No. 21-4202

In the United States Court of Appeals for the Sixth Circuit

POLYWEAVE PACKAGING, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Pipeline and Hazardous Materials Safety Administration,
Respondent.

PETITIONER'S OPPOSITION TO VACATE AND REMAND

August 1, 2022

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Leadership, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., (June 28, 2022) https://www.phmsa.dot.gov/about-phmsa/leadership. 3

Memorandum from Solicitor General to Agency Gen. Couns., Guidance on Admin. Law Judges after *Lucia v. SEC* (S. Ct.) 6, 11

INTRODUCTION

In 2021, the federal government asserted that, when agency decisions are tainted by Appointments Clause errors that were not raised during administrative proceedings, vacating those decisions and "granting new hearings … would not serve … *any* useful purpose at all." Brief for the Respondent at 22, *Carr v. Saul*, 141 S. Ct. 1352 (2021) (No. 19-1442) (emphasis added). The government added that an administrative adjudication "system would become unworkable if … [an agency] were required to reopen its files, rehear old cases, and re-decide old claims every time a new [appointment] issue is raised in court." *Id.* at 21. The government now takes the opposite view: Respondent Pipeline and Hazardous Materials Safety Administration ("PHMSA") raises a new appointment error *sua sponte* so it can vacate its own tainted administrative order and reopen, rehear, and re-decide a case. The purpose of this strategy—coming less than one week before PHMSA's responsive brief was due—appears to be to evade judicial review of the statutory and constitutional questions raised by Petitioner Polyweave Packaging, Inc. ("Polyweave").

This Court should deny PHMSA's Motion to Vacate and Remand ("Motion") as an improper attempt to manipulate judicial review through voluntary conduct. The Motion would not resolve any issue raised in the Petition and would instead force Polyweave to suffer again the unconstitutional administrative procedures it challenges. Moreover, PHMSA's assertion that a remanded case would be "reviewed by a new and properly appointed official," Motion at 3, rings hollow because it fails to identify any

such properly appointed official. Indeed, as explained below, there are no PHMSA personnel whom the Secretary of Transportation ("Secretary") could appoint to rehear the case and issue a new "final" decision. Thus, any remand would simply subject Polyweave to yet another round of unconstitutional proceedings overseen by yet another federal bureaucrat who lacks proper authority to decide the case.

BACKGROUND

Polyweave is a manufacturer of packaging used to transport explosives and is thus subject to Hazardous Materials Regulations ("HMR") at 49 C.F.R. parts 171-180 administered by PHMSA. *See generally* 49 U.S.C. ch. 51. PHMSA began investigating Polyweave in March 2015 and charged Polyweave in December 2016 with violations of the HMR. PHMSA's Chief Counsel served Polyweave with a civil-penalty order in February 2021, which Polyweave appealed. That appeal was supposed to be decided by PHMSA's Administrator, 49 C.F.R. §§ 1.97(b)(1), 107.325(d), who is a Senate-confirmed official directly accountable to the President. But it was instead decided by PHMSA's Chief Safety Officer, Howard W. McMillan, a member of the Senior Executive Service ("SES") who enjoys multiple layers of protection from removal by the President. On October 18, 2021, Mr. McMillan issued a purported final Decision on Appeal ("DOA" attached as Exhibit 1) assessing a civil penalty against Polyweave.

Despite being constitutionally ineligible for such a responsibility, Mr. McMillan has issued at least 18 other final civil-penalty orders against regulatory-enforcement targets.

Polyweave petitioned this Court to review the Decision on Appeal under 49 U.S.C. § 5127 and filed an opening brief on April 13, 2022, that identifies numerous statutory and constitutional defects. First, even though 49 U.S.C. § 5123 allows imposition of civil penalties only when a person "knowingly violates" the HMR, Mr. McMillan concluded PHMSA was not "required to show Polyweave acted in ways it knew or should have known were non-compliant," and he instead imposed a civil penalty based on an atextual strict-liability standard. DOA at 11; *see* Opening Br. at 18-19. Next, he imposed a civil penalty outside of 28 U.S.C. § 2462's five-year statute of limitations to collect civil penalties in federal court. *Id.* at 33. The opening brief further argues that Polyweave was denied due process of law because PHMSA's administrative adjudications lack an impartial tribunal. The adjudication process occurs entirely within PHMSA by its own personnel, with teammates reviewing each other's conclusions—in Polyweave's case, the Chief Safety Officer reviewed the Chief Counsel's imposition of a civil penalty even though they are co-workers who serve together on the "senior leadership team."[1] *Id.* at 39-42. PHMSA's adjudication scheme also deprives Polyweave of its constitutional right to a jury trial, *id.* at 42-44, which the Fifth Circuit recently

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[1] "The … senior leadership team [is] comprised of a Deputy Administrator, *Chief Safety Officer, Chief Counsel*, Associate Administrators, and a Director." (emphases added. *Leadership,* PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., (June 28, 2022) https://www.phmsa.dot.gov/about-phmsa/leadership (last visited July 29, 2022)).

recognized applies in civil-enforcement proceedings such as this one, *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022) (SEC's imposition of civil penalty violated petitioners' constitutional jury-trial right). Finally, the opening brief argues that Chief Safety Officer McMillan lacked authority to issue the final civil-penalty order against Polyweave because he is a career SES employee who is insulated from presidential accountability. Opening Br. at 45-46; *See Lucia v. SEC*, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., concurring); *Jarkesy*, 34 F.4th at 454 (holding that "the statutory removal restrictions for SEC ALJs are unconstitutional").

Rather than respond to the opening brief, PHMSA moved to vacate the Decision on Appeal and remand the case back to itself. The reason for vacatur is not based on any of the statutory or constitutional claims raised by Polyweave. Motion at 3 (acknowledging that "petitioner did not make this argument"). Rather, PHMSA asserts without elaboration that, in the intervening four years since *Lucia*, 138 S. Ct. at 2251, Mr. McMillan was never properly appointed by the Secretary as an "Officer." *Id.* at 2. PHMSA further claims, again without elaboration or support, that "[t]he Secretary of Transportation has subsequently appointed the Chief Security Officer and ratified his prior appointment" as an "Officer." *Id.* The Motion concedes that Mr. McMillan cannot rehear the case and seeks to remand the case back to PHMSA to be "reviewed by a new and properly appointed official." *Id.* But it fails to identify any PHMSA personnel, other than Mr. McMillan, who has been properly appointed or ratified.

ARGUMENT

I. PHMSA'S MOTION MUST BE DENIED TO PREVENT STRATEGIC MANIPULATION OF JUDICIAL REVIEW

Every litigant—whether government or private—seeks to avoid losing lawsuits and thus has a strong "incentive … to strategically alter its conduct in order to prevent or undo a ruling adverse to its interest." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006). Compared to private parties, "[g]overnment officials have stronger incentives and a greater ability to engage in the strategic mooting of cases … because of their status as repeat litigants with a powerful interest in curating precedent." Joseph C. Davis, Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325, 328 (2019). Judge James Ho recently "bemoaned that acts of 'strategic mooting litter the Federal Reporter[,]'" and warned that "judicial acceptance of such gamesmanship 'harms both good sense and individual rights' and 'deprives the citizenry of certainty and clarity in the law' by 'preventing the final resolution of important legal issues.'" *Tucker v. Gaddis*, No. 20-40267, 2022 U.S. App. LEXIS 18996 *11 (5th Cir. Jul. 11, 2022) (Ho, J., concurring) (quoting Davis and Reaves at 328.) (cleaned up). PHMSA's motion to voluntarily vacate and remand the final civil-penalty order at issue here is precisely the sort of strategic behavior that Judge Ho rightly condemns.

PHMSA's proffered basis for vacatur is the improper appointment of Mr. McMillan as an inferior officer who must be appointed by "the President, a court of

law, or a head of department." Motion at 2 (quoting *Lucia*, 138 S. Ct. at 2051). Polyweave could not have known about Mr. McMillan's improper appointment under *Lucia*—which apparently occurred in secret—and thus could not have objected to it. PHMSA's Motion explains neither how the appointment error occurred nor how (nor even when) it was corrected. Motion at 2. If an unexplained appointment error followed by a claim of unverified correction were enough to vacate and remand, agencies' capacity for manipulating judicial review would be virtually limitless. An agency facing a challenge to its final order could wait until the eleventh hour of litigation to assert an unexplained appointment defect to run up a petitioner's defense costs and then evade judicial review. That is inappropriate, particularly where, as here, the agency already dragged out the internal administrative adjudication process for years.

PHMSA knew or should have known about Mr. McMillan's supposedly defective appointment under *Lucia* because that case was decided four years ago in June 2018, and the Solicitor General immediately issued guidance to federal agencies—including PHMSA—to correct *Lucia* appointment errors. *See* Memorandum from Solicitor General to Agency Gen. Couns., Guidance on Admin. Law Judges after *Lucia v. SEC* (S. Ct.), July 23, 2018 ("*Lucia* Guidance").[2] Yet, PHMSA disclosed the unexplained *Lucia* appointment error only one week before its briefing deadline in this case and is using it

[2] Available at: https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf (last visited July 29, 2022)

to dodge its obligation to respond to Polyweave's arguments. An agency cannot hide an appointment error in its back pocket as a "get out of judicial review free" card for later use when it confronts a legal challenge to which it has no good response.

Notably, PHMSA has not conceded this error in the previous cases decided by Mr. McMillan. The civil-penalty order against Polyweave is one of many final agency actions Mr. McMillan issued on behalf of PHMSA during what apparently is the five-year tenure of his improper appointment. Between January 2017 and March 2022, he issued at least 18 other final civil-penalty orders.[3] PHMSA tellingly displays no interest

[3] *In the Matter of: Seagrave Coating Corp*., PHMSA-2021-0057, 2022 WL 1813681 (March 10, 2022), https://www.regulations.gov/document/PHMSA-2021-0057-0002; *In the Matter of: Dynasty Enterprises, LLC d/b/a Dynasty Propane*, PHMSA-2021-0001, 2021 WL 8697907 (May 5, 2021), https://www.regulations.gov/document/PHMSA-2021-0001-0002; *In the Matter of: Enviromart Industries, Inc*., PHMSA-2021-0005, 2021 WL 2291841 (Apr. 22, 2021), https://www.regulations.gov/document/PHMSA-2021-0005-0002; *In the Matter of: J & J A/C Supply, Inc*, PHMSA-2020-0110, 2021 WL 2291842 (Apr. 7, 2021), https://www.regulations.gov/document/PHMSA-2020-0110-0002; *In the Matter of: Sochem Solutions, Inc*., PHMSA-2020-0035, 2020 WL 9889598 (Dec. 16, 2020), Decision on Appeal not available on regulation.gov; *In the Matter of: Fireaway, Inc*., PHMSA-2020-0058, 2020 WL 9889579 (Oct. 23, 2020), Decision on Appeal not available on regulation.gov; *In the Matter of: Bluewater Scuba*, PHMSA-2020-0034, 2020 WL 9889575 (Sep. 11, 2020), https://www.regulations.gov/document/PHMSA-2020-0034-0002; *In the Matter of: Havillah Lumber*, PHMSA-2020-0019, 2020 WL 9889580 (July 24, 2020), Decision on Appeal not available on regulation.gov; *In the Matter of: Unger, W E & Associates, d/b/a W.E. Unger Associates*, PHMSA-2019-0099, 2020 WL 9889599 (May 15, 2020), Decision on Appeal not available on regulation.gov; *In the Matter of: 3-G Propane Services*, PHMSA-2019-0066, 2020 WL 9889574 (May 8, 2020), https://www.regulations.gov/document/PHMSA-2019-0066-0002; *In the Matter of: DVG Packaging, Inc*., PHMSA-2019-0053, 2019 WL 12361210 (Dec. 12, 2019), https://www.regulations.gov/document/PHMSA-2019-0053-0002; *In the Matter of: National Power Corporation, Inc*., PHMSA-2018-0044, 2019 WL 12361211 (May 16, 2019), https://www.regulations.gov/document/PHMSA-2018-0044-0002; *In the Matter of:*

in revisiting any of those invalid orders and instead seeks a "redo" of only Polyweave's order—when doing so confers a strategic advantage to PHMSA.

II. PHMSA's Motion Must Be Denied Because Polyweave Will Suffer the Same Constitutional Injuries Again on Remand

PHMSA is attempting to "deprive[] [Polyweave] of a personal stake in the outcome of the lawsuit" through voluntary vacatur of the decision being challenged. *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (internal quotation marks omitted). But voluntary conduct ends judicial review only if PHMSA meets the "heavy" burden to demonstrate it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). PHMSA fails this rigorous requirement, which exists precisely to prevent a party from strategically manipulating judicial review.

Crazy Debbies Fireworks, LLC, PHMSA-2017-0069, 2018 WL 4741866 (Apr. 25, 2018), https://www.regulations.gov/document/PHMSA-2017-0069-0002; In the Matter of: RAK Testing, LLC, PHMSA-2017-0050, 2018 WL 4741875 (Apr. 23, 2018), https://www.regulations.gov/document/PHMSA-2017-0050-0002; *In the Matter of: S & F Gas Works, Inc.*, PHMSA-2017-0032, 2018 WL 4741876 (Apr. 23, 2018), https://www.regulations.gov/document/PHMSA-2017-0032-0002; *In the Matter of: Trajectory Technologies, Inc.*, PHMSA-2016-0051, 2018 WL 4741868 (Jan. 8, 2018), https://www.regulations.gov/document/PHMSA-2017-0015-0002; *In the Matter of: North American Coil Company*, PHMSA-2017-0015, 2018 WL 4741867 (Jan. 2, 2018), https://www.regulations.gov/document/PHMSA-2017-0015-0002; *In the Matter of: Bullseye FW, Inc.*, PHMSA-2012-0194, 2017 WL 6946229 (Jan. 5, 2017), https://www.regulations.gov/document/PHMSA-2012-0194-0003. All last visited July 29, 2022.

In *West Virginia v. EPA*, the Environmental Protection Agency ("EPA") attempted to evade judicial review by stating that "it does not intend to enforce the Clean Power Plan." 142 S. Ct. 2587, 2606 (2022). The Court nonetheless reviewed the merits of the case because EPA "nowhere suggests that … it will not reimpose emissions limits predicated on [the] generation[-]shifting[]" approach being challenged. *Id.* (quotation marks omitted). PHMSA likewise has not represented that it will not reimpose the civil penalty against Polyweave, which is predicated on the very strict-liability standard being challenged here. *See* DOA at 11. To the contrary, PHMSA's request for remand evinces a clear intent for continuing the enforcement action against Polyweave under the same unlawful standard, and thus it has an even weaker basis to avoid judicial review than EPA. One ground for Polyweave's petition for review is that PHMSA has dragged out its administrative prosecution for longer than what Congress permits under 28 U.S.C. § 2462. Opening Br. at 33. A remand back to PHMSA for further proceedings would only exacerbate that injury. Moreover, remand would force Polyweave to undergo a new round of enforcement proceedings that would violate its rights to due process of law and to a jury trial. Opening Br. at 39-42. In other words, far from depriving Polyweave of a stake in this case, PHMSA's Motion would re-inflict the very constitutional wrongs for which Polyweave seeks judicial review and from which Polyweave seeks judicial relief—and it would do so through serial, resource-depleting, unconstitutional, to-be-vacated proceedings best described as Kafkaesque.

III. PHMSA HAS NOT REMEDIED THE APPOINTMENTS CLAUSE ERROR

Remand is improper for the additional reason that PHMSA has not remedied the appointment error. PHMSA asserts that the case will be heard on remand by "a new and properly appointed official," Motion at 3, but fails to identify one. That is because there are none. Under 49 C.F.R. § 1.97(b)(1), the authority to issue a final civil-penalty order under 49 U.S.C. § 5123 for violation of the HMR is vested in the PHMSA Administrator, who is a presidentially appointed and Senate-confirmed officer. That position is vacant, the President has not nominated anyone to fill it, and PHMSA fails to establish that the Administrator's authority has been re-delegated to an appropriate Senate-confirmed official by someone with the authority to re-assign it.

The Motion asserts that the Secretary has appointed or ratified at least one PHMSA personnel (Mr. McMillan) as "Officers of the United States," but it provides no explanation of how or when that happened. Motion at 2. The Secretary cannot simply declare someone to be an Officer. *Cf. Eberly v. Optimum Nutrition, Inc.*, 562 F. Supp. 2d 956, 961 n.2 (N.D. Ohio 2008) (noting that "'declaring' a legal [conclusion] … is not legally effective.") (citing The Office: Episode 4.4 "Money" (NBC television broadcast Oct. 19, 2007) (wherein Michael Scott (Steve Carell), in an attempt to cure his personal financial woes, attempts to declare bankruptcy by yelling "I declare bankruptcy!")). Rather, an Officer must be delegated "significant discretion" to carry out "important functions," such as (relevant here) having "all the authority needed to ensure fair and orderly adversarial hearings." *Lucia*, 138 S. Ct. at 2054. The Motion

provides no evidence that the Administrator's authority under § 1.97(b)(1) to hear and decide enforcement actions has been re-delegated to any PHMSA official in such a manner.

To the extent such a re-delegation somehow was made in secret, it is invalid because secret appointments fail to provide for *public accountability* of the appointment of Officers. The Solicitor General's *Lucia* Guidance expressly advised agencies that to comply with the Appointments Clause, they should issue a public order identifying persons empowered with adjudicatory authority with the effective dates of their appointments. *Lucia* Guidance at 5-6. The Guidance went on to advise that "it would be fitting for the [appointments] to be accompanied by an appropriate degree of public ceremony and formality." *Id.* at 5-6. PHMSA has never publicly delegated to PHMSA personnel duties that make them "Officers" or provided the dates of such delegation. Nor does the Motion identify any PHMSA personnel whom the Secretary has appointed as "Officers," other than Mr. McMillian, who PHMSA concedes cannot rehear the case on remand, *see* Motion at 2-3 (citing *Lucia*, 138 S.Ct. at 2055).

Moreover, even if secret re-delegations were somehow permissible, they would still be invalid to the extent that any such appointed PHMSA officials would be improperly protected from removal by the President. As Polyweave's opening brief set forth, an Officer of the United States must be accountable to the President, and therefore he or she cannot be insulated from presidential removal by "more than one level of good-cause protection." Opening Br. at 45 (quoting *Free Enter. Fund v. Pub. Co.*

Accounting Oversight Bd., 561 U.S. 477, 483 (2010)); *see also Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring) (noting that "to hold that the administrative law judges are 'Officers of the United States' is, *perhaps*, to hold that their removal protections are unconstitutional") (emphasis in original). The Motion does not identify any PHMSA personnel who is accountable to the President and therefore can be properly appointed as an "Officer of the United States."

Finally, any attempt by the Secretary to re-delegate the Administrator's authority to decide Polyweave's case would be invalid under *United States v. Arthrex*, 141 S. Ct. 1970 (2021). In that case, the Court held that only a *Principal* Officer appointed by the President and confirmed by the Senate may issue a final agency decision that is not subject to review by another Executive Branch official. *Id.* at 1987-88. The Secretary may appoint only *Inferior* Officers whose decisions must be reviewed by a Senate-confirmed Principal Officer. *Id.* at 1986 ("Decisions by APJs must be subject to review by the Director."). And there currently are no Senate-confirmed Principal Officers in PHMSA who could re-decide Polyweave's case. Hence, PHMSA's pie-crust promise to have Polyweave's case "reviewed by a new and properly appointed official" on remand will be broken as easily as it was made. *See* Motion at 3.

CONCLUSION

For the foregoing reasons, this Court should deny PHMSA's Motion to Vacate and Remand.

August 1, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit 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
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CERTIFICATE OF COMPLIANCE

This response complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. It also complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,086 words, according to the count of Microsoft Word

/s/ Sheng Li
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