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 Material Safety Administration,
Respondent.

BRIEF OF PETITIONER, POLYWEAVE PACKAGING, INC.

Oral Argument Requested

April 13, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6th Circuit Rule 26.1, the undersigned counsel states that Petitioner Polyweave Packaging, Inc. is organized under the laws of Delaware. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ Sheng Li

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner Polyweave Packaging, Inc., respectfully requests oral argument because it will assist the Court in its review of the issues presented by this petition.

STATEMENT OF JURISDICTION

Jurisdiction in this Court is granted by 49 U.S.C. § 5127. Venue is proper in either the D.C. Circuit Court of Appeals or the Circuit Court of Appeals where Polyweave resides or has its principal place of business. Polyweave is incorporated in Delaware and has its principal place of business in Madisonville, Kentucky, which is in the Sixth Circuit Court of Appeals.

STATEMENT OF ISSUES

1. May the U.S. Department of Transportation ("DOT"), Pipeline and Hazardous Materials Safety Administration ("PHMSA"), impose a civil penalty under a statute that authorizes it to impose a civil penalty against a person who "knowingly violates" the Hazardous Materials Regulations without pleading or offering evidence that the person acted "knowingly?"
2. Did PHMSA's initiation of an administrative proceeding satisfy or toll the five-year statute of limitations that bars enforcement of civil penalties?
3. Did PHMSA's administrative proceeding deprive Polyweave of its constitutional rights?

INTRODUCTION

PHMSA's administrative proceeding against Polyweave Packaging, Inc. ("Polyweave") was rotten from the start: it began with allegations of regulatory violations based on evidence that a PHMSA inspector altered. Things only got worse. Even though a civil penalty is authorized only against a person who "knowingly violate[d] … a regulation," 49 U.S.C. § 5123(a)(1), PHMSA imposed a penalty without alleging, let alone proving, Polyweave committed any knowing violation. PHMSA Chief Safety Officer's Decision on Appeal at 11 (Oct. 18, 2021) ("Decision on Appeal" or "DOA"), JA__. Additionally, PHMSA's final decision was not issued until October 2021, *id.* at 13, JA__, more than seven years after the violations allegedly occurred in 2015, and thus it runs afoul of the five-year statute of limitations under 28 U.S.C. § 2462.

Problems with PHMSA's adjudication apparatus extend far beyond this single decision. The agency's entire adjudication regime is constitutionally defective because it subjects the accused to bias and deprives them of their right to a jury trial. Constitutional infirmities are especially pronounced in this case because the final agency decision was issued by the Chief Safety Officer, *id.*, who is not politically accountable and so lacked authority to adjudicate this case. The Chief Safety Officer's Decision on Appeal is thus defective from beginning to end and cries out for correction by this Court.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The Hazardous Materials Transportation Act ("HMTA"), Pub. Law. No. 93-633, 88 Stat. 2156, 2160 (Jan. 3, 1975), authorizes the Secretary of Transportation to promulgate regulations for "the safe transportation … of hazardous material in … commerce." 49 U.S.C. § 5103(b)(1). The HMTA further authorizes the Secretary to seek from any "person that *knowingly violates* this chapter or a regulation … issued under this chapter … a civil penalty of not more than $75,000 for each violation." 49 U.S.C. 5123(a)(1) (emphasis added). The referenced chapter is 49 U.S.C. Chapter 51, and the regulations issued thereunder are known as the Hazardous Materials Regulations ("HMR"). A "knowing" violation occurs where "(A) the person has actual knowledge of the facts giving rise to the violation; or (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge." *Id.*

A separate and more venerable statute, 28 U.S.C. § 2462, bars the federal government from commencing any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" more than five years after the date of an alleged violation.

The HMR is codified at 49 C.F.R. parts 171-180 and consists of 1,250 pages of detailed requirements governing every aspect of hazardous materials transportation. These requirements range from the manufacture, certification and sale of myriad sizes and shapes of packaging products designed to contain hazardous ladings, to the

preparation, labeling and marking of packages before they are offered to land, sea and air carriers, to the acceptance, segregation and security of packages in transportation. Authority to assess civil penalties for HMR violations was delegated to the PHMSA Administrator. 49 C.F.R. § 1.97(b). PHMSA regularly "harmonizes" the HMR with changes and additions published by the United Nations ("UN") Subcommittee of Experts on the Transport of Dangerous Goods. *See, e.g.*, 86 Fed. Reg. 43,844, 43,846 (August 10, 2021) (proposing to "revise the HMR to adopt changes consistent with revisions to" various "international standards").

Under 49 C.F.R. § 171.2, no person may sell a packaging for use in the transportation of hazardous material in commerce unless the packaging is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of the HMR. This case involves the following four substantive HMR provisions:

First, 49 C.F.R. § 178.601(e) requires manufacturers of hazardous material packaging to retest their designs periodically. The mandatory retesting period depends on highly technical definitions that purport to distinguish basic types of packaging designs: "For single or composite packagings, the periodic retests must be conducted at least once every 12 months. For combination packagings, the periodic retests must be conducted at least once every 24 months." *Id.* "Combination packaging means a combination of packaging, for transport purposes, consisting of one or more inner packagings secured in a non-bulk outer packaging." 49 C.F.R. § 171.8. "Composite

packaging means a packaging consisting of an outer packaging and an inner receptacle, so constructed that the inner receptacle and the outer packaging form an integral packaging." *Id.*

Second, and related to the retesting requirement, § 178.601(l)(1)(2) states that, "following … each periodic retest on a packaging, a test report must be prepared." Reports must include several types of non-safety related details, including, *inter alia*, a report identification number.

Third, § 172.704 requires certain employers to provide their "hazmat employees" with hazardous material training and retain records of the same. A hazmat employee is defined as a "person who is … [e]mployed … by a hazmat employer and who in the course of such … employment *directly affects* hazardous materials transportation safety[.]" *Id.* § 171.8 (emphasis added).

Fourth, § 178.503 requires manufacturers to "mark every packaging" with "durable [and] legible" words and symbols that generally identify its manufacturer and the UN standard against which its design was tested.[1]

[1] PHMSA also erroneously accused Polyweave of violating § 172.407, which requires shippers of hazardous materials—not packaging manufacturers like Polyweave—to apply "durable and weather resistant" labels that warn emergency response personnel about the nature of the lading.

II. BACKGROUND OF THE DISPUTE

Polyweave is a Delaware corporation located at Madisonville, Kentucky. It has seven employees. It has been in business since 1980 manufacturing "polywoven bags with inner liners" for customers who transport explosives and is subject to the HMR. DOA at 2, JA__. Polyweave's bag "has an outer polypropylene component and an inner polyethylene bag." Letter from Robert Richard to Tristan Brown Appealing Order of the Chief Counsel at 2 (March 25, 2022) ("Appeal Letter"), JA___.

In 1992, Polyweave obtained a "manufacturer's symbol" for its bag from PHMSA's predecessor agency, then known as the Research and Special Programs Administration ("RSPA"). *See* Inspection Report No. 15129080 (Dec. 23, 2015), Exhibit 3, Letter Assigning Manufacturer's Symbol to Polyweave, dated Feb. 6, 1992, JA___. To obtain this symbol, Polyweave's president, Mr. Neil Werthmann, corresponded by phone with Ms. Linda Cooper, the RSPA employee who assigned the symbol, on multiple occasions between December 1991 and February 1992. Affidavit of Neil Werthmann (Dec. 22, 2017) ("Werthmann Affidavit"), JA___. Mr. Werthmann noted the complexity and lack of clarity in the agency's definitions and specifically asked Ms. Cooper whether Polyweave's multi-layered bag counted as a *combination* package that must be retested every 24 months or a *composite* packaging that must be retested every 12 months. After Mr. Werthmann "describe[ed] in detail [Polyweave's] package, Linda [Cooper] concluded and informed [him] that it was a Combination Package" subject to 24-month retesting. *Id.*

For more than two decades, Polyweave relied on Ms. Cooper's guidance that its bags fit the definition for combination packaging and successfully retested its bag designs every 24 months. During that period, agency enforcement personnel inspected Polyweave's bags dozens of times without ever questioning Polyweave's compliance with the testing schedule, the completeness of its test reports, the legibility of its markings, or any other HMR requirements. No failures have ever occurred, in testing or actual use. *See* PHMSA Notice of Proposed Violation, Addendum A at 7 (Dec. 30, 2016) ("NOPV") ("PHMSA's records do not contain any prior violation by Respondent"), JA___.

In March 2015, a Polyweave customer in Cherokee, Alabama, reported that a PHMSA inspector named Edward Rastetter found it difficult to read markings on some of the Polyweave bags in the customer's inventory. Appeal Letter at 1, JA___. Rastetter did not find the customer's use of bags with blurry printing to violate the HMR. Inspection Report No. 15129020 (March 25, 2015) at 1 ("There were no violations"), JA___. Polyweave immediately recalled and replaced every affected bag, identified the printer that caused the problem, and mothballed that device. By the time Rastetter first contacted Polyweave on April 22, 2015, Polyweave had already corrected the legibility problem. Appeal Letter at 1-2, JA___. Rastetter inspected another Polyweave customer later in 2015 and specifically found no violations in that shipper's use of Polyweave's bags. Inspection Report No. 15129057 (August 18, 2015) at 1 ("There were no violations"), JA___.

In 2015, Rastetter requested training records for Polyweave's employees. Polyweave responded that, because it never handles or ships hazardous materials, it was not aware that its employees are subject to training requirements for those who "directly affect[] hazardous materials transportation safety." 49 C.F.R. § 171.8. Once Rastetter explained why he believed such training requirements apply to Polyweave's employees, the company "immediately developed [the required] training program and trained the entire staff." Appeal Letter at 2, JA___. Polyweave "shut down the entire plant on 5/15/2015 and conducted the [required] training." *Id.* It also retained appropriate training records. Any possible training deficiency "was corrected in less than 3 weeks." *Id.*

Rastetter telephoned Polyweave's president on June 8, 2015. Five months later, on November 17, 2015, he inspected the company's facility and produced an Exit Briefing Report ("EBR") that alleged the following five "probable violations": (1) "design qualification testing was not performed"; (2) "failure to keep complete and accurate test records"; (3) "failure to provide hazardous materials training to all hazmat employees"; (4) "markings … are not durable or legible"; and (5) "labels printed on package … do not meet the requirements." *See* Nov. 17, 2015 EBR at 1-3 (cleaned up), JA___. Rastetter made these allegations even though he knew Polyweave had, at substantial expense, already completed corrective actions and even though he could not find any deficiency in Polyweave's compliance as of the date of the November Exit

Briefing Report. Inspection Report No. 15129080 at 8 (summarizing corrective actions), JA___. He did not claim Polyweave committed any violation "knowingly."

A. Notice of Probable Violation and the Chief Counsel's Order

Despite being notified that Polyweave was previously unaware of any noncompliance with HMR requirements and took immediate corrective action once it became aware, PHMSA issued a Notice of Probable Violation ("NOPV") against Polyweave on December 30, 2016.[2] The NOPV sought a civil penalty of $15,360 under 49 U.S.C. § 5123(a)(1) for the four alleged violations of the HMR detailed below. NOPV at 1, JA___.

The first alleged violation concerned the regulatory requirement that, "[f]or single or composite packagings, the periodic retest must be conducted at least once every 12 months." NOPV, Addendum at 2, JA___; *see also* 49 C.F.R. § 170.601(e). According to PHMSA, "[d]uring an inspection at [Polyweave customer's facility] on August 18, 2015, PHMSA's investigator observed and photographed [Polyweave's] bag." The inspector "asked the inspected company for the most current test report" and "noted the date was May 15, 2013." *Id.* He also determined that Polyweave sold the bag between 20 and 22 months after its design was retested. Contrary to the advice RSPA/PHMSA staff provided Polyweave, the NOPV claimed that Polyweave's bags were "composite packaging" and alleged that Polyweave sold them in violation of the

[2] A NOPV is the first step in bringing an administrative proceeding against "a person that knowingly violates" the HMR under 49 U.S.C. § 5123(a)(1).

12-month retesting requirement under 49 C.F.R. § 170.601(e). The NOPV did not allege that Polyweave had any reason to know it had received incorrect guidance from the agency and that its bags were composite packaging subject to the 12-month retesting requirement, as opposed to combination packaging subject to the 24-month requirement.

The second alleged violation is based on the regulatory requirement under 49 C.F.R. § 172.704 that "all employees that perform functions subject to the HMR must be provided with … [hazmat] training." NOPV, Addendum at 3, JA__. The NOPV did not allege that Polyweave knew or should have known that PHMSA deemed all of its employees to "directly affect" hazardous materials transportation safety and, therefore were subject to § 172.704's training requirements.

The third alleged violation concerns the requirement under 49 C.F.R. § 178.601(l) that a manufacturer must include certain information in its test reports. NOPV, Addendum at 4, JA__. The NOPV alleged Polyweave's test reports omitted the test report identification number and a description of the method of manufacturing.[3] *Id.* at 5 (citing 49 C.F.R. § 178.601(l)(2)), JA__. The NOPV, however, did not allege that Polyweave knew or should have known that the test reports were required under § 178.601(l)(2) to include those details.

[3] The NOPV also erroneously alleged that Polyweave's test reports omitted the test facility's address, a description of the packaging, the characteristics of contents and a description of test results.

The fourth alleged violation relates to 49 C.F.R. § 178.503's requirement that packaging display durable and legible markings (*e.g.*, a statement that Polyweave manufactured the product). "On March 25, 2015, PHMSA's investigator photographed bags that [Polyweave] had sold to a customer in Cherokee, AL," which "show[ed] that the bags had blurred and illegible markings." NOPV, Addendum at 6, JA__. The NOPV did not allege that Polyweave knew or should have known that markings on its bags had become blurry.

PHMSA initially delivered the December 30, 2016 NOPV to an incorrect address, so Polyweave did not receive it until February 2017. As a small business with only seven employees, Polyweave could not afford legal counsel and thus its President, Mr. Werthmann, responded *pro se* to PHMSA's allegations in a letter dated February 24, 2017. *See* Werthmann Letter, JA__. Mr. Werthmann stated that Polyweave did not knowingly violate any regulation. Regarding the first alleged violation of the 12-month retesting requirement, Mr. Werthmann explained that Polyweave "believed that [its] packaging was a combination packaging that is required to be tested every 24 months," and it "relied on the guidance provided by a staff member of [RSPA/PHMSA]" to reach this belief. *Id.* at 2. Polyweave further explained its bag "has an outer polypropylene component and an inner liner, so it is not unreasonable to believe that the packaging was a combination package especially since a [RSPA/PHMSA] staff member confirmed this understanding. … We had no reason to question the staff member's guidance and authority." *Id.* Mr. Werthmann submitted an affidavit attesting

that he spoke by phone with former RSPA employee Linda Cooper between December 1991 and February 1992 regarding Polyweave's bags. Werthmann Affidavit at 1, JA__. "After describing in detail [Polyweave's] package, Linda [Cooper] concluded and informed [Mr. Werthmann] that it was a Combination Package." *Id.*

Regarding the second alleged violation concerning training requirements, Mr. Werthmann stated that he believed the training requirements applied only to shippers and that Polyweave is one of "a number of packaging manufacturers that do not know they are required by 49 C.F.R. § 172.704 to train their employees because they do not actually ship hazardous materials." He also noted that Polyweave immediately trained its employees as soon as the PHMSA inspector informed him that all Polyweave employees "directly affect" hazardous material transportation safety and therefore were subject to 49 C.F.R. § 172.704. Werthmann Letter at 2-3, JA__. Mr. Werthmann further explained that Polyweave was not aware that its test reports omitted certain mandatory details or that markings on any bags sent to customers were blurry. *Id.* at 3, JA__. The letter confirmed that Polyweave corrected all alleged non-compliances as soon as it became aware of them.

On July 28, 2020, PHMSA's Chief Counsel issued an Order assessing Polyweave with a $15,360 civil penalty for all four alleged violations without addressing whether Polyweave knew or should have known that it was noncompliant with the HMR, as required under 49 U.S.C. § 5123(a)(1). *See* Order of the Chief Counsel (July 28, 2020), JA___. As with the NOPV, PHMSA sent the Order to the wrong address, and

Polyweave did not receive it until six months later, on February 26, 2021. On March 25, 2021, Polyweave filed a timely administrative appeal. *See* Appeal Letter.[4]

B. Appeal and PHMSA's Final Decision

The Appeal Letter reiterated that Polyweave did not knowingly violate any HMR. *Id.* at 2 ("it is not unreasonable to believe that [Polyweave's] packaging was a combination package" subject to 24-month retesting "especially when a [RSPA/PHMSA] staff member confirmed this understanding."), JA__; *see also id.* ("Since Polyweave is not a shipper of hazardous materials they were not aware that they needed to maintain training records"). The Appeal Letter also objected to the long delay in PHMSA's administrative proceeding, noting that the "initial correspondence and notification of violation date back to April 22, 2015 almost 6 years ago." *Id.* at 3, JA__.

Between May and July 2021, Polyweave exchanged emails with PHMSA counsel concerning exculpatory evidence that Polyweave believed agency lawyers had withheld. Email Correspondence between Bob Richard (Representative of Polyweave) and PHMSA Office of Chief Counsel (May 6, 2021 to July 15, 2021), JA___. PHMSA

[4] Polyweave was represented by former senior PHMSA official and former Chair of the UN Subcommittee of Experts on the Transport of Dangerous Goods, Mr. Robert Richard, who is not a licensed attorney. Shortly after Mr. Richard filed the Appeal Letter, DOT rescinded regulations that ensured Polyweave's due-process rights in administrative enforcement proceedings, including the right to access exculpatory evidence in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963). *See* DOT, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17,292 (Apr. 2, 2021) (rescinding due-process regulations at 49 C.F.R. Part 5 Subpart D). Polyweave is challenging the unlawful rescission of its due-process rights in *Polyweave v. Buttigieg,* No. 21-5929 (6th Cir.).

initially asserted that all relevant evidence had been provided to Polyweave but then backtracked to announce it "discovered a 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.*, JA___. PHMSA did not turn over the previously undisclosed draft report to Polyweave until July 15, 2021.

PHMSA claimed the draft report was not exculpatory because it 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.*, JA__. But handwritten pages from the withheld June 8, 2015 Inspection Report No. 15129039 indisputably were photocopied and redated to make the June 2015 claims part of the allegedly superseding November 17, 2015 Inspection Report No. 15129080. Specifically, at least the second and third pages of the June 8, 2015 Exit Briefing Report were redated and presented as part of the November 17, 2015 Exit Briefing Report. *Compare* June 8, 2015 EBR included in Inspection Report No. 15129039 at 2-3 (containing handwritten allegations), JA__, *with* Nov. 17, 2015 EBR included in Inspection Report No. 15129080 at 2-3 (containing identical handwritten allegations), JA__.

Polyweave continued to press PHMSA to stop hiding additional documents, including inspection reports of Polyweave's customers. On August 4, 2021, PHMSA belatedly turned over two previously undisclosed Inspection Reports (Nos. 15129020

and 15129057) of Polyweave's customers six years after they were written.[5] *See* Email Correspondence between Bob Richard (Representative of Polyweave) and PHMSA Office of Chief Counsel (May 6, 2021 to July 15, 2021), JA___. Rastetter's two reports concluded neither customer's use of Polyweave's supposedly non-compliant bags violated the HMR. Inspection Report Nos. 15129020 (Mar 25, 2015), JA__, and 15129057 (Aug. 18, 2015), JA__. These reports were thus exculpatory.

Polyweave filed a Supplemental Appeal Letter on August 17, 2021 ("Supplemental Letter"), JA__. The Supplemental Letter noted that the June 8, 2015 Exit Briefing Report "was altered and redated" and asserted that Polyweave "deserved to know why the inspector manipulated that evidence." *Id.* at 2, JA__. The Supplemental Letter also said that "Polyweave had a right … to explore th[e] contradiction" in why "use of Polyweave's packaging [by its customers] was declared *not to violate the* HMRs, yet Polyweave's sales of that packaging were deemed to violate those regulations." *Id.* (emphasis in original), JA__. Polyweave argued that PHMSA's withholding of these relevant documents prevented it from developing defenses and thereby violated Polyweave's due-process rights. *Id.* at 2-3, JA__.

[5] PHMSA confirmed that allegations against Polyweave are based on Inspection Report No. 15129080. But that "report is based on observation made during an inspection at Nelson Brothers, LLC., … on March 24, 2015, RPT# 15129020 and Kentucky Powder Company … on August 18, 2015, RPT# 15129057." Inspection Report No. 15129080 at 2, JA___.

The Supplemental Letter reiterated that PHMSA "has never provided any reason to conclude that Polyweave *knowingly* violated the HMRs," which "is a required element of the alleged offenses" under 49 U.S.C. 5123 § (a)(1). *Id.* at 3, JA__. Polyweave also repeated its objection "that this proceeding involves alleged violations that last occurred in 2015, more than six years ago. Under 28 U.S.C. § 2462, the government may not commence any proceeding to collect a civil penalty or otherwise punish Polyweave more than five years after the date of the alleged violative act." *Id.* at 3, JA__.

On October 18, 2021, PHMSA's Chief Safety Officer Howard W. McMillan—a career civil servant who is not politically accountable—issued the Final Decision on Appeal affirming the four alleged violations against Polyweave and assessing a civil penalty of $14,460. *See* DOA, JA___. The Chief Safety Officer explicitly rejected Polyweave's argument that, to impose a civil penalty for violation of the HMR, PHMSA "is required to show that Polyweave acted in ways it knew or should have known were non-compliant." *Id.* at 11, JA__. Rather, he concluded "PHMSA only must establish that [Polyweave] 'knowingly engaged in *conduct* which is a violation of the [HMR].'" *Id.* (quoting 49 C.F.R. § 107.307). He also rejected Polyweave's argument that the five-year statute of limitations under 28 U.S.C. § 2462 prevents PHMSA from punishing Polyweave on the ground that "[t]his proceeding was commenced on December 30, 2016 when the NOPV was issued to Polyweave, well within the 5-year period following discovery of the violations." *Id.* at 12, JA__. The Chief Safety Officer also found no due-process violation from PHMSA's withholding of three inspection reports,

including one that showed a PHMSA inspector altered his Exit Briefing Report. According to the Chief Safety Officer, he failed to see "how … photocopying and re-dating an Exit Briefing affects the probative value of the evidence[.]" *Id.* at 10, JA__.

As with the NOPV and the Order of the Chief Counsel, PHMSA sent the Decision on Appeal to the wrong address even after being advised repeatedly of the correct address, so Polyweave was not notified of that decision until November 18, 2021. Polyweave timely filed a petition for review in this Court on December 17, 2021.

STANDARD OF REVIEW

"In reviewing an agency decision, [this Court] consider[s] questions of law … de novo." *Louisville Gas & Elec. Co. v. FERC*, 988 F.3d 841, 846 (6th Cir. 2021). De novo review also applies to the issue of whether agency action violates due process. *See FCC v. Fox TV Stations, Inc.*, 567 U.S. 239 , 253 (2012). Due process is a "fundamental principle in our legal system" that requires those that would regulate the conduct of others, and subject them to punishment, to "give fair notice of conduct that is forbidden or required." *Id.* Because Congress did not delegate authority for the agency to interpret the statutes at issue—28 U.S.C. § 2462 and 49 U.S.C. § 5123—the agency's interpretations of them are likewise reviewed de novo. *See Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324(2014). "A document filed pro se is 'to be liberally construed.'" *United States v. Smotherman*, 838 F.3d 736, 739 (6th Cir. 2016) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted)).

SUMMARY OF ARGUMENT

The Chief Safety Officer's Decision on Appeal must be vacated for three reasons. *First*, by imposing a civil penalty based solely on Polyweave's knowing "*conduct*" without also establishing that Polyweave knew its conduct was noncompliant with the HMR, DOA at 11, JA__, PHMSA contravened 49 U.S.C. § 5123(a)(1), which authorizes a civil penalty only if a person "knowingly violates" the HMR. *Second*, the five-year statute of limitations to enforce a penalty for Polyweave's alleged 2015 violations had long expired before the Decision on Appeal issued, and PHMSA obviously cannot impose an unenforceable civil penalty. *Third*, the administrative proceeding that led to the Decision on Appeal was unconstitutional because it was biased in favor of the agency, deprived Polyweave of its right to a jury trial, and was issued by an official who is unconstitutionally insulated from Presidential control. Moreover, nothing in the record suggests the Chief Safety Officer was delegated with the Administrator's power to issue the Decision on Appeal.

ARGUMENT

I. PHMSA FAILED TO SATISFY THE STATUTORY REQUIREMENT TO ALLEGE AND PROVE POLYWEAVE 'KNOWINGLY' VIOLATED THE HMR

The Decision on Appeal assessed a civil penalty against Polyweave based on the Chief Safety Officer's determination that PHMSA was not "required to show that Polyweave acted in ways it knew or should have known were non-compliant. On the contrary, in order to establish a violation, PHMSA only must establish that [Polyweave]

'knowingly engaged in *conduct* which is a violation of the [HMR].'" DOA at 11 (quoting 49 C.F.R. § 107.307) (emphasis in original) , JA__. Under the Chief Safety Officer's interpretation, all PHMSA needs to prove is knowing "*conduct*" rather than knowing violation. This is a strict liability standard that contravenes 49 U.S.C. § 5123(a)(1), which authorizes a civil penalty only where a person "knowingly violates" the HMR. PHMSA was thus required to prove that Polyweave both knowingly sold bags *and* that it knew (or should have known) the bags did not conform to HMR requirements. *See Nat'l Power Corp. v. FAA*, 864 F.3d 529, 534 (7th Cir. 2017) (affirming civil penalty under § 5123(a)(1) based on company's awareness that its conduct violated the HMR). The Chief Safety Officer imposed a civil penalty without even considering, let alone concluding, whether Polyweave knew or should have known its conduct violated the HMR. The Court must therefore reverse his Final Decision. *Contract Courier Servs., Inc. v. RSPA*, 924 F.2d 112, 114 (7th Cir. 1991) (reversing civil penalty under § 5123(a)(1) because PHMSA's predecessor agency failed to apply "knowingly" scienter).

A. Section 5123(a)(1)'s Plain Text Requires PHMSA to Prove Polyweave Knew or Should Have Known Its Conduct Violated the HMR

By its plain terms, § 5123(a)(1)'s "knowingly violates" language requires a knowing violation of the HMR as a condition of imposing a civil penalty. "As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)

(internal citation omitted). "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

The text of 49 U.S.C. § 5123(a)(1) is clear: PHMSA may seek a civil penalty only from a person who "knowingly violates this chapter or a regulation … issued under this chapter," *i.e.,* the HMR. "The term 'knowingly' in [§ 5123(a)(1)] modifies the verb 'violates' and its direct object," *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019), which in this case is the HMR. "The proper interpretation of the statute thus turns on what it means for [Polyweave] to know that [it] has 'violate[d]'" the HMR. *Id.*[6]

The Supreme Court's recent decision in *Rehaif* is instructive. There, a defendant was charged under 18 U.S.C. § 922(g), which makes it unlawful for certain persons, including unlawfully present aliens, to possess firearms. *Rehaif*, 139 S. Ct. at 2194. A separate provision, § 924(a)(2), adds that anyone who "knowingly violates" the first provision shall be fined or imprisoned for up to 10 years. *Id.* Mr. Rehaif was convicted for possessing a firearm as an alien unlawfully in the United States, in violation of §§ 922(g) and 924(a)(2), after the trial "judge instructed the jury (over Rehaif's objection) that the 'United States is not required to prove' that Rehaif 'knew that he was illegally or unlawfully in the United States.'" *Id.* 2194. The Supreme Court reversed

[6] A person acts knowingly if he has "actual knowledge" or if "a reasonable person acting in the circumstances and exercising reasonable care would have [such] knowledge." 49 U.S.C. § 5123(a)(1)(A), (B).

based on the plain statutory text: "by specifying that a defendant may be convicted only if he 'knowingly violates' [listed legal provisions], Congress intended to require the Government to establish that the defendant knew he violated the material elements of [those legal provisions]." *Id.* at 2196. "[T]he Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status [as an unlawfully present alien] when he possessed it." *Id.* at 2194.

The same logic obtains with respect to 49 U.S.C. § 5123(a)(1)'s identically worded "knowingly violates" scienter. "As a matter of ordinary English grammar," the Court must read "'knowingly' as applying to all the subsequently listed elements of the [offense]." *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (holding unanimously that convicting defendant who "knowingly … uses, without lawful authority, a means of identification of another person … requires the Government to show that the defendant knew that the means of identification at issue belonged to another person."). Here, violating the HMR is an element of the offense to which the "knowingly" scienter explicitly applies. 49 U.S.C. § 5123(a)(1).

The *Rehaif* Court squarely rejected the argument that the government only needs to prove "a defendant knew [] that he engaged in the relevant conduct" when the statute requires him to have "knowingly violate[d]" the law. 139 S. Ct. at 2194. It is likewise not enough for PHMSA to merely establish that Polyweave "knowingly engaged in *conduct* which is a violation," DOA at 11 (emphasis in original), JA__, without regard to knowledge of the conduct's legal effect. Rather, PHMSA must also establish that

Polyweave knew (or should have known) the legal ramification of that conduct. *See Nat'l Power*, 864 F.3d at 534.

In *National Power*, the Federal Aviation Administration ("FAA") imposed a civil penalty under § 5123(a)(1) on National Power for shipping untested lithium batteries in accordance the HMR's "packing group II performance standards" when the batteries "should have been packed according to the more stringent packing group I performance standards." *Id.* at 532. The Seventh Circuit affirmed that National Power "knowingly violated" the HMR because "National Power was aware that the Batteries were untested and that untested lithium-ion batteries must be packaged using packing group I performance standards. National Power, however, packed the Batteries using packing group II performance standards." *Id.* at 534.

In other words, § 5123(a)(1)'s scienter was met because FAA established National Power knew its batteries were untested (as opposed to tested) and thus were subject to a more stringent packaging standard than then one National Power used. *Id.* PHMSA was likewise required to establish, for instance, that Polyweave knew its bags were composite (as opposed to combination) packaging and thus were subject to a more stringent retesting requirement than the one Polyweave used. But PHMSA "did not explain why [Polyweave] 'should have known'" this fact or "suggest that failure to acquire this knowledge was negligent." *Contract Courier*, 924 F.2d at 114. It instead "went straight from the existence of a violation to liability. The statute does not permit this equation." *Id.*

B. Legislative History Reinforces Section 5123(a)(1)'s Plain Text Meaning

The plain language of § 5123(a)(1) alone should decide this case. *Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019) ("We begin with the language of the statute itself, and that is also where the inquiry should end, for the statute's language is plain.") (Cleaned up). Even were that not so, legislative history confirms Congress's careful judgment that civil penalties shall not be levied against persons with neither actual nor constructive knowledge that their conduct violates the HMR. *See Wirtz v. Local 153, Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968) ("[P]roper construction [of a statute's text] frequently requires consideration of wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.").

Judge Easterbrook succinctly summarized the legislative history of § 5123(a)(1)[7]: "Congress enacted the law in 1974. The House bill, H.R. 15223, created a system of strict liability. The Senate bill, S. 4057, authorized strict liability for corporations. … The Conference Committee spurned both options and rewrote the legislation. It authorized civil penalties only for 'knowing' violations." *Contract Courier*, 924 F.2d at 115. By 1990, Congress considered amending the scienter requirement. The Senate proposed "[r]epeal[ing] the current requirement that a person must 'knowingly' violate

[7] The relevant text was originally codified as 49 U.S.C.App. § 1809(a)(1) and was recodified as U.S.C. § 5123(a)(1) in 1994. *See* Revision of Title 49, United States Code Annotated, "Transportation," PL103-272, July 5, 1994, 108 Stat. 745 ("revis[ing], codify[ing], and enact[ing] without substantive change certain general and permanent laws, related to transportation").

… [the HMR] before being subject to civil penalties," and adopting a strict liability approach that would authorize civil penalties against a person who "committed an act which is a violation." S. Rep. 101-449 at 5, 38 (July 10, 1990). The House made its own proposal to clarify the "definition of 'knowingly'" to authorize DOT "to seek civil penalties for actions or omissions that are committed negligently as well as those which are committed with actual knowledge." H.R. Rep. 101-444(I) at 44-47 (Apr. 3, 1990). Congress ultimately rejected the Senate's strict liability approach and enacted an actual-or-constructive-knowledge standard:

> Section 12 of the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. 101–615, 104 Stat. 3244, which the President signed on November 16, 1990, … adds a new § 1809(a)(3), which provides that a person acts knowingly if he has actual knowledge or if "a reasonable person acting in the circumstances and exercising due care would have such knowledge."

Contract Courier, 924 F.2d at 114.

Congress explicitly considered and rejected civil penalties for strict liability violations of the HMR in 1974. It again considered and rejected strict liability in 1990. The actual-or-constructive-knowledge standard thus reflects Congress's careful choice to authorize civil penalties for blameworthy violations while protecting businesses that could not have reasonably known their conduct violated the HMR from overzealous enforcement. The Decision on Appeal's "knowingly engaged in *conduct*" standard, *see* DOA at 11, JA___, throws this balance out the window and thus must be rejected. Instead, the Court should give effect to clear congressional intent to require proof not

only that a company knowingly sold a product that happened to not comply with certain HMR provisions, but also that it knew or should have known about the product's non-compliance.

C. Principles of Due Process and Fair Notice Reinforce Section 5123(a)(1)'s Plain Text Meaning

As demonstrated above, the text of the statute is plain and consistent with the legislative history. PHMSA's alternative reading must be rejected under the constitutional avoidance canon, which states that "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Adopting PHMSA's interpretation of § 5123(a)(1) to impose civil penalties on businesses that, unbeknownst to them, violate the HMR would create irreconcilable due process and fair notice problems.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox*, 567 U.S. at 253. Such "clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment," *id.*, especially when, as here, a defendant faces "damages that are essentially punitive in nature," *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Accordingly, "defendants must be put on notice before facing liability for allegedly failing to comply with complex legal requirements.

Without such notice, defendants are not likely to receive due process." *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 351 (4th Cir. 2022).

Sheldon concluded that imposing civil liability under the False Claims Act ("FCA") for "knowingly [making] false certification of compliance with a regulation" would violate due process and fair notice, *id.* at 349-50, unless there was "strict enforcement of the FCA's 'rigorous' scienter requirement," *id.* at 351. Because many regulations are complex or vague, it is unavoidable for good-faith statements regarding regulatory compliance to differ from what an agency believed (but never spelled out) was required. "It is profoundly troubling to impose [FCA] liability on [such] individuals or companies without any proper notice as to what is required." *Id.* at 350. To avoid this due-process problem, the Fourth Circuit joined five other circuits to strictly enforce the FCA's scienter standard and concluded that "a defendant cannot act 'knowingly' if it bases its actions on an objectively reasonable interpretation of the relevant statute," unless it was previously warned away from that interpretation by the relevant agency. *Id.* at 348; *see also id.* at 344 (citing *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455, 459 (7th Cir. 2021); *United States ex rel. Streck v. Allergan, Inc.*, 746 F. App'x 101, 106 (3d Cir. 2018); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017); *United States ex rel. Donegan v. Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 879–80 (8th Cir. 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290–91 (D.C. Cir. 2015)).

Similar to the FCA context, failure to enforce § 5123(a)(1)'s "knowingly" scienter requirement would impose liability for good-faith *beliefs* regarding compliance with the HMR. A seller of hazardous material packaging may not sell or offer for sale its product without first determining compliance with every requirement of the HMR. 49 C.F.R. § 171.2 (g). Many of those provisions are complex, vague, and difficult to understand, especially for small businesses such as Polyweave that cannot afford specialized legal counsel. Honest disagreement with what an agency may believe, but has not previously said, is unavoidable.

Take for example, 49 C.F.R. § 178.601(e), which requires retesting designs of *composite* packaging every 12 months and designs of *combination* packages every 24 months. *Id.* The HMR's definitions for those terms offer little guidance: "Combination packaging means a combination of packaging, … consisting of one or more inner packagings secured in a non-bulk outer packaging," while "[c]omposite packaging means a packaging consisting of an outer packaging and an inner receptacle [that] form an integral packaging." 49 C.F.R. § 171.8. Polyweave's bags consist of an inner and an outer layer that are attached to one another. Their status as combination or composite depends on whether the inner layer constitutes an "inner packaging[]"(combination) or an "inner receptacle" (composite) and on whether the two layers are "secured" (combination) or "integral" (composite). None of these crucial terms is defined by the HMR.

Lacking notice of compliant conduct, Polyweave described its bags to an RPSA/PHMSA employee, and the employee told Polyweave they are combination packages with a 24-month retesting period. Werthmann Affidavit at 1, JA___. PHMSA apparently changed its mind over 20 years later and sought to penalize Polyweave for *believing* an agency employee who had told them its bags are "combination" rather than "composite" packaging. Given the complexity, numerosity, and vagueness of HMR provisions, it is unavoidable for some businesses to adopt good-faith beliefs regarding their compliance that differ from what PHMSA believes is needed. Imposing liability for having beliefs that the agency deems—but never previously stated—to be incorrect violates due process. As this Court explained: "punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014)).

PHMSA's unfair and discriminatory enforcement in this case is further demonstrated by Rastetter's conclusion that Polyweave's sale of allegedly non-compliant bags violated the HMR but its customers' actual use of those same bags to transport explosive materials was somehow not a violation. *See* Inspection Report No. 15129020 (March 25, 2015) at 1 ("There were no violations"); Inspection Report No. 15129057 (August 18, 2015) at 1 ("There were no violations"), JA___. The Decision on Appeal's explanation for this incongruity confirmed that standardless and

discriminatory enforcement is a feature of PHMSA, not a bug. According to the Chief Safety Officer, "PHMSA may choose to bring an action against the entity it deems has the most culpability or closest causal connection to a violation, based on the nature of its business." DOA at 11, JA__. This statement provides no meaningful guidance regarding when a civil penalty might be imposed for not following the letter of a 1,250-page ukase, except perhaps for the reference to "culpability." But culpability, *i.e.*, whether a violation was knowing, is the one thing PHMSA absolutely refuses to consider. *Id.* Such refusal means civil liability for HMR violations is based on PHMSA's whim instead of a standard discernable in advance.

Fortunately, "concerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of [a civil-penalty statute's] … scienter requirements.'" *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016)). All that is needed is to give effect to the § 5123(a)(1)'s plain text requiring that a person "knowingly violates" the HMR before a civil penalty can be imposed. "Strict enforcement of the … knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into [civil] liability." *Purcell*, 807 F.3d at 287. As such, "a defendant cannot act 'knowingly' if it bases its actions on an objectively reasonable interpretation of the relevant [regulation]." *Sheldon*, 24 F.4th at 351. PHMSA explicitly refused to apply that standard, instead asserting that "a regulatory violation caused by a 'not unreasonable belief' is still a violation," DOA at 4, JA__. The Court must therefore vacate PHMSA's decision.

D. Requiring PHMSA to Prove Polyweave Knew or Should Have Known Its Conduct Violated the HMR Does Not Enable an 'Ignorance of the Law' Defense

The plain text meaning of § 5123(a)(1)'s "knowingly violates" scienter requirement does not conflict with the maxim that "ignorance of the law is no defense." The Supreme Court has explained that the "ignorance of the law" maxim "applies where a defendant has the requisite mental state in respect to the elements of the [offense] but claims to be unaware of the *existence* of a statute [or regulation] proscribing his conduct." *Rehaif*, 139 S. Ct. at 2198 (emphasis added) (citation and quotation marks omitted). "In contrast, the maxim does not normally apply where a defendant has a *mistaken impression concerning the legal effect* of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct, thereby negating an element of the offense." *Id.* (emphasis added).

The *Rehaif* Court had no trouble interpreting the "knowingly violates" scienter requirement in § 924(a)(2) to encompass proof that the defendant knew his presence in the United States violated immigration law. *Id.* That such knowledge involves a legal judgment did not run afoul of the "ignorance of the law" maxim. This distinction drawn between existence of the law, on one hand, and the lawfulness of conduct, on the other, is not new. *Liparota v. United States*, for example, involved a federal statute that penalized "knowingly" transferring a food stamp "in any manner not authorized by [the statute] or the regulations." 471 U.S. 419, 420 (1985). The Court concluded "knowingly" required that "the Government must prove that the defendant knew that his acquisition

or possession of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433. "[T]o interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426. Examples from the civil context can be found in the FCA cases discussed above, where courts of appeal agree that FCA claims based on false certification of regulatory compliance must prove that the accused was aware of noncompliance with the relevant regulation, *i.e.*, that the underlying conduct was unlawful. *See Sheldoni*, 24 F.4th 340, 351; *Supervalu*, 9F.4th 455, 470; *Allergan*, 746 F. App'x at 106; *Purcell*, 807 F.3d at 287.

In this case, Polyweave never asserted that it lacked awareness of the *existence* of HMR provisions. Rather, Polyweave consistently argued it neither knew nor had reason to know that its conduct violated regulations of which it was aware. For instance, Polyweave was aware of the HMR's retesting requirements but did not know its product was composite packaging subject to 12-month re-testing rather than combination packaging subject to 24-month re-testing. It was also aware that it was required to ensure markings are legible, but it could not have known (until a customer called) that a printer malfunction caused some markings to become blurred after transit.

Requiring PHMSA to establish Polyweave's actual or constructive knowledge regarding the "legal effect" of conduct does not conflict with the ignorance-of-the-law maxim. *Rehaif*, 139 S. Ct. at 2198. Rather, the plain text of § 5123(a)(1)'s "knowingly violates" scienter requirement mandates this, and it is supported by legislative history and the need to interpret penal statutes in accordance with constitutional due process.

E. PHMSA's Strict Liability Standard Is Not Entitled to Deference and Must Be Rejected

DOT's regulation at 49 C.F.R. § 107.307 authorizes PHMSA to seek a civil penalty only if a person "knowingly engaged in conduct which is a violation." The Decision on Appeal applied this regulation's "knowingly" degree of scienter to "*conduct*" but not "violation," thus circumventing the need to establish Polyweave "acted in ways it knew or should have known were non-compliant." DOA at 11 (quoting 49 C.F.R. § 107.307) (emphasis in original), JA___. The Court must not defer to PHMSA's strict liability interpretation, because 49 U.S.C. § 5123(a)(1)'s unambiguous "knowingly violates" language leaves no doubt that 49 C.F.R. § 107.307's "knowing" degree of scienter applies to "violation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("If uncertainty does not exist, there is no plausible reason for deference.").

Nor can the Court defer to PHMSA's construction of 49 U.S.C. § 5123(a)(1). To start, such deference violates Article III of the Constitution by "[t]ransferring the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J. concurring). Doing so also constitutes "systematic bias in favor of the government" that deprives Polyweave of due process. Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016). To mitigate its constitutional defects, the Supreme Court limited deference to an agency's statutory interpretation to only instances where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law[.]" *United States v. Mead*

Corp., 533 U.S. 218, 227 (2001). Here, "the terms of the congressional delegation give no indication that Congress meant to delegate authority to" define "knowingly" in § 5123(a)(1). *Id.* at 231; *see also Contract Courier*, 924 F.2d at 116 ("The Department [of Transportation] does not contend that Congress delegated to it the task of altering or fleshing out the word 'knowingly[.]'").

To the contrary, Congress undertook that task itself in 1990, when it amended § 5123(a)(1) to define "knowingly" as having either actual or constructive knowledge. PHMSA has ignored clear congressional intent by misconstruing its own regulation at 49 C.F.R. § 107.307 to impose strict liability that Congress twice considered and rejected, first in 1974 and again in 1990. The Court must vacate the Decision on Appeal because it is based on a faulty construction of the statute's scienter requirement.

II. PHMSA IMPROPERLY IMPOSED A CIVIL PENALTY THAT THE GOVERNMENT IS TIME-BARRED FROM ENFORCING

"The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty" for violations of the HMR. 49 U.S.C. § 5123(d). However, such enforcement of a civil penalty must "commence[] within five years from the date when the claim first accrued," or else it is time barred under 28 U.S.C. § 2462. Any possible claims against Polyweave accrued in June 2015 at the latest. *See* June 8, 2015 EBR, JA___. The five-year statute of limitations thus expired by June 2020, at which point the federal government lost the ability to enforce any civil penalty. PHMSA's imposition of a time-barred civil penalty is reversible error.

A. The Statute of Limitations to Enforce Any Civil Penalty Against Polyweave Expired in 2020

"Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 331 U.S. 342 at 348-49 (1944)). They provide "security and stability to human affairs" and have been deemed by the Supreme Court as "vital to the welfare of society." *Id.* (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

> An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

Wood, 101 U.S. at 139.

PHMSA's administrative proceeding against Polyweave is marked by inexcusable delays of the agency's own making. A PHMSA inspector concluded that Polyweave violated the HMR in June 8, 2015 at the latest. *See* June 8, 2015 EBR, JA__. It took more than one-and-a-half years for PHMSA to serve Polyweave with a NOPV in February 2017. One month of this delay is attributed to PHMSA mailing the NOPV to the wrong address. Polyweave responded to the NOPV in February 2017, and PHMSA did not serve Polyweave with the Chief Counsel's July 28, 2020 Order until over *four years* later, in February 2021. Six months of this delay is attributed to PHMSA again

misaddressing materials to Polyweave. Altogether, more than five-and-a-half years passed since the latest possible date of alleged HMR violations by the time Polyweave appealed the Chief Counsel's Order in March 2021. By the time the Decision on Appeal issued, more than six years had passed

In that administrative appeal, Polyweave correctly argued the proceeding should be dismissed because 28 U.S.C. § 2462 barred enforcement of any civil penalty PHMSA could possibly assess. Supplemental Letter at 3, JA__. The timeline of this case resembles the time-barred attempt to enforce a civil penalty in *United States v. Core Labs, Inc.*, 759 F.2d 480, 481 (5th Cir. 1985). There, a laboratory allegedly violated the Export Administration Act, with "the last alleged violation occurring on August 1, 1978." *Id.* at 481. An agency brought an administrative proceeding in November 1979 and issued a final order that imposed a civil penalty in March 1983. The government attempted to enforce this civil penalty in federal court on January 26, 1984. *Id.* The Fifth Circuit held that a "claim under [§ 2462] accrues at the time of the underlying violation." *Id.* at 483; *see also Gabelli*, 568 U.S. at 448 (affirming that five-year statute of limitation began to run when the violation occurs, even if discovered at a later date). Because more than five years elapsed between August 1978—when the alleged violation occurred—and January 1984—when the government sought to enforce a civil penalty—the enforcement action was time barred. *Core Labs, Inc.*, 759 F.2d at 484.

Here, the latest possible date on which any HMR claim against Polyweave could possibly have accrued is June 8, 2015. The five-year statute of limitations thus expired

by June 2020, at which point the government was time-barred from enforcing any civil penalty against Polyweave. The administrative proceeding should have been dismissed because PHMSA lacks authority to assess an unenforceable civil penalty.

B. PHMSA's Administrative Proceeding Against Polyweave Neither Satisfied Nor Tolled the Statute of Limitations

The Decision on Appeal erroneously rejected Polyweave's statute-of limitations argument on the ground that PHMSA brought an administrative proceeding within the five-year period. DOA at 12, JA__. The Supreme Court has explicitly rejected the government's prior argument "that the issuance of a formal complaint in the administrative proceedings … is the commencement of an action in the statutory sense." *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953) (dismissing time-barred enforcement action). Indeed, FAA, one of PHMSA's sister agencies within DOT, recognizes that an administrative proceeding cannot satisfy 28 U.S.C. § 2462's five-year limit. Rather, "[c]ivil penalties … have a five-year time limit from the date of violation [to] the filing of *a complaint in a U.S. district court* under 28 U.S.C. § 2462." FAA, Order 2150.3C at 4-8 (emphasis added).[8] Nor does the commencement of administrative proceedings toll the statute of limitations. *Core Labs.*, 759 F.2d at 483 (rejecting "government's fallback position … [that] the limitation period was tolled during the administrative proceedings").

[8]Available at: https://www.faa.gov/documentLibrary/media/Order/FAA_Order_2150.3C_CHG_7.pdf (last visited at April 13, 2022).

Administrative proceedings cannot satisfy, nor toll, § 2462's five-year limit because that statute is designed to ensure "a fixed date when exposure to the specified Government enforcement efforts ends." *Gabelli*, 568 U.S. at 448. "The progress of administrative proceedings is largely within the control of the Government." *Core Labs.*, 759 F.2d at 483. If the commencement of an administrative proceeding could satisfy or toll the statute of limitations, as the Decision on Appeal claimed, the government would have "within its power to prolong the period of limitations and [the target of the administrative proceeding] would remain indefinitely under the hazard of having penalties imposed." *United States v. Appling*, 239 F. Supp. 185, 194 (S.D. Tex. 1965). "A limitations period that [is satisfied or tolled by] administrative proceedings would thus amount in practice to little or none," and would result "in derogation of the right to be free of stale claims[.]" *Core Labs.*, 759 F.2d at 483. This Court should therefore reject the endless enforcement authorized by the Decision on Appeal and hold that, since at least June 2020, PHMSA has been without power to enforce any civil penalty against Polyweave.

III. PHMSA'S ADMINISTRATIVE ENFORCEMENT PROCESS DEPRIVED POLYWEAVE OF ITS CONSTITUTIONAL RIGHTS

PHMSA forces parties it accuses of violating the HMR to undergo an unlawful adjudication process that deprives them of their constitutional rights.

Regulations at 49 C.F.R. §§ 107.307-107.331 set out PHMSA's adjudicatory apparatus. Under that scheme, PHMSA's Assistant Administrator and its Office of

Chief Counsel "may … [i]nitiate proceedings to assess a civil penalty" by issue and serve an NOPV on an alleged violator. 49 C.F.R. §§ 107.307, 107.311. The NOPV sets forth the agency's factual allegations and notifies the respondent of its right "to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the [NOPV]" and to request a hearing and of the procedures for doing so. 49 C.F.R. § 107.311. An enforcement target may respond to an NOPV in three ways: (1) admit it violated the statute or regulations; (2) provide an "informal response"; or (3) request a formal administrative hearing before an Administrative Law Judge. 49 C.F.R. §§ 107.311, 107.315, 107.317, 107.319.

Under the informal response process, which Polyweave used, an accused party provides the Chief Counsel with "written explanations, information, or arguments in response to the allegations, the terms of a proposed compliance order, or the amount of the preliminarily assessed civil penalty" and may request a conference to present additional explanations, information, and arguments. 49 C.F.R. § 107.317(a)-(c). The Chief Counsel then "consider[s]" the party's written submissions and presentation at conference and either dismisses the NOPV or "issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both." 49 C.F.R. § 107.317(d). Respondents aggrieved by the Chief Counsel's order may file a written appeal with PHMSA's Administrator who may affirm or dismiss the order in whole or in part. 49

C.F.R. § 107.325(b), (d).[9] Decisions on appeal are final agency actions and may be appealed to an appropriate U.S. Court of Appeals. 49 U.S.C. § 5127.

A. PHMSA's Adjudicatory Apparatus Is Structurally Biased and Violates Polyweave's Due-Process Rights

At a minimum, due process requires adequate notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But notice and opportunity alone are not enough because the Constitution requires "not simply due process … but due process of law—meaning judicial decisions following the law, in the courts of law, in accord with their essential traditional procedures." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 254 (2014).

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). A fair tribunal requires an unbiased and impartial adjudicator. *See In re Murchison*, 349 U.S. at 136 ("no man can be a judge in his own case"); *id.* ("no man is permitted to try cases where he has an interest in the outcome"). Thus, "[e]very procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). The necessity of a fair tribunal "applies to administrative agencies which adjudicate as

[9] The appeal process from an ALJ's decision and order is identical to the appeal process for the informal response procedure. 49 C.F.R. § 107.325(b).

well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (holding that agency adjudication proceedings must provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by … bias").

PHMSA's adjudicatory scheme, permitting informal response or hearing before an Administrative Law Judge ("ALJ"), suffers from profound structural biases. The civil penalty process is initiated by the Assistant Administrator or the Office of Chief Counsel. 49 C.F.R. § 107.307. While the process can take different tracks, *see* 49 C.F.R. §§ 107.310, 107.311, the process for responding to the agency, the agency's review of that response, and its eventual appeal, if any, all occur within PHMSA by its own personnel acting as prosecutors, adjudicators, and appellate judges. *See* 49 C.F.R. §§ 107.311, 107.313, 107.317, 107.325. In effect, the informal hearing process PHMSA developed amounts to little more than telling a prosecutor why he is wrong, then permitting that prosecutor to consider he may be wrong, and, if he decides he is right, then trying to convince the prosecutor's boss he was in fact wrong. This system runs afoul of the due-process right to proceed before a fair and impartial tribunal.[10]

[10] This due-process violation cannot be corrected by the option to proceed before the agency's own ALJs under 49 C.F.R. §§ 107.319, 107.321, 107.323, as the same structural bias problem occurs there.

PHMSA's self-favoring bias and inattention to due process of law were on full display in its response to being caught red-handed in July 2021 withholding exculpatory evidence, including a draft inspection report that indicated the NOPV against Polyweave was based on altered and redated evidence. *See* Supplemental Letter at 2, JA__. According to the NOPV, the allegations against Polyweave were based on Rastetter's November 17, 2015 inspection of Polyweave and his August 18, 2015 inspection of a Polyweave customer. NOPV, Addendum A at 1-2, JA__. But the withheld inspection report, including redated handwritten portions, shows Rastetter reached his conclusions as early as June 8, 2015, before either of those inspections took place. The NOPV thus failed the requirement under 49 C.F.R. 107.311 to provide a true and complete "statement of the factual allegations upon which the demand for … a civil penalty … is based." PHMSA refused to remedy this due-process violation and professed ignorance regarding "how … photocopying and re-dating an Exit Briefing affects the probative value of the evidence." DOA at 10, JA__. An impartial tribunal would have reached the obvious conclusion that altering evidence—and then concealing that alteration by withholding the original for years—undermines credibility.[11] But PHMSA's self-serving bias prevented it from doubting its own integrity.

[11] The redating also appears to be an improper attempt to extend the statute of limitations.

Also withheld were two inspection reports concluding use of Polyweave's allegedly non-compliant bag to ship explosives did not violate the HMR. *See* Inspection Report No. 15129020 (March 25, 2015) at 1 ("There were no violations" for "manufacturer of 1.5D explosives [which it] shipped in UN 5H2 bags made by Polyweave."); Inspection Report No. 15129057 (August 18, 2015) at 1 ("There were no violations"), JA__. An impartial tribunal would have, at minimum, granted Polyweave's request for time and opportunity to develop a defense based on this newly disclosed exculpatory evidence. *See id.* But PHMSA refused because its own Chief Counsel had already determined Polyweave's culpability, and the Chief Safety Officer was not prepared to overrule his teammate on the agency's "senior leadership team."[12] Due-process violations thus infect the Decision on Appeal, and this Court should reject PHMSA's liability determination as constitutionally unsound.

B. PHMSA's Adjudicatory Apparatus Deprives Polyweave of Its Right to Trial by Jury

A trial by jury is a "fundamental" component of our system, "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9-10 (1957). As Blackstone said, "the most transcendent privilege which any subject can enjoy, or wish for [is] that he cannot be affected either in his property, his liberty, or his

[12] "The … senior leadership team [is] comprised of a Deputy Administrator, *Chief Safety Officer*, *Chief Counsel*, Associate Administrators, and a Director." PHMSA Leadership (emphases added), available at: https://www.phmsa.dot.gov/about-phmsa/leadership (Last visited Apr. 13, 2022).

person, but by the unanimous consent of twelve of his neighbors and equals." *Id.* (quoting 3 William Blackstone, *Commentaries* 379). "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

The "right of trial by jury" is preserved in "Suits at common law." U.S. Const. amend. VII. Absent congressional intent to grant the right of trial by jury, courts "determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty" by "exam[ining] both the nature of the action and of the remedy sought." *Tull v. United States*, 481 U.S. 412, 417 (1987) (finding a constitutional right to a jury trial to determine liability in an action to enforce civil penalties under the Clean Water Act). Under *Tull*'s two-part analysis, courts first "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and then, second, "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* At 417-18. The second inquiry into the nature of the remedy sought "is more important than the first." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

Civil penalty suits are akin to action in debt that were "within the jurisdiction of English courts of law." *Tull*, 481 U.S. at 418. But because the characterization of the relief sought is preeminent, it is not necessary to "find[] a precisely analogous common-

law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Id.* at 421. Actions that impose civil penalties are thus remedies at common law, which "could only be enforced in courts of law." *Id.* at 422.

Here, PHMSA seeks to impose liability on Polyweave for various alleged violations of the HMR—a legal claim. And, as in *Tull*, PHMSA seeks to levy civil penalties for the alleged violations. As such, the *Tull* two-part test is met and Polyweave has a constitutional right to a jury trial to determine its liability under the HMR. But the agency's adjudication structure permits no pathway to district court until *after* a determination of liability, *see* 49 C.F.R. §§ 107.307-107.331. Because PHMSA's adjudicatory scheme denies Polyweave its constitutional right to a jury trial, this Court should reject PHMSA's liability determination as constitutionally invalid.

C. PHMSA's Chief Safety Officer Is Insulated from Presidential Removal and so Lacked Authority to Issue the Decision on Appeal

Article II of the United States Constitution vests "[t]he executive Power … in a President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1 cl. 1, 3. At the same time, "[i]n light of 'the impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*,

561 U.S. 477, 483 (2010) (quoting 30 *Writings of George Washington* 334 (J. Fitzpatrick ed. 1939)).

"Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Id.* In some circumstances, "multilevel protection from removal" within an agency and for executive officers "is contrary to Article II's vesting of the executive power in the President." *Id.* If "the President cannot remove an officer who enjoys more than one level of good-cause protection," and "[t]hat judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him," the President's "constitutional obligation to ensure the faithful execution of the laws" will have been short-circuited. *Id.* (internal citation and quotation marks omitted).

On appeal, the HMR permits the PHMSA Administrator to affirm or dismiss the Chief Counsel's order in whole or in part, and that decision is final agency action. 49 CFR § 107.325(d); 49 U.S.C. § 5127. Here the Decision on Appeal was issued by PHMSA's Chief Safety Officer, who is a member of the Senior Executive Service ("SES"). "Senior executives are high-level federal employees who do not require presidential appointment but who nonetheless exercise significant responsibility—including directing organizational units, supervising work, and determining policy—and who may be held accountable for their projects or programs." *Esparraguera v. Dep't of the*

Army, 981 F.3d 1328, 1330 (Fed. Cir. 2020), *cert. denied sub nom. Esparraguera v. Dep't of Army*, No. 21-686, 2022 WL 892105 (U.S. Mar. 28, 2022).

Members of the SES enjoy protections from removal. They "may be removed … for 'misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.'" *Id.* (quoting 5 U.S.C. § 7543(a)). Removal under § 7543 "includes procedural protections like those available for covered employees in the competitive and excepted services." *Id.*; *see also* 5 U.S.C. § 7543 (b), (d) (permitting notice of the action, the opportunity to respond, the right to be represented by counsel, a written determination, and appeal to the Merit Systems Protection Board ("MSPB")).[13] On appeal to the MSPB, the agency's decision "shall be sustained" if it is supported by substantial evidence for unacceptable performance actions or preponderance of the evidence for all other actions. 5 U.S.C. § 7701(c). The President may, in turn, remove members of the MSPB only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

This framework grants SES members like the Chief Safety Officer who issued the Decision on Appeal unlawful multilevel job protection that prevents the President from exercising his Article II removal authority. *See Lucia v. SEC*, 138 S. Ct. 2044, 2060

[13] SES members may also be removed "for 'unsatisfactory' or 'less than fully successful' performance" as determined by agency performance review boards. *Esparraguera*, 981 F.3d at 1331. A senior executive "may not appeal any appraisal and rating under any performance appraisal system." *Id.* (quoting 5 U.S.C. § 4312(d)).

(2018) (Breyer, J., concurring). The President could not, for instance, hold the Chief Safety Officer in this case directly accountable and remove him unless the MSPB first gave permission. But the President also would be unable to hold the MSPB directly accountable. Thus, the President lacks "full control" over the Chief Safety Officer and cannot hold him accountable in constitutionally required ways. *Free Enterprise Fund*, 561 U.S at 496. This lack of accountability invalidates any final adjudication issued by the Chief Safety Officer, including the Decision on Appeal.

In any event, nothing in the record indicates that the Chief Safety Officer was empowered to issue the Decision on Appeal pursuant to a proper delegation from the Secretary or the Administrator. PHMSA's own regulations make clear that only the Administrator has authority to issue a decision on appeal, 49 C.F.R. § 107.325, but the Decision on Appeal here was issued by Mr. McMillian in his capacity as "Chief Safety Officer," DOA at 13, JA__.

CONCLUSION

For the foregoing reasons, this Court should grant Polyweave's Petition for Review and vacate PHMSA's Decision on Appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 11,875 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Sheng Li