No. 21-5929

In the United States Court of Appeals for the Sixth Circuit

POLYWEAVE PACKAGING, INC.,
Plaintiff-Appellant,

v.

PETER PAUL MONTGOMERY BUTTIGIEG,
Secretary, United States Department of Transportation,
in his official capacity,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Kentucky

Plaintiff-Appellant's Opening Brief

Oral Argument Requested

November 15, 2021

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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 Plaintiff-Appellant Polyweave Packaging, Inc. is organized under the laws of the Delaware. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ Sheng Li

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants Polyweave Packaging, Inc. respectfully request oral argument because it will assist the Court in its review of the issues presented by this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 2201(a). RE 1 PageID#6, ¶ 25. The district court entered final judgment on September 2, 2021. RE 30 PageID#404. Plaintiff timely filed a notice of appeal on October 1, 2021. RE 31 PageID#405. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in ruling that Plaintiff lacks standing because Defendant's rescission of regulations promising due-process rights in Department of Transportation enforcement actions did not inflict a cognizable injury against Polyweave Packaging, Inc., which is subject to an ongoing enforcement action.
2. Whether the district court erred in ruling that 49 U.S.C. § 322(a) grants Defendant "absolute" and unreviewable power to issue, revise, or rescind enforcement-related regulations.
3. Whether the district court erred in denying Plaintiff a preliminary injunction restoring its due-process rights.

STATEMENT OF THE CASE

I. INTRODUCTION

In March 2021, the U.S. Department of Transportation ("Department" or "DOT")'s Pipeline and Hazardous Materials Safety Administration ("PHMSA") served Polyweave Packaging, Inc. ("Polyweave") with a civil-penalty order for regulatory violations that allegedly occurred in 2015. Polyweave appealed, triggering certain due-

process rights under the Department's then-applicable regulations at 49 C.F.R. Part 5, Subpart D ("Subpart D"), including the right under 49 C.F.R § 5.83 to disclosure of exculpatory evidence "as a matter of course" in that proceeding. In April 2021, Defendant Secretary of Transportation Peter Buttigieg ("Defendant" or "Secretary") rescinded those due-process regulations, thus subjecting Polyweave to an enforcement proceeding in which it has diminished due-process rights. PHMSA twice withheld evidence in that enforcement proceeding that would otherwise have been disclosed had Subpart D been in effect.

Defendant's rescission of Subpart D's due-process rights, along with the resulting withholding of evidence, denied due process of law and inflicted other constitutional, informational, and pecuniary injuries. Polyweave therefore has standing to challenge the rescission, which was unlawful because it was not accompanied by a reasoned explanation, failed to account for legitimate reliance interests, and did not follow the Administrative Procedure Act ("APA")'s notice-and-comment procedures. This Court should reverse the district court's dismissal on standing grounds and enter an injunction reinstating Subpart D's due-process protections.

II. FACTUAL BACKGROUND

A. The Department of Transportation Acknowledges and Responds to Inadequate Due Process in Enforcement Actions

On February 15, 2019, DOT's General Counsel issued a memorandum acknowledging and responding to the Department's past failure "to ensure that [its]

enforcement actions satisfy principles of due process." DOT, *Procedural Requirements for DOT Enforcement Actions* at 1, 9–11 (Feb. 15, 2019) (the "Bradbury Memo") (RE 1-2 PageID#22). The Bradbury Memo indicated that the Department had routinely played "a game of 'gotcha'" in investigations; relied on "overly broad or unduly expansive interpretations of the governing statutes or regulations" in enforcement actions; conducted "'fishing expeditions' absent sufficient evidence in hand to support assertion of a violation"; acted without fair notice to the accused; forced regulated persons to undergo interminable adjudications; and tainted its investigative and enforcement activities with "personal animus against a party." *Id.* PageID#26-30.

The Bradbury Memo directed Department personnel to ensure due process of law by taking certain measures, including following *Brady v. Maryland*, 373 U.S. 83 (1963), to affirmatively disclose "as a matter of course" exculpatory evidence. *Id.* PageID#30-31. The Memo further directed Department personnel to stop certain abusive practices, including using "its enforcement authority effectively to convert agency guidance documents into binding rules;" allowing cases to "to linger unduly;" and imposing penalties that do not "reflect due regard for fairness, the scale of the violation [and] the violator's knowledge and intent." *Id.* PageID#31-32.

On October 9, 2019, then-President Trump issued Executive Order 13,892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55,239 (Oct. 9, 2019) (RE 1-3 PageID#36), which has since been revoked by President Biden. In relevant part, Executive Order 13,892

directed the Department to "act transparently and fairly with respect to all affected parties … when engaged in civil administrative enforcement or adjudication." 84 Fed. Reg. at 55,239. It also prescribed standards for the Department's notice, guidance document, inspection, and information collection practices. *Id.* at 55,239, 55,240-41.

B. The Department Promulgates 'Subpart D' Regulations to Ensure Due Process in Enforcement Actions

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) (RE 1-4 PageID#41). 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. Subpart D, the subject of this lawsuit, codifies the Bradbury Memo's due-process protections. Subpart D promised:

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

84 Fed. Reg. at 71716. Subpart D contained substantive rules affecting Polyweave's due-process rights and protections, which were taken directly, sometimes verbatim, from

the Bradbury Memo. *Compare, e.g.*, Bradbury Memo, RE1-2 PageID#32-33, ¶¶ 13, 14, 20 with 49 C.F.R §§ 5.83, 5.85, 5.87. They include:

- The Department in 49 CFR § 5.83 guaranteed regulated persons the right to disclosure of exculpatory evidence under the principle of *Brady v. Maryland*, 373 U.S. 83 (1963), in enforcement proceedings.

- Department in 49 CFR § 5.59 affirmed that regulated persons shall not "be subject to an administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."

- The Department in 49 CFR § 5.61 required enforcement personnel "to promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review."

- The Department in 49 CFR § 5.65 mandated that enforcement personnel "must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations" when initiating enforcement actions and promised the Department "will not rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority."

- The Department in 49 CFR § 5.67 guaranteed it "will not initiate enforcement actions as a 'fishing expedition' to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation."

- The Department in 49 CFR § 5.69 guaranteed regulated persons subject to enforcement actions to notice containing all "legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review."

- The Department in 49 CFR § 5.85 stated that "the Department may not use its enforcement authority to convert agency guidance documents into binding rules. Likewise, enforcement attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law."

- The Department in 49 CFR § 5.97 stated "[n]o civil penalties will be sought in any DOT enforcement action except when and as supported by clear statutory authority and sufficient findings of fact." Additionally, the Department affirmed the right of regulated persons to have robust procedural transparency rights with respect to civil penalty assessments: "The assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties." DOT must "voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials."

Subpart D also contained rules of agency organization, procedure, or practice[1] and codified "requirements found in [now-revoked] 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.

Polyweave is regulated by PHMSA, which began investigating Polyweave in June 2015 for alleged regulatory violations but waited until March 2021 to serve Polyweave with an order to pay a civil penalty. RE 1 PageID#12-14, ¶¶ 45-55. On March 25, 2021,

[1] These include 49 CFR §§ 5.55 ("Enforcement attorney responsibilities"); 5.79 ("The hearing record"); 5.87 ("Alternative Dispute Resolution (ADR)"); 5.99 ("Publication of decisions"); 5.101 ("Coordination with the Office of Inspector General on criminal matters"); 5.93 ("Settlements"); 5.95 ("OGC approval required for certain settlement terms"); 5.103 ("Standard operating procedures"); 5.105 ("Cooperative Information Sharing").

Polyweave appealed this order to the PHMSA Administrator, which triggered Subpart D's due-process protections in prosecutorial proceedings.

C. The Department Rescinds Subpart D Without Explanation

On April 2, 2021, Defendant rescinded Subpart D in its entirety, and with it the binding due-process rights and procedural protections upon which Polyweave relied. Rescission occurred without notice and comment, without a reasoned explanation, and without any consideration of the legitimate reliance interests of regulated persons. DOT, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17,292, 17,293 (Apr. 2, 2021) (RE 1-5 PageID#62). Rescission was announced just a week after Polyweave's decision to appeal the March 2021 civil-penalty order served on it. Polyweave relied on Subpart D as a source of rights and protections in DOT enforcement proceedings, including the right to *Brady* disclosures under 49 CFR § 5.83. RE 6-1 PageID#88. But those rights were stripped away immediately.

Defendant defended his rescission by citing Executive Order 13,992, which President Biden issued on January 20, 2021. *Id.* Executive Order 13,992 revoked Executive Order 13,892 and directed agencies to rescind regulations implementing it that might "threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." Executive Order 13,992, *"Revocation of Certain Executive Orders Concerning Federal Regulation"* 86 Fed. Reg. 7,049 (Jan. 20, 2021). Defendant did not, however, explain how Subpart D's due-process rights in

any way hinder the government's ability to confront the "coronavirus disease 2019 pandemic," "economic recovery," "racial justice," or "climate change."

Defendant also claimed "many" (but not all) of the rescinded 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." 86 Fed. Reg. at 17,292. But 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, let alone promise to give them effect in its civil enforcement actions. Defendant removed the Bradbury Memo from the Department's website but has not publicly repudiated the memo's conclusion that rights listed therein and codified in Subpart D are needed to "ensure that DOT enforcement actions satisfy principles of due process and remain lawful." *See* RE 1-2 PageID#22.

III. PRIOR PROCEEDINGS

On May 19, 2021, Plaintiff filed suit in the United States District Court for the Western District of Kentucky seeking injunctive and declaratory relief and a motion for preliminary injunction to restore Polyweave's due-process rights in its ongoing administrative appeal. *See* RE 1 PageID #1 and 6 PageID#81. 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* RE 17 PageID#177. Among Defendant's motion-to-

dismiss arguments was the assertion that Polyweave lacked standing to sue for violation of *Brady* rights under § 5.83 because PHMSA had already disclosed all relevant evidence to Polyweave. *Id.* PageID#191-92. But then, on July 15, 2021, Defendant interrupted the briefing schedule to notify the court its prior assertion was false. RE 24 PageID#273. Apparently "on July 13[, 2021,] PHMSA located a draft investigative report concerning Polyweave, with accompanying exhibits," and "photographs of Polyweave products that had not been included in the case file." *Id.* PageID#274.

PHMSA told Polyweave this withheld evidence was not exculpatory, but still gave Polyweave additional time in its administrative appeal to cure prejudice from the withholding. *Id.* Defendant repeated to the district court the *fact* that PHMSA told Polyweave the withheld draft report was not exculpatory. *See Id.* ("PHMSA has stated its position that none of the located materials constitute 'exculpatory evidence'"); *see also* RE 28 PageID#362 ("PHMSA has already rejected" the idea that "the disclosed materials were exculpatory[.]"). Tellingly, however, Defendant never made any representation to the district court regarding the truth of PHMSA's assertions.

Neither PHMSA nor Defendant guaranteed that additional evidence was not being withheld. In fact, Polyweave's responsive brief identified the withholding of two inspection reports of Polyweave's customer. According to PHMSA, the allegations against Polyweave were "based on observations made during [these two] inspection[s]." RE 27 PageID#311 n.9 (citing RE 27-3 PageID#341). Defendant disclosed both of

those reports shortly before filing his reply brief and again gave Polyweave time to amend its administrative appeal in light of the new evidence. RE 28 PageID#362 n.3.

On September 2, 2021, the district court granted Defendant's motion to dismiss, finding that Polyweave did not suffer an Article III injury. RE 29 PageID#392. The court held that Polyweave's loss of *Brady* rights was not an injury because there is no constitutional right to *Brady* disclosures in civil enforcement proceedings. *Id.* PageID#380. The court also found Subpart D's due-process rights could not serve as the basis for an Article III injury because they were regulatory, as opposed to statutory, in origin. *Id.* PageID#381. Finally, the district court held Polyweave did not suffer an Article III injury by being subjected to an enforcement proceeding in which exculpatory evidence has been withheld or by having to pay additional defense costs as a result of such withholding. *Id.* PageID#389, 391.

The district court also ruled in the alternative that Polyweave is not entitled to a preliminary injunction. The principal reason offered was that 49 U.S.C. § 322(a) gave Defendant "absolute" and unreviewable power to "prescribe regulations to carry out [his] duties and powers." *Id.* PageID#396. The district court further found that notice and comment rulemaking was not needed to rescind Subpart D and that Polyweave would not suffer an irreparable injury absent an injunction. This appeal followed.

SUMMARY OF ARGUMENT

The district court erroneously concluded Polyweave suffered no Article III injury. Polyweave suffered four separate types of injuries. *First*, the rescission of

Polyweave's rights to *Brady* disclosure under § 5.83 inflicted a constitutional injury. *Second*, even if the rescinded Subpart D rights were not constitutional, they still protected Polyweave from harms bearing a close relationship with traditionally recognized harms, namely due-process violations. Their rescission therefore inflicts an Article III injury. *Maddox v. Bank of New York Mellon Tr. Co.*, 997 F.3d 436, 446 (2d Cir. May 10, 2021). *Third*, Polyweave suffered informational injuries by being denied exculpatory material in an ongoing enforcement proceeding. *Fourth*, Polyweave suffered pocketbook injuries because the loss of due-process rights increased its defense costs. Each of these harms represents an independent Article III injury.

The district court's holding in the alternative that Polyweave is not entitled to a preliminary injunction is in error. The district court's conclusion that Defendant has unreviewable power to issue, revise, or revoke any regulation under 49 U.S.C. § 322(a), including Subpart D, is plainly wrong and would place countless federal regulations outside the reach of judicial review. The rescission of Subpart D is reviewable under the APA's arbitrary and capricious standard, which Defendant fails because it neither explained why it is abandoning DOT's prior commitment to due process of law nor accounted for regulated persons' legitimate reliance interests in enjoying due-process protection. Defendant also failed to follow the APA's notice-and-comment procedures in rescinding substantive rights. Finally, the district court's conclusion that Polyweave suffered no irreparable harm is flawed for the same reasons as its no-cognizable-injury conclusion, and thus it should also be reversed.

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, "the court must take the material allegations … as true and construed in the light most favorable to the nonmoving party." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); *see also Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) ("a trial court takes the allegations in the complaint as true"). 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 such 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). Courts of appeal "review a district court's decision regarding a plaintiff's Article III standing *de novo*." *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012).

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). "Whether the movant is likely to succeed on the merits is a question of law … reviewed de novo." *City of Pontiac Retired Emps. Ass'n v. Schimmel*,

751 F.3d 427, 430 (6th Cir. 2014) (en banc). "These factors are not prerequisites, but are factors to be balanced against each other." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 385 (6th Cir. 2020).

ARGUMENT

I. POLYWEAVE HAS STANDING TO CHALLENGE SUBPART D'S RESCISSION

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, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quotation marks and citation omitted). Article III injuries may include tangible harms, such as loss of access to useful information, *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004), and "pocketbook injury," *Collins v. Yellen,* 141 S. Ct. 1761, 1779 (2021).

"[I]ntangible injuries can nevertheless be concrete." *Spokeo*, 136 S. Ct. at 1549. Deprivation of an intangible constitutional right is a concrete injury. *Id.* Additionally, 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). An injury-in-fact occurs where a non-constitutional "substantive right" is violated. *Maddox*, 997 F.3d a 446. A right is "substantive" rather than procedural 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).

Polyweave has standing to challenge Defendant's rescission of Subpart D because it has suffered four types of Article III injuries, each of which is explained in detail below.

A. Deprivation of Polyweave's Right to *Brady* Evidence, Standing Alone, Establishes an Article III Injury

Polyweave suffered an Article III injury when Defendant rescinded 49 C.F.R. § 5.83, which guaranteed a right in DOT's civil enforcement proceeding to voluntary disclosure of exculpatory evidence under "the principles articulated in *Brady v. Maryland*, 373 U.S. 83 (1963)." The district court correctly recognized that "the deprivation of a constitutional right, standing alone, can establish an Article III injury-in-fact." RE 29 PageID#380 (citing *Spokeo*, 136 S. Ct. at 1549). But it held Defendant's deprivation of Polyweave's right to *Brady* disclosure did not qualify because "there is no constitutional right to exculpatory information in a regulatory enforcement proceeding." *Id.* According to the district court, *Brady* due process rights are limited to criminal cases and only rarely apply in civil cases. RE 29 PageID#380.

This civil-criminal dichotomy, however, is contrary to *Brady*'s reasoning that disclosure of exculpatory evidence was necessary for the "avoidance of an unfair trial to the accused," an objective that supersedes the government's interest in winning a case. 373 U.S. at 87. As explained below, the correct *Brady* dichotomy is whether a

proceeding is adversarial or prosecutorial. In adversarial proceedings, attorneys have a duty to win for their respective clients and therefore do not have an affirmative duty to disclose favorable evidence to the other side. Prosecutorial proceedings, by contrast, are governed by constitutional due process, which requires prosecutors to prioritize fairness over winning, thus necessitating affirmative disclosure of exculpatory evidence. While administrative enforcement proceedings are civil, they are also indisputably prosecutorial in nature: the government investigates, charges, and ultimately attempts to punish the accused. Hence, *Brady* disclosure is required to satisfy due process, and the rescission of *Brady* rights inflicts constitutional harm.

While *Brady* specifically concerned a criminal defendant facing the death penalty, its logic applies with equal force in other prosecutorial proceedings, whether criminal or civil. As one court explained in a civil enforcement case brought by the Federal Trade Commission: "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) (*Campbell v. United States*, 365 U.S. 85, 96 (1961)). Another federal court relied on *Brady* to hold in an employment-discrimination enforcement action that the government must disclose witnesses who "may be able to give testimony helpful to defendant," explaining that "[a] defendant in a civil case brought by the government should be afforded no less due process of law"

than a criminal defendant. *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1374 n.5 (D.N.M. 1974).

Several federal agencies have held through administrative adjudication that *Brady* disclosure is a due-process requirement and is not limited to criminal cases. The Commodity 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 extended *Brady* disclosures to civil enforcement proceedings 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)).

The district court did not engage with the reasoning in the above cases and instead concluded that *Brady* disclosure applies in civil cases "only … where 'a person's liberty is at stake.'" RE 29 PageID#380 (quoting *Brodie v. Dep't of Health and Human Serv.*,

951 F. Supp. 2d 108, 118 (D.D.C. 2013). The heart of this rationale is that "consequences of a civil case are fundamentally different from criminal sanctions." *U.S. ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 481 (D. Utah 2001). Justice Gorsuch's concurrence in *Sessions v. Dimaya* dispelled that notion: "today'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." 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J. concurring).

The severity of punishment does not justify the divergent application of *Brady* in criminal and civil cases. Even though *Brady* was a death-penalty case, federal courts must apply its protection to all defendants facing criminal charges, no matter how mild. Federal Rule of Criminal Procedure 5(f) ("In *all* criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny[.]") (Emphasis added). Importantly, no liberty interest needs to be at stake. *Brady* applies in criminal prosecutions of corporate defendants, for example, which have become commonplace and do not threaten any liberty interest. It also applies when individuals are prosecuted for any of countless federal crimes that do not threaten imprisonment. For instance, 27 U.S.C § 207 states: "[a]ny person violating any of the [liquor-permitting and competition provisions] of section 203 or 205 of this title

shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense." Similarly, 47 U.S.C. § 502 criminalizes willful violations of FCC regulations and sets punishment at "a fine of not more than $500 for each and every day during which such offense occurs." Neither the district court nor Defendant explained why the government should be allowed to withhold exculpatory evidence in civil enforcement actions threatening fines that are orders of magnitude greater than the above criminal fines.

Cases relied upon by the district court to draw a civil-criminal dichotomy are unpersuasive. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cited at RE 29 PageID #380, involved a civil denaturalization proceeding of an accused war criminal who faced the death penalty in the country of execution. The court applied *Brady* because "[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. The *Demjanjuk* court noted in dicta that the threat of death penalty in that case meant "[t]he consequences of denaturalization and extradition equal or exceed those of most criminal convictions." *Id.* at 354. But it provided no explanation why government attorneys could pursue their own preconceived ideas of what the outcome should be instead of justice—by withholding exculpatory evidence—when denaturalizing an individual who did not face criminal punishment.

The district court implied that the Sixth Circuit declined to follow *Demjanjuk* and extend *Brady* rights in a subsequent case because threat of death penalty in *Demjanjuk* was "an unusual set of circumstances." *See* RE 29 PageID#380 (citing *In re Extradition of Drayer*, 190 F.3d 410, 414 (6th Cir. 1999)). But the "unusual set of circumstances" referred in *Drayer* to distinguish *Demjanjuk*'s application of *Brady* rights was not the threat of death, nor any other criminal punishment. Rather, "in *Demjanjuk*, the United States had conducted its own investigation of the offense underlying the request for extradition and uncovered exculpatory material in the course of that effort," whereas in *Drayer*, "[n]o such investigation occurred" and "all documents received by the United States from [foreign] authorities were, in fact, turned over[.]" *Id.* In other words, the distinguishing circumstances that justified applying *Brady* in *Demjanjuk* was that the government performed an investigation, uncovered exculpatory evidence, and then withheld that evidence. Those are the exact circumstances in the civil enforcement proceeding faced by Polyweave.

Another case cited by the district court is *Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131 (4th Cir. 2014), cited at RE 29 PageID#380. There, a coal miner's widow argued that private counsel for a mining company should have disclosed medical evidence favorable to her deceased husband's claim in a proceeding under the Black Lung Benefits Act to determine the mine company's potential liability. *Id.* at 134. The court said "[w]hat Fox requests is something akin to a civil *Brady* rule," and declined to extend that rule to the benefits proceedings. *Id.* The Fourth Circuit reasoned that *Brady*

applies in "a criminal case [because] the government's duty to disclose under *Brady* arises from the obligation of the prosecutor not simply to convict, but to see that justice is done." *Id.* at 139 (citing *United States v. Agurs,* 427 U.S. 97, 110–11 (1976)). In contrast, in the benefits proceedings, "the basic duty of [the mining company's] attorney to his or her client is not offset by the countervailing duty a government prosecutor has to exercise in the interest of justice his or her awesome and extraordinary powers." *Id.* This reasoning does not create a clear-cut civil-criminal dichotomy. Rather, the Fourth Circuit recognized *Brady*'s applicability depended on whether an attorney is a "government prosecutor" whose duty to win is "offset by a countervailing duty" to act "in the interest of justice," as opposed to being a private attorney whose sole duty is to his or her client.

Litigation between private parties are adversarial proceedings involving opposing attorneys whose duties are to win for their respective clients, rather than to seek justice. A central premise of our legal system is that truth and justice are nonetheless served by this adversarial process. The same logic does not apply in prosecutions. The prosecutor's responsibilities are to the public, and as such, his or her duty to seek justice must supersede any desire to win. That is the underlying explanation in *Brady* for why a prosecutor must voluntarily disclose exculpatory material. 373 U.S. at 87. *Brady*'s application does not turn on whether a case is criminal or civil. What matters is whether the case is *adversarial*—wherein the attorney's duty is to win for his client—or *prosecutorial*—wherein the attorney has a higher duty to ensure a just result.

Many civil proceedings, such as the benefits proceedings in *Fox*, are adversarial. But the DOT's civil enforcement proceedings are indisputably prosecutorial. DOT brings the enormous power of the state to bear against businesses accused of violating regulations and explicitly refers to its power as "prosecutorial and enforcement discretion." *See* 49 C.F.R. § 5.65. The accused should be entitled to the full gamut of due-process rights in such prosecutorial proceedings, even if liberty interests are not being threatened. For example, this Court held in *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018), that the due-process right to cross examine one's accuser is not limited to criminal cases and extends to university disciplinary proceedings. *See also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017). It was of no moment that such proceedings do not threaten imprisonment or otherwise impair a student's liberty. *See Baum*, 903 F.3d at 582 ("The student may be forced to withdraw from his classes and move out of his university housing."). There is an even stronger case to apply constitutional due-process rights to Polyweave's proceedings. Unlike universities, DOT's core purpose includes prosecuting alleged violators of its regulations. As such, the Department has no excuse not to afford those whom it prosecutes the full panoply of constitutional protections.

B. Rescission of Subpart D Rights Is an Article III Injury Because Those Rights Were Promulgated to Protect Against Constitutional Harms

Even if Polyweave were not entitled to *Brady* rights guaranteed under § 5.83 as a constitutional matter, the rescission of § 5.83 and other Subpart D rights would still

have inflicted an Article III injury. An injury-in-fact includes the deprivation of a non-constitutional "substantive right," which is defined as a right that "protects against a harm bearing a 'close relationship' to a harm [that is] traditionally recognized." *Maddox*, 997 F.3d a 446 (citing *Spokeo*, 136 S. Ct. at 1548). Subpart D rights are "substantive" within this meaning because 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 district court mistakenly believed "congressional authorization is a *necessary* predicate for a court to recognize an intangible injury[-in-fact]." RE 29 PageID#381 (emphasis in original). It appears to have overinterpreted a concurring opinion stating that "Congress has the power to define injuries" to mean that *only* Congress has such power. *Id.* (*quoting* Lujan, 504 U.S. at 580 (Kennedy, J., concurring)). This "congressional authorization" predicate, however, is contradicted by the district court's own recognition that "state law" can create an intangible injury-in-fact. *Id.* PageID#381 (citing *Maddox*, 997 F.3d at 446-49). In *Maddox*, a state law required mortgage lenders "to timely file mortgage satisfactions and gave borrowers rights to claim a penalty payment in designated amounts for the mortgagee's failure to comply." 997 F.3d at 446. Violation of this mortgage-recording right was a cognizable injury because that right protected against a harm "bearing a close relationship" to common-law harms that have

"traditionally been regarded as providing a basis for lawsuit in English and American courts." *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

The same analysis applies with respect to Subpart D rights that bear a close relationship to due-process harms. For instance, even if the *Brady* right under 49 C.F.R. § 5.83 were not constitutional, it nonetheless would protect against a harm "bearing a close relationship" to due-process violations, and thus their deprivation inflicts an injury-in-fact. *Id.* The same is true of the prohibition under 49 C.F.R. § 5.65 against judicial deference to "nonbinding guidance documents" in enforcement actions because such action should "be based upon a reasonable interpretation of the law about which the public has received fair notice." This requirement bears a close relationship to 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). Numerous Subpart D rights are designed to protect constitutional due process, including, *inter alia*, the 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). DOT was explicit that Subpart D was promulgated to "ensure DOT provides affected parties appropriate due process in all enforcement actions." 84 Fed. Reg. at 71,716. The rights provider under Subpart D, even more so than the mortgage-

recording rights in *Maddox*, are closely related to a traditionally recognized harm and therefore serve as predicates for Article III injury.

Subpart D was promulgated to provide due-process rights that had not been previously available to DOT's enforcement targets. The district court, however, repeatedly suggested that Subpart D merely "broadcast[ed]" internal procedures and therefore it is "unclear whether Subpart D's rescission actually changed any of DOT's [due process] obligations." RE 29 PageID#389, 399. Not so. Subpart D was promulgated in December 2019 to codify policy articulated just a few months prior in the Bradbury Memo. As such, there is no longstanding history of the Department protecting due process in the absence of Subpart D rights. In fact, the Bradbury Memo was issued precisely to address the Department's history of due-process violations.

While Defendant has not publicly repudiated the Bradbury Memo, the memo is no longer accessible through the Department's website, which indicates abandonment of due-process policies undergirding Subpart D. This conclusion is reinforced by Defendant's own admission that Subpart D placed restriction on enforcement beyond its internal policies. In opposing Polyweave's preliminary-injunction motion, he asserted that "an injunction [restoring Subpart D] would prevent DOT from carrying out its [enforcement] mission." RE 17 PageID#208. That assertion could be true only if rights and protections provided granted to enforcement targets through Subpart D were more robust than what the Department's internal procedures would otherwise provide. So, taking those substantive protections away does inflict concrete injuries

against regulated persons, especially those that, like Polyweave, face an ongoing enforcement action.

It is of no moment that Subpart D rights are regulatory rather than based on federal or state statutes because "deprivation of … a regulatory right (as opposed to a statutory right) can constitute an injury in fact for the purposes of standing." *Nat'l Educ. Ass'n v. DeVos*, 345 F. Supp. 3d 1127, 1142 (N.D. Cal. 2018) (teachers' association had standing to sue for violation of regulatory disclosure right); *see also PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (animal rights group had standing to challenge agency regulations "that were inconsistent with 'government-wide regulations[.]'"). Agencies may craft their own rules for prosecutorial proceedings. *McClelland*, 606 F.2d at 1285–86 ("Some agencies have of their own accord adopted regulations providing for some form of discovery in their proceedings."). But they are indisputably "bound by those rules." *Id.* Under the district court's holding, however, agencies would not be bound because rights they confer to the accused by regulation—such as *Brady* rights under 49 C.F.R. § 5.83—could not serve as the basis for Article III standing when violated.

Such a holding has ramifications far beyond this case because DOT is by no means the first federal agency to issue regulations providing for *Brady* rights. 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

safeguard due process in their enforcement actions.[2] If, as the district court held, loss of the regulatory right to *Brady* disclosure were not a cognizable injury, any of these agencies could ignore their own *Brady*-like due-process safeguards without fear of Article III review. In other words, agencies would no longer be bound by their own enforcement rules. This Court should reverse the district court's decision to prevent such a lawless outcome.

C. Polyweave Suffers an Article III Injury by Being Denied Exculpatory Evidence in an Ongoing Administrative Enforcement Proceeding

1. Polyweave Suffered Informational Injury

Polyweave also suffered an Article III injury by being subjected to an ongoing enforcement proceeding in which it was denied exculpatory evidence. *See Am. Canoe Ass'n*, 389 F.3d at 542 ("The lack of information deprived him of the ability to make choices … These allegations are sufficient to establish that [plaintiff] has suffered a concrete and particularized injury sufficient to confer Article III standing."). In the middle of the motion-to-dismiss briefing before the district court, Defendant admitted that PHMSA withheld from Polyweave a 645-page draft investigation report and

[2] *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 Nov. 15, 2021); 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 Nov. 15, 2021).

photographs of Polyweave's products. *See* RE 24 PageID#273. This is conclusive proof that Polyweave had suffered an informational injury-in-fact at the time it filed its Complaint.

The district court stated "Polyweave did not plead that PHMSA is withholding exculpatory evidence." RE 29 PageID #385. But the Complaint, which must be "construed in the light most favorable to [Polyweave]," *Ritchie*, 15 F.3d at 598, plainly alleged that "[i]f Subpart D had not been rescinded, then Polyweave would have been provided *Brady* evidence 'as a matter of course' under 49 CFR § 5.83." RE 1 PageID#15, ¶ 61. This "would have been provided" language makes clear that Polyweave was not provided *Brady* evidence *because of* 49 CFR § 5.83's rescission.[3] Defendant's opening motion-to-dismiss brief explicitly acknowledged and responded to Polyweave's evidence-withholding allegation by attempting to "refute [] any suggestion that such evidence has been or is being withheld." RE 17 PageID #192. The district court was therefore incorrect that Polyweave's evidence-withholding "allegations ar[o]se for the first time in [Polyweave's] response brief," *see* RE 29 PageID #385, and there is no need for Polyweave to amend its Complaint.[4]

[3] Polyweave could not have known what specific evidence was being withheld at the time it filed the Complaint, nor indeed any time thereafter.

[4] Nor is there is a need, as the district court intimated, to sanction Polyweave's counsel under Federal Rule of Civil Procedure 11(b)(3) for amending the Complaint. *See* RE 29 PageID#389.

The existence of an Article III injury "depends on the facts *as they exist when the complaint is filed*." *Lujan*, 504 U.S. at 571 n.4 (quoting *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 830 (1989)) (Emphasis in original). There is definitive proof that evidence was being withheld when Polyweave filed its Complaint on May 19, 2021. Defendant initially asserted in his June 14, 2021 motion-to-dismiss brief that no evidence "has been or is being withheld" because "PHMSA re-produced the entire case file to Polyweave at the company's request." *Id.* He retracted that assertion on July 15, 2021, because PHMSA apparently located previously undisclosed evidence. RE 24 PageID#273-74. Polyweave's responsive brief complained of additional withheld material: two inspection reports of Polyweave's customers upon which PHMSA's allegations against Polyweave were based.[5] Defendant turned over these two reports shortly before filing his reply brief. RE 28 PageID#362 n.3. In short, there can be no dispute that, at the time Polyweave filed its Complaint on May 19, 2021, PHMSA was withholding at least the following evidence: (1) photographs of Polyweave's products; (2) a draft inspection report of Polyweave's facilities; and (3) two inspection reports concerning Polyweave's customers.

[5] 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." RE 27-3 PageID#341.

As the district court recognized, Polyweave is entitled to a favorable inference that the withheld documents are exculpatory. *See* RE 29 PageID#386 ("the Court would assume [so] in an amended complaint"); *see also Ohio Nat. Life Ins.*, 922 F.2d at 325. Such an inference is especially warranted for at least two additional reasons. *First*, PHMSA acknowledged the prejudicial effect of withholding evidence and attempted to cure such prejudice by "allocat[ing] to Polyweave additional time in its administrative appeal, as well as leave to amend its administrative appeal." RE 24 PageID#274; *see also* RE 28 PageID#362 n.2 ("Polyweave was [again] provided with additional time to amend its administrative appeal").

Second, even a cursory review of the withheld evidence undermines PHMSA's claim to Polyweave that the withheld evidence was not exculpatory. According to Defendant, "on July 13 PHMSA located a draft investigative report concerning Polyweave, with accompanying exhibits," RE 24 PageID#274, which totaled 645 pages, *see* RE 27 Page ID#309. PHMSA apparently reviewed this voluminous evidence and concluded it was not exculpatory in just two days. PHMSA's July 15, 2021 email to Polyweave stated that the withheld "Inspection Report No. 15129039 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." RE 24-1 PageID#278. However, a quick comparison indicates that a handwritten portion of the withheld report (No. 15129039) was photocopied and re-dated to become part of the allegedly superseding report (No. 15129080). *Compare* June 8, 2015 Exit Briefing

included in Inspection Report No. 15129039 at 2-3, RE 27-1, PageID#333 *with* Nov. 17, 2015 Exit Briefing included in Inspection Report No. 15129080 at 2-3, RE 27-2, PageID#337. 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. This is exculpatory.

Despite these factors, the district court held that, because "it is not clear whether the [withheld] documents produced are exculpatory," such documents are not exculpatory for the purposes of motion-to-dismiss proceedings. RE 29 PageID#386. But Polyweave need not prove it is "clear" that withheld evidence is exculpatory because "a trial court takes the allegations in the complaint as true." *Ohio Nat. Life Ins.*, 922 F.2d at 325. Instead of complying with that ordinary obligation, the district court accepted Defendant's unsupported assertion that "'PHMSA has already rejected' [Polyweave's] claim that the documents are exculpatory," RE 29 PageID#386 (quoting RE 28 PageID#362). This conclusion was especially inappropriate because Defendant merely repeated PHMSA's assertion to Polyweave—he never made a claim or argument *to the district court* regarding the truth of PHMSA's assertion.

After disclosing the withheld evidence, PHMSA emailed Polyweave stating the evidence was not exculpatory. RE 24-1 PageID#277-78. Defendant then conveyed to the district court the *fact* that "PHMSA has stated its position that none of the located materials constitute 'exculpatory evidence'" RE 24 PageID#274. But that is not the same as endorsing PHMSA's assertion as truth as an officer of the court. *Cf. United*

States v. Rodriguez-Lopez, 565 F.3d 312, 314 (6th Cir. 2009) ("A statement offered as evidence of the bare fact that it was said, rather than for its truth, is not hearsay."). Defendant's reply brief also stated that "PHMSA has already rejected" "that the disclosed materials were exculpatory in nature," but he again made no claim or argument in support of the truth of that conclusion. RE 28 PageID #362; *see id.* PageID #362 n.3 (stating as a factual matter that "PHMSA did not find that any of the materials in those reports were exculpatory"). Thus, not only did the district court fail to draw a favorable inference that the withheld evidence is exculpatory, but it somehow reached an opposite conclusion based on PHMSA's statements that Defendant merely repeated but never explicitly endorsed.

The district court also held that "Polyweave provides no factual allegation to refute" Defendant's assertion that "PHMSA had turned over every relevant document in its system." RE 29 PageID#387. But PHMSA itself later refuted its own claim. This supposedly unrefuted assertion appeared in Defendant's opening motion-to-dismiss brief, which claimed "the evidence incorporated by reference in the Complaint," namely an email exchange wherein PHMSA represented all relevant documents were turned over, "conclusively refutes any allegation that PHMSA is withholding exculpatory evidence." *Id.* (quoting RE 17 PageID#191). But on July 15, 2021, Defendant retracted that claim and admitted PHMSA had been withholding evidence all along. *See* RE No. 24 PageID#273 (citing RE 17 PageID#191). In other words, assuming for sake of argument that the burden of proof fell on Polyweave, it did not need to refute

Defendant's assertion that "PHMSA had turned over every relevant document in its system." Defendant refuted that assertion himself. Hence, the district court could not properly rely on that assertion.

2. Polyweave's Claim Based on Informational Injury Is Not Moot

The district court also improperly held that, "even if the [withheld documents] are exculpatory (as the Court would assume in an amended complaint), it brings Polyweave no closer to establishing standing" because "Polyweave must allege PHMSA continues to withhold exculpatory evidence today." RE 29 PageID#386. This analysis, however, conflates standing and mootness. "Standing and mootness, albeit related, are distinct doctrines with separate tests to evaluate their existence at different times of the litigation." *Hargett*, 2 F.4th at 559. "Standing is determined at the time the complaint is filed." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012). On the other hand, "[a] case may become moot if, as a result of events that occur during pendency of the litigation, the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome." *Id.*

Thus, PHMSA's withholding of exculpatory documents at the time of the Complaint is enough to establish standing. In requiring that "Polyweave must allege PHMSA continues to withhold exculpatory evidence today," RE 29 PageID#386, the district court committed legal error. It was attempting to perform a mootness analysis based on PHMSA's subsequent turning over of previously withheld evidence. But it then applied the wrong legal standard for that exercise. "The burden of demonstrating

mootness is a heavy one." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). "A defendant's voluntary cessation of allegedly unlawful conduct," *i.e.*, failing to turn over *Brady* evidence, "ordinarily does not suffice to moot a case." *Laidlaw*, 528 U.S. at 174 (2000). Rather, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190 (emphasis added). Here, the district court misplaced the burden of demonstrating lack of mootness on Polyweave. RE 29 PageID#387 ("Polyweave's reply brief vaguely attempts to assert that PHMSA continues to withhold exculpatory evidence" but lacked "any *factual* allegations allowing the Court to draw that 'inference'"). The burden falls on Defendant, but he has not even raised mootness, let alone make an "absolutely clear" showing.

Nor could he. Defendant admitted PHMSA withheld certain documents. While PHMSA has since disclosed those documents, neither it nor Defendant has promised that no further evidence is being withheld. Even such a representation would not be enough to establish mootness. "If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change,

significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Schlissel*, 939 F.3d at 768.

3. Polyweave's Informational Injury Is Redressable

The district court also *sua sponte* held that an injunction would not redress Polyweave's informational injury. According to the court, "[t]he only way reinstatement of Subpart D would redress Polylweave's 'informational injury' is if PHMSA turned over exculpatory evidence." RE 29 PageID#388. The court reasoned that PHMSA would not turn over exculpatory evidence even if Subpart D were reinstated because "Subpart D was effective for fifteen months of Polyweave's enforcement proceeding and PHMSA turned over no exculpatory evidence." *Id.* Defendant made no argument in support of this reasoning, as it necessarily implicates his Department in violating its own regulations for over a year.

The district court's reasoning rests on two faulty premises. *First,* Subpart D did not require PHMSA to disclose *Brady* evidence to Polyweave in December 2019. Rather, *Brady* disclosure obligations would not have triggered until March 2021, when PHMSA first served a civil-penalty order on Polyweave. RE 1 PageID#14, ¶¶ 55-56. Before then, PHMSA was investigating Polyweave and deciding whether to prosecute Polyweave and for what. In the criminal prosecution context, for example, *Brady* rights do not

trigger until after charges are brought against the suspect.[6] Charges were not brough against Polyweave until March 2021, and Subpart D was rescinded immediately thereafter.

Second, even if PHMSA had ignored Subpart D's *Brady* obligation for over a year, as the district court asserted, there is no basis to believe PHMSA would continue to ignore that obligation if Subpart D were reinstated through an injunction. That is because PHMSA would not be merely violating its own regulations, but a court order. Defendant made no claim and provided no reason to believe that PHMSA might defy the court and refuse to disclose evidence if subject to an injunction. And even if he did make such a claim, the proper response would be the threat of contempt, not a *sua sponte* conclusion that Defendant's continued unlawful conduct renders injuries un-redressable.

D. Polyweave Suffers Article III Pocketbook Injuries by Being Forced to Expend Additional Resources

The rescission of Subpart D's due-process rights makes Polyweave's administrative appeal more expensive. Such "pocketbook injury is a prototypical form

[6] The notice of probably violation served on Polyweave is a not a prosecutorial charge triggering *Brady* disclosure because "[t]he Office of Chief Counsel may amend a notice of probable violation at any time before issuance of a compliance order or an order assessing a civil penalty." 49 C.F.R. § 107.311(c). There is logically no way for PHMSA to determine what evidence is exculpatory with respect to charges against a regulated party before the Chief Counsel decides what those charges are. In any event, PHMSA regulations require notices of probable violation be accompanied by separate disclosure requirements. *See id.* § 107.311(b).

of injury in fact." *Collins*, 141 S. Ct. at 1779. The district court correctly recognized that Polyweave "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 further acknowledged that "of course could be a cognizable injury." RE 29 PageID #390. But the court incorrectly concluded "such allegations appear only in [Polyweave's] response brief." *Id.*

Polyweave's Complaint clearly alleged that "Subpart D's rescission has improperly increased Polyweave's regulatory burden and raised the cost of defending itself." RE 1 PageID#15 ¶ 61. It also provided a specific example why: "on May 6, 2021, Polyweave's representative affirmatively demanded exculpatory evidence. If Subpart D had not been rescinded, then Polyweave would have been provided Brady evidence 'as a matter of course' under 49 CFR § 5.83." *Id.* So, there is no need to amend Polyweave's Complaint to re-allege pocketbook injuries.

There can be no doubt that Polyweave suffered pocketbook costs. After the Complaint was filed, Polyweave's representative spent time requesting exculpatory documents from PHMSA. PHMSA initially refused but later acquiesced and disclosed exculpatory evidence, including a 645-page draft report, and gave Polyweave additional time to amend its complaint. RE 24 PageID#274. After this disclosure, Polyweave's representative spent time requesting more exculpatory documents, which PHMSA eventually disclosed. RE 28 PageID#362 n.3. The hourly fees Polyweave incurred for

these repeated requests conclusively establishes it incurred and would continue to incur additional expenses as a result of Subpart D's rescission.

The district court concluded that reinstatement of Subpart D would not redress expenses Polyweave has already incurred. RE 29 PageID#390. Polyweave does not seek to recover past expenses but rather to prevent future ones. As explained above, PHMSA's post-Complaint disclosure of withheld evidence did not moot the case because Defendant has not made an "absolutely clear" showing that no evidence will be withheld in the future. As such, Polyweave still must request additional evidence, and it will incur additional hourly fees for doing so. Injunctive relief will redress these future costs.

II. POLYWEAVE IS ENTITLED TO A PRELIMINARY INJUNCTION

The preliminary-injunction factors favor granting Polyweave relief. The district court erred in holding that Polyweave was not likely to succeed on the merits because rescission of Subpart D is not reviewable under any standard. As explained below, the APA's arbitrary and capricious standard applies, which Defendant fails. Defendant also failed to follow the APA's notice-and-comment procedures in rescinding substantive rights, which provides another reason why Polyweave is likely to succeed on the merits. Finally, the district court's conclusion that Polyweave suffered no irreparable harm suffers from the same defects as its no-cognizable-injury conclusion and thus should be reversed for the same reasons.

A. Regulations Issued Under 49 U.S.C. § 322(a), Including Subpart D, Are Reviewable Under the APA

The district court held that Polyweave has no likelihood of success because Defendant has unreviewable discretion to issue, revise, or revoke regulations under 49 U.S.C. § 322(a), which states: "The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary." According to the district court, the phrase "may prescribe" confers "absolute" and unreviewable power. RE 29 PageID#396 (quoting Section 322(a)). This reasoning would place countless regulations promulgated under similar "may issue" authority outside of judicial review, turning on its head "the strong presumption favoring judicial review of administrative action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

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 instructed lower courts to "read the § 701(a)(2) exception for action committed to agency discretion quite narrowly." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019) (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.

Unreviewable agency actions do not include general rulemaking because there are always standards to apply: Congress enacted the APA as a set of "default rules" that all regulations must satisfy. *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."). Section 322(a)'s "may prescribe" language is not a magical phrase that circumvents APA standards. Congress routinely enacts statutes stating that an agency "may" issue regulations to achieve certain objectives.[7] Such "may" language is "permissive" only in the sense that "Congress gave the [agency] the authority to promulgate rules … or to make no rules at all." *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 253 (2d Cir. 2020). But if an agency decides to promulgate a rule, its contents are reviewable.

In *XY Planning*, for instance, the Second Circuit reviewed (and upheld) SEC's Regulation Best Interest under the APA's arbitrary and capricious standard notwithstanding the "may promulgate" language in the authorizing statute. *Id.* at 255. As another example, 21 U.S.C. § 346a states the "Administrator [of the EPA] *may issue* regulations establishing, modifying, or revoking a tolerance for a pesticide chemical residue in or on a food." (Emphasis added). This language did not stop the D.C. Circuit from reviewing and striking down EPA's regulation revoking all tolerances for

[7] *See, e.g.,* 42 U.S.C. § 300gg-92 ("The Secretary [of Health and Human Services] … may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter."); 15 U.S.C. § 80b-11(g)(1) ("The [Securities and Exchange] Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers….''). 15 U.S.C. § 57a(1)(B) ("the [Federal Trade] Commission may prescribe … rules which define with specificity acts or practices which are unfair or deceptive ….").

carbofuran pesticide residue on imported food. *Nat'l Corn Growers Ass'n v. EPA*, 613 F.3d 266 (D.C. Cir. 2010). The district court's holding that "may issue" language in 49 U.S.C. § 322(a) gives Defendant "absolute" and unreviewable regulatory power is clearly erroneous and should be reversed.

The district court also misapplied *Vermont Yankee Nuclear Power Corporation. v. NRDC*, 435 U.S. 519 (1978), to conclude it lacks power to review DOT's "discretionary decision about which enforcement procedures it must provide to the public." Cited at RE 29 PageID#399. *Vermont Yankee* did not concern enforcement procedures but rather rulemaking procedures and stands for the proposition that a court may not compel agencies to adopt more strict rulemaking procedures than the APA. *Id.* at 524. Here, Polyweave asks the Court to review the rescission of Subpart D under APA standards, no more and no less. Revision to an agency's enforcement policy is reviewable under those APA standards. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1906 (2020) (reviewing and vacating agency's rescission of enforcement policy).

The district court thought otherwise and held Subpart D is unreviewable because it regulates "DOT enforcement procedures [that] are closely tied to the prototypical type of unreviewable agency action: the decision not to institute enforcement proceedings." RE 29 PageID#398 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985)). In *Heckler*, 470 U.S. at 832, the Supreme Court held an agency's decision not to bring specific enforcement actions—use of drugs in lethal injections—was

unreviewable. That case is inapposite because Subpart D contains many provisions that do not concern the decision not to institute enforcement proceedings. For instance, § 5.83 states that DOT must disclose *Brady* material after enforcement proceedings have already been instituted, while § 5.97 states DOT "shall voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that shed light on the way penalties are calculated." As another example, § 5.85 states "enforcement attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law." These provisions concern conduct *after* a decision to initiate enforcement has already been made and thus bear no relation to non-enforcement discretion under *Heckler*.

Additionally, being merely "closely tied" to non-enforcement is not enough for agency action to be unreviewable under *Heckler*, 470 U.S. at 832, which extends only to the specific decision to not initiate enforcement actions on a case-by-case basis. The Supreme Court has explicitly held that *Heckler* does not cover general policies directing agencies not to initiate certain enforcement actions. *See Regents*, 140 S. Ct. at 1906 (reviewing rescission of policy not to enforce immigration laws against certain aliens); *see also Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (reviewing promulgation of policy not to enforce immigration laws against certain aliens).

A general policy mandating non-enforcement in certain instances reflects legal and policy judgments that are much broader than case-by-case non-enforcement discretion and that are reviewable. In *Texas*, 809 F.3d at 163, the Fifth Circuit concluded

the Deferred Action for Parents of Americans (DAPA) program was reviewable even though it resulted in non-enforcement of immigration laws because that program was "much more than nonenforcement: It would affirmatively confer 'lawful presence' [status]." In *Regents*, 140 S. Ct. at 1906, the Supreme Court held that rescission of the Deferred Action for Childhood Arrivals Program (DACA) was likewise reviewable despite being closely related to non-enforcement, because "the [rescinded program] does not announce a passive non-enforcement policy; it creates a program for conferring affirmative immigration relief."'

While some Subpart D provisions concern non-enforcement, their rescission is nonetheless reviewable because non-enforcement is undergirded by reviewable legal and policy judgments. For instance, § 5.65 states that "DOT will not rely on judge-made rules of judicial discretion" and therefore "[a]ll decisions by DOT to prosecute or not to prosecute an enforcement action should be based upon a reasonable interpretation of the law." As with DAPA and DACA, non-enforcement contemplated under § 5.65 reflects a broader legal view, *i.e.*, due process prohibits reliance on judicial deference in enforcement actions. *See* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1213 (2016) ("[U]nder the Fifth Amendment's guarantee of due process, [judges] at the very least are barred from engaging in systematic bias. Nonetheless, when they defer to administrative interpretation, they systematically favor executive and other governmental interpretations over the interpretations of other parties."); *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes

judges from exercising [independent] judgment[.]"). The rescission of § 5.65 is thus more than the mere exercise of non-enforcement discretion—it is a change in the Department's position on law and policy, which is reviewable under the APA.

B. Polyweave Is Likely to Succeed on the Merits Because the Rescission of Subpart D Was Arbitrary and Capricious

Defendant's rescission of Subpart D fails the APA's arbitrary and capricious standard for two reasons. *See* 5 U.S.C. § 706(2). *First*, he provided no reasoned explanation for departing form DOT's prior policy of providing due-process protection in enforcement action. *Second*, he did not account for the legitimate reliance interest of regulated persons, including Polyweave, in the rescinded due-process protections.

The APA requires agencies to engage in "reasoned decisionmaking." *Regents*, 140 S. Ct. at 1905. 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[.]" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (quoting *FCC v. Fox Television Stations Inc.*, 556 U. S. 502, 515 (2009)). 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. Here, Subpart D was needed to "ensure that DOT provides affected parties appropriate due process in all enforcement actions." 84 Fed. Reg. at 71,716. Any rescission effort must therefore explain why DOT is "disregarding" its prior due-process need. Yet the phrase "due process" does not even appear in the rescission rule, let alone receive meaningful consideration. *See* 86 Fed. Reg. 17,292.

The primary explanation offered is the revocation of Executive Order 13,892 by Executive Orders 13,990 and 13,992. *See* ECF No. 17 PageID#201-02. New Executive Orders, however, 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).[8] Otherwise, 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 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

[8] In any event, due-process rights in Subpart D were issued to codify the Bradbury Memo, 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.'").

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.

Defendant also explained his rescission of Subpart D's due-process rights by stating "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. He added that DOT may implement rescinded Subpart D protections through "internal directives" as it "deems necessary and appropriate." *Id.* 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." RE 6-1 PageID#94. As such, it is impossible to follow, let alone judge, this explanation.

The rescission of Subpart D's due-process rights is arbitrary and capricious for the additional reason that Defendant did not consider the legitimate reliance interest of regulated persons. Regulated persons develop reliance interests in regulations, and "[i]t

would be arbitrary and capricious to ignore such matters" when rescinding those regulations. *Regents*, 140 S. Ct. at 1913. This is true even where the rule being rescinded was unlawfully promulgated. In *Regents*, the Supreme Court remanded as to the rescission of DACA due to failure to account for reliance interests despite accepting the Attorney General's determination that DACA 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 interests of recipients).

Here, Polyweave fully expected to benefit from Subpart D's rights and protections when it appealed PHMSA's civil-penalty order on March 25, 2021, when Subpart D was in force. RE 1 PageID#15, ¶¶ 61; RE 6-1 PageID#100 ("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, Defendant stripped away those rights and protections without giving any consideration to those reliance interests.

C. Polyweave Is Likely to Succeed on the Merits Because the Rescission of Subpart D Failed to Follow Notice-and-Comment Procedures

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). The district court concluded otherwise, holding that because Subpart D was not issued through notice and comment, it may be withdrawn without notice and comment. RE 29 PageID#401.

Notice and comment is needed to modify a rule that is substantive, *i.e.,* a rule that "conclusively bind[s] the agency, the court, or affected private parties." *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 93 (D.D.C. 2020). Subpart D bound the agency because it commanded that: "DOT *will not rely* on judge-made rules of judicial discretion, such as the *Chevron* doctrine," 49 C.F.R. § 5.65 (emphasis added); "[t]he Department *will not initiate* enforcement actions as a 'fishing expedition,'" *id.* § 5.67 (emphasis added); "each responsible [office] *will voluntarily follow* in its civil enforcement actions the principle articulated in *Brady v. Maryland*…." *Id.* § 5.83 (emphasis added); "the Department *may not use* its enforcement authority to convert agency guidance documents into binding rules," *id.* § 5.85 (emphasis added). Defendant recognizes that Subpart D provisions bound the agency. RE 17 PageID#206 ("DOT employees were directed by the promulgated rules").

"[I]f 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." *AFL-CIO*, 466 F. Supp. 3d at 90. Here, Defendant cannot hope to show that Subpart D merely had an "incidental effect" on private parties. 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 in a DOT enforcement action. *See* 84 Fed. Reg. 71,716. Therefore, Subpart D's substantive rules are not mere "internal processes" exempt from APA notice and comment. *Texas*, 809 F.3d at 176 ("An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply.").

The fact that Subpart D was issued without notice and comment does not, as the district court believed, obviate notice and comment for its rescission because a non-notice-and-comment rule may still be legally binding and therefore substantive. The Supreme Court has said that "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking, *see* 5 U.S.C. § 553, does not automatically deprive that interpretation of" having binding legal effect. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). In *Hickman v. TL Transportation LLC*, 318 F. Supp. 3d 718, 723 (E.D. Pa. 2018), for instance, the court held Department of Labor's regulations defining "regular rate" under the Fair Labor Standards Act were legally binding despite never being promulgated though notice and comment. In

recognition of their legal binding effect, when the Department of Labor revised those "regular rate" regulations in 2019, it did so through notice-and-comment procedures. *See* Dep't of Labor, *Regular Rate Under the Fair Labor Standards Act*, 84 Fed. Reg. 68,736 (Dec. 16, 2019).

Additionally, as the Supreme Court recognized in *Regent*, 140 S. Ct. at 1913, even if an agency improperly promulgated a policy, it must still follow APA procedures when rescinding that same policy. Here, those procedures include notice and comment, which were not followed.

D. The Rescission of Subpart D Inflicts Irreparable Injury

The district court's conclusion that Polyweave suffered no irreparable injury is based entirely on its mistaken belief that Polyweave suffered no cognizable injury at all. RE 29 PageID#402 ("For the same reason that doomed Polyweave's standing arguments, it is unlikely that Polyweave is suffering any ongoing irreparable injury."). The injury inflicted on Polyweave's constitutional right to exculpatory evidence in prosecutorial proceedings by itself is sufficient to establish irreparable injury. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("When reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"). Additionally, Polyweave is being denied access to exculpatory evidence in an ongoing prosecutorial proceeding. This is not a speculative allegation. Defendant admitted that PHMSA had withheld evidence. He also has refused to affirm that no further evidence

is being withheld. Being denied information needed to defend oneself from administrative prosecution is an irreparable injury.

E. The Public Interest Favors an Injunction

While the district court did not consider the final two preliminary-injunction factors, harm to others and the public interest, *see* RE 29 PageID #403, they also favor grant of a preliminary injunction. "When the government is a party, the factors addressing the harm to the government and the public interest merge." *United States v. McGowan*, 2020 WL 3867515, at *4 (6th Cir. July 8, 2020). This is because the purpose of government is to serve the public. As such, the public interest trumps any possible setbacks to the government's equities. *See* RE 27 PageID#328-29.

Here, the public interest is served by promoting due process and the rule of law in DOT enforcement actions. DOT itself agreed, explaining that Subpart D "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. The public interest is further served by DOT having to follow APA requirements when rescinding regulations. *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 judgment of the district court should be reversed, and this Court should enter a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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 12,982 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