IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

gh PACKAGE PRODUCT TESTING AND CONSULTING, INC.,

Plaintiff,

v.

PETER M. BUTTIGIEG, Secretary, U.S. Department of Transportation, in his official capacity

-and-

TRISTAN BROWN, Acting Administrator, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation

-and-

U.S. DEPARTMENT OF TRANSPORTATION,

Defendants.

Civil Case No. 1:23-cv-00403-MRB

Hon. Michael R. Barrett
U.S. District Court Judge

Hon. Karen L. Litkovitz
U.S. Magistrate Judge

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

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INTRODUCTION

Defendants' motion to dismiss falters out of the gate. The Supreme Court's unanimous decision in *Axon Enter., Inc. v. FTC and SEC v. Cochran*, 598 U.S. 175 (2023) ("*Axon/Cochran*") squarely forecloses their primary subject-matter jurisdiction argument based on 49 U.S.C. § 5127. There, the Supreme Court made clear that statutory review schemes for final agency action, such as Section 5127, do not strip district courts of jurisdiction to hear Plaintiff's claims challenging the inherent *legitimacy* of an ongoing agency proceeding, as opposed to the proceeding's *outcome*.

Defendants' arguments on the merits are likewise unavailing. Secret appointments of Department of Transportation ("DOT") adjudicators frustrate the Appointments Clause's public-accountability objective, and multi-layered removal protection prevents Chief Executives from controlling the adjudicators' exercise of executive power. Moreover, DOT's attempt to deprive Plaintiff of private property in a jury-less Article II tribunal violates Article III's vesting of judicial powers in federal courts and tramples Plaintiff's Seventh Amendment right to trial by jury. *See* U.S. CONST. art. III, § 1; *Id.* at amend. VII. It also violates Plaintiff's due-process right to an impartial tribunal because the same agency—indeed the same person—acts as both accuser and adjudicator. In sum, Plaintiff has a strong likelihood of showing that DOT's administrative proceeding is unconstitutional and illegitimate. Such a proceeding inflicts immediate and irreparable constitutional injuries that cry out for preliminary relief. Plaintiff therefore opposes Defendants' Motion to Dismiss, Doc. 21, under Fed. R. Civ. P. 12(b)(1) and (b)(6) and urges the Court to grant its Motion for Preliminary Injunction, Doc. 18.

SUPPLEMENTAL STATEMENT OF FACTS

Defendants attached three exhibits that supplement facts surrounding the purported appointment of Administrative Law Judge ("ALJ") Rawald and Chief Safety Officer ("CSO") McMillan. *See* Exhibit A, Doc. 21-2, Exhibit B, No. 21-3, and Exhibit C, No. 21-4. Exhibit B indicates

Secretary of Transportation ("Secretary") Chao purported to appoint Rawald as an ALJ on April 25, 2019. Doc. 21-3 PageID 282. Defendants do not contest Plaintiff's contention that there is no prior public record indicating who appointed ALJ Rawald nor when. Complaint, Doc. 1 PageID 16.

Nor do Defendants dispute that McMillan adjudicated administrative appeals in his capacity as "Chief Safety Officer" but was not properly appointed to that position as of July 2022. Doc. 1 PageID 8–9; Motion to Vacate and Remand, Doc. 1-1 PageID 32. Exhibit C purports to appoint McMillan on July 15, 2022, but not as Chief Safety Officer. Doc. 21-4 PageID 284. Rather, Secretary Buttigieg appointed him as "Executive Director," a position that did not have authority to adjudicate administrative appeals. *Id.* Exhibit A confirms that such adjudication authority was not delegated to the Executive Director until November 2022—four months later. Doc. 21-2 PageID 270. Thus, Exhibit C merely shows Secretary Buttigieg appointed CSO McMillan to an "Executive Director" position that, at the time in July 2022, did not have authority to decide administrative appeals.

STANDARD OF REVIEW

On a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. of Civ. P. 12(b)(1), "a trial court takes the allegations in the complaint as true[.]" *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Additionally, the Court must "accept as valid the merits of [Plaintiff's] legal claims[.]" *FEC v. Cruz*, 142 S. Ct. 1638, 1647 (2022). In resolving a motion to dismiss under Rule 12(b)(6), the Court must "accept all the Plaintiffs' factual allegations as true and construe the complaint in the light most favorable to the Plaintiffs." *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (quoting *Hill v. Blue Cross & Blue Sheild of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)).

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). The final two factors "merge" because the federal government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. THE COURT HAS SUBJECT-MATTER JURISDICTION TO HEAR ALL CLAIMS

Axon/Cochran forecloses both of Defendants' subject-matter jurisdiction arguments. *First*, Defendants assert that 49 U.S.C. § 5127's statutory review scheme for final agency actions precludes district court jurisdiction. But *Axon/Cochran* held such schemes do not displace the general 28 U.S.C. § 1331 jurisdiction over challenges to the inherent *legitimacy* of agency proceedings, as opposed to precluding district court review of administrative *outcomes*. *Id.* at 191–92. This Court, therefore, has jurisdiction and must hear Plaintiff's claims against the legitimacy of the DOT proceeding.

Second, Defendants argue that Plaintiff lacks Article III standing to challenge the legitimacy of the adjudicator who hears administrative appeals because such appeal has not yet been filed. *Axon/Cochran*, however, found no standing defects with respect to Axon's separation-of-powers and due-process claims against the legitimacy of agency commissioners who hear administrative appeals, even though no such appeal had been filed in the underlying proceeding. That is because having unconstitutional and biased officials decide administrative appeals renders the entire adjudication structure illegitimate and inflicts a "here-and-now injury" on parties dragged into it. *Id.* at 191.

A. Section 5127 Does Not Preclude District Court Jurisdiction over Plaintiff's Claims

Defendants argue that Section 5127 strips this Court of jurisdiction and requires Plaintiff to "exhaust its administrative remedies … and pursue judicial review in the court of appeals after doing so." Defendants' Brief, Doc. 21-1 PageID 235. Section 5127 states that a person "aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in [appellate court,]" *id.* at (a), which "has exclusive jurisdiction … to affirm or set aside any part of the Secretary's final action[,]" *id.* at (c). By its explicit terms, Section 5127's exclusive jurisdiction plainly applies only

to challenges to a "final action." Just as plainly, Plaintiff does not challenge a DOT final order. Nor could it because the agency has not entered one. Nor does Plaintiff seek relief in anticipation of an adverse final order. Instead, it seeks to avoid being dragged through an agency proceeding that is unconstitutional and illegitimate. Such a collateral challenge does not fall within Section 5127's exclusive-jurisdiction provision. The Supreme Court so ruled in *Axon/Cochran*, which unanimously held that statutory review schemes for *final agency actions* like Section 5127 do not preclude a district court from hearing a challenge to the facial *legitimacy* of an ongoing agency proceeding. 598 U.S. at 191. Therefore, this Court has jurisdiction.

1. *Axon/Cochran* Confirms that Section 5127 Does Not Preclude Jurisdiction to Hear Challenges to the Inherent Legitimacy of Agency Proceedings

Axon/Cochran resolved a circuit split regarding whether a statutory scheme requiring review of final agency actions in appellate court precluded district courts from hearing collateral attacks against the legitimacy of ongoing agency proceedings. 598 U.S. at 184. In *Cochran*, an accountant subject to an enforcement proceeding by the Securities and Exchange Commission ("SEC") before an ALJ sued in federal district court arguing that removal protections for the ALJ violated Article II's vesting of executive power in the President and therefore the ALJ could not hold hearings or issue decisions. *Id.* at 182. Ms. Cochran sought "relief freeing her of the obligation 'to submit to an unconstitutional proceeding.'" *Id.* at 183. The en banc Fifth Circuit held that the district court had jurisdiction over her case notwithstanding the statutory review scheme for SEC final actions. *Id.* at 184; *see also Cochran v. SEC*, 20 F.4th 194, 213 (5th Cir. 2021) (en banc), *aff'd sub nom, SEC v Cochran*, 598 U.S. 175 (2023).

In *Axon*, a company subject to an enforcement action by the Federal Trade Commission ("FTC") sued in federal district court arguing that FTC's ALJs and Commissioners were unconstitutionally protected from removal and that the "combination of prosecutorial and adjudicative functions" in agency officials violated due process of law. *Axon/Cochran*, 598 U.S. at 183.

"Axon asked the court to enjoin the FTC 'from subjecting' it to the Commission's 'unfair and unconstitutional internal forum.'" *Id.* (quoting Complaint in No. 2:20-cv-00014 (D. Ariz.), Doc. 1 at 7). The Ninth Circuit held that the statutory review scheme for FTC final actions precluded district court jurisdiction. *Id.* at 184; *see also Axon v. FTC*, 986 F.3d 1173, 1189 (9th Cir. 2021), *rev'd sub nom*, *Axon v FTC*, 598 U.S. 175 (2023).

The Supreme Court unanimously held that the Fifth Circuit's decision in *Cochran* was correct and the Ninth Circuit's decision in *Axon* was wrong. The majority applied the three-factor balancing test under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994), which asks whether: (1) "precluding district court jurisdiction" would "foreclose all meaningful judicial review"; (2) the claims are "wholly collateral" to the statutory review scheme; and (3) the claims are outside the agency's "competence and expertise." *Axon/Cochran*, 598 U.S. at 186 (internal quotation marks and citation omitted).[1] The Court held that all three factors favored district court jurisdiction over Axon and Ms. Cochran's claims because "being subjected to such an illegitimate proceeding causes legal injury [that is] independent of any ruling[] the [agency] might make[.]" *Id.* at 182.

Starting with the "meaningful judicial review" factor, the Court held that statutory review schemes for final agency actions did not provide for meaningful review of Axon's and Ms. Cochran's "here-and-now injury" of "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* at 191. Indeed, a party "would have the same claim [even] had it *won* before the agency." *Id.* (emphasis in original). Because a statutory review scheme of final agency actions cannot address objections to the *legitimacy* of an ongoing agency proceeding, the district court has jurisdiction over such claims. *Id.* "The collateralism factor favors Axon and Cochran for much the same reason—because they are challenging the [agencies'] power to proceed at all, rather than actions taken in the

[1] Justice Gorsuch reached the same conclusion without applying the *Thunder Basin* factors, which he criticized for being atextual and unclear. *Axon/Cochran*, 598 U.S. at 205–09 (Gorsuch, J. concurring). He instead would have held that the district court had jurisdiction under the plain text of 28 U.S.C. § 1331. *Id.* at 209–11.

agency proceedings." *Id.* at 192. Axon's and Ms. Cochran's claims have "nothing to do with [how the agencies] would adjudicate" and are therefore wholly collateral. *Id.* at 193. Under the competence-and-expertise factor, the Court recognized that agencies lack competence to decide objections to their own legitimacy. *Id.* at 194. Accordingly, Axon's and Ms. Cochran's "claims of here-and-now harm" of being subject to an illegitimate and unconstitutional proceeding "would remain no matter how much expertise could be 'brought to bear' on the other issues" that may fall within agencies' remit. *Id.* at 195 (quoting *Thunder Basin*, 510 U.S. at 215).

Defendants' contention that "structural" challenges district courts have jurisdiction over are limited to Article II claims, *see* Doc. 21-1 PageID 237, is wrong because such challenges include Axon's "combination-of-functions claim" under the Fifth Amendment's Due Process Clause. *Axon/Cochran*, 598 U.S. at 189. Rather, the Supreme Court referred to claims against the overall structure of an agency's adjudication scheme—as opposed to specific decisions made within that structure. A defective adjudication structure renders all proceedings within it illegitimate, and being dragged into such an inherently illegitimate proceeding inflicts a separate injury from the proceeding's erroneous outcome. *Id.* at 191. This distinction drove the analysis of all three *Thunder Basin* factors. *Id.* at 190–96. It is also supported by the plain text of statutory review provisions for "final" agency actions because challenges to the inherent legitimacy of an ongoing proceeding plainly are not challenges to any "final" action covered by review provisions. *Id.* at 210 (Gorsuch, J. concurring) ("Ms. Cochran does not seek to challenge an SEC final order. Nor could she, because the agency has not entered one in her case.").

2. The Court Has Jurisdiction over Plaintiff's Claims Challenging the Inherent Legitimacy of DOT's Administrative Proceedings

Plaintiff's claims here fall comfortably within district court jurisdiction under *Axon/Cochran*'s reasoning. To start, Section 5127 is indistinguishable from the SEC's and FTC's statutory review schemes for final agency action at issue in *Axon/Cochran*. *Compare* 49 U.S.C. § 5127 *with* 15 U.S.C.

§ 78y(a)(1) (SEC scheme) *and id.* § 45(c) (FTC scheme). As such, Section 5127 does not preclude this Court from hearing Plaintiff's claims challenging the legitimacy of DOT's ongoing enforcement proceeding—as opposed to the final action DOT might take in that proceeding.

Defendants wisely do not contest the Court's jurisdiction to hear Plaintiff's Counts 1 and 2, which respectively claim that DOT adjudicators lack authority to decide enforcement actions because their positions do not comply with the Appointments and Take Care Clauses. Those claims are indistinguishable from Axon's and Cochran's arguments that agency adjudicators "could not constitutionally exercise governmental authority." *Axon/Cochran*, 598 U.S. at 183.

Defendants nonetheless argue that Counts 3 and 4 are precluded by Section 5127's statutory review scheme, even though both Counts also claim that DOT adjudicators could not constitutionally exercise governmental authority to resolve proceedings. Count 3 alleges that DOT adjudicators are executive officials who may not exercise judicial power. Doc.1 PageID 19–20. Count 4 alleges that having DOT adjudicators decide questions of fact violates the Seventh Amendment right to a jury trial. *Id.* PageID 20–21. Both claims clearly object to being subject to an unconstitutional and illegitimate proceeding, and thus fit under this Court's jurisdiction. *Axon/Cochran*, 598 U.S. at 190–96.

Defendants are incorrect that Plaintiff's Article III and Seventh Amendment claims somehow "depend on the outcome of the proceeding." Doc. 21-1 PageID 238. Being dragged into an illegitimate proceeding led by illegitimate DOT officials who lack authority to resolve questions of law and fact is the same "here-and-now injury" as in *Axon/Cochran*, and it would occur "irrespective of [the proceeding's eventual] outcome, or of other decisions made within it." 598 U.S. at 191–92. Plaintiff could not obtain "meaningful judicial review" of that ongoing injury if it must wait for the agency's final action. *Id.* at 190 (quoting *Thunder Basin*, 510 U.S. at 512–13). It would have already been subject to an unconstitutional proceeding in which executive officers improperly wielded Article III power and denied its rights to a jury trial and jury fact-finding. Plaintiff's Article III and Seventh Amendment

claims are also "wholly collateral[,]" *id.* at 186, to the agency's final action because they challenge the agency's power to proceed at all in this unconstitutional forum, rather than any final decision. *Id.* at 192. Finally, the agency's competence and expertise in transportation policy does not extend to Plaintiff's constitutional claims. Hence, Plaintiff's Article III and Seventh Amendment claims are not covered by Section 5127's review scheme for final agency actions. *Id.* at 194–95.

The same is true of Counts 5 and 6, which allege that DOT's procedures violate the due process of law by, respectively, combining prosecutorial and adjudicative functions within the same agency and by failing to disclose exculpatory material as a matter of course. Indeed, Count 5 raises the identical "combination-of-functions claim" made by Axon. *Axon/Cochran*, 598 U.S. at 189; *See* Doc. 1 PageID 21–22. The Supreme Court explained that such a claim neither challenges "any specific substantive decision" nor "commonplace procedures agencies use[.]" *Axon/Cochran*, 598 U.S. at 189. Rather, it alleges that "an agency is wielding authority unconstitutionally" and therefore "belonged in [the] district court." *Id.*

Count 6 likewise is wholly unrelated to any substantive agency decision. Plaintiff does not, for example, challenge the merits of a final agency adjudication in which exculpatory material was not disclosed. Rather, it objects to being forced into a proceeding in which the agency prohibits the disclosure of such material as a matter of course, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Doc. 1 PageID 23–24. To determine subject-matter jurisdiction, the court must "accept as valid" Plaintiff's contention that *Brady* disclosure is constitutionally required in administrative enforcement proceedings. *Cruz*, 596 U.S. at 298. A proceeding that fails on its face to comply with that due-process requirement is unconstitutional, and being dragged into such a proceeding inflicts a here-and-now

constitutional injury.[2] As in *Axon/Cochran*, review of the agency's eventual final decision under Section 5127 would not address that injury. 598 U.S. at 191. Plaintiff's due-process challenge is also "wholly collateral[,]" *id.* at 186, to the agency's final action because Plaintiff will suffer a deprivation of a constitutional right regardless of the proceeding's result. *Id.* at 192. Finally, the scope of constitutional due-process protection lies far outside of the agency's expertise in transportation policy and wholly outside its competence. *Id.* at 194. Plaintiff's combination-of-function and *Brady* due-process claims at Counts 5 and 6 therefore cannot be meaningfully reviewed or adequately redressed by Section 5127's scheme for post-hoc judicial consideration of final agency actions.

Finally, Counts 7 and 8 allege that Defendants violated the APA by, respectively, enacting a regulation that misstates 49 U.S.C. § 5123's scienter requirement for a civil penalty and by rescinding *sub silentio* due-process protections that would otherwise protect Plaintiff in the ongoing enforcement proceeding. Doc. 1 PageID 24–26. Count 7 does not challenge the agency's ruling based on an incorrect *application* of scienter. Rather, it challenges being dragged into a proceeding governed by rules that require the application of an unlawful scienter. *Id.* at 24–25. That here-and-now injury cannot be addressed through eventual review under Section 5127 of DOT's final action. Likewise, Count 8 does not complain of any specific agency decision regarding exculpatory evidence. Rather, it complains of being subject to a proceeding in which the agency disclaims any obligation to disclose such evidence to begin with. *Id.* at 25–26. Again, being subject to such an illegitimate proceeding is a "here-and-now injury" that cannot be addressed through review under Section 5127. Plaintiff's APA claims against rules that govern proceedings—as opposed to rules that DOT alleges Plaintiff to have violated—are

[2] Suppose the Department of Justice issued a regulation forbidding federal prosecutors from disclosing *Brady* evidence as a matter of course. A criminal defendant would not have to wait until he is convicted before challenging the constitutionality of that regulation.

wholly collateral to the final action.[3] Lastly, DOT lacks competence to address "standard questions of administrative law," such as whether an APA violation occurred. *Free Enter. Fund v. PCAOB,* 561 U.S. 477, 491 (2010). Section 5127 therefore does not strip this Court of jurisdiction over the APA claims.

3. The 'Inescapably Intertwined' Doctrine Does Not Preclude this Court's Jurisdiction over Plaintiff's Claims

Defendants' reliance on the "inescapably intertwined" doctrine from *Polyweave Packaging, Inc. v. Buttigieg*, 51 F.4th 675, 680–81 (6th Cir. 2022), is misplaced. *See* Doc. 21-1 PageID 233. To start and importantly here, *Polyweave* acknowledges that, under the "inescapably intertwined" doctrine, a district court has jurisdiction over "constitutional claims [that] are broad challenges to [agency] procedures and are not contingent on the merits of a particular [final] order." *Polyweave*, 51 F.4th at 682 (quoting *Burdue v. FAA*, 774 F.3d 1076, 1083–84 (6th Cir. 2014)). Counts 1–6 of the Complaint are constitutional claims that broadly challenge DOT procedures and do not depend on the merits of any final order. Hence, this Court has jurisdiction over those constitutional claims.

Moreover, *Polyweave*'s "inescapably intertwined" analysis conflicts with the three-factor analysis the Supreme Court used in *Free Enter. Fund*, 561 U.S. at 489–91, and *Axon/Cochran*, 598 U.S. at 186–96. *Polyweave* involved a company's APA claims against DOT's rescission of due-process rules that would otherwise apply in an ongoing enforcement action against that company. 51 F.4th at 678. The district court held that Section 5127 did not preclude jurisdiction because the APA claims were not "inescapably intertwined" with the merits of the proceeding. *Id.* at 678–89. The Sixth Circuit disagreed, holding that Section 5127 stripped the district court of jurisdiction to hear the APA claims. *Id.* at 679.

Judge Murphy's concurrence urged the majority to resolve the case on other grounds because *Polyweave*'s "jurisdictional question implicates a circuit split that the Supreme Court will soon resolve"

[3] Rescission of due-process protections under Count 7 was promulgated pursuant to the Secretary's general rulemaking powers under 49 U.S.C. § 322(a). *See* 86 Fed. Reg. 17,292, 17,294. The rescission thus falls outside of Section 5127, which covers review of agency actions taken only under 49 U.S.C. §§ 5101-28.

in the then-pending *Axon/Cochran* case. *Id.* at 688 (Murphy, J. concurring). He did "not see much daylight" between *Axon/Cochran* and Polyweave's case and cautioned that if "the Supreme Court agrees with the Fifth Circuit in *Cochran* that the district court had subject-matter jurisdiction, it would go a long way toward showing that [the majority] mistakenly [found] that the district court lacked jurisdiction." *Id.* Of course, that is precisely what the Supreme Court did.

Judge Murphy would also have found the district court had jurisdiction over the APA claims because:

> [N]othing in the text of 49 U.S.C. § 5127 strips district courts of jurisdiction over a challenge to the Secretary of Transportation's rule rescinding [due-process regulations]. The text gives circuit courts exclusive jurisdiction only over "a final action of the Secretary under this chapter[.]" 49 U.S.C. § 5127(a), (c). Yet Polyweave did not seek review of PHMSA's "final action" imposing a civil penalty under Chapter 51. … The company instead sought review of the Secretary's general rulemaking … under his general rulemaking power[s]. … So I do not see how § 5127 could be read to cover a suit like this one.

Id. (citations omitted). According to Judge Murphy, the majority's analysis based on the "inescapably intertwined" doctrine was incompatible with the Supreme Court's more recent approach. *Id.* at 689. The majority ignored Judge Murphy's warning and articulated reasoning that *Axon/Cochran* unanimously rejected just a few months later.

First, the *Polyweave* majority erroneously concluded stripping jurisdiction to challenge the rescission of due-process protections would not deprive a party subject to an ongoing enforcement action of meaningful review because the party could "obtain[] meaningful judicial review of its APA claims on direct review of the civil-penalty order." *Id.* at 683. Judge Murphy's concurrence asked rhetorically: "But what would have happened if Polyweave had won that proceeding? How could it get review of an agency's general rule in that scenario?" *Id.* at 689. *Axon/Cochran* likewise reasoned that a party challenging structural rules that govern a proceeding (as opposed to the proceeding's eventual outcome) "would have the same claim had it won before the agency." *Axon/Cochran*, 598 U.S. at 191. That is because "subjection to an illegitimate proceeding" is a "here-and-now injury" that

cannot be redressed by judicial review of the proceeding's outcome. *Id.* (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)). *Axon/Cochran* thus vindicated Judge Murphy's view that Section 5127 does not offer meaningful review of an APA claim challenging procedures that would govern in an ongoing proceeding.

Second, *Polyweave* held that APA claims challenging the rescission of due-process rules were not collateral to the final civil penalty order because they were brought "in an effort to undo the underlying enforcement proceeding." *Polyweave*, 51 F.4th at 684. Judge Murphy disagreed, explaining that "Polyweave seeks only an injunction to reinstate [the due-process rules]—not an injunction that would do anything to PHMSA's civil penalty." *Id.* at 689 (Murphy, J. concurring). The Supreme Court agreed with Judge Murphy's reasoning. In *Axon/Cochran*, the government made the same argument as the *Polyweave* majority, *i.e.*, that "no claim 'directed at' a pending [agency] proceeding can qualify as collateral to it, even if wholly disconnected in subject." 598 U.S. at 193 (citing Brief for the Federal Parties 39, 52-53). The Court forcefully and unanimously rejected that argument as "strip[ping] the collateralism factor of its appropriate function." *Id.*

Third, the *Polyweave* majority conceded that "PHMSA may not be able to adjudicate the specific claim that the Secretary violated the APA when he rescinded Subpart D" but nonetheless concluded that the claim fell within the agency's expertise because "PHMSA's expertise could be brought to bear on other issues that could resolve the enforcement proceeding in Polyweave's favor." 51 F.4th at 684. The Supreme Court explicitly rejected the boot-strapping position that a claim outside of the agency's competence can be consider within it simply because "an agency … can still 'apply its expertise' by deciding other issues." *Axon/Cochran*, 598 U.S. at 195 (quoting Brief for Federal Parties 54). Here, the agency has neither expertise nor competence in deciding constitutional questions presented by Counts 1–6. Nor does it have special expertise in "standard questions of administrative law," such as the Plaintiff's APA claims at Count 7 and 8. *Free Enter. Fund*, 561 U.S. at 491; *see also Polyweave*, 51 F.4th at

689–90 (Murphy, J. concurring). The fact that the agency has expertise in "'other issues'" does not cure its incompetence in the constitutional and APA issues Plaintiff raises. *Axon/Cochran*, 598 U.S. at 195 (quoting Brief for Federal Parties 54).

In addition to resolving a split between the Fifth and Ninth Circuits, *Axon/Cochran* settled the disagreement between the *Polyweave* majority's "inescapably intertwined" approach and Judge Murphy's concurrence. All nine Justices decidedly favored Judge Murphy's reasoning, which would have concluded that a party subject to an ongoing agency proceeding may bring APA claims against procedures governing that proceeding in district court.

In sum, Plaintiff's constitutional and APA claims challenge the legitimacy of DOT's proceeding and allege here-and-now injuries that are independent from any final action that could be reviewed under Section 5127. Plaintiff's harm does not accrue from the outcome of the DOT proceeding, but from the constitutional deprivations embedded in the very process itself. As such, these claims do not fall under Section 5127's review scheme and thus may be brought in this Court.

B. Plaintiff Has Standing to Challenge CSO McMillan's Position as the Final Agency Adjudicator

Defendants argue that Plaintiff lacks standing to challenge the constitutionality of a proceeding in which CSO McMillan is the final adjudicator because no administrative appeal has been filed. Doc. 21-1 PageID 242–43. To start, this objection is based on ripeness rather than standing. *See Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967) (explaining the ripeness doctrine's "basic rationale is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]"). The argument also misses the point. Plaintiff is not seeking to overturn the outcome of CSO McMillan's eventual decision on appeal. Rather, Plaintiff's "here-and-now injury" is subjection to a proceeding in which the final decision (whatever it may be) lies with an unconstitutional decisionmaker, here CSO McMillan. It is of no moment that CSO McMillan is not currently presiding over Plaintiff's administrative appeal because having an unconstitutional appellate reviewer is a

structural defect that renders the entire proceeding illegitimate. Moreover, as Justice Kagan observed in *Axon/Cochran*: "a problem remains, stemming from the interaction between the alleged injury and the timing of review … A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful." 143 S. Ct. at 904. The same is true with respect to Plaintiff's claims against CSO McMillan.

Because he is authorized to issue final enforcement orders, CSO McMillan's position in PHMSA's adjudication scheme is the same as the FTC Commissioners whose legitimacy Axon challenged. Plaintiff's constitutional claims regarding CSO McMillan are thus no different from Axon's claims regarding FTC Commissioners, which the Supreme Court unanimously held could be heard in the district court. *Axon/Cochran*, 598 U.S. at 195–96. Importantly, Axon did not merely challenge the constitutionality of ALJs' removal protection; it also challenged removal protection for FTC Commissioners who did not yet preside over Axon's case. *See* Complaint ¶¶ 40–43, 62, *Axon v FTC*, No. 2:20-cv-14-DMF (D. Ariz. Jan. 3, 2020).[4] Axon likewise challenged the concentration of investigation and adjudication functions in those Commissioners. *Id.* ¶¶ 34–35, 58.

Axon's case was not before FTC Commissioners when it filed suit. While the FTC did not challenge Axon's standing to bring claims against its Commissioners, "it is well established that [the Supreme Court] has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). Yet, all nine Justices agreed that the district court had jurisdiction over Axon's separation-of-powers and due-process claims against FTC Commissioners, even though the Commissioner had not yet started to preside over Axon's case. *Axon/Cochran*, 598 U.S. at 195–96. That was because Axon's "here-and-now injury" had nothing to do with any decision FTC Commissioners might make. Rather, the injury is

[4] Available at: https://axon-2.cdn.prismic.io/axon-2/1438309c-d103-472e-85a5-929e79642aa5_1-3-20+Axon+FTC+Complaint+-+File-stamped+version.pdf (last visited Oct. 25, 2023).

being dragged into an illegitimate show trial wherein the FTC is preordained to win because the final decisionmakers are illegitimate and biased Commissioners.

Plaintiff's claims against CSO McMillan for being improperly appointed, unconstitutionally protected from removal, and biased in favor of the agency allege the same "here-and-now injury" as did Axon. When assessing standing, the Court must assume the validity of Plaintiff's legal claims that CSO McMillan is illegitimate and unconstitutionally biased. *Cruz*, 596 U.S. at 298. Just as Axon suffered a "here-and-now injury" by being subjected to a proceeding that will ultimately be decided by illegitimate and biased FTC Commissioners, Plaintiff suffers an identical injury by being subjected to a show trial that will be decided by the agency's illegitimate and biased Chief Safety Officer. Defendants' contrary argument rests on the presumption that all nine Justices are mistaken about the district court's jurisdiction over Axon's separation-of-powers and due-process claims.

II. PLAINTIFF STATES CLAIMS FOR RELIEF THAT ARE LIKELY TO SUCCEED

Defendants argue that Counts 1–5 of the Complaint fail to state claims on which relief can be granted, and as a result, they are unlikely to succeed on the merits. Doc. 21-1 PageID 243–51, 254–61.[5] Defendants are wrong. Secret appointment of DOT adjudicators and their multiple layers of removal protection run afoul of Supreme Court case law requiring presidential control of and accountability for agency adjudicators. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); *Lucia v. SEC*, 138 S. Ct. 2044, 2052–54 (2018); *Free Enter. Fund.*, 561 U.S. at 492. Moreover, agency adjudication of private rights exists in "tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases." *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanagh, J. dissenting) (citing Philip Hamburger, *Is Administrative Law Unlawful?* 227–57 (2014)); *Axon/Cochran*, 598 U.S. at 196 (Thomas, J. concurring)

[5] While Defendants' arguments regarding Counts 3-5 are part of their response to Plaintiff's motion for preliminary injunction, they also contend these counts should also be dismissed for failure to state a claim. Doc. 21-1 PageID 232. Defendants do not dispute that Counts 6, 7, and 8 state claims upon which relief can be granted.

("I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end."); *Id.* at 215 (Gorsuch, J., concurring) (recognizing that "combin[ing] the functions of investigator, prosecutor, and judge under one roof[]" creates a "tilted … game"). Plaintiff not only states claims on which relief can be granted, but those claims have a strong likelihood of success on the merits, thus entitling Plaintiff to injunctive relief.

A. Count 1 States an Appointments Clauses Claim that Is Likely to Succeed

Count 1 alleges that the proceeding against Plaintiff is illegitimate because it is led by decisionmakers—ALJ Rawald and CSO McMillan—who are not properly appointed as inferior officers with authority to decide agency enforcement cases. Defendants do not dispute Plaintiff's allegation that, prior to this litigation, there is no public record of ALJ Rawald's and COS McMillan's appointments. They instead allege that both were appointed (in secret) and argue "[t]hat is all the Appointments Clause requires." Doc. 21-1 PageID 243.

But the reason why the Appointments Clause requires the President or agency head to appoint inferior executive officers is not because veiled incantations are needed to convey Article II powers. Rather, the Supreme Court has explained that the Appointments Clause "guarantees accountability for the appointees' actions because the 'blame of a bad nomination would fall upon the president singly and absolutely.'" *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (quoting The Federalist No. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton)). As Plaintiff's motion for preliminary injunction points out, such accountability is not possible if misbehaving officials are appointed in secret so that no one can know which President is responsible for their appointments. Doc. 18 PageID 191–92.

Defendants offer no response to this charge and instead assert without evidence that there is no "historical tradition" of publicizing appointments. Doc. 21-1 PageID 244. To the contrary, the nation has a long history of the public blaming Presidents for the misdeeds of executive officials they

appoint.[6] That is obviously possible only if it is knowable which President (or department head) appointed which official. By contrast, there is no historical tradition of executive officers being appointed in secret so that public accountability for their appointment is impossible. Such secret appointments are precisely what Defendants did with respect to ALJ Rawald and CSO McMillan. Defendants do not dispute Plaintiff's claim that the identities of the President or department head who appointed ALJ Rawald and CSO McMillan were secret—they have even refused to respond a FOIA request seeking that information. *See* Doc. at 1 PageID 9 n.4.

ALJ Rawald and CSO McMillan's appointments suffer from additional defects. ALJ Rawald's appointment is invalid because the Secretary was only able to select ALJs from a list of individuals approved by the Office of Personal and Management ("OPM"). *See* 5 C.F.R. § 930.204(a). Such gatekeeping is forbidden under *Lucia*, which held that an ALJ is an executive officer of the United States who may not be appointed by unaccountable civil servants. 138 S. Ct. at 2054–55; *see also id.* at 2058 (Breyer, J., concurring) ("I do not believe that the Administrative Procedure Act permits the Commission to delegate its power to appoint its administrative law judges to its staff."). That prohibition would be meaningless if OPM staff could restrict the pool of candidates from which the President or Secretary must select ALJs. While Congress may require an executive officer to be "learned in the law" or have "professional experience" in a field, as Defendants note, Doc. 21-1 at Page ID 244 (quoting 28 U.S.C. § 505 and 49 U.S.C. § 108(c), respectively), it is up to the President (or Secretary) to decide whether a candidate meets those criteria.[7] Unelected civil servants may not restrict the pool of individuals who are sufficiently "learned in the law" and thus may be appointed by

[6] For instance, the public blamed Andrew Jackson for creating a "spoils system" whereby he appointed incompetent or corrupt officials to exercise executive power. *See, e.g.,* DANIEL FELLER, *Andrew Jackson: Domestic Affairs*, UNIVERSITY OF VIRGINIA MILLER CENTER, https://millercenter.org/president/jackson/domestic-affairs (last visited Oct. 25, 2023).

[7] The President's decision is subject to the Senate's advice and consent with respect to principal officers but not inferior officers such as ALJ Rawald and CSO McMillan.

the President as his Solicitor General. Nor may they restrict the President's power to appoint agency adjudicators to only candidates they deem qualified.

Defendants' factual submissions reveal a further defect in CSO McMillan's purported ratification as an inferior officer. According to Exhibit C, Secretary Buttigieg ratified CSO McMillan as the agency's "Executive Director" on July 15, 2022. Doc. 21-4 PageID 284. That document notably did not ratify CSO McMillan as "Chief Safety Officer," which is the capacity in which he purported to exercise adjudication powers in July 2022. *See* Decision on Appeal, *Metal Conversion, LLC*, PHMSA-2021-0088 at 11 (July 25, 2022).[8] Nor did it indicate that the "Executive Director" position comes with any power consistent with being an inferior officer of the United States, including the authority to issue final agency enforcement decisions. Indeed, Exhibit A confirms that the Executive Director position was not invested with authority to "[d]ecide and sign decisions on appeal of hazardous materials safety enforcement orders[]" until November 9, 2022. Doc. 21-2 PageID 270.

As of July 2022, CSO McMillan was not properly appointed to be an Officer of the United States who can adjudicate enforcement actions. *See* Doc. 1-1. Secretary Buttigieg's ratification of CSO McMillan appointment as "Executive Director" in July 2022 did not cure that defect because, at that time, the Executive Director was not empowered to decide enforcement actions. Nor did the subsequent delegation of adjudicatory powers in the Executive Director in November 2022 cure the defect because that delegation was issued by Deputy Administrator Brown, not the President or Secretary. *Id.* PageID 32–33. Thus, CSO McMillan still has not been properly appointed to act as an agency adjudicator by the President or Secretary as *Lucia* requires.

B. Count 2 States a Take Care Clause Claim that Is Likely to Succeed

Count 2 alleges that the proceeding against Plaintiff violates the Take Care Clause because it is led by decisionmakers—ALJ Rawald and COS McMillan—who are improperly protected from

[8] Available at: https://www.regulations.gov/document/PHMSA-2021-0088-0002 (last visited Oct. 25, 2023).

removal by the President and thus are not subject to his control. Doc. 1 PageID 18–19. Defendants' conclusory response that Plaintiff "misstates the permissible limits that may be imposed on [the President's] removal power[,]" fails to say what those limits are. *See* Doc. 21-1 PageID 248. Their assertion that the Supreme Court has upheld limits on the removal power "in various contexts[,]" *id.*, is likewise devoid of any explication. The Supreme Court has never upheld the multi-layered removal protection at issue in this case. To the contrary, the Court repeatedly affirmed that it would be unconstitutional for executive branch officers like ALJ Rawald and COS McMillan to enjoy multiple layers of removal protection. *Seila Law*, 140 S. Ct. at 2192; *Free Enter. Fund*, 561 U.S. at 483–84.

Defendants tellingly urge this Court to "not wade into" Supreme Court case law concerning the unconstitutionality of multi-layered removal protection for executive officers, Doc. 21-1 PageID 248, which all go against Defendants. Instead, they rely on *Calcutt v. FDIC*, 37 F.4th 293, 310 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023) (per curiam), to argue that "even if an agency's structure unconstitutionally shields officers from removal, a party challenging the agency's action is not entitled to relief unless that unconstitutional provision 'inflict[s] compensable harm.'" *Id.* (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021) (alteration in original)). *Calcutt*, however, lacks precedential value because the Supreme Court summarily reversed on other grounds without even merits briefing. *See Calcutt v. FDIC*, 598 U.S. 623 (2023) (per curiam). Moreover, *Calcutt*'s reasoning regarding the remedy for a *past* agency adjudication tainted by an unconstitutional decisionmaker is inapposite to Plaintiff's challenge against the unconstitutionality of an *ongoing* agency adjudication.

Calcutt relied primarily on *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which held that, although an agency head was unconstitutionally protected from removal, that was "no reason to regard any of the actions taken by the" the agency "as void." *Id.* at 1787. The Court thus remanded to determine whether, but for the unconstitutional removal protection, the agency's past decision might have been different. *Id.* at 1789. *Calcutt* cited this reasoning to conclude that a petitioner who challenges the past

result of an agency enforcement order based on the unconstitutional removal protection of adjudicators must demonstrate that the order would have been different but for the removal protection. 37 F.4th at 318. The Sixth Circuit panel concluded that Calcutt's "vague assertions that it 'cannot be ruled out' that the multiple levels of for-cause removal protections insulating [the agency adjudicator] caused him harm, … is insufficient[.]" *Id.* (quoting Reply Br. 18, *Calcutt*). But proving such a counterfactual is nigh well impossible, as recognized by this Court in *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017), noting "the effects of the error are simply too hard to measure."[9]

Defendants' other cases that "have rejected harmless removal claims under *Collins*[,]" Doc. 21-1 PageID 250 (collecting cases), likewise involved challenges to past agency final actions, and thus they required the plaintiff "show that the agency action would not have been taken *but for* the President's inability to remove the [agency decision-maker]," *id.* PageID 249 (quoting *CFBP v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023), *cert. filed,* No. 22-1233 (June 23, 2023)). By contrast, Plaintiff does not seek to overturn a *past* civil-penalty order. So, there is no need for retrospective analysis regarding whether ALJ Rawald or COS McMillan would have come to different decisions but for their improper tenure protections. Rather, Plaintiff is subject to an *ongoing* proceeding led by illegitimate adjudicators who are unconstitutionally protected from removal. The Supreme Court has unanimously held that is a "here-and-now injury" that is independent from any final agency action. *Axon/Cochran*, 598 U.S. at 191. The proper relief is injunctive.

Defendants finally argue that removal protections for ALJ Rawald and CSO McMillan are constitutional because "*Congress* has not tied the Executive Branch's hands here by requiring that ALJs or the Chief Safety Officer be involved in the adjudication at issue here." Doc. 21-1 PageID 250–51. According to Defendants, the President may "restrain himself in his dealings with subordinates[,]" *id.*

[9] This non-redressability problem demonstrates all the more reason why claims such as Plaintiff's must be heard prior to the constitutional injury and proves the correctness of *Axon/Cochran* which now permits such claims be heard *before* the administrative adjudication concludes.

PageID 251 (quoting *Free Enter. Fund*, 561 U.S. at 497), and thus can divest executive power in officers over whom he lacks control. But the passage Defendants quote stands for the opposite proposition. The full quotation warns that the President's ability to "restrain himself in his dealings with subordinates" does not allow him to "escape responsibility for his choices by pretending that they are not his own." *Free Enter. Fund*, 561 U.S. at 497.

> The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies … subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.,* No. 70, at 476 (same).

Id. at 497–98. Although "an individual President might find advantages in tying his own hands[,]" *id.* at 497, the Constitution does not allow him to do so in a manner that results in the exercise of "executive power without the Executive's oversight[.]" *Id.* at 498. That is because all "executive power shall be vested in [the] President." *See* U.S. CONST. art. II, § 1. If he appoints an official who he does not oversee to wield executive powers, then such power would have been unconstitutionally divested. Multiple layers of removal protection prevent the President from properly overseeing the exercise of executive power wielded by ALJ Ralwald and CSO McMillan. Such an arrangement is intolerable to the Constitution because "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 514).

C. Counts 3 and 4 State Article III and Seventh Amendment Claims that Are Likely to Succeed

Count 3 alleges that the proceeding against Plaintiff is illegitimate because it requires an unconstitutional exercise of judicial power that Article III vests solely in federal courts. Count 4 alleges that the proceeding violates Plaintiff's Seventh Amendment right to a jury trial. Defendants respond to these claims together by invoking the "'public rights'" doctrine. Doc. 21-1 PageID 255 (quoting *Oil*

States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018)) This argument fails because it is well-settled that the public-rights doctrine does not apply when the government seeks to impose a common-law remedy—here a civil penalty to deprive Plaintiff of private property—against a person for an alleged statutory violation. *Tull v. United States*, 481 U.S. 412, 422–23 (1987).

The term "public rights" is found nowhere in the Constitution and first appears in Supreme Court decisions in the Nineteenth Century to refer to government property. *See Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855). The concept expanded in the Twentieth Century, reaching its highwater mark in *Atlas Roofing v. OSHA*, 430 U.S. 442 (1977), which upheld jury-less administrative proceedings for certain violations of the Occupational Safety and Health Act. *Id.* at 443. The Court has since retreated from that position. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), recognized that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 61. *Tull*, 481 U.S. at 522–23, further held that a party has a right to a jury trial when the government seeks to impose a statutory civil penalty.

Defendants contend that private-rights cases, which require an Article III forum with the right to a jury trial, are limited to "disputes between 'two private parties,' not disputes with the Government." Doc. 21-1 PageID 256 (citing *Stern v. Marshall*, 564 U.S. at 462, 489 (2011)). That is wrong. Whether a claim involves a public or private right depends not on the identity of the parties but on the nature of the underlying claim. "Congress cannot 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law[.]'" *Stern*, 564 U.S. at 488 (quoting *Murray*'s *Lessee*, 59 U.S. at 284). The fact that the government is a party does not obviate the right to a jury trial nor the need for an Article III forum. *See Tull*, 481 U.S. at 425.

Defendants argue that Section 5123 is not "analogous to common-law negligence action" because it does not share every element of that tort. Doc. 21-1 PageID 257. But *Tull* did not require a

precise 18th Century common-law analogue to a modern statutory violation. 481 U.S. at 420–21. It held that a civil-penalty action for violation of the Clean Water Act was sufficiently analogous to both common-law action in debt and a public nuisance action without making an element-by-element comparison. *Id.* Here, what is important is that DOT is prosecuting Plaintiff for breaching a statutory duty while failing to meet the standards of "a reasonable person acting in the circumstances and exercising reasonable care." 49 U.S.C. § 5123(a)(1)(B). Such cause of action invoking the "reasonable person" standard is sufficiently analogous to a common-law negligence claim.

Moreover, the specific claim brought against Plaintiff is that it knowingly submitted test reports to DOT containing false information. *See* Doc. 1 PageID 12–16; 49 U.S.C. § 5123(a)(1) (authorizing civil penalty against a "person that knowingly violates" a regulation). DOT's allegation is therefore also analogous to common-law fraud or misrepresentation and thus the Seventh Amendment right to a jury trial applies. *Jarkesy v. SEC*, 34 F.4th 446, 455 (5th Cir. 2022) (holding that the accused has a right to a jury trial against agency's enforcement action for securities fraud), *cert. granted*, 143 S. Ct. 2688 (2023).

In any event, there is no need for "an 'abstruse historical' search for the nearest 18th-century analogue" because "the relief sought is more important than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Tull*, 481 U.S. at 421 (cleaned up). On this score, *Tull* explained that a "civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at 422 (quoting *Ross v. Bernhard*, 396 U.S.531, 538, n. 10 (1970)). Defendants' motion inexplicably does not even mention *Tull*, even though the federal government routinely invokes that case to assert *its* Seventh Amendment right to a jury trial when seeking to impose a civil penalty for a statutory violation. *See, e.g.*, *SEC v. Jenson*, 835 F.3d 1100,

1106 (9th Cir. 2016) ("SEC had a right to a jury trial on most of its claims against Defendants" because "the SEC requested legal relief in the form of civil penalties.") (Citing *Tull*, 481 U.S. at 422); *United States v. Dish Network, LLC*, 754 F. Supp. 2d 1002, 1003 (C.D. Ill. 2010) ("An action for civil penalties is an action at law for which the Seventh Amendment guarantees a right to a jury trial to determine liability.") (Citing *Tull*, 481 U.S. at 422). Here, as in *Tull*, "[b]ecause the nature of the relief authorized by § [5123] was traditionally available only in a court of law, [Plaintiff] in this present action is entitled to a jury trial on demand." *Tull*, 481 U.S. at 423.

Defendants' reliance on *Oil States*, 138 S. Ct. 1365, and *Atlas Roofing*, 430 U.S. 442, is misplaced. Doc. 21-1 PageID 255. *Oil States* is inapposite because it concerned patents, which are "'public franchises' that the Government grants." 138 S. Ct. at 1373 (quoting *Seymour v. Osborne*, 11 Wall. 516, 533 (1871)). Its holding that patent disputes are public rights cases does not displace the conclusion that the DOT's attempt to deprive Plaintiff of private property by seeking a civil penalty for a statutory violation implicates Plaintiff's private rights. *Tull*, 481 U.S. at 421–23.

Nor does *Atlas Roofing* support Defendants' contention that Congress can place the question of whether a statutory violation occurred outside the reach of juries. *See* Doc. 21-1 PageID 256. As explained above, post-*Atlas Roofing* cases confirm that Congress lacks such power where the statutory violation is analogous to a common-law action or remedy. *See Stern*, 564 U.S. at 489; *Granfinanciera*, 492 U.S. at 61; *Tull*, 481 U.S. at 420-21. Rather, *Atlas Roofing* turned on the fact that the statutory violation at issue was "one unknown to the common law." 430 U.S. at 453. The remedy sought was not a common-law remedy such as the civil fine at issue in this case. Rather, the remedies in *Atlas Roofing* were "[r]einstatement of the employee and payment for time lost[.]" *Id.* Such injunctive and back-pay remedies are matters of equity, whereas punitive measures such as civil penalties under Section 5123 can only be awarded by courts of law. *Tull*, 481 U.S. at 421. As such, that cause of action must be resolved in an Article III forum in which the accused has the right to a jury trial. *See id.*

D. Count 5 States a Due Process Claim that Is Likely to Succeed

Count 5 alleges that the proceeding against Plaintiff violates due process because the functions of accuser and adjudicator are concentrated in the same agency, and in the case of CSO McMillan, in the same person. Doc. 1 PageID 21–22. Defendants argue that more than the mere "'combination of investigative and adjudicative functions' within [one] administrative agency" is needed to show a due-process violation. Doc. 21-1 PageID 259 (citing *Withrow v. Larkin*, 421 U.S. 35, 58 (1975)).

Plaintiff has adduced the necessary "more." As Justice Gorsuch explained:

> Agencies [that] combine the functions of investigator, prosecutor, and judge under one roof … employ relaxed rules of procedure and evidence—rules they make for themselves. The numbers reveal just how tilted this game is. From 2010 to 2015, the SEC won 90% of its contested in-house proceedings. … Meanwhile, some say the FTC has not lost an in-house proceeding in 25 years.

Axon/Cochran, 598 U.S. at 215–16 (Gorsuch, J. concurring). PHMSA combines the same functions under one roof and makes up relaxed rules. *See* Doc. 1 PageID 7–11. The agency has an astonishing *100 percent* win rate since 2017. *See id.* PageID 8. This tilted game violates the due process of law.

This conclusion is reinforced by the fact that each ALJ has a "duty to decide all cases in accordance with agency policy." MORELL E. MULLINS, *Manual for Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES, 137 (2004) (footnote omitted). Defendants misleadingly claim this duty merely required ALJs to "apply, rather than disregard, the relevant statutes, rules and procedures." Doc. 21-1 PageID 260. Federal courts apply relevant statutes, rules, and procedures. But they have no corresponding duty to decide cases in accordance with the policy of executive agencies litigating before them. If such a duty existed, it would constitute "systematic bias" in favor of the federal government, thus violating the due process right to an impartial tribunal. *Cf. Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of cert.) (citing PHILIP HAMBURGER, *Chevorn* Bias, 84 GEO. WASH. L. REV. 1187, 1212 (2016)). The same is true of administrative proceedings.

Finally, PHMSA procedures violate due process of law because they do not merely combine accuser and adjudicator in the same agency, but rather in the *same person*, namely CSO McMillan. *See Williams v. Penn*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.") (citing *In re Murchison*, 349 U.S. 133, 136–37 (1955)). Defendants' claim that CSO McMillan has nothing at all to do with Plaintiff's proceeding is refuted by the very organization chart they cite. *See* Doc. 21-1 PageID 260–61 (citing *About PHMSA*, Organization, PHMSA, U.S. Dept. of Transp.).[10] All factual allegations against Plaintiff came from inspection reports that conclude Plaintiff violated the law and that were prepared by PHMSA's "Office of Hazmat Safety." *See* Exit Briefing, Report No. 20242016 (attached as Exhibit 1); Exit Briefing, Report No. 21242019 (attached as Exhibit 2); Notice of Probable Violation; Doc. 1-7 PageID 100 (listing "Inspection Reports 20242016 and 20242019" as basis for charging Plaintiff). Defendants' own organization chart shows that office sits directly underneath the "Executive Director & Chief Safety Officer" McMillan. *About PHMSA*, Organization, PHMSA, U.S. Dept. of Transp. CSO McMillan is thus responsible for the Office of Hazmat Safety's conclusion that Plaintiff violated a hazardous materials regulation. Plaintiff is put in a position of having to convince him that a prosecution his office recommended is meritless.

In *Williams*, the Supreme Court recognized the risk that an adjudicator "would be … psychologically wedded" to a position he took as the supervisor of a prosecutors' officer over 20 years ago. 579 U.S. at 9 (quoting *Withrow*, 421 U.S. at 57). Additionally, the adjudicator's "'own personal knowledge and impression' of the case, acquired through his or her role [as supervisor in a case], may carry [undue] weight[.]" *Id.* at 9-10 (quoting *Murchison*, 349 U.S. at 138). Under *Williams*, "[h]aving been a part of [the accusatory] process [CSO McMillan] cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 9 (quoting *Murchison*,

[10] Available at: https://www.phmsa.dot.gov/about-phmsa/offices (last updated Mar. 3, 2022) (last visited Oct. 25, 2023).

349 U.S. 133, 137) (first alteration in original). His role as the agency's chief adjudicator thus violates due process of law.

Defendants' attempt to distinguish *Williams* on the basis that it involved a criminal case is unavailing because nothing in the opinion suggests its holding is limited to criminal proceedings. The due process right to an unbiased tribunal is not somehow relaxed when the government "merely" attempts to impose a civil penalty. Nor can the "significant, personal involvement" in *Williams* serve as a meaningful distinction. Doc. 21-1 PageID 261 (quoting *Williams*, 579 U.S. at 11). The judge in *Williams* supervised the office that prosecuted the defendant over two decades prior, and his sole personal involvement was the approval of a single decision. *See* 579 U.S. at 11. Here, CSO McMillan is *currently* supervising the Office of Hazmat Safety and has been in that position since at least 2021. He was therefore responsible for approving that office's investigation of Plaintiff and recommendation to prosecute. If anything, CSO McMillan has more of a personal stake in the proceeding than the judge in *Williams* and his role as adjudicator raises even greater due-process concerns. His future promotion and paychecks depend at least in part on his record as an effective supervisor of the Office of Hazmat Safety. If that office is found to have improperly exercised its investigatory power and recommended a meritless prosecution, it will reflect badly on him. CSO McMillan thus has an ongoing personal stake in rejecting Plaintiff's arguments.

III. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiff is entitled to a preliminary injunction halting the enforcement proceeding against it. For reasons discussed above at Argument Part II, Plaintiff is likely to succeed in showing that the agency proceeding is illegitimate and unconstitutional. Being subject to such an illegitimate proceeding is an irreparable, "here-and-now injury" that justifies injunctive relief. *Axon/Cochran* 598 U.S. at 191. Finally, the balance of the harms and public interest favor an injunction.

A. Plaintiff Will Suffer Irreparable Harm Absent an Injunction

Plaintiff is entitled to a preliminary injunction to prevent irreparable constitutional harm as articulated in Counts 1–5 of the Complaint. *See, e.g., Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("a prospective violation of a constitutional right constitutes irreparable injury"). Defendants' first response that structural separation-of-powers violations (at Counts 1 and 2) do not inflict irreparable harm, Doc. 21-1 PageID 253, is not well taken. *Axon/Cochran*, 598 U.S. at 191, explicitly recognized that the separation-of-power violations alleged by Axon and Ms. Cochran inflicts upon each a "here-and-now injury" of being subject to an illegitimate proceeding. The Court further confirmed that such injury is irreparable because it cannot be addressed after the offending proceeding concludes. *Id.* ("[W]e have recognized that those rights are 'effectively lost' if review is deferred until after trial.") *Id.*

Defendants' next contention that "*Axon* has nothing to do with Counts 3–8" is meritless.[11] Doc. 21-1 PageID 254. Counts 3 and 4 allege that the proceeding against Plaintiff is unconstitutional because it is led by illegitimate decisionmakers who lack authority to, respectively, exercise Article III judicial powers and decide questions of fact reserved for a jury. Doc. 1 PageID 19–21. That is the same "here-and-now injury" at issue in *Axon/Cochran*, 598 U.S. at 191. Moreover, Count 5 alleges the exact due process claim as raised by Axon, *i.e.*, a challenge against "the combination of prosecutorial and adjudicatory functions in a single agency." *Id.* at 180. The Supreme Court had no trouble holding that such an agency proceeding constituted a "here-and-now" due-process injury. *Id.* at 191.

Defendants finally suggest that the "here-and-now injury" referred to in *Axon/Cochran* of being subject to an illegitimate proceeding might not be irreparable. Doc. 21-1 PageID 254. To be sure, *Axon/Cochran* did not review the denial of a motion for preliminary injunction and thus did not specifically address the "irreparable harm" factor. But it is impossible to escape the conclusion that

[11] Plaintiff did not move for a preliminary injunction based on Counts 6–8.

the "here-and-now injury" referred to in *Axon/Cochran* is irreparable. Indeed, the Court held that district courts have jurisdiction to hear challenges to the legitimacy of agency proceeding precisely because the injury inflicted by being subject to an illegitimate proceeding cannot be remedied later. *Id.* at 191. The irreparable constitutional injuries that Plaintiff would suffer under Counts 1-5 are more than enough to justify an injunction.

In addition to constitutional injuries, being subject to Defendants' illegitimate proceeding results in unrecoverable, and therefore irreparable, monetary costs. *Commonwealth v. Biden*, 57 F.4th 545, 555–56 (6th Cir. 2023). Defendants cite *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, for the proposition that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." 415 U.S. 1, 24 (1974). "This misses the mark: the expense at issue in *Bannercraft* was the expense of litigating the *instant* case, not a parallel proceeding in another [forum.]" *Hill v. Washburne*, 953 F.3d 296, 309 (5th Cir. 2020) (citing *Bannercraft*, 415 U.S. at 24). In *Hill*, the Fifth Circuit explained that a party's "irreparable harm was not the expense of defending *this appeal*; it was the "expense of defending against [the opposing party's] challenges in [another] court[.]" *Id.* Here, the Plaintiff's financial injury is likewise not the expense of litigation in the instant case, but rather is the unrecoverable expense of defending against Defendants in another proceeding. *Id.* (affirming that a party "would suffer irreparable harm … by having to defend against [a separate proceeding.]").

B. Remaining Factors Favor an Injunction

The remaining injunction factors, the balance of harms and public interest, "merge" when the Government is the opposing party. *Nken*, 556 U.S. at 435. Defendants argue that halting the proceeding would frustrate the HMTA's statutory objective. Doc. 21-2 PageID 261. But subjecting a business to an illegitimate and unconstitutional proceeding is not the purpose of the HMTA nor any other statute. Rather, "the public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022).

Maryland v. King, 567 U.S. 1301, 1303 (2012), cited at Doc. 21-1 PageID 261, does not compel a contrary conclusion. There, the Supreme Court held it was irreparable harm to enjoin Maryland from collecting DNA from individuals arrested for violent crime, explaining that "[c]rimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries." *Id.* By contrast, there is no immediate public-safety interest in fining Plaintiff as soon as possible for allegedly inaccurate test reports that were submitted many years ago. Defendants notably do not allege that any product Plaintiff tested has caused or is likely to cause safety hazards. Nor has Defendant brought enforcement actions against companies that manufacture, sell, or use products that Plaintiff tested. Unlike *King*, there is no ongoing public-safety concern that would be implicated by an injunction. Any possible public interest in prosecuting Plaintiff while this case is resolved is easily outweighed by the irreparable injury to Plaintiff's constitutional rights.

CONCLUSION

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

October 26, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2023, a true and correct copy of the foregoing was filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system.

/s/ David T. Bules
David T. Bules