged here are simply not "the right kind" to constitute irreparable harm. (*See* ECF No. 19 at 35.) They rely on Judge Shepherd's concurrence in *Powell v. Ryan*, 855 F.3d 899, 907 (8th Cir. 2017) to support that position. (ECF No. 19 at 34.)

This Court should reject Defendants' view of which constitutional rights merit protection and which do not. Courts have long recognized the dire consequences of due process violations

in the suspension and debarment context because "the very economic life of the contractor may be in jeopardy." *Old Dominion*, 631 F.2d at 968. Due process is all that stands in the way of such deprivations. *See id.*

Moreover, this Court should reject Judge Shepherd's suggestion to create a new and heightened rule for those constitutional rights the government thinks to be less deserving of protection. The majority of the Court rejected Judge Shepherd's approach, and the full Court denied the requested injunction on the likelihood of success prong. *See Powell*, 855 F.3d at 904. This Court is therefore not bound by that concurring opinion.

Judge Shepherd's view of a hierarchy of constitutional injuries is also wrong. Judge Shepherd provided no reason to favor certain rights over others. looking at the cases he cited in his opinion, it is clear that his rationale is inapposite to this case. The only court cited by Judge Shepherd, *Pub. Serv. Co. of New Hampshire v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987), followed from a First Circuit rule that violations of *any* constitutional rights are not deemed irreparable, and even said that "the fact that [plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury." (citation omitted). Not even Defendants have advocated for such a crabbed understanding of the harm caused by constitutional violations.

More importantly, another case relied on by Judge Shepherd, *Bauman v. Twp. of Tittabawassee,* No. 14-CV-12841, 2014 WL 5499285, at *4 (E.D. Mich. Oct. 30, 2014), provides greater insight, and explains *why* the constitutional injuries here *are* sufficient. That court drew a distinction between irreparable and compensable constitutional injuries by stating, "The primary focus of the rule is on the infringement, or threatened infringement of First Amendment rights, rights which must be exercised within a certain period of time, or other

injuries which cannot be compensated by monetary damages alone." *Bauman*, 2014 WL 5499285, at *4 (citation omitted). A "constitutional violation where the only remedy would be monetary in nature" is sometimes viewed as insufficiently irreparable. *Id*. Even if this Court accepted that idea, as discussed below, there are no available damages here, and Mr. Gubbels has sought only an injunction to allow him to go back to work. Thus, the constitutional violation *has no available remedy* other than an injunction. It warrants immediate intervention.

Defendants next turn to Mr. Gubbels's economic loss and claim that the disastrous consequences of the suspension order are not quite bad enough to be "irreparable." According to Defendants, "the Eighth Circuit has acknowledged '[e]conomic loss, on its own, is not an irreparable injury so long as the losses can be recovered.'" (ECF No. 19 at 34 (quoting *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015) and *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013)).)

This argument distorts the Eighth Circuit's precedent and ignores the fact that Mr. Gubbels's economic losses are *unrecoverable* from Defendants or anyone else. The Eighth Circuit has clearly held that such losses *do* warrant an injunction. One of the cases relied on by Defendants, *Watkins Inc. v. Lewis*, 346 F.3d 841 (8th Cir. 2003), proves Mr. Gubbels's point. That case involved a contract dispute between two private parties. The Court concluded that the plaintiffs would not suffer irreparable harm because they could later seek damages against the other party. *Id*. at 844-45. Importantly, the Eighth Circuit *distinguished* that case from a lawsuit involving *government* actors because those harmed by agency misconduct "would not be able to bring a lawsuit to recover their undue economic losses if the [agency's] rules are eventually overturned[.]" *Id*. at 845 (quoting *Iowa Utilities Board v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996)).) As the Eighth Circuit explained in *Iowa Utilities Board*, the presumption that economic

loss, alone, fails to constitute irreparable harm, "rest[s] on the assumption that the economic losses are recoverable. The threat of *unrecoverable* economic loss, however, does qualify as irreparable harm." 109 F.3d at 426 (emphasis added).

Mr. Gubbels has no hope of recovering his economic losses from Defendants or anyone else and Defendants have certainly never suggested otherwise, much less identified a cause of action for damages that might be available to him. That is not surprising as the APA allows only for "relief *other* than money damages," 5 U.S.C. § 702 (emphasis added), and Mr. Gubbels has sought only declaratory and injunctive relief on his constitutional claims. (*See* ECF No. 1 at Count I, Count II, Count III.) Moreover, even if he had a cause of action, the D.C. Circuit has recognized that the harm resulting from the loss of opportunities to contract with the government "cannot be adequately corrected" because it is often impossible to reconstruct the financial harm arising from these lost chances. *Old Dominion Dairy Prod.*, 631 F.2d at 969. As a result, Mr. Gubbels's "unrecoverable economic loss" "does qualify as irreparable harm." *See Iowa Utilities Bd.*, 109 F.3d at 426.

Finally, Defendants argue that damage to Mr. Gubbels's reputation and health do not warrant immediate intervention. (ECF No. 19 at 36.) On the contrary, the dire reputational and physical consequences set out in Mr. Gubbels's affidavit clearly warrant intervention. (*See* ECF 7-3 at 3-4.)

Defendants acknowledge that reputational harm *can* constitute an irreparable injury. (ECF No. 19 at 37.) The Eighth Circuit agrees: "[b]ecause damage to one's reputation is a harm that cannot be remedied by a later award of money damages, the threat of reputational harm may form the basis for preliminary injunctive relief." *Kroupa v. Nielsen*, 731 F.3d 813, 820 (8th Cir. 2013). Suspension and debarment inflict "economic losses, professional indignities, and injuries

to their reputations, and these sufferings no doubt will continue to linger so long as [the contractors] are tarnished by an official record suggesting that they engaged in 'serious irregularities' in their business dealings with the Government." *Sloan*, 231 F.3d at 17. Moreover, Defendants have repeatedly accused Mr. Gubbels of dishonesty and misconduct and prohibited him from *any* federal contracting across the government. Indeed, the suspension order says Mr. Gubbels committed three distinct violations that "indicate[] a serious lack of business honesty and integrity demonstrating that [Mr. Gubbels is] not presently responsible, which poses a significant risk to the government." (ECF No. 7-3 at 18-19.) Those reputational harms are certainly irreparable. *See Kroupa*, 731 F.3d at 820.

To the extent that Defendants just want more explanation of the consequences of the suspension order, Mr. Gubbels would be happy to provide that information at an evidentiary hearing. Mr. Gubbels has requested a hearing on this matter where he would expound on the harm he has suffered. (ECF No. 6, ¶ 26.) This Court should take Defendants' protestations as an invitation to allow him to do just that.

iii. The Balance of Equities Weighs Heavily in Favor of Mr. Gubbels

Finally, Defendants are wrong that the balance of equities fall in their favor. (*See* ECF No. 19 at 39.) It is critical to recognize what is at stake for the respective parties. Mr. Gubbels has already been indefinitely suspended from all government contracting based on the public and repeated assertion that he is "not presently responsible" and lacks honesty and integrity. This has resulted in dire and incalculable economic and reputational harms. All he has asked for is that Defendants follow their own rules and provide constitutional-required due process.

Providing Mr. Gubbels with adequate constitutional protections is of the highest public interest. When a party seeks to protect his "constitutional rights," "the public interest weighs

strongly in favor of issuing the preliminary injunction." *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *14 (E.D. Mo. Feb. 9, 2018); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.") (citation omitted).

Without disputing the importance of constitutional protections, Defendants nevertheless insist that they would suffer harm from providing Mr. Gubbels with a fair process. (ECF No. 19 at 40-42.) According to them, because Mr. Gubbels has "admit[ted] the most egregious violation" lodged against him, he has no basis to demand any level of due process before he is summarily and indefinitely suspended from all government contracting. (*See* ECF No. 19 at 40.) They then assert without any evidence that it "has a reasonable belief that additional policies may have been sold after the December 3, 2019 presentation[.]" (ECF No. 19 at 40)

Defendants fail to appreciate the relief requested by Mr. Gubbels. He seeks vacatur of the existing suspension order solely because, among other things, he has been denied fair notice of all the charges, an appropriate opportunity to contest *two* of the allegations against him before a neutral adjudicator, and a final debarment order in a reasonable period of time. He simply wants a fair process. While he admitted part of one of the three counts against him, the suspension order is based on all three allegations, and premised on facts that he thoroughly disputes. Defendants' unwillingness to provide him a fair chance to dispute *all* of the charges requires this Court's intervention.

Finally, Defendants claim it "would be devastatingly harmful to Defendants and the taxpayers" if Mr. Gubbels were allowed to seek judicial enforcement of constitutional protections in suspension and debarment proceedings. (ECF No. 19 at 43.) For all its rhetoric, the issue is not whether Defendants can or should investigate alleged wrongdoing, the issue is

whether the process provided to Mr. Gubbels is fair. Defendants' process falls well below the constitutional minimum.

III. CONCLUSION

The Court should deny Defendants' motion for partial summary judgment, preliminarily enjoin Defendants from proceeding on their suspension and proposed debarment order against Plaintiffs and vacate the existing suspension.

July 17, 2020

Respectfully,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH WORD COUNT

I hereby certify that pursuant to District of Nebraska Local Civil Rule 7.1(d)(1)(A) and (3) this document contains 12793 words.

I hereby certify that on July 17, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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