IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

POLYWEAVE PACKAGING, INC., a Delaware corporation, *Plaintiff*, v. PETER PAUL MONTGOMERY BUTTIGIEG, Secretary of the Department of Transportation, in his official capacity, *Defendant*.	CASE NO: 4:21-cv-00054

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

When the Department of Transportation ("Department" or "DOT") served Polyweave with a civil-penalty order in March 2021, regulations then on DOT's books guaranteed rights and protections the Department knew were needed to ensure due process in enforcement actions. But in April 2021, Defendant rescinded those regulations, subjecting Polyweave to an enforcement action that lacks necessary components of due process.

Rescinding the due-process regulations was unlawful on numerous grounds. For instance, Defendant did not follow mandatory rulemaking procedures under the Administrative Procedure Act (APA) and did not offer any explanation for terminating the protections it had adopted to safeguard citizens subject to enforcement. Nor did he consider Polyweave's and others' reliance on the due-process rights guaranteed by the rescinded regulations. According to Defendant's brief, this is apparently because he believes Congress conferred upon him "wholly discretionary" power to issue regulations under 49 U.S.C. § 322(a), "so long as the regulation pertains to Defendant's wide scope of authority." ECF No. 17 at 22. But Congress did not and could not have granted DOT such sweeping authority unchecked by constitutional and statutory limitations, including the Administrative Procedure Act (APA).

Remarkably, Defendant also initially asserted that Plaintiff suffers no injury where it has lost rights that DOT once recognized were needed to ensure due process. *Id.* at 14. It is now unclear, however, whether Defendant still stands by this claim after admitting to withholding from Polyweave evidence required to be voluntarily disclosed by the rescinded due-process regulations. *See* ECF No. 24 (notifying the Court that Defendant's prior statements regarding disclosure of evidence was inaccurate). Regardless, this claim cannot stand because the loss of a right that protects against traditionally recognized injuries, such as due-process violations, is itself a cognizable injury. As such,

Defendant is both required to respect due process as spelled out in the repealed regulations and follow the requirements of the APA when exercising rulemaking authority. He failed on all counts.

BACKGROUND

On December 27, 2019, the Department exercised its authority under 49 U.S.C. § 322 to promulgate 49 CFR Part 5. *See* DOT, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71,714 (Dec. 27, 2019), ECF No. 1-4. The 2019 rule contained multiple subparts. Subpart B codified the Department's rulemaking procedures and updated internal references. *Id.* at 71,714-15. Subpart C implemented the DOT General Counsel's memorandum on reviewing and clearing guidance documents and established a process to issue "significant" guidance as defined under a now-revoked Executive Order. *Id.* at 71,715. And Subpart D, the subject of this lawsuit, required the Department to recognize and respect a host of rights (including *Brady* rights mandating disclosure of exculpatory evidence by the Department) and to operate within the bounds of robust procedural guardrails, all to protect the targets of its civil investigative and enforcement actions from due-process abuse.[1]

> This final rule ensures DOT provides affected parties appropriate due process in all enforcement actions, that the Department's conduct is fair and free of bias and concludes with a well-documented decision as to violations alleged and any violations found to have been committed, that the penalties or corrective actions imposed for such violations are reasonable, and that proper steps needed to ensure future compliance were undertaken by the regulated party. [This] is in the public interest and fundamental to good government ….

84 Fed. Reg. 71,716.

Subpart D was promulgated primarily to implement a February 2019 memorandum issued by the Department's General Counsel directing enforcement personnel to undertake specific measures

[1] The substantive rights conferred by Subpart D are listed in Polyweave's opening brief. *See* ECF No. 6-1 at 4-6. Subpart D also contained several rules of agency organization, procedure, or practice. *See id.* at 4 n.4.

to ensure fairness and due process in enforcement actions. DOT, *"Procedural Requirements for DOT Enforcement Actions"* at 1, 9–11 (Feb. 15, 2019) ("Bradbury Memo"), ECF No. 1-2; *see* 84 Fed. Reg. 71,715. The Bradbury Memo's measures were received into law, sometimes verbatim, in Subpart D. *Compare, e.g.,* Bradbury Memo ¶¶ 13, 14, 20 with 49 C.F.R §§ 5.83, 5.85, 5.87. The Department further explained that some portions of Subpart D "incorporates requirements found in Executive Order 13,892 related to cooperative information sharing, the Small Business Regulatory Enforcement Fairness (SBREFA) Act, and ensuring reasonable administrative inspections." 84 Fed. Reg. 71,716.

On January 20, 2021, the incoming Biden administration issued Executive Order 13,992 revoking Executive Order 13,892 and directing agencies to rescind regulations implementing it "as appropriate and consistent with applicable law, including the Administrative Procedure Act." Executive Order 13992, *"Revocation of Certain Executive Orders Concerning Federal Regulation"* 86 Fed. Reg. 7,049 (Jan. 20, 2021). Revocation was justified by reference to "the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change." *Id.*[2]

The Chief Counsel of the Department's Pipeline and Hazardous Materials Safety Administration (PHMSA) served Polyweave with a civil-penalty order for alleged regulatory violations on March 8, 2021, when Subpart D was in effect. And Polyweave appealed to the PHMSA Administrator on March 25, 2021, in reliance on Subpart D. However, one week later, Defendants rescinded Subpart D, stripping Polyweave of the due-process protections it was expecting to receive. *See* DOT, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 17,292 (Apr. 2, 2021); ECF No. 1-4. Rescission occurred without notice and comment, without a reasoned

[2] Executive Order 13,892's revocation was not self-executing as to follow-on regulatory acts, *i.e.*, it did not automatically revoke any regulations entered pursuant to Executive Order 13,892—at DOT or at any other agency. Once adopted, the regulations at issue in Subpart D were law that could be repealed only in accord with governing law, including the Administrative Procedure Act, not by stroke of the presidential pen.

explanation, and without considering the legitimate reliance interests of Polyweave and the rest of the regulated community.

Defendant defended his rescission by citing Executive Order 13,992. *Id.* But he did not explain how Subpart D (or any other subpart of 49 CFR Part 5 for that matter) threatened to frustrate his ability to "confront" the "coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." He claimed "many" but not *all* of the rights and protections of Subpart D were merely "derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective." *Id.* Again, he did not explain with particularity which Subpart D rights are among the "many" derived from existing legal authorities, and which are not. Nor did he identify what those legal authorities are or promise the Department would recognize them and give them effect in its civil-enforcement investigations and proceedings. Moreover, he did *not* revoke the Bradbury Memo. Thus, the Department's position must be that the rights and protections codified at Subpart D are still needed to "ensure that DOT enforcement actions satisfy principles of due process," as the Bradbury Memo, and the preamble to Subpart D itself, had stressed. *See* Bradbury Memo at 1; 84 Fed. Reg. 71,716.

On May 19, 2021, Plaintiff filed suit in this Court seeking injunctive and declaratory relief and a motion for preliminary injunction. *See* ECF Nos. 1 and 6. On June 14, 2021, Defendant filed an opposition to the preliminary-injunction motion and simultaneously moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. *See* ECF Nos. 17 and 18. Among Defendant's motion-to-dismiss arguments was the assertion an email exchange "conclusively refutes any allegation that PHMSA is withholding exculpatory evidence" in Polyweave's administrative appeal. *Id.* at 15. But on June 15, 2021, Defendant filed a Notice Regarding Administrative Proceeding to explain that assertion had been inaccurate and to admit that PHMSA

had actually been withholding evidence form Polyweave. *See* ECF No. 24. This necessitated a short extension of time to file this brief. *See* ECF No. 26.

STANDARD OF REVIEW

On a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) based on the pleadings, "a trial court takes the allegations in the complaint as true." *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). One requirement of subject-matter jurisdiction is Article III standing, which is satisfied where a plaintiff pleads: (1) an injury in fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

In deciding a motion for preliminary injunction, the Court "must balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Wilson v. Gordon*, 822 F.3d 934, 952 (6th Cir. 2016). "Each of these factors should be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) (internal quotation marks and alteration omitted). "[I]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Northeastern Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012).

ARGUMENT

Defendant raises three meritless objections to this Court's subject-matter jurisdiction.

First, he contends that Polyweave did not suffer an injury needed for Article III standing, *see* ECF No. 17 at 13-14, even though Polyweave was deprived of rights and protections that Defendant continues to acknowledge are needed to "ensure that DOT enforcement actions satisfy principles of due process," Bradbury Memo at 1. The deprivation of rights that protect against "traditionally recognized" harms—here due-process violations—is a cognizable injury. *Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 997 F.3d 436, 446 (2d Cir. 2021) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

Second, he argues that 49 U.S.C. § 5127(c) vests jurisdiction exclusively in the Courts of Appeals. *Id.* at 17-18. But that jurisdictional provision applies only to challenges to actions taken under *Chapter 51* of Title 49 U.S. Code, and not to the rescission of Subpart D under *Chapter 3* of that Title.

Third, he makes the remarkable and unprecedented claim that 49 U.S.C. § 322's "may prescribe regulations" language commits to agency discretion absolute and unreviewable regulatory power. *Id.* at 21-22 ("the language of 49 U.S.C. § 322(a) is broad and nearly absolute"). The law is otherwise. The "committed to agency discretion" exemption to reviewability is extremely narrow and does not extend to general rulemaking authority. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019).

Defendant's objections to a preliminary injunction are likewise meritless. He offers only convoluted explanations for rescinding Subpart D and fails to acknowledge or address the fundamental due-process problem Subpart D was promulgated to solve. *See* ECF No. 17 at 25-26. Again without competent supporting authority, he claims that a single conclusory sentence regarding the economic impact of rescission somehow manages to fully consider the reliance interests of Polyweave and all other regulated persons in Subpart D. *Id.* at 28. And then he extrapolates from a case holding that *interpretive* rules need not undergo notice and comment to argue that he may bypass the public to rescind Subpart D's *substantive* rules. *Id.* at 29 (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015)). Secretary Buttigieg does not contest Polyweave's irreparable injury except by claiming

that the loss of rights needed to ensure due process is somehow not an injury. *Id.* at 9. And finally, he advances an Orwellian theory that whatever he decides to do is the public interest, *id.* at 31, a claim to overweening power reminiscent of Louis XIV's quip, "l'état, c'est moi."

None of these arguments alters the conclusions that Polyweave has a substantial likelihood of winning on the merits, faces irreparable injury, and that an injunction issued by this Court would serve the public interest. Therefore, the Court should deny Defendant's Rule 12(b)(1) motion and grant Polyweave's motion for preliminary injunction.

I. DEFENDANT INJURED POLYWEAVE BY REVOKING ITS DUE-PROCESS RIGHTS

Defendant wrongly claims Polyweave has not suffered the injury-in-fact required for Article III standing. ECF No. 17 at 14-15.

To establish injury-in-fact, Polyweave must show that it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quotation marks and citation omitted). "[I]ntangible injuries can nevertheless be concrete." *Id.* at 1549. If "'an alleged intangible harm' is closely related 'to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts' … it is likely to be sufficient to satisfy the injury-in-fact element of standing." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637 (3d Cir. 2017) (quoting *Spokeo*, 136 S. Ct. 1549). In fact, the deprivation of a "substantive right" is an injury-in-fact. *Maddox*, 997 F.3d a 446. A right is "substantive" if it protects against a harm bearing a 'close relationship' to a harm [that is] traditionally recognized." *Id.* (citing *Spokeo*, 136 S. Ct. at 1548).

Subpart D's rights are "substantive." They were promulgated explicitly to protect Polyweave and others from due-process violations, which is a traditionally recognized harm. 84 Fed. Reg. at 71,716 ("This final rule ensures that DOT provides affected parties appropriate due process in all enforcement actions."). The Department continues to recognize these rights are needed to "ensure

that DOT enforcement actions satisfy principles of due process." Bradbury Memo at 1. As such, the rescission of these rights inflicts a concrete injury by forcing Polyweave to proceed in an ongoing enforcement action that lacks what the Department recognizes to be necessary due-process safeguards.

Defendant's argument to the contrary focuses entirely on the loss of *Brady* rights promised under 49 C.F.R. § 5.83, because, according to Defendant, "Polyweave leans heavily on '*Brady* rights.'" *Id.* Ironically, Defendant later vindicated Polyweave's focus on *Brady* rights by admitting that it withheld over 600 pages of evidence—evidence that Polyweave believes is exculpatory. *See* ECF No. 24.[3] But the Complaint also alleges the loss of *nine other substantive rights*, ECF No. 1 at 7-10, including, *inter alia,* the right under § 5.63 to be free from prosecution without a clear legal foundation, the right under § 5.67 to be free from "fishing expedition" investigations launched without evidence of wrongdoing, and the right under § 5.65 to be free from enforcement actions that rely on judicial deference doctrines. Tellingly, Secretary Buttigieg completely ignores these. Regardless, as explained below, Polyweave has suffered a "concrete" injury from his purported rescission of Subpart D's rights and protections.

[3] In particular, the documents PHMSA disclosed to Polyweave for the first time on July 15, 2021, indicate that the DOT inspectors started their investigation of Polyweave before June 2015 based on an incorrect assumption that Polyweave offered hazardous materials for transportation when Polyweave merely manufactured *packaging* for hazardous materials. For example, the belatedly-released documents contain a June 2015 exit briefing report that alleges Polyweave violated 49 C.F.R. § 172.407's labels specification requirements. *See* June 8, 2015 Exit Briefing included in Inspection Report No. 15129039 at 3, (Exhibit 1). Those requirements, however, apply only to "each person who offers for transportation or transports a hazardous material," 49 C.F.R. § 172.400(a), not manufacturers of packaging. PHMSA altered and re-dated that report, then used it as the centerpiece of its enforcement case against Polyweave. The fact that DOT altered this evidence and kept the alteration secret, apparently even from its own enforcement attorneys, for more than five years tends to undermine DOT's case and suggests that, had the inspector correctly understood Polyweave's line of business from the start, the enforcement action at issue would never have been brought.

A. Losing *Brady* Rights Is an Injury-in-Fact

Defendant insists losing *Brady* rights is not an injury because "those constitutional rights generally do not apply in civil proceedings." ECF No. 17 at 14. At the outset, we note that a right need not be constitutional for its deprivation to be an injury-in-fact. For instance, in *Maddox*, the court found violation of a state-law mortgage-recording right was a cognizable injury because that right protected against a harm "bearing a close relationship" to common-law harms. *Maddox*, 997 F.3d at 447. And *Brady* rights under 49 C.F.R. § 5.83 indisputably protect against a harm "bearing a close relationship" to due-process violations, and thus their loss constitutes an injury-in-fact. *Id.* Moreover, the relevant harm associated with *Brady* rights being rooted in the Due Process Clause, which *is* constitutional, instead of in the common law, only strengthens the conclusion that actionable rights were impaired by the withdrawal of DOT's Subpart D regulatory protections.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that failure to disclose exculpatory evidence "material either to guilt or punishment" in its possession "violate[s] due process … irrespective of the good faith or bad faith of the prosecution." This disclosure requirement was necessary for "avoidance of an unfair trial to the accused," an objective that supersedes the government's interest in winning a case. *Id.* This principle should apply with equal force in agency enforcement actions. As one court explained: "the essentials of due process at the administrative level require similar disclosures by the agency [because] … [i]n civil actions, also, the ultimate objective is not that the Government 'shall win a case, but that justice shall be done.'" *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966);[4] *see also Demjanjuk v. Petrovsky,* 10 F.3d 338, 353 (6th Cir.

[4] The Department of Justice, which is defending DOT here, need not be reminded that "[s]teps away from the Attorney General's office, in the Justice Department headquarters, in Washington, there is a ceremonial anteroom. The stately chamber is octagonal, and across the top of its walls are fifteen words in capital letters, carved in wood, with stars interspersed between them: 'THE UNITED STATES WINS ITS POINT WHENEVER JUSTICE IS DONE ITS CITIZENS IN THE

1993) (requiring *Brady* disclosure in denaturalization case where government withholding of evidence "deprived [the accused] of information and materials that were critical to building the defense."); *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1374 n.5 (D.N.M. 1974) (requiring *Brady* disclosure in an employment discrimination case because "[a] defendant in a civil case brought by the government should be afforded no less due process of law.").

Several federal agencies reached the same conclusion. The Commodities Futures Trading Commission concluded that the "*Brady* rule is not a discovery rule rather it is a rule of fairness and minimum prosecutorial obligation. Since *Brady* is premised upon due process grounds … its principles are applicable to administrative enforcement actions." *In re First Guar. Metal Co.*, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980). The Federal Deposit Insurance Corporation likewise held that "in civil and enforcement matters fundamental fairness requires the production of all exculpatory, factual material." *In re Rick A. Jenson*, 1997 WL 33774615, at *2 (F.D.I.C. Apr. 7, 1997). And while the Federal Maritime Commission "recognize[d] that criminal prosecutions operate under different rules than do civil or administrative proceedings," it too protects targets of its civil enforcement actions with *Brady* disclosures because "[t]he right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor." *Exclusive Tug Franchises-Marine Terminal Operators Serving the Lower Miss. River*, 2001 WL 1085431, at *4 (F.M.C. August 14, 2001) (quoting *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968)). *Brady* disclosure is especially important in civil-enforcement actions launched by federal agencies because "[t]he extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal

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COURTS.'" David Rohde, NEW YORKER (June 15, 2021), *available at* https://www.newyorker.com/news/daily-comment/the-political-legal-and-moral-minefield-that-donald-trump-left-for-merrick-garland (last visited July 22, 2021); *see also Brady*, 373 U.S. at 87 (explaining that the above "inscription on the walls of the Department of Justice states the proposition" undergirding the need to disclose exculpatory evidence).

Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable." *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979). Such an environment creates significant risk to due process resulting from suppression of material exculpatory evidence.

To be sure, some courts have been hesitant to require *Brady* disclosure in civil cases,[5] while others have categorically refused.[6] While Polyweave disagrees with the reasoning in these cases, this Court need not decide whether *Brady* rights under § 5.83 are mandatory in all civil-enforcement proceedings for the purpose of this injury-in-fact inquiry. Rather, it is enough that such rights bear a "close relationship" to protecting against a "traditionally recognized" harm, namely the violation of due process. *See Maddox*, 997 F.3d at 447 (injury-in-fact occurs where violated right "protects against

[5] The *Demjanjuk* court explained in dicta that it applied *Brady* in a civil denaturalization action in part because the government's case was "based on proof of alleged criminal activities of the party proceeded against"—the accused was alleged to have been a concentration camp guard—as opposed to mere "misrepresentations." 10 F.3d at 353. But the court did not explain why requirements of due process and fairness should depend on the nature of proof. The *Demjanjuk* court specifically found that "[t]he attitude of the [government] attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be." *Id.* at 349-50. It is unclear why government attorneys should be permitted to pursue their own preconceived ideas instead of justice in denaturalizing individuals who are accused of, for example, misrepresenting their employment status as a physician.

[6] *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) (declining to apply *Brady* where a case "does not involve potential incarceration"); *United States v. Scherer*, 2020 WL 2395214, at *1 (S.D. Ohio May 12, 2020) (declining to apply *Brady* in a civil case where "an individual's liberty is not at stake"), *cited at* ECF No. 17 at 14; *U.S. ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 481 (D. Utah 2001) (declining to apply *Brady* in civil case because "consequences of a civil case are fundamentally different from criminal sanctions.").

This civil-criminal distinction, however, fails to withstand serious scrutiny. *Brady* is not a discovery principle but is rather grounded in due process and procedural fairness. Why should government attorneys' obligations to ensure due process and fairness end when sanctions are civil rather than criminal? Moreover, *Brady* rights apply in criminal cases even when no liberty interests are at stake and only fines are threatened. Why not in civil enforcement proceedings that threaten penalties that are also consequential to the target? *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J. concurring) ("[T]oday's civil laws regularly impose penalties far more severe than those found in many criminal statutes. … Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.").

a harm bearing 'close relationship' to a harm [that is] traditionally recognized"). Here, the Department explicitly recognized that *Brady* rights under § 5.83 were needed to "provide[] affected parties appropriate due process in [its] enforcement actions." 84 Fed. Reg. 71,716.

DOT is by no means the first federal agency to reach this conclusion. The Securities and Exchange Commission (SEC), Federal Energy Regulatory Commission (FERC), and the Federal Election Commission (FEC), have all adopted *Brady*-like disclosure requirements through binding regulations tailored to ensure appropriate due process in their enforcement actions.[7] "Some agencies have of their own accord adopted regulations providing for some form of discovery in their proceedings. In addition to being bound by those rules, the agency is bound to ensure that its procedures meet due process requirements." *McClelland*, 606 F.2d at 1285–86 (footnote omitted). If, as Defendant claims, the loss of *Brady* disclosure rights codified in regulations were not a cognizable injury, any of these agencies could violate their own *Brady*-like due-process safeguards without fear of judicial review, and thus would not be bound by their own discovery rules. *See id.*

Defendant's recent admission that evidence relating to the enforcement action against Polyweave had in fact been withheld concretely illustrates injury to Polyweave and demonstrates the need for Subpart D to protect due process. ECF No. 24. In response to Polyweave's May 6, 2021 request for exculpatory evidence, PHMSA responded that no "documents were omitted from the casefile," *id.* at 8, but this evasive answer failed to mention that the "casefile" represents only a subset

[7] *See* 17 C.F.R 201 § 230(b)(3); *FERC Policy Statement on Disclosure of Exculpatory Material*, PL10-1-000 (Dec. 17, 2009), available at https://www.ferc.gov/legal/major-orders-regulations/policy-statements (last visited July22, 2021); The Federal Election Commission applies "the principles of the due process clause set forth in *Brady v. Maryland* (373 U.S. 83)" to its investigations and civil enforcement actions to "promote fairness in the enforcement process, promote administrative efficiency and certainty and contribute to the Commission's goal of fair and open investigations." Federal Election Commission, *Agency Procedure for Document and Information Disclosure During Enforcement* (July 1, 2011), *available at* https://www.fec.gov/updates/agency-procedure-for-document-and-information-disclosure-during-enforcement/ (last visited July 22, 2021).

of evidence in the larger "administrative investigation file" that inspectors happened to share with the PHMSA Chief Counsel. Polyweave renewed its request on June 21, 2021, explaining that "[t]he scope of § 5.83 is not limited to the 'case file.' If it were, agency personnel would simply make sure not to transfer evidence subject to disclosure to … the case file." *Id.* at 3.[8]

The June 21, 2021 request by Polyweave accused PHMSA of withholding photographs and an exculpatory investigation report. *Id.* Polyweave explained that the PHMSA inspector who commenced the investigation against Polyweave "fundamentally misunderstood the nature of Polyweave's business and reached conclusions about what regulations applied to them that were totally unjustified." Polyweave further believed "the inspector made revisions to the initial exit briefing that reflected his misunderstanding of the alleged violations." *Id.* Such an exculpatory report would demonstrate the enforcement action against Polyweave started on the wrong foot. Nearly a month later, PHMSA announced it "discovered" the precise evidence Polyweave accused it of hiding: photographs of Polyweave's product and a 645-page long "draft investigation report that was never finalized but related to an inspection at Polyweave's Madisonville facility on June 8, 2015 (Inspection Report No 15129039)." *Id.* at 1-2.

PHMSA has still not provided Polyweave with the missing photographs of Polyweave products despite promising to do so. ECF No. 24-1 at 2. PHMSA provided the June 8, 2015 report and claims this report was "closed out and no further action was taken on that draft" and that a "superseding November 17, 2015 inspection became the basis for PHMSA's enforcement action." *Id.*

[8] Just as police detectives cannot circumvent *Brady* by keeping exculpatory evidence outside of a prosecutor's case file, PHMSA inspectors cannot do so by keeping such evidence outside of the Chief Counsel's "casefile." PHMSA is obligated under § 5.83 to disclose "any material evidence known to the Department's adversarial personnel that may be favorable to the regulated entity," which includes exculpatory evidence in the administrative investigation file that has never been shared with the PHMSA Chief Counsel or Polyweave.

at 2. However, handwritten portions of the June 8, 2015 Inspection Report No. 15129039 appears to have been *photocopied and re-dated* to be part of the allegedly superseding November 17, 2015 Inspection Report No. 15129080. *Compare* June 8, 2015 Exit Briefing included in Inspection Report No. 15129039 at 2-3, (Exhibit 1) *with* Nov. 17, 2015 Exit Briefing included in Inspection Report No. 15129080 at 2-3, (Exhibit 2). PHMSA apparently altered, re-dated, and withheld evidence to create a false impression that violations an inspector allegedly found on June 8, 2015, were uncovered on November 17, 2015. At the very least, this revelation casts doubt on the credibility of PHMSA inspectors and indicates 28 U.S.C. § 2462's five-year statute of limitations on civil penalties started to run months earlier. Defendant notified the Court that, in an email to Polyweave, "PHMSA has stated its position that none of the located materials constitute 'exculpatory evidence' pertaining to the administrative violations assessed against Polyweave." ECF No. 24 at 2; *see also* ECF No. 24-1 at 2. But he tellingly made no claim regarding the merits of PHMSA's position. *Id.*

Withholding such *Brady* evidence clearly inflicts due-process injuries—Defendant essentially conceded as much by *sua sponte* offering Polyweave additional time to amend its administrative appeal in an attempt to make up for such harms. *Id.* Polyweave is further injured by being forced to accept whatever remedy Defendant deems fit, rather than what § 5.83 requires: a remedy based on "factors identified by courts when applying the *Brady* rule in the criminal context," which may include dismissal with prejudice. *See United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) ("dismissal with prejudice may be an appropriate remedy for a *Brady* … violation").

Polyweave also suffered pocketbook injuries. *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) ("pocketbook injury is a prototypical form of injury in fact."). It had to pay an hourly fee to its administrative-proceeding representative to repeatedly request evidence that PHMSA would have been required to affirmatively disclose "as a matter of course" under § 5.83. And Polyweave will have

to expend additional funds to amend its administrative appeal in light of the previously withheld evidence.

Notably, Defendant's admission that it withheld photographs and a draft investigation report was not accompanied by any assurance that he has now disclosed *all* exculpatory evidence, *e.g.*, "this is it—all of it—and we apologize we missed even this in our prior record searches." *See* ECF No. 24 and ECF No. 24-1 at 1-2. Instead, Defendant has merely disclosed precisely the evidence that Polyweave accused it of withholding. Thus, Polyweave has no going-forward assurance that further withheld material will not emerge out of the depths of DOT, in dribs and drabs, on a *seriatim* basis.[9] *Brady* rights, moreover, are perhaps most important in requiring disclosure of evidence that the accused does not know about and thus cannot accuse the prosecutor of hiding. Without § 5.83's guarantee, Polyweave cannot be certain that PHMSA is not withholding additional "evidence that tends to negate or diminish [Polyweave's] responsibility for a violation or that could be relied upon to reduce the potential fine or other penalties." At the motion-to-dismiss stage, Polyweave is entitled to the inference that Defendant's continued refusal to provide assurances indicates that additional *Brady* material is being withheld, to the detriment of due process. None of these due-process injuries would have occurred had PHMSA followed § 5.83's mandate to "mak[e] affirmative disclosures of exculpatory evidence in all enforcement actions." Unfortunately, Defendant no longer provides *Brady* rights that his own Department and others have recognized as necessary for due process. This is Article III injury.

[9] Additional undisclosed evidence almost certainly exists. For example, the November 17, 2015 Inspection Report that PHMSA maintains to be the basis for the enforcement action against Polyweave states: "This report is based on observations made during an inspection at Nelson Brothers, LLC … on March 25, 2015, TPT#15129020… and Kentucky Powder Company … on August 18, 2015, RPT# 15129057." Inspection Report No. 15129080 at 2, Dec. 23, 2015 (Exhibit 3). Neither of the referenced reports (nos. 15129020 and 1529057) has been disclosed to Polyweave.

B. Losing Other Subpart D Substantive Rights Constitutes an Injury-in-Fact

In addition to *Brady*, Subpart D recognized and affirmed other critical due-process rights and protections. *See* ECF No. 1 at 7-10. These included, *inter alia*, freedom from prosecution without clear authority (49 C.F.R. § 5.63); freedom from "fishing expedition" investigations to seek violations without any prior evidence of wrongdoing (§ 5.67); fair notice (§ 5.69); unbiased enforcement (§ 5.73), and fair and transparent penalties (§ 5.97). Defendant does not explain why these deprivations are not cognizable injuries, except to assert without support that "Polyweave lacks constitutional right to its other desired procedures, such as barring the use of 'nonbinding guidance documents' and requiring the consideration of 'mitigating factors' in administrative penalty calculations." ECF No. 17 at 14.

The truth is many of Subpart D's critical provisions *are* constitutional in origin. For example, the prohibition under § 5.65 against leveraging judicial deference to "nonbinding guidance documents" in enforcement actions protects the "fundamental principle in our legal system [] that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Fair notice is violated when an agency relies on judicial deference to nonbinding guidance to prosecute an enforcement action. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("To defer to the agency's interpretation [of its nonbinding guidance] in [this enforcement action] would seriously undermine the principle that agencies should provide regulated parties fair warning[.]"); *ExxonMobil Pipeline Co. v. DOT*, 867 F.3d 564, 579 (5th Cir. 2017) (holding that *Auer* deference to PHMSA's interpretation of its own regulations "in this enforcement action would constitute unfair surprise and deprive ExxonMobil of the fair notice to which it is entitled."); *see also generally General Elec. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) (agreeing that the "fine cannot be sustained consistent with fundamental principles of due process because GE was never on notice of the agency interpretation it was fined for violating [because d]ue

process requires that parties receive fair notice before being deprived of property."). *General Electric*, penned by Judge Tatel, is one of the D.C. Circuit's main cases on the topic of regulatory fair notice.

As with *Brady* rights under § 5.83 discussed above, all of Subpart D's substantive rights were promulgated to "ensure DOT provides affected parties appropriate due process in all enforcement actions." 84 Fed. Reg. at 71,716. The Department has not changed this conclusion. *See* Bradbury Memo at 1. If rights that ensure appropriate due process in enforcement actions are taken away, what remains would be enforcement actions that, by definition, do not provide appropriate due process. Being forced into such an enforcement action is a cognizable injury.

Loss of rights that ensure due process also inflicts "pocketbook injury [that] is a prototypical form of injury in fact" by forcing Polyweave to expend excessive resources in enforcement actions. *See Collins*, 141 S. Ct. at 1779. Polyweave would not have to expend any resources at all if the Department were still bound by § 5.63's requirement that "the authority to impose monetary penalties, … must be clear in the text of the statute." 49 C.F.R. § 5.63. According to PHMSA, a "November 17, 2015 inspection became the basis for PHMSA's enforcement action." ECF No. 24-1 at 2. However, 28 U.S.C. § 2462 prohibits the Department from commencing any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture after five years from the date when the claim first accrued. If Defendant were still bound by § 5.63's "clear authority" requirement, he would not have served Polyweave with a civil-penalty order in March 2021 based on a 2015 inspection, obviating the need for Polyweave to hire a representative to defend itself.[10] Thus, the entire enforcement action against Polyweave and its ongoing expense are injuries traceable to Subpart D's rescission.

[10] The civil-penalty order is even more time barred in light of revelation that much of the handwritten exit briefing of the November 17, 2015 inspection is simply a re-dated photocopy of an earlier June 8, 2015 exit briefing. *Compare* Exhibit 1 at 2-3 *with* Exhibit 2 at 2-3.

II. SUBJECT-MATTER JURISDICTION DOES NOT RESIDE WITH COURTS OF APPEALS

Defendant's second subject-matter-jurisdiction argument is that Courts of Appeals, rather than this Court, have exclusive jurisdiction under 49 U.S.C. § 5127(c). According to Defendant, 49 U.S.C. § 5127(c) states: "any 'person adversely affected or aggrieved by a final action of the Secretary … may petition for review of the final action in the United States Court of Appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business.'" ECF No. 17 at 17-18.

However, Defendant omits crucial information. The ellipsis from the above quotation conceals statutory text limiting 49 U.S.C. § 5127(c) to where a person challenges "a final action of the Secretary *under this chapter*[.]" 49 U.S.C. § 5127(c) (emphasis added). The referenced chapter is Title 49 U.S. Code Chapter 51—Transportation of Hazardous Material. As Defendant makes clear in his own brief: "Authority for issuing and amending Subpart D is found solely in 49 U.S.C. § 322," ECF No. 17 at 22, which resides in an entirely different chapter, namely 49 U.S. Code Chapter 3—General Duties and Powers.

This case is not—as Defendant contends—an instance of "[c]reative pleading" to circumvent the exclusive jurisdiction of the Courts of Appeals. *See* ECF No. 17 at 18. Nor is there jurisdictional ambiguity that may call for resolution by the Courts of Appeals. *See Tennessee v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986), *cited at* ECF No. 17 at 21. Rather, the text of 49 U.S.C. § 5127(c)'s exclusive-jurisdiction provision plainly does not apply, and this District Court may therefore hear Polyweave's challenges to Defendant's final action under 49 U.S.C. § 322. *Cf. Ashwood Manor Civic Ass'n v. Dole*, 619 F. Supp. 52 (E.D. Pa.), *aff'd*, 779 F.2d 41 (3d Cir. 1985) (reviewing challenge to delegation of Secretary's authority under 49 U.S.C. § 322).

III. DEFENDANT'S RESCISSION OF SUBPART D IS REVIEWABLE UNDER THE APA

Defendant's final subject-matter-jurisdiction argument is the remarkable claim this Court lacks jurisdiction to hear a challenge to his "wholly discretionary" and "nearly absolute" power. ECF No. 17 at 22.

Subpart D was issued and rescinded under 49 U.S.C § 322(a), which states that "[t]he Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary." According to Defendant, "the language of 49 U.S.C. § 322(a) is broad and nearly absolute: so long as the regulation pertains to Defendant's wide scope of authority, regulation is permissible." *Id.* This is apparently because "a court would have no meaningful standard against which to judge [his] exercise of discretion" under § 322(a)'s "may prescribe" language. *Id.* at 21-22 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).[11]

The APA has "a strong presumption favoring judicial review of administrative action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018), including the exercise of rulemaking authority. While some agency actions are not reviewable because they are "committed to agency discretion" under Section 701(a)(2) of the APA, the Supreme Court has instructed lower

[11] Every delegation of rulemaking authority states an executive official "may prescribe regulations," or uses similar language. It would surely strain our constitutional structure and raise a substantive nondelegation issue if each of those officials exercised the type of "wholly discretionary" regulatory power Defendant claims here. *Cf. Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472 (2001) ("[W]hen Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.") (cleaned up).

courts to "read the § 701(a)(2) exception for action committed to agency discretion quite narrowly." *New York*, 139 S. Ct. at 2568 (quotation marks omitted).

Non-reviewability is limited to only "those rare circumstances where … a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Weyerhaeuser*, 139 S. Ct. at 370, such as "a decision not to institute enforcement proceedings," *New York*, 139 S. Ct. at 2568 (citing *Heckler*, 470 U.S. at 832-32), or "to terminate an employee in the interest of national security," *id.* (citing *Webster v. Doe*, 486 U.S. 592, 600-01 (1988)).

Such "rare circumstances" do not include rulemaking, as Defendant appears to believe, lest the exception swallows the rule. To the extent § 322(a)'s "may prescribe" language confers any unreviewable discretion, it is discretion not to engage in rulemaking. *See Heckler*, 470 U.S. at 832-32 (recognizing discretion not to launch enforcement action). Thus, Defendant was free to leave Subpart D in place. Rescission of Subpart D, in contrast, constitutes rulemaking that is reviewable under numerous APA standards. Some of these standards are procedural. For instance, regulations must be issued in accordance with notice-and-comment requirements under 5 U.S.C. § 533(b). Others are substantive. For instance, a regulation must not be arbitrary or capricious, meaning that rescission of a prior rule must offer a reasoned explanation for the choices made and account for reliance interests. *Id.* § 706(2)(A). Nor may a regulation exceed statutory authority or violate a constitutional right. *Id.* §§ 706(2)(B), (C). Accordingly, this Court had no shortage of standards under which to review Defendant's rescission of Subpart D.

IV. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION

Defendant's arguments against preliminary injunction fare no better than his Rule 12(b)(1) arguments. As explained below, nothing in Defendant's brief alters the conclusion that Polyweave is likely to succeed on the merits because he (1) failed to explain his departure from the Department's conclusion that rights codified at Subpart D are needed to ensure due process; (2) failed to consider

the reliance interests of Polyweave and others in those rights; and (3) failed to follow appropriate notice-and-comment procedures. Nor does Defendant meaningfully contest the fact that Polyweave is suffering an ongoing irreparable injury by being forced into an enforcement proceeding without due-process rights that had been promised, aside from claiming that loss of due-process rights is somehow not an injury. Finally, Defendant incorrectly believes pursuit of vaguely defined duties listed at 49 U.S.C. § 101(b) in whatever way he deems appropriate necessarily *ipso facto* serves the public interest. *See* ECF No. 17 at 31-32. Not so. The public interest requires him to respect due process and follow the APA's rulemaking requirements.

A. Plaintiff Is Likely to Succeed on the Merits Because Defendant Lacks a Reasoned Explanation for Rescinding Subpart D

The APA requires new regulations to be accompanied by a reasoned explanation that accounts for all "important aspects of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and that "may reasonably be discerned," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Additionally, "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy[.]" *Mortg. Bankers*, 575 U.S. at 106 (quoting FCC v. *Fox Television Stations Inc.*, 556 U. S. 502, 515 (2009)). Specifically, the agency must explain why it is "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U. S. at 515.

An "important aspect" that Defendant was required to consider when rescinding Subpart D is the protection of due process in enforcement actions. He was further required to make a "more substantial" explanation of why he is disregarding the Department's rationale for promulgating Subpart D in the first place, *i.e.*, "ensur[ing] that DOT provides affected parties appropriate due process in all enforcement actions." 84 Fed. Reg. at 71,716. Yet the phrase "due process" does not appear in the final rule, let alone receive meaningful consideration. *See* Fed. Reg. 17,292. Defendant's

brief likewise fails to point to any consideration of due process and fair treatment in enforcement actions, and he instead offers two sets of wholly inadequate explanations for rescinding Subpart D.

The primary explanation offered is the revocation of Executive Order 13,892 by Executive Order 13,992. *See* ECF No. 17 at 25-26. As an initial matter, this excuse wholly ignores the fact that most of Subpart D was issued to codify the Bradbury Memo (which DOT has not disturbed), rather than Executive Order 13,892. 84 Fed. Reg. 71,715 ("This final rule incorporates into the Code of Federal Regulations at 49 CFR part 5, subpart D, the policies and procedures found in the General Counsel's memorandum, titled: 'Procedural Requirements for DOT Enforcement Actions.'"). Indeed, many rights and protections under Subpart D are lifted verbatim from the Bradbury Memo. *Compare*, *e.g.*, Bradbury Memo ¶¶ 13, 14, 20 with 49 CFR §§ 5.83, 5.85, 5.87.[12] The Bradbury Memo has not been withdrawn and thus the Department continues to recognize the rights and protections it prescribes are necessary for due process. An explanation is needed for why the Department is rescinding binding rules that ensure due process, but none is offered.

Moreover, a new Executive Order cannot satisfy the APA's reasoned-explanation requirement. *California v. Bernhardt*, 472 F. Supp. 3d 573, 605 (N.D. Cal. 2020) ("BLM's reliance on Executive Order 13783 falls short of supplying the required 'reasoned explanation' for the Rescission" of a prior rule). If it could, every rulemaking effort could circumvent the APA's reasoned-explanation requirement simply by being accompanied by an Executive Order directing the agency to adopt that rule. But that is not the case. In *Bernhardt*, the Bureau of Land Management (BLM) issued a 2016 rule to regulate waste on public lands. 472 F. Supp. 3d at 605. The then-incoming Trump Administration issued an Executive Order to rescind regulations that would "unnecessarily encumber energy

[12] Only narrow portions of Subpart D concerning "cooperative information sharing, the Small Business Regulatory Enforcement Fairness (SBREFA) Act, and ensuring reasonable administrative inspections" implemented now-revoked Executive Order 13,892. 84 Fed. Reg. 71,716.

production, constrain economic growth, and prevent job creation," and BLM relied on this directive to rescind the 2016 rule. *Id.* The *Bernhardt* court, however, concluded "such reliance is impermissible" because "BLM's duty [to regulate waste] could not be eliminated by the Executive Order." *Id.* The same logic applies here. The Department issued Subpart D to satisfy its constitutional duty to ensure due process and fair treatment. 84 Fed. Reg. 71,716. The incoming Biden Administration replaced Executive Order 13,892 with Executive Order 13,992, which directs agencies to rescind regulations that threaten to frustrate the government's ability to address "the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." 86 Fed. Reg. 17,293. As in *Bernhardt*, the new Executive Order cannot eliminate the Department's duty to provide rights and protections it deems necessary for due process and fair treatment, and therefore, the Department may not rely on that Executive Order to satisfy the APA's reasoned-explanation requirement. 472 F. Supp. 3d at 605.

The only authority Defendant cites to support a contrary position is a Supreme Court quotation that "executive agencies may 'properly rely upon the incumbent administration's views of wise policy to inform its judgments.'" ECF No. 17 at 25 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)). The quotation, however, omits a key qualifier: the Supreme Court permits reliance on the incumbent administration only "within the limits of delegation" of rulemaking authority, *id.*, and those limits indisputably include the APA's reasoned-explanation requirement. Thus, an agency may not—as Defendant appears to believe—justify regulations by pointing to what the incumbent administration deems a wise policy. It must instead explain *why* the policy is wise.

At bottom, a change in Executive Orders merely indicates a *desire* for new policy priorities, but it is no substitute for a *reasoned explanation* for abandoning prior policies by the agencies tasked by Congress with rulemaking authority. *Cf. Pineros v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Ca, 2018) ("A new administration's simple desire to have time to review, and possibly revise or repeal, its

predecessor's regulations" is not "good cause" to delay the effective date of a regulation).[13] Rather, the agency itself must supply the explanation. For example, while the December 2019 Final Rule referenced an Executive Order, it also explained that Subpart D's binding rights and protection were necessary to "ensure[] that DOT provides affected parties appropriate due process in all enforcement actions." 84 Fed. Reg. 71,716. In contrast, the rescission of Subpart D was not accompanied by any explanation why this conclusion was abandoned.

Instead, Defendant points to four reasons in the final rule's preamble that purport to explain the rescission of various unspecified portions of 49 CFR Part 5. *See* 86 Fed. Reg. at 17,293. As explained above, Part 5 contains multiple subparts that concern rulemaking (Subpart B), guidance (Subpart C), and enforcement (Subpart D). Only one of these four rationales explicitly states that it is with "regard to the regulation on enforcement matters," suggesting that the remaining three are directed toward other subparts. As such, Polyweave's preliminary-injunction brief explained why that enforcement-related rationale was inadequate. ECF No. 6-1 at 13-14. Defendant now claims all four listed rationales are applicable. A fair reading, however, reveals the flat inapplicability of the three non-enforcement rationales to the rescission of DOT's enforcement-related regulations. *See Encino*, 136 S. Ct. at 2125. Nevertheless, for the sake of completeness, the inadequacy of all four rationales is addressed below.

[13] Some statutory regimes do confer regulatory authority on the President (which he typically quickly delegates), but that is not the typical model and it is certainly not the model applicable here to DOT and Polyweave. *See, e.g.,* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601(24) (emphasis added) (term "remedy …. [i]ncludes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare … .").

The first rationale is that some portions of 49 CFR Part 5 pertain "solely … to [DOT's] internal operations and thus need not be codified in the Code of Federal Regulations." ECF No. 17 at 26 (quoting 86 Fed. Reg. 17,293). This explanation is inapplicable because Subpart D does not pertain solely to internal operations, but rather provides binding guarantees of due-process rights and protections for all regulated persons. Agency regulations are binding on agencies as well as on the public. *See Webster*, 486 U.S. at 602 n.7; *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959); *Service v. Dulles*, 354 U.S. 363, 373 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

Second, Defendant states certain provisions of 49 CFR Part 5 are "duplicative of existing procedures." ECF No. 17 at 26 (quoting 86 Fed. Reg. 17,293). The final rule, however, did not identify any such internal procedures or match those procedures with Subpart D rights that are allegedly duplicative. Nor does Defendant's brief undertake such an attempt. Moreover, it would not be duplicative to codify internal procedures that promote due process in the Code of Federal Regulations because mere internal procedures are not known to the public and do not bind the agency. Due-process rights would be wholly ineffective if they are non-binding and hidden. *Cf. Miranda v. Arizona*, 384 U.S. 436, 468 (1966) (Fifth Amendment privilege against self-incrimination requires making the suspect aware of that privilege).

The third preamble rationale is the only one that on its face concerns Subpart D's enforcement-related rights. It states "many" of those rights are "derived from the [APA] and significant judicial decisions and thus need not be adopted by regulation in order to be effective." 86 Fed. Reg. at 17,293. This is an inadequate explanation because Defendant "did not identify a single APA requirement or judicial decision that would make redundant any given Subpart D rule" or "describe the conditions under which the Department might deem it 'necessary and appropriate' to provide Subpart D-type protection." ECF No. 6-1 at 13. Moreover, "many" means not all. Thus,

Defendant concedes that at least some of the rescinded rights need to be adopted by regulation to be effective but did not specify which ones.

Defendant's opposition brief offers no response and instead argues that Subpart D "need not be adopted by regulation in order to be effective" because "DOT could apply [still unspecified] relevant law via 'internal directives as [DOT] deems necessary and appropriate.'" ECF No. 17 at 26 (quoting 86 Fed. Reg. 17,293). Provision of due process on a *discretionary* basis whenever the Department deems appropriate, however, is a poor replacement for Subpart D's binding rules, as demonstrated by Defendant's admission of having withheld evidence from Polyweave, *see* ECF No. 24. Indeed, the purpose of those binding rules was to cabin enforcement discretion that otherwise causes due-process violations. The inability to distinguish between binding due-process rights and unfettered agency discretion further reinforces the conclusion that Defendant has not even acknowledged a change in policy, *i.e.,* the rescission of *binding* due-process rights codified in the Code of Federal Regulations.

The fourth and final preamble rationale Defendant cites is "to support the objectives stated in E.O. 13990," which direct agencies to rescind obstacles to "improv[ing] public health and protec[ing] the environment." ECF No. 17 at 26. There is, however, no explication in the final rule or Defendant's brief regarding how due-process rights in Subpart D are related in any way to public health or the environment. Protecting the public health/environment and comporting with due process are not mutually exclusive. DOT's rationale to the contrary thus amounts to nothing more than another "because I say so," which falls far short of the APA' reasoned-explanation requirement.

B. Plaintiff Is Likely to Succeed on the Merits Because Defendant Failed to Account for Reliance Interests in Rescinding Subpart D.

Regulated persons develop reliance interests in regulations, and "[i]t would be arbitrary and capricious to ignore such matters" when rescinding those regulations. *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913 (2020). This is true even where the rule being

rescinded was unlawful in the first place. In this vein, it is very important that in the famed DACA case, *Regents*, the Supreme Court remanded as to the rescission of the policy despite accepting the Attorney General's determination that the policy was unlawful from its inception. *See id.* ("Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General."); *see also Texas v. United States*, 2021 WL 3025857, at *42 (S.D. Tex. July 16, 2021) (striking down DACA while respecting reliance interest of recipients). By contrast, then, the reliance interests here are even stronger because Subpart D was not unlawful in any way. The illegal nature of DACA is surely a factor to be weighed in assessing the objective propriety of reliance interests. But Polyweave relied on a fully legal set of pro-Constitution regulations was entirely objectively reasonable.

Defendant contends that Polyweave "never once allege[d] that it relied on Subpart D to do anything at all." ECF No. 17 at 19. This ignores the allegation in the Complaint that PHMSA served Polyweave with a civil-penalty order on March 8, 2021, which Polyweave appealed on March 25, 2021. ECF No. 1 ¶¶ 55-56. At that time, Subpart D was in force, and therefore, Polyweave fully expected to benefit from its due-process rights and protection in that enforcement proceeding. ECF No. 6-1 at 18 ("Polyweave reasonably expected the Department's adversarial personnel would, as a matter of course, reveal any exculpatory evidence bearing on its culpability or the proper extent of any punishment the agency intends to mete out, even if Polyweave does not know such evidence exists or otherwise does not request access to it."). A week later, Defendants stripped away rights and protections that Polyweave had every reason to expect would apply in the administrative appeal. Polyweave is hardly alone. Every regulated person facing a pending enforcement action prior to April 2, 2021, would have reasonably relied on due-process rights provided under Subpart D when responding. Nowhere in the final rule did Defendant consider such reliance interests.

Instead, Defendant argues that reliance interests were somehow considered because he "did not 'anticipate that this rulemaking will have an economic impact on regulated entities.'" ECF No. 17

at 28 (quoting 86 Fed. Reg. at 17,293).[14] But it is unclear how a macro-level economic-impact analysis can possibly account for the particular reliance interests of regulated persons in rights they reasonably believed would enshrine due process safeguards in pending enforcement actions, especially where the post-rule development of reliance interests was not even part of the agency's economic-impact analysis at the outset. Defendant's failure to account for such interests accordingly renders the final rule arbitrary and capricious. *Regents,* 140 S. Ct. at 1913.

Defendant's insistence that he properly considered reliance interests, ECF No. 17 at 28, logically suggests that he believes Subpart D's rescission applies retroactively, since its enforcement action against Polyweave *predates* the rulemaking under review here. But this is flat wrong. Agencies simply lack the power to regulate retroactively unless Congress explicitly conferred that power upon them. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (striking down retroactive rule where the "statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking"). And nothing in 49 U.S.C. § 322 confers such a retroactive rulemaking power on the Department. Subpart D's due-process rights thus indisputably applied when Polyweave filed its administrative appeal on March 25, 2021. As a result, those rights can only continue to protect Polyweave throughout the entire proceeding.

Indeed, nothing in the text of the final rule rescinding Subpart D even contemplates that rescission would have a retroactive effect on regulated persons who, like Polyweave, saw their Subpart D due-process rights attach to enforcement proceedings commenced before the rescission was even

[14] The sole support Defendant offers for this no-impact conclusion is that "in the issuance of Subpart D, DOT similarly found that the regulations would not have any economic impact on regulated entities." ECF No. 17 at 28. He does not identify—and Polyweave is not aware of—any principle of economic-impact analysis stating that if the provision of rights does not have an economic impact, then the revocation of those same rights after the regulated community becomes accustomed to them necessarily would also have no economic impact.

promulgated. This brings in another principle of law that the Department's position violates. *See Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 892 (6th Cir. 2016) ("[C]ourts should not construe … administrative rules to have retroactive effect unless their language requires this result.") (quoting *BellSouth Telecommunications, Inc. v. Southeast Tel., Inc.*, 462 F.3d 650, 657 (6th Cir. 2006)). And it gets worse for DOT because agencies cannot make adjustments from the line of scrimmage to add to or subtract from the rationales they provide at the time their regulations are adopted to support their regulations. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*SEC v.*] *Chenery*[, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself …."); *Atrium Med. Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 766 F.3d 560, 568 (6th Cir. 2014) ("an agency cannot bolster its case with rationales offered post hoc"). Accordingly, in whatever direction the Department turns, it faces the insuperable obstacles of (i) no retroactive rules under *Bowen*, (ii) the absence of retroactive rulemaking text under *Siding & Insulation*, and (iii) the bar on *post hoc* rationalizations in *Chenery* and *Burlington Truck Lines*.

C. Plaintiff Is Likely to Succeed on the Merits Because Defendant Rescinded Subpart D Without Notice or Comment.

An agency may revise or rescind substantive rules that, like Subpart D, impose binding rights and obligations only after following the APA's notice-and-comment procedures. *See* 5 U.S.C. § 533(b). Defendant's reliance on *Perez v. Mortgage Bankers* is misplaced because that case concerns an interpretive rather than substantive rule. 575 U.S. at 106. "From the beginning, the parties [in *Mortgage Bankers*] litigated … on the understanding that the Administrator's Interpretation [at issue] was … an interpretive rule," which the Supreme Court confirmed could be promulgated without notice and comment. *Id.* The Supreme Court, however, explicitly declined to answer whether notice-and-

comment procedures were needed if instead the Administrator's Interpretation "should in fact be classified as a legislative rule." *Id.* at 107 (explaining that "neither the District Court nor the D.C. Circuit considered MBA's current claim that the Administrator's Interpretation is actually a legislative rule."). *Mortgage Bankers* is thus explicitly inapposite to assessing whether Subpart D is a substantive rule that requires notice and comment to rescind.

A rule is substantive "if it … appears on its face to be binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted). Defendant does not and cannot dispute that Subpart D is binding. *See* ECF No. 6-1 at 10 (listing Subpart D's mandatory requirements). Instead, he insists the rule is not substantive because it does not bind "third-parties—in other words, those outside the agency." *Id.* at 30.

To the contrary, a rule is substantive if it "conclusively bind[s] the agency, the court, *or* affected private parties." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l Lab. Rels. Bd.*, 466 F. Supp. 3d 68, 93 (D.D.C. 2020) (quoting *Batterton v. Marshall,* 648 F.2d 694, 702 (D.C. Cir. 1980)) (emphasis added); *see also The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (considering "whether the action has binding effect on private parties *or* on the agency") (emphasis added). Also relevant is whether "the action was published in the Federal Register or the Code of Federal Regulations," *id.*, which is the case for Subpart D. The ultimate question is "whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion." *Id.* (cleaned up). Subpart D is indisputably substantive under this rubric. It imposes rights and obligations and is designed to extinguish agency discretion that otherwise could chafe against robust due-process protections for enforcement targets. For example, § 5.83 provides regulated persons with *Brady* rights and imposes disclosure obligations that the Department has no discretion to ignore.

Defendant's repeated attempt to characterize Subpart D as a rule of internal procedure is thus misplaced. ECF No. 17 at 29-30. While Subpart D bound only agency personnel, it did so in a way that was designed to bolster the rights of private third parties and reassure them of those measures as they proceeded from soup to nuts in a DOT enforcement action. According to Defendant's own case, "if the agency cannot show that the default assumptions of the APA have been properly displaced because the rule at issue is, in fact, directed at the agency's internal processes despite the incidental effect on the parties, then the rule cannot be characterized as fitting within the APA's narrow procedural exemption, and notice-and-comment is required." *Am. Fed'n of Lab. & Cong. of Indus. Organizations*, 466 F. Supp. 3d at 90, *cited at* ECF No. 18 at 30. Here, Defendant cannot hope to show that Subpart D merely had an "incidental effect" on private parties because providing those parties with binding due-process rights was Subpart D's core raison d'être and its explicitly stated purpose. 84 Fed. Reg. 71,716. Notice-and-comment requirements were thus a prerequisite to regulatory repeal, but they were not followed.

D. Plaintiff Will Suffer Irreparable Injury Absent an Injunction

Defendant's sole irreparable-injury argument is that "Polyweave has failed to allege infringement of any constitutional right or other concrete, irreparable injury caused by the repeal of Subpart D." ECF No. 17 at 17. It is unclear how Defendant reached this conclusion given this entire case is about the rescission of rights and protection needed to ensure due process. *See* ECF No. 1; *see also General Elec.*, 53 F.3d at 1329 ("an agency may not deprive a party of property by imposing civil or criminal liability" without due process). Due process, of course, is guaranteed under the Fifth Amendment of the U.S. Constitution.

The Department acknowledged that Subpart D's rights were needed to ensure adequate due process in enforcement actions when it issued those regulations and has not changed its mind. 84 Fed. Reg. 71,716; Bradbury Memo at 1. By its own logic, rescinding those rights necessarily results in

enforcement actions that lack adequate due process. Polyweave suffers irreparable harm by being forced into such an enforcement proceeding. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (same). A stark example of impaired due process is Defendant's recent admission of withholding evidence from Polyweave. *See* ECF No. 24. Defendant still has not promised to disclose all "evidence that tends to negate or diminish [Polyweave's] responsibility for a violation or that could be relied upon to reduce the potential fine or other penalties" as 49 C.F.R. § 5.83 would require, indicating that due-process violations will continue unabated absent an injunction. Indeed, Defendant has not even disclosed the photographs of Polyweave products that he admits were suppressed. *See* ECF No. 24.

E. Public Interest Favors an Injunction

While DOT correctly states the balance-of-equities and public-interest factors merge when the government is the opposing party, ECF No. 17 at 31, its reasoning is off. The reason for merger is not, as Defendant contends, "because the government's interest is the public interest." *Id.* (quoting *Malam v. Adducci*, 469 F. Supp. 3d 767, 792 (E.D. Mich. 2020)). Nobel Prizes have been awarded to public-choice economists for their insight into how government actors have interests that often diverge from the public interest.[15] The government's equities merges with the public-interest factor because the government's *purpose* is to serve the public interest, even if it sometimes strays. Where the interests of the government and the public diverge, public interest trumps the government's equities.

[15] *See, e.g.*, Royal Swedish Academy of Sciences, Press Release: This Year's Economics Prize Awarded for Synthesis of the Theories of Political and Economic Decision-Making (Public Choice), Oct. 16, 1986, *available at* https://www.nobelprize.org/prizes/economic-sciences/1986/press-release/ ("Individuals who behave selfishly on markets can hardly behave wholly altruistically in political life. This results in analyses which indicate that political parties or authorities that to at least some extent act out of self-interest ….") (last visited July 22, 2021).

The rule of law is designed to encourage government actors to serve the public interest rather than their own. As DOT explained when promulgating Subpart D's binding rules, "[i]t is in the public interest and fundamental to good government that the Department carry out its enforcement responsibilities in a fair and just manner." 84 Fed. Reg. at 71,716. Defendant now contradicts his Department's prior statement, contending that "an injunction [restoring Subpart D] would prevent DOT form carrying out its mission and acting on its congressionally approved discretion in accordance with the law. That cannot serve the public interest." ECF No. 17 at 32. The "mission" he refers to consists of "six broad government equities related to transportation" listed in 49 U.S.C. § 101(b).[16] *Id.* They include extremely vague concepts such as acting to "ensure the coordinated and effective administration of the transportation programs" and "identifying and solving transportation problems." 49 U.S.C § 101(b). By "congressionally approved discretion," he is referring to an imagined "congressional grant of authority [that] is wholly discretionary in nature." *Id.* at 22 ("[S]o long as the

[16] Title 49 U.S.C. § 101(b) states that:

> A Department of Transportation is necessary in the public interest and to—
>
> (1) ensure the coordinated and effective administration of the transportation programs of the United States Government;
>
> (2) make easier the development and improvement of coordinated transportation service to be provided by private enterprise to the greatest extent feasible;
>
> (3) encourage cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives;
>
> (4) stimulate technological advances in transportation, through research and development or otherwise;
>
> (5) provide general leadership in identifying and solving transportation problems; and
>
> (6) develop and recommend to the President and Congress transportation policies and programs to achieve transportation objectives considering the needs of the public, users, carriers, industry, labor, and national defense.

regulation pertains to Defendant's wide scope of authority, regulation is permissible."). In other words, Defendant claims the public interest is served by his exercise of unreviewable regulatory power to pursue any objective that pertains to one of 49 U.S.C § 101(b)'s vague equities, such as, "identifying and solving transportation problems."

While Secretary Buttigieg may have an interest in wielding absolute power, the public interest lies elsewhere. *First*, Members of Congress, like members of the Executive Branch, have taken oaths to "support this Constitution," U.S. Const. Art. VI, cl. 3, so statutes have no explicit need to instruct Department of Transportation officials to adhere to the Constitution, which explains why Section 101(b)'s purposes do not specifically reference constitutional duties. But once the Department of Transportation adopted the due-process regulations, it was bound by them just as it was bound to the Constitution as the original font from which the regulations were derived. And despite the protestations of his lawyers, nothing would prevent Secretary Buttigieg from pursuing Section 101(b)'s aspirational policies while still adhering to the constitutional restrictions DOT's due-process regulations put in place to protect the public. There is nothing about adhering to due process that prevents any of Section 101(b)'s policies from being pursued lawfully.

Second, the public has a stronger interest in due process than any equity of the Department of Transportation, narrowly defined. Thus, public interest requires Defendant to respect due process while carrying out his duties, which is precisely what Subpart D does. And while Defendant no doubt retains some degree of regulatory discretion, if he acts within the bounds of regular channels, the relevant statute, 49 U.S.C. § 322(a), does not remotely confer "wholly discretionary" and "nearly absolute" authority on DOT. *See* ECF No. 17 at 22. Rather, Congress enacted the APA as a set of "default rules" to require regulations undergo notice-and-comment procedures and not be arbitrary and capricious. *See, e.g.,* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 630 (2017) ("The Administrative Procedure Act (APA) has set the default rules that

govern the federal regulatory state since its enactment in 1946."). The final rule rescinding Subpart D did not meet these requirements. As a result, enjoining a final rule that violates the APA and undermines due process undeniably serves the public interest. *Shawnee Tribe v. Mnuchin,* 984 F.3d 94, 102 (D.C. Cir. 2021) ("[T]here is generally no public interest in the perpetuation of unlawful agency action.").

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion to dismiss and grant Polyweave's motion for preliminary injunction.

Respectfully,

/s/ Sheng Li
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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2021, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/Sheng Li