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NCLA Files Appeal in Lawsuit Challenging Transportation Secretary Buttigieg’s ‘Gotcha’ Investigations

Polyweave Packaging, Inc. v. Secretary of Transportation Peter Buttigieg

Washington, DC (November 16, 2021) – Late yesterday, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed its [opening brief](#) in a lawsuit against Transportation Secretary Peter Buttigieg at the U.S. Court of Appeals for the Sixth Circuit. NCLA’s appeal against Secretary Buttigieg in his official capacity pushes back against the agency’s efforts to eliminate due process rights for defendants in its enforcement actions.

NCLA represents Polyweave Packaging, Inc., a Delaware corporation that makes packaging for the safe transportation of hazardous materials. In March 2021, the U.S. Department of Transportation (DOT) served Polyweave a civil-penalty order for alleged regulatory violations. Polyweave appealed, triggering certain due process rights under the Department’s then-applicable regulations, including, *e.g.*, the right to obtain exculpatory evidence held by DOT under principles articulated by the U.S. Supreme Court in *Brady v. Maryland*. One week later, Buttigieg [revoked](#) those regulations, forcing Polyweave to defend itself with diminished due process protections.

By revoking DOT’s rule, Secretary Buttigieg took away rights and procedural steps put in place to cure deep-seated institutional abuse of due process and restore fundamental fairness. NCLA argues that the U.S. District Court for the Western District of Kentucky erred in [ruling](#) that the rescission of these due process regulations inflicted no injuries upon Polyweave, even though DOT admitted to withholding evidence—including a 600-page draft investigative report—that the rescinded regulations required to be disclosed. The court also mistakenly held that the Secretary has “absolute” power to revise or rescind any enforcement-related regulations.

On February 15, 2019, DOT’s General Counsel issued a memorandum acknowledging and responding to DOT’s past failures. 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” to support enforcement actions; and conducted “fishing expeditions” to find potential violations absent sufficient evidence to support an assertion of a violation. The Bradbury Memo strongly influenced the creation of the now-rescinded due process regulations.

Once granted, the government does not have lawful authority to take away a business’s due process and procedural rights by fiat. The Sixth Circuit should reverse the district court’s judgment and grant Polyweave a preliminary injunction restoring due process of law, especially its right to obtain exculpatory evidence from DOT.

NCLA released the following statements:

“As with any law enforcement agency, the Department of Transportation must exercise its vast investigative and prosecutorial powers in accordance with the due process rights of those whom it accuses of violations. It cannot

codify due process rights in regulations on which Polyweave relied only to pull the rug out from under Polyweave by rescinding those rights immediately after commencing enforcement proceedings.”

— **Sheng Li, Litigation Counsel, NCLA**

“Secretary Buttigieg withdrew due process protections from Polyweave and all other defendants in DOT enforcement proceedings arbitrarily. There is no excuse for this lawless ransacking of rights in violation of the Administrative Procedure Act. The Sixth Circuit should force DOT to restore the due process of law, and it should recognize that *Brady* rights to exculpatory materials fully extend to administrative enforcement proceedings.”

— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

For more information visit the case page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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