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 Reply Brief

Oral Argument Requested

February 25, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUPPLEMENTAL FACTS

Polyweave Packaging, Inc ("Polyweave") provides supplemental facts that it learned after filing its opening brief. As set forth in that brief, Defendant's rescission of Subpart D deprived Polyweave of, *inter alia*, the right to exculpatory evidence in an enforcement proceeding brought by the Pipeline and Hazardous Material Safety Administration ("PHMSA") of the Department of Transportation ("DOT" or "Department"). Polyweave's preliminary-injunction brief specifically warned that, if PHMSA were to issue an adverse decision before disclosing all exculpatory evidence, Polyweave would be forced to proceed on appeal without that evidence in the record. RE6-1 PageID#100. This irreparable injury, which Defendant claimed was speculative, has now come to pass.

After initially denying any evidence was omitted from the casefile, PHMSA admitted to withholding evidence after being caught red-handed by Polyweave. RE24 PageID#274; RE24-1 Page#277-79. PHMSA then refused Polyweave's request to affirm that no additional evidence is being withheld and issued an adverse decision against Polyweave on October 18, 2021. PHMSA, however, did not inform Polyweave or its counsel until November 18, 2021—*after* Polyweave filed its opening brief in this case on November 15, 2021. PHMSA served Polyweave with that decision on November 19, 2021, and Polyweave timely petitioned for judicial review on December 17, 2021. PHMSA inspectors have since repeatedly requested further information from Polyweave, which raises the specter of future enforcement actions against the company.

SUMMARY OF ARGUMENT

Defendant's lead argument that 49 U.S.C. § 5127 removes subject-matter jurisdiction is misguided because that provision's plain text makes clear it does not apply to regulatory actions taken under 49 U.S.C. § 322, which is the basis for Subpart D. His standing arguments are likewise meritless for three reasons. *First*, the rescission of Subpart D's guarantee of *Brady* disclosure inflicts a constitutional due-process harm, and therefore is a cognizable injury. *Second*, the rescission of other Subpart D due-process protections bears a close relationship to the traditionally recognized injury of due-process violation and is thus cognizable. *Third*, Polyweave's informational and pocketbook injuries are concrete and not speculative because they already occurred and are ongoing.

On the merits, the Court must reject Defendant's attempt to wield unlimited and unreviewable discretion to issue regulations under 49 U.S.C. § 322. Otherwise, that statute would be a standardless and unconstitutional delegation of legislative power. Subpart D's rescission is therefore subject to arbitrary and capricious review under the Administrative Procedure Act ("APA"), which it fails. The rescission is also subject to the APA's notice-and-comment requirement, which Defendant did not attempt to meet. Polyweave thus has a substantial likelihood of success on the merits. Polyweave further suffers irreparable harm because the rescission of Subpart D inflicts constitutional injuries and because the very informational and pocketbook injuries Polyweave alleged have come to pass and are ongoing.

ARGUMENT

I. SECTION 5127 DOES NOT GRANT EXCLUSIVE JURISDICTION OVER POLYWEAVE'S CHALLENGE TO THE RESCISSION OF SUBPART D

Defendant quotes 49 U.S.C. § 5127(c) to argue that an appellate court "has exclusive jurisdiction, as provided in [the APA], to affirm or set aside any part of the Secretary's final action." Appellee's Br. at 18 (alteration in original). But he omits § 5127(a)'s limitation on this exclusive jurisdiction to "a final action of the Secretary *under this chapter*[.]" (Emphasis added). The referenced chapter is Chapter 51 of Title 49—Transportation of Hazardous Material. As Defendant himself argued before the district court: "Authority for issuing and amending Subpart D is found solely in 49 U.S.C. § 322," RE17, PageID#198, which resides in an entirely different chapter, namely 49 U.S. Code Chapter 3—General Duties and Powers. There is no "ambiguity as to whether jurisdiction lies with a district court or court of appeal," as Defendant claims, *see* Appellee Br. at 19 (quoting *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986)), because § 5127's plain text conclusively states exclusive jurisdiction does not extend to the rescission of Subpart D.

Defendant's invocation of the "inescapably intertwined" doctrine changes nothing. "The purpose of the inescapable-intertwinement doctrine is to prevent a plaintiff from circumventing the exclusive jurisdiction of the court of appeals by collaterally attacking an administrative order in a federal district court." *Mokdad v. Lynch*, 804 F.3d 807, 812 (6th Cir. 2015) (cleaned up). This case does not circumvent the

appellate court's direct-review jurisdiction under 49 U.S.C. § 5127. "A claim is inescapably intertwined [with an agency order] if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Id.* at 813 (alteration in original). No appellate court has direct-review jurisdiction with respect to the rescission of Chapter 3 regulations, such as Subpart D, because the direct-review jurisdiction is explicitly limited to final actions taken under Chapter 51. 49 U.S.C. § 5127(a).

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

A. Subpart D's Rescission Injures Polyweave's Constitutional Due Process Right to Exculpatory Evidence

Defendant does not dispute the district court's conclusion that rescission of Polyweave's right under 49 C.F.R. § 5.83 to exculpatory evidence in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), would inflict a cognizable injury if such a right is constitutional in nature. *See* RE29 PageID#380 ("[T]he deprivation of a constitutional right, standing alone, can establish an Article III injury-in-fact."). He further concedes that "[t]he extent to which *Brady*-like obligations extend to civil cases is [at least] an open question." *Kashem v. Barr*, 941 F.3d 358, 386 (9th Cir. 2019) (requiring disclosures of exculpatory evidence to individuals placed on No-Fly List), quoted at Appellee's Br. at 34.

Brady disclosures are not constitutionally required in *all* civil cases, just enforcement proceedings where the government seeks to punish an accused for

allegedly violating the law. That is because *Brady* is grounded in constitutional due process, which requires fundamental fairness before an accused can be "deprived of life, liberty, or property" by the government. U.S. Const. Amend. V, XIV. Deprivation of *property* occurs not only in criminal proceedings, but also in many administrative enforcement proceedings. *Brady* obligations derive from the principle that due process requires the government to ensure "justice is done" when punishing an accused for violating the law, rather than win at all costs. *Brady*, 373 U.S. at 87. Federal courts have recognized this principle applies regardless of whether the proceeding is labeled "criminal" or "civil." *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1383 n.5 (D.N.M. 1974) ("A defendant in a civil case brought by the government should be afforded no less due process of law."); *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("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."). This principle should likewise apply regardless of whether the Department of Justice or the Department of Transportation prosecutes the proceeding.

Defendant mischaracterizes administrative decisions applying *Brady* in civil enforcement cases as mere choices "federal independent agencies have voluntarily made." Appellee's Br. at 34. These agencies, however, do not regard *Brady* as an optional measure. The Commodity Futures Trading Commission unmistakably characterized *Brady* as "a rule of fairness and minimum prosecutorial obligation" that is "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 called *Brady* a requirement of "fundamental fairness" in civil enforcement cases. *In re Rick A. Jenson*, 1997 WL 33774615, at *2 (F.D.I.C. Apr. 7, 1997). These categorical statements confirm fundamental fairness requires federal agencies to make *Brady* disclosures.

Defendant's assertion that federal and administrative cases applying *Brady* in civil enforcement cases "cannot bear the weight Polyweave assigns to them" is conclusory and not accompanied by any reasoning why those cases are wrong. Appellee's Br. at 34. His reliance on *Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 138-39 (4th Cir. 2014), cited at Appellee's Br. at 34-35, to assert that "courts have only in rare instances found *Brady* applicable in civil proceedings" misses the point because *Fox* was a non-enforcement civil case between private parties. Such cases do not implicate due-process obligations and are subject to discovery rules that are unavailable in agency adjudications, *see McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable.").

The non-enforcement civil cases Defendant cites are thus irrelevant to whether *Brady* is required to ensure fundamental fairness in administrative enforcement cases. *Fox* involved a widow's claim against a mining company for survivor benefits. 739 F.3d at 134. The fact that *Brady* did not govern a case between two private parties says

nothing about the need for disclosure where the government acts as a prosecutor. Defendant's reliance on *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990), is likewise misplaced because that was an employee-discharge case. Moreover, Defendant omits *Swank*'s key holding. In that case, a police chief fired an officer for a midnight motorcycle ride with a teenage girl. The chief took the girl's statement, which confirmed there was no romantic relationship, but withheld that statement at the discharge hearing. *Id.* at 1254. Although the court assumed without deciding that *Brady* is not generally required in employee-discharge cases, it nonetheless held that failure to disclose the girl's exculpatory statement at issue violated the officer's due-process right to a fair hearing. *Id.* at 1254-55. To the extent *Swank* is relevant, it supports the government's obligation to uphold fundamental fairness by disclosing exculpatory evidence.

Defendant notably does not endorse the district court's mistaken position that *Brady* applies "only … where a person's liberty is at stake," RE29 PageID#380 (citation and quotation marks omitted), and instead agrees with Polyweave that *Brady* applies in civil enforcement cases that, "like criminal proceedings[,] are 'indisputably prosecutorial.'" *Id.* at 35. But he refuses to apply *Brady* in "garden-variety administrative proceeding[s]," *id.*, even though such proceedings are indisputably prosecutorial. To start, he claims *Brady* does not apply in Polyweave's case because the "modest civil penalty at stake" of "$14,460" is too small. *Id.* at 35-36. A distinction based on the amount at stake, however, does not explain why *Brady* is constitutionally required in cases involving far smaller criminal fines, including fines in the range of hundreds of

dollars. *See* Appellant's Br. at 17-18 (listing fines). The Due Process Clause guarantees fundamental fairness regardless of how much property is being deprived. If withholding exculpatory evidence is unfair in a legal proceeding where stakes are large, it would remain unfair even when stakes are smaller.

Next, Defendant unpersuasively seeks to limit *Brady* to civil "case[s] that involved an unusual set of circumstances," as referenced in *in re Extradition of Drayer*, 190 F.3d 410, 414 (6th Cir. 1999), quoted at Appellee's Br. at 35. The "unusual set of circumstances" in *Drayer* simply referred to a prior case in which "the United States had conducted its own investigation of the offense underlying the request for extradition." *Id.* at 414 (citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353-54 (6th Cir. 1993)); *see also id.* (*Brady* disclosure unnecessary because "[n]o such investigation occurred here"). While the U.S. government's own investigation may be "unusual" in the extradition context—the foreign government seeking extradition typically provides evidence—such investigation is routine in civil enforcement actions like the one launched against Polyweave. Thus, if *Brady* were limited to the "unusual" circumstances referenced in *Drayer*, disclosure would be constitutionally required in nearly all civil enforcement proceedings—that is, whenever the "government conducted its own investigation of the offense." 190 F.3d at 414.

Moreover, while federal investigations and prosecutions of a person to impose civil rather than criminal penalties may have been comparatively "unusual" in the 1990s, that is no longer true today. A 1992 law review article quoted in Justice Gorsuch's

concurrence in *Sessions v. Dimaya* highlighted the then-emerging trend of "punitive civil sanctions … rapidly expanding." 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (emphasis in original) (quoting Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1798 (1992)). The article explained that "[p]unitive civil sanctions are replacing a significant part of the criminal law … because they carry tremendous punitive power" and "since they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions." *Id.* This trend was just beginning in 1993, when this Court last considered the need for *Brady* in a civil enforcement case. *See Demjanjuk*, 10 F.3d at 354. Three decades later, the federal government has vastly increased its use of civil penalties to circumvent procedural protections. The creation of PHMSA in 2004 and grant of authority in that agency to impose civil penalties for regulatory infractions is just one example.

In recognition of this perverse trend, Justice Gorsuch cautioned lower courts against limiting procedural protections in civil enforcement cases. *Dimaya*, 138 S. Ct. at 1204 (Gorsuch, J. concurring). Consistent with that instruction, this Court refused to limit the due-process right to confront one's accuser to the criminal context, holding in *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018), that such right also applies in university disciplinary proceedings. There is likewise no basis to confine *Brady* to high-dollar, criminal, or "unusual" cases. Doing so would only encourage administrative agencies

to continue expanding civil penalties as a workaround to evade constitutional due process.

Defendant is correct that *Demjanjuk*, where this court applied *Brady* in a civil enforcement case, involved the denaturalization of someone who obtained his citizenship by allegedly misrepresenting his role as a concentration camp guard in the commission of mass murder. *See* Appellee's Br. at 35. But there is no reason to confine *Brady*, nor any other constitutional due-process protection, to that narrow context. The crux is whether the underlying proceeding was fair. If the government's withholding of exculpatory evidence in its possession rendered the denaturalization proceeding in *Demjanjuk* fundamentally unfair, it is unclear how the same practice would be fair if the government attempted, for example, to denaturalize someone whom it accused of obtaining citizenship through other forms of deceit.

As noted above, this Court has held that due-process confrontation rights apply in university disciplinary proceedings even when the accused does not face any deprivation of liberty interests. *Baum*, 903 F.3d at 578; *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017). They apply because, regardless of the seriousness of the accusation and potential punishment, the inability for the accused to confront his accusers renders a proceeding "fundamentally unfair." *Id.* The same is true where an accused is denied exculpatory evidence in the prosecutor's possession. Hence, this Court should recognize the constitutional due-process right to exculpatory evidence in

the administrative enforcement hearing context and hold that the rescission of § 5.83's guarantee of such right inflicted a cognizable injury.

B. Rescission of Subpart D Rights Inflicted Concrete Injuries Because Those Rights Safeguard Constitutional Due Process

Defendant's argument that "[a] mere right of action is not enough" for an Article III injury, Appellee's Br. at 38 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021)), is misplaced because Subpart D is not the source of a right of action. Rather, the APA provides the right of review. *See* 5 U.S.C. § 702. Subpart D's due-process rights, and rescission thereof, constitute the substance being reviewed.

A DOT rule that, for instance, censored regulated entities would certainly inflict a cognizable "free speech" injury. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). The loss of Subpart D's due-process rights likewise amounts to a cognizable due-process injury under *TransUnion*, which clarified that Article III "does not require an exact duplicate in American history and tradition" for an injury to be cognizable. 141 S. Ct. at 2204. In that case, the Supreme Court concluded failure to ensure "fair and accurate" credit reporting inflicted a cognizable injury because it bears a close relationship to the traditionally recognized injury of defamation. *Id.* at 2209. This was so even though the reports themselves were not defamatory. *Id.* Similarly, even if Subpart D's due-process rights are not "exact duplicate[s]" of previously recognized

constitutional requirements, they nonetheless bear a sufficiently "close relationship" to constitutional due process such that their deprivation constitutes an Article III injury.

The district court accepted that loss of rights bearing a close relationship to traditionally recognized harms can constitute an injury-in-fact, but it drew a distinction based on Subpart D rights being promulgated by regulation as opposed to Congress. *See* RE29 PageID#381 ("[C]ongressional authorization [for the right] is a *necessary* predicate for a court to recognize an [Article III] injury."). Defendant does not endorse this mistaken view and instead advances a new and unpersuasive claim that Subpart D did not confer any rights in the first place. Specifically, his appellate brief argues—for the first time—that rescission inflicted no injury because 49 C.F.R. § 5.111 disclaims that Subpart D "does not[] create any right or benefit, substantive or procedural enforceable in law or in equity by any party against the United States."[1] Identical boilerplate language appears in the Bradbury Memo and Executive Order 13,892. *See* Appellee's Br. at 31-32 n.8 (citing RE1-2 PageID#34 and RE1-3 PageID#39).

This newly raised argument is squarely foreclosed by *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). In that seminal case, the EPA argued a document it promulgated was not an enforceable regulation because the last paragraph contained a "boilerplate" disclaimer stating the document "cannot be relied upon to

[1] Defendant did not raise 49 C.F.R. § 5.111 to support his subject-matter jurisdiction argument before the district court. Rather, the only time he cited that provision was a footnote to support his argument on the merits regarding the need for notice and comment. RE17 PageID#206 n.7.

create any rights enforceable by any party." *Id.* The D.C. Circuit rejected this argument because the document "from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates." *Id.* Here too, except for the last paragraph in § 5.111, Subpart's D "commands," "requires," "orders" and "dictates." For example:

- "The authority to prosecute the asserted violation and the authority to impose monetary penalties, if sought, *must be* clear in the text of the statute." 49 CFR § 5.63 (emphasis added).

- "DOT *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." § 5.65 (emphasis added).

- "All documents initiating an enforcement action *shall* ensure notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken to allow an opportunity to challenge the action and to avoid unfair surprise." § 5.69 (emphasis added).

- "[E]ach responsible OA or component of OST *will voluntarily follow* in its civil enforcement actions the principle articulated in *Brady v. Maryland*…." § 5.83 (emphasis added).

- "[T]he 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." § 5.85 (emphases added).

The result in *Appalachian Power* is unsurprising. If an agency could evade judicial review of otherwise binding regulations with a boilerplate disclaimer, then the APA's right to review would be rendered meaningless. Cases Defendant cites do not alter this conclusion because none pertains to the enforceability of an agency's regulation. Rather,

they all concern the enforceability of *executive orders* that direct agencies to conduct economic analysis during rulemaking. *See* Appellee's Br. at 32-33 (citing *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326 (11th Cir. 2021) (executive orders "which direct agencies to conduct cost-benefit analyses of regulatory actions and alternatives" were unenforceable); *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) (executive orders "which require that the agency perform cost benefit analyses for each proposed regulation" were unenforceable); *Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986) (executive order directing EPA to perform regulatory impact analysis was unenforceable)).

The Executive Branch may use boilerplate language to clarify the enforceability and reviewability of its own executive orders. But it cannot "clarify" or delimit the right of judicial review under the APA. Permitting an executive agency to unilaterally extinguish the Congressionally created right to judicial review simply by copying and pasting a boilerplate disclaimer would violate the Constitution's separation of powers. Thus, Defendant's reliance on § 5.111's boilerplate disclaimer is unavailing.

C. The Rescission of Subpart D Inflicts Informational and Pocketbook Injuries

Unlike the district court, Defendant does not dispute that Polyweave alleged informational and pocketbook injuries. He instead relies on this Court's statement in a case filed against Tennessee election officials to assert that "a claimant must show a present ongoing harm or imminent future harm." *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) ("*Hargett I*"), cited at Appellee's Br. at 27. But

that showing of ongoing or future harm must be made when Polyweave filed its complaint because standing "depends on the facts as they exist when the complaint is filed." *Lujan v Defenders of Wildlife*, 504 U.S. 555, 571 n.4 (1992). Eighteen months after *Hargett I*, this Court made clear in another case against Tennessee election officials that "[s]tanding is determined *at the time the complaint is filed*." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548 (6th Cir. 2021) ("*Hargett II*") (quoting *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012)) (Emphasis added).

Polyweave was required to allege future informational and pocketbook injuries *when it filed its complaint* on May 19, 2021. Whether subsequent events moot a case is a different analysis altogether. *Id.* ("Standing and mootness, albeit related, are distinct doctrines with separate tests to evaluate their existence at different times of the litigation."). "The burden of demonstrating mootness is a heavy one," and falls on Defendant. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Defendant did not attempt to meet this burden before the district court. Nor does he raise mootness on appeal.[2] Thus, the only issue before this Court is whether the May 19, 2021

[2] As explained in Polyweave's opening brief, this case is not moot as a result of "voluntary cessation." Appellant's Br. at 32-33. Mootness is further inappropriate because PHMSA's issuance of a final decision against Polyweave before this litigation concluded, especially when combined with PHMSA inspectors' subsequent requests for information from Polyweave, demonstrates the injury is capable of repetition yet evading review. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) ("This exception applies when (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.") (Citation and internal quotation marks omitted).

Complaint alleged that Polyweave would suffer informational and pocketbook injuries as a result of Subpart D's rescission. The Complaint clearly did so. RE1 PageID#14-15, ¶¶58-60. Indeed, Defendant's admission that he withheld an early draft report, and Polyweave's expenditure of resources to obtain that admission, proved Polyweave's allegations far beyond what is required to survive a motion to dismiss. *See* RE24 PageID#273-74; RE24-1 PageID#277-79.

Defendant's skepticism of the withheld report's exculpatory value is not well taken. *See* Appellee's Br. at 28. To start, he ignores the favorable inference to which Polyweave is entitled at the motion-to-dismiss stage. He does not dispute that portions of the withheld report that were originally dated July 2015 were re-dated November 2015 when included in the final report, which undermines the credibility of PHMSA inspectors. He instead defends this unexplained redating practice by asserting that "a different date for the same violation is hardly exculpatory." Appellee's Br. at 28. As Defendant knows full well, one of Polyweave's defenses in the enforcement proceeding is that the five-year federal statute of limitations had expired. RE27 PageID#310 (citing 28 U.S.C. § 2462). The re-dating proves the statute of limitations for civil penalties began to run months earlier. Such evidence is indubitably exculpatory. *Id.*

Under the favorable motion-to-dismiss standard, Polyweave's complaint properly alleged informational and pocketbook injuries arising from rescission of Subpart D's disclosure rights. Defendant's admission to withholding evidence—which

must be considered exculpatory under the same motion-to-dismiss standard—proves those allegations.[3]

III. POLYWEAVE IS ENTITLED TO A PRELIMINARY INJUNCTION

A. Section 322 Does Not Grant Unlimited Discretion to Regulate

Defendant makes the remarkable claim that 49 U.S.C. § 322(a)'s "may prescribe regulations" language confers unlimited and unreviewable discretion to regulate. The sole supporting authority he musters is an offhand hypothetical scenario raised as dicta in *Barrios Garcia v. DHS*, 14 F.4th 462 (6th Cir. 2021), *amended and superseded on denial of reh'g*, No. 21-1037, 2022 WL 402190 (6th Cir. Feb. 10, 2022), cited at Appellee's Br. at 41.

In *Barrios Garcia*, noncitizens sued the Department of Homeland Security ("DHS") for delaying their work visas. *Id.* at *1. In rejecting DHS's argument that it had unlimited discretion to grant visas under the existing statute, this Court mused that a hypothetical statute stating that DHS "may grant work authorization to noncitizens" might confer the same type of non-enforcement discretion as in *Heckler v. Chaney*, 470 U.S. 821 (1985). *Id.* at *11. This hypothetical comparison with *Heckler*, even if valid, does not support Defendant's interpretation of § 322(a) because "*Heckler* does not apply to agency rules" such as Subpart D. *Texas v. Biden*, 20 F.4th 928, 978 (5th Cir. 2021), *cert. granted*, No. 21-954 (Feb 18, 2022).

[3] Informational and pocketbook injuries are ongoing because Polyweave is required to proceed on appeal under an incomplete and unfavorable record.

Heckler held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 823. This type of prosecutorial discretion can only be exercised on a case-by-case basis and therefore does not apply to rules of general applicability. In *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1906 (2020), and *Texas*, 20 F.4th at 978, for instance, the Supreme Court and the Fifth Circuit held that rescissions of enforcement-related *rules* were reviewable because *Heckler* did not apply.[4] The Supreme Court further held that a denial of a petition for rulemaking, *i.e.*, the decision not to make a rule, is reviewable in *Massachusetts v. EPA*, 549 U.S. 497 (2007). As the Fifth Circuit asked rhetorically, "if the decision not to make a rule is subject to [judicial] review under *Massachusetts*, how could the decision to make a rule be entirely exempt from review under *Heckler*?" *Texas*, 20 F.4th at 984.

Defendant's claim to unreviewable discretion is based on his assertion that the authorizing statute is "standardless." Appellee's Br. at 41 (quoting *Barrios Garcia*, 14 F. 4th at 481). But if that were true, there would be no intelligible principle guiding

[4] Defendant's attempt to distinguish *Regents* on the basis that it involved "a program for conferring affirmative immigration relief," Appellee's Br. at 44 (citing *Regents*, 140 S. Ct. at 1906), fails because Subpart D likewise confers affirmative relief by guaranteeing due-process rights in enforcement actions. In any event, "to be reviewable agency action, [a rule] need not directly confer public benefits." *Texas v. United States*, 809 F.3d 134, 167 (5th Cir. 2015) (citing *Heckler*, 470 U.S. at 832).

Defendant's regulatory discretion. *See Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472 (2001) ("[W]e repeatedly have said that when Congress confers decision making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.") (Cleaned up). Defendant's interpretation of 49 U.S.C. § 322 as being "standardless" would require this Court to strike down that statute as an unconstitutional and "sweeping delegation of legislative power." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). Thus, "a construction of [§ 322] that avoids this kind of open-ended grant should certainly be favored." *Id.*

Even within *Heckler*'s enforcement (as opposed to rulemaking) context, unreviewable discretion is limited to inaction. "[W]hen an agency refuses to act it generally does not exercise its coercive power," and therefore, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict." *Heckler*, 470 U.S. at 832. This "presumption against judicial review of decisions *not to take* enforcement action protects agency discretion in allocating its resources to choose their enforcement." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016) (emphasis added). Unreviewable discretion, however, does not obtain where plaintiffs "ask the court to review whether the [agency] acted arbitrarily and capriciously in *taking* enforcement actions[.]" *Id.* (emphasis added).

Thus, even if *Heckler* applies in the rulemaking context—it does not—any discretion conferred by § 322(a)'s "may prescribe" language must be limited to the

decision *not* to regulate. This is precisely how "may promulgate" was interpreted in *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 253 (2d Cir. 2020), which explained that language was "permissive" only in the sense that "Congress gave the [agency] the authority to promulgate rules … or to make no rules at all." *Id.* Once the agency decides to regulate, the *content* of the rule is still reviewable. This conclusion is supported by routine judicial review of regulations issued under statutes providing that an agency "may" promulgate regulations. Polyweave's opening brief cited two such cases as illustrative examples. Appellant's Br. at 39-40 (citing *XY Planning*, 963 F.3d at 255, and *Nat'l Corn Growers Ass'n v. EPA*, 613 F.3d 266 (D.C. Cir. 2010)).

Defendant unpersuasively responds that these and similar cases did not specially address the "committed to agency discretion" question. Perhaps that question was not raised for the simple reason that SEC and EPA did not want to get laughed out of court for asserting unlimited and unreviewable regulatory power. Nor did they want their authorizing statutes to be struck down under the nondelegation doctrine as standardless delegations of legislative power. The self-evident conclusion is that § 322(a)'s "may prescribe" language does not confer unlimited discretion, and thus the rescission of Subpart D is reviewable under the APA's arbitrary and capricious standard.

B. Defendant's Explanations for Rescinding Subpart D Are Arbitrary and Capricious

As explained in Polyweave's opening brief, 49 C.F.R. Part 5 contains multiple subparts: Subpart B concerned rulemaking, Subpart C concerned guidance, and Subpart

D concerned enforcement. *See* Appellant's Br. at 4. Defendant cites four reasons in the final rule's preamble to explain his rescission of Subpart D. Appellee Br. at 45 (citing 86 Fed. Reg. 17,293). But only one of these four rationales is with "regard to the regulation on enforcement matters" in Subpart D, indicating the remaining three are directed toward other subparts and thus are irrelevant. For the sake of completeness, Polyweave explains why all four reasons are deficient.

The first rationale is that portions of Part 5 pertain "solely … to [DOT's] internal operations and thus need not be codified in the Code of Federal Regulations." 86 Fed. Reg. 17,293, cited at Appellee's Br. at 45. This explanation is inadequate because Subpart D does not pertain solely to internal operations, but rather provides binding guarantees of due-process rights and protections. Agency regulations are binding on agencies as well as on the public. *See Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959); *Service v. Dulles*, 354 U.S. 363, 373 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

Second, Defendant claims certain provisions of 49 CFR Part 5 are "duplicative of existing procedures." 86 Fed. Reg. 17,293, cited at Appellee's Br. at 45. The final rule, however, did not identify any such redundant internal procedures nor match those procedures with Subpart D rights that are allegedly duplicative. Nor does Defendant's brief undertake such an attempt.

The third preamble rationale is the only one that on its face concerns Subpart D's enforcement-related rights. It states "many" of those rights are "derived from the

[APA] and significant judicial decisions and thus need not be adopted by regulation in order to be effective." 86 Fed. Reg. at 17,293, cited at cited at Appellee's Br. at 45. This explanation is inadequate because Defendant did not identify a single APA requirement or judicial decision that would make redundant any given Subpart D rule. Moreover, the explanation directly contradicts the Department's prior position that adoption by regulation of Subpart D rights was necessary "to ensure that DOT enforcement actions satisfy principles of due process." 84 Fed. Reg. 71,715. "[T]he Department needed a more reasoned explanation for its decision to depart from its [pre]existing enforcement policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223 (2016). Finally, "many" means not all. Thus, Defendant impliedly concedes that at least some of the rescinded rights need to be adopted by regulation to be effective but did not specify which ones.

Defendant's fourth and final preamble rationale is "to effectively and efficiently promulgate new Federal regulations and other actions to support the objectives stated in E.O. 13990." 86 Fed. Reg. at 17,293, cited at Appellee's Br. at 45. That executive order directs agencies to rescind obstacles to "improv[ing] public health and protect[ing] the environment." 86 Fed. Reg. 7,037. There is no explication in the final rule, nor in Defendant's brief, regarding how disregarding due-process rights in Subpart D is related in any way to improving public health or the environment. In any event, executive orders do not justify agency rulemaking. Appellant Br. at 44-45 (citing *California v. Bernhardt*, 472 F. Supp. 3d 573, 605 (N.D. Cal. 2020)).

Defendant's explanations for why he was not required to account for legitimate reliance interests are also unpersuasive. To start, his assertion that "Subpart D … was in effect for only 18 months," Appellee's Br. at 45, is irrelevant because reliance interests can develop in much shorter spans, *see Texas v. United States*, 524 F. Supp. 3d 598, 608 (S.D. Tex. 2021) (recognizing legitimate reliance where the federal government reversed course on immigration policy after only 12 days). Next, 49 C.F.R. § 5.111's boilerplate disclaimer does not prevent legitimate reliance. *See* Appellee's Br. at 45-46. As explained above, a boilerplate disclaimer that a regulation "cannot be relied upon to create any rights enforceable by any party" does not negate the enforceability of otherwise binding language. *Appalachian Power*, 208 F.3d at 1023.

Finally, Defendant makes the nonsensical double-negative assertion that, "the rescission itself did not mean [Subpart D's] various procedural protections no longer apply." Appellee's Br. at 46. This claim only deepens the extent of the rescission's arbitrariness and capriciousness. Defendant must at least "display awareness that [he] *is* changing position" when rescinding Subpart D. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). His inability (or unwillingness) to explain after one year of litigation whether and when Subpart D's due-process protections apply reveals a failure to meet even *FCC*'s minimal threshold.

C. Subpart D Was Not an Internal Agency Guideline that Could Be Rescinded Without Notice and Comment

Defendant's insistence that labelling Subpart D "procedural" makes it non-substantive turns administrative law on its head. It is well established that the content of a rule—*i.e.*, whether it is binding and affects rights—determines its status as procedural or substantive, not the agency's label. *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). Defendant does not, and cannot, dispute that Subpart D uses binding language to confer due-process protections on regulated parties. Hence, those provisions are substantive and cannot be rescinded without notice and comment. *Id.*

Defendant also asserts that Subpart D is non-substantive because it was issued without notice and comment in 2019. But as Polyweave explained, the Supreme Court explicitly stated that rules issued without notice and comment could nonetheless be substantive. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002), cited at Appellant's Br. at 48. And federal agencies have used notice and comment to revise substantive rules that were not originally promulgated through notice and comment. *E.g.*, 84 Fed. Reg. 68,736, cited at Appellant's Br. at 49. Defendant has no response to these examples.

In any event, Subpart D's promulgation without notice and comment in 2019 was innocuous. The purpose of notice and comment is to give regulated entities an opportunity to object, and no entity would reasonably object to Subpart D's guarantee of due-process rights. It is thus analogous to direct final rules that agencies routinely promulgate without formal notice and comment when no one is expected to lodge

substantive objections. In stark contrast, Subpart D's 2021 rescission takes away due-process rights, which leaves regulated persons with obvious reasons to object. Notice-and-comment procedures were needed to ensure the Department understands and responds to those objections.

D. Polyweave Did and Will Continue to Suffer Irreparable Harm Absent an Injunction

Polyweave easily satisfies the irreparable-harm requirement for a preliminary injunction because the rescinded Subpart D rights either are constitutional (*i.e.*, *Brady* right to exculpatory evidence) or bear a "close relationship" to constitutional due-process protections. Such constitutional injuries always constitute irreparable harm. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Moreover, the precise irreparable harm anticipated in Polyweave's complaint has now occurred. Polyweave specifically warned that, if PHMSA were to render a final decision without following its obligation to disclose all exculpatory evidence, Polyweave would be forced to appeal the decision on an incomplete and unfavorable administrative record. RE1 Page#14-15, ¶¶58-60. PHMSA's final ruling against Polyweave made that prediction a reality, and Defendant cannot now assert such irreparable harm is somehow speculative.

CONCLUSION

The judgment of the district court should be reversed, and this Court should enter a preliminary injunction restoring Subpart D.

February 25, 2022 Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	Description	PageID#'s
1	Complaint (May 19, 2021)	1-20
1-2	Ex. 1: Memorandum of Steven G. Bradbury, General Counsel, Department of Transportation (Feb. 15, 2019)	22-35
1-3	Ex. 2: Executive Order 13892 (Oct. 9, 2019)	36-40
1-4	Ex. 3: Final Rule, Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71714 (Dec. 27, 2019)	41-61
1-5	Ex. 4: Final Rule, Administrative Rulemaking, Guidance, and Enforcement Procedures, 86 Fed. Reg. 17292 (Apr. 2, 2021)	62-66
6-1	Plaintiff's Memorandum in Support of Preliminary Injunction (May 19, 2021)	83-103
17	Defendant's Motion to Dismiss and Opposition to Motion for Preliminary Injunction (June 14, 2021)	177-210
24	Defendant's Notice Regarding Administrative Proceedings, with exhibits (July 15, 2021)	273-285
24-1	Email Exchange between Polyweave and PHMSA regarding PHMSA's Withholding of Evidence (July 15, 2021)	277-285
27	Plaintiff's Opposition to Motion to Dismiss and Reply to Motion for Preliminary Injunction (July 22, 2021)	290-331
28	Defendant's Reply to Motion to Dismiss (August 6, 2021)	349-373
29	Memorandum Opinion and Order (Sept. 2, 2021)	374-403
30	Judgment (Sept. 2, 2021)	404
31	Notice of Appeal (Oct. 1, 2021)	405-406

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 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 32(a)(7) because it contains 6,353 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