IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE WINCHESTER DIVISION

JAMES D. MCCONNELL,

Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE; THOMAS JAMES VILSACK, in his official capacity as the Secretary of Agriculture; KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,

Defendants.

No. 4:23-cv-00024-TRM-SKL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff James "Jimmy" Dale McConnell moves for a preliminary injunction against Defendants U.S. Department of Agriculture ("USDA"); Thomas James Vilsack, the Secretary of Agriculture (the "Secretary"); and Kevin Shea, the Administrator of the Animal and Plant Health Inspection Service ("APHIS") to immediately stop their ongoing prosecution of Mr. McConnell for alleged violations of the Horse Protection Act ("HPA") in an unconstitutional internal USDA adjudication process. The USDA's Judicial Officer unconstitutionally makes final decisions for the agency and supervises inferior officers as merely an employee. And USDA's in-house tribunal deprives Mr. McConnell of his right to a neutral Article III judge and a jury of his peers under the Seventh Amendment. As the Supreme Court confirmed this term, continued enforcement of an unconstitutional process like this results in irreparable harm to parties like Mr. McConnell. The Court should immediately enjoin the adjudication—or at least before a scheduled October 2023 hearing—to ensure that Mr. McConnell does not forever lose his right to bring his constitutional challenges.

BACKGROUND

A. Mr. McConnell's Tennessee Walking Horse Career

Mr. McConnell has spent his multi-decade career training and showing Tennessee Walking Horses. Compl. ¶¶ 9–12, 18–26. He owns and operates Formac Stables, Inc. in Shelbyville, Tennessee. *Id.* ¶ 10. Formac Stables boards approximately five dozen horses and employs six people who care for and train the horses boarded there. *Id.* ¶¶ 11–12. For over 50 years, Mr. McConnell has been involved in preparing, grooming, and transporting horses for thousands of entries throughout the southeast. *Id.* ¶ 18.

The Tennessee Walking Horse and its desirable gait is the basis for a significant horse-showing industry in Tennessee. *See id.* ¶¶ 13, 16–17. The Tennessee Walking Horse was developed in middle Tennessee. *Id.* ¶ 14. They perform three distinct gaits: the flat-foot walk, running walk, and canter. *Id.* ¶ 15. And they are shown in competitions across the southeast. *Id.* ¶ 16. The premier competition each year is the Tennessee Walking Horse National Celebration (the "Celebration") in Shelbyville, Tennessee. *Id.* ¶ 17. The Celebration can attract 100,000 people to its ten days of competition. *Id.*

Mr. McConnell is an honored member of the Tennessee Walking Horse industry. *Id.* ¶¶ 19–26. He has been recognized by peers as the Walking Horse Trainers Association ("WHTA") Trainer of the Year in 1985, 2004, 2010, and 2017. *Id.* ¶ 21. He has personally shown the Grand Champion horse at the Celebration four times. *Id.* ¶ 23. And Mr. McConnell served as the president of the WHTA in 1984, 1985, and from 1996 to 1998. *Id.* ¶ 26.

B. The Horse Protection Act

The Tennessee Walking Horse industry has sometimes involved the unfortunate practice of horse soring. Compl. ¶ 28. Abusive trainers intentionally inflict pain on the legs of a horse through

devices or chemicals in order to exaggerate the horse's gait for advantage in competitions. *Id.*; 15 U.S.C. §§ 1821(3); 1822(2).

In 1970, Congress passed the HPA in an effort to prohibit horse soring in competitive events. 15 U.S.C. § 1821, *et seq*. The HPA does not ban the practice of soring itself, but prohibits, among other things, the showing or exhibition of sore horses. 15 U.S.C. § 1824(2). HPA defines soring as the practice of applying "irritating or blistering agent[s]," inflicting "burn[s], cut[s], or laceration[s]," inserting "any tack, nail, screw, or chemical agent," or the use of "any other substance[s] or device[s]" on the limb of a horse that cause "or can reasonably be expected" to cause "physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3). The Secretary can impose civil monetary penalties of up to $2,000 per violation and disqualify violators from the walking horse industry after notice and a hearing. 15 U.S.C. § 1825(b) and (c).

The HPA is enforced through inspections at horse shows conducted by licensed individuals appointed by the show's management and by USDA employees. 15 U.S.C. § 1823(c) and (e); 9 C.F.R. §§ 11.4 and 11.7. Horses found to be sore must be disqualified from the competition. 9 C.F.R. § 11.20(a) and (b). And USDA can initiate civil enforcement proceedings to address disqualifications. *See* 9 C.F.R. § 11.25(f).

C. USDA's In-House Adjudication Process

Civil monetary penalties and disqualification orders can only be imposed by the Secretary after notice and a hearing. 15 U.S.C. § 1825(b) and (c). But the Secretary delegated that power to a USDA employee, creating a two-tier adjudication process that excludes the Secretary entirely. *See* 7 C.F.R. §§ 1.131, 1.144–45, 2.27, 2.35(a). Improperly supervised Administrative Law Judges ("ALJs") and an improperly appointed Judicial Officer now determine liability for alleged HPA violations. *See* 7 C.F.R. §§ 2.27, 2.35(a).

The current USDA adjudication process arose from two 1930s Supreme Court decisions that held that due process requires an agency's decisionmaker in an adjudicatory proceeding to conduct a full hearing of the record himself before issuing a decision. *Morgan v. United States*, 298 U.S. 468, 480–82 (1936); *Morgan v. United States*, 304 U.S. 1, 16–22 (1938). But it was impossible for the Secretary himself to conduct full hearings for every decision he had to make. *See In re: World Wide Citrus*, 50 Agric. Dec. 319, 335 (U.S.D.A. May 9, 1991). So, Congress granted the Secretary the authority to delegate his power, creating the constitutional problems that are before the Court today. 7 U.S.C. § 2204-2.

The Schwellenbach Act allows the Secretary to delegate his final decision-making authority in adjudications to not more than two "officers or employees" of USDA "and to assign appropriate titles to such officers or employees." 7 U.S.C. § 2204-2. The Secretary's delegations of authority are "vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture." 7 U.S.C. § 2204-3.

Pursuant to the Schwellenbach Act, the Secretary created a Judicial Officer and delegated to him the Secretary's final decision-making authority in many USDA adjudications. 7 C.F.R. § 2.35. The Judicial Officer hears appeals from the initial decisions of ALJs by reviewing the parties' briefs and the ALJ record, presiding over oral argument, and issuing a final decision for USDA. 7 C.F.R. § 1.145. Only decisions of the Judicial Officer are "final for purposes of judicial review." 7 C.F.R. §§ 1.139, 1.142(c)(4), 1.145(i). "The purpose of [the Judicial Officer] is to relieve the Secretary, *completely*, of the responsibilities imposed by law on a final deciding officer in such proceedings." *In re: World Wide Citrus*, 50 Agric. Dec. at 331 (emphasis added). The Secretary cannot review the Judicial Officer's decisions nor retroactively remove the delegation. 7 U.S.C. § 2204-3.

ALJs make the initial decision in each adjudication, 7 C.F.R. § 2.27(a)(1), and are appointed pursuant to 5 U.S.C. § 3105, which provides for the appointment of all ALJs. USDA ALJ appointments are made by the Secretary. *See, e.g.*, *In re: Philip Trimble, Respondent*, 77 Agric. Dec. 15, 17 (U.S.D.A. June 8, 2018). And ALJs exercise their decision-making authority through a designation by the Secretary pursuant to the Administrative Procedure Act ("APA"). 5 U.S.C. § 556(b)(3); 7 C.F.R. §§ 1.131, 2.27(a)(1). USDA ALJs are empowered to manage hearings like a trial-court judge, 7 C.F.R. § 1.144(c), and are bound by "specific [Judicial Officer] precedent," *In re Kenny Compton*, 78 Agric. Dec. 151, at *4 (U.S.D.A. Feb. 25, 2019). ALJs' initial decisions are only reviewed if appealed. 7 C.F.R. §§ 1.139, 1.142(c)(4), 1.145(a); 2.27(a)(1).

D. USDA Proceedings Against Mr. McConnell

Mr. McConnell has been fighting allegations that he violated the HPA through USDA's internal adjudication process since 2013. Compl. ¶¶ 67–68. APHIS, the USDA office responsible for civil enforcement of the HPA, *see, e.g.*, 9 C.F.R. § 11.4, first brought a complaint against Mr. McConnell in 2013, Compl. ¶¶ 67–68. In the intervening years, APHIS has repeatedly amended its existing complaints and filed new ones. *Id.* ¶ 68. There are nine allegations currently pending against Mr. McConnell (the "Pending Allegations"). Declaration of James Dale McConnell ¶ 3; Ex. 1 ¶¶ 18, 22, 27, 32, 36–39 (October 2016 Amended Complaint); Ex. 2 ¶ 102 (February 2017 Complaint); Ex. 3 at 5–6 (Mar. 8, 2022, Motion to Dismiss Certain Violations with Prejudice); Ex. 4 at 2 (Mar. 3, 2023, Notice of Violations that Complainant Has Retained and Intends to Try). USDA alleges that on several occasions Mr. McConnell entered or showed sore horses, one of which was also bearing a prohibited substance, and on two occasions allegedly gave false information to APHIS or refused to provide information. Ex. 1 ¶¶ 18, 22, 27, 32, 36–39; Ex. 2 ¶ 102. Mr. McConnell denied all nine allegations. McConnell Decl. ¶ 7. APHIS has already

presented its case on six of the allegations against Mr. McConnell during a 2019 hearing, but Mr. McConnell has yet to put on his defense. McConnell Decl. ¶ 9; Ex. 3 at 6.

Mr. McConnell has repeatedly tried to convince the USDA ALJ to dismiss the claims against him because the adjudication process is unconstitutionally structured. In his March 27, 2017, motion to dismiss and disqualify the ALJ, he argued that the ALJ was not appointed in compliance with the Appointments Clause and is improperly supervised, and that the Judicial Officer is illegitimately issuing final decisions for USDA without a proper appointment to a statutorily created office. Ex. 5 (March 27, 2017, Motion to Disqualify the USDA's ALJs and JO; Motion to Dismiss for Lack of Jurisdiction; and Request for Certification of Issues to the Secretary of Agriculture). The ALJ refused to dismiss the case, in part, on the grounds that she did not have the authority to resolve Mr. McConnell's constitutional claims and refused to certify his disqualification motion to the Secretary. Ex. 6 at 5–8, 10–14 (June 13, 2017, Order Denying Motion to Disqualify Administrative Law Judges and Judicial Officer, Motions to Dismiss, and Request for Certification of Issues).

Mr. McConnell moved to dismiss the allegations against him on constitutional grounds again on February 24, 2022, shortly after the ALJ refused to decide his constitutional claims until she issued an initial decision on the merits of APHIS's allegations. Ex. 7 (Feb. 24, 2022, Motion to Dismiss: The USDA Administrative Law Judges and Judicial Officer Have No Lawful Authority to Grant the Relief Complainant Requests); Ex. 8 at 4 (Mar. 15, 2022, Complainant's Response to Respondent's Motion to Dismiss). He raised again the illegitimate exercise of final decision-making authority by the Judicial Officer, who was not properly appointed to an office. Ex. 7 at 15–50. He also asserted that the USDA ALJs function as principal officers who are not appointed by the President and confirmed by the Senate and who are unconstitutionally shielded from removal

by two layers of tenure protection. *Id.* at 51–87. He raised his constitutional claims before the ALJ again on March 28 and May 11, 2022. Ex. 9 at 2–3, 21–35 (Mar. 28, 2022, Response to Complainant's March 8, 2022, Motion to Dismiss Certain Violations with Prejudice); Ex. 10 at 3–7 (May 11, 2022, Respondents' Request for Reconsideration).

After the decision of the U.S. Court of Appeals for the Fifth Circuit in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023), Mr. McConnell requested a jury trial under the Seventh Amendment. Ex. 11 (June 15, 2022, Respondents' Request for a Jury Trial). He argued that, because APHIS's claims against him were effectively common-law fraud allegations concerning private claims between competitors like the SEC's fraud allegations in *Jarkesy*, he is entitled to a jury trial. *Id.*

The adjudication process against Mr. McConnell accelerated in 2023. In February 2023, Mr. McConnell re-raised his constitutional objections and request for a jury trial. Ex. 12 at 1–5 (Feb. 10, 2023, Respondents' Identification of Issues for February 28, 2023, Telephone Conference). But the ALJ's response was familiar: she will hear APHIS's claims on the merits until a higher authority tells her otherwise. Ex. 13 at 1–2 (May 3, 2023, Respondents' Renewed Objections). On March 7, 2023, the ALJ set the case for a three-week in-person hearing starting October 10, 2023. Ex. 14 at 1–2 (2023 October and November Segments, Hearing RESUMED Notice). USDA intends to try three Pending Allegations during the October 2023 hearing and Mr. McConnell intends to put on his defense to all nine Pending Allegations. Ex. 4 at 1–2; McConnell Decl. ¶ 10.

On April 14, 2023, the Supreme Court decided it was permissible to bring constitutional challenges to agency adjudications in federal court prior to the completion of the adjudication process. *Axon v. FTC*, 143 S. Ct. 890, 906 (2023). Mr. McConnell renewed his constitutional

objections in light of *Axon*. Ex. 13 at 2. In response, USDA conceded that Mr. McConnell's constitutional claims belong in federal court. Ex. 15 at 1–5 (May 22, 2023, Complainant's Response to: Respondents' Renewed Objections).

Mr. McConnell takes USDA's advice and brings the above-captioned action. USDA's adjudication process unconstitutionally requires Mr. McConnell to litigate effectively common-law claims affecting private rights outside of an Article III court and instead in an unconstitutionally constituted agency adjudication process. Mr. McConnell faces a here-and-now injury if he is forced to continue defending himself in this illegitimate process; an injury that cannot be undone. Only this Court can provide Mr. McConnell with relief. Mr. McConnell requests that USDA's adjudication of the allegations against him—including the upcoming October 2023 hearing—be enjoined unless and until the allegations can be brought in a proper forum.

LEGAL STANDARD

The Court must evaluate four factors before issuing a preliminary injunction: "'(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.'" *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curium). In general, the factors "'[should] be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014). For motions to preliminarily enjoin a potential constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Schimmel*, 751 F.3d at 430 (quotation marks omitted).

ARGUMENT

A. Mr. McConnell Is Likely to Succeed on the Merits

For several reasons, USDA's internal adjudication process runs afoul of constitutional guarantees. It violates the Appointments Clause, the Seventh Amendment, and Article III. Supreme Court and Sixth Circuit precedent make clear that Mr. McConnell is likely to succeed on these claims.

1. The Judicial Officer Does Not Constitutionally Exercise Final Decision-Making Authority

USDA's final decision-maker—the Judicial Officer—unconstitutionally exercises principal officer power as merely an employee. "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" in an agency adjudication. *United States v. Arthrex*, 141 S. Ct. 1970, 1985 (2021). The office must be "established by Law," U.S. CONST. art. II, § 2, cl. 2, such that its "'duties, salary, and means of appointment'" are "created by statute," *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). But the Judicial Officer is entirely a creation of the Secretary through a delegation of authority: the Judicial Officer holds no office established by Congress and was neither appointed by the President nor confirmed by the Senate. *See* 7 U.S.C. § 2204-2; 7 C.F.R. §§ 2.35, 2.4. The Secretary delegated his authority to the Judicial Officer pursuant to statutes that never mention such an office. Schwellenbach Act, ch. 75, 54 Stat. 81 (1940); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3219–21 (June 5, 1953), *reprinted as amended in* 5 U.S.C. app. at 145–46.

In fact, Congress affirmatively decided *not* to create a new office held by a principal officer with authority to make final adjudicative decisions for USDA. *In re World Wide Citrus*, 50 Agric. Dec. at 335–44. When the Schwellenbach Act was initially proposed in the Senate, it included a new office of Second Assistant Secretary of Agriculture that required a presidential appointment

and Senate confirmation. *Id.* at 335–36. But the House of Representatives passed a version of the bill that authorized the Secretary to delegate his "quasi-judicial functions to not more than two employees" of a certain civil service rank. *Id.* at 339–40. Congress adopted the House's approach and the Chairman of the House Agriculture Committee explained that the final version "'eliminate[d] the additional position and require[d] the hearings, and so forth, to be conducted before authorities [then] in the Department.'" *Id.* at 341–44. Congress cannot have established what it explicitly refused to do.

Yet, the Judicial Officer is the "final deciding officer in adjudicatory proceedings" regarding HPA violations, and for other statutes enforced by USDA. 7 C.F.R. §§ 1.145(i), 2.35(a)(1); *Utica Packing Co. v. Block*, 781 F.2d 71, 72 (6th Cir. 1986). Respondents may seek judicial review of the Judicial Officer's decision "without filing a petition for rehearing, reargument, or reconsideration." 7 C.F.R. § 1.145(i). And his decisions are binding on USDA ALJs. *In re Compton*, 78 Agric. Dec. at *4. So, the Judicial Officer exercises principal-officer power. *See Arthrex*, 141 S. Ct. at 1981, 1985. That is not something an employee is permitted to do. *Id.*

Even if the Judicial Officer holds an office, he was not properly appointed as a principal officer to issue final decisions for USDA. The Appointments Clause requires "Officers of the United States" to be appointed by the President "with the Advice and Consent of the Senate" to an office "established by Law." U.S. CONST. art. II, § 2, cl. 2. Except Congress may provide for the appointment of "inferior officers" by "the President alone," "the Courts of Law," or "the Heads of Departments." *Id.* An officer who issues "final decision[s] binding the Executive Branch" (i.e., a principal officer) must be appointed by the President and confirmed by the Senate. *Arthrex*, 141 S. Ct. at 1979, 1985. That process ensures political accountability for their conduct, including their supervision of inferior officers. *Id.* at 1979, 1981. But the Judicial Officer was neither appointed

by the President nor confirmed by the Senate. 7 C.F.R. §§ 2.35(a), 2.4. He cannot constitutionally issue final decisions in USDA adjudications even if he is an officer. *Arthrex*, 141 S. Ct. at 1985.

The Judicial Officer's role also cannot be salvaged through a recharacterization of his position as an inferior officer because he is not supervised by a principal officer.[1] *Id.* at 1980. Principal officers may delegate authority as long as they retain final decision-making authority for the agency. *See Michigan Dep't of Educ. v. U.S. Dep't of Educ.*, 875 F.2d 1196, 1204 (6th Cir. 1989). But the Secretary is forbidden from reviewing Judicial Officer decisions. 7 U.S.C. § 2204-3; *see also Office of the Judicial Officer*, U.S. Department of Agriculture, https://www.usda.gov/oha/ojo (last visited July 19, 2023) ("The Judicial Officer's decisions are not reviewable within USDA."). The Secretary's delegation "vested by law" in the Judicial Officer—"instead of in the Secretary"—the authority to make final adjudicatory decisions. 7 U.S.C. § 2204-3. Moreover, the Secretary cannot retroactively revoke his delegation as a means of exercising control over the Judicial Officer's decisions. *Id.* In fact, efforts by the Secretary to circumvent these restrictions and intervene in the decision-making process have been struck down as a due process violation. *Utica Packing*, 781 F.2d at 74, 78 (violation of due process to selectively

[1] The Sixth Circuit previously held that the Secretary of Labor's establishment of the Administrative Review Board ("ARB"), which exercised final decision-making authority, did not violate the Appointments Clause despite concluding that ARB members were "at most" inferior officers. *Varnadore v. Sec'y of Lab.*, 141 F.3d 625, 629–31 (6th Cir. 1998). But *Varnadore* is not binding precedent because it was decided before the Supreme Court settled that "[o]nly an officer properly appointed to a *principal office* may issue a final decision binding the Executive Branch." *Arthrex*, 141 S.Ct. at 1985 (emphasis added); *see also Miller v. Caudill*, 936 F.3d 442, 447–48 (6th Cir. 2019) ("[P]ublished precedent binds all future panels unless ... it conflicts with intervening United States Supreme Court precedent and thus requires modification."). *Varnadore* also did not squarely address the question of whether ARB members held offices established by law as required by the Appointments Clause and is not binding on that question either. 141 F.3d at 631; *Wright v. Spaulding*, 939 F.3d 695, 702 (6th Cir. 2019) ("[Q]uestions which merely lurk in the record ... are not to be considered as having been so decided as to constitute precedent." (quotation marks omitted)).

remove the Judicial Officer from a case and move for reconsideration before a different USDA official). The Secretary's delegation unconstitutionally "relieve[s him] of responsibility for the final decisions rendered by [the Judicial Officer] purportedly under his charge," *see Arthrex*, 141 S. Ct. at 1981. This structure interferes with the Appointments Clause's "chain of command" and cannot continue. *Id.* at 1982.

The Judicial Officer is simply an employee of USDA who neither holds an office nor received a presidential appointment and Senate confirmation. Without these essential characteristics, the Judicial Officer cannot issue final adjudication decisions for USDA. *Id.* at 1985.

2. USDA ALJs Are Improperly Supervised Inferior Officers

The Judicial Officer's status as an employee has cascading effects down the "chain of command" established by the Appointments Clause. *Id.* at 1982. To maintain the "legitimacy and accountability" of Presidential power wielded by subordinate officers, that "'chain of command'" must be "'clear and effective.'" *Id.* at 1979. But that is not the case for USDA's ALJs, whose decision-making is exclusively supervised by the Judicial Officer. *See* 7 C.F.R. § 1.145(a). Because the ALJs are insulated from supervision by the Secretary through his delegation of final decision-making authority to the Judicial Officer, 7 C.F.R. § 2.35, ALJs do not have the constitutionally requisite principal officer supervision, *Arthrex*, 141 S. Ct. at 1980.

As a threshold matter, USDA ALJs are officers. *See Lucia*, 138 S. Ct. at 2053–54. Like the SEC ALJs in *Lucia*, USDA ALJs oversee adversarial hearings by "examin[ing] witnesses and receiv[ing] evidence," "[a]dminister[ing] oaths and affirmations," "[r]ul[ing] upon motions and requests," "[a]dmit[ing] or exclud[ing] evidence," and maintaining order, including by excluding "contumacious counsel or other persons." 7 C.F.R. § 1.144(c); *Lucia*, 138 S. Ct. at 2053. And without an appeal, the ALJs' decisions become final—similar to SEC ALJs. 7 C.F.R. § 2.27(a)(1); *Lucia*, 138 S. Ct. at 2053–54.

After the U.S. Solicitor General took the position in *Lucia* that SEC ALJs were officers, the Secretary, a head of department, ratified USDA ALJs' appointments. *In re: Trimble*, 77 Agric. Dec. at 17. And USDA's adjudication process is organized such that ALJs issue initial decisions that are reviewed by the Judicial Officer exercising the Secretary's authority. 7 C.F.R. §§ 1.145, 2.35(a). But this supervisory structure does not withstand constitutional scrutiny.

The defining feature of an inferior officer is "direct[ion] and supervis[ion] at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Arthrex*, 141 S. Ct. at 1980 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). Two factors determine whether the direction and supervision of inferior officers is adequate: (1) the level of administrative oversight—including removal power—a principal officer has and (2) the principal officer's review of inferior officer decisions. *Id.* The more significant factor is whether the inferior officer can make final decisions for the United States without any review from a principal officer. *Id.* at 1980–81.

The critical component of inferior officer supervision—principal officer review—is missing here. *See id.* at 1981. Only an employee, the Judicial Officer, reviews USDA ALJ decisions. 7 C.F.R. §§ 1.145, 2.35; *see also* 7 U.S.C. § 2204-3. But the Judicial Officer satisfies none of the Appointments Clause's requirements for exercising principal officer power. *See supra* Part A1. At no point are USDA ALJ decisions "permitted" to become final "by other Executive officers." *Arthrex*, 141 S. Ct. at 1980 (quoting *Edmond*, 520 U.S. at 665). With no principal officer to review their decisions, USDA ALJs lack the supervision the Constitution requires for an inferior officer. *Id.* at 1988.

The Secretary's limited administrative oversight of USDA ALJs through the Uniform Rules of Practice does not rehabilitate the constitutionality of the supervisory structure. *See Arthrex*, 141

S. Ct. at 1980–81; 7 C.F.R. § 1.131. ALJ pay is established by statute, not the Secretary. 5 U.S.C. § 5372. And the Secretary cannot remove ALJs at will. *See* 5 U.S.C. § 7521(a). He has even less administrative control over USDA ALJs than the Supreme Court held was insufficient in *Arthrex*. *See* 141 S. Ct. at 1980–82. Ultimately, the Secretary's administrative oversight is not enough because the Secretary cannot review "the one thing that makes the [ALJs] officers," their adjudicatory decisions. *Id.* at 1980; 7 C.F.R. § 1.145(a).

3. USDA's In-House Adjudication Process Denies Mr. McConnell His Seventh Amendment Right to a Jury Trial

The HPA violations Mr. McConnell is alleged to have committed are essentially common-law claims involving private rights for which Mr. McConnell is entitled to a jury trial. *See Jarkesy*, 34 F.4th at 452–59. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. Suits at common law can include those created by statute where the action is analogous to a suit that would otherwise be brought at common law. *Tull v. United States*, 481 U.S. 412, 417 (1987). A statutory claim is analogous to a common law claim if it satisfies two criteria: (1) it is sufficiently similar to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and (2) it provides a legal remedy. *Id.* at 417–18. If the statutory claim is effectively a common law claim, it must be determined whether the public-rights doctrine nonetheless permits the claim to be assigned to an administrative agency. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 51 (1989).

Mr. McConnell is accused of violating statutes that prohibit the "showing or exhibiting" or "entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore," entering a horse bearing a prohibited substance, and the provision of false information to or withholding of information from USDA. 15 U.S.C. § 1824(2), (7), (9); 9 C.F.R.

§ 11.2(e). An action to enforce these statutes is analogous to two common-law claims: fraud and breach of contract.

Fraud is a quintessential common-law action and has been civilly prosecuted dating back to English common law courts. *Jarkesy*, 34 F.4th at 453 (citing 3 William Blackstone, Commentaries on the Laws of England *42). The HPA essentially creates a statutory prohibition against common-law fraud in walking horse competitions and empowers the USDA to administratively prosecute those claims. 15 U.S.C. §§ 1824–1825. In Tennessee, the elements of common-law fraud are (1) the "representation of an existing or past fact," (2) that is "false," (3) that regards a "material fact," (4) that is made knowingly, "without belief in its truth," or recklessly, (5) the plaintiff relied on the "misrepresented material fact," and (6) the plaintiff is harmed as a result of the fraud. *Edwards v. Travelers Ins. of Hartford*, 563 F.2d 105, 110–13 (6th Cir. 1977); *see also* Restatement (Second) of Torts § 525 (1977). Here, the USDA alleged that Mr. McConnell made materially false statements about whether the horses he was entering or showing were sore, whether one horse was bearing a prohibited substance, and his identity, and that he refused to provide certain information. Ex. 1 ¶¶ 18, 22, 27, 32, 36–39; Ex. 2 ¶ 102. The alleged conduct would allow Mr. McConnell to gain an unfair advantage in the competition—the elimination of which was one of Congress's explicit purposes in adopting the HPA, 15 U.S.C. § 1822(2)—harming his fellow competitors and the competition itself who relied on compliance with the rules. These are quintessential common-law fraud claims converted into regulatory enforcement actions. *See Jarkesy*, 34 F.4th at 453–54.

APHIS's allegations are also analogous to common law breach of contract claims against Mr. McConnell. "[S]tate-law causes of action for breach of contract ... are paradigmatic private rights" for which litigants are entitled to a jury trial. *Granfinanciera*, 492 U.S. at 56. In Tennessee,

the elements of common law breach of contract are "the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011). Those elements are all present here. Entry of the horses at issue into their competitions included an agreement to abide by the rules of the competition. *See, e.g.*, Ex. 16 ("I agree to abide by the Rules of the SHOW, Inc. and this show."); *see also* Ex. 17 at 12–13 (Rule Book–HPA Compliance Section, S.H.O.W. (Rev. Jan. 2011)); Ex. 18 at 12 (Rule Book–HPA Compliance Section, S.H.O.W. (Rev. Sept. 2013)); Ex. 19 at 12 (Rule Book–HPA Compliance Section, S.H.O.W. (Rev. Feb. 2016)); Declaration of David Broiles ¶ 17–20. For all nine of the allegations pending against Mr. McConnell, the applicable rules prohibited sore horses and the provision of false information to show management or inspectors. Ex. 17 at 3–4, 12–15; Ex. 18 at 3, 12–15; Ex. 19 at 3, 12–14; Broiles Decl. ¶ 17–20. APHIS accused Mr. McConnell of conduct that violates the competitions' rules agreed to by participants, just as if it was a breach of contract action.

USDA's remedy—civil monetary penalties—is also traditionally sought at common-law.[2] *Tull*, 481 U.S. at 420; 15 U.S.C. § 1825(b). Actions for civil monetary penalties are "clearly analogous to the 18th-century action in debt" and "require[] a jury trial." *Tull*, 481 U.S. at 420. So, Mr. McConnell is entitled to a jury trial unless Congress permissibly removed from the jurisdiction of Article III courts actions for HPA violations.

Congress can only assign the adjudication of public rights to non-Article III tribunals without a jury. *Granfinanciera*, 492 U.S. at 51. But the allegations against Mr. McConnell involve

[2] USDA could also ban Mr. McConnell from showing or exhibiting horses, an injunctive remedy. 15 U.S.C. § 1825(c). But USDA can only impose that remedy if it has also imposed a civil fine. *Id.* And the jury trial right attaches where any part of the action is legal in nature. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990).

private rights. *See Jarkesy*, 34 F.4th at 455–57. A statutory action enforces a public right when it is a "new cause of action" that was previously "unknown to the common law" enacted "because traditional rights and remedies were inadequate to cope with a manifest public problem." *Granfinanciera*, 492 U.S. at 60 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 461 (1977)). Conversely, "[p]rivate rights address 'the liability of one individual to another under the law as defined.'" *Brott v. United States*, 858 F.3d 425, 435 (6th Cir. 2017) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–70 (1982)).

A cause of action for fraud is certainly not unknown to the common law. *See Jarkesy*, 34 F.4th at 453–54. And claims of fraud through cheating really seek to redress the harm that the cheating causes to other rule-abiding competitors and to the integrity of the competition itself. *See* 15 U.S.C. § 1822(2) ("[H]orses shown or exhibited which are sore ... compete unfairly with horses which are not sore."). For example, civil fraud suits have been brought by video game companies against players attempting to circumvent anti-cheating measures despite agreeing to a license agreement. *Bungie, Inc. v. L.L.*, No. 22-cv-0981, 2023 WL 3318588, at *2 (W.D. Wash. May 9, 2023). Fraud "is not a matter that can be pursued only by grace of the other branches." *Stern v. Marshall*, 564 U.S. 462, 493 (2011).

Causes of action for breach of contract are similarly common-law cases. *Granfinanciera*, 492 U.S. at 56. And the harm done to the other competitors and the competitions by Mr. McConnell's alleged breach of the rules he agreed to follow could have been redressed without Congress creating an administrative enforcement regime. *See Stern*, 564 U.S. at 493. Like fraud, courts have recognized the availability of breach of contract lawsuits for video game companies suing individuals who enabled cheating by inserting additional software into the companies' games in violation of the terms of service. *Bungie, Inc. v. Claudiu-Florentin*, No. 21-cv-01114, 2023 WL

3158585, at *3 (W.D. Wash. Apr. 27, 2023) (entering default judgement on breach of contract claim); *Epic Games, Inc. v. C.R.*, No. 17-CV-534, 2018 WL 11386290, at *1–2 (E.D.N.C. July 12, 2018) (denying motion to dismiss complaint that included breach of contract claim); *Epic Games, Inc. v. Lucas*, No. 18-CV-484, 2019 WL 177936, at *1–2 (E.D.N.C. Jan. 11, 2019) (refusing to dismiss complaint including breach of contract claim because it was "facially plausible"). The competitions could have similarly pursued breach of contract claims against Mr. McConnell. APHIS's claims that Mr. McConnell competed unfairly in walking horse shows involve private rights. *See Stern*, 564 U.S. at 493.

In addition to actions addressing liability between private parties, Article III courts must also adjudicate cases involving the core private rights at the heart of the judicial power: life, liberty, and property. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567, 610–11, 626–27 (2007). Here, Mr. McConnell's core private right to his property is at stake through potential civil monetary penalties. 15 U.S.C. § 1825(b)(1). While *Atlas Roofing* permitted an administrative agency to seek civil penalties for newly created claims of unsafe working conditions before a "speedy and expert" agency tribunal, it did not permit Congress to remove *any* enforcement action seeking civil money penalties from an Article III court. 430 U.S. at 445, 461; *see also* Nelson, *supra*, at 611. *Atlas Roofing* only applies to those "cases in which 'public rights' are being litigated"—particularly where Congress "created a new cause of action, and remedies therefor, unknown to the common law"—not cases involving private rights. 430 U.S. at 450 & n.7, 461. The fraud and breach-of-contract-type claims and civil money penalties created by the HPA are very well known to the common law. *See supra*, at 15–18. So, Mr. McConnell is entitled to have USDA's claims affecting his core private right to his property adjudicated in an Article III

court. *See Jarkesy*, 34 F.4th at 458–59 (comparing fraud claims that "are quintessentially about the redress of private harms to "the 'new' claims and remedies in *Atlas Roofing*").

Any argument APHIS's allegations assert a public right is further undermined by the absence of a congressionally devised "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by [USDA]." *Stern*, 564 U.S. at 494 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)). USDA does not have a unique adjudication method for HPA violations. *See, e.g.*, 7 C.F.R. § 1.131. The Secretary designated ALJs to hear any APA administrative adjudication for multiple statutes enforced by USDA. 7 C.F.R. § 2.27. Additionally, all appeals from initial decisions in USDA adjudicatory proceedings covered by the APA are decided by the Judicial Officer, who also issues the final decision in 11 other circumstances. 7 C.F.R. § 2.35(a). And HPA adjudications are conducted under the same rules as the adjudication of claims under no fewer than 38 other statutes. 7 C.F.R. § 1.131. USDA is effectively operating its own general court system. Moreover, this in-house system has not yielded any efficiency gains given that Mr. McConnell's proceeding has now lasted almost a decade. *See* Compl. ¶¶ 67–68, 70. A jury is not "'incompatible'" with the adjudication of HPA violations, nor would requiring a jury "'go far to dismantle the statutory scheme.'" *Granfinanciera*, 492 U.S. at 61–62.

4. USDA's In-House Adjudication Process Violates Article III

Because APHIS's claims against Mr. McConnell involve the adjudication of private rights, the entire case must be brought in an Article III court. *Id.* at 53. Article III vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The same private rights analysis for the availability of a jury trial under the Seventh Amendment is applicable to whether Congress can "assign adjudication of that cause of action to a non-Article III tribunal." *Granfinanciera*, 492 U.S.

at 53. Adjudications of violations of the HPA involve private rights, not public rights. *See supra* Part A3. So, "Congress may not assign [their] adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.'" *Granfinanciera*, 492 U.S. at 53 (quoting *Crowell*, 285 U.S. at 51).

B. Mr. McConnell Is Irreparably Injured by the USDA In-House Adjudication

If Mr. McConnell is forced to continue to defend himself in an unconstitutional USDA adjudication, that injury will be "impossible to remedy once the proceeding is over." *Axon*, 143 S. Ct. at 903. Like the plaintiffs in *Axon*, Mr. McConnell raises constitutional challenges to the structure of USDA's internal adjudication process. *See supra* Part A; *Axon*, 143 S. Ct. at 898–99. And his injury is "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* at 903; McConnell Decl. ¶¶ 11–12. That is a redressable "here-and-now" injury. *See Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020). Once USDA's adjudication process is complete, "[it] cannot be undone," and judicial review of USDA's final decision can provide no relief. *Axon*, 143 S. Ct. at 904. Without a preliminary injunction, Mr. McConnell will continue to be irreparably injured by the unconstitutional adjudication process. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); McConnell Decl. ¶¶ 11–12.

The certainty of Mr. McConnell's ongoing irreparable injury also reduces the "degree of likelihood of success that need be shown to support a preliminary injunction." *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997). To be sure, Mr. McConnell's constitutional challenges to USDA's adjudication process are likely to succeed. *See supra* Part A. Nevertheless, the likelihood of success a movant must show "varies inversely with the degree of injury the plaintiff might suffer" to avoid a "serious danger of irreparable harm" even where "[the] probability of success on the merits of a claim is not very high." *Doe*, 106 F.3d at 707. Here, there is no question

Mr. McConnell is being irreparably injured by the ongoing adjudication. *Axon*, 143 S. Ct. at 903–04; McConnell Decl. ¶¶ 11–12.

C. A Preliminary Injunction Is In The Public Interest

The final two factors are whether a preliminary injunction "would cause substantial harm to others" and "whether the public interest would be served by [its] issuance." *Wilson v. Williams*, 961 F.3d 829, 836 (6th Cir. 2020) (quotation marks omitted). Where the government is the opposing party to a preliminary injunction motion, these two factors "'merge.'" *Id.* at 844.

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Liberty Coins*, 748 F.3d at 690; *see also Weaver v. Univ. of Cincinnati*, 942 F.2d 1039, 1047 (6th Cir. 1991) (public interest is served by requiring "constitutionally valid collective bargaining agreement"). In such cases, any more practical harms, to the extent they exist, fall away because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021); *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) (refusing to "weigh [] tradeoffs" where an agency plainly overstepped its authority). Regardless, a preliminary injunction will not cause substantial harm to others here because third parties will *benefit* from the enjoining of an illegitimate USDA adjudication process. *Weaver*, 942 F.2d at 1047. Mr. McConnell is likely to succeed on his arguments that the USDA's adjudication process is unconstitutional. *See supra* Part A. So, the public interest favors a preliminary injunction of the ongoing adjudication, including the October 2023 hearing.

D. Bond Is Not Necessary

A bond is not necessary to grant a preliminary injunction for Mr. McConnell given the "circumstances" of a constitutional challenge. *FemHealth USA, Inc. v. City of Mount Juliet*, 458 F. Supp. 3d 777, 805 n.27 (M.D. Tenn. 2020). Federal Rule of Civil Procedure 65(c) requires that

issuance of a preliminary injunction be accompanied by a "security" paid by the movant "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). But a bond is not necessary where the movant is seeking to vindicate his constitutional rights. *See FemHealth USA*, 458 F. Supp. 3d at 786, 805 n.27 (declining to require a bond in a constitutional challenge); *cf. Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (bond not required where case involved "strong public interest"). Nor is it necessary if there is no evidence of harm to the defendant. *See, e.g.*, *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 432 (6th Cir. 2013). Here, Mr. McConnell seeks to end a nearly decade-long unconstitutional adjudication process, which is in the public interest. *See Liberty Coins*, 748 F.3d at 690. Moreover, this adjudication process has dragged on for nearly a decade, Compl. ¶¶ 67–68, 70, demonstrating that USDA is not concerned with delays in resolving APHIS's claims.

CONCLUSION

For the foregoing reasons, Mr. McConnell respectfully requests a preliminary injunction be entered enjoining the USDA from proceeding against him.

DATED: July 20, 2023

Respectfully submitted,

s/ *Joshua M. Robbins*_____
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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2023, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system. I also certify that courtesy copies of the foregoing have been served via next-day mail to the following:

Francis M. Hamilton III
United States Attorney for the Eastern District of Tennessee
800 Market Street, Suite 211
Knoxville, Tennessee 37902
Attn: Civil Process Clerk

Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Kevin Shea
Administrator of the Animal and Plant Health Inspection Service
United States Department of Agriculture
Animal and Plant Health Inspection Service
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U.S. Department of Agriculture
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Washington, DC 20250

Thomas James Vilsack, Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

s/ *Joshua M. Robbins*_____
JOSHUA M. ROBBINS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE WINCHESTER DIVISION

JAMES D. MCCONNELL, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE; THOMAS JAMES VILSACK, in his official capacity as the Secretary of Agriculture; KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service Defendants.	No. 4:23-cv-00024-TRM-SKL

DECLARATION OF JAMES DALE MCCONNELL

Pursuant to 28 U.S.C. § 1746, I, James Dale McConnell declare as follows:

1. I am over the age of 18 years. The facts set forth in this declaration are based upon my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.

2. I am a resident of Shelbyville, Tennessee.

3. The Animal and Plant Health Inspection Service ("APHIS")—an agency of the United States Department of Agriculture ("USDA")—is currently pursuing against me nine alleged violations of the Horse Protection Act arising from an October 5, 2016 amended complaint in HPA Docket No. 16-0169 (the "October 2016 Amended Complaint") and a February 3, 2017 complaint in HPA Docket No. 17-0207 (the "February 2017 Complaint") (collectively, the "Pending Allegations").

4. The Pending Allegations were filed in USDA's internal adjudication process and are currently pending before Administrative Law Judge Jill S. Clifton.

5. Eight of the Pending Allegations were included in the October 2016 Amended Complaint at paragraphs 18, 22, 27, 32, and 36–39.

6. The ninth Pending Allegation was included in the February 2017 Complaint at paragraph 102.

7. I denied all nine Pending Allegations in the USDA internal adjudication process.

8. The Pending Allegations have not yet been fully heard in the USDA internal adjudication process.

9. USDA presented its case on six of the Pending Allegations—paragraphs 18, 22, and 36–39 of the October 2016 Amended Complaint—during a hearing before Administrative Law Judge Clifton in 2019. The USDA has rested its case as to those six Pending Allegations, but I have not yet put on my defense.

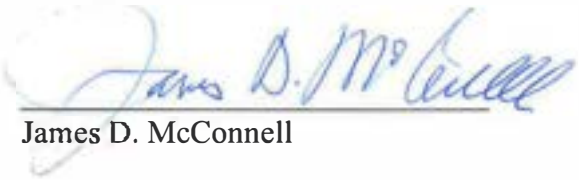
10. Administrative Law Judge Clifton scheduled a hearing beginning on October 10, 2023 during which USDA intends to try the three Pending Allegations for which it did not put on its case in 2019—paragraphs 27 and 32 of the October 2016 Amended Complaint and paragraph 102 of the February 2017 Complaint. I anticipate putting on my defense to all nine Pending Allegations during this hearing.

11. I have participated in USDA's adjudication process to protect my interests and rights as a practical matter, but I object to having to defend myself against the Pending Allegations in an improperly constituted agency adjudication process outside of an Article III court without a jury as a fact-finder.

12. I have expended significant time and resources defending myself in the USDA internal adjudication process against the Pending Allegations. And I am currently preparing for the upcoming hearing on the Pending Allegations scheduled to begin on October 10, 2023.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2023, at Shelbyville, Tennessee



James D. McConnell

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE WINCHESTER DIVISION

JAMES D. MCCONNELL, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE; THOMAS JAMES VILSACK, in his official capacity as the Secretary of Agriculture; KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service Defendants.	No. 4:23-cv-00024-TRM-SKL

DECLARATION OF DAVID BROILES

Pursuant to 28 U.S.C. § 1746, I, David Broiles declare as follows:

1. I am over the age of 18 years. The facts set forth in this declaration are based upon my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.

2. Exhibit 1 attached hereto is an excerpt of a true and correct a copy of the Amended Complaint filed on October 5, 2016 in *In re James Dale McConnell*, HPA Docket No. 16-0169 (U.S.D.A.) (the "October 2016 Amended Complaint").

3. Exhibit 2 attached hereto is an excerpt of a true and correct copy of the Complaint filed on February 3, 2017 in *In re James Dale McConnell*, HPA Docket No. 17-0207 (U.S.D.A.) and other cases (the "February 2017 Complaint").

4. Exhibit 3 attached hereto is a true and correct copy of the Animal and Plant Health Inspection Service's ("APHIS") March 8, 2022 Motion to Dismiss Certain Violations with

Prejudice filed in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

5. Exhibit 4 attached hereto is an excerpt with pagination added pursuant to Local Rule 5.1 of a true and correct copy of APHIS's March 3, 2023 Notice of Violations that Complainant Has Retained and Intends to Try at the Hearings Scheduled for October and November, 2023 filed in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

6. Exhibit 5 attached hereto is a true and correct copy of Mr. McConnell's March 27, 2017 Motion to Disqualify the USDA's ALJs and JO; Motion to Dismiss for Lack of Jurisdiction; and Request for Certification of Issues to the Secretary of Agriculture filed in *In re McConnell*, HPA Docket No. 16-0169 and other cases on behalf of Mr. McConnell and another respondent.

7. Exhibit 6 attached hereto is a true and correct copy of Administrative Law Judge Jill S. Clifton's June 13, 2017 Order Denying Motion to Disqualify Administrative Law Judges and Judicial Officer, Motions to Dismiss, and Request for Certification of Issues issued in *In re McConnell*, HPA Docket No. 16-0169 and other cases.

8. Exhibit 7 attached hereto is a true and correct copy of Mr. McConnell's Motion to Dismiss: The USDA Administrative Law Judges and Judicial Officer Have No Lawful Authority to Grant the Relief Complainant Requests filed on February 24, 2022 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases on behalf of other respondents.

9. Exhibit 8 attached hereto is an excerpt of a true and correct copy of Complainant's Response to Respondent's Motion to Dismiss: The USDA Administrative Law Judges and Judicial Officer Have No Lawful Authority to Grant the Relief Complainant Requests filed on March 15,

2022 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

10. Exhibit 9 attached hereto is an excerpt of a true and correct copy of Mr. McConnell's Response to Complainant's March 8, 2022 Motion to Dismiss Certain Violations with Prejudice filed on March 28, 2022 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases on behalf of other respondents.

11. Exhibit 10 attached hereto is an excerpt of a true and correct copy of Respondents' Request for Reconsideration and Respondents' Specific Responses to ALJ's Requests in the 2022 Rulings filed on May 11, 2022 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

12. Exhibit 11 attached hereto is a true and correct copy of Respondents' Request for a Jury Trial filed on June 15, 2022 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

13. Exhibit 12 attached hereto is an excerpt of a true and correct copy of Respondents' Identification of Issues for February 28, 2023, Telephone Conference filed on February 10, 2023 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

14. Exhibit 13 attached hereto with pagination added pursuant to Local Rule 5.1 is a true and correct copy of Respondents' Renewed Objections to (1) a Hearing Before the ALJ Who Is Not Lawfully Appointed and Infringes Separation of Powers and (2) to the Judicial Officer Who Is Not Lawfully Appointed and (3) to the Denial of the Constitutional Right to a Jury Trial filed May 3, 2023 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

15. Exhibit 14 attached hereto is a true and correct copy of Administrative Law Judge Jill S. Clifton's March 7, 2023 order titled 2023 October and November Segments, Hearing RESUMED Notice issued in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

16. Exhibit 15 attached hereto with pagination added pursuant to Local Rule 5.1 is a true and correct copy of Complainant's Response to: Respondents' Renewed Objections to (1) a Hearing Before the ALJ Who Is Not Lawfully Appointed and Infringes Separation of Powers and (2) to the Judicial Officer Who Is Not Lawfully Appointed and (3) to the Denial of the Constitutional Right to a Jury Trial; and Respondents' Supplemental Correction to Their Renewed Objections to (1) a Hearing Before the ALJ Who Is Not Lawfully Appointed and Infringes Separation of Powers and (2) to the Judicial Officer Who Is Not Lawfully Appointed and (3) to the Denial of the Constitutional Right to a Jury Trial filed on May 22, 2023 in *In re McConnell*, HPA Docket No. 16-0169; *In re McConnell*, HPA Docket No. 17-0207; and other cases.

17. Exhibit 16 attached hereto is a true and correct copy of the entry form for She's Limitless at the 2016 Mississippi Charity Horse Show that is the entry addressed by paragraph 27 of the October 2016 Amended Complaint.

18. Exhibit 17 attached hereto is an excerpt of a true and correct copy of the S.H.O.W. Tennessee Walking Horse Rule Book – HPA Compliance Section revised in January 2011 that was operative at the time of the allegation in paragraph 18 of the October 2016 Amended Complaint.

19. Exhibit 18 attached hereto is an excerpt with pagination added pursuant to Local Rule 5.1 of a true and correct copy of the S.H.O.W. Tennessee Walking Horse Rule Book – HPA Compliance Section revised in September 2013 that was operative at the time of the allegation in paragraph 22 of the October 2016 Amended Complaint.

20. Exhibit 19 attached hereto is an excerpt of a true and correct copy of the S.H.O.W. Tennessee Walking Horse Rule Book – HPA Compliance Section revised in February 2016 that was operative at the time of the allegations in paragraphs 27, 32, and 36–39 of the October 2016 Amended Complaint and paragraph 102 of the February 2017 Complaint.

21. I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2023, at Fort Worth, Texas

David Broiles

Exhibit 1
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket 16-0169
	)	
JAMES DALE MCCONNELL, also known as JIMMY MCCONNELL, an individual,	)	
	)	
Respondent	)	AMENDED COMPLAINT

There is reason to believe that the respondent named herein has violated the Horse Protection Act (15 U.S.C. § 1821 et seq.)(HPA or Act). Therefore, the Administrator of the Animal and Plant Health Inspection Service (APHIS) issues this amended complaint pursuant to section 1.137(a) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.130 *et seq.*)[1] and alleging the following:

JURISDICTIONAL ALLEGATIONS

1. Respondent James Dale McConnell, also known as Jimmy McConnell, is an individual whose business mailing address is 2039 Walker Tanner Road, Union City, Tennessee 38261-8252.

2. At all times mentioned herein, respondent McConnell was a "person" and an "exhibitor," as those terms are defined in the regulations promulgated under the Act (9 C.F.R. Parts 11 and 12)(Regulations).

ALLEGATIONS REGARDING THE NATURE, CIRCUMSTANCES, EXTENT, AND GRAVITY OF THE PROHIBITED CONDUCT, THE RESPONDENT'S DEGREE OF CULPABILITY, ABILITY TO PAY CIVIL PENALTIES, EFFECT ON ABILITY TO CONTINUE TO DO BUSINESS, AND OTHER MATTERS AS JUSTICE MAY REQUIRE

3. The nature and circumstances of the prohibited conduct alleged in the amended

[1]The complainant instituted this proceeding by filing a complaint on August 31, 2016, alleging that Mr. McConnell and another respondent violated the HPA. No motion for hearing has been filed in this action.

August 23, 2014, and having entered a horse (I'm Bob Marley) in a horse show on August 24, 2014, while the two horses were sore.

16. On February 17, 2016, APHIS issued an Official Warning (TN 150095, TN 150125 and TN 150127) to Mr. McConnell with respect to his having shown a horse (Brookie) in a horse show on August 22, 2014, having entered one horse (Blues Master) in a horse show on August 23, 2014, and having entered another horse (The Jazz Player) in a horse show on August 24, 2014, while the three horses were sore.

17. Mr. McConnell was named the Walking Horse Trainers Association's "Trainer of the Year" in 1985, 2004 and 2010.

ALLEGED VIOLATIONS

18. On or about September 3, 2011, Mr. McConnell entered a horse (He's Shady in Black[6]), while the horse was sore, for showing in class 176 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

19. On or about March 14, 2011, respondent McConnell entered a horse (The Anonymous Ace[7]), while the horse was sore, for showing in class 27 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

20. On or about July 25, 2014, respondent McConnell entered a horse (Zipline[8]), while

[6]He's Shady in Black is believed to be a stallion that foaled on May 2, 2007, and is registered as No. 20709290.

[7]The Anonymous Ace is believed to be a stallion that foaled on April 24, 2011, and is registered as No. 21100132.

[8]Zipline is believed to be a stallion that foaled on April 12, 2011, and is registered as No. 21101430.

the horse was sore, for showing in class 28 in a horse show in Lewisburg, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

21. On or about August 22, 2014, Mr. McConnell showed a horse (Brookie[9]), while the horse was sore, in class 55 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(A)).

22. On or about August 27, 2014, Mr. McConnell entered a horse (Blue's Master[10]), while the horse was sore, for showing in class 139B in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

23. On or about November 6, 2014, Mr. McConnell entered a horse (Silver Fog[11]), while the horse was sore, for showing in class 6 in a horse show in Tunica, Mississippi, in violation of the Act (15 U.S.C. § 1824(2)(B)).

24. On or about March 17, 2016, Mr. McConnell entered a horse (Puttin' Cash on the Line[12]), while the horse was sore, for showing in class 7 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

25. On March 17, 2016, Mr. McConnell entered a horse (Bee Bee King[13]), while the horse was bearing a prohibited substance, for showing in class 8 in in a horse show in Shelbyville,

[9]Brookie is believed to be a mare that foaled on October 3, 2009, and is registered as No. 20905546.

[10]Blue's Master is believed to be a stallion that foaled on March 20, 2009, and is registered as No. 20901603.

[11]Silver Fog is believed to be a seven-year-old mare registered as No. 20904822.

[12]Putting Cash on the Line is believed to be a 13-year-old stallion registered as 20302821.

[13]Bee Bee King is believed to be a 12-year-old stallion registered as 20401298.

Tennessee, in violation of the Act (15 U.S.C. § 1824(7)).

26. On March 17, 2016, Mr. McConnell failed and refused to provide information related to Bee Bee King, as required by regulation (9 C.F.R. § 11.2(e)), in violation of the Act. (15 U.S.C. § 1824(9)).

27. On or about April 2, 2016, Mr. McConnell entered for showing and/or showed a horse (She's Limitless[14]), while the horse was sore, in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)).

28. On or about April 23, 2016, Mr. McConnell entered Bee Bee King, while the horse was sore, for showing in class 58 in a horse show in Panama City Beach, Florida, in violation of the Act (15 U.S.C. § 1824(2)(B)).

29. On May 26, 2016, Mr. McConnell entered a horse (Royal Dollar[15]), while the horse was sore, for showing in class 13 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

30. On May 26, 2016, Mr. McConnell entered Royal Dollar, while the horse was bearing a prohibited substance, for showing in class 13 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(7)).

31. On May 26, 2016, Mr. McConnell failed and refused to provide information related to Royal Dollar, as required by regulation (9 C.F.R. § 11.2(e)), in violation of the Act. (15 U.S.C. § 1824(9)).

[14]She's Limitless is believed to be an eight-year-old mare registered as 20302821.

[15]Royal Dollar is believed to be an 11-year-old gelding registered as 20513550.

32. On May 26, 2016, with respect to Royal Dollar, Mr. McConnell provided false or misleading information to APHIS (9 C.F.R. § 11.2(e)), and specifically, Mr. McConnell falsely identified himself to APHIS by using another exhibitor's name, in violation of the Act. (15 U.S.C. § 1824(9)).

33. On or about June 30, 2016, Mr. McConnell entered a horse (The Jazz Player[16]), while the horse was sore, for showing in class 33 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

34. On June 30, 2016, Mr. McConnell entered She's Limitless, while the horse was sore, for showing in class 20 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

35. On June 30, 2016, Mr. McConnell entered She's Limitless, while the horse was bearing a prohibited substance, for showing in class 20 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(7)).

36. On July 1, 2016, Mr. McConnell showed a horse (She's Happy-Happy-Happy[17]), while the horse was sore, in class 19 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(A)).

37. On or about July 2, 2016, Mr. McConnell entered He's Shady in Black, while the horse was sore, for showing in class 38 in a horse show in Woodbury, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

[16]The Jazz Player is believed to be a 16-year-old stallion registered as 20083732.

[17]She's Happy-Happy-Happy is believed to be a three-year-old mare registered as 21300961.

38. On or about July 2, 2016, Mr. McConnell entered He's Shady in Black, while the horse was bearing a prohibited substance, for showing in class 38 in a horse show in Woodbury, Tennessee, in violation of the Act (15 U.S.C. § 1824(7)).

39. On or about July 2, 2016, Mr. McConnell failed and refused to provide information related to He's Shady in Black, as required by regulation (9 C.F.R. § 11.2(e)), in violation of the Act. (15 U.S.C. § 1824(9)).

40. On or about July 22, 2016, Mr. McConnell entered She's Happy-Happy-Happy, while the horse was sore, in class 12 in a horse show in Lewisburg, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

41. On July 22, 2016, Mr. McConnell entered She's Happy-Happy-Happy, while the horse's toe length had been artificially extended to exceed 50% of the natural hoof length, in class 12 in a horse show in Lewisburg, Tennessee, in violation of the Act (15 U.S.C. § 1824(7)).

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondent has in fact violated the Act, this amended complaint shall be served upon the respondent. The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file a timely answer shall constitute an admission of all the material allegations of this amended complaint. APHIS requests that this matter proceed in conformity with the Rules of Practice governing proceedings under the Act, and that such order or orders be issued as are authorized by the Act (15 U.S.C. § 1825) and

////

////

warranted under the circumstances.

DATED: October 3, 2016

Respectfully submitted,

COLLEEN A. CARROLL
Attorney for Complainant
Office of the General Counsel
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 2014 South Building
Washington, D.C. 20250-1400
Telephone: 202-720-6430
FAX: 202-690-4299
e-mail: colleen.carroll@ogc.usda.gov

CERTIFICATE OF SERVICE

James Dale McConnell a/k/a Jimmy McConnell, Respondent

Docket: 16-0169

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy Amended Complaint has been furnished and was served upon the following parties on October 6, 2016 by the following:
USDA (OGC) – Electronic Mail

Colleen A. Carroll, OGC: COLLEEN.CARROLL@OGC.USDA.GOV

Ada Quick, OGC: ADA.QUICK@OGC.USDA.GOV

USDA (APHIS) – Electronic Mail

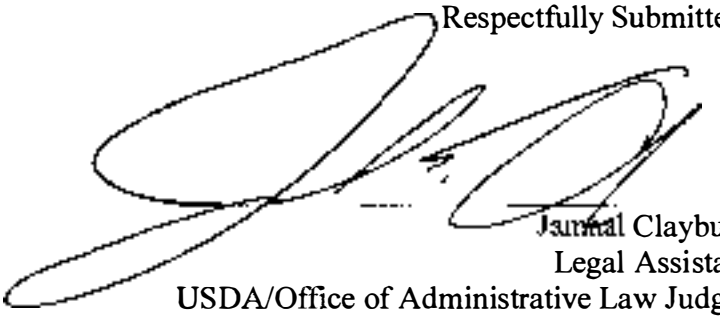
Teresa M.Lorenzano: Teresa.M.Lorenzano@aphis.usda.gov

Felicia L.Hubb: Felicia.L.Hubb@aphis.usda.gov

Respondent(s) – Electronic Mail/Regular Mail

KARIN CAGLE, ESQUIRE
TEXAS STATE BAR NO. 24043588
1619 PENNSYLVANIA A VENUE
FORT WORTH, TEXAS 76014
E-MAIL: kcaglelaw@gmail.com

Respectfully Submitted,



Jamal Clayburn
Legal Assistant
USDA/Office of Administrative Law Judges
Hearing Clerk's Office
1400 Independence Ave., SW, Room 1031-S
Washington, DC 20250-9203
Phone: 202-720-4443

Exhibit 2
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 17-0195
	)	17-0196
	)	17-0197
CHRISTOPHER ALEXANDER, an individual; ALIAS FAMILY INVESTMENTS, LLC, a Mississippi limited liability company; MARGARET ANNE ALIAS, an individual; KELSEY ANDREWS, an individual; TAMMY BARCLAY, an individual; RAY BEECH, an individual; NOEL BOTSCH, an individual; LYNSEY DENNEY, an individual; MIKKI ELDRIDGE, an individual; FORMAC STABLES, INC., a Tennessee corporation; JEFFREY GREEN, an individual; WILLIAM TY IRBY, an individual; JAMES DALE MCCONNELL, an individual; JOYCE MEADOWS, an individual; JOYCE H. MYERS, an individual; LIBBY STEPHENS, an individual; TAYLOR WALTERS, an individual,	)	17-0198 17-0199 17-0200 17-0201 17-0202 17-0203 17-0204 17-0205 17-0206 17-0207 17-0208 17-0209 17-0210 17-0211
Respondents	)	COMPLAINT

The Administrator of the Animal and Plant Health Inspection Service (APHIS) has reason to believe that the respondents named herein have violated section 5 of the Horse Protection Act, as amended (15 U.S.C. § 1821 et seq.) (HPA or Act). Therefore, APHIS issues this complaint alleging the following:

JURISDICTIONAL ALLEGATIONS

1. Christopher Alexander is an individual whose business mailing address is c/o Formac Stables, Inc., 2039 Walker Tanner Road, Union City, Tennessee 38261. At all times mentioned herein, Mr. Alexander was a "person" and an "exhibitor," as those terms are defined in the regulations issued pursuant to the Act (9 C.F.R. § 11.1 et seq.) (Regulations).

99. On or about September 3, 2016, Mr. Green entered a horse (Our Commander in Chief), while the horse was sore, for showing in class 187 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

100. On or about August 26, 2016, Mr. Irby allowed Mr. Green to enter a horse he owned (Addicted to Gin[14]) while the horse was sore, for showing in class 51A in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

101. On or about August 29, 2016, Mr. McConnell entered a horse (Lace & Lead) while the horse was sore, for showing in class 119 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

102. On August 31, 2016, Mr. McConnell entered a horse (Putting Cash on the Line) while the horse was sore, for showing in class 140 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

103. On or about September 1, 2016, Mr. McConnell entered a horse (Taylor Made) while the horse was sore, for showing in class 158 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

104. On or about August 25, 2016, Ms. Meadows allowed Mr. Green to enter a horse she owned (I'm Tampa Bay) while the horse was sore, for showing in class 25 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

105. On or about August 25, 2016, Ms. Myers allowed Mr. Green to enter a horse she owned (I'm Tampa Bay) while the horse was sore, for showing in class 25 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

[14]Addicted to Gin is believed to be a three-year-old mare registered as 21301594.

106. On or about August 27, 2016, Ms. Stephens allowed Mr. Green to enter a horse she owned (Chris Crossed) while the horse was sore, for showing in class 73 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

107. On or about August 31, 2016, Taylor Walkers entered a horse (Putting Cash on the Line) while the horse was sore, for showing in class 140 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondents have in fact violated the Act, this complaint shall be served upon the respondents. **The respondents shall file an answer with the Hearing Clerk, U.S. Department of Agriculture, Room 1031 South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file a timely answer shall constitute an admission of all the material allegations of this complaint. APHIS requests that this matter proceed in conformity with the Rules of Practice governing proceedings under the Act, and that such order or orders with respect to sanctions be issued as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances.**

Done at Washington, D.C.
this 30th day of Dec. 2016

Kevin Shea

Kevin Shea
Administrator
Animal and Plant Health Inspection Service

Attorney for Complainant:
Colleen A. Carroll
Office of the General Counsel
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 2014 South Building
Washington, D.C. 20250-1400

Telephone: 202-720-6430; FAX: 202-690-4299
e-mail: colleen.carroll@ogc.usda.gov

Exhibit 3

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
James Dale McConnell, also known as	)	HPA Docket No. 16-0169
Jimmy McConnell, an individual;	)	HPA Docket No. 17-0207
	)	
Formac Stables, Inc.,	)	HPA Docket No. 16-0170
A Tennessee corporation;	)	HPA Docket No. 17-0204
	)	
Christopher Alexander, an individual;	)	HPA Docket No. 17-0195
	)	
Kelsey Andrews, an individual; and	)	HPA Docket No. 17-0198
	)	
Taylor Walters, an individual,	)	HPA Docket No. 17-0211
	)	
Respondents.	)	

MOTION TO DISMISS CERTAIN VIOLATIONS WITH PREJUDICE

Complainant filed an administrative complaint in the matters titled above as HPA Docket Nos. 16-0169 and 16-0170 on August 31, 2016 ("2016 Complaint"). Complainant filed an amended complaint as to HPA Docket No. 16-0169 on October 5, 2016 ("Amended 2016 Complaint"). Complainant filed another administrative complaint in the matters titled above as HPA Docket Nos. 17-0195, 17-0198, 17-0204, 17-0207, and 17-0211 on February 3, 2017 ("2017 Complaint").[1] Complainant respectfully requests that the following violations that were set forth in the Alleged Violations section of the 2016 Complaint, Amended 2016 Complaint, and 2017 Complaint be dismissed with prejudice:

[1] On July 29, 2019, Complainant filed a motion for leave to amend the 2017 Complaint and a proposed amended complaint. The proposed amended complaint sought to add new alleged violations for the respondents named in the 2016 Complaint and Amended 2016 Complaint, to add new alleged violations for the respondents named in the 2017 Complaint, and to join new respondents with additional alleged violations to this matter. On November 5, 2019, Administrative Law Judge Jill Clifton issued an order denying without prejudice Complainant's motion to amend the 2017 Complaint.

(1) Complainant requests that respondent McConnell's and respondent Formac Stables' alleged violations with respect to a horse named "The Anonymous Ace" on or about March 14, 2011,[2] as set forth in paragraph 33 of the 2016 Complaint and realleged as to respondent McConnell in paragraph 19 of the Amended 2016 Complaint, be dismissed with prejudice because Complainant's Show Horse Protection Program (the program) has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(2) Complainant requests that respondent McConnell's and respondent Formac Stables' alleged violations with respect to a horse named "Zipline" on or about July 25, 2014, as set forth in paragraph 34 of the 2016 Complaint and re-alleged as to respondent McConnell in paragraph 20 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(3) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Brookie" on or about August 22, 2014, as set forth in paragraph 21 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(4) Complainant requests that respondent McConnell's and respondent Formac Stables' alleged violations with respect to a horse named "Silver Fog" on or about November

[2] The 2016 Complaint alleges that these violations occurred with respect to respondent Formac Stables on March 14, 2014, but the Amended 2016 Complaint alleges that they occurred with respect to respondent McConnell on March 14, 2011. The evidence that Complainant collected in support of these violations indicates that March 14, 2014 is the correct date.

6, 2014, as set forth in paragraph 35 of the 2016 Complaint and re-alleged as to respondent McConnell in paragraph 23 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(5) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Puttin' Cash on the Line" on or about March 17, 2016, as set forth in paragraph 24 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(6) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Bee Bee King" on or about March 17, 2016, as set forth in paragraphs 25 and 26 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(7) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Bee Bee King" on or about April 23, 2016, as set forth in paragraph 28 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(8) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Royal Dollar" on or about May 26, 2016, as set forth in paragraphs 29, 30, and 31 of the Amended 2016 Complaint, be dismissed with prejudice because

the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(9) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "The Jazz Player" on or about June 30, 2016, as set forth in paragraph 33 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(10) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "She's Limitless" on or about June 30, 2016, as set forth in paragraphs 34 and 35 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(11) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "She's Happy-Happy-Happy" on or about July 22, 2016, as set forth in paragraphs 40 and 41 of the Amended 2016 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(12) Complainant requests that respondent Alexander's, respondent Formac Stables', and respondent McConnell's alleged violations with respect to a horse named "Lace & Lead" on or about August 29, 2016, as set forth in paragraphs 76, 89, and 101, respectively, of the 2017 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

(13) Complainant requests that respondent McConnell's alleged violations with respect to a horse named "Taylor Made" on or about September 1, 2016, as set forth in paragraph 103 of the 2017 Complaint, be dismissed with prejudice because the program has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes.

Accordingly, Complainant proposes to retain and try the following alleged violations:

(1) Respondent McConnell's alleged violations with respect to a horse named "She's Limitless" on or about April 2, 2016, as set forth in paragraph 27 of the Amended 2016 Complaint.

(2) Respondent McConnell's alleged violations with respect to a horse named "Royal Dollar" on or about May 26, 2016, as set forth in paragraph 32 of the Amended 2016 Complaint.

(3) Respondent Alexander's and respondent Formac Stables' alleged violations with respect to a horse named "She's Happy-Happy-Happy" on or about August 27, 2016, as set forth in paragraphs 75 and 88, respectively, of the 2017 Complaint.

(4) Respondent Alexander's and respondent Formac Stables' alleged violations with respect to a horse named "The Master Jimmy Mac" on or about August 31, 2016, as set forth in paragraphs 77 and 90, respectively, of the 2017 Complaint.

(5) Respondent Alexander's, respondent Andrews', respondent Formac Stables', respondent McConnell's, and respondent Walters' alleged violations with respect to a horse named "Putting Cash on the Line" on or about August 31, 2016, as set forth in paragraphs 78, 81, 91, 102, and 107, respectively, of the 2017 Complaint.

Finally, Complainant notes that the following alleged violations were fully tried during the hearings that were held in this matter in Shelbyville, Tennessee, in December 2019:[3]

(1) Respondent McConnell's and respondent Formac Stables' alleged violations with respect to a horse named "He's Shady in Black" on or about September 3, 2011, as set forth in paragraph 32 of the 2016 Complaint and re-alleged as to respondent McConnell in paragraph 18 of the Amended 2016 Complaint;

(2) Respondent McConnell's alleged violations with respect to a horse named "Blue's Master" on or about August 27, 2014, as set forth in paragraph 22 of the Amended 2016 Complaint;

(3) Respondent McConnell's alleged violations with respect to a horse named "She's Happy, Happy, Happy" on or about July 1, 2016, as set forth in paragraph 36 of the Amended 2016 Complaint;

(4) Respondent McConnell's alleged violations with respect to the horse named "He's Shady in Black" on or about July 2, 2016, as set forth in paragraphs 37, 38, and 39 of the Amended 2016 Complaint; and

(5) Respondent Alexander's and respondent Formac Stables' alleged violations with respect to the horse named "She's Happy, Happy, Happy" on or about August 27, 2016, as set forth in paragraphs 75 and 88, respectively, of the 2017 Complaint.[4]

---

[3] By saying that the enumerated violations were "fully tried", Complainant means that, with the exception of the alleged violations involving the horse named "She's Happy, Happy, Happy" (see fn. 4, *infra*), the government rests its case with respect to all of these violations and will not be recalling the witnesses who testified or revisiting the evidence they presented during the December 2019 hearing.

[4] These violations were only partially tried during the December 2019 hearing. Complainant's evidence for these violations indicates that two of Complainant's Veterinary Medical Officers, Dr. Cody Yager, D.V.M., and Dr. Aaron Rhyner, D.V.M., inspected the horse named "She's Happy, Happy, Happy" on or about August 27, 2016. During the 2019 hearing, Dr. Yager testified and presented documentary and video evidence about his inspection of this

Respectfully submitted,

THOMAS BOLICK

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Date: 2022.03.08 11:35:05 -05'00'

Thomas N. Bolick
Attorney for Complainant

DANIELLE PARK

Digitally signed by DANIELLE PARK
Date: 2022.03.08 10:50:39 -05'00'

Danielle Park
Attorney for Complainant

horse and his findings. If this matter proceeds to hearing again, Dr. Rhyner will present additional testimony and evidence about his inspection of the same horse and his findings. *See* paragraph 3 in the list of alleged violations to be retained and tried above. However, the government has rested its case as to Dr. Yager's inspection and, as noted in fn. 3 *supra*, Complainant will not be recalling him or revisiting the testimony and evidence that he presented at the December 2019 hearing.

Exhibit 4
(Excerpted
and Pagination Added)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
James Dale McConnell, also known as	)	HPA Docket No. 16-0169
Jimmy McConnell, an individual;	)	HPA Docket No. 17-0207
	)	
Formac Stables, Inc.,	)	HPA Docket No. 16-0170
A Tennessee corporation;	)	HPA Docket No. 17-0204
	)	
Christopher Alexander, an individual;	)	HPA Docket No. 17-0195
	)	
Kelsey Andrews, an individual; and	)	HPA Docket No. 17-0198
	)	
Taylor Walters, an individual,	)	HPA Docket No. 17-0211
	)	
Respondents.	)	

NOTICE OF VIOLATIONS THAT COMPLAINANT HAS RETAINED AND INTENDS TO TRY AT THE HEARINGS SCHEDULED FOR OCTOBER AND NOVEMBER, 2023

On March 8, 2022, Complainant filed a MOTION TO DISMISS CERTAIN VIOLATIONS WITH PREJUDICE in the matter captioned above that (1) dismissed certain violations alleged in the administrative complaints[1] previously filed in this matter, (2) identified other violations that the government tried during the hearings held in Shelbyville, Tennessee, in December, 2019, and (3) identified the alleged violations that Complainant retains and still intends to try in any future hearing scheduled in this matter.

On February 28, 2023, Administrative Law Judge Jill S. Clifton convened a conference call with counsel for the parties in the matter referenced above. Judge Clifton scheduled hearings to resume in this matter in October and November, 2023, and asked counsel for

[1] Those complaints are the initial complaint, HPA Docket Nos. 16-0169 and 16-0170, that complainant filed on August 31, 2016, an amended complaint as to HPA Docket No. 16-0169 that complainant filed on October 5, 2016 ("Amended 2016 Complaint"), and a third complaint, HPA Docket Nos. 17-0195, 17-0198, 17-0204, 17-0207, and 17-0211, that complainant filed on February 3, 2017 ("2017 Complaint").

PX1

Complainant to file a notice identifying again the allegations that Complainant intends to retain and try at those hearings.

In accordance with Judge Clifton's request, counsel for Complainant sent counsel for Respondents, on February 28, 2023, a list of alleged violations that Complainant intends to retain and try. Complainant has retained and intends to try the following alleged violations at the aforementioned hearings:

(1) Respondent McConnell's alleged violations with respect to a horse named "She's Limitless" on or about April 2, 2016, as set forth in paragraph 27 of the Amended 2016 Complaint.

(2) Respondent McConnell's alleged violations with respect to a horse named "Royal Dollar" on or about May 26, 2016, as set forth in paragraph 32 of the Amended 2016 Complaint.

(3) Respondent Alexander's and respondent Formac Stables' alleged violations with respect to a horse named "She's Happy-Happy-Happy" on or about August 27, 2016, as set forth in paragraphs 75 and 88, respectively, of the 2017 Complaint.

(4) Respondent Alexander's and respondent Formac Stables' alleged violations with respect to a horse named "The Master Jimmy Mac" on or about August 31, 2016, as set forth in paragraphs 77 and 90, respectively, of the 2017 Complaint.

(5) Respondent Alexander's, respondent Andrews', respondent Formac Stables', respondent McConnell's, and respondent Walters' alleged violations with respect to a horse named "Putting Cash on the Line" on or about August 31, 2016, as set forth in paragraphs 78, 81, 91, 102, and 107, respectively, of the 2017 Complaint.

Respectfully submitted,

Thomas N. Bolick

Thomas N. Bolick
Counsel for Complainant

Danielle Park

Danielle S. Park
Counsel for Complainant

PX3

Exhibit 5

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:		**HPA DOCKET NOS.**
	§	
FORMAC STABLES INC	§	**13-0367, 13-0373, 13-0374,**
JAMES DALE MCCONNELL	§	**14-0200, 16-0169, 16-0170**

MOTION TO DISQUALIFY THE USDA'S ALJS AND JO; MOTION TO DISMISS FOR LACK OF JURISDICTION; AND REQUEST FOR CERTIFICATION OF ISSUES TO THE SECRETARY OF AGRICULTURE

United States Department of Agriculture (USDA, Department, Agency) enforcement proceedings seeking penalties for alleged violations of the Horse Protection Act (HPA), 15 U.S.C. §1825(b) and (c), are permeated with statutory and constitutional defects that prevent lawful adjudication of the merits of the Agency's complaint.[1] Respondents face actual or imminent prejudice from adjudication before a USDA Administrative Law Judge (ALJ) and an appeal to the Department's Judicial Officer (JO).

The first constitutional defect in USDA HPA enforcement proceedings arises from the Department's Rules of Practice, 7 C.F.R. §1.130 *et seq.* (Rules of Practice), which in HPA enforcement proceedings require assignment of a USDA ALJ to conduct a hearing and render an initial decision. Under the Rules of Practice, USDA ALJs are authorized to perform significant discretionary functions, including issuing final orders, such that ALJs act in the

[1] While this motion raises issues with possible consequences in USDA proceedings under other statutes it administers, Respondents do not address that concern because this motion is limited to the proceedings against them under the Horse Protection Act.

capacity of, at least, inferior officers of the United States. However, USDA ALJs are not lawfully appointed as inferior officers as required by the Appointments Clause. The President

> shall nominate, and by the Advice and Consent of the Senate, shall appoint Ambassadors, and other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in Heads of Departments.

U.S. Const., art. II, § 2, cl. 2. The USDA's ALJs are not appointed by the Secretary of Agriculture. USDA ALJs cannot lawfully determine liability or assess a penalty, actions which can be performed only by a duly appointed inferior Officer.

The USDA's enforcement scheme suffers an additional and unique constitutional defect arising from the Secretary's delegation to the Judicial Officer of his quasi-judicial powers to make final enforcement decisions. Through this delegation the JO makes final decisions, binding on the Government and citizens, without further review by the Agency. This delegation violates the Appointments Clause and the Separation of Powers doctrine, and it is contrary to the controlling statute. HPA administrative enforcement proceedings, authorized by 15 U.S.C. §1825(b)(1), require that any civil sanctions or penalties be assessed by the Secretary in a written order:

> Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. **No penalty shall be assessed unless such person is given notice and an opportunity for a hearing before the Secretary** with respect to such violation. The amount of **such civil penalty shall be assessed by the Secretary by written order.** (Emphasis added)

The Secretary is the only officer Congress authorized to make and enter penalties. The Secretary is appointed to perform that function by the President, with the advice and consent of the Senate (a Principal or PAS Officer).[2] Congress did not establish the Office of Judicial Officer, Congress did not provide a method for appointment of a Judicial Officer as either as a Principal Officer or as an inferior officer, and the USDA JO has not been constitutionally appointed. The USDA JO cannot lawfully make final decisions because he is not a Principal Officer lawfully appointed to a position established by Congress.

Complainant APHIS has the burden to establish the lawful authority of an adjudicatory tribunal's jurisdiction, but it cannot meet this burden. Neither the USDA ALJs nor the JO are appointed as the Constitution requires, and they must be disqualified from presiding over HPA enforcement proceedings. As the USDA has no rules or regulations authorizing lawful alternate enforcement proceedings, this Complaint should be dismissed.

Respondents move to have these issues referred to the Secretary under 5 U.S.C. 556 and Rule of Practice 1.144(b) because the issues presented raise apparent conflicts of interest that preclude an ALJ and the JO ruling upon issues that impact their careers with the USDA.

[2] "PAS" officer or office refers to a person or office requiring Presidential appointment and Senate confirmation. See *NRLB v. SW Gen., Inc.,* Slip Op. No. 15-1251 at p. 1, 580 U.S. --- (2017), 2017 WL 1050977 (March 21, 2017).

ARGUMENT

I. THE SECRETARY OF AGRICULTURE MUST DECIDE THIS MOTION TO DISQUALIFY THE USDA'S ALJS AND JO.

Neither the ALJ nor the JO should decide whether they are disqualified. "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, **the agency shall determine the matter** as a part of the record and decision in the case." 5 U.S.C. §556(b)(emphasis added). USDA ALJs are presiding employees; the JO is a participating employee. The Secretary is the "agency" for the purpose of deciding a motion to disqualify filed under 5 U.S.C. §556(b). The caption of an HPA proceeding clearly indicates the "agency" is the "United States Department of Agriculture Before the Secretary."

The Department's Rule of Practice §1.144(b), which permits a motion to disqualify an ALJ to be certified for decision only to the Secretary, not the JO, reinforces certification to the Secretary. Because 5 U.S.C. 556(b) requires a motion to disqualify supported by an affidavit to be decided by the agency, and Rule §1.144(b) identifies the Secretary as the only USDA official authorized to decide a motion to disqualify when the ALJ cannot decide the motion, this motion to disqualify supported by an affidavit must be forwarded to the Secretary for decision.

Further, prudential considerations require this motion to disqualify be submitted to the Secretary for decision. Rule of Practice §1.144(a) provides that "[n]o Judge shall be assigned to serve in a proceeding who…has any pecuniary interest in any matter… involved in the proceeding…or… has any conflict of interest which might impair the Judge's objectivity in

the proceeding." Recusal of judges is evaluated on an objective standard. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009). "What matters is not the reality of bias or prejudice, but the appearance. Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned'." *Liteky v. U.S.*, 510 U.S. 540, 548 (1994).

Respondents need not allege that any USDA ALJ or the JO has a direct financial interest in the outcome of the case on the merits, or a bias favoring the Complainant or disfavoring the Respondent that will affect his or her decision on the merits. However, USDA ALJs do have an apparent financial interest and actual conflict of interest in the outcome of a motion to disqualify. A reasonable person would believe that a USDA ALJ or the JO, entertaining a motion to disqualify, may see a ruling granting the motion as a potential threat to his or her job security or to the Judge's personal financial interest.

Any ALJ or JO who is assigned to a case and decides to undertake ruling on a motion to disqualify has an actual conflict of interest; a decision granting the motion would render unlawful their authority to decide future Horse Protection Act enforcement proceedings. By implication, a decision granting the motion would mean that the ALJs' and JO's prior decisions in HPA cases were unlawfully made and possibly of no effect. Because of the appearance of the USDA ALJs' and JO's possible financial interests in the outcome of the motion, and the actual conflict of interest the motion presents, neither a USDA ALJ nor the JO should be assigned to decide the motion to disqualify.

A motion to disqualify also implicates constitutional considerations under the Due Process Clause. The decision whether the Judge should be disqualified because of the apparent

financial implications of a decision can rise to a constitutional dimension. A fair trial in a lawful tribunal is a requirement of due process. *See Caperton,* 556 U.S. at 876. The "Due Process Clause incorporated the common-law rule that a judge must recuse when he has 'a direct, personal, substantial, pecuniary interest' in a case." *Id.* Because of the reasonable appearance of impropriety of a USDA ALJ or JO deciding a motion to disqualify, and their actual conflict of interest in deciding such a motion, the motion must be referred to the Secretary, or the presiding ALJ should voluntarily recuse.

The Secretary should grant the motion to disqualify the ALJ and the JO from adjudicating the HPA enforcement proceeding and enter an order dismissing the proceeding. Alternatively, if the Judge or the JO undertakes to decide this motion, respondents request that the Judge or JO disqualify themselves from deciding the complaint on the merits and order dismissal.

II. USDA ALJS ARE NOT LAWFULLY APPOINTED UNDER THE APPOINTMENTS CLAUSE.

USDA ALJs perform adjudicative functions that can only be performed by a lawfully appointed inferior or principal officer of the United States. Any ALJ assigned to an HPA enforcement proceeding should be disqualified, and the case dismissed, because the ALJ is not lawfully appointed as required by the Appointments Clause, art. II. § 2. cl. 2.

The seminal and controlling case deciding what constitutes an "inferior officer" subject to the Appointments Clause is *Freytag v. C.I.R.*, 501 U.S. 868 (1991)(*Freytag*), which sets forth the factors for determination. The Court held that while the authority of a Special Trial Judge (STJ) to enter a final decision in some small cases was sufficient to make the STJ an inferior

Officer, the ability to make final decisions was not a necessary condition and its presence or absence does not end the analysis. *Id.* at 881-882. Other factors must be considered. *Id.* The "significance of the duties and discretion," whether the "the duties, salary, and means of appointment for that office are specified by statute," and whether STJs "perform more than ministerial tasks" must be considered in making the determination. *Id.*

Applying the *Freytag* factors to USDA ALJs leads to but one conclusion: USDA ALJs perform significant functions in adjudication proceedings that can only be assigned to a properly appointed inferior officer. USDA ALJs act, at least, in the capacity of inferior officers of the United States, and, arguably, as principal officers. In either case, they are not constitutionally appointed to perform their assigned functions.

A. The position of USDA ALJs is established by law, and the duties, salary and means of appointment are specified by statutes or regulations.

The Department of Agriculture is one of 15 executive departments established by Congress. 5 U.S.C. §101 and 7 U.S.C. §2201. The Department is "under the control of a Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate." 7 U.S.C. §2202. The Secretary is one of 16 statutory principal officers in the Department, all appointed by the President and subject to Senate confirmation (PAS).

The Secretary is "authorized and directed to perform all the duties in all the Acts of Congress" that were performed by the former Commissioner of Agriculture. 7 U.S.C. §2205. The Secretary is vested with "all functions of all agencies, offices, officers and employees of the Department" except "[f]unctions vested by [the APA] in the administrative law judges." 7

U.S.C. §6911(a) and (b)(1). The functions of the USDA ALJs are vested in them by 5 U.S.C. §§554 and 556-558.

USDA ALJs are employees appointed under 5 U.S.C. §3105 to conduct proceedings under 5 U.S.C. §§ 556 and 557. The Assistant Secretary of Agriculture for Administration is a PAS officer whose position is authorized by statute. 7 U.S.C. §6918. The Secretary delegated to the Assistant Secretary of Agriculture for Administration limited authority relating to the Office of Administrative Law Judge, i.e., providing administrative supervision of the Office. 7 C.F.R. §2.24(a)(10)(ii). The Assistant Secretary certifies that a position to which an ALJ is appointed is necessary for carrying out functions for which the ALJ is responsible and certifies that the ALJs' functions are set forth in the Position Description. A Personnel Management Specialist makes the same certification for a person being appointed as an ALJ. The Secretary does not make, authorize or approve the ALJ appointments.

The USDA's "Position Description" of the functions and responsibilities of an ALJ includes these provisions:

> Incumbent Judge's decisions have a broad impact on the farm community…and the public in general. Incumbent conducts disciplinary actions instituted by an agency of this Department for violations of a statutory or regulatory provision, which seek the imposition of a civil penalty….
>
> Cases assigned to the incumbent Judge involve important questions of public policy and parties to those cases must be scrupulously assured that hearings are conducted in an impartial manner.
>
> Cases assigned to the incumbent Judge involve difficult, complex and conflicting legal questions or factual issues. Individual cases may involve important questions of public policy or have substantial impact on activities of the agency and the major interest groups involved.

> The incumbent's role in conducting administrative hearing proceedings is functionally comparable to that of a judge in a court of record, with unusual latitude for the exercise of discretion and independent judgment in the conduct of the proceedings and the determination of all issues of law and fact.
>
> Once assigned, the incumbent Judge has complete control of the case, its conduct and resulting decision. Where there is no appeal, the incumbent's decision becomes the final decision of the Secretary.
>
> Incumbent has complete independence of action with respect to determinations to be made on assigned cases, is exempt from performance appraisal, and may be removed only for good cause as determined in a hearing on the record before the Merit System Protection Board.

Congress provided ALJs civil-service employee protections and required the hiring agency to employ civil-service laws and regulations. The Office of Personnel Management establishes an ALJ's qualifications and administers a detailed civil-service system for selecting ALJs that includes examinations of candidates and issuing certificates of qualification. 5 U.S.C. §§3105, 3317, 3318, 5 U.S.C. §5372 and 5 C.F.R. §930.204.

The functions of administrative law judges are designated in APA §§554 and 556-558. A Department regulation has "designated" the scope of their authority by establishing the Office of Administrative Law Judges. 7 C.F.R. §2.27. USDA ALJs are "designated pursuant to 5 U.S.C. §556(b)(3) to hold hearings and perform related duties," and pursuant to §556 and §557 they are designated to "make initial decisions" which "shall become final without further proceedings unless there is an appeal to the Secretary by a party…." *Id.*

Formal enforcement proceedings are initiated by the Office of General Counsel filing a complaint with the USDA's Hearing Clerk. 7 C.F.R. §1.133. In an HPA case, the Complainant is APHIS, an agency within the USDA. The General Counsel's office is established by statute, and the General Counsel is a principal Officer appointed by the

President with the advice and consent of the Senate. 7 U.S.C. §2214. The General Counsel's duties include advising the Secretary and providing the Department legal services, including representation in adjudicatory proceedings where the General Counsel will "decide whether initial decisions of the administrative law judges shall be appealed by the Department to the Secretary." 7 C.F.R. §2.31(a)(6).

The Hearing Clerk assigns the complaint a docket number, serves the respondent, and, if a hearing is requested, assigns the proceeding to a USDA ALJ to make an initial decision in accordance with 5 U.S.C. §§556 and 557. 7 C.F.R. §1.132. The ALJ's written decision is filed with the Hearing Clerk, and "shall become final and effective without further proceedings 35 days after issuance of the decision." 7 C.F.R. §1.142(c)(4). Either party can appeal the decision to the USDA's Judicial Officer. 7 C.F.R. §1.145.

B. USDA ALJs exercise discretion in carrying out significant functions in adjudicatory proceedings.

Under the authority vested in USDA ALJs by the APA and the Rules of Practice, USDA ALJs exercise significant discretion in carrying out important adjudicatory functions. The table below identifies the authority of USDA ALJs in enforcement proceedings.

An ALJ's Duties and Authority	Authorizing Provision(s)
Administers oaths and affirmations.	5 U.S.C. §556(c)(1) and 7 C.F.R. §1.144(c)(3)
Excludes evidence the Judge finds immaterial, irrelevant or unduly repetitious or which it would not be reasonable to rely on. Any error in the admission or exclusion of evidence shall be overruled by the Judicial	5 U.S.C. §556(c)(1), 7 C.F.R. §1.140(h)(1)(iv) and 7 C.F.R. §1.140(h)(7) and 7 C.F.R. §1,144§(7)

Officer only if it is both erroneous and prejudicial.	
Determines the scope and form of evidence, rebuttal evidence or cross examination and method of taking evidence and conducting the hearing.	7 C.F.R. §1.140
If a respondent fails to timely answer, upon complainant's motion, the Judge may issue a decision without further procedure or hearing, and such decision shall become final and effective without further proceedings unless appealed to the Judicial Officer.	7 C.F.R. §1.139
Orders that the hearing be conducted by audio-visual telecommunication or by personal attendance of a witness or person.	7 C.F.R. §1.140(b)(3)
Grants extensions of time or stays.	7 C.F.R. §1.140(b)(i)
Conducts prehearing conferences.	7 C.F.R.§1.140(a)
Holds settlement conferences and requires parties to attend.	5 U.S.C. §556(c)(6) and §556(c)(8) and 7 C.F.R. §1.140
Invokes the rule requiring witnesses be examined separately from each other.	7 C.F.R. §1.140(h)(1)(ii)
Issues, denies, revokes, quashes or modifies subpoenas for the production of documents or witnesses.	5 U.S.C. §556(c)(2) and 7 C.F.R. §1.144(c)(4) and 7 C.F.R. §1.149
Orders the USDA to provide a witness's prior statement as required by the Jencks Act.	7 C.F.R. §1.140(h)(1)(iii)
Rules on objections to evidence.	7 C.F.R. §1,140(h)(2)(i)

Prepares an initial decision containing factual findings and legal conclusions, along with an appropriate order.	5 U.S.C. §556(c)(10) and
Takes official notice of matters that are judicially noticed in the U.S. courts.	7 C.F.R. §1.140(h)(6)
Regulates the course of the hearing and the conduct of the parties and counsel	5 U.S.C. §556(c)(5) and 7 C.F.R. §140(c)(13)
Informs parties about alternative means of dispute resolution.	5 U.S.C. §556(c)(7)
Examines witnesses and receives evidence at trial.	5 U.S.C. §556(c)(9) and 7 C.F.R. §1.144(c)(5)
Requires parties to exchange documents	7 C.F.R. §1.144(c)(9) and (10)
Takes depositions and orders depositions taken and orders corrections the Judge finds warranted in the transcript and determines the admissibility of deposition testimony.	5 U.S.C. §556(c)(4) and 7 C.F.R. §1.144(c)(6) and 7 C.F.R. §1.148
Makes initial decisions that include findings, conclusions and reasons on issues of law and fact and an order. (These are not described as recommendations.)	7 C.F.R. §1.132
May sign and approve the parties consent agreements settling a case that consents to an agreed decision without further proceedings, and the Judge shall enter the decision without further proceedings, which decision shall become final upon issuance.	7 C.F.R. §1.138
May rule on all motions, requests, objections or questions or certify issues to the Judicial Officer, but not both.	5 U.S.C. §556(c)(9) and 7 C.F.R. §1.144(c)(1) and 7 C.F.R. §1.143(a) and (e)
Neither the Judge nor the Judicial Officer shall discuss ex parte the merits of the	7 C.F.R. §1.151

proceeding with any party or representative of a party to a proceeding.	
May Debar an attorney for misconduct.	7 C.F.R. §1.141(d)
May "[d]ispose of procedural requests or similar matters."	5 U.S.C. §556(c)(9)
"May issue a declaratory order to terminate a controversy or remove uncertainty."	5 U.S.C. §554(e)
Makes initial decisions and orders that become final decisions and orders binding on the government and respondent with the lapse of time and without mandatory review by the JO.	5 U.S.C. §557(b) and 7 C.F.R. §2.27 and 7 C.F.R. §1.138 and 7 C.F.R. §1.142(c)(4)7 C.F.R. §1.145((a)

Because USDA ALJs exercise these significant functions, they act as Officers of the United States, not as mere employees, and they are subject to the Appointments Clause.

C. USDA ALJs' initial decisions can be final and binding without review by the Judicial Officer or Secretary.

Congress provides agencies options as to the roles ALJs may perform in enforcement proceedings. 5 U.S.C. §557(b). Under one option, an agency could require, by specific or general rule, the ALJ's administrative record be forwarded to a superior officer for final decision. *Id.* That was the procedure in *Freytag*, where Special Trial Judges (STJ) assisted the Tax Court Judge by hearing the evidence and submitting a report of his or her findings; however, the Tax Court Judge made the final decision in the case on review of the report and evidence. Likewise, in *Landry v. FDIC*, 204 F.3d 9 (D.C. Cir. 2000), FDIC ALJs prepared reports with recommended findings and conclusions that were submitted to and reviewed by

the Commission, which entered a final decision and order. The D.C. Circuit held that the FDIC ALJ's were not inferior officers. In *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016), a D.C. Circuit Court panel followed the Circuit's precedent in *Landry* and held that SEC ALJs were not inferior officers because their decisions did not become final except on an order by the Commission.

However, *Landry's* precedent holding that final decision making authority is necessary to find inferior officer status is in question. On a petition for rehearing *en banc*, the *Lucia* panel's decision was vacated and the rehearing is to address these issues: (1) "Is the SEC administrative law judge…an inferior officer…for the purposes of the Appointments Clause" and (2) "Should the court overrule *Landry v. FDIC?"* [3] And recently, the Tenth Circuit disagreed with the holding in *Landry*. *Bandimere v. SEC,* 844 F.3d 1168 (10th Cir. 2016)(*Bandimere*). In *Bandimere,* SEC ALJs issued initial decisions, which could be reviewed by the Commission, and become final on the written order of the ALJs' superior, the Commission.

Relevant to the analysis of USDA ALJs's status, in *Freytag*, *Landry, Lucia* and *Bandimere*, the government contended that under the Tax Court, FDIC and SEC rules, those STJs and ALJs performed the functions of mere employees because, ultimately, any final order was

[3] In *PHH Corp. v. CFPB,* 839 F. 3d 1 (D.C. Cir. 2016), a panel held the CFPB Director's appointment unconstitutionally contravened the Appointments Clause. The D.C. Circuit Court vacated the panel's decision on February 16, 2017, No. 15-1177, and ordered rehearing *en banc*. Because a SEC ALJ had conducted the adjudicatory proceeding, the court ordered this issue addressed: "If the en banc court, which has today separately ordered en banc consideration of *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016), concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition in this case?"

entered by lawfully appointed principal officers of the United States. However, unlike the Tax Court, FDIC and SEC, the USDA decided there would be no general or specific rule requiring a superior officer to review an ALJ's initial decision in order for the decision to become final. Instead, USDA ALJs' initial decisions can become final with the lapse of time for appeal to the JO. 7 C.F.R. § 2.27(a)(1) and 7 C.F.R. §1.142(c)(4).

The USDA's Rules of Practice, authorizing an ALJ's initial decision to become final without mandatory review or a written order by the Secretary, are inconsistent with the APA requirement that a "sanction may not be imposed …or order issued except within jurisdiction delegated to the agency and authorized by law." 5 U.S.C. §558(b). The Horse Protection Act, 15 U.S.C. §1825(b)(1), provides that no penalty shall be assessed for a violation except on the written order of the Secretary. The APA does not authorize the USDA to adopt regulations that repeal or contravene the statutory requirement in HPA §1825(b)(1). 5 U.S.C. §559 (APA provisions "that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute.")

USDA ALJs' initial decisions are titled "DECISION AND ORDER," and conclude by informing the parties that the "provisions of this order shall become final and effective, thirty five (35) days after service … unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding." See *In Re: John Allen*, HPA Docket Nos. 13-0348; 15-0063 (Decision and Order Based on Failure to Appear at Hearing, December 15, 2015, at p. 4).[4]

[4] The cited ALJ and JO decisions are available at https://www.oaljdecisions.dm.usda.gov/.

The Rules of Practice do not require or permit the administrative record in the ALJ proceeding resulting in an initial decision to be certified and transmitted to the JO if there is no timely appeal. 7 C.F.R. §1.145. Absent a timely appeal, the JO does not have the discretionary authority to *sua sponte* review the record to approve, modify or reverse the ALJ's initial decision. An appeal is effectuated by timely filing an appeal petition and brief with the Hearing Clerk. 7 C.F.R. §1.132. Section 1.145(c) provides: "Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or the time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding."

The Judicial Officer's long established precedent holds that jurisdiction is only acquired over an ALJ's initial decision if an appeal petition is timely filed. 7 C.F.R. §1.145. "The Judicial Officer has continuously held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal filed after an administrative law judge's decision becomes final." *In re: Tim Gray*, HPA Docket No. 01-D022, (Order Denying Late Appeal, Oct.17, 2015, at pp.3-4, (internal citations omitted). In the *Gray* decision, the JO characterized the USDA's Rules of Practice as "consistent with the construction of the Federal Rules of Appellate Procedure," which require a notice of appeal within 30 days of the district court decision in order for the court of appeals to acquire jurisdiction. The JO quoted an Article III court appellate decision that held Federal Rule of Appellate Procedure 4 "is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend." *Id.* at 8. Under USDA's rules, the JO does not have jurisdiction to review, modify, reject or approve the ALJ's

decision if the time for appeal has lapsed. Like Article III courts of appeal, a Judicial Officer only has jurisdiction over a USDA ALJ's decision when the JO's authority is timely invoked.[5]

Further, the Rules of Practice do not allow interim appeals by parties from ALJs' decisions during proceedings. *See Robert Raymond Black*, 64 Agric. Dec. 681, 684 (U.S.D.A. 2005). Only three exceptions permit the JO to acquire authority to rule on issues, questions or motions during ALJ proceedings. They are: (1) motions filed under §1.143(e) that are certified by the Judge for a JO decision, (2) an appeal petition from an ALJ order debarring an attorney under §1.141(d), and (3) Department appeals filed under §1.139 challenging the ALJ's denial of a default order.

During the proceeding, a respondent has no right to take an interim appeal from an ALJ's ruling. *In re: All-AirTransport*, 50 Agric. Dec. 420, 421 (U.S.D.A. 1991). The JO cannot reach out and assume jurisdiction over the ALJ's proceeding and adopt, modify or reverse USDA ALJs' decisions. The USDA ALJs are not the JO's assistants; the JO is not their supervisor. USDA ALJs issue final decisions, not subject to further agency review; thus, they act, at least, as inferior officers.

1. ALJ Consent Decisions are final when issued.

USDA ALJs regularly sign and enter Consent Decisions as their initial decisions, and they are final without further action. The Rules of Practice provide:

[5] The implications of the JO's comparison with Article III courts are striking: USDA ALJs' decisions are like Article III district court decisions— they are final unless timely appealed; ALJs are analogous to independent decision-making Article III district court judges; and just as district court judges are not supervised by circuit court judges, USDA ALJs are not supervised by the JO. Of course, district and circuit court judges are subject to appointment by the President and confirmation by the Senate, unlike USDA ALJs and the JO.

> §1.138 Consent decision.
> At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with an appropriate space for signature by the judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after a full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

ALJs have no authority to modify the Consent Decision after it is issued.[6] *Far West Meats and Michaela A. Serrato,* 55 Agric. Dec. 1045 (U.S.D.A. 1996). The JO has no jurisdiction to review, modify, affirm or reverse an ALJ's Consent Decision. *Velasam Veal Connection et al*, 55 Agric. Dec. 295, 298 (U.S.D.A. 1996).

2. ALJs enter final orders of dismissal.

USDA ALJs also enter agreed final orders of dismissal, which have the legal effect of barring the USDA from recovering any penalty or sanction from the respondent. These dismissal orders bar the government from filing a complaint seeking penalties for alleged violations that were asserted in the dismissed complaint. *See In re: Paige Edwards*, [HPA] Docket No. 14-0008 (DISMISSAL May 23, 2016) (The ALJ "order[s] the Complaint as to Respondent Paige Edwards in Docket No. 14-0008 DISMISSED, with prejudice [meaning the case cannot

[6] The Office of Administrative Law Judges provides links to initial decisions, consent decisions and default orders. From 2014-2016, of the 353 decisions or orders published on these three lists, USDA ALJs issued 263 Consent Decisions, or 74% of the total. Available at https:// www.oaljdecisions.dm.usda.gov/.

be refiled].") No notice of a right to appeal is provided. This final order determines not only that the USDA is barred from filing another suit, it also bars the respondent from "seek[ing] reimbursement of attorneys' fees." *Id.* A USDA ALJ's dismissal for lack of jurisdiction is not appealable to the JO, who lacks appellate jurisdiction, and the ALJ's order is final. *See In re: Mass. Indnp't Cert., Inc.,* 63 Agric. Dec. 282 (U.S.D.A. 2004). ALJs also enter Final Orders dismissing cases solely at the request of the Office of General Counsel. *See In re: SHOW, INC.*, 74 Agric. Dec. 160 (U.S.D.A. 2015).

3. Default orders become final orders.

Consent orders and default orders are the primary enforcement orders in USDA enforcement proceedings.[7] The USDA's former Chief Administrative Law Judge, Peter M. Davenport, published an article discussing default decisions and other issues arising from the Department's Rules of Practice. Peter Davenport, *The Department of Agriculture's Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss.2, 567 (2013).[8] The Department, he observed, "has steadfastly and repeatedly resisted even the slightest alignment of its rules with the Federal Civil Rules." *Id.* at 574. The language in the Rules is "almost invariably strictly construed." *Id.* at 576; and see *In re: William J. Reinhart and Reinhart Stables*, 59 Agric. Dec. 721(U.S.D.A. 2000). According to Davenport, the Department frequently amends its complaint, then, when an amended answer is not filed,

[7] The Office of Administrative Law Judges provides links to ALJ initial decisions, consent decisions and default orders. Of the 353 orders listed on these three lists, USDA ALJs made 42 default decisions in 2014, 2015 and 2016, representing 12% of the total orders. See, https:// www.oaljdecisions.dm.usda.gov/. (As of 2/24/17.) And see note 5. The resulting total is 86% for Consent and Default Decisions.

[8] Available at http://digital commons.pepperdine.edu/naalj/vol33/iss2/3.

the Department will move for a default even when the amendment is minor. *Davenport* at 577. Significantly, Mr. Davenport noted the "Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believed good cause existed." *Id.* at 677. The entry of a Default Decision is a final order, that even if timely appealed, under a strict application of the Rules, is affirmed by the JO.

D. Under *Freytag* and *Bandimere*, USDA ALJs are inferior officers who are not lawfully appointed.

In *Freytag*, the Supreme Court concluded that Special Trial Judges (STJ), appointed by the Chief Judge of the Tax Court to hear contested matters, were inferior officers of the United States because they performed more than ministerial tasks in taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.

The Tax Court is an Article I court, established by Congress, whose judges are PAS officers. *Freytag*, 501 U.S. at 870-71; and 26 U.S.C. §7443(b). Congress authorized the Chief Judge to assign an STJ to initially conduct a hearing in any proceeding. In most proceedings, the Chief Judge could authorize the STJ to carry out any "duties short of 'mak[ing] the decision.'" *Id.* at 873. The Conference Report explaining the statute supported this limitation, by stating that the role of the STJ was "to write proposed opinions, subject to review and final decisions by a Tax Court judge." *Id.* at 874.

Before the Supreme Court, the government argued that the Tax Court Chief Judge's appointment of the STJ did not violate the Appointments Clause because (1) "special trial judges do not effectively decide cases under 26 U.S.C. 7443A(b)(4)"; (2) a "special trial judge

… acts only as an aide to the Tax Court judge responsible for deciding the case"; (3) the Tax Court Judge "may adopt, modify, or reject entirely the report of the [STJ], who has "no independent authority whatever"; and (4) "the Tax Court judge must decide every case assigned to a special trial judge….no objection or exception to the special trial judge's report is necessary or even possible, because submission of the special trial judge's report is a matter internal to the Tax Court." Brief of Resp., *Freytag v. CIR* (No. 90-762), 1991 WL 11007941, at *28 and *31 - 32.

The Supreme Court was unconvinced. It acknowledged the government's contention that in the petitioners' proceeding, the STJ "does no more than assist the Tax Court judge in taking evidence and preparing the proposed findings and opinion." And that the STJ could not make a final decision in the petitioners' case. *Freytag*, 501 U.S. at 881. Nonetheless, the Court felt compelled to address the issue of whether the STJs were "inferior officers." *Id.* at 881-82. The Court held: "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by §2, cl. 2 of [Article] II." *Id.* at 881. The Court found that the "degree of authority exercised by the special trial judges to be so 'significant' that it was inconsistent with the classifications of 'lesser functionaries' or employees"; thus, their "appointment must conform to the Appointments Clause." *Id.*

The Court rejected the government's argument that authority to enter a final decision was a necessary condition to find inferior officer status, and it identified three other factors that distinguish inferior officers for purposes of the Appointments Clause.

> The Commissioner reasons that special trial judges may be deemed employees …because they lack authority to enter final decisions. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of the special trial judge is "established by Law"…and the duties, salary, and means of appointment for that office are specified by statute. [cites omitted] These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose functions and duties are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Id. at 881-82.

The Court concluded the fact that STJs could make final decisions in other proceedings (such as declaratory judgments or limited-amount cases) was sufficient to make them inferior officers, even though the STJ did not have authority to enter final orders in the petitioners' proceeding or even if the duties were not sufficiently significant to meet the other factors. The authority to make final decisions in some cases, not just the one at hand, was sufficient to establish that "special trial judges act as inferior officers who exercise independent authority" and require appointment conforming with the Appointments Clause. *Id.* at 882. The Court found that the Tax Court was a Court of Law and its Chief Judge was statutorily authorized to appoint STJs as inferior officers.

Relying on *Freytag,* in December 2016, the Tenth Circuit decided that SEC ALJs are not mere employees but acted as inferior officers subject to the Appointments Clause. *Bandimere,* 844 F.3d at 1168. The government's argued the "Commission's ALJs – like the FDIC's ALJs and unlike the special trial judges in *Freytag* – have no authority to enter final decisions in any proceeding." Brief for Resp., *Bandimere v. SEC,* Tenth Circuit No. 15-9586,

2016 WL 3036458 at *13. Further, the government contended that all final orders are entered by the Commission:

> As the Commission has emphasized … even when no party files a timely petition for review and the Commission does not conduct plenary review, an "ALJ's decision 'does not become final simply on the lapse of time'." JA 467 n. 113. In those instances the Commission's "rules provide that 'the Commission will issue an order that the decision has become final,' and it becomes final only 'upon issuance of the order' by the Commission." JA 467 (citing 17 C.F.R. §201.360(d)(2); see also 17 C.F.R. §201.360(d)(2).

Id. at *21.

The Court considered and rejected the government's position that the SEC ALJs' functions were those properly performed by employees, as opposed to inferior officers, merely because they lacked authority to enter final decisions.

> *Freytag* held that STJs were inferior officers based on three characteristics. Those three characteristics exist here: (1) the position of the SEC ALJ was "established by Law," *Freytag,* 501 U.S. at 881, 111 S. Ct. 2631 (quoting U.S. Const. art. II, §2, cl. 2); (2) "the duties, salary, and means of appointment…are specified by statute," *id.*; and (3) SEC ALJs "exercise significant discretion" in "carrying out…important functions," *id.* at 882, 111 S. Ct. 2631.

Bandimere, 844 F.3d at 1179. The Tenth Circuit concluded that SEC ALJs are inferior officers.

Judge Briscoe's concurring opinion in *Bandimere* succinctly sets forth the proper analysis for deciding whether an ALJ is an inferior officer. In rejecting "*Landry's* and *Lucia's* misstatement of *Freytag's* test," Judge Briscoe observed:

> [F]inal decision-making authority is but one sovereign power, albeit an important one that is typically *sufficient* to render an employee an Officer. [ ] Though final decision-making authority might be *sufficient* to make an employee an Officer, that does not mean that such authority is *necessary* for an employee to be an Officer, contrary to …*Lucia's* holding – by its refusal to consider any of the … ALJs other duties and functions.

Id. at 1192(emphasis in the original).

Both *Bandimere* and *Freytag* concluded that the administrative judges in the initial proceedings should have been appointed pursuant to the Appointments Clause because they performed duties and had powers of inferior officers of the United States. In *Freytag*, the Court held that the STJs were appointed properly by the Chief Judge, and affirmed the agency's final decision. However, in *Bandimere*, the court found the ALJ was acting as an inferior officer who was not lawfully appointed pursuant to the Appointments Clause: "The SEC ALJ held his office unconstitutionally when he presided over Mr. Bandimere's hearing. We grant the petition for review and set aside the SEC's opinion." *Id.* at 1188.

That USDA ALJs enter final orders is sufficient alone to categorize them as inferior officers without even considering the other powers they wield. USDA ALJS are not lawfully qualified to preside over, adjudicate or decide an HPA enforcement proceeding. An order should be entered disqualifying the ALJ assigned to this proceeding. Because there is no lawfully qualified USDA ALJ who can preside over and decide a case, and there are no lawful alternative procedures, the proceeding should be dismissed.

III. THE JUDICIAL OFFICER IS NOT LAWFULLY APPOINTED UNDER THE APPOINTMENTS CLAUSE.

A. Congress must establish the positions of principal officers and inferior officers.

Formal enforcement proceedings filed against participants in walking horse events are subject to this restriction in HPA §1825(b)(1): "No penalty shall be assessed unless…such civil penalty shall be assessed by the Secretary by written order." However, no HPA respondent has had a penalty assessed by a written order of the Secretary. Instead, the penalty has been assessed in a written order signed by an ALJ or the JO. Further, under the current structure,

no constitutionally appointed principal officer (PAS), like the Secretary, will review, approve, or sign a written order assessing a penalty for an HPA violation.

Every federal-government official whose position is "established by Law" and who exercises "significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 125, 132 (1976). The Appointments Clause recognizes two types of Officers – principal and inferior – and permits distinct methods of appointment for each. *See United States v. Germaine*, 99 U.S. 508, 509-10 (1879). Principal officers – including ambassadors, ministers, heads of departments, judges, and others who report directly to the President, can be appointed only by the President with the Senate's consent. *See Edmond v. United States*, 520 U.S. 651, 659 (1997)

There are numerous PAS offices in the USDA:

- Secretary of Agriculture, 7 U.S.C. §2210;
- Deputy Secretary of Agriculture, 7 U.S.C. §2210;
- General Counsel, 7 U.S.C. §2214;
- Assistant Secretary of Agriculture for Congressional Affairs, 7 U.S.C. §6918;
- Assistant Secretary of Agriculture and Administration, 7 U.S.C. §6918;
- Assistant Secretary for Civil Rights, 7 U.S.C. §6918;
- Under Secretary of Agriculture for Farm and Foreign Agriculture Services, 7 U.S.C. §6931;
- Under Secretary of Agriculture for Trade and Foreign Agriculture Affairs, 7 U.S.C. §6935;
- Under Secretary of Agriculture for Rural Development, 7 U.S.C. §6941;
- Under Secretary of Agriculture for Food, Nutrition, and Consumer Services, 7 U.S.C. §6951;
- Under Secretary of Agriculture for Natural Resources and Environment, 7 U.S.C. §6961;
- Under Secretary of Agriculture for Research, Education, and Economics, 7 U.S.C. §6971;

- Under Secretary of Agriculture for Food Safety, 7 U.S.C. §6981;
- Under Secretary of Agriculture for Marketing and Regulatory Programs, 7 U.S.C. §7005; and
- Inspector General, 5 U.S.C. App. §3 and 7 U.S.C. §2270.

Congress has not established the Office of Judicial Officer as a PAS office. Congress also established numerous offices to which the Secretary, as the head of the Department, is authorized to appoint inferior officers:

- Chief Clerk, 7 U.S.C. §2215;
- Military and Veterans Affairs Liaison, 7 U.S.C. §6919;
- Office of Energy Policy and New Uses, 7 U.S.C. §6920;
- Office of Tribal Relations, 7 U.S.C. §6921;
- Consolidated Farm Service Agency, 7 U.S.C. §6932;
- Office of Risk Management, 7 U.S.C. §6933;
- Office of Advocacy and Outreach, 7 U.S.C. §6934;
- Coordinator for Chronically Underserved Rural Areas, 7 U.S.C. §6941a;
- Rural Housing and Community Development Service, 7 U.S.C. §6943;
- Rural Business and Cooperative Development Service, 7 U.S.C. §6944;
- Natural Resources Conservation Service, 7 U.S.C. §6962;
- National Appeals Division and Director, 7 U.S.C. §6992; and
- Administrator of the Department of Rural Utilities Service, 7 U.S.C. §6942.

Congress passed no law establishing a position that authorizes the appointment of a Judicial Officer as either a principal or inferior officer of the United States.

The position of Judicial Officer was established solely by the Secretary through Department regulations. The Secretary's functions and authority to make final decisions in enforcement proceedings has been delegated by a regulation to a Department employee, who has been given the title of Judicial Officer by the Secretary. See 7 C.F.R. §2.35.

B. The Secretary established the position of the Judicial Officer.

The origins of the USDA's Judicial Officer trace to the Supreme Court's decision in *Morgan v. U.S.*, 298 U.S. 468 (1936), a case arising from an agency administrative proceeding in which the Secretary entered a final regulatory order fixing rates for stockyard services. However, the Secretary did not preside over the evidentiary hearing or review the hearing record and evidence, he just signed the order.

The Court invalidated the Secretary's order, holding that one making the final decisions of a "quasi-judicial character" and having a "quality resembling a judicial proceeding" must at the least review the evidence. *Id.* at 480. The Court noted this did not preclude using assistants within the Department, like an examiner taking the evidence, "but the officer who makes the determination must consider and appraise the evidence which justifies [the order]." *Id.* at 481-82.

The USDA's response to the *Morgan* decision was to support the passage of the 1940 Schwellenbach Act, which authorized the Secretary to select a Department employee or officer to whom he would delegate his quasi-judicial functions. See 7 U.S.C. §§450c-450g. This Act was intended to relieve "completely" the Secretary of the time consuming tasks of hearing and deciding the proceedings that came before the Agency. *See In re: World Wide Citrus*, 50 Agric. Dec. 319, 335 (U.S.D.A. 1991)(*World Wide Citrus* hereafter).

The Senate version of the Schwellenbach Act would have established a new position in the USDA, the Second Assistant Secretary of Agriculture, to perform the quasi-judicial functions delegated by the Secretary. Senator Schwellenbach, who endorsed establishing the new position, recognized that

> Congress has given these powers to the Secretary, and when these laws were passed it was contemplated that the Secretary himself would do the work. Now we are proposing to substitute for the Secretary somebody who will occupy a very important position…. The rights of people who are brought before the regulatory sections of the Department of Agriculture are very important, and they should be able to have the findings reviewed by someone of experience and ability.

Id. at 338.

The House version "eliminated the provisions establishing the position of Second Assistant Secretary, and authorized the Secretary to delegate regulatory functions under the bill to not more than two officers or employees of the department of Agriculture, who held positions not below the two top grades in the classified service." *Id.* at 339-41. There appears to have been no consideration of the Appointments Clause, or whether the quasi-judicial functions of the Secretary, a PAS officer, could be delegated to an employee. The legislative focus seems to have been making the pay grade sufficient to attract a qualified person. Thus, the Schwellenbach Act did not create a new position or specify that the person filling it would have to be appointed by the President as a PAS (or even as an inferior) officer.

The Schwellenbach Act defines a "regulatory order" to include an "order…if it has the force and effect of law, and if it may be made, prescribed, issued, or promulgated only after notice and a hearing or opportunity for hearing have been given." 7 U.S.C. §450c(a). A "regulatory function" means a function vested in the Secretary, including "making" or "issuing" a "regulatory order," and includes "determining" whether it is "authorized or required by law." 7 U.S.C. §450c(b)(1).

The Act provides that whenever the Secretary deems the delegation of a regulatory function required, authorized, or expeditious, "he is authorized to make such delegation to

any officers or employees designated under this section." 7 U.S.C. §450d. No consideration seems to have been given to the fact that even if a given law or procedure is efficient, convenient or useful in facilitating functions of government, standing alone, that will not save it if it is contrary to the Constitution. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010).

In the end, what Congress did was authorize the Secretary to designate an employee or officer to whom the Secretary could delegate regulatory functions that were vested in the Secretary. Pursuant to USDA Regulations, the JO has been delegated the authority to perform quasi-judicial regulatory functions by the Secretary. These functions are set out in Department Regulation 7 C.F.R. §2.35, by which the "Secretary of Agriculture makes the following delegations of authority to the Judicial Officer," pursuant to 7 U.S.C. §450c-450g.

But a congressional authorization to assign or delegate functions to an employee or officer is not the same as Congress establishing a position by law and authorizing the Secretary to appoint an officer to perform functions that can only be performed by inferior or principal officers:

> Congress has consistently used the word "appoint" with respect to … positions requiring a separate appointment, rather than using terms not found in the Appointments Clause, such as "assign": "Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer."

Edmond v. U.S., 520 U.S. at 657-58(quoting *Weiss v. U. S.*, 510 U.S. 163, 172 (1997)). This delegation of the Secretary's authority and duty to enter final written orders to a JO violates the Appointments Clause: It delegates the Secretary's functions as a principal officer to an

employee without Congress establishing the position; it does not require Presidential appointment and Senate confirmation; and there is no congressional authorization for the Secretary to appoint an inferior officer to such position.

C. The Judicial Officer is an employee, not an officer.

Initially, the Secretary delegated his quasi-judicial functions to make decisions and enter final orders to an Assistant to the Secretary, but in 1945 the title became Judicial Officer as a result of a Reorganization Plan. See Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash. L. Rev. 277, 278 n.6 (1957-58). Mr. Flavin was designated the first Judicial Officer in 1945, 10 Fed. Reg. 13769 (Nov. 9, 1945), serving until 1971, when Donald Campbell was appointed. William Jenson has held the JO position since his appointment in 1996.

Reorganization Plan No. 2 of 1953, vested all agency functions in the Secretary, except the functions of hearing examiners under the Administrative Procedures Act. 18 Fed. Reg. 3219, §1. (June 5, 1953). In section 4, the plan carried forward the Secretary's authority under 7 U.S.C. §450c-d to delegate functions to USDA officers or employees. On January 6, 1954, pursuant to the 1953 Reorganization Plan, the Secretary delegated to the Judicial Officer the authority to take final actions in proceedings held pursuant to the APA. 19 Fed. Reg. 74.

The Department of Agriculture Reorganization Act of 1994, 7 U.S.C. §6901 *et seq.* provided the Secretary of Agriculture with the necessary authority to streamline the Department, but it did not affect the "authority of the Secretary under Reorganization Plan No. 2 of 1953 (5 U.S.C. App.; 7 U.S.C. 2201 note)." 7 U.S.C. §7014(b)(2). Since 2009, the Judicial Officer has been an employee in the USDA Office of Departmental Management,

which provides administrative support to Department officials and coordinates administrative programs and services. The Office of Judicial Officer is one of ten Departmental Management Agencies. Departmental Management is headed by the Deputy Assistant Secretary for Administration, who reports to the Assistant Secretary for Administration. 7 U.S.C. §6918(b). The Assistant Secretary for Administration reports to the USDA's Deputy Secretary, who reports to the Secretary, and both positions are PSA offices.

D. The scope of the JO's authority is unlimited.

The Department's Rules of Practice define the Judicial Officer as "an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g) and the Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary." 7 C.F.R. §1.132. The Judicial Officer is identified as one of the Department's General Officers. 7 C.F.R. §2.4. As a result of the delegation of the agency's quasi-judicial functions to the JO, "the Judicial Officer is the alter ego of the Secretary." *World Wide Citrus*, 50 Agric. Dec. at 327.

According to former JO Donald Campbell, the JO's powers are strikingly extensive:

- The incumbent is the Secretary's alternate on all matters concerned with quasi-judicial authorities of the Secretary and relieves him entirely of this responsibility.
- The Judicial Officer exercises the deciding function of the Secretary pursuant of law (Schwellenbach Act, 54 Stat. 81, 5 U.S.C. 516a et seq.) in all quasi-judicial proceedings where the statute administered by the Department requires a hearing.
- The purpose of this position is to relieve the Secretary, completely, of the responsibilities imposed by law on a final deciding officer in such proceedings.

- The incumbent's decisions, in the name of the Secretary, are appealable only to the United States Courts.
- A Judicial Officer of the Department independently renders decisions in the name of the Secretary.
- Decisions made are of the utmost significance, are legally binding on those affected and are appealable only to the courts.
- Decisions against the Department are not appealable. Mistakes in judgment on important decisions could be of upmost concern to the Department of Agriculture, to the government as a whole, and to widespread industries and businesses regulated.
- Unlimited authority is exercised by acting fully for the Secretary on all responsibilities assigned to the Judicial Officer.
- No supervision of direction is received.
- The Secretary delegates full authority to the Judicial Officer and holds him/her responsible for his/her decisions.
- These ["quasi-judicial or judicial"] functions are the kind generally exercised by independent regulatory agencies such as the Interstate Commerce Commission, the National Labor Relations Board, the Federal Trade Commission, the Securities and Exchange Commission, etc.
- Department's practice…is different from that of most federal agencies. In most federal agencies, direct review by the agency head (i.e., by the cabinet head or the agency members of a multi-member agency) is available in at least some cases.

World Wide Citrus, 50 Agric. Dec. at 328 n.5 and 330-332. In 1991, when Mr. Campbell wrote the *World Wide Citrus* opinion, he recognized that the JO is an employee and not an Officer of the United States. JO Campbell had argued, unsuccessfully, "that the Judicial Officer is eligible for the Senior Executive Service, i.e., arguing that the Judicial Officer 'exercises important policy-making policy determining, or executive functions.' (5 U.S.C. §3132(a)(2)." 50 Agric. Dec. at 328 n. 5. The classification of "Senior Executive Service" applies to a position "which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate…." 5 U.S.C. §3132(a)(2). The described extensive governmental powers

are not of a nature that can generally be delegated to an employee. Designation of such powers to an employee, who is not accountable to the President, Secretary, Congress or the public, violates the Separation of Powers.

E. The Judicial Officer performs functions only a principal officer should perform.

In *Morrison v. Olsen*, a case arising from the appointment of an Independent Counsel, the Court noted that the line between inferior and principal officers is far from clear and that it had not decided exactly where the line fell. 487 U.S. 654, 670-71 (1988). The Court, however, identified several factors for determining the type of officer and the related appointment requirements: (1) whether the person was removable by a higher executive branch official, (2) whether the officer was "empowered by the Act to perform only certain, limited duties," (3) whether the position included "any authority to formulate policy for the Government or the Executive Branch," and (4) whether the "office is of limited jurisdiction." *Id.* at 671. By comparing the position of Independent Counsel, an inferior officer as described in *Morrison*, with the position of Judicial Officer, unquestionably the Judicial Officer aligns in the category of principal officer.

In *Morrison*, the Court held that since the Act establishing the Independent Counsel's position made her subject to removal by a higher executive branch official, the Attorney General, this weighed in favor of her being an inferior officer. *Id.* Here, no congressional act creates the Office of Judicial Counsel, and there is no provision for removal. The only Act the USDA points to as the source of its authority to designate a Judicial Officer is the Schwellenbach Act. Presumably the JO has some grade of civil service classification. But the

Schwellenbach Act is silent on whether any superior officer must appoint or can remove the JO from office. The Act does provide that the "Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section." 7 U.S.C. §450d. But the Appointments Clause does not deal with the authority to delegate. The Appointments Clause concerns the power to appoint, or terminate, a person holding an officer's position.

For the second factor, the Court looked to the breadth of the authority and found that the "independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution of certain federal crimes." *Id.* Limitation on authority indicates the position could be held by an inferior officer. Further, the Court noted that the IC's "grant of authority does not include any authority to formulate policy for the Government or the Executive Branch…." *Id.* The Schwellenbach Act, by contrast, places no restriction on the executive, administrative or judicial functions the Secretary is authorized to delegate to the Judicial Officer.

Significantly, the JO is the "alternate for all matters concerned with quasi-judicial authorities of the Secretary," his co-equal in policy making decisions that must be made in Department adjudications of rate-making and enforcement proceedings. *World Wide Citrus*, 50 Agric. Dec. at 331. The JO's "independently rendered decisions are of the upmost importance." *Id.* at 332. And the JO's "unlimited authority is exercised by acting fully for the Secretary…." *Id.* Contrasting the Judicial Officer's "unlimited authority" and the Independent Counsel's limited authority illustrates that the former acts in the capacity of a principal officer while the latter acts as an inferior officer.

The *Morrison* Court found that the limited jurisdiction of the Independent Counsel weighed in favor of her being considered an inferior officer. The Act restricted her role to

investigating certain officials and only on the Attorney's General request. By contrast, the Judicial Officer has a broad jurisdictional mandate to make final decisions in all quasi-judicial proceedings under all applicable laws within the agency's authority. "The Secretary delegates full authority to the Judicial Officer," according to the JO's position description. *Id.* at 332.

The final factor in *Morrison* was whether "the office was limited in tenure." *Id.* at 672. While there was no time limit on the appointment of the Independent Counsel, the office was temporary, "in the sense that an independent counsel is appointed essentially to accomplish a single task." *Id.* By contrast, the Judicial Officer is delegated the Secretary's function of issuing final orders in all quasi-judicial proceedings under the laws the USDA administers. The JO's position is not temporary. Indeed, since 1945, when the Secretary first designated an employee to perform the Secretary's quasi-judicial functions, only three individuals have served lengthy terms as the Judicial Officer. The *Morrison* Court concluded the Independent Counsel was an inferior officer properly appointed under the Appointments Clause. The JO is not.

Justice Scalia dissented in *Morrison*, suggesting one factor distinguished principal officers from inferior officers— whether or not the officer was subordinate to another officer in the Executive Branch. "One is not a 'superior officer' without some supervisory responsibility, just as … one is not an 'inferior officer' within the meaning of the provision under discussion unless one is subject to supervision by a 'superior officer'." *Id.* at 720 (Scalia, J., dissenting).

The USDA's "Position Description" states that the "Judicial Officer of the Department independently renders decisions in the name of the Secretary," which are not appealable to a Department superior, but only to "the United States courts," and "[n]o

supervision or direction is received." *World Wide Citrus*, 50 Agric. Dec. at 331-32. Under Justice Scalia's test, "[b]ecause [the Judicial Officer] is not subordinate to another officer, [he or she] is not an 'inferior officer' and [an] appointment other than by the President with the advice and consent of the Senate is unconstitutional." 487 U.S. at 723 (Scalia, J., dissenting). By 1997, Justice Scalia's dissent would become the opinion of the Court.

Weiss v. U.S., 510 U.S. 163 (1994), concerned the method of appointing military judges. It was not disputed that the judges were officers within the meaning of the Appointments Clause. All of the military judges were commissioned officers, previously appointed by the President and confirmed by the Senate. *Id.* at 169. The issue was whether they needed a second appointment to function as judges. The Court held that reappointment was not required under the Appointments Clause. *Id.* at 176. Justice Suter concurred joining the Court's opinion with the understanding that the military judges were inferior officers within the meaning of the Appointments Clause. *Id.* at 182. He noted that these "cases would raise far more difficult constitutional questions … if, as petitioners argue, military judges were 'principal officers'." *Id.*

Even though these military judges were PAS officers, the procedure by which they were appointed alone did not determine whether the functions they performed were those of a principal or an inferior officer. No branch of the government can abdicate the Appointments Clause. "Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation; nor may the President allow Congress or a lower level Executive Branch official to select a principal officer." *Id.* at 188 (Souter, J., concurring). Military judges were not principal officers "because not only the legal rulings of military judges

but also their fact finding and sentencing are subject to *de novo* scrutiny by the Courts of Military Review," a superior court within the same Department. *Id* at 193 (Souter, J., concurring). By contrast, under no circumstance are the USDA JO's decisions reviewable within the agency by an official superior to the JO.

Edmond v. U.S., 520 U.S. 651 (1997), again dealt with the appointment of military judges. The Secretary of Transportation appointed civilian judges to the Court of Criminal Appeals. Congress authorized the Secretary to appoint officers and fix their pay. The issue was whether the judges were principal or inferior officers for the purposes of the Appointments Clause. While the President, Department Heads and Courts of Law could appoint inferior officers, "the President's power to select principal officers of the United States was not left unguarded, as Article II further requires the 'Advice and Consent of the Senate'." *Id.* at 659.

This requirement promotes a judicious choice of persons for filling the offices of the United States. *Id.* Presidential appointment and Senate confirmation "was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Id.* at 660. Justice Scalia, writing for the Court, held:

> Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally hold a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 662-63.

Decisions of the judges of the Court of Criminal Appeals were appealable to "another Executive Branch entity, the Court of Appeals for the Armed Forces." *Id.* at 664. While that Court's review was not *de novo,* the Court concluded that it was significant "that judges in the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Id.* at 665. The Court of Appeals for the Armed Forces consisted of five judges "appointed from civilian life by the President, by and with the advice and consent of the Senate…." 10 U.S.C. §942(b). The judges, who made final decisions, were principal officers.

In *Free Enterprise Fund,* the Court followed the holding in *Edmond*:

> We held in *Edmond v. United States* [cites omitted] that, "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that "'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent.

561 U.S. at *510. Under the Court's holdings in *Edmond* and *Free Enterprise Fund*, the USDA's Judicial Officer, who is not subject to supervision by any superior officer, functions as a principal officer.

That the USDA's Judicial Officer functions as a principal officer, and has no superior officer, is uncontestable based on the Judicial Officer's decision in *World Wide Citrus*, as set out above. In making decisions that are "of utmost significance, are legally binding on those affected and are appealable only to the courts…. no supervision or direction is received." 50 Agric. Dec. at 332. The "Secretary delegates full authority to the Judicial Officer." *Id.* The JO has "unlimited authority." *Id.* By the Judicial Officer's own description of his position, the functions of the Judicial Officer "are the kind generally exercised by independent regulatory

agencies such as the Interstate Commerce Commission, the National Labor Relations Board, the Federal Trade Commission, the Securities and Exchange Commission, etc." *Id.*

Significantly, the USDA JO equates himself with agencies, commissions and boards that all have one thing in common, but a characteristic not possessed by the JO. The Interstate Commerce Commission Board consisted of eleven Commissioners, appointed by the President and confirmed by the Senate. *See Assure Competitive Transp., Inc. v. U.S.,* 629 F. 2d 467, 475 (7th Cir. 1980). The National Labor Relations Board is an agency consisting of five Board Members, "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. §153(a). The Federal Trade Commission "is composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. §41. The Securities and Exchange Commission is "composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate." 15 U.S.C. §78d.

By contrast, the USDA's JO is a USDA employee occupying a position somewhere below the "Senior Executive Service position," who has been delegated functions only a principal officer can perform. The JO has not been appointed to any position within the USDA by the President with the advice and consent of the Senate. The JO is not lawfully qualified to participate in any HPA enforcement proceeding, and must be disqualified from those proceedings.

IV. THIS CASE, AND ALL HPA COMPLAINTS, SHOULD BE DISMISSED BECAUSE THE USDA HAS NO LAWFUL PROCEDURES FOR ADJUDICATING THE MERITS.

The USDA's Rules of Practice, 7 C.F.R. §1.130 *et seq*., are fatally flawed because there is no review of the evidence presented at a hearing before an ALJ from which a final decision is made by a lawfully appointed principal officer of the Agency. The Judicial Officer performs the decision making functions of the Secretary, a PAS officer in whom Congress vested exclusive decision making authority to assess penalties by written orders under the HPA. 15 U.S.C. §1825(b). This function has not been lawfully delegated to an officer whose position was created by a law authorizing the Secretary to appoint an officer to the position.

Congress did not establish a position that can make final decisions that are not reviewable by a superior within the agency. Nor can Congress authorize the Secretary to appoint an inferior officer to perform those functions. Any employee or officer within an agency who makes final and unreviewable decisions must be a principal officer, appointed by the President and confirmed by the Senate.

Over seventy years ago, in the wake of the Supreme Court's decision in *Morgan*, the USDA created an unconstitutional system to expeditiously solve a problem. The Court's suggested solution called for the use hearing examiners to accumulate the evidence, which the Secretary could then review and issue orders based on the record. Instead, the Secretary decided not only would he not hear or review the evidence taken by a hearing examiner, he would not even sign the final decision. The Secretary decided that Congress should pass legislation authorizing him to delegate his duties to make final decisions and sign final orders to an employee or officer he selected within the Department. Further, the Secretary decided

to give that person a title. But calling someone an officer does not make them one under the Appointments Clause.

The USDA's cure for the *Morgan* problem was worse than the evil the Court identified. Thereafter, all final decisions and orders were made and entered based on a single employee reviewing the evidence, making the final decision and signing the order. There was no office established by Congress. There was no requirement that the person exercising these powers be appointed to the position as a principal officer, or even as an inferior officer. There is no accountability, only an expedient, unconstitutional exercise of power.

In *Edmond*, Justice Scalia recognized that in "the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 662-63. That never happens in USDA HPA enforcement proceedings under the Rules of Practice. No superior officer of the United States, who lawfully acts as a principal officer by virtue of being appointed by the President and confirmed by the Senate, is involved in the proceeding. No principal officer hears the evidence. No principal officer reviews the evidence. No principal officer makes a final decision binding on the parties and the government.

The USDA appears to be unique among executive and independent agencies in permitting penalties to be assessed against citizens by an agency employee with no opportunity to have a lawfully appointed principal officer review, amend, modify or rescind the punitive order. No lawfully appointed principal officer even has a right to such review or modification.

No principal officer of the USDA ever touches an HPA enforcement proceeding, the result of which may dramatically affect the rights or liberty of a citizen.

One lesson is abundantly clear from the major decisions discussed above: An inferior officer must report to, and his or her decisions must be reviewed by, superior officers within the agency. This never happens in HPA enforcement proceedings, which are conducted in violation of the Constitution and the HPA.

V. CONCLUSION

Only a principal officer has the authority to assess a penalty in a final written order in an enforcement proceeding under the HPA. 15 U.S.C. §1825(b)(1). The USDA's Judicial Officer is not a principal officer appointed by the President and confirmed by the Senate. The USDA ALJs are neither lawfully appointed inferior or principal officers.

This fatal flaw in the USDA's enforcement proceedings under its current Rules of Practice cannot be cured by applying a patch. It cannot be cured by severing any unconstitutional provision. The Department cannot simply make up new rules and regulations, rule-making procedures must be followed. See 5 U.S.C. §551 *et seq.* In pending proceedings there is only one course that can be taken. The complaints against Respondents should be dismissed. Therefore, upon review of this motion to disqualify, supported by a good faith and sufficient affidavit, the Secretary — as the lawfully appointed authority of the USDA authorized by Congress to make decisions and issue orders in enforcement proceedings — should grant this motion and disqualify the ALJs and JO.

The Secretary should declare that (1) the USDA's ALJs and JO are not lawfully appointed pursuant to the Appointments Clause to adjudicate HPA enforcement proceedings,

(2) the USDA ALJs and JO are disqualified from further involvement in such proceedings, (3) the USDA's enforcement proceedings unlawfully deny respondents the right to have their cases ultimately decided by the Secretary or a duly appointed principal officer, and (4) the pending proceedings against HPA respondents are dismissed.

Respectfully submitted,

_/s/ Karin Cagle_____

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ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

Under penalty of perjury, I affirm that I served this document with the Affidavit in Support on the Hearing Clerk, OALJ, via email at OALJHearing Clerks@ocio.usda.gov, on March 27, 2017, pursuant to the instructions on the cover letter issued by the Office of Administrative Law Judges.

____/s/ Karin Cagle_____
Karin Cagle

Exhibit 6

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

JIMMY McCONNELL (HPA Docket No. 13-0367); and
FORMAC STABLES, INC. (HPA Docket No. 14-0200);

AND

JIMMY McCONNELL (HPA Docket No. 13-0373);
MOLLY WALTERS (HPA Docket No. 13-0375); and
FORMAC STABLES, INC. (HPA Docket No. 14-0200);

AND

JAMES DALE McCONNELL, also known as
JIMMY McCONNELL, an individual (HPA Docket No. 16-0169); and
FORMAC STABLES, INC., a Tennessee corporation (HPA Docket No. 16-0170),

Respondents.

ORDER DENYING MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGES AND JUDICIAL OFFICER, MOTIONS TO DISMISS, AND REQUEST FOR CERTIFICATION OF ISSUES

Appearances:

Colleen A. Carroll, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Animal and Plant Health Inspection Service [APHIS]; and

Karin Cagle, Esq., of Fort Worth, TX, for Respondents James Dale McConnell and Formac Stables, Inc.

Preliminary Statement

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*) [HPA or Act] by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service [APHIS or Complainant] on August 31, 2016 and amended on October 5, 2016. On March 28, 2017, respondents ***James Dale McConnell, a/k/a Jimmy McConnell (HPA Docket No. 16-0169)*** and ***Formac Stables, Inc. (HPA Docket No. 16-0170)*** [Respondents] filed

a "Motion to Disqualify the USDA's ALJs and JO; Motion to Dismiss for Lack of Jurisdiction; and Request for Certification of Issues to the Secretary of Agriculture."[1] In addition, Respondents filed a "Motion to Dismiss this Proceeding Because No Attorney in the Office of General Counsel Is Lawfully Authorized to Prosecute this Case or Assert a Legal Position on Behalf of the United States" on March 29, 2017.

For the reasons discussed more fully herein, the Motion to Strike, Motions to Dismiss, Motion to Disqualify USDA Administrative Law Judges and Judicial Officer, and Request for Certification of Issues are DENIED.

Procedural History

On August 31, 2016, APHIS filed a complaint against Respondents alleging violations of the Horse Protection Act. On September 26, 2016, Respondents, by and through counsel, filed an answer to the Complaint.

On October 5, 2016, APHIS filed an amended complaint against Respondents. On November 23, 2016, Respondent James McConnell, by and through counsel, filed an "Amended Answer of Respondent James McConnell." On January 3, 2017, Respondent James McConnell, by and through counsel, filed a "Second Amended Answer of Respondent James McConnell." Also on January 3, 2017, Respondents, by and through counsel, filed an "Answer of Respondents James McConnell and Formac Stables, Inc."

On March 28, 2017, Respondents, by and through counsel, filed a "Motion to Disqualify

[1] Specifically, the Motion requested: (1) that the Administrative Law Judge [ALJ] presiding over this case, as well as all ALJs presiding over all HPA cases, and the Judicial Officer be disqualified; (2) that the Motion to Disqualify the ALJ be certified to the Secretary of Agriculture and that the Secretary rule on the Motion to Disqualify the Judicial Officer; and (3) that the Complaint in this case, as well as "all HPA complaints," be dismissed on the basis that the Rules of Practice are "unlawful" and the ALJs and the Judicial Officer lack authority to adjudicate them. (Motn. at 3, 5, 42-43).

the ALJs and JO; Motion to Dismiss for Lack of Jurisdiction; and Request for Certification of Issues to the Secretary of Agriculture." [Motion to Disqualify; Second Motion to Dismiss Complaint; Request for Certification].[2] On March 29, 2017, Respondents, by and through counsel, filed a "Motion to Dismiss this Proceeding Because No Attorney in the Office of General Counsel Is Lawfully Authorized to Prosecute This Case or Assert a Legal Position on Behalf of the United States" [Motion to Dismiss Proceeding].

On April 18, 2017, APHIS filed "Complainant's Response to Motions to Disqualify, to Dismiss Complaint, and to Certify Motion." On April 19, 2017, APHIS filed "Complainant's Response to Motion to Dismiss the Proceeding."

Discussion

I. Motion to Disqualify

The Motion to Disqualify directly challenges the authority of the United States Department of Agriculture [USDA] ALJs and Judicial Officer to preside over this and other administrative proceedings before the Secretary of Agriculture. (Mots. at 6-39). The Rules of Practice provide:

> (b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

7 C.F.R. § 1.144(b).

First, the Motion to Disqualify is premature for adjudication. Respondents are attempting to raise a constitutional issue that can and should be raised in administrative proceedings to preserve them for appeal ***if an appeal is necessary and appropriate*** but which is not ripe for

[2] For purposes of clarity and understanding, Respondents' March 28, 2017 filing—which includes the Motion to Disqualify, Motion to Dismiss Complaint, and Request for Certification—will be cited as "Motions" (Mots). in this Order.

adjudication until ***after exhaustion of administrative remedies***.

The Rules of Practice explicitly provide that any party who disagrees with an ALJ's initial decision may appeal "the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of right" to the Judicial Officer by filing an appeal petition with the Hearing Clerk. 7 C.F.R. § 1.145(a). The HPA provides that a person adjudged to have violated the Act and sanctioned therefor may appeal to a United States Court of Appeals for judicial review of the Secretary's final decision and order. 15 U.S.C § 1825(b)(2).[3]

Respondents' motion does not concern the HPA or the issues in this case; rather, it advances a challenge to the Department's delegations of authority and the Department's Rules of Practice, which govern this and other disciplinary proceedings. (Mots. at 6-39). Respondents challenge the validity of the Rules of Practice yet rely on those same rules in an apparent effort to stop administrative enforcement of the HPA by disqualifying the Department's ALJs and the Judicial Officer from presiding over HPA cases.[4]

Second, Respondents allege that the Rules of Practice are unlawful. (Mots. at 43). The use of the term "unlawful" to describe the Department's procedural rules suggests that Respondent

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[3] Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders—including challenges rooted in the Appointments Clause—through the administrative adjudication and judicial review process set forth in the statute."); Hill v. SEC, 825 F.3d 1236, 1252 (11th Cir. 2016) ("Congress set forth a detailed process for exclusive judicial review of final Commission orders in the federal courts of appeals. . . . From the text of the statute, we fairly discern Congress's general intent to channel all objections to a final Commission order—including challenges to the constitutionality of the SEC ALJs or the administrative process itself—into the administrative forum and to preclude parallel federal district court litigation."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500, 194 L. Ed. 2d 588 (2016) ("After the pending enforcement action has run its course, she can raise her objections in a circuit court of appeals established under Article III.").

[4] "The first constitutional defect in USDA HPA enforcement proceedings arises from the Department's Rules of Practice, 7 C.F.R. §1.130 *et seq.* (Rules of Practice), which in HPA enforcement proceedings require assignment of a USDA ALJ to conduct a hearing and render an initial decision." (Mots. at 1).

is advancing a challenge under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) [APA]. Respondents cite no support for raising an APA challenge to the Rules of Practice in a pending disciplinary case before the Secretary under the Rules of Practice.

Third, as correctly pointed out by Complainant's counsel, the federal courts have not made a final determination as to the authority of ALJs generally or the Department's ALJs specifically. (Resp. to Mots. at 3). The Rules of Practice explicitly provide for appeals of the decisions of the ALJs, and the HPA provides for appellate review of the decisions of the Secretary. The status quo should be maintained unless or until the federal courts rule otherwise.

Finally, the Rules of Practice contain no procedures for disqualifying the Judicial Officer.

For these reasons, Respondents' constitutional challenges questioning the authority of USDA's Administrative Law Judges and Judicial Officer to preside over administrative proceedings before the Secretary of Agriculture and requesting that these administrative enforcement proceedings be dismissed or forestalled shall be DENIED.

II. Request to Certify Motion to the Secretary

Respondents seek to certify the Motion to Disqualify the ALJ to the Secretary of Agriculture.[5] The Rules of Practice provide:

> (e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

[5] "The Department's Rule of Practice § 1.144(b), which permits a motion to disqualify an ALJ to be certified for decision only to the Secretary, not the JO, reinforces certification to the Secretary. Because 5 U.S.C. 556(b) requires a motion to disqualify supported by an affidavit to be decided by the agency, and Rule § 1.144(b) identifies the Secretary as the only USDA official authorized to decide a motion to disqualify when the ALJ cannot decide the motion, this motion to disqualify supported by an affidavit must be forwarded to the Secretary for decision." ((Mots. at 4)).

7 C.F.R. § 1.143(e).

First, although Respondents state that their motion was required to be accompanied by an affidavit and contends that the motion was "supported by a good faith and sufficient affidavit" (Mots. at 42), the affidavit of David Broiles filed in this proceeding is not "a good faith and sufficient affidavit." Mr. Broiles's affidavit comprises legal opinions and argument and does not set forth facts based upon personal knowledge.[6] Mr. Broiles's affidavit also contains verbatim some of the exact arguments contained in Respondents' motion. Putting these arguments in affidavit form does not convert them into facts based on personal knowledge. Moreover, the Broiles affidavit does not satisfy the evidentiary requirements of the Rules of Practice, which provide for the exclusion of evidence that is "immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely." 7 C.F.R. § 1.141(h)(iv).

Second, the Rules of Practice do not *require* a motion to disqualify an ALJ to be certified to the Secretary. The plain language of the Rules of Practice provide that "[t]he Judge may then either rule upon or certify the motion to the Secretary, but not both." 7 C.F.R. § 1.144(b). The Rules of Practice do not define the term "Secretary." *See* 7 C.F.R. § 1.132. The Rules of Practice provide:

> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect.

7 C.F.R. § 1.132. The HPA defines "Secretary" as "the Secretary of Agriculture." 15 U.S.C. § 1821(2). The term "Judicial Officer" in the Rules of Practice, however, means the Judicial

[6] In its response, APHIS indicates that the affidavit "comprises much of the same legal opinions and arguments that Mr. Broiles set forth in an *amicus* brief recently filed on behalf of the two horse-industry organizations [HIOs], the Tennessee Walking Horse National Celebration, Inc., and SHOW, Inc.," in *Raymond J. Lucia Companies, Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc granted, judgment vacated* (Feb. 16, 2017). (Resp. at 5).

Officer or the Secretary of Agriculture, if the Secretary elects to exercise the authority delegated to the Judicial Officer. The Rules of Practice provide:

> In addition and except as may be provided otherwise in this subpart: . . . .
>
> . . . . *Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§ 2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.

7 C.F.R § 1.132.

Third, Respondents allege that no ALJ should rule on their motion to disqualify the ALJs from presiding over HPA cases because the ALJ would have "an actual conflict of interest." (Mots. at 5).

> Respondents need not allege that any USDA ALJ or the JO has a direct financial interest in the outcome of the case on the merits, or a bias favoring the Complainant or disfavoring the Respondent that will affect his or her decision on the merits. However, USDA ALJs do have an apparent financial interest and actual conflict of interest in the outcome of a motion to disqualify. A reasonable person would believe that a USDA ALJ or the JO, entertaining a motion to disqualify, may see a ruling granting the motion as a potential threat to his or her job security or to the Judge's personal financial interest.
>
> Any ALJ or JO who is assigned to a case and decides to undertake ruling on a motion to disqualify has an actual conflict of interest; a decision granting the motion would render unlawful their authority to decide future Horse Protection Act enforcement proceedings. By implication, a decision granting the motion would mean that the ALJ s' and JO's prior decisions in HPA cases were unlawfully made and possibly of no effect. Because of the appearance of the USDA ALJs' and JO's possible financial interests in the outcome of the motion, and the actual conflict of interest the motion presents, neither a USDA ALJ nor the JO should be assigned to decide the motion to disqualify.

(Mots. at 5). Respondents' argument that because ALJs receive compensation for performing their duties they have a "direct financial interest" that should preclude them from ruling on a motion to disqualify is unsupported and without merit.

Finally, again, the Rules of Practice contain no specific procedures for disqualifying the Judicial Officer. The Rules of Practice do, however, provide that the ALJs shall rule on all motions filed before a petition for appeal has been filed:

> The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a).

III. Motions to Dismiss

Respondents move to dismiss the Complaint on the basis that the Rules of Practice are "unlawful." (Mots. at 40-42). Respondents state: "The USDA's Rules of Practice, 7 C.F.R. §1.130 *et seq.*, are fatally flawed because there is no review of the evidence presented at a hearing before an ALJ from which a final decision is made by a lawfully appointed principal officer of the Agency." (Mots. at 40).

At the outset, Respondents initially represent that the Motion to Dismiss Complaint is limited to this case alone: "While this motion raises issues with possible consequences in USDA proceedings under other statutes it administers, Respondents do not address that concern because *this motion is limited to the proceedings against them under the Horse Protection Act*." (Mots. at 1 n.1) (emphasis added)). Later in the motion, Respondents request dismissal of "all HPA complaints":

> **IV. THIS CASE, AND ALL HPA COMPLAINTS, SHOULD BE DISMISSED BECAUSE THE USDA HAS NO LAWFUL PROCEDURES FOR ADJUDICATING THE MERITS....**
>
> .... The Secretary should declare that (1) the USDA's ALJs and JO are not lawfully appointed pursuant to the Appointments Clause to adjudicate HPA enforcement proceedings, (2) the USDA ALJs and JO are disqualified from further involvement in such proceedings, (3) the USDA's enforcement proceedings unlawfully deny respondents the right to have their cases ultimately decided by the Secretary or a

> duly appointed principal officer, and (4) the pending proceedings against HPA respondents are dismissed.

(Mots. at 40, 42).

In addition, Respondents move to dismiss the instant proceeding on the grounds that "the USDA attorney's [sic] in this proceeding cannot lawfully act for or speak for the United States." (Mot. to Dismiss Proceeding at 1). Respondents argue, in pertinent part:

> . . . . The proceeding as filed by the USDA Office of General Counsel. It is being prosecuted by an attorney assigned to that Office. There is no USDA General Counsel lawfully appointed by the President or confirmed by the Senate. The vacancy in the General Counsel's position has not been lawfully filled by an appointment of an acting General Counsel pursuant to 5 U.S.C. § 3345. Therefore, Respondents move to dismiss because the USDA's attorney's [sic] in this proceeding cannot lawfully act or speak for the United States.

(Mot. to Dismiss Proceeding at 1). The motion directly challenges the authority of the Office of General Counsel [OGC] to represent departmental agencies in administrative proceedings before the Secretary of Agriculture. Moreover, it appears that Respondents seek to disrupt APHIS's administrative enforcement of the HPA by way of collateral attack on the authority of the acting General Counsel and his subordinates in OGC to represent APHIS in this proceeding. Respondents request that the Complaint be dismissed or that "the proceeding be abated."[7] (Mot. to Dismiss Proceeding at 5).

First, the Rules of Practice specifically provide that a "motion to dismiss on the pleading" will not be entertained. 7 C.F.R. § 1.143(b). Respondents seek dismissal of the Complaint "and all HPA complaints" based on their contention that the Rules of Practice under which the

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[7] "Any and all actions taken by the USDA's Office of General Counsel since the vacancy of the General Counsel's office arose are void *ab initio*, 5 U.S.C. § 3348(d)(1) and (2), and 'shall have no effect' and 'may not be ratified.' The complaint in this case should be dismissed because they [sic] cannot be lawfully prosecuted. Alternatively, any actions taken by the Office of General Counsel since the vacancy occurred should be declared of no effect, and void, and the proceeding abated until there is a lawfully appointed General Counsel." (Mot. to Dismiss Proceeding at 5).

complaints were filed and which govern HPA proceedings are "unlawful."[8] Respondents' motions to dismiss are, in name and substance, motions to dismiss on the pleading. Therefore, they may not be entertained and shall be denied pursuant to the Rules of Practice.

Second, the motions to dismiss are untimely. *See* 7 C.F.R. § 1.143(a)(2) ("All motions and requests concerning the Complaint must be made within the time allowed for filing an answer."). The time for filing an answer to the Complaint expired well before Respondent filed the instant motions to dismiss.

Third, the motions to dismiss, which challenge the validity of the Rules of Practice and the authority of OGC, are extraneous to the HPA and cannot be adjudicated by the Office of Administrative Law Judges [OALJ] under the Rules of Practice.[9] The Secretary of Agriculture has delegated the following authority to the Assistant Secretary of Administration:

> (a) The following delegations of authority are made by the Secretary of Agriculture to the Assistant Secretary for Administration:
>
> . . . . (12) *Related to Office of Administrative Law Judges.*
>
> > (i) Assign, after appropriate consultation with other general officers, to the Office of Administrative Law Judges proceedings not subject to 5 U.S.C. 556 and 557, involving the holding of hearings and performance of related duties pursuant to the applicable rules of practice, when the Assistant Secretary for Administration determines that because of the nature of the proceeding it would he desirable for the proceeding to be presided over by an Administrative Law Judge and that such duties and responsibilities would not be inconsistent with those of an Administrative Law Judge. . . .

7 C.F.R. § 2.24(a)(12). The Secretary of Agriculture, by regulation, has made the following designations:

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[8] Respondents state: "The USDA's Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, are fatally flawed because there is no review of the evidence presented at a hearing before an ALJ from which a final decision is made by a lawfully appointed principal officer of the Agency." (Mots. at 40).

(a) The following designations are made by the Secretary of Agriculture to the Office of Administrative Law Judges:

(1) Administrative law judges (formerly hearing examiners) are designated pursuant to 5 U.S.C. 556(b)(3) to hold hearings and perform related duties in proceedings subject to 5 U.S.C. 556 and 557, arising under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*); the Commodity Exchange Act as amended (7 U.S.C. 1 *et seq.*); the Perishable Agricultural Commodities Act, as amended (7 U.S.C. 499a *et seq.*); the Federal Seed Act, as amended (7 U.S.C. 1551 *et seq.*); the (Laboratory) Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*); the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*); the Forest Resources Conservation and Shortage Relief of 1990 (16 U.S.C. 630 *et seq.*); and any other acts providing for hearings to which the provisions of 5 U.S.C. 556 and 557, are applicable. Pursuant to the applicable rules of practice, the administrative law judges shall make initial decisions in adjudication and rate proceedings subject to 5 U.S.C. 556 and 557. Such decisions shall become final without further proceedings unless there is an appeal to the Secretary by a party to the proceeding in accordance with the applicable rules of practice: Provided, however, that no decision shall be final for purposes of judicial review except a final decision of the Secretary upon appeal. As used herein, "Secretary" means the Secretary of Agriculture, the Judicial Officer, or other officer or employee of the Department delegated, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. App.), "regulatory functions" as that term is defined in the 1940 Act, in acting as final deciding officer in adjudication and rate proceedings subject to 5 U.S.C. 556 and 557. Administrative Law Judges are delegated authority to hold hearings and perform related duties as provided in the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper–Volstead Act, set forth in part 1, subpart I of this title. . . .

7 C.F.R. § 2.27.

The Rules of Practice apply to adjudicatory proceedings and proceedings for the debarment of counsel. *See* 7 C.F.R. § 1.131.

§ 1.131 Scope and applicability of this subpart.

. . . .

(a) The rules of practice in this subpart shall be applicable to all adjudicatory proceedings under the statutory provisions listed below as those provisions have been or may be amended from time to time,[1] except that those rules shall not be applicable to reparation proceedings under section 6(c) of the Perishable

Agricultural Commodities Act, 1930. Section 1.26 shall be inapplicable to the proceedings covered by this subpart.

Agricultural Bioterrorism Protection Act of 2002, section 212(ii) (7 U.S.C. 8401(ii)).
Agricultural Marketing Agreement Act of 1937, as amended, section 8c(14)), 7 U.S.C. 608c(14)).
Animal Health Protection Act, section 10414 (7 U.S.C. 8313)).
Animal Welfare Act, section 19 (7 U.S.C. 2149).
Beef Promotion and Research Act of 1985, section 9 (7 U.S.C. 2908).
Egg Products Inspection Act, section 18 (21 U.S.C. 1047).
Endangered Species Act of 1973, as amended, section 11(a) (16 U.S.C. 1540(a)).
Egg Research and Consumer Information Act, as amended, 7 U.S.C. 2714, Pub.L. 96–276, 94 Stat. 541.
Federal Land Policy and Management Act of 1976, section 506 (43 U.S.C. 1766).
Federal Meat Inspection Act, sections 4. 6. 7(e), 8, and 401 (21 U.S.C. 604, 606, 607(e), 608, 671).
Federal Seed Act, section 409 (7 U.S.C. 1599).
Fluid Milk Promotion Act of 1990, section 1999L [7 U.S.C. 6411].
Forest Resources Conservation and Shortage Relief Act of 1990, section 492 (16 U.S.C. 620d).
Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act of 1993, section 9 [7 U.S.C. 6808].
Honey Research, Promotion, and Consumer Information Act, section 11 (7 U.S.C. 4610).
Horse Protection Act of 1970, sections 4(c) and 6 (15 U.S.C. 1823(c), 1825).
Lacey Act Amendments of 1981, section 4(a) and (b) (16 U.S.C. 3373(a) and (b)).
Lime Research, Promotion, and Consumer Information Act of 1990, as amended, section 1958 [7 U.S.C. 6207].
Mineral Leasing Act, section 28(o)(1) (30 U.S.C. 185(o)(1)).
Mushroom Promotion, Research, and Consumer Information Act of 1990, section 1928 [7 U.S.C. 6107].
Organic Foods Production Act of 1990, sections 2119 and 2120 (7 U.S.C. 6519, 6520).
Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221).
Pecan Promotion and Research Act of 1990, section 1914 [7 U.S.C. 6009]].
Perishable Agricultural Commodities Act, 1930, sections 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, and 13(a) (7 U.S.C. 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a)).
Plant Protection Act, section 424 (7 U.S.C. 7734).
Pork Promotion, Research, and Consumer Information Act of 1985, section 1626 (7 U.S.C.
Potato Research and Promotion Act, as amended, 7 U.S.C. 2621, Pub.L. 97–244, 96 Stat. 310.
Poultry Products Inspection Act, sections 6, 7, 8(d), and 18 (21 U.S.C. 455, 456, 457(d), 467).
Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7107]].
Soybean Promotion, Research, and Consumer Information Act, section 1972 [7 U.S.C. 6307]].
Swine Health Protection Act, sections 5 and 6 (7 U.S.C. 3804, 3805).
Title V of the Agricultural Risk Protection Act of 2000, section 501(a) (7 U.S.C. 2279e).

United States Cotton Standards Act, as supplemented, section 3 of the Act and section 2 of 47 Stat. 1621 (7 U.S.C. 51b, 53).
United States Grain Standards Act, sections 7(g)(3), 9, 10, and 17A(d) (7 U.S.C. 79(g)(3), 85, 86, 87ff-1(d)).
United States Warehouse Act, sections 12 and 25 (7 U.S.C. 246, 253).
Virus-Serum-Toxin Act (21 U.S.C. 156).
Watermelon Research and Promotion Act, section 1651 (7 U.S.C. 4910).

(b) These rules of practice shall also be applicable to:

(1) Adjudicatory proceedings under the regulations promulgated under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) for the denial or withdrawal of inspection, certification, or grading service;[1]

(2) Adjudicatory proceedings under the regulations promulgated under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) for the suspension or revocation of accreditation of veterinarians (9 CFR parts 160, 161);

(3) Proceedings for debarment of counsel under § 1.141(d) of this subpart;

(4) Adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*) for the denial of an initial license application (9 CFR 2.11) or the termination of a license during the license renewal process or at any other time (9 CFR 2.12);

(5) Adjudicatory proceedings under the regulations promulgated under sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note) pertaining to the commercial transportation of equines to slaughtering facilities (9 CFR part 88); and

(6) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

7 C.F.R. § 1.131.

Respondents' motions to dismiss cannot he adjudicated in this HPA administrative case. Specifically with respect to the HPA, the Rules of Practice apply only to proceedings under sections 4(c) and 6 (15 U.S.C. §§ 1823(c), 1825). Although they filed the motions in an HPA disciplinary proceeding that itself is governed by the Rules of Practice, Respondents' challenge in fact has nothing to do with APHIS, the HPA, or the material issues in this HPA enforcement case.

Their constitutional challenges against the OALJ, Judicial Officer, General Counsel, and OGC are simply not part of an "adjudicatory proceeding" governed by the Rules of Practice. Respondents cite no support for contesting the authority of the OALJ, Judicial Officer, or OGC in a pending HPA disciplinary case before the Secretary under the applicable Rules of Practice.

Fourth, Respondents' constitutional argument is without merit. Respondents argue that the Complaint must be dismissed because the Acting General Counsel must be appointed, and the current acting General Counsel was not appointed. (Mot. to Dismiss Proceeding at 2-3).

Section 3345(a) of the Federal Vacancies Reform Act of 1998 [FVRA], 5 U.S.C. § 3345 *et seq.*, allows three categories of government officials to act in a vacant presidentially-appointed office. The general rule is section 3345(a)(1).[10] If a person serving in the office dies, resigns, or is otherwise unable to perform his or her duties, the first assistant to that office "shall perform" the office's "functions and duties . . . temporarily in an acting capacity." *NLRB v. SW Gen., Inc.*, No. 15-1251, 2017 WL 1050977, at *6 (U.S. Mar. 21, 2017).[11] The statute is clear: the first assistant to the General Counsel may serve as General Counsel without a presidential appointment.

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[10] The exception to the general rule is that a first assistant of the office cannot serve as an acting officer if he or she has been presidentially nominated for the vacant office *and*, during the 365-day period preceding the vacancy, he or she did not serve in the position of first assistant or served in the position for fewer than ninety (90) days. 5 U.S.C. § 3345(b)(1). Mr. Vaden does not fall into that exception because the President has not nominated him to be General Counsel.

[11] The *NLRB* case is inapposite in that it concerned a presidentially-directed appointment. Justice Thomas's concurrence, cited by Respondents, focused on instances where the President directs the appointment of a person under section 3345(a)(2) or section 3345(a)(3). *NLRB v. SW Gen. Inc.*, No. 15-1251, 2017 WL 1050997, at *16-17 (U.S. Mar. 21, 2017) (Thomas, J., concurring) ("As relevant in this case, when a vacancy arises, the President may 'direct' an official to 'perform the functions and duties of the office temporarily.' 5 U.S.C. § 3345(a)(2), (3). . . . When the President 'direct[s] someone to serve as an officer pursuant to the FVRA, he is 'appoint[ing]' that person as an 'officer of the United States' within the meaning of the Appointments Clause.'"). Deputy General Counsel Vaden does not fall within either section 3345(a)(2) or section 3345(a)(3).

Respondents argue that Deputy General Counsel Stephen Vaden is not and has never been the first assistant to the General Counsel. (Mot. to Dismiss Proceeding at 2-3). On March 17, 2017, Mr. Vaden transferred to the position of Deputy General Counsel (Principal). As such, he *is* the first assistant to the General Counsel. Accordingly, he is acting General Counsel for the United States Department of Agriculture until the President of the United States nominates, and the Senate confirms, a General Counsel.

Fifth, that Respondents have raised constitutional issues does not justify a dismissal of the Complaint in this or any other case, although it is well settled that constitutional issues should be raised in administrative proceedings, thereby preserving them for appeal. *Lesser*, 52 Agric. Dec. 155, 167–68 (U.S.D.A. 1993) ("Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ.").[12] The Tenth Circuit has ruled:

> Although Robinson claims on appeal that the ALJ effectively precluded him from attacking the constitutionality of the AWA and the applicability of the AWA to his activities, the record clearly indicates that Robinson in fact had numerous opportunities to present his defenses....Even if the ALJ had refused to admit Robinson's evidence, he still could have made the evidence a part of the record through an offer of proof. *See* 7 C.F.R. § 1.141(g)(7). Further, the Judicial Officer could have decided all issues *de novo* under the Administrative Procedure Act, 5 U.S.C. § 557(b), when it reviewed the ALJ's decision. *See Containerfreight Transportation Co. v. ICC*, 651 F.2d 668, 670 (9th Cir. 1981). However, Robinson once again failed to present his constitutional arguments."

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[12] Gallo Cattle Co., Inc., 57 Agric. Dec. 357 (U.S.D.A. 1998) ("It would be inappropriate for me to rule on the constitutionality of bloc voting, since '[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer.' Buckeye Industries, Inc. v. Secretary of Labor, 587 F.2d 231, 235 (5th Cir. 1979)") (other citations omitted); Berosini, 54 Agric. Dec. 886 (U.S.D.A. 1995) ("Respondent [argues] that USDA lacks the jurisdiction to regulate Respondent's activities. In the first place, it would be inappropriate for me to rule on the constitutionality of the Act...") (citing Buckeye Indus., Inc., 587 F.2d at 235, and Orchard, 47 Agric. Dec. 378, 379 (U.S.D.A. 1988)); Horne, 67 Agric. Dec. 1244, 1253 (U.S.D.A. 2008) ("Mr. Horne and partners are challenging the constitutionality of the Raisin Order. . . . I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. . . . Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional. . . .") (citations omitted).

Robinson v. United States, 718 F.2d 336, 337–39 (10th Cir. 1983). As noted above, however, the constitutional issues that Respondents have raised (Mots. at 6-39) are unrelated to the HPA or its regulations or to the issues in this case.

The Rules of Practice explicitly provide that any party who disagrees with an ALJ's initial decision may appeal "the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of right" to the Judicial Officer by filing an appeal petition with the Hearing Clerk. 7 C.F.R. § 1.145(a). The HPA provides that a person adjudged to have violated the Act and sanctioned therefor may appeal to a United States Court of Appeals for judicial review of the Secretary's final decision and order. 15 U.S.C. § 1825(b)(2).

Moreover, a respondent cannot avoid or enjoin the USDA's administrative process simply by raising a constitutional issue. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980) (refusing to enjoin allegedly unlawful administrative proceeding where court of appeals would be able to review alleged unlawfulness after agency proceeding had concluded); *Jarkesy v. SEC*, 803 F.3d 9, 27 (D.C. Cir. 2015) (refusing to enjoin proceedings before ALJ based on Appointments Clause challenge because, *inter alia*, plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his argument were correct.).

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. *See Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the

> denouement of proceedings within the Article II branch."); *Chau v. SEC*, 72 F.Supp.3d 417, 425 (S.D.N.Y. 2014) ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . . We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC., 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500, 194 L. Ed. 2d 588 (2016).

Finally, there is no constitutional defect in the Complaint or in its filing that would justify dismissal of the present case. OGC does not file complaints and did not file a complaint in this matter; the Complainant, APHIS, filed the Complaint. OGC is not a party to this action. The OGC, generally, and Complainant's counsel, specifically, represent APHIS in this proceeding.

For the reasons set forth herein, the motions to strike, to dismiss, to disqualify, and to certify issues to the Secretary shall be DENIED.

ORDER

1. The Motion to Disqualify the ALJs and Judicial Officer (filed March 28, 2017) is hereby **DENIED**.
2. The Motion to Dismiss Complaint (filed March 28, 2017) is hereby **DENIED**.
3. The Request to Certify Issues to the Secretary of Agriculture (filed March 28, 2017) is hereby **DENIED**.

4. The Motion to Dismiss Proceeding (filed March 29, 2017) is hereby **DENIED**.

Copies of this Order shall he served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 13 day of June 2017

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776

CERTIFICATE OF SERVICE

James Dale McConnell and Formac Stables, Inc., Petitioner (s))
Docket: 16-0169 and 16-0170

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the ORDER DENYING MOTIONS TO DISMISS, MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGES AND JUDICIAL OFFICER, MOTIONS TO DISMISS, AND REQUEST FOR CERTIFIFICATION OF ISSUES has been furnished and was served upon the following parties on June 13, 2017 by the following:

USDA OGC - Electronic Mail
Colleen Carroll, OGC
Ada Quick, OGC

USDA (APHIS)- Electronic Mail
IESLegals@aphis.usda.gov

Petitioner(s) Representative – Electronic Mail
Karen Cagle, Esq.
kcaglelaw@gmail.com

Respectfully Submitted,

Reneé Leach-Carlos, Hearing Clerk
USDA/Office of Administrative Law Judges
Hearing Clerk's Office, Rm. 1031-S
1400 Independence Ave., SW
Washington, DC 20250-9203

Exhibit 7

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**
Respondents	

MOTION TO DISMISS: THE USDA ADMINISTRATIVE LAW JUDGES AND JUDICIAL OFFICER HAVE NO LAWFUL AUTHORITY TO GRANT THE RELIEF COMPLAINANT REQUESTS.

Respectively Submitted,

/e/ David Broiles
David Broiles
2400 Indian Cove St.
Fort Worth, TX. 76108
817-246-7801

Karin Cagle, Lead Counsel
1619 Pennsylvania Ave.
Fort Worth, TX. 76104
817-7215127

February 24, 2022

Respondents' Proposed Findings and Conclusions in Support of Their Motion in Accordance with 5 U.S.C. § 557

Conclusion 1: The Judicial Officer is not lawfully appointed under the Appointments Clause.

Finding 1.1: The Appointments Clause issue arises from the Schwellenbach Act.

Finding 1.2: The Secretary Implemented the Schwellenbach Act by delegating final decision-making authority in enforcement adjudications to an employee or official not appointed by the President with Senate confirmation.

Finding 1.3: The Judicial Officer functions as a principal officer.

Finding 1.4: USDA precedent establishes that the Judicial Officer makes final decisions without substantial principal officer supervision prior to issuance of a decision by the Judicial Officer.

Finding 1.5: Judicial Officers' decisions establish the Secretary does not supervise or direct them in making final decisions.

Finding 1.6: Current USDA policy establishes the independence of the Judicial Officer from principal officer supervision or authority to review final decisions.

Finding 1.7: No statute, rule or regulation authorizes the Secretary to supervise the Judicial Officer in making adjudicatory final decisions.

Conclusion 2: No statute establishes a Judicial Officer Position or authorizes the Secretary to appoint such an Officer.

Finding 2.1: The Schwellenbach Act permits a delegation of the Secretary's authority; it does not authorize the Secretary to appoint an officer.

Finding 2.2: The authority to appoint is distinct from the authority to delegate, assign or designate.

Finding 2.3: The Agriculture Code distinguishes "appoint" from "designate" and specifies methods of officer appointments and contains no provision establishing an office for an inferior officer designated as Judicial Officer.

Conclusion 3: The Secretary's unlawful ex parte direction prior to the Judicial Officer's decision-making is not lawfully authorized, is prohibited and violates the right to a hearing before an impartial adjudicator.

Finding 3.1: The Secretary is statutorily prohibited from supervising or directing the Judicial Officer's decision-making.

Finding 3.2: The Secretary's attempt to direct the outcome of the appeal violates the affected parties' right to due process of law and the right to a hearing before and impartial adjudicator.

Finding 3.3: The USDA Rules prohibit the Secretary from communicating with the Judicial Officer concerning the merits of an appeal.

Finding 3.4: The Secretary's delegation of agency final decision-making authority in adjudicatory proceedings to an employee or official not appointed by the President with Senate confirmation violates U.S. Const. Art. II, §2, cl. 2.

Conclusion 4: The USDA's ALJs function as principal officers who are not appointed by the President with Senate confirmation in violation of the Appoints Clause.

Finding 4.1: *Fleming* incorrectly held USDA ALJs were inferior officers.

Finding 4.2: The Rules of Practice are not a means of supervision by the USDA Secretary of USDA ALJs.

Finding 4.3: The Secretary does not supervise USDA ALJs under the HPA's "substantive regulations."

Finding 4.4: USDA ALJ decisions become final without possible review by an Executive Branch principal officer.

Finding 4.5: The unreviewable adjudicatory authority wielded by USDA ALJs is incompatible with their appointment by the Secretary to an inferior office, because only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch.

Finding 4.6: USDA ALJs' appointments violate the Appointments Clause.

Conclusion 5: USDA ALJs' dual-tenure protections contravene the U.S. Constitution's separation of powers.

Finding 5.1: Historically, ALJs did not have dual-level tenure protection.

Finding 5.2: To remove an ALJ the USDA must initiate a proceeding before the MSPB and prove to the Board there is good cause for removal.

Finding 5.3: USDA ALJs have dual-tenure protection under the USDA ALJs' union contract.

Finding 5.4: The USDA had judicially acknowledged the present USDA ALJ tenure protections contravene separation of powers.

Finding 5.5: The ALJs and Judicial Officer cannot construe §7521 to avoid the separation of powers violation.

Finding 5.6: ALJs, as officers with two levels of tenure protection, serve in contravention of the Constitution's separation of powers.

Finding 5.6: ALJs, as officers with two levels of tenure protection, serve in contravention of the Constitution's separation of powers.

Conclusion 6: The ALJ must decide the merits of Respondent's structural constitutional claims prior to a trial on the merits of the Complainant's HPA claims.

Finding 6.1: Respondent here should not be put through the USDA's constitutionally infirm adjudicatory process in order to prevail on the structural constitutional claims.
Finding 6.2: Respondent has exhausted administrative appeal procedures.

Finding 6.3: Respondent and the USDA can have access to a court to resolve the structural constitutional issues before a trial on the merits.
Conclusion 7: The Complaint against Respondent must be dismissed because the USDA's ALJs and the Judicial Officer have no lawful authority to grant binding relief for Complainant or Respondent.

Conclusion 7: The Complaint against Respondent must be dismissed because the USDA's ALJs and the Judicial Officer have no lawful authority to grant binding relief for Complainant or Respondent.

Finding 7.1: The Secretary has no authority under the prevailing statutes, rules or regulations to intervene in, supervise or direct USDA ALJs or the Judicial Officer in performing their adjudicatory functions.

Finding 7.2: The USDA's ALJs and Judicial Officer cannot lawfully determine the Respondent violated the HPA and impose a penalty, nor can it grant lawfully a binding dismissal with prejudice to the Respondent that it did not violate the HPA.

Finding 7.3: Respondent's constitutional challenges must be decided before a trial on the merits.

Finding 7.4: If the ALJ decides she is not constitutionally appointed and her dual-tenure protection contravenes separation of powers, the only order that can be entered is dismissal of the complaint without prejudice.

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**

Respondents

THE USDA ADMINISTRATIVE LAW JUDGES AND JUDICIAL OFFICER HAVE NO LAWFUL AUTHORITY TO GRANT THE RELIEF COMPLAINANT REQUESTS.

The USDA's adjudicatory enforcement scheme is unconstitutional.

(1) USDA administrative law judges, appointed by the Secretary as inferior officers, function as principal officers, who are not supervised by a principal officer and their initial decisions become final without being permitted to do so by a principal officer, in violation of the Appointments Clause.

(2) USDA ALJs, once so appointed as inferior officers, have two levels of tenure protection, cannot be removed by the President or Secretary, are removable only for good cause determined by the Merit System Protection Board, whose members can be removed only for good cause, contravening the Constitution's separation of powers.

(3) The Judicial Officer's appointment by the Secretary as an inferior officer, contravenes the Appointments Clause because the Judicial Officer is not supervised by a principal officer and the Judicial Officer's decisions become final without being

permitted to do so by a principal officer appointed by the President with Senate confirmation.

(4) Respondent will suffer a personal harm from being subjected to a trial on the merits before adjudicators who have no lawful authority to grant binding relief,

The USDA's ALJs and Judicial Officer serve in violation of the U.S. Constitution, have no authority to grant relief requested by the Complainant, so the complaints should be dismissed without prejudice.

BACKGROUND.

APHIS seeks penalties for alleged HPA violations against the undersigned's clients Christopher Alexander, Kelsey Andrews, Formac Stables, Inc., James Dale McConnell and Taylor Walters. Hereafter, movants' attorneys will refer to their clients -- Alexander, Andrews, Formac Stables, McConnell and Walters -- as "Respondent," since this objection to the USDA's adjudicatory scheme applies to each client.

In February 2017, APHIS filed a complaint against these named Respondents and 12 others who had no connection to the named Respondents. Respondent's cases were consolidated with existing HPA cases pending against Mr. McConnell and his company Formac Stables, Inc. Two weeks of hearings were held in November and December 2019. Subsequent to the hearings, APHIS withdrew or dismissed the oldest pending actions against Mr. McConnell and Formac. At the hearings,

Respondent's counsel objected to proceeding due to the Agency's lack of jurisdiction to conduct the hearings. This motion expands and updates the previously asserted objections.

Respondent's attorneys and the USDA are not strangers to the three constitutional challenges to USDA enforcement proceedings. *See Fleming v. USDA*, 987 F.3d 1093 (D.C. Cir. 2021). In *Fleming*, Respondent's attorneys argued that the ALJ who presided over the proceedings functioned as an officer, but was not appointed as required by the Appointments Clause, U. S. Const., Art. II, §2, cl. 2. Counsel additionally raised the objections set forth in the opening three paragraphs to this document, objecting to the appointments of USDA's administrative law judges and Judicial Officer.

At the administrative level of the *Fleming*[1] proceedings, the Department, its ALJ who decided the cases, and the Judicial Officer, took the position the Secretary had not granted them authority in HPA enforcement proceedings to decide the constitutional challenges to the ALJ's appointments, and that such constitutional issues must first be decided by an Article III court. Fleming lost at the administrative level, and appealed to the D.C. Circuit Court of Appeals.

[1] Hereafter, the three respondents in the circuit court proceeding will be referred to as "Fleming" or "Mr. Fleming."

While on appeal to the D.C. Circuit, the Supreme Court decided SEC ALJs were officers who must be appointed pursuant to the Appointments Clause. *Lucia v. SEC,* 138 S.Ct. 2044 (2018). After that decision, in *Fleming,* the USDA conceded its ALJs functioned as officers who had not been appointed by the Secretary, and moved the court to (1) remand the appellants' cases to a properly appointed ALJ, and (2) forego answering appellants other three constitutional issues.

A majority of the panel partially agreed with the USDA's request. The panel did decide USDA ALJs were lawfully appointed because they were subject to sufficient supervision by the Secretary, even though their decisions were subject to review only by the Judicial Officer. But the majority declined to decide whether the ALJs' dual-tenure protections contravened separation of powers. Judge Rao dissented from this decision. The panel also declined deciding whether the Judicial Officer was lawfully appointed as an inferior officer.

The panel did not address how, on remand, the USDA's ALJ or Judicial Officer could address the issues of their unconstitutional appointments, given that the Department, the Chief ALJ and the JUDICIAL OFFICER decided in appellants' administrative proceedings they could not decide such constitutional issues in HPA cases, but such issues must be first decided by a court. Thus, the USDA at the administrative level argued it could not decide the constitutional challenges to ALJs' authority to decide cases. But, in the court of appeals, the Department took the

position the court should not decide these constitutional issues. Rather, the USDA acknowledged Fleming had been correct that the ALJ was not lawfully appointed, so the Court should vacate its decision and remand without deciding Fleming's other constitutional challenges to the agency's adjudicatory scheme.

Judge Rao put her finger on the inconsistent and unjustifiable position taken by the USDA.

> [T]he USDA argued below that its Rules of Practice – which include 7 C.F.R. § 1.145 – do not apply to constitutional objections. The agency cited 7 C.F.R, § 1.131, which provides that the USDA's Rules of Practice apply only to "adjudicatory proceedings" arising under several dozen specifically enumerated statutes. According to the Department's Brief before the Department's Judicial Officer, constitutional objections are not subject to the Rules of Practice because they do not arise in any of the enumerated statutes. The Department's position could not be clearer: "[A] constitutional challenge against the ALJs and Judicial Officer is not a part of an 'adjudicatory proceeding' governed by the Rules of Practice." J.A. 247. Moreover, the Department maintained that "[t]he Department's ALJs and the Judicial Officer should continue to preside over the administrative proceedings… unless and until there is a final determination by federal courts that they lack authority to do so." J.A. 243.

Fleming, 987 F.3d 1093, 1110-11 (Judge Rao, dissenting in part and concurring in part).

Judge Rao argued the Department should have been estopped from objecting to the Court deciding the ALJ separation of powers constitutional issue. *Id.* ("After successfully making its argument below, the Department does a 180 and argues to this court – and the majority agrees – that the agency's regulations require parties to

exhaust structural constitutional challenges before the agency.") Fleming argued his case should not be remanded to again be heard in an unlawful adjudicatory proceeding where the USDA adjudicators could not decide whether the enforcement scheme was or was not constitutional.

With regard to the ALJ separation of powers challenge in the court of appeals, the USDA argued that 7 U.S.C. §6912(e) mandated that all arguments made on appeal be first raised at the administrative level. Fleming had not raised the dual-tenure separation of powers issue.[2] The USDA's invocation of 7 U.S.C. §6912(e) was optional. The Department could have waived this affirmative defense had it actually wanted a court to first decide whether its ALJs were lawful officers. It didn't. Fleming's case was remanded to the USDA to have a first crack at addressing the undecided constitutional issues raised herein. On remand, the *Fleming* parties resolved their cases.

What follows is unavoidably lengthy. Respondent's attorneys will present every reasonable argument supporting their objections, lest they be faced again on appeal by a meaningless and dilatory 7 U.S.C. §6912(e) objection that they waived

[2] Fleming could not argue at the administrative level that the ALJ was an appointed officer whose dual tenure protection violated separation of powers. The ALJ, who decided the case, was not a lawfully appointed officer, precisely the issue Fleming prevailed on to get the agency's final decision vacated. Only officers can violate separation of powers if they have dual-level tenure protections. The issue was not raised because to allege the ALJ was an officer whose appointment violated separation of powers would have been false. She was not an officer.

an argument by not specifically raising it before the USDA. Additionally, Respondent's attorneys seek to avoid the virtually meaningless proceedings the *Fleming* parties went through. Several issues raised by the respondents in those proceedings were not decided by the ALJ and JUDICIAL OFFICER. The USDA's positions on issues raised herein were not addressed by the agency. They should have been, because they were properly raised.

In the *Fleming* administrative proceedings, the adjudicating officials and USDA attorneys disclosed few reasons justifying the agency's conclusion that in HPA cases they could make no decision as to whether the ALJ was lawfully appointed. This contributed to an appeal that lasted four years, required thousand hours of attorney and court time, only to leave the constitutional issues unresolved. Additionally, Respondent's attorneys learned that ALJs can overlook or refuse to rule on a raised issue, which the JUDICIAL OFFICER excuses as an "implicit denial," preventing the parties from learning whether the "implicit denial" was supported by any justification:

> I find nothing in the record indicating that the Chief ALJ ruled on Mr. Fleming's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Fleming's motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Fleming's request for additional time to file an answer operate as an implicit denial of Mr. Fleming's motion to extend the time to respond to the Complaint.

Decision and Order As To Joe Fleming, 2017 WL 9473093, *5 (U.S.D.A.)

That ruling is not right. The HPA provides for appeals of HPA decisions to be decided under the "substantial evidence" standard. 15 U.S.C. §1825(b). "By employing the term 'substantial evidence,' Congress thus invoked, among other things, our recognition that 'the orderly functioning of the process of [substantial-evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed,' and that courts cannot exercise their duty of [substantial-evidence] review unless they are advised of the considerations underlying the action under review." *T-Mobile South, L.L.C. v. City of Roswell, Ga*., 135 S.Ct. 808, 815 (2015).

In light of counsels' past experience, it is worth setting forth several provisions of Title Five of the Administrative Procedures Act applicable to the objections Respondent requests the ALJ decide.

> § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision
>
> **(c)** Subject to published rules of the agency and within its powers, employees presiding at hearings may--
>
> **(d)** Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.
>
> § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

> **(a)** This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
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> **(c)** Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
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> **(1)** proposed findings and conclusions; or
> **(2)** exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
> **(3)** supporting reasons for the exceptions or proposed findings or conclusions.
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> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--
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> **(A)** findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and
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> **(B)** the appropriate rule, order, sanction, relief, or denial thereof.

First, the agency, which seeks an order sanctioning Respondent, must establish the USDA's adjudicative officials can lawfully grant the relief Complainant requests, even though Respondent filed the objection to the ALJs' and JUDICIAL OFFICER's authority. Second, before a decision is made by the deciding official on Respondent's objections to the USDA's adjudicative officials authority, Respondent will here avail itself of the entitlement to submit proposed findings and conclusions on the issues with the supporting them. Below,

Respondent sets forth proposed conclusions and findings as headings of each section or subsection of this document, with the supporting reasons justifying the proposed conclusion or finding. Third, the deciding official shall make decisions on the proposed findings and conclusions in the record. Fourth, the deciding official's "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented [shall be] on the record; and…the appropriate … order … relief, or denial thereof." 5 C.F.R. §557.

ARGUMENT

Conclusion 1: The Judicial Officer is not lawfully appointed under the Appointments Clause.

The *Fleming* Court did not decide whether the Judicial Officer is lawfully appointed under Article II, §2, cl. 2. He is not. The Judicial Officer is not subject to meaningful supervision and his or her decisions become final without review by an Executive Branch principal officer. By statute and Department Rules, the Judicial Officer's decisions are final without being subject to review by a principal officer. Indeed, that is exclusively the Judicial Officer's function – to make the agency's final decisions that are appealable to appellate courts. 7 U.S.C. §2204-3, 7 C.F.R. §§1.145, 2.35 and 15 U.S.C. §1825(b)(2).

The *Fleming* panel refused to decide whether the Judicial Officer is constitutionally appointed based on its "understanding" of what would happen on remand in Fleming's agency adjudication. The panel avoided deciding the Judicial

Officer issue based of a "government assurance," which was not only factually inaccurate when the Court's decision was made, but irrelevant to that and any other enforcement proceeding. The Court's February 21, 2021, decision recited that

> petitioners contend that the Judicial Officer is an improperly appointed principal officer. There is no cause for us to address that issue because the government represents that the current Judicial Officer will be recused from these cases on remand due to her prior service as the ALJ who entered the underlying default orders against petitioners. If a different ALJ rules against petitioners on remand and they wish to appeal, the government assures us that **their appeals** will be heard by the Secretary or another officer with properly delegated authority, not the Judicial Officer. On that understanding, we see no need to address petitioners' challenge to the Judicial Officer's appointment.

Fleming, 987 F.3d at 1103 (Emphasis added).

The problem with this rationale: it takes the USDA's attorney's representation about what would happen when the alleged representation was made (Sept. 2019), and assumes it would still apply to Fleming when the Court's decision was made in February 2021.[3] The judges understood the USDA to be assuring them that, on remand, the *Fleming* petitioners' "appeals will be heard by the Secretary or another officer with properly delegated authority, not the Judicial Officer." *Id.* Put another way, the court accepted the government's assurance that because Judicial Officer

[3] By the date of the court's decision, Judicial Officer McCartney had resigned. Judicial Officer Walk had been appointed. There would be no necessity for his recusal. There are no rules requiring the Secretary to appoint someone special to Fleming's appeal, or to an appeal from the ALJ's decision by this respondent.

McCartney would be recused, the Secretary would have to decide any appeals himself or appoint "another officer with properly delegated authority." *Id.*

The Court's decision rests on mistaken factual assurances. In September 2019, Judicial Officer McCartney, who as Chief ALJ had decided Fleming's case, was then the Judicial Officer. She would have to recuse herself from deciding any appeal by Fleming as the Judicial Officer. This would have required the Secretary to decide the appeal or appoint someone else, presumably a principal officer. This, the Court assumed, without so stating, would avoid the problem that the USDA's Rules of Practice have no provision authorizing such action. Nonetheless, by February 2021, when the Court's decision was made. Ms. McCartney was not the Judicial Officer; Mr. Walk was. There would be no necessity for Judicial Officer Walk to recuse, or for the Secretary to take any action. Nor would there be any necessity or lawful authority for the Secretary to appoint anyone who was not a Judicial Officer. 7 C.F.R. §2.35. Finally, Judicial Officer Walk would be subject to the Appointments Clause Objection made here, since he is not lawfully appointed.

The Court's non-decision, which avoided deciding whether the Judicial Officer is unconstitutionally appointed, has nothing to do with this proceeding. It was the Court's duty to resolve the parties' conflicting positions about whether USDA adjudicators have "properly delegated authority." The *Fleming* decision has no

application or precedential value in this case involving a Respondent who was not a party to the *Fleming* proceeding.

Which brings us to the merits of the objection: Is the Judicial Officer a principal officer who is not lawfully appointed?

Finding 1.1: The Appointments Clause issue arises from the Schwellenbach Act.

In 1930, the Secretary of Agriculture initiated a proceeding to set rates for Kansas City stockyards. Evidence was taken by the Bureau of Animal Industry examiners, who prepared 180 findings that the Secretary signed in 1933. *Morgan v. U.S.*, 298 U.S. 468, 472 (1936) (*Morgan I*). The stockmen-plaintiffs challenged the Secretary's order in district court, alleging the Secretary, "without warrant of law, delegated to Acting Secretaries the determination of the issues." *Id.* at 475. Though the Secretary signed the final order, plaintiffs alleged "the sole information of the Secretary with respect to the proceeding was derived from consultation with employees of the Department …out of the presence of plaintiffs or any of their representatives." *Id*. The district court struck the allegations, denying plaintiffs an opportunity "to prove the facts alleged." *Id.*

The Supreme Court reversed, holding that "the officer who makes the determinations must consider and appraise the evidence which justifies them." *Id. at* 482. On remand to the district court, the evidence established that at the examiners' two-plus month hearing "voluminous testimony and exhibits were introduced,"

supplemented with additional testimony and exhibits in 1932, comprising "about 10,000 pages of oral transcript and over 1,000 pages of statistical exhibits." *Morgan v. U.S.*, 304 U.S. 1, 16 (1938) (*Morgan II*). The bulky record had been placed on the Secretary's desk "and he dipped into it from time to time to get its drift." *Id.* at 17. He also "had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry, and discussed the proposed findings." *Id.* at 18. The Secretary signed the order based on their findings. *Id*.

On appeal, the Supreme Court held "a 'full hearing'—a fair and open hearing – requires more than that." In "the performance of their quasi-judicial functions" the agency's final decision-makers "must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Id.* at 22. Signing a final order, based on "findings which had been prepared by active prosecutors for the Government, after ex parte discussions with them and without according any reasonable opportunity to the respondents in the proceedings to know the claims thus presented and to contest them…is a vital defect." *Id.* A full hearing must have "regard to judicial standards – not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a Judicial nature." *Id*. at 19.

Morgan I and *Morgan II* created problems for the USDA. The first was "the obvious inability of the Secretary or the Under Secretary to study the hearing

records, conduct oral arguments, examine briefs and prepare final decisions." *World Wide Citrus*, 50 Agric. Dec. 319, 332 (USDA 1991). This would require the attention of one-person, full time. The second problem was that the final decision-maker must review only the record established by all parties rather than relying on ex parte discussions or communications with the Department's employees. The USDA turned to Congress for a solution.

Passed in 1940, the Schwellenbach Act sought to solve the problems created by Morgan *I* and *Morgan II*. Senator Schwellenbach's proposed solution, passed by the Senate, "established … the position of Second Assistant Secretary of Agriculture, to be appointed by the President, by and with the consent of the Senate," who would be tasked with the duty to make final decisions in regulatory and adjudicatory proceedings. *World Wide Citrus,* 50 Agric. Dec. 319, 335 (1991). One principal officer would make final decisions, based solely on the record generated in hearings before hearing examiners.

However, the House substitute authorized the Secretary to delegate "to anyone in his Department the power to review facts and findings" in the record and make the agency's final decisions. *Id.* at 337 (quoting 84 Cong. Rec. 7092-93, 8367 (1939)). Senator Schwellenbach suggested "it was a job for one man all the time, that a particular job be created and that one man, who would be selected for that purpose, do that work." *Id*. Senator King demurred, saying that "with the number of

lawyers who are attached to the staff of the Department of the Secretary of Agriculture, he could find one out of the number…who would be competent to discharge the duties indicated by the bill [and] I do not see any necessity for creating a new office." *Id*.

"The House amendment eliminated establishing the position of Second Assistant Secretary, instead authorizing the Secretary to delegate regulatory functions under the bill to not more than two officers or employees of the Department." *Id*. at 341. Representative Jones stated "that this bill originally was introduced in the Senate, and carried the creation of a new position, Second Assistant Secretary of Agriculture…[but] [i]n the matter of creating a new position in the Department of Agriculture…the Committee eliminated that provision." *Id.* at 341-42.

Senator Schwellenbach noted that in the Conference Report, the "House changed the bill to provide that the Secretary may delegate such authority to two individuals within the Department who are in the highest grades of civil service, doing away with the establishment of a new position." *Id.* at 343 (quoting 86 Cong. Rec. 3409 (1940)). The conference version became law. *Id.* at 339.

As passed, the Schwellenbach Act addressed the *Morgan II* problem by deciding that a "regulatory order" could be issued "only after notice and hearing or an opportunity for a hearing had been given." 7 U.S.C. §2204-1(a). No more

decisions influenced by ex parte communications within the Department. Final decisions would be made on the examiner's record, and only that record.

To solve the *Morgan I* problem, that the Secretary did not have time to review the record and make independent final decisions, §2204-2 provided "[t]he Secretary is authorized to designate officers or employees of the Department to whom functions may be delegated…and to assign appropriate titles to such officers or employees." 7 U.S.C. §2204-2.

To assure the designated person had complete authority to make final decisions, §2204-3 requires that

> Whenever a delegation is made under section 2204-2 of this title, all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture.

The Secretary's designee would be vested with the regulatory functions Congress had assigned to the Secretary, and the Secretary would be divested of them.

The Judicial Officer makes the USDA's final decision. The Judicial Officer cannot be supervised by the Secretary prior to the Judicial Officer's decision being made because the Secretary has been divested of those decision-making functions, which by law are now vested in the Judicial Officer. Nor can any principal officer in the Department review, affirm,

modify or reverse the Judicial Officer's decision after it is made, because the Secretary has delegated the authority to make final decisions in the Secretary's place solely to the Judicial Officer. The Act may have solved the Morgan I and II problems, but the solution resulted in the Appointments Clause problem raised here.

Finding 1.2: The Secretary Implemented the Schwellenbach Act by delegating final decision-making authority in enforcement adjudications to an employee or official not appointed by the President with Senate confirmation.

HPA enforcement complaints are assigned to USDA ALJs to conduct administrative hearings and make initial decisions. 7 C.F.R. §2.27. Parties can appeal ALJ's initial decisions only to the Judicial Officer. 7 C.F.R. 1.145. The Secretary has delegated final-decision authority to an employee the Secretary designates as the Judicial Officer. 7 C.F.R. §2.35.

> Pursuant to the [Schwellenbach] Act of April 4, 1940 [and the Reorganization Plan No. 2 of 1953], the Secretary of Agriculture makes the following delegations of authority to the Judicial Officer…. The Judicial Officer is authorized to: (1) Act as final deciding officer in adjudicatory proceedings subject to 5 U.S.C. 556 and 557 [and] the term Judicial Officer shall mean any person or persons so designated by the Secretary of Agriculture.

7 C.F.R. §2.35. As the USDA's "final deciding officer in adjudicatory proceedings," the Judicial Officer exercises "significant authority pursuant to the laws of the United States," and is subject to the Appointments Clause. *Edmond v. United States,* 520

U.S. 651, 662 (1997). It is undisputable that the Judicial Officer is not appointed as a principal officer.

Finding 1.3: The Judicial Officer functions as a principal officer.

Inferior officers "are officers whose work is directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate." *Edmond,* 520 U.S. 651, 663 (1997). The judges in *Edmond* were inferior officers because Congress granted the Judge Advocate General "administrative oversight" and authority to remove a judge "from judicial assignment without cause." *Id.* at 664. But the Judge Advocate General could not influence or reverse the judges' decisions. That authority vested in the Court of Appeals for the Armed Forces, composed of Executive Branch principal officers. *Id.* at 665. Significantly, the Coast Guard Court of Appeals judges were inferior officers because they had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers," specifically, "another Executive Branch entity, the Court of Appeals for the Armed Forces." *Id*.

In *Department of Transportation v. Association of American Railroads*, Justice Alito questioned the Surface Transportation Board's authority to constitutionally appoint an arbitrator to make a final binding decision, since "it is common ground that an officer without supervision must be principal." 135 S.Ct. 1225, 1238 (2015) (Alito, J. concurring). On remand, the D.C. Circuit held that the

arbitrator's "appointment by the STB, rather than 'the President with the advice and consent of the Senate,' violated the Appointments Clause." *Assoc. of Am. R.R. v. Dept. of Transp.*, 821 F.3d 19, 37 (D.C. Cir, 2016). An officers' authority to make final decisions in adjudicatory proceedings is sufficient to require appointment by the President with Senate confirmation. The Judicial Officer's "appointment" by the Secretary as the USDA's final decision-maker in adjudicatory proceedings, rather than by the President after Senate confirmation, violates the Appointments Clause.

Recently the Supreme Court affirmed and reinforced *Edmond*'s holding that the most significant and necessary factor for being an inferior officer is that the officer must have "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers…." 520 U.S. at 665. In *United States v. Arthrex*, 141 U.S. 1970 (2021), the Court rejected the government's argument that administrative patent judges were inferior officers because of their extensive supervision by principal officers, even though the patent judges' decision could become final without possible review or reversal by an executive branch principal officer. The Court unambiguously held: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding …." *Id.* at 1985.

Finding 1.4: USDA precedent establishes that the Judicial Officer makes final decisions without substantial principal officer supervision prior to issuance of a decision by the Judicial Officer.

In Fleming's appeal to the Judicial Officer, in order to avoid *Edmond*'s requirement that only a principal officer can make final decisions, Judicial Officer Jenson disclosed:

> The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time *prior to issuance of a decision by the Judicial Officer,* instruct the Judicial Officer regarding the disposition of the proceeding. (Emphasis added)

Judicial Officer Jenson's description of the Secretary's "supervision" prior to issuance of his decision contradicts 7 U.S.C. §2204-3, Rule §1.145, 7 C.F.R. §2.35, existing precedent and current USDA policy. Mr. Jenson's revelation also turns *Morgan II* on its head since, purportedly, the Secretary secretly confers with the Judicial Officer to influence the final decision. 304 U.S. at 18. Additionally, it fails to meet the *Edmond* test. Even if the Secretary secretly directs the Judicial Officer *prior to* the final decision, the final decision is still made by the Judicial Officer and not subject to review or reversal by an executive principal officer. After the Judicial Officer's decision is issued, the Secretary has no authority to reverse it. Only an Article III court can do that.

Finding 1.5: Judicial Officers' decisions establish the Secretary does not supervise or direct them in making final decisions.

For three-quarters of a century Judicial Officers have unequivocally proclaimed their total independence from the Secretary's supervision. Thomas Flavin, the first Judicial Officer (1942-1971), described his role as the "final deciding officer in lieu of the Secretary in Department administrative proceedings involving adjudication." Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash. L. Rev. 277, 278-79 (1957-58). Donald Campbell, the second Judicial Officer (1971-1996), in *World Wide Citrus*, 50 Agric. Dec. at 327-333, described the Judicial Officer's position:

- The Secretary has delegated to the Judicial Officer all of the Secretary's authority to decide cases subject to the APA. *Id.* at 330.

- The Department's practice…is different from that of most federal agencies. In most federal agencies, direct review by the agency head (i.e., by the cabinet head or the agency members of a multi-member agency) is available in at least some cases. *Id*. at 330 n. 6.

- The [Judicial Officer] is the Secretary's alternate on all matters concerned with quasi-judicial authorities of the Secretary and relieves him entirely of this responsibility. The Judicial Officer exercises the deciding function of the Secretary pursuant to law (Schwellenbach Act …) in all quasi-judicial proceedings where the regulatory statute administered by the Department requires a hearing. The purpose of this position is to relieve the Secretary, completely, of the responsibilities imposed by law on a final deciding officer in such proceedings. The [Judicial Officer's] decisions, in the name of the Secretary, are appealable only to the United States Courts. [The] Judicial Officer…independently renders decisions in the name of the Secretary. *Id.* at 331.

- Unlimited authority is exercised by acting fully for the Secretary. *Id*. at 332.

- No supervision is received. [T]he Secretary delegates full authority to the Judicial Officer. *Id*. at 332.

- [T]he Judicial Officer is the "agency" within the meaning of the Administrative Procedures Act. *Id*. at 326.

- [T]he Judicial Officer is the alter ego of the Secretary. *Id*. at 327.

William Jenson, the third Judicial Officer (1996-2018), prior to Mr. Fleming challenging his appointment, acknowledged his independence from Department supervision. According to then Judicial Officer Jenson,

> [USDA] policy requires that the Judicial Officer render impartial decisions in administrative proceedings. A number of statutory provisions and institutional practices are designed to ensure that the Judicial Officer can render impartial decisions in administrative proceedings. The Administrative Procedures Act requires that the functions of the Judicial Officer be conducted in an impartial manner (See 5 U.S.C. §556(b)).
> ***
>
> Further, no [USDA] employee or officer has ever discussed the merits of an ongoing administrative proceeding with me, without the opportunity for all parties to the proceeding to be present. During my employment as the Judicial Officer, my performance has never been evaluated and I have never been rewarded, promoted, demoted, penalized, or reprimanded for a decision, ruling, or any other reason.

In re: Reinhart, 59 Agric. Dec. 721 (2000), 2000 WL 1693640, *26, aff'd. per curium, 39 F. App'x. 954 (6th Cir. 2002), cert. denied, 538 U.S. 979 (2003).

Finding 1.6: Current USDA policy establishes the independence of the Judicial Officer from principal officer supervision or authority to review final decisions.

On July 13, 2018, the Department of Justice affirmed that the Judicial Officer is the USDA's final decision-making authority:

> The Secretary of Agriculture has delegated authority to the Judicial Officer to act as the final deciding officer in various USDA adjudicatory proceedings. The Judicial Officer has been appointed by the Secretary of Agriculture, consistent with the Appointments Clause.

USDA's Motion to Remand, Doc. 20, p.2, n.1, *Blackburn v. USDA*, 17-4102 (6th Cir. 2018).

The USDA has represented that the Judicial Officer's decisions are not reviewable within the agency:

> About the Office of the Judicial Officer (JO)
>
> The Office of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g). The Act of April 4, 1940, is also known as the Schwellenbach Act. The Judicial Officer is delegated authority by the Secretary of Agriculture to act as final deciding officer in United States Department of Agriculture (USDA) adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 and other proceedings listed in 7 C.F.R. § 2.35.
>
> The mission of the Office of the Judicial Officer is to review carefully the record in each proceeding and to issue expeditiously a fair, clear, well-reasoned final USDA decision, which is consistent with law and USDA policy. The Judicial Officer's decisions are not reviewable within USDA, but any litigant in a proceeding, other than USDA, may seek judicial review of the Judicial Officer's decision.

https://www.dm.usda.gov/ojo /about.htm.

The D.C. Circuit in *Fleming* described the Judicial Officer's position:

> Parties can appeal the ALJ's decision to a Department Officer known as the Judicial Officer. *Id*. §1.145(a). The Judicial Officer, exercising authority delegated by the Secretary of Agriculture, acts as the agency's final adjudicator. *Id*. §2.35(a). The Judicial Officer reviews the parties' briefs, presides over any oral argument, and issues a final decision for the Department. *Id*. §§ 1.145, 2.35(a). By regulation, only decisions of the Judicial Officer are "final for purposes of judicial review." *Id*. §§ 1.139, 1.142(c)(4).

Fleming, 987 F.3d at 1095-96.

Finding 1.7: No statute, rule or regulation authorizes the Secretary to supervise the Judicial Officer in making adjudicatory final decisions.

Judicial Officer Jenson's unsworn statement supporting his inferior officer status is unavailing. Even if the Secretary's secret supervision or direction prior to the Judicial Officer's issuance of the final decision occurs in practice, no statute, rule or regulation authorizes or requires such supervision. More importantly, in evaluating Appointment Clause challenges, "reviewing courts do not evaluate the degree of supervision or reversal authority allegedly exercised by superiors regarding the particular agency decision at issue, but rather the extent to which relevant statutes or regulations provide for such oversight as a structural matter." *Estes v. Dept. of the Treasury*, 219 F. Supp.3d 17, 38 (D.D.C. 2016); *United States v. Concord Mgmt. and Consulting, LLC*, 317 F. Supp. 3d 598, 608 (D.D.C. 2018) ("Statutes and regulations provide the framework for evaluating the direction and supervision of the Special Counsel.")

In re Grand Jury Investigation illustrates the difference between an agency that has regulations authorizing principal officer supervision of inferior officer special counsels. 916 F.3d 1047, 1050 (D.C. Cir. 2019). At the DOJ, supervision of a special counsel begins with "statutes authoriz[ing] the Attorney General to appoint special counsels and define their duties," while regulations establish the "procedure within the Executive Branch for appointing special counsels." (*Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999); 28 C.F.R. §§600.1-600.10.)" *Id.* DOJ regulations "strike a balance between independence and accountability," while assuring that "ultimate responsibility for the matter…rests with the Attorney General." *Id.* "[T]hus, the regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel." *Id.* at 1052-53.

DOJ regulations balance independence and accountability by permitting and requiring a special counsel to consult with and report to the Attorney General and senior Department officials during the investigation — *prior to* any special counsel decision becoming final. 28 C.F.R. §§600.6 and 600.7. The regulations impose on the Attorney General the duty to review, supervise, advise, and approve or disapprove a special counsel's proposed decisions *prior to* the Special Counsel taking final action. 28 C.F.R. § 600.7(b).

Supervision begins with the requirement that the Attorney General specify the Special Counsel's jurisdiction and authorize any expansion of that authority. 28 C.F.R. §600.4(a) and (b).

> Additionally, the "Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step." *Id.* §600.7(b). And the Special Counsel must notify the Attorney General of important events in the investigation under the Department's Urgent Report's guidelines. *Id*. §600.8(b). The regulations provide that after review the Attorney General may conclude that a contemplated action is "so inappropriate or unwarranted under established Departmental practices that it should not be pursued." *Id.* §600.7(b). During review, the Attorney General is to "give great weight" to the views of the Special Counsel.

Grand Jury Investigation, 916 F.3d at 1050.

The Attorney General's consultations with, supervision of, and directions to a special counsel occur *prior to* the special counsel acting on a proposed decision. The Attorney General has a right to be informed of the progress of the investigation and the basis supporting a special counsel's proposed decision.

More significantly, after the Attorney General's differential review of the Special Counsel's proposed decision, if the Attorney General disagrees with the special counsel, who refuses to accept the Attorney General's direction, the Attorney General can terminate the special counsel's authority by revoking or revising the appointment order or the relevant regulations. *Id.* at 1052. No decision of a special counsel can become final unless permitted to do so by a superior principal officer in the Executive Branch. *Id.* By contrast, no rule or regulation permits the Secretary of

Agriculture to consult with or be informed about a Judicial Officer's proposed decision *prior to* its being final. Nor can the Secretary reverse or nullify the Judicial Officer's decision after it is issued.

The Secretary of Agriculture lacks any legally authorized supervisory relationship over the Judicial Officer like the Attorney General has by regulation over the Special Counsel. While, under 7 U.S.C. §2204-2, the Secretary can at any time terminate delegated decision-making authority to the Judicial Officer, but once the Secretary delegates final decision-making authority, the Secretary is divested of lawful authority to consult with or direct the decision-maker. 7 U.S.C. §2204-3, 7 C.F.R. §1.145, 1.151(b) and § 2.35. Once the delegation is made, the Secretary's authority is "vested by law in the individual to whom the delegation is made, instead of the Secretary." 7 U.S.C. §2204-3.

USDA rules prohibit the Secretary from discussing the merits or disposition of cases with the Judicial Officer. Twelve times 7 C.F.R. §2.35 states the Judicial Officer acts as the "final deciding officer." Section 2.35 does not mention Secretarial supervision. Rule of Practice §1.145 requires "the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal," which ruling shall be "final for the purposes of judicial review." *See*, *Morgan I,* 298 U.S. at 482. ("[T]he officer who makes the determinations must consider and appraise the evidence which justifies them.") Rule

1.145 prohibits the Judicial Officer from considering anything outside the record, including any communication of the Secretary's desired decision. Communication by the Secretary to the Judicial Officer about the merits of a case is prohibited by 7 C.F.R. §1.151(b). *See Morgan II*, 504 U.S. at 16-22.

The USDA, "like all other decision-making tribunals, is obligated to follow its own Rules." *Ballard v. Comm'r Internal Revenue*, 544 U.S. 40, 59 (2005). The Secretary "could not, so long as the Regulations remained unchanged, proceed without regard to them." *Service v. Dulles,* 354 U.S. 363, 388 (1957). Under the existing laws and regulations, the Secretary cannot direct the Judicial Officer on how to decide a case. Due process of law requires as much. *See Morgan II*, 504 U.S. at 16-22. Secret instructions from the Secretary to the Judicial Officer plainly violate the right to a fair and impartial hearing.

The Judicial Officer should be appointed by the President with Senate consent, but he is not. Compounding the problem, the Judicial Officer cannot lawfully be appointed an officer of the United States at all.

Conclusion 2: No statute establishes a Judicial Officer Position or authorizes the Secretary to appoint such an Officer.

In *Lucia*, the majority opinion held that an individual must occupy a "'continuing' position established by law" to qualify as an officer, and "appointment is to a position created by statute, down to its 'duties, salary and means of

appointment.'" 138 S.Ct. at 2053 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)). Justices Thomas and Gorsuch, concurring, recognized that "[f]or federal officers, that duty is 'established by Law' — that is, by statute. Art. II, §2, cl. 2." *Id.* at 2057. Justices Breyer, Ginsburg and Sotomayor, concurring in part and dissenting in part, noted that "by Law" appears twice in the Appointments Clause, requiring that principal officers' positions "shall be '*established by Law*' [however] 'Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in Courts of law or in the Heads of Departments,' suggesting that Congress must play a major role in determining who is an 'Office[r] of the United States.'" *Id.* at 2062 (emphasis in original). In dissent, Justice Sotomayor recognized that one prerequisite of officer status was that "an individual must hold a 'continuing' office established by law," a requirement that "is relatively easy to grasp." *Id*. at 2065.

Recently, in rejecting a challenge that no statute authorized the appointment of the Special Counsel, the court held:

> Congress has also authorized the Attorney General to commission attorneys "specially retained under the authority of the Department" as "special assistant to the Attorney General or special attorney," *id* §515(b), and provided "any attorney specially appointed by the Attorney General under law, may, when specially directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal…which United States Attorneys are authorized by law to conduct," *id*. §515(a). Congress has also provided for the Attorney General to "appoint officials…to detect and prosecute crimes against

> the United States." *Id*. §533(1) These statutes authorize the Attorney General to appoint special counsels and define their duties.

In re Grand Jury Investigation, 916 F.3d at 1049-50. No statute authorizes the USDA's Secretary to appoint an officer to whom final decision-making authority can be delegated.

Finding 2.1: The Schwellenbach Act permits a delegation of the Secretary's authority; it does not authorize the Secretary to appoint an officer.

Prior to Fleming's May 2017, challenge to the Judicial Officer's status, USDA practice was consistent with the Schwellenbach Act's language: The Secretary **delegated** functions to designated Department employees. "Appointment" was not mentioned. Also, prior to the Fleming's challenge to the Judicial Officer's authority, the Department's published rules required the Judicial Officer's final decisions be based solely on the record made when all parties had notice and an opportunity to be heard, not on ex parte discussions or communications.

The Department's public filings from 1941 to 2017, reflect that the USDA did not consider the Judicial Officer an inferior officer appointed by the Secretary. On July 17, 1941, Robert Shields was "designated Assistant to the Secretary [] authorized to perform such regulatory functions devolving upon the Secretary…." 6 Fed. Reg. 3523. His designation and delegation order was reissued on October 11, 1941. 6 Fed. Reg. 5192. On April 7, 1942, "Thomas J. Flavin, Assistant to the Secretary, was authorized to perform any regulatory function … which the Secretary

… may be authorized or required by law to perform." 7 Fed. Reg. 2656. The Secretary, on November 9, 1945, designated Thomas Flavin as the "Judicial Officer … authorized to perform any regulatory function" assigned to him by the Secretary. 10 Fed. Reg. 13769. Changing the title of the designee from "Assistant to the Secretary" to "Judicial Officer" was the Secretary's prerogative, not the result of Congress establishing an officer's position "by Law."

The USDA Reorganization Plan No. 2 of 1953, Section 201, reserved to the Judicial Officer "[f]inal action in proceedings pursuant to sections 7 and 8 of the Administrative Procedures Act…." 19 Fed. Reg. 74, 76. In 1967, the Secretary delegated to the Judicial Officer final decision-making authority under the Packers and Stockyards Act. 32 Fed. Reg. 7468. In 1975, the Secretary revoked a delegation to the Judicial Officer to supervise the Board of Contract Appeals. 40 Fed. Reg. 48340. In 1977, the delegated authority to the Judicial Officer under the Rules of Practice was revised. 42 Fed. Reg. 4395. In 1982, the Judicial Officer was delegated authority over cases involving subordinate officials and bodies. 47 Fed. Reg. 26611.

In 1988, the Judicial Officer was delegated authority to take final action in Equal Access to Justice cases. 53 Fed. Reg. 15685 and 53 Fed. Reg. 36949. In 1992, 7 C.F.R. §2.35 was revised to delegate final decision-making authority to the Judicial Officer over ALJ initial decisions. 57 Fed. Reg. 11261. In 1993, the Judicial Officer was delegated authority over Food Stamp Program cases and some

Commodity Credit Corp. programs. 58 Fed. Reg. 5188 and 58 Fed. Reg. 41955, respectively. None of these notices mention an "appointment" of the Judicial Officer.

The USDA was reorganized under The Reorganization Act of 1994. 7 U.S.C. 6901. Delegations of authority to the Judicial Officer were made involving the Forest Service (59 Fed. Reg. 8823), the Food and Nutrition Service (59 Fed. Reg. 34553), and the Equal Access to Justice Act (67 Fed. Reg. 12898 and 67 Fed. Reg. 63237). In 2010, revisions were made to delegations by the Secretary to the Judicial Officer, resulting in the current version of 7 C.F.R. §2.35. 75 Fed. Reg. 43366.

Under 7 C.F.R. §2.35, the Secretary delegates to the Judicial Officer authority to "[a]ct as final deciding officer in adjudicatory proceedings subject to 5 U.S.C. 556 and 557… [and] the term Judicial Officer shall mean any person or persons so designated by the Secretary of Agriculture." Since 1941, in these public notices, proposed rules and final rules, there has been no suggestion the Secretary appoints the Judicial Officer to a statutorily established office.

Finding 2.2: The authority to appoint is distinct from the authority to delegate, assign or designate.

In *Freytag v. C.I.R.,* petitioners complained that the Chief Judge of the Tax Court could not assign their cases to a Special Trial Judge. 501 U.S. 868, 868 (1991). The applicable statute authorized the Chief Judge to "appoint" STJs. The statute also authorized the Chief Judge to assign STJs to hear "any other proceeding which

the chief judge may designate." *Id*. at 873. Congress authorized the Chief Judge to "appoint" STJs, which qualified them as inferior officers, and the Chief Judge designated cases STJs would preside over. *Id.* "Appoint," "assign," and "designate" have distinct meanings.

Edmond addressed the Department of Transportation Secretary's appointment of appellate judges who were no longer commissioned military officers. 520 U.S. at 657. Petitioner argued the judges were not lawfully appointed because Congress authorized only the Judge Advocate General to assign judges and designate a Chief Judge. The Court held the statute's use of "assign" did not mean "appoint."

> Congress has consistently used the word "appoint" with respect to … positions requiring a separate appointment, rather than using terms not found in the Appointments Clause, such as "assign": "Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer."

Id. at 558 (quoting *Weiss v. U.S.*, 510 U.S. 163, 172 (1994).)

The Schwellenbach Act does not contain the word "appoint." 7 U.S.C. §2204-2. The Secretary is authorized to delegate final decision-making authority to Department officers or employees classified GS-14 or above. 5 U.S.C. §5109(a)(A-3) ("The position held by an employee of the Department of Agriculture while he, under section 450d of Title 7, is designated and vested with a delegated regulatory function…shall be…not lower than GS-14.") No statute authorizes the Secretary to appoint an officer or employee to an office established by Congress.

Finding 2.3: The Agriculture Code distinguishes "appoint" from "designate" and specifies methods of officer appointments and contains no provision establishing an office for an inferior officer designated as Judicial Officer.

The Agriculture Code distinguishes the Secretary's authority to "designate" from the authority to "appoint." When Congress authorizes appointment to a USDA office, it specifies the method of appointment. Congress has adopted at least 105 statutes specifying who has the power to appoint USDA officers.

USDA STATUTES AUTHORIZING APPOINTMENTS

APPOINTMENTS BY THE PRESIDENT WITH CONSENT OF THE SENATE.

1. Commissioners and Chairman, Commodity Futures Trading Commission, 7 U.S.C. §2(a)(2)(B);
2. State Administrator, Agricultural Adjustment Administration, 7 U.S.C. §610(a);
3. Federal Member and Chairman, Delta Regional Authority, 7 U.S.C. §2009aa-1(a)(2)(A) and (b)(2);
4. Federal Member and Tribe Member, Northern Great Plains Regional Authority, 7 U.S.C. §2009bb-1(a)(2)(A) and (C);
5. Secretary of Agriculture, 7 U.S.C. §2202;
6. Deputy Secretary of Agriculture, 7 U.S.C. §2210;
7. General Counsel, 7 U.S.C. §2214;
8. Inspector General, 5 U.S.C. App. §3 and 7 U.S.C. §2270;
9. Assistant Secretary of Agriculture for Congressional Relations and Intergovernmental Affairs, 7 U.S.C. §6918;
10. Assistant Secretary of Agriculture and Administration, 7 U.S.C. §6918;
11. Assistant Secretary for Civil Rights, 7 U.S.C. §6918;
12. Under Secretary of Agriculture for Farm Production and Conservation Services, 7 U.S.C. §6931;
13. Under Secretary of Agriculture for Rural Development, 7 U.S.C. §6941;
14. Under Secretary of Agriculture for Food, Nutrition, and Consumer Services, 7 U.S.C. §6951;

15. Under Secretary of Agriculture for Natural Resources and Environment, 7 U.S.C. §6961;
16. Under Secretary of Agriculture for Research, Education, and Economics, 7 U.S.C. §6971;
17. Under Secretary of Agriculture for Food Safety, 7 U.S.C. §6981;
18. Under Secretary of Agriculture for Marketing and Regulatory Programs, 7 U.S.C. §7005;
19. Under Secretary of Agriculture for Trade and Foreign Agriculture Affairs, 7 U.S.C. §7007; and
20. Chief Financial Officer, 31 U.S.C. §901.

APPOINTED BY THE PRESIDENT

1. Seven Members of the Board of the Commodity Credit Corporation, 15 U.S.C. §714g;
2. Special Assistant for Agricultural Trade and Food Assistance,7 U.S.C. §1736-1(a);
3. Representatives, Environmental Fund, 7 U.S.C. §1738f(c)(1)(A);
4. Board Members and Chairman, Enterprise for the Americas Board, 7 U.S.C. §1738i(b);
5. Alternate Federal Cochairperson, Delta Regional Authority, 7 U.S.C. §2009aa-1(b)(2);
6. Alternate Federal Cochairperson, Northern Great Plains Regional Authority, 7 U.S.C. §2009bb-1(b)(1).
7. Five Members, National Nutrition Monitoring Advisory Council, 7 U.S.C. §5331(a)(2)(A);
8. Administrator, Department of Rural Services, 7 U.S.C. §6942(b);
9. Director, National Institute of Food and Agriculture,7 U.S.C. §6971(f)(3)(A)(ii);
10. Commission Members, Commission on 21st Century Production Agriculture. 7 U.S.C. §7312.

APPOINTMENTS BY THE SECRETARY OF AGRICULTURE

1. Officers and Employees, Cotton Standards Act, 7 U.S.C. §64;
2. Members, Advisory Committee for Grain Standards, 7 U.S.C. §87j(a);
3. Employees. Rubber and Other Critical Agriculture Act, 7 U.S.C. §172(a);

4. Officers and Employees, Packers and Stockyards Act, 7 U.S.C. §228(a);
5. Chief, Bureau of Animal Industry, 7 U.S.C. §391;
6. Chief, Bureau of Dairy Industry, 7 U.S.C. §402;
7. Officers and Employees, Cooperative Marketing, 7 U.S.C. §456;
8. Officers and Employees, Cotton Statistics and Estimates, 7 U.S.C. §474;
9. Officers and Employees, Dumping and Destruction of Interstate Produce, 7 U.S.C. §494;
10. Officers and Employees, Tobacco Inspection Act, 7 U.S.C. §511m;
11. Officers and Employees, Export Standards for Apples, 7 U.S.C. § 587;
12. Officers and Employees, Export Standards for Grapes and Plums, 7 U.S.C. §597;
13. Officers and Employees, Agriculture Adjustments Administration, 7 U.S.C. §610(a);
14. Attorneys, Engineers, Experts, Officers and Employees, Rural Electrification, 7 U.S.C. §911;
15. Officers and Employees, Peanut Statistics Act, 7 U.S.C. §956;
16. Local Review Committee, Agricultural Adjustment Act, 7 U.S.C. §1363;
17. Employees, Agricultural Adjustment Administration, 7 U.S.C. §1389;
18. Board of Directors, Federal Crop Insurance Act Corporation, 7 U.S.C. §1505(a)(2)(E), (F) and (G);
19. Manager, Federal Crop Insurance Corporation, 7 U.S.C. §1505(d);
20. Officers and Employees, Federal Crop Insurance Act, 7 U.S.C. §1507;
21. Officers and Employees, Distribution and Marketing of Agricultural Products, 7 U.S.C. §1627;
22. Board of Directors, National Sheep Industry Improvement Center, 7 U.S.C. §1627(a)(4)(A);
23. Agricultural Counselors and Attaches, Foreign Market Development, 7 U.S.C. §1762(a);
24. Agricultural Trade Officers, 7 U.S.C. §1765a(b);
25. Wildlife Advisory Board, 7 U.S.C. §1838(p);
26. Board Members, Cotton Board, 7 U.S.C. §2106(b);
27. Director, Office of Risk Management and Cost-Benefit Analysis, 7 U.S.C. 2204e;
28. Chief Clerk, 7 U.S.C. §2215;
29. General Administration Board for Graduate Schools, 7 U.S.C. §2279b(e)(1);
30. Board Members, Plant Variety Protection Board, 7 U.S.C. §2327(a);

31. Board Members, National Potato Promotion Board, 7 U.S.C. §2617;
32. Board Members, Egg Board, 7 U.S.C. §2707(a) and (b);
33. Board Members, Cattlemen's Beef Promotion and Research Board, 7 U.S.C. §2904(1);
34. Board Members, National Agricultural Research, Extension, Education, and Economics Advisory Board, 7 U.S.C. §3123(b)(1);
35. Members, Citrus Disease Subcommittee, 7 U.S.C. §3123a(a)(2)(A);
36. Director, National Agricultural Library, 7 U.S.C. §3125a(c);
37. Executive Director to Advisory Board, 7 U.S.C. §3127(a);
38. Scientific or Professional Positions, Agriculture Advanced Research and 39. Development Pilot, 7 U.S.C. §3319f(a)(9);
40. Members, Wheat Industry Council, 7 U.S.C. §3405(a)(b);
41. Board Members, Floraboard, 7 U.S.C. §4306(1) and (2)
42. Members, National Dairy Promotion and Research Board, 7 U.S.C. §4504(b);
43. Members, National Honey Nominations Committee, 7 U.S.C. §4606(b);
44. Members, National Pork Producers Delegate Body, 7 U.S.C. §4806(a) and (b);
45. Members, National Pork Board, 7 U.S.C. §4808(a)(2);
46. Members, National Watermelon Promotion Board, 7 U.S.C. §4906(c)(1);
47. Officers and Employees, Perishable Agricultural Commodities, 7 U.S.C. §4990;
48. Advisory Committee, Agricultural Trades Initiatives reorganization, 7 U.S.C. §5214;
49. Director, Office of Agriculture Environmental Quality, 7 U.S.C. §5402(b);
50. Board of Evaluators, Export Promotion, 7 U.S.C. §5678(b)(1);
51. Director, National Genetic Resources Program, 7 U.S.C. §5842(a);
52. Members National Genetics Resources Program Advisory Council, 7 U.S.C. §5843(a)(2);
53. Director, Agricultural Weather Station, 7 U.S.C. §5852(a)(2);
54. Task Force Advisors, Research Grants, 7 U.S.C. §5925((b)(2);
55. Council Members, Mushroom Council, 7 U.S.C. §6104(b);
56. Board Members, Lime Board, 7 U.S.C. §6204(b)(2)(A);
57. Board Members, United Soybean Board, 7 U.S.C. §6304(b)(1);
58. Board Members, National Processor Advertising and Promotion Board, 7 U.S.C. §6407(b)(4);
59. Members, National Organic Standards Board, 7 U.S.C. §6518;

60. Council Members, PromoFlor Council, 7 U.S.C. §6804(b)(1)(B)(i);
61. Members, Tribal Relations Advisory Committee, 7 U.S.C. §6921(b)(3)(A)(i);
62. Director, Office of Urban Agriculture and Innovative Production and
63. Advisory Committee Members, 7 U.S.C. §6923(a)(2) and (b)(2)(B);
64. Administrator, Office of Risk Management, 7 U.S.C. §6933;
65. Director, Office of Partnership and Public Engagement, 7 U.S.C. §6934;
66. Director, National Appeals Division, 7 U.S.C. §6992;
67. Members, National Sheep Promotion, Research and Information Board, 7 U.S.C. §7104(b)(1)
68. Board Members, Agricultural Promotions, 7 U.S.C. §7414(b)(2)(B);
69. Board Members, National Canola and Rapeseed Board, 7 U.S.C. §7444(b)(3);
70. Members, National Kiwifruit Council, 7 U.S.C. §74649c(1);
71. Board Members, Popcorn Board, 7 U.S.C. §7484(b)(2);
72. Members, Senior Scientific Research Service, 7 U.S.D.A. §7657(b)(1);
73. Board Members, Hass Avocado Board, 7 U.S.C. §7804(b)(1)(B)(i) and
74. Board Members, Peanut Standards Board, 7 U.S.C. §7958(c)(2)(B).

Twenty statutes require Presidential appointment with Senate confirmation. Ten statutes authorize appointments to USDA offices by the President alone. Seventy-four statutes authorize appointments by the Secretary. No statute establishes or mentions establishment of an office of Judicial Officer. "This raises the obvious question of why Congress would go to the trouble of enshrining the positions in a statute and providing for their appointment" if no specific statutory authorization is required? *United States v. Janssen*, 73 M.J. 221, 225 (2014).

Other statutes permit designations of Department personnel to perform specified duties. The Tobacco Inspection Act authorizes the Secretary to "designate" officers or employees "of the Department" to execute the Secretary's duties under

that Act. 7 U.S.C. §511. The Seeds Act permits the Secretary to delegate his or her duties to officers or employees "of the Department of Agriculture as the Secretary may designate for the purpose" of implementing the Act. 7 U.S.C. §1591. The Noxious Weeds Act requires that "[e]ach Federal agency shall…designate an officer or person…to coordinate an undesirable plants management program." 7 U.S.C. §2814. The Environmental Programs Act allows "under and assistant secretaries as may be designated by the Secretary" to serve on the Agricultural Council on Environmental Quality and the Secretary "shall designate a member of the Council…as chair." 7 U.S.C. §5401(b). The Global Climate Change Program provides that secretaries designated by the Secretary "may be Council Members" and "[t]he Secretary shall designate a director of the Program who shall be responsible to the Secretary." 7 U.S.C. §6701(b).

The Agriculture Code also includes statutes authorizing the Secretary to both "appoint" and "designate" individuals for different positions, illustrating the terms have different meanings. For example, 7 U.S.C. §8108(b)(2)(A), provides "the Secretary of Agriculture shall designate an officer of the Department of Agriculture appointed by the President …by and with the advice and consent of the Senate" as a point of contact on biomass research. The Foreign Markets Development Act, 7 U.S.C. §1762(a) and (b), provides the Secretary is "authorized to appoint such

personnel… necessary" to implement the Act who "shall have the designation of Agriculture Counselor…."

"Designate" does not mean "appoint." Even if the Judicial Officer position could be filled by an inferior officer, the plain language and legislative history of the Schwellenbach Act do not authorize the Secretary to appoint an inferior officer.

Conclusion 3: The Secretary's unlawful ex parte direction prior to the Judicial Officer's decision-making is not lawfully authorized, is prohibited and violates the right to a hearing before an impartial adjudicator.

Former Judicial Officer Jenson disclosed, for the first time, that the Secretary ex parte and secretly "can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding." *See Fleming v. USDA*, 987 F.3d 1093 (D.C. Cir. 2021).

Finding 3.1: The Secretary is statutorily prohibited from supervising or directing the Judicial Officer's decision-making.

The Schwellenbach Act provides: "The Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section." 7 U.S.C. §2204-2. However, §2204-3 provides:

> A revocation of delegation shall not be retroactive, and each regulatory function or part thereof performed (within the scope of the delegation) by such individual prior to the revocation shall be considered as having been performed by the Secretary.

If the Secretary terminates a Judicial Officer's delegated decision-making authority, any decisions made prior to the termination are considered as having been made by

the Secretary. After the Judicial Officer's final decision is made, if the Secretary disapproves, the Secretary can terminate future delegations to that Judicial Officer — an action more akin to punishment than supervision. The Secretary cannot, *after* a decision is made by the Judicial Officer, review, affirm or reverse the decision.

Finding 3.2: The Secretary's attempt to direct the outcome of the appeal violates the affected parties' right to due process of law and the right to a hearing before and impartial adjudicator.

Only once – as far as counsel has determined – has the Secretary attempted to obtain a preferred decision by terminating a Judicial Officer's delegated authority *after* the Judicial Officer made the decision. In *Utica Packing v. Block*, the Secretary "violently disagreed" with Judicial Officer Campbell's dismissal of a complaint. 781 F.2d 71, 74 (6th Cir. 1986). No statute or rule authorized the Secretary to reverse the decision or to direct Judicial Officer Campbell to reverse the decision.

To get around Judicial Officer Campbell's independence from his control, the Secretary revoked the delegation to Mr. Campbell only as to the *Utica Packing* case. The Secretary then delegated authority to decide a motion for reconsideration to "a 'second Judicial Officer' … to improve the Department's chances of winning." *Id.* at 75. The General Counsel filed a motion for reconsideration, which the newly designated Judicial Officer granted. *Id.* at 74. Then, the new Judicial Officer reversed Mr. Campbell's order of dismissal, achieving the Secretary's preferred outcome. *Id.*

On appeal in the Sixth Circuit, the USDA asserted "that the Secretary's delegation can be withdrawn before reconsideration any time he disagrees with the Judicial Officer's conclusion." *Id.* at 76. In rejecting this argument, the Court, citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975), observed "that the due process requirement of a fair trial in a fair tribunal 'applies to administrative agencies which adjudicate as well as courts.'" *Id.* at 77.

> There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. **** Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much.

Id. at 78.

The Sixth Circuit vacated the Secretary's preferred order, and remanded the case to the district court "with directions to remand it to the Secretary for re-entry of Judicial Officer's Campbell's order dismissing the complaint." *Id.* at 79. Judicial Officer Campbell's decision was the agency's final decision because 7 U.S.C. §2204-3 provides that "[a] revocation of a delegation shall not be retroactive, and each regulatory function…performed…by such individual prior to the revocation shall be considered as having been performed by the Secretary." The USDA has not repudiated Judicial Officer Jenson's claim that the USDA allows the Judicial Officer to go outside the record or permits the Secretary to secretly direct the Judicial Officer's decision.

Finding 3.3: The USDA Rules prohibit the Secretary from communicating with the Judicial Officer concerning the merits of an appeal.

No USDA rule or regulation authorizes the Secretary or any principal officer to discuss with the Judicial Officer a proposed final decision, much less instruct the Judicial Officer about what decision to make. Indeed, USDA Rules of Practice prohibit communication from the Secretary or Department personnel to the Judicial Officer about the merits of a case:

> No interested person shall make or knowingly cause to be made to the Judge or Judicial Officer an ex parte communication relevant to the merits of the proceeding.

7 C.F.R. § 1.151(b).

Morgan II rejected the practice of the USDA's final decision-maker discussing or communicating with others outside the record in making a final decision. 304 U.S. at 19-22. *Utica Packing* also rejected such practices: "Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much." 781 F. 2d at 78. The D.C. Circuit recently held that "Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label." *In re Al-Nashiri*, 921 F.3d 224, 233-34 (D.C. Cir. 2019). Due process demands an unbiased adjudicator and bias is constitutionally intolerable. *Id.* (citing *Withrow v. Larkin,* 421 U.S. at 47).

Finding 3.4: The Secretary's delegation of agency final decision-making authority in adjudicatory proceedings to an employee or official not appointed by the President with Senate confirmation violates U.S. Const. Art. II, §2, cl. 2.

The Schwellenbach Act and 7 C.F.R. §§1.145 and 2.35, unconstitutionally authorize the Secretary to delegate final decision-making authority to officials and employees who are not appointed by the President after Senate confirmation. "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch …." *Arthrex*, 141 S. Ct. at 1985.

And while the D.C. Circuit in *Fleming* decided USDA ALJs are inferior officers, it did so based on its precedent in *Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Board,* 684 F.3d 1332, 1341-42 (D.C. Cir. 2012), finding Fleming's argument "inconsistent with *Intercollegiate,* which found the officers at issue to be inferior *even though they could make significant decisions without review by another officer.*" (Emphasis added) *Intercollegiate* is no longer good law.

The Federal Circuit relied on *Intercollegiate* in *United States v. Arthrex*, 141 S.Ct. 1970 (2021), to justify patent judges, appointed as inferior officers, making final decisions not subject to review by a principal officer. The Supreme Court in *United States v. Arthrex,* 141 S. Ct. 1970, 1985 (2021) held, as to adjudicatory officers: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch …."

Conclusion 4: The USDA's ALJs function as principal officers who are not appointed by the President with Senate confirmation in violation of the Appoints Clause.

Of course, if the Judicial Officer is an inferior officer who cannot lawfully make final decisions, it follows that USDA ALJ decisions, reviewable only by the Judicial Officer, unlawfully become final without review by a principal officer. For adjudicatory decisions in agency enforcement proceedings to become final they must be reviewable, after issuance, by an Executive Branch principal officer appointed by the President with Senate confirmation.

Finding 4.1: *Fleming* incorrectly held USDA ALJs were inferior officers.

The D.C. Circuit, in *Fleming*, incorrectly decided that USDA ALJs were inferior officers.

> Petitioners first argue that the Department's ALJs are principal officers, and that the steps the Secretary of Agriculture has taken to redress the *Lucia* problem—namely, ratifying ALJs' appointments and administering new oaths of office, *Trimble*, 77 Agric. Dec. 15, 17 (2018)—are insufficient to allow any ALJ to hear petitioners' case on remand. We disagree. The ALJs are inferior officers who can be appointed by department heads like the Secretary.
>
> An officer of the United States is "inferior" for purposes of the Appointments Clause if her "work is directed and supervised at some level by" principal officers. *Edmond v. United States*, 520 U.S. 651, 663, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997). Under *Edmond*, courts examine three factors in applying that test: (i) whether the officer is subject to supervision and oversight by a principal officer; (ii) whether the officer is subject to removal by a principal officer; and (iii) whether the officer has final decisionmaking authority. *See id.* at 664, 117 S.Ct.

1573; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339 (D.C. Cir. 2012).

Applying those factors, we have little difficulty classifying the Department's ALJs as inferior officers. Although the ALJs are not removable at will by a principal officer, the analysis hardly ends there, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 671–72, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), and the other factors point decidedly in favor of inferior-officer status. The Department's ALJs are subject to substantial oversight by the Secretary. The ALJs must follow the Secretary's procedural and substantive regulations, as in *Edmond*. *See* 520 U.S. at 664, 117 S.Ct. 1573 (relying on principal officer's "administrative oversight" over Court of Criminal Appeals Judges given his "responsibility to prescribe uniform rules of procedure" and "formulate policies" for the Court (internal quotation marks omitted)). And the ALJs' decisions may be appealed to the Judicial Officer, whom the Secretary can remove at will. *See* 7 U.S.C. § 2204-2; 7 C.F.R. §§ 1.132, 2.12.

Petitioners contend that the Judicial Officer's appellate review is insufficient to demonstrate the ALJs' inferior-officer status unless the Judicial Officer is a principal officer, because, petitioners say, an inferior officer's decisions must be subject to review by a principal officer. We do not decide whether the Judicial Officer is a principal officer (see below), but we reject petitioners' argument regardless. It is inconsistent with *Intercollegiate*, which found the officers at issue to be inferior even though they could make significant decisions without review by another officer. 684 F.3d at 1341–42. Moreover, the Secretary (a principal officer) has considerable influence over whether an ALJ's decision becomes the final decision of the agency. For one thing, the Secretary may, at his election, step in and act as final appeals officer in any case. *See* 7 C.F.R. § 2.12. For another, the Secretary may remove the Judicial Officer at will, providing the Secretary "a powerful tool for control," *Edmond*, 520 U.S. at 664, 117 S.Ct. 1573. Indeed, the Supreme Court has suggested that an officer who may be removed at will by another officer is the latter's "alter ego" for constitutional purposes. (Citations omitted) In short, the Department's ALJs are inferior officers.

Fleming, 987 F.3d at 1103-04. The Court got it wrong.

Finding 4.2: The Rules of Practice are not a means of supervision by the USDA Secretary of USDA ALJs.

USDA ALJs are not subject to "substantial oversight" by the Secretary because they "must follow the Secretary's procedural and substantive regulations as in *Edmond*." *Id.* The USDA's Rules of Practice, 7 C.F.R. §1.130 et seq., must be followed by all parties to the adjudicatory proceeding. A USDA ALJ must apply the Rules. Under the Rules, the presiding ALJ supervises the proceeding by assuring the parties and counsel abide by the Rules. ALJs are officers of the United States precisely because they have significant discretion when making decisions about how the Rules should apply to a particular issue, problem or dispute that arises in the case. If the ALJ misapplies the Rules, the USDA Secretary does not correct the ALJ's mistake. The Judicial Officer may correct the ALJ's mistake, but the Judicial Officer is not a principal officer. Supervision of ALJs under the Rules of Practice by the Judicial Officer, who is not a principal officer, fails the *Edmond* test.

The Rules of Practice are not a means of supervision of USDA ALJs by the USDA's Secretary. It makes no sense to say the Secretary, by adopting the Rules of Practice, is "supervising" ALJs, any more than it makes sense to say the Secretary is "supervising" the parties to the proceeding and their attorneys by adopting the Rules of Practice. The USDA's Rules of Practice govern the adjudication proceedings, and ALJs attempt to assure all parties and their attorneys abide by the

Rules. The ALJ has significant authority to assess the appropriate relief or sanction for following or not following the Rules.

It seems anomalous to contend that the Rules of Practice are the means by which the Secretary supervises ALJs, when *Lucia* held that ALJs have such broad unfettered discretion in applying the Rules in adjudicatory proceedings that they cannot be mere employees, but must be appointed as officers of the United States. The Rules of Practice are not an example of the Secretary supervising USDA ALJs, they are part of what makes ALJs independent of the Secretary.

Finding 4.3: The Secretary does not supervise USDA ALJs under the HPA's "substantive regulations."

The D.C. Circuit relied upon "substantive regulations" as an example of the Secretaries supervision of ALJs, but the court did not identify any regulation as an example of the Secretary's "supervision" of USDA ALJs. The only "substantive rules" applicable here are the Horse Protection Act Regulations, 9 C.F.R. §11.1 *et seq*. These Regulations do not supervise the ALJs. The ALJs are not mentioned in the Regulations. The Regulations guide, direct, authorize or prohibit activities of walking horse owners, exhibitors, trainers, exhibitions, events, auctions, HIOs, DQPs, VMOs, transporters, inspectors, management and record keepers in determining their responsibilities and liabilities under the HPA. The Regulations issued under the HPA no more "supervise" ALJs than the U.S. Criminal Code is a means by which Congress supervises Article III district court judges.

USDA ALJs enforce the HPA substantive regulations against respondents in APHIS enforcement proceedings. Exercising the significant discretion vested in USDA ALJs, the ALJs make rulings, issue orders and, based on the evidence, assess a penalty or dismiss the complaint. If either party believes the ALJ made a mistake, their only recourse is an appeal to the Judicial Officer. The Judicial Officer can acknowledge the mistake and remand to the ALJ to correct it or find a mistake was inconsequential and affirm or find a mistake requires dismissal of the complaint. This kind of corrective action by the Judicial Officer looks like supervision of the ALJ, but the supervision is not performed by a principal officer. The HPA's substantive regulations are not a method by which the Secretary supervises USDA ALJs.

Finding 4.4: USDA ALJ decisions become final without possible review by an Executive Branch principal officer.

The *Fleming* Court noted that while ALJs' decisions are appealable to the Judicial Officer, Fleming contended this was not sufficient because the Judicial Officer was not a principal officer. 987 F.3d at 1103. The Court decided Fleming's position was inconsistent with its decision in *Intercollegiate,* which held officers could "be inferior even though they could make significant decisions without review by another. 684 F. 3d at 1341-42." *Id. Intercollegiate* held that the Library of Congress judges were inferior officers even though their decisions, when issued,

were final and binding on the parties, and not subject to review, affirmance or reversal by a principal officer in the Executive Branch.

USDA ALJs are different from the supervision of adjudicatory officers by principal officers in *Intercollegiate. Intercollegiate* involved rate-maker judges deciding disputes between private parties as opposed to judges in enforcement proceedings who decide cases filed by a governmental agency. The Copyright Royalty Judges (CRJs) were appointed by the Librarian of Congress, a principal officer and Department Head. The CRJs' determinations of regulatory rates and royalties are final. 684 F.3d at 1336. In *Intercollegiate* the D.C. Circuit held CRJs were inferior officers because they are "supervised in some respects by the Librarian and Register of Copyrights." *Id*. at 1338. The Court noted the Librarian approved the CRJs' procedural regulations, issued ethical rules for the judges to follow, and oversaw logistical aspects of CRJs' duties. *Id.* The Librarian appointed and supervised the Register, who interpreted copyright law and issued legal opinions about issues in the CRJs' cases that the CRJs were bound to follow. *Id.* at 1339.

Prior to CRJ determinations becoming final, "[t]he Register also review[ed] and correct[ed] any legal errors in the CRJs' legal determinations," and this statutorily mandated and authorized "[o]versight by the Register at the direction of the Librarian on issues of law." *Id.* The Court held this "a non-trivial limit on the CRJs' discretion, and the Librarian may well be able to influence the nature of the

Register's interventions." *Id*. The Register's oversight provided the Librarian, a principal officer, with knowledge of the CRJs' proposed rate determination *prior* to it becoming final.

To ensure a greater degree of effective supervision, the D.C. Circuit held the Librarian would have authority to terminate CRJs without cause. However, once the CRJs' decisions were issued, they became final binding decisions, not subject to review, approval or reversal by an Executive Branch principal officer. Only an Article III court had that authority.

Unlike it did in *Intercollegiate*, the *Fleming* court identified no statute or regulation authorizing the Secretary's involvement in ALJs' decision-making. There are none. The law that binds ALJs and guides their activities is not issued by the Secretary, but by Congress in 5 U.S.C. §§556 and 557. The law provides no authority for the Secretary to interfere with ALJs' decision-making once the Secretary has established an ALJ adjudicatory system that assigns cases to an ALJ.

There is one similarity between the Library of Congress CRJs and the USDA's ALJs. What supervision there was of CRJs was carried out by the Register, an inferior officer appointed by the Librarian. Similarly, whatever supervision there is of USDA ALJs' decision making is carried out by the Judicial Officer, who is appointed by the Secretary. Both CJR and USDA ALJ decisions become final without being permitted to do so by a principal officer of the Executive Branch.

Compare these two adjudicative officers with the SEC ALJs described in *Lucia*. The SEC promulgated the procedural rules for adjudication. SEC ALJs followed, implemented and enforced the rules. If a party believed the SEC ALJ committed error in implementing or enforcing these rules, that party could appeal to the SEC, whose members were appointed by the President with Senate confirmation. No decision of an SEC ALJ could become final without the consent of principal officers of the Executive Branch. The SEC Commissioners, all principal officers, had statutory and regulatory authority to review and affirm, reverse or correct SEC ALJs' mistakes. Not so at the USDA ALJs and Library of Congress CRJs, a constitutional shortcoming recognized in *United States v. Arthrex*, 141 S. Ct. 1970 (2021).

Finding 4.5: The unreviewable adjudicatory authority wielded by USDA ALJs is incompatible with their appointment by the Secretary to an inferior office, because only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch.

Intercollegiate is no longer good law. In 2019, the Federal Circuit held that the Administrative Patent Judges (APJs) of the Patent and Trial Board were principal officers because of their civil service tenure protection, but let stand their authority to make final decisions not subject to principal officer review. *Arthrex v Smith & Nephew,* 941 F. 3d 1320 (Fed. Cir. 2019).

The decision was appealed to the Supreme Court, where the Government, as Intervenor, argued that the supervision by principal officers of the APJs was

sufficient to deem them inferior officers under *Edmond*, even though their decisions, after issuance, were not reviewable by an executive principal officer.

The March 16, 2021, Petition for Writ of Certiorari by the U.S. Solicitor set forth a comprehensive identification of the supervision by principal officers of APJs. The summary that follows is taken directly from that brief, without further attribution.

> The Patent Trial and Appeal Board (Board or PTAB) is an administrative tribunal within the United States Patent and Trademarks Office. (USPTO). 35 U.S.C. 6. The Board consists of the Director, the Deputy Director, the Commissioners for Patents and Trademarks, and "administrative patent judges." 35 U.S.C. 6(a). USPTO administrative patent judges are "subject to the provisions of title 5, relating to Federal employees," 35 U.S.C. 3(c), under which civil servants may be removed "only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). APJs have standard employee civil service tenure protection.
>
> The Patent Act establishes several mechanisms by which the Director can supervise the Board and the administrative patent judges serving on it. 35 U.S.C. §3(a)(2). For example, the Director may promulgate (on behalf of the USPTO) regulations to "govern the conduct of proceedings" in the agency. 35 U.S.C. §2(b)(2)(A). He may issue policy directives to govern the Board's implementation of various Patent Act provisions, including directives regarding the proper application of those statutory provisions to sample fact patterns.
>
> The Patent Act vests appointment of administrative patent judges in "the Secretary, in consultation with the Director." 35 U.S.C. §6(a). The Secretary and Director, both principal officers, are authorized to appoint and remove administrative patent judges—the former with respect to judges' federal service, and the latter with respect to their "judicial assignment[s]." The Secretary may remove those judges from federal service under the same standard that applies to federal civil-service employees generally, *i.e.*, "for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). That standard generally

permits removal for any legitimate reason with a connection to "the work of the agency."

The Director has unfettered authority to determine which (if any) Board cases each administrative patent judge will adjudicate. The statute empowers the Director alone to "designate" which members of the Board— which consists of himself, three senior USPTO officials, and 200-plus APJ judges—will compose the panel to decide any particular case. 35 U.S.C. §6(c); see 35 U.S.C. §6(a) and (b). Although the Director has "delegated" that panel-designation authority "to the Chief Judge" of the Board, subject to guidelines the Director has prescribed, that delegated authority is non-exclusive and the Director expressly retains his or her own statutory authority to designate panels at any time, in his or her sole discretion. Exercising that authority (personally or through a delegee), the Director may exclude a particular judge from one case, from a category of cases, or from all cases—effectively precluding the judge from deciding any Board cases where, for example, the Director believes that the judge will not faithfully and properly apply the relevant patent laws, regulations, and agency policies. An administrative patent judge thus is appointed to and removable from federal office and particular adjudicatory tasks in Board proceedings by the Secretary and the Director, respectively.

The Director has broad authority to establish binding agency policies for inter partes reviews and for the other agency proceedings that the Board adjudicates. The Patent Act "vest[s]" the "powers and duties" of the USPTO in the Director and makes him "responsible for providing policy direction and management supervision" for the agency. 35 U.S.C. §§3(a)(1) and (2)(A). The Director exercises this policy-direction and supervisory responsibility in a variety of ways. He may promulgate regulations on behalf of the USPTO. 35 U.S.C. §§2(b)(2), 316(a)(4). He may issue binding policy directives that govern the Board. See 35 U.S.C. §3(a)(2)(A). Using that authority, the Director may issue instructions as to how patent law, regulations, and USPTO policies apply to particular fact patterns, including in connection with pending cases. He may also exercise his broad statutory authority to determine which Board decisions are precedential and therefore binding on future panels.

The Director has substantial prerogatives with respect to the conduct of individual proceedings. For example, the statute grants the Director unilateral authority to determine whether to institute a particular inter partes review, 35 U.S.C. §314(a), and his determination

> "whether to institute an inter partes review under [Section 314] shall be final and nonappealable." 35 U.S.C. §314(d). The Director has delegated to the Board the authority to decide whether particular inter partes reviews will be instituted. 37 C.F.R. §42.4(a); see also 37 C.F.R. §42.208 (same for post-grant review); 37 C.F.R. §42.408(a) (delegating institution of derivation proceedings to administrative patent judge). The crucial point for Appointments Clause purposes is that administrative patent judges possess that authority only because, and to the extent that, the Director has chosen to confer it.
>
> Once review has been instituted, the Director may vacate his decision (or that of his delegee) to institute the review, thereby terminating the proceedings. And while "[o]nly the [Board] may grant rehearings" of Board decisions, 35 U.S.C. §6(c), the Director's power, to prescribe Board procedures and policies, and to designate the members of Board panels, gives him substantial authority over rehearings as well. For example, the Director has established a Precedential Opinion Panel, which consists of Board members he chooses (typically including the Director himself, the Commissioner for Patents, and the Chief Administrative Patent Judge), and which can determine whether to rehear and reverse any Board decision.
>
> The work of a USPTO administrative patent judge thus is superintended by presidentially appointed, Senate-confirmed officers at virtually every step. An administrative patent judge decides only those Board cases, if any, that the Director assigns him. In deciding those cases, the judge must apply the patent laws in accordance with regulations, policies, and guidance the Director has issued, and with past decisions the Director has designated as precedential. Once the Board issues its final written decision, that decision can be deemed precedential (or not) by the Director, countermanded prospectively by further guidance he issues, or both. Any proceeding in which the judge participates may always be reheard de novo.

In spite of this supervision of APJs, the Federal Circuit concluded in *Arthrex* that APJs were principal officers. 941 F.3d at 1335. Neither the Secretary nor Director had the authority to review issued APJ decisions or to remove APJs at will. The Federal Circuit held that these limitations meant that APJs were themselves

principal officers, not inferior officers under the direction of the Secretary or Director. In an effort to correct this constitutional violation, the Federal Circuit invalidated the tenure protections for APJs, making APJs removable at will by the Secretary, which, it held, "renders them inferior rather than principal officers." *Id.* at 1338.

The Supreme Court, in deciding *Arthrex*, noted that Congress structured the PTAB differently from the judges in *Edmond*, providing only half of the "divided" supervision applicable to judges of the Coast Guard Court of Criminal Appeals. 141 S.Ct. at 1980. Like the Judge Advocate General, the PTO Director possessed powers of "administrative oversight." *Id*. But Congress structured the PTAB to provide only half of the "divided" supervision to which judges in *Edmond* were subject. Like the Judge Advocate General, the PTO Director possesses powers of "administrative oversight." *Id.* The PTO Director fixed the rate of pay for APJs, controlled the decision whether to institute inter partes review, and selected the APJs to reconsider the validity of the patent. *Id.*

The PTO Director also promulgated regulations governing inter partes review, issued prospective guidance on patentability issues, and designated issued PTAB decisions as "precedential" for future panels. *Id*. The Court noted the PTO Director was the boss, except when it came to the one thing that makes the APJs' officers exercising "significant authority" in the first place—their power to issue decisions

on patentability. *Id*. "In contrast to the scheme approved by *Edmond*, no principal officer at any level within the Executive Branch 'direct[s] and supervise[s]' the work of APJs in that regard." *Id.*

Edmond, the Court held, went a long way toward resolving the dispute. *Id*. at 1981. What was "significant" to the outcome in *Edmond* —"review by a superior executive officer—is absent here: APJs have the 'power to render a final decision on behalf of the United States' without any such review by their nominal superior or any other principal officer in the Executive Branch." *Id*.

That is the problem: The Government's proposed roadmap for the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision. *Id*.1982 "Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor 'attribute the Board's failings to those whom he *can* oversee.'" *Id.* APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Id.*

"History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers." *Id.* "Since the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy. We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the

Secretary to an inferior office." *Id*. at 1985. The Court concluded: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us." *Id.*

The Supreme Court rejected the government's argument that even a high degree of pre-decision supervision was sufficient to categorize an officer as inferior. Following *Intercollegiate,* in *Fleming* the Court held that very minimal supervision by the USDA Secretary was sufficient to make ALJs inferior officers, even though their decisions became final without review by a principal officer. USDA ALJs function as principal officers. Their appointments by the Secretary are unconstitutional.

The *Fleming* Court's observation that, since ALJ decisions are reviewable by the Judicial Officer, and the Judicial Officer is removable by the Secretary at will, this suggests "an officer who may be removed at will by another officer is the latter's 'alter ego' for constitutional purposes." *Fleming*, 987 F.3d at 1104. But this identifies the problem, not the solution. The Judicial Officer *is* the alter ego of the Secretary. The Judicial Officers' actions are in the name of the Secretary. But the Secretary is a principal officer, who Congress authorized to make final decisions in enforcement proceedings. Even as the Secretary's alter ego, the Judicial Officer is not a principal officer appointed by the President with Senate confirmation. "Only

an officer properly appointed to a principal office may issue a final decision binding the Executive Branch ….” *Arthrex*, 141 S. Ct. at 1985.

Finding 4.6: USDA ALJs’ appointments violate the Appointments Clause.

In *Lucia,* SEC ALJs were inferior officers because their initial decisions were appealable to the SEC Commissioners who are officers appointed by the President after Senate confirmation. USDA ALJs are not inferior officers. Under USDA Rules of Practice and Departmental Regulation, ALJs’ decisions become final without the possibility of lawful review or reversal by Executive Branch officers appointed by the President after Senate confirmation. See 7 C.F.R. §1.145, and 7 C.F.R. §2.35.

Like the Judicial Officer, ALJs’ decisions, after they are issued, can only be reviewed, affirmed or reversed, by the Judicial Officer. Since the Judicial Officer is not appointed by the President with Senate confirmation, the ALJs’ decisions become final without possible review by a principal officer in the executive branch. ALJs’ appointments contravene the Appointments Clause because only an officer properly appointed to a principal office may issue a final decision binding the executive branch.

USDA ALJs are appointed under 5 U.S.C. §3105. The Secretary does not, and cannot, direct them in performing their APA functions under 5 U.S.C. §§556 and 557. Prior to February 20, 2019, 7 U.S.C. §6911(a) and (b) vested in the Secretary the functions of USDA agencies and offices, except “[f]unctions vested by

subchapter II of Chapter 5 of Title 5, United States Code, in administrative law judges employed by the Department."[4] The Secretary does not delegate adjudicatory functions to ALJs; rather the Secretary designates ALJs to perform the functions in 5 U.S.C. §§ 556 and 557. *See* 7 C.F.R. §2.27. ALJ decisions become final if not appealed to the Judicial Officer. 7 C.F.R. §2.27. Appeals are only to the Judicial Officer, whose decisions are "final for purposes of judicial review." 7 C.F.R. §1.145(i). USDA ALJs cannot be inferior officers because no principal can review, reverse or affirm their initial decisions after they are issued and are final and binding on the agency.

Judicial Officer Jenson's contention that he was an inferior officer highlighted a constitutional problem regarding USDA ALJs' appointments. Inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate" and who "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Edmond*, 520 U.S. at 663, 665. Because USDA ALJs' decisions are not subject to review, affirmance or reversal by an Executive Branch principal officer, USDA ALJs must be appointed by the President after Senate confirmation. 7 C.F.R. §§1.45 and 2.35.

[4] 7 U.S.C. §6911 was repealed, and not replaced. PL 115-334, December 20, 2018, 132 Stat. 4490, effective February 20, 2019. A-30.

Conclusion 5: USDA ALJs' dual-tenure protections contravene the U.S. Constitution's separation of powers.

ALJs appointed under 5 U.S.C. §3105 can be removed "only for good cause established and determined by the Merit System Protection Board," 7 U.S.C. §7521(a), whose members can be removed "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. §1202(d). ALJs have two layers of tenure protection. In *Lucia,* though the Solicitor General twice requested the constitutionality of ALJs' tenure protections be decided, the Court declined to do so. 138 S.Ct. at 2050 n.1. Justice Breyer expressed concern that "to hold that the administrative law judges are Officers of the United States is, perhaps, to hold that their removal protections are unconstitutional." *Id*. at 2060 (Breyer, J., concurring in part and dissenting in part.) The Constitution permits Congress to impose "limited restrictions on the President's removal power" – i.e., "only one level of protected tenure separat[ing] the President from an officer exercising power." *Free Enter. Fund* v. *Public. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495 (2010).

Multi-level tenure protections for officers undermines executive authority and political accountability. *Id.* at 506. While the President can remove the Secretary at will, those officers who decide whether an ALJ's conduct merits removal under a good conduct standard are not subject to removal at will. As a result, "[n]either the President, nor anyone directly responsible to him …has full control." *Id.* at 496.

Congress enacted the APA to assure fairness in agency adjudications conducted by ALJs. Pub. L. No. 79-404, 60 Stat. 237 (1946). To decrease bias favoring the judge's employer, tenure protection was included in Section 11. *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 130 (1953). Congress' goal was to ensure ALJs were "insulat[ed] from political interference." *See Butz v. Economou,* 438 U.S. 478, 513 (1978).[5] In *Lucia*, the Federal Administrative Law Judges Conference reminded the Supreme Court that the ALJs' ability "to provide for due process in administrative proceedings" is because "[t]he APA ensures due process through ALJ selection, appointment, protections, and independence."[6] Federal ALJ Conference Amicus Brief at 3, *Lucia v. SEC*, No.17-130. Unless USDA ALJs are judicially independent from influence by political appointees, they will be "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspeck,* 345 U.S. at 130. One level of tenure protection for inferior officers is not unconstitutional. But the

[5] The Civil Service Reform Act of 1978 placed the function of determining good cause for ALJ termination in the Merit Systems Protection Board, providing a double layer of statutory tenure protection for ALJs, enhancing their independence. Pub. L. 95-454, 92 Stat. 1111 (1978).

[6] ALJs' selection and appointment protections were eliminated by President Trump on July 10, 2018, in The Executive Order Excepting Administrative Law Judges from the Competitive Service. 83 Fed. Reg. 32,755.

constitutional problem arises when an inferior officer has two levels of tenure protection.

Finding 5.1: Historically, ALJs did not have dual-level tenure protection.

From 1883 through 1978, hearing examiners, classified as employees, did not have two levels of tenure protection. The Civil Service Act of 1883 provided the "president is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of which shall be adherents of the same party, as Civil Service Commissioners."[7] The President could "remove any commissioner."[8] The "duty of said commissioners" was to "aid the President, as he may request, in preparing suitable rules for carrying this act into effect."[9]

Congress enacted the APA in 1946. "Congress intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers' by vesting control of their … tenure in the Civil Service Commission to a greater extent than in the case of other federal employees." *Ramspeck,* 345 U.S. at 132. While the APA gave ALJs' tenure protection as determined by the Commissioners, from 1946 until 1979, the Commissioners did not have tenure protection.[10]

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[7] U.S. Civ. Serv. Comm'n, *Biography of an Ideal, A History of the Federal Civil Service*, p. 9, Office of Personnel Management (2002) ("*History*" hereafter).
[8] *Id.*
[9] *Id*.
[10] See the H.R. Rep. No. 95-1403, Report of the Committee on Post Office and Civil Service on H.R. 11280 To Reform The Service, July 31, 1978, page 119,

Finding 5.2: To remove an ALJ the USDA must initiate a proceeding before the MSPB and prove to the Board there is good cause for removal.

The 1979 Civil Service Reform Act (CSRA) assigned to a newly established independent agency, the Merit System Protection Board, responsibility to adjudicate federal employees' appeals in matters affecting their employment. Only then did ALJs acquire a second level of tenure protection with the addition of for-cause protection of MSPB members. Of course, in 1979, ALJs were still considered civil service employees, a classification that prevailed for 40 years, and still covers over 90 percent of the nearly two million civilian federal employees.[11] With the *Lucia* decision in 2018, most ALJs have been reclassified as officers. That is the issue — whether USDA ALJs appointed under §3105, whose duties are those of officers rather than employees, can be insulated from presidential removal by two levels of tenure protection.

Here's how ALJs' statutory dual-tenure protection system works. The Civil Service Reform Act created "[t]he Office of Personnel Management [as] an independent establishment in the Executive Branch." 5 U.S.C. §1101. Its Director, appointed by the President with Senate confirmation, promulgates civil service regulations "except with respect to functions for which the Merit System Protection

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describing the effect on the Civil Service Commissioners is to repeal Public Law 89-554 – Sept. 6, 1966, §1102(d): "The President may remove a Commissioner."

[11] History at 174.

Board…is primarily responsible." *Id.* at §§1102-03. The MSPB's three Board members can be removed "only for inefficiency, neglect of duty, or malfeasance in office." *Id*. at §§1201-02.

If the President or the Secretary of Agriculture wants to remove a USDA ALJ, the decision is not theirs to make. Statutorily, in order to remove a USDA ALJ, the agency must file and serve a complaint with the MSPB, with supporting exhibits and attachments. 5 C.F.R. § 1201.137(c). The complaint "must describe with particularity the facts that support the proposed agency action." *Id*. at §1201.138. The ALJ has the right to answer and be represented by counsel at an evidentiary hearing on the record. *Id*. §1201.140.

The MSPB adjudicates complaints to remove ALJs that are initiated under 5 C.F.R. §§1201.137-142. The MSPB has exclusive authority to "determine" whether the agency has proven "good cause" for removal by a preponderance of the evidence. The OPM Director cannot direct or reverse MSPB decisions. However, if the OPM Director believes a MSPB interpretation could adversely affect a civil service law, rule or regulation, the Director may intervene in the proceeding. 5 U.S.C. §7701(d).

The President or Secretary, if dissatisfied with an MSPB decision, can do nothing. The MSPB is an independent agency. Its three Board members can "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id*. at §1202. The members cannot be removed because the President

disagrees with their decisions. Since two Board members would have agreed on a decision displeasing to the President, two members would have to be removed by the President for-cause, a remote possibility.

The USDA or ALJ can appeal MSPB final orders only to the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §7703. The Federal Circuit has "exclusive jurisdiction…of an appeal from a final order or decision of the [MSPB]." 28 U.S.C. §1295(a)(9). When MSPB decisions are appealed, the Federal Circuit, "as a general matter, [] defer[s] to the Board's reasonable interpretation of 'good cause,' because 'the Board has exclusive rulemaking and adjudicatory authority with respect to section 7521.'" *Shapiro v. Social Sec. Admin.*, 800 F.3d 1332, 1336 (Fed. Cir. 2015).

The detailed and comprehensive nature of the CSRA's administrative scheme demonstrates Congress intended to vest adjudicatory authority solely in the MSPB and Federal Circuit. *See United States v. Fausto*, 484 U.S. 439, 448 (1988). In *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013), the D.C. Circuit Court recognized the CSRA is "designed to safeguard the decisional independence of administrative law judges," and the "Act establishes the 'exclusive…remedial regime for federal employee personnel complaints.'" "The degree of independence of an administrative law judge – the extent to which an administrative law judge may 'exercise[] his independent judgment on the evidence before him, free from

pressures by…officials within the agency'" is a working condition, and courts, other than the Federal Circuit, lack jurisdiction to construe the CSRA's exclusive administrative scheme. *Id.* at 437-38.

Finding 5.3: USDA ALJs have dual-tenure protection under the USDA ALJs' union contract.

There is an alternative method under which USDA ALJs have dual-level tenure protection, the "Collective Bargaining Agreement Between the Office of Hearing and Appeals (OHA) and the AFSCME Council 20, Local 3020, July 24, 2019."https://www.dm.usda.gov/employ/labor/docs/ta/AHR_Approval_of_the_new_CBA_between_OHA_AFSCME_L_3020.pdf. ["Union Agreement"]. The Union Agreement covering USDA ALJs contractually and statutorily protects ALJs' dual-level tenure protections. As employees in the USDA's Office of Hearing and Appeals, ALJs are not managers, thus they are covered employees under the Union Agreement. If the USDA wants to take an adverse action against an ALJ, under Union Agreement §18.10, the ALJ can either follow the CSRA statutory procedures, a hearing before the MSPB, or follow a Union Agreement negotiated grievance procedure under Article 19, pages 67-73. If, at the conclusion of the grievance procedure, the ALJ is not satisfied with the USDA's proposed action, the Union may invoke arbitration on behalf of the ALJ under Article 20, pages 74-75.

The arbitrator must apply the same statutorily prescribed standards in deciding the case as would be applied if the matter had been heard by the MSPB. 5 U.S.C.

§7121(e)(2). By that requirement, Congress assured uniformity of direct review in adverse personnel actions, at least in §7521 removal cases. *AFGE v. FLRA*, 850 F.2d 782, 784 (D.C. Cir. 1988). Review of the arbitral decision is taken to the Federal Circuit "as if the matter had been decided by the [MSPB]." 5 U.S.C. §7121(f).

Whether a USDA ALJ contests a removal action by following the statutory scheme, where the MSPB makes the decision, or proceeds under the Union Agreement grievance procedure, where an independent arbitrator makes the final decision, the ALJ has two levels of tenure protection. Neither the President nor the Secretary can remove an ALJ at will, and the Constitution's principle of separation of powers is contravened.

Further, as the final decision-maker for the Department, the arbitrator would have to be appointed as a principal officer, because the arbitrator's decision becomes final without being permitted to do so by an Executive Branch principal officer. The arbitration system is constitutionally defective under both the Appointments Clause and separation of powers. *Assoc. of Am. R.R. v. Dept. of Transp.*, 821 F.3d 19, 37 (D.C. Cir. 2016).

Finding 5.4: The USDA had judicially acknowledged the present USDA ALJ tenure protections contravene separation of powers.

In *Fleming*, the USDA took the position that the "removal restrictions for administrative law judges (ALJs) contained in § 7521 would raise grave constitutional concerns if certain ambiguous statutory phrases were construed in a

manner that unduly infringes on the authority of the President and Heads of Departments to hold accountable those subordinate officials entrusted with exercising significant executive power." February 27, 2020, Respondent's Supplemental Brief, page 1. The USDA recognized that the dual-tenure statutory restrictions on removal of ALJs raises "serious constitutional concerns," and suggested that §7521 should be "construed" by the court in order to avoid making USDA ALJs appointments as officers unconstitutional. USDA Br. 38. The "construction" of §7521 the USDA proposed was not one any lawful authority had adopted. Indeed, the USDA contended: "The MSPB's Construction of Section 7521 Would, if Accepted, Violate Article II." USDA Supplemental Br. at 18.

The MSPB's current construction of "good cause," the USDA argued, "violate[s] Article II for two reasons." *Id.* "*First*, MSPB's understanding of the standard for 'good cause' is too high." *Id.* "[I]t has sometimes made it too difficult to show cause," citing *Social Sec. Adm. v. Goodman*, 19 M.S.P.B. 321, 331 (1984). *Id*. "*Second,"* the USDA contended, "the MSPB's understanding of its role in 'establishing and determining' good cause is too expansive." *Id* at 19. The USDA acknowledged to the Court that "the independent MSPB has usurped the employing agency's policy determinations whether appropriate discipline for misbehavior that concededly exists is removal or a lesser sanction," citing not only the MSPB's decision in *Social Sec. Admin. v. Brennan,* 27 M.S.P.B. 242 (1985), but the Federal

Circuit's decision affirming the Board at 787 F.2d 1559 (Fed. Cir. 1986). *Id*. Simply put, the USDA admitted that the present tenure system for USDA ALJs is unconstitutional because it contravenes separation of powers.

Finding 5.5: The ALJs and Judicial Officer cannot construe §7521 to avoid the separation of powers violation.

In the D.C. Circuit the USDA proposed construing §7512 to avoid the separation of powers conflict. There were two parts to the USDA's proposed new construction of §7521: (a) construe "good cause" to include failure to follow directions, and (b) limit the MSPB's authority to determine "good cause" by permitting it to only determine if the agency is acting in "good faith." USDA Br. 38-39.

It is one thing for the USDA to ask an Article III court to construe statutory language, a power a court sometimes has, but it is another thing for the USDA, in an agency proceeding, to construe three statutes that do not fall within the agency's jurisdiction. The USDA is not authorized to construe "good cause," only the MSPB and Federal Circuit have that authority. Congress could, of course, provide definitions for its statutes. But the USDA cannot.

Congress "intentionally failed to define 'good cause' in the Administrative Procedures Act (APA)." *Brennan v. Dept. of Health and Human Services,* 787 F.2d 1559, 1561-62 (Fed. Cir. 1986). The USDA argued in the D.C. Circuit that "[t]he 'good cause' required by 5 U.S.C. §7521 is most naturally read to authorize removal

of an ALJ for misconduct, poor performance, or failure to follow lawful directions," citing a 1951 edition of Black's Law Dictionary. USDA Br. 39. This "natural reading" would allow agencies to terminate ALJs for "appropriate Judicial performance related reasons while still protecting ALJs from removal for invidious reasons otherwise prohibited by law." *Id.* Nothing is more "performance related" to ALJs' employment than making initial decisions. Implicit in the USDA's preferred "construction" is an effort to stretch "good cause" to permit agencies to terminate ALJs who make decisions not favored by the President or Secretary.

The USDA's proposed construction of "good cause" is contrary to Congress' intent to ensure ALJs' decisional independence from executive influence. Federal Circuit and MSPB decisions establish that ALJs can be terminated for "good cause" for not following "lawful directives," so long as the directives do not interfere with the ALJ's decisional independence. *Abrams v. Social Sec. Adm*., 703 F.3d 538, 545 (Fed. Cir. 2012). MSPB and Federal Circuit tribunals have defined what is not a "lawful directive."

> Determining the existence of "good cause" is not a simple task, but it is commenced by stating what "good cause" is not. If the agency bases a charge on reasons which constitute an improper interference with the ALJ's performance of his quasi-judicial functions, the charge cannot constitute "good cause." Whether the charge is based on reasons which interfere with the quasi-judicial function is a question of fact and must be answered on a case by case basis.

Brennan, 787 F.2d at 1563 n.3.

"The APA ensures the decisional independence of the ALJs and prohibits review and supervision of an ALJ's performance of his quasi-judicial functions." *Id.* at 1562, 1563 n. 2 (identifying ten APA provisions supporting ALJs' decisional independence: 5 U.S.C. §§ 554(d), 554(d)(1), 556(c), 556(d), 556(e), 557(c), 3105, 3321(c), 4301 and 5335.) See also 5 C.F.R. §§930.206(a) ("An agency shall not rate the performance of an administrative law judge") and §930.201(e)(11) (OPM "[e]nsures the independence of administrative law judges") and §930.201(f)(3) (the employing agency has the "responsibility to ensure the independence of administrative law judges.") "Good cause" for termination cannot be based on the President's or Secretary's disagreement with an ALJ's decision. ALJs' dual-level tenure protections unlawfully protect USDA ALJs from the President's authority to see the laws are faithfully executed, even under the USDA's definition of "good cause."

The second prong of the USDA's proposed construction of §7521 involves construing "'establish and determine' that there is 'good cause' for removal" to mean that "the [MSPB] Board must determine that factual evidence exists to support the agency's proffered, good-faith grounds for removal." USDA Br. 39. According to the USDA, the MSPB should only determine if the agency is acting in "good faith" rather than determining that there is good cause for termination or a lesser sanction.

Under this construction, if the President in "good faith" believed an ALJ's decisions were mistaken, the President could remove the ALJ, even if this action infringed on the ALJ's decisional independence. Congress did not envision this interpretation, the MSPB and Federal Circuit have rejected it, and the USDA cannot unilaterally rewrite the statute to adopt it.

The USDA suggested in *Fleming* construing §7521 to limit the MSPB to determining "that factual evidence exists to support the agency's proffered, good-faith grounds for removal." USDA Br. 39. Only Congress can amend MSPB's jurisdiction under §7521, §7701(c)(1)(B) and §7513(a). Construing §7521 as the USDA suggests, will create a separation of powers problem more glaring than the one it attempts to solve. Solving the ALJs' dual-tenure separation-of-powers problem must be left to Congress.

No court has accepted the USDA's proposed statutory constructions of §7521, and certainly the USDA itself lacks such authority. Further, under the Union Contract, binding on the USDA by agreement with the Union, informal negotiations and formal arbitration proceedings are guided by the MSPB's and Federal Circuit's constructions of "good cause" and the determination of fault and an appropriate penalty.

Finding 5.6: ALJs, as officers with two levels of tenure protection, serve in contravention of the Constitution's separation of powers.

Judge Rao, prior to her appointment to the court, as a law school professor, was considered among the leading scholars on tenure protections and their relation to the President's authority to the see that the laws are effectively enforced. In her dissent in *Fleming*, she set forth an excellent argument why ALJ's dual-tenure protection contravenes separation of powers. Below, Judge Rao's dissent is set forth, edited only by removal of Judge Rao's discussion of §6912(e), her comments on the positions of the five amicus briefs supporting dual level system and her proposed remedy. Rather than put an "*id*" after every sentence, the page numbers from the decision appear at the end of the paragraphs. Other than those deletions, none of the opinion has been changed:

> This appeal raises an important structural constitutional question, namely whether administrative law judges, who are Executive Branch officers exercising significant executive power, can be insulated from the Chief Executive with two layers of for-cause removal protection. The Constitution and decisions of the Supreme Court provide a clear answer: such a double layer of independence contravenes the separation of powers and undermines the democratic accountability promoted by vesting all executive power in the President. [1104]
>
> Under the text, structure, and original meaning of the Constitution, as well as Supreme Court precedent, it is unconstitutional to insulate Agriculture ALJs with two layers of removal protection. [1113]
>
> The Constitution vests the executive power in a single person, the President. U.S. Const. art. II, § 1; *see also Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone."). The powers vested in the President and the unitary structure of the

Executive Branch mean that the President must control execution of the laws. In order to "take care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the President must be able to direct his subordinates in how the laws will be executed. Because "removal at will" is "the most direct method of presidential control," *Seila Law*, 140 S. Ct. at 2204, "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties,'" *id.* at 2191 (quoting *Free Enterprise Fund*, 561 U.S. at 513–14, 130 S.Ct. 3138). Placing the removal power squarely in the President's hands preserves "the chain of dependence," such that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 518 (1789) (statement of J. Madison).[1113]

This chain of dependence promotes democratic accountability by ensuring the President is "a single object for the jealousy and watchfulness of the people." *The Federalist* No. 70, at 479 (Alexander Hamilton) (Cooke ed. 1961). Moreover, the removal power reinforces the independence of the Executive—the absence of such control "would undermine the separate and coordinate nature of the executive branch." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1228 (2014). While the President can and must rely on subordinates, the power to remove those subordinates is a "structural protection[ ] against abuse of power" that is "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). [1113]

The President's removal power derives from the text and structure of the Constitution and "has long been confirmed by history and precedent." *Seila Law*, 140 S. Ct. at 2197. Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal power. The view that "prevailed" in the First Congress "as most consonant to the text of the Constitution" was that the Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power "remained with the President" unless "expressly taken away" by the Constitution. Letter from James Madison to Thomas Jefferson (June 30, 1789). [1113-14]

The Supreme Court has repeatedly returned to that original meaning in recognizing that "[s]ince 1789, the Constitution has been understood to empower the President to keep ... officers accountable—by removing them from office, if necessary." *Free Enterprise Fund*,

561 U.S. at 483, 130 S.Ct. 3138; *see also Bowsher*, 478 U.S. at 723–24, 106 S.Ct. 3181 (observing that the Decision of 1789 is "weighty evidence" of the scope of the removal power) (citation omitted); *Myers v. United States*, 272 U.S. 52, 111–36, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (discussing the Decision of 1789 at length); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259, 10 L.Ed. 138 (1839) (noting that the First Congress's understanding became the "settled and well understood construction of the Constitution"). Consistent with this original public meaning, the Supreme Court has emphasized that the executive power vested in the President includes nearly unfettered power to remove officers of the Executive Branch. [1114]

Moreover, the Court has recognized only two judicially created exceptions to the general constitutional requirement of "the President's unrestricted removal power." *Seila Law*, 140 S. Ct. at 2192. These exceptions "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 2199–2200 (quoting *PHH Corp.*, 881 F.3d at 196 (Kavanaugh, J., dissenting)). First, the Court has held that Congress may "create expert agencies led by a *group* of principal officers removable by the President only for good cause." *Id.* at 2192 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935)). Second, the Court has held that Congress may provide limited "tenure protections to certain *inferior* officers with narrowly defined duties." *Id.* (citing *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700 (1886)). The Supreme Court recently declined to elevate these exceptions "into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority." *Seila Law*, 140 S. Ct. at 2206 (cleaned up). [1114]

Of particular relevance to petitioners' challenge is *Free Enterprise Fund*, in which the Court explained that "Congress cannot limit the President's authority" by imposing "two levels of protection from removal for those who nonetheless exercise significant executive power." 561 U.S. at 514, 130 S.Ct. 3138. That case involved members of the PCAOB, who could be removed by the SEC only "for good cause shown." 15 U.S.C. § 7211(e)(6). Commissioners of the SEC, the Court assumed, could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise Fund*, 561 U.S. at 487, 130 S.Ct. 3138 (quoting *Humphrey's Executor*, 295 U.S.

at 620, 55 S.Ct. 869). Thus, two layers of for-cause removal protections insulated members of the PCAOB from presidential control. [1114-15]

The Court held that this "novel structure does not merely add to the Board's independence, but transforms it." *Id.* at 496, 130 S.Ct. 3138. "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. ... He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Id.* Refusing to sanction innovative intrusions on the President's removal authority, the Court held that the independence created by a double layer of tenure protection was unconstitutional. [1115]

The Constitution's vesting of executive power in a single President, the structure of separate and independent powers, and longstanding Supreme Court precedent confirm that the President has broad power to remove executive officers. The Court has also reaffirmed that any judicially created exceptions to the removal power must be construed narrowly in light of the President's constitutional responsibility to execute the law. [1115]

Under this framework, the "dual for-cause limitations on the removal" of ALJs "contravene the Constitution's separation of powers." *Free Enterprise Fund*, 561 U.S. at 492, 130 S.Ct. 3138. [1115]

First, ALJs are officers of the United States. As the government concedes and the majority agrees, this conclusion follows from the Court's decision in *Lucia*, because Agriculture ALJs are materially indistinguishable from SEC ALJs. For example, Agriculture ALJs have extensive control over hearings, including the authority to issue subpoenas, take and order depositions, admit or exclude evidence, and rule upon motions. 7 C.F.R. § 1.144(c). The ALJ's decision becomes final absent an appeal. *Id.* § 1.142(c)(4), § 2.27(a)(1). Agriculture ALJs also have career appointments, 5 C.F.R. § 930.204(a), pursuant to an authorizing statute, *see* 5 U.S.C. § 3105. Since *Lucia*, no appellate court has found that a particular agency's ALJs are not officers. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (extending *Lucia* to apply to Social Security Administration ALJs). *See also* U.S. Dep't of Justice, Memorandum: Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (2018) at 2 ("[W]e conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause."). Following *Lucia*, Agriculture ALJs are inferior Executive Branch

officers.[1115]

Second, as "Officers of the United States," ALJs exercise the Article II executive power on behalf of the President. To be sure, ALJs perform adjudicative functions and use adjudicatory procedures to execute the law. *See* 7 C.F.R. § 1.141. Whatever methods or functions are employed, however, officers of the Executive Branch cannot exercise anything but executive power:

> The [legislative power] is vested exclusively in Congress, the [judicial power] in the "one supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish." Agencies make rules ... and conduct adjudications ... and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the "executive Power." [1115-16]

City of Arlington v. FCC, 569 U.S. 290, 304 n.4, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (citations omitted); *see also Freytag*, 501 U.S. at 912, 111 S.Ct. 2631 (Scalia, J., concurring in part) ("[T]he Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power."). As Congress lacks the power to delegate to Executive Branch officers either the legislative power, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), or the judicial power, *Stern v. Marshall*, 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), ALJs can exercise neither. *See also Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring in part and dissenting in part) (explaining that Congress cannot "create agencies that straddle multiple branches of Government ... [f]ree-floating agencies simply do not comport with [the] constitutional structure"). [1116]

Third, while "Congress may afford the officers of [Executive Branch adjudicative bodies] a measure of independence from other executive actors ... they remain Executive–Branch officers subject to presidential removal." *Kuretski v. Comm'r*, 755 F.3d 929, 944 (D.C. Cir. 2014). As officers exercising the executive power, Agriculture ALJs must be accountable to the President. To secure the requisite constitutional accountability, officers must be in the chain of command to the President, with control generally provided by removal at will. *See Seila Law*, 140 S. Ct. at 2191. [1116]

Yet despite being Executive Branch officers wielding the executive power on behalf of the President, Agriculture ALJs are not subject to the President's control, either directly or through the Secretary of Agriculture. Congress insulated ALJs with two layers of for-cause removal protection: an agency may remove an ALJ "only for good cause established and determined by the [MSPB]," 5 U.S.C. § 7521(a), and members of the MSPB "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). [1116]

When the two for-cause removal restrictions are combined, neither the President nor the Secretary has any meaningful power to remove ALJs from office—for any reason, much less for "simple disagreement with [their] policies or priorities." *Free Enterprise Fund*, 561 U.S. at 502, 130 S.Ct. 3138. Because adjudication is the sole mechanism by which the USDA can execute statutes like the Horse Protection Act, *see* 15 U.S.C. § 1825(b)(1), an ALJ's double layer of independence deprives the President of any effective control over enforcement of such statutes. The two layers insulating Agriculture ALJs from removal are materially identical to the two layers that protected members of the PCAOB—an ALJ may be removed only for cause by a Board whose members may be removed only for cause. This is an unconstitutional infringement of the President's executive power. [1117]

While the Court has recognized that an inferior officer may be insulated from removal in some circumstances, *see Seila Law*, 140 S. Ct. at 2199 (citing *Morrison*, 487 U.S. at 662–63, 696–97, 108 S.Ct. 2597), that narrow exception to the President's removal power does not extend to two layers of for-cause tenure protection. A second layer of for-cause protection "contravene[s] the Constitution's separation of powers," because it results in officers who are "not accountable to the President, and a President who is not responsible for" his officers. *Free Enterprise Fund*, 561 U.S. at 492, 495, 130 S.Ct. 3138. [1117]

Under the double tenure protection in Section 7521(a), the Secretary cannot remove an ALJ who fails to follow the policy directives of the agency—the "second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so." *Id.* at 497 n.4, 130 S.Ct. 3138. This limitation on the President's oversight of the execution of the laws "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his

efforts." *Id.* at 498, 130 S.Ct. 3138. Thus, statutory insulation of ALJs with two layers of for-cause removal protection impedes the President's control over execution of the laws and violates the Constitution's structure of separate and independent powers. [1117-18]

Dodging the constitutional question, the government insists that we can and must interpret the double for-cause removal protection in Section 7521(a) to avoid running afoul of Article II. To reach this result, the government maintains that the "good cause" standard can be read to allow removal of ALJs for "misconduct, poor performance, or failure to follow lawful directions, but not for reasons that are invidious or otherwise improper in light of their adjudicatory function," and that such a reading would be sufficient to protect the President's executive power. Gov't Supp. Br. 31. [1118]

The Supreme Court, however, has repeatedly declined to read statutory removal restrictions contrary to their conventional and longstanding meaning, a meaning that includes a measure of independence from policy direction. As the Court has explained, "removal restrictions set forth in the statute mean what they say," and for-cause provisions generally do not permit removal based on "simple disagreement with ... policies or priorities." *Free Enterprise Fund*, 561 U.S. at 502, 130 S.Ct. 3138. In *Seila Law*, the Court likewise rejected constructions of "good cause" to allow for greater presidential control, because "we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority." 140 S. Ct. at 2207; *see also id.* at 2206 (noting that the government's saving construction would conflict with *Humphrey's Executor*, which "implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy"); *Free Enterprise Fund*, 561 U.S. at 503 n.7, 130 S.Ct. 3138 (finding the government's construction of good cause "implausibl[e]"), *PHH Corp.*, 881 F.3d at 191 n.16 (Kavanaugh, J., dissenting) ("[F]or-cause removal restrictions attached to independent agencies ordinarily prohibit removal except in cases of inefficiency, neglect of duty, or malfeasance.") [1118-19]

The government also fails to provide any criteria for separating what it considers "legitimate reasons" for removal from the invidious ones. Gov't Supp. Br. 32. *Cf. Seila Law*, 140 S. Ct. at 2206 (noting that the CFPB's defenders failed to articulate "any workable standard derived from the statutory language" for their interpretation of good cause). The government's ahistorical and unconventional interpretation

> would create substantial uncertainty about the degree of permissible presidential control of ALJs and run afoul of the separation of powers. Enforcing the President's constitutional power of removal through case-by-case statutory interpretation would leave courts to make the ultimate assessment of "good cause" for removal. Such a scheme would undermine the President's independent constitutional authority to ensure faithful execution of the law by controlling and directing his subordinates. [1119]
>
> Thus, I would reject the government's attempt to reconstruct "good cause" removal protections in a manner contrary to longstanding Supreme Court precedent. The double for-cause removal protection is not amenable to an interpretation that allows us to avoid the constitutional question. [1119]
>
> The law is clear: "[T]ext, first principles, the First Congress's decision in 1789 [and precedent] all establish that the President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206. The double layer of for-cause removal protection insulating the Agriculture ALJs violates the Constitution's separation of powers. Officers executing the law must be accountable to the President and, through this chain of command, to the people. I would therefore hold 5 U.S.C. § 7521(a) unconstitutional as applied to ALJs within the USDA. [1123]

Respondent adopts Judge Rao's arguments as Respondent's own arguments.

Conclusion 6: The ALJ must decide the merits of Respondent's structural constitutional claims prior to a trial on the merits of the Complainant's HPA claims.

The *Fleming* respondents, prior to any ALJ decision on the merits of APHIS' contentions, challenged the structural constitutionality of the USDA's authority to grant the relief sought in the complaint. Nonetheless, the ALJ declined to decide whether she was lawfully appointed, deferring to future decisions by the courts. On appeal to the Judicial Officer, the *Fleming* respondents argued that the ALJ should have decided she had no lawful authority to grant relief and that the Judicial Officer

was unconstitutionally appointed. The Judicial Officer decided a court must first decide the ALJ challenge. Fleming and his co-respondents appealed. Their structural constitutional challenge to the ALJ's unlawful appointment was sustained, the agency's order was vacated, and the cases remanded.

Finding 6.1: Respondent here should not be put through the USDA's constitutionally infirm adjudicatory process in order to prevail on the structural constitutional claims.

Any adjudication on the merits before the constitutional claims are decided by the ALJ will subject Respondent to a here-and-now harm, a violation of due process and deny Respondent's right to have the merits of the case adjudicated only by lawful adjudicators. Recently the Supreme Court reiterated that an administrative regime that "violates the separation of powers … inflicts a 'here-and-now' injury on affected third parties." *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). The Supreme Court emphasized that constitutional structural provisions are designed to protect individual rights, not institutions of government for their own sake. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222 (2011).

When litigants assert that they are being subjected to ongoing structurally unconstitutional proceedings, the litigants are not claiming that agency *action* will inflict injury when it becomes final, but that the agency *structure* is inflicting a here-and-now injury. In the context of individual constitutional rights, the answer to such

ongoing constitutional injuries is immediate action to eliminate the constitutional problem. *See, e.g.*, *Roman Cath. Diocese*, 141 S.Ct. 63, 67 (2020); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.).

Though the USDA fixed the ALJ inferior officer appointment problem *Lucia* addressed, it has not fixed the removability problem *Lucia* declined to reach. Nor has any court decided the Appointments Clause challenges to the authority of USDA ALJs and the Judicial Officer who make final decisions without principal officer review. Respondent's removal power claim and Appointment Clause challenges are directed against the *structural constitutionality* of the USDA's adjudicatory tribunal, not the legality or illegality of an agency merits-decision final order. Respondent's constitutional injury has nothing whatsoever to do with a final order.

Recently, in *Cochran v. SEC,* 20 F. 4th 194 (5th Cir. 2021), the court held en banc that the district court had jurisdiction to decide the structural constitutional challenge raised by the dual-tenure separation of powers issue even though the plaintiff was a respondent in an SEC enforcement proceeding. That decision is relevant here because it held the respondent in the administrative enforcement proceeding should not have to go through a burdensome and expensive administrative trial on the merits before she could obtain judicial review of her structural constitutional claims.

As in *Cochran* and *Free Enterprise Fund*, Respondent here challenges the

lawful authority of USDA's ALJs and Judicial Officer. The nature of Respondent's challenge is structural—it does not depend on the validity of any substantive aspect of the HPA or its regulations. Respondent is challenging the USDA's adjudicatory scheme itself. *Cochran,* 40 F. 4th at 207. Further, the outcome of Respondent's constitutional challenge to the ALJs' removal protection on the Appointments Clause claims will have no bearing on Respondent's ultimate liability for allegedly violating the HPA.

Consequently, Respondent does not seek relief of the sort the USDA's adjudicatory scheme is designed to provide. *Id.* at 207-208. The *Free Enterprise Fund* accounting firm sought structural relief. 510 U.S. at 215. The accounting firm in *Free Enterprise Fund* asserted that it was harmed by being investigated by a constitutionally illegitimate agency. Respondent is being harmed by a prosecution under the HPA by a constitutionally illegitimate USDA adjudicatory scheme.

Nor is there any guarantee Respondent will ever be able to vindicate Respondent's personal constitutional right to due process and a hearing before lawfully appointed and serving adjudicators. The USDA's statutory-review scheme under 15 U.S.C. §1825(b)(2) does not guarantee Respondent meaningful judicial review of Respondent's constitutional claims because the enforcement proceedings may not necessarily result in a final adverse order— a prerequisite for judicial review under §1825(b)(2).

Respondent may prevail on the merits, and the ALJ or Judicial Officer may enter an order of dismissal with prejudice. That dismissal order will not be appealable because Respondent will not have had a sanction entered under §1825(b)(1). Nor will the dismissal order be a lawful or binding order of dismissal with prejudice, since it will have been issued by unlawful adjudicators. Respondent will be unable to seek or redress the injury of having to appear for a merits-trial before the USDA. *Cochran*, 20 F.4th at 208. Hence, just as in *Free Enterprise Fund*, it remains possible that Respondent will not be able to obtain judicial review of the ALJ removal power claim and Appointments Clause claims unless the ALJ hears and decides them before a merits trial. *Id*. at 203.

It seems clear that if Respondent ends up without any avenue to having the constitutional claims heard by a court, judicial review is foreclosed, though the harm Respondent suffers in going through the adjudicatory proceedings is irreparable. To be sure, it is possible that Respondent could ultimately wind through enforcement proceedings, lose on the merits, and get some later chance at judicial review of the constitutional claims—but it is also possible that Respondent could never have that opportunity. *Id.* at 210.

A constitutional challenge to an agency's tribunal is in one important respect analogous to a motion for disqualification of a judge. Given that disqualification disputes concern the basic integrity of a tribunal, they must be resolved at the outset

of the litigation. Virtually every circuit allows parties to promptly challenge a judge's decision not to recuse. *See, e.g., In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (noting that "mandamus is an appropriate legal vehicle for challenging the denial of a disqualification motion"). The same logic applies to the Respondent's challenges to the USDA's administrative adjudicators. The claims should be decided as the first order of business. *Cochran,* 40 F.4th at 212.

If Respondent's structural constitutional claims are meritorious, then withholding an early consideration and decision would injure Respondent by forcing Respondent to litigate the case on the merits before an ALJ and Judicial Officer who are not appointed as principal officers and an ALJ who is unconstitutionally insulated from presidential control. *Id*. 212-213. *See Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (determining that the petitioners had adequately demonstrated hardship where withholding judicial review would have forced them to participate in an arbitration proceeding that they alleged to be "ultra vires"); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("The concrete cost of an additional proceeding is a cognizable Article III injury.") Both factors indicate that Respondent's removal power claim and Appointment Clause claims should be decided before a trial on the merits. *Cochran*, 40 F.3d at 212.

Any trial on the merits before the ALJ is preordained to become a nullity. Like *Fleming*, such proceedings violate the Respondent's constitutional rights to due process to be tried only before lawful, constitutional adjudicators. At a minimum, the presiding ALJ should decide whether Respondent really must suffer the constitutional injury of submitting to the jurisdiction of unaccountable executive officers before Respondent can challenge their constitutionality.

Finding 6.2: Respondent has exhausted administrative appeal procedures.

Fleming held that before a court in a USDA proceeding can consider any structural constitution challenge, the USDA must first have an opportunity to address the issue. That holding was based on 7 U.S.C. §6912(e), which provides:

> **(e) Exhaustion of administrative appeals**
> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against--
> **(1)** the Secretary;
> **(2)** the Department; or
> **(3)** an agency, office, officer, or employee of the Department.

Before Respondent can seek judicial review of an a USDA decision, the USDA must be afforded the opportunity to address and decide the issue. This does not require a respondent in an HPA case to go through a trial on the merits and have a penalty entered under §1825(b)(1) before the respondent can go to court on

constitutional structural issues that have nothing to do with the merits of the charges brought by APHIS.

Finding 6.3: Respondent and the USDA can have access to a court to resolve the structural constitutional issues before a trial on the merits.

Deciding Respondent's structural constitutional claims before a trial on the merits will afford Respondent, or the USDA, to seek judicial review while avoiding a trial on the merits. Unlike the SEC and other agencies, whose statutes arguably vest exclusive jurisdiction in a court only after a final adverse decision, the HPA expressly provides for district court jurisdiction over disputes other than the final order issued after a trial on the merits.

The HPA, 15 U.S.C. §1825(d)(6) provides:

> The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in subsection (b) of this section.

Several cases have recognized plaintiffs' right to sue in district court under §1825(d)(2) before a decision on the merits. In *McSwain v. Vilsack*, 2016 WL 4150028 (N.D. Ga. 2016) the district court enjoined APHIS from disqualifying a horse, Honors, from events unless it provided due process to the plaintiff.

The Animal Welfare Act, 7 U.S.C. §2146(c) is identical to §1825(d)(6). In *Haviland v. Butz*, 543 F.2d 169 (D.C. Cir. 1976), the court held that "the District

Court had power to deal with [this] lawsuit" because §2146 "confers jurisdiction on federal district courts in all …kinds of cases arising under this chapter" except where jurisdiction is vested in another court. In *Marshall v. Barlow*, 436 U.S. 307, 321, fn. 19 (1978), the Court noted that

> Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts are vested with jurisdiction "specifically to enforce and prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter."

In *Whitehead Street Inc. v. USDA,* Case 4:09-cv-10050-JEM (S.D. Fl. 2009) (unreported), the district court held it had jurisdiction under §2146(c) over the plaintiff's declaratory judgment suit. On appeal the USDA did not challenge the district court's jurisdiction and stated: "Plaintiff invoked the district court's jurisdiction pursuant to 7 U.S.C. §2146(c) and 28 U.S.C. §§ 1331, 1337." *See, Whitehead Street Inc. v. Secretary U.S. Depart. of Agriculture*, 701 F.3d 1345(11th Cir. 2012).

In *Big Cats of Serenity Springs, Inc. v. Vilsack*, 84 F. Supp. 3d 1179 (D. Colo. 2015), the plaintiffs pled a violation of their Fourth and Fourteenth Amendment constitutional rights in a *Biven*'s action for damages. In ruling on a Rule 12(b) motion, the court affirmed its jurisdiction under §2146(c), but dismissed some of plaintiffs' claims. On plaintiffs' appeal, the USDA did not challenge the district

court's jurisdictional decision. *Big Cats of Serenity Springs, Inc. v. Vilsack,* 843 F. 3d 853 (10th Cir. 2016).

Section 1825(d)(6) provides that either party to a dispute, except in an appeal under §1825(b)(2) from the Secretary's order imposing a penalty after an administrative proceeding on the merits, can file a lawsuit in district court. Thus, if the ALJ in this proceeding dismisses this case against Respondent because of the structural constitutional challenges, then APHIS can appeal that order to the Judicial Officer. If the Judicial Officer affirms the dismissal because the USDA's ALJs and Judicial Officer are not constitutionally appointed, then the USDA can file a lawsuit in district court requesting a declaratory judgment resolving Respondent's claims the ALJs and Judicial Officer serve in contravention of the Constitution. The Article III courts are open to the USDA to determine this controversy without having to have a trial on the merits.

Likewise, if the ALJ in this proceeding does not dismiss the case against Respondent on the structural constitutional claims, then, under the Rules of Practice, it does not appear the Respondent can appeal to the Judicial Officer. The Respondent would have exhausted all administrative appeal procedures, as required by §6912(e). The Respondent could then file a lawsuit in district court requesting a declaratory judgment resolving the Respondent's claims that the ALJs and Judicial Officer serve in contravention of the Constitution. Article III courts are open to the USDA and to

Respondent to determine this controversy without having to have a trial on the merits.

Under 15 U.S.C. §1825(d)(6), after a decision by the ALJ or Judicial Officer, either party can take the Respondent's structural constitutional challenges to a district court for decision without putting Respondent through a merits trial in violation of due process and a right to have a trial before lawfully appointed adjudicators.

Conclusion 7: The Complaint against Respondent must be dismissed because the USDA's ALJs and the Judicial Officer have no lawful authority to grant binding relief for Complainant or Respondent.

Finding 7.1: The Secretary has no authority under the prevailing statutes, rules or regulations to intervene in, supervise or direct USDA ALJs or the Judicial Officer in performing their adjudicatory functions.

The Secretary is bound by the USDA's procedural rules and regulations, as is Respondent. If the Secretary delegates final decision-making authority to the Judicial Officer, "all provisions of law shall be construed as if the regulatory function had … been vested by law in the individual … instead of the Secretary." 7 U.S.C. §2204-3. The Secretary, under 7 C.F.R. §2.35, has delegated final decision-making authority to the Judicial Officer. Thus, "as long as the regulations remain operative, the [Secretary] denies himself the right to sidestep the [Judicial Officer] or dictate [his or her] decision in any manner." *See United States ex rel. Accardi v Shaughnessy*, 347 U.S. 260, 267 (1954).

Likewise, with the ALJs. The Secretary has designated to ALJs appointed under 7 C.F.R. §2.27, the sole authority to preside over adjudications governed by 5 U.S.C. §§556-557 and to issue initial decisions. The Secretary has not reserved for himself, the authority to direct or supervise ALJs in their adjudicatory or decision-making activities. Indeed, the Secretary in §2.27 expressly delegated to the Chief Administrative Law Judge "administrative responsibilities subject to the guidance and control of the Assistant Secretary Administration." The Chief ALJ also has responsibility for the administrative activities of the Office of Administrative Law Judges and the duty to direct the Hearing Clerk. *Id*. By implication, these explicit delegations to the Chief ALJ of administrative authority over the office of ALJs, negates the authority of any official, including the Chief ALJ, from interfering with the independent decision-making authority of the individual ALJs.

More significantly, no statute, rule or regulation authorizes a principal officer to supervise or direct USDA ALJs or the Judicial Officer in carrying out their adjudicatory and decision-making functions. Under the APA, "the presiding official … must be a duly appointed ALJ, *id.* at §556(b), who must render a recommended decision on a closed record with a statement of reasons, *id.* at §557(c), and without any *ex parte* contacts relevant to the proceeding, *id.* at 557(d)." *Loumiet v. United States*, 948 F.3d 376, 384 (D.C. Cir. 2020). As a result, under the USDA's novel

enforcement scheme, USDA ALJs and the Judicial Officer must be appointed as principal officers by the President with Senate confirmation.

Finding 7.2: The USDA's ALJs and Judicial Officer cannot lawfully determine the Respondent violated the HPA and impose a penalty, nor can it grant lawfully a binding dismissal with prejudice to the Respondent that it did not violate the HPA.

USDA ALJs' and the Judicial Officer's appointments violate the Appointments Clause. Additionally, the ALJs' dual tenure protection impedes the President's authority to see to the faithful execution of the laws. Addressing the separation of powers issue, Respondent does not contend 5 U.S.C. § 1202(d), § 3105 or § 7521 are facially unconstitutional. Rather, Respondent complains that the USDA's HPA adjudication enforcement system, as applied, violates the Appointments Clause and separation of powers doctrine. As a result, USDA ALJs and its Judicial Officer cannot lawfully adjudicate this case and grant the sanctions Complainant requests. Likewise, a decision in favor of Respondent at the conclusion of a trial on the merits would not lawfully be *res judicata* to the USDA refiling the case. Just as the presiding ALJ cannot grant Complainant's relief, the ALJ cannot lawfully grant Respondent a binding dismissal with prejudice. It takes a lawfully serving Judge to grant either party legally binding relief.

With regard to the dual-tenure separation of powers problem, the USDA cannot cure this constitutional conundrum by reinterpreting or declaring unconstitutional and severing an offending statute. In *Lucia*, the Court did not

declare a statute unconstitutional; rather, it held that, because the SEC ALJ was not lawfully appointed, the final decision entered by the SEC had to be vacated and the case remanded for a hearing before a different and lawfully appointed ALJ.

That cannot be done in this case. Under the USDA's existing rules and regulations, there is no way to lawfully appoint an ALJ. USDA ALJs' initial decisions become final without possible supervisory review by an Executive Branch principal officer. Nor is there any solution that would permit a Judicial Officer to make a lawful decision in Respondent's case. The Judicial Officer is appointed by the Secretary, but is authorized to make final decisions that only a principal officer can make. The only option is to declare the USDA's HPA adjudication system unconstitutional as applied and dismiss the complaint without prejudice.

The Supreme Court, in *Reid v. U.S.*, held that judges "are bound to take notice of the limits of their authority…." 211 U.S. 529, 538 (1909). The limits of the USDA's ALJs and Judicial Officers authority in this case are evident – neither has the authority to enter any legally binding order on the merits at this time. Theoretically, Congress, or the courts, could resolve the dual-tenure conflict so that ALJs' appointments as officers do not contravene separation of powers. The USDA could change its rules and regulations to eliminate the Judicial Officer's power to make final decisions, thus resolving that Appointments Clause violation. Under such circumstances, ALJs would have the lawful authority to adjudicate a case like

Respondent's. But, having failed to resolve these constitutional issues during the last five years the USDA has been litigating them, the Agency has left the ALJ presiding over this case no alternative but dismissal.

Finding 7.3: Respondent's constitutional challenges must be decided before a trial on the merits.

In *Fleming*, the USDA argued that constitutional issues should not be decided by the Court if that can be avoided. It noted that if Fleming's case was remanded, for an ALJ trial on the merits. Mr. Fleming might prevail, obviating any need to decide the undecided constitutional issues. What the USDA did not explain is how an ALJ who Fleming correctly claimed served in violation of the Constitution could lawfully enter an order of dismissal that would be *res judicata* to a refiling of the complaint if the constitutional infirmities were corrected. To have a trial on the merits presupposes the lawful authority of the ALJ to grant relief, begging the very question raised challenging the ALJ's lawful authority to grant relief. The constitutional issues must be decided before a trial, to decide whether there can be a trial.

Finding 7.4: If the ALJ decides she is not constitutionally appointed and her dual-tenure protection contravenes separation of powers, the only order that can be entered is dismissal of the complaint without prejudice.

USDA precedent compels dismissal of a complaint when the presiding judge has no authority to grant the relief requested. This principle was applied on May 26, 2011, in *In re: Corey Lea*, Docket Nos. 11-0180 and 11-0252, rehearing denied 2011

WL 28544039 (U.S.D.A.), a civil rights case requesting an ALJ hearing. The case was dismissed by the ALJ without prejudice, and as a result, Mr. Lea filed an amended petition, which was also dismissed because the "OALJ does not have jurisdiction to adjudicate Petitioners' Complaints." *Id.* *2.

Corey Lea was not deterred. On August 29, 2016, Mr. Lea filed another Amended Petition in the same two previously dismissed cases, again requesting a hearing before an ALJ. Judge Clifton dismissed the amended complaint and an appeal was taken. The Hearing Clerk transmitted the file to the Judicial Officer, who affirmed the dismissal. *In re: Corey Lea,* 2016 WL 7785973 (U.S.D.A.) The persistent Mr. Lea then filed a motion for summary judgment, which the Judicial Officer denied based on the prior dismissal. *In re: Corey Lea*, 2017 WL 167997 (U.S.D.A.).

In 2013, ALJ Davenport dismissed another civil rights case, *In re: Roque*, Doc. No. 13-0321, because there was no authority for an ALJ to hear the action. On November 17, 2015, ALJ Bullard dismissed another civil rights case without prejudice because ALJs lacked jurisdiction to grant relief. *In re: Wise*, Docket number 16-0002. The Wises, undeterred by one loss, enlisted the now very experienced Mr. Corey Lea as their representative, and filed two new petitions, Docket numbers 16-0161 and 0162. These cases were assigned to ALJ Clifton, who dismissed the petitions with prejudice. *In re Wise*, No. 16-0161, 2016 WL 6235795

(U.S.D.A.) (Sept. 22, 2016) (dismissal with prejudice). Judge Clifton's order was affirmed by the Judicial Officer. 75 Agric. Dec. 531 (2016) (affirmed based upon the ALJ's lack of authority to grant relief).

Corey Lea continued to file civil rights cases as the representative for several petitioners. All of which were dismissed with prejudice because ALJs lacked the authority to grant relief. See *In re Nelson,* Docket Nos. 16-0156 and 0157; *In re Parker*, Docket No 16-0065; *In re: Carpenters and Clark*, Docket Nos. 16-245-0250; *In re Nelson*, Docket Nos. 16-0156- 0157; *In re: Oden*, Docket No. 0167; *In re Douglas*, Docket No. 17-0212; *In re: Carpenters*, Docket Nos. 17-0247-0251; and *In re: Kennedy*, Docket No. 17-0259.

USDA ALJs have consistently dismissed cases where they lacked lawful authority to decide them, and those decisions have been affirmed by the Judicial Officer. *See*, *In re Douglas*, No. 17-0212, 2017 WL 2721894 (U.S.D.A.) (March 20, 2017) (dismissing case because ALJs "have no authority to grant the relief requested."); *In re Carpenter*, No. 17-0245, 2017 WL 3085777 (U.S.D.A.) (April 20, 2017) (ALJs "have no authority to grant relief requested.")

Possibly the switch from dismissals to dismissals with prejudice in the flood of civil rights cases was motivated in part by the many identical cases being filed with the Hearing Clerk, especially by Mr. Lea. Possibly these petitioners, and in particular Mr. Lea, would get the message if the dismissals were with prejudice, i.e.,

these cases cannot be filed in this forum. And that was true. There was no way, at the time or in the future, that the ALJs would have authority to grant relief.

That is not the case in Respondent's proceeding. The government could correct or remedy the constitutional problems in this case. The Tax Court provides an example. The Tax Court's judges are principal officers. The Chief Judge is authorized to appoint Special Trial Judges as inferior officers to whom cases are assigned for trial and a recommended decision. The STJs are supervised by the Chief Judge, and the STJs' decisions do not become final unless the taxpayer so consents prior to trial, or a Tax Court Judge reviews and adopts the STJ's decision. Under this system, the STJs are lawfully appointed inferior officers by the Chief Judge because their decisions are subject the review by a principal officer. The Tax Court's judges are also free from influence by the Internal Revenue Service and Secretary of the Treasury Department. *See, Freytag v. Commissioner,* 501 U.S. 868 (1991).

Since the presiding ALJ in this case has no authority to grant binding relief to either party, the order that should be entered in Respondent's case is a dismissal. Dismissal is the relief Respondent requests.

Respectively Submitted,

/e/ David Broiles

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Attorneys for Respondents

I, David Broiles, declare under the penalty of perjury that the statements above are true, based on personal knowledge, information and belief or a founded opinion. Signed in Fort Worth, Texas on February 24, 2022.

s/ David Broiles

CERTIFICATE OF SERVICE

Under penalty of perjury, I affirm that I served this document on the Hearing Clerk, OALJ, via email at SM.OHA.HearingClerks@usda.gov, on February 24, 2022, pursuant to the Judge's instructions.

____/s/ Karin Cagle_____
Karin Cagle

CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc. .	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walter	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the E-MAIL CONFIRMING NOTICE OF APPEARANCE AND MOTION TO DISMISS: THE USDA ADMINISTRATIVE LAW JUDGES AND JUDICIAL OFFICER HAVE NO LAWFUL AUTHORITY TO GRANT THE RELIEF COMPLAINANT REQUESTS has been furnished and was served upon the following parties on February 24, 2022 by the following:

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Respectfully Submitted,

CAROLINE HILL Digitally signed by CAROLINE HILL
Date: 2022.02.24 15:34:58 -05'00'

Caroline Hill, Hearing Clerk
USDA/Office of Administrative Law Judges
Hearing Clerks' Office, Rm. 1031-S
1400 Independence Ave., SW
Washington, DC 20250-9203

Exhibit 8
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	)	HPA Docket No. 16-0169
a/k/a Jimmy McConnell, an individual;	)	HPA Docket No. 17-0207
Formac Stables, Inc.;	)	HPA Docket No. 16-0170
	)	HPA Docket No. 17-0204
Christopher Alexander, an individual;	)	HPA Docket No. 17-0195
Kelsey Andrews, an individual; and	)	HPA Docket No. 17-0198
Taylor Walters, an individual,	)	HPA Docket No. 17-0211
	)	
Respondents	)	

Complainant's Response to Respondent's Motion to Dismiss: The USDA Administrative Law Judges and Judicial Officer Have No Lawful Authority to Grant the Relief Complainant Requests

On February 24, 2022, Respondents filed the motion to dismiss referenced above. Respondents argue that the cases captioned above should be dismissed because the United States Department of Agriculture's (USDA's) Administrative Law Judges (ALJs) and Judicial Officer (JO) are not properly appointed under the Appointments Clause of the U.S. Constitution, Art. 2, § 2, cl. 2, and thus have no legal authority to adjudicate these cases. For the reasons cited below, Respondents' motion should be denied.

1. Respondents' counsel represented Joe Fleming in In re: Joe Fleming, HPA Docket No. 17-0123, and raised the same arguments before the JO in an appeal petition and supporting brief filed on Mr. Fleming's behalf on May 10, 2017. On June 6, 2017, then-JO William G. Jenson issued an order and decision as to Respondent Fleming denying his motion. The JO stated in pertinent part:

> *The federal courts have made no final determination that administrative law judges generally—or United States Department of Agriculture administrative law judges specifically—lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States'*

> *Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so.* . . . The Rules of Practice provide for appeals of the initial decisions of administrative law judges and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture. Based upon the provisions for judicial review in the Horse Protection Act, I find *challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States Court of Appeals.* Moreover, Mr. Fleming cannot avoid or enjoin this administrative proceeding by raising constitutional issues. As the United States Court of Appeals for the Seventh Circuit stated: This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. . . .
>
> *To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature.* Therefore, I reject Mr. Fleming's contention that this case must be dismissed because the Chief ALJ had not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States (emphasis added). In re: Beth Beasley et. al, Decision and Order as to Joe Fleming, 2017 WL 9473093 (U.S.D.A.) (Nov. 6, 2017) at 2-3 (internal citations omitted).

The JO also rejected Mr. Fleming's argument that he, too, was unlawfully and unconstitutionally appointed, noting that (1) Congress had authorized the Secretary of Agriculture to delegate his authority to implement the Horse Protection Act to an officer or employee of USDA who would act as the deciding officer in lieu and on the behalf of the Secretary, that the Secretary had created the office of the "Judicial Officer" for this very purpose, and that a prior Secretary had appointed him as Judicial Officer in January 1996 and then-Secretary Sonny Perdue had re-appointed him to the same in June 2017; and (2) the JO serves at the pleasure of the Secretary and has been subject to a performance appraisal by either the USDA's Assistant Secretary for Administration or the Deputy Secretary of Agriculture since August 2015, thereby rendering his

exercise of decision making authority subject to the supervision of a principal officer in the USDA. Id. at 4.

2. On March 27, 2017, and March 29, 2017, Respondents filed motions to disqualify the ALJs and JO and to dismiss the proceedings in the present matter on grounds the same as or substantially similar to those set forth in their February 24, 2022 motion. On April 18, 2017, Complainant filed a response to these motions, and on June 13, 2017, Judge Clifton filed an order denying Respondents' motions to disqualify and dismiss. Echoing the JO's decision and order as to Mr. Fleming, Judge Clifton stated that the present Respondents' motion to disqualify was "premature for adjudication" because Respondents were "attempting to raise a constitutional issue that can and should be raised in administrative proceedings to preserve them [sic] for appeal *if an appeal is necessary and appropriate* but which is not ripe for adjudication until *after exhaustion of administrative remedies*." *See* Judge Clifton's Order Denying Motion to Disqualify Administrative Law Judges, and Judicial Officer, Motions to Dismiss, and Request for Certification of Issues at 3-4. Judge Clifton likewise stated that

> *[T]he federal courts have not made a final determination as to the authority of ALJs generally or the Department's ALJs specifically*. The Rules of Practice explicitly provide for appeals of the decisions of the ALJs, and the HPA provides for appellate review of the decisions of the Secretary. *The status quo should be maintained unless or until the federal courts rule otherwise* (emphasis added). Id. at 5.

3. Though there have been intervening court decisions addressing the constitutionality of the appointments of the ALJs at various other federal departments and agencies, it remains the case today that "[t]he federal courts have made no final determination that [ALJs] generally—or [USDA ALJs] specifically—lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act" and that "[t]o disqualify [ALJs] and dismiss administrative

proceedings in advance of a final determination by the federal judiciary as to the authority of those [ALJs] to preside over administrative proceedings would be premature."[1] For these reasons, "[t]he status quo should be maintained unless or until the federal courts rule otherwise"[2] and Respondents' current motion to dismiss (and all such future motions) should be denied.

4. Finally, Complainant re-iterates Judge Clifton's previous holding that Respondents' arguments challenging the constitutionality of her appointment and those of the Department's other ALJs and the JO are "not ripe for adjudication until after exhaustion of administrative remedies." Complainant further re-iterates the JO's previous holding that "challenges to the constitutionality of the [USDA ALJs] and the administrative process should be raised in an appropriate United States Court of Appeals." However, Complainant notes that, notwithstanding the foregoing, Judge Clifton stated during her February 15, 2022 conference call with Complainant and Respondents' counsel that she felt compelled to rule on Respondents' constitutional challenges to her appointment and those of her fellow ALJs and the JO[3] but also stated that she will not do so unless and until she issues her initial decision in the present matter.[4] Complainant thus re-asserts and affirms the arguments that it made in its April 18, 2017 response to Respondents' March 2017 motions to disqualify and dismiss to the degree that those arguments remain relevant. If the issues that Respondents raised in their present motion require

[1] 2017 WL 9473093, at 2-3.

[2] Judge Clifton's Order Denying Motion to Disqualify Administrative Law Judges, and Judicial Officer, Motions to Dismiss, and Request for Certification of Issues at 5.

[3] In light of the JO's decision and order as to Mr. Fleming that the appropriate U.S. Court of Appeals is the proper forum for addressing such complex constitutional issues, Complainant contends that neither Judge Clifton nor the JO should attempt to decide them but should pass them on to said Court, should an appeal to that Court become "necessary and appropriate" following the conclusion of the administrative process.

[4] In so doing, Judge Clifton effectively and pre-emptively denied Respondents' current motion to dismiss this proceeding and any such motions that they are likely to file in the future.

a more fulsome response, Complainant reserves the right to fully brief them in its post-hearing brief, should one actually become necessary.

Respectfully submitted,

THOMAS BOLICK

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Thomas N. Bolick
Attorney for Complainant

DANIELLE PARK

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Danielle Park
Attorney for Complainant

Exhibit 9
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**
Respondents	

Response to Complainant's March 8, 2022 Motion to Dismiss Certain Violations with Prejudice.

Respondent Jimmy McConnell owns Formac Stables, where, at the relevant times, Respondent Chris Alexander was employed and Respondents Kelsey Andrews and Taylor Walters board horses for training and showing in Tennessee Walking Horse events. All have been charged with numerous alleged Horse Protection Act violations, some of which are still pending in the cases numbered above. The Complainant has requested the Judge dismiss many still pending allegations because "Complainant's Show Horse Protection Program (the program) has determined that it is not necessary to pursue these violations at this time in order to effectuate the program's purposes."

Any adjudicatory tribunal has the authority to dismiss cases about which it cannot grant the relief the plaintiff seeks. Respondents join this Complainant's request to dismiss the allegations it no longer seeks to prosecute, and commend those making the agency's decision. However, Complainant identifies a number of allegations it seeks to retain and try or complete, which Respondents oppose for the reasons presented below.

The allegations against Respondents the Complainant seeks to retain have been assigned to an ALJ for initial decision. The USDA ALJ does not have lawful authority to grant the relief sought. Respondents have a constitutional right to be tried before a lawful tribunal. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F. 3d 990,1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Fleming v. USDA*, 987 F. 3d 1093 (D.C. Cir. 2021) established that respondents in USDA enforcement proceedings are entitled to a trial before a constitutionally lawful tribunal, and that the USDA proceeding to enter a final order on the merits violated those respondents' constitutional rights.

The USDA cannot feign ignorance of the ALJ's constitutional defects and thereby subject the individual Respondents to an enforcement system whose final decisions are void ab initio. The USDA's position, that it wants to try 18 allegations before there is a decision on whether the ALJ has constitutional authority to do so,

and that this is merely the cost of doing business, reduces a matter of constitutional right – and the principle that our government is subject to the rule of law bounded by the Constitution – to a nullity.

In Part I, Respondents specifically identify the allegations against them made in eight Complainants and identify those that have been or should be dismissed. In Part II, Respondents set forth their objections to retaining any of the remaining allegations for trial.

I. USDA's Allegations Against the Respondents.

A. Docket Nos. 13-0367 and 13-0373 against McConnell.

Complainant initiated two HPA enforcement proceedings against Jimmy McConnell on September 23, 2013, which alleged McConnell entered Up for Parole (13-0367) and Dark and Shady (13-0373) in 2011 in an event in violation of the HPA.[1] Exhibit 1. On September 18, 2014, an Amended Complaint in 13-0373 adding case 14-0200 against McConnell's business entity Formac Stables, Inc. Exhibit 2.

On October 24, 2014, Judge Clifton issued an order in 3-0373, 13-0374, 13-0375, and 14-0200 (Dark and Shady) dismissing 13-0374 concerning the case

[1] This response references some documents that are not a part of the records in the above styled cases. Those documents, and the others that are referenced herein and are a part of some cases in these proceedings, are marked as exhibits and submitted separately. This is the only way a complete record could be before a court of appeals in any appealed case.

become final without principal officer permission, and whether ALJs' dual tenure protections contravene separation of powers.

As Respondents' motion to dismiss on constitutional grounds makes clear, the USDA's adjudicative scheme is rife with unconstitutional problems that deny Respondents their constitutional right to a lawful trial. In *Fleming*, as in these Respondents' cases, the USDA argues that the presiding ALJ should not decide the constitutional challenges. Rather, APHIS insists 18 HPA allegations be tried by an ALJ who has not determined she is a lawfully appointed to hear the cases. Only then, if necessary, could a court decide whether the judge had authority to decide the cases.

That is the use of litigation to coerce Respondents into waiving their constitutional rights, and settling because they can't afford to fight. If they chose to fight, Respondents will try the 18 retained cases before an ALJ who declines to address whether she has any lawful authority to grant the relief Complainant requests, while Respondents pay tens of thousands of dollars in order to eventually have a court decide Respondents' constitutional rights to a trial in a lawful tribunal have been violated.

APHIS' request to put Respondents through hearings on 18 allegations before the judge's lawful authority is even addressed is a continuation of the USDA's effort to use litigation to coerce Respondents into waiving their

constitutional rights. Worse, APHIS and the OGC urge Your Honor to be a party to this abuse.

On February 24, 2022, Respondents filed a motion to dismiss based on the fact the USDA ALJs are principal officers who are not lawfully appointed and that their dual tenure protection contravenes separation of powers. Respondents also argued that the Judicial Officer was serving unlawfully as a principal officer because his decisions become final without permission from an Executive Branch principal officer. Finally, the Respondents contended the USDA ALJs' dual-level tenure protection contravened separation of powers. The 106-page motion to dismiss is incorporated herein as though fully set forth, and is a part of the files in these cases.

On March 15, 2022, the Complainant filed its response to the motion to dismiss. Exhibit 20. Rather than directly address the Respondents' constitutional issues, Complainant argues that Your Honor should follow Judicial Officer Jenson's decision in *In re: Fleming,* where he held that the "federal courts have made no final determination that administrative law judges specifically – or United States Department of Agriculture administrative law judges specifically–lack constitutional authority to preside over administrative disciplinary proceedings initiated by the Secretary of agriculture in accordance with the Administrative Procedure Act." *Fleming,* 2017 WL 9473093 (U.S.D.A.), reversed and vacated, *Fleming v. USDA*, 987 F. 3d 1093 (D.C. Cir. 2021).

Again, from Judicial Officer Jenson's reversed and vacated nonprecedential *Fleming* decision, Complainant argues that the "Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture until there is a final determination by federal courts that they lack the authority to do so…." Exhibit 20, pp. 1-2. The response concludes by restating the USDA's position that such challenges "should be raised in an appropriate United States Court of Appeals." Exhibit 20, p. 2.

This is not a legal argument. It is a request that Your Honor ignore your duty to uphold the Constitution, and if the Respondents don't agree to the Agency's terms, they will proceed to try 18 cases, which any court of appeals will subsequently reverse. The USDA, as in the *Fleming* administrative proceedings and judicial appeal, does not want the constitutional status of its adjudicative system decided; thus, it will not have to cure the constitutional defects.

There are several problems with this position. First, the authority cited to support the agency's request was reversed and vacated. It was wrong to begin with. APHIS cites no legal authority holding that constitutional challenges to an ALJ's authority cannot be decided by the ALJ. Indeed, as officers, ALJs have sworn to uphold and defend the Constitution of the United States. That includes not violating a party's constitutional right to a trial before a lawful authority. That is an ALJ's first, and most important obligation, which should not be trumped by the ALJ's

agency conflicting interests. Were the ALJ in this case to uphold the Constitution and hold she cannot grant the relief Complainant requests; the first consequence would be that because she cannot decide the cases they should be dismissed without prejudice. Another consequence would be someone, or maybe Congress, undertakes to fix the problem.

Before the Court of Appeals in *Fleming*, the USDA flipped 180 degrees from its position in the administrative proceedings, argued that the Agency, not the Court, should first decide the same constitutional issues raised here, and it requested the Court remand them without decision. The Court did. In the *Fleming* cases, the USDA's ALJs, OGC and Judicial Officer refused to decide any constitutional challenges in the administrative proceedings, contending that in an HPA proceeding the Agency lacked jurisdiction. As a result of the Agency's conduct, over four years of proceedings, Fleming's attorneys spent around 2,000 hours litigating against the Agency. But the USDA accomplished its goal. It avoided having the constitutional defects of its adjudicatory system decided by a court.

Complainant argues that in 2017, in the cases subject to its motion to dismiss, Judge Clifton denied a Motion to Disqualify as "premature" because, she said, the constitutional issues could and should only be raised in a judicial appeal from an adverse Agency final order. Exhibit 20, p. 3. Complainant then requests Judge Clifton follow her prior decision, holding that until there is a final decision by the

courts on the constitutional challenges to the ALJs' authority, "the *status quo* should be maintained…." Exhibit 20, p. 3.

But what is the *status quo* in this HPA proceeding? The *status quo* results in both parties remaining in the same position until an event occurs that allows the cases to proceed, e.g., a court decision on the issues. In other words, the Complainant contends that the *status quo* is to proceed with hearings on 18 allegations, knowing that, as happened in *Fleming,* thousands of the participants' attorneys' hours and hundreds of thousands of dollars might be wasted.

The *status quo* is not maintained if this litigation proceeds. A litigation battle between Mr. Alexander, who trains horses in Tennessee, and the USDA, with a $100,000,000,000 budget and 105,000 employees, is more than a little lopsided. To continue the litigation until some court decides the constitutional issues to the USDA's satisfaction punishes an individual, like Mr. Alexander, by burdening him with the cost of litigation.

That is what the USDA wants here. It wants Your Honor, without deciding the constitutional challenges —which would lead to dismissals -- to retain 18 allegations for hearing. Delaying the inevitable, which waiting for a court decision does, allows the USDA to continue its unconstitutional and cost-effective enforcement scheme rather than cure the defects.

An alternative for maintaining the *status quo* would be to stay the proceedings until a court decides the constitutional issues. But this incorrectly assumes no court has decided these constitutional issues. The Supreme Court has.

The best alternative for maintaining the *status quo* is for the ALJ to abide by her oath to uphold the Constitution. That would entail deciding the constitutional challenges to her authority to hear these cases and grant relief. The Supreme Court has already enunciated the legal principles controlling the constitutional issues.

Respondents set out at length their arguments why the USDA ALJs have no lawful authority to adjudicate these proceedings. They have also shown that the only order that can be issued is one acknowledging USDA ALJs lack authority to decide HPA enforcement cases and dismiss the cases without prejudice.

To Respondents' substantive constitutional arguments, the USDA made no response. It does not even contend the USDA ALJs are lawfully appointed. Rather, as in *Fleming*, it again seeks to avoid a decision on the constitutional challenges. The agency has no answers to, or defenses against, these challenges; it seeks to continue its unconstitutional and cost-effective adjudicatory scheme. Complainant wants to use the threat of time-consuming and expensive hearings to coerce Respondents into waiving their constitutional rights. Complainant clearly states its position: "Complainant contends neither Judge Clifton nor the JO should attempt to decide [such complex constitutional issues] but should pass them on to [the

appropriate U.S. Court of Appeals] should an appeal to that Court become 'necessary and appropriate' following the conclusion of the administrative process." Exhibit 20, p.4, fn. 3.

Inconsistently, Complainant concludes its response to Respondents' motion to dismiss by stating that "[i]f the issues that Respondents raised in their present motion require a fulsome response, Complainant reserves the right to fully brief them in its post hearing brief, should one actually become necessary." Exhibit 20, pp. 4-5. Apparently, the issues are not "such complex constitutional issues" that the USDA Office of Legal Counsel could not address them now if it wanted to. It would prefer not to do so now, but might after extensive hearings. It is worth noting that after the last round of hearings, the Agency dismissed many of the allegations it tried.

In failing to substantively address the constitutional issues now, Complainant fails to show that the issues are so complex that Judge Clifton or Judicial Officer Walk are not capable of deciding them. And the issues are not complex. Indeed, the constitutional issues have been clearly decided by the Supreme Court. There is no future decision by some court needed for resolution. These constitutional issues have been decided: (1) ALJs and agency adjudicating officers cannot be appointed by a Department Head if their decisions become final without being permitted by an Executive Branch principal officer, and (2) United States' officers who have more

than one level of tenure protection unconstitutionally contravene the separation of powers.

Complainant inaccurately states that the courts have not decided that ALJs generally, or USDA ALJs specifically, lack authority to decide these proceedings. Exhibit 20, p.3. Respondents' constitutional challenges are based on two constitutional principles that have been unequivocally adopted by the Supreme Court. Respondents make a simple logical argument challenging the ALJs' and Judicial Officer's appointments as inferior officers.

The major premise: Any executive officer whose adjudicatory decisions become final without being permitted by an Executive Branch principal officer, cannot be lawfully appointed an inferior officer by a Department Head. The minor premise: USDA ALJs' decisions and the Judicial Officer's decisions become final without being permitted by an Executive Branch principal officer. The conclusion: USDA ALJs and the Judicial Officer are not constitutionally appointed inferior officers under Art. II, §2, cl. 2.

Complainant does not contest that USDA ALJs' and the Judicial Officer's decisions are not subject to review and reversal by a principal officer after they are made. Nor has Complainant demonstrated how any legal principal is too complex for an ALJ decision. The law here is clear. "Inferior officers are officers whose work is directed and supervised at some level by others who are appointed by Presidential

nomination with the advice and consent of the Senate." *Edmond,* 520 U.S. 651, 663 (1997). The Supreme Court, in *United States v. Arthrex,* 141 S. Ct. 1970, 1985 (2021), held as to adjudicatory officers: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch …."

In *United States v. Arthrex*, the Supreme Court rejected the government's argument that administrative patent judges were inferior officers because of their extensive supervision by principal officers, because the patent judges' decisions could become final without possible review or reversal by an Executive Branch principal officer. The Court unambiguously held: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding …." *Id.* at 1985.

Edmond and *Arthrex* do not involve ALJs or Judicial Officers. But it is incumbent on the USDA to demonstrate how USDA ALJs or its Judicial Officers are so distinguishable from the Coast Guard Court of Appeals Judges or Patent Law Judges so that the legal principle in *Edmond* and *Arthrex* is inapplicable. It is clear: USDA ALJs and Judicial Officers are appointed in violation of Art. II, §2, cl. 2.

Respondents' second constitutional challenge is to the ALJs' authority to decide cases because their dual tenure protection contravenes separation of powers. Again, it is a simple logical argument. The major premise: Any officer of the United States who has more than one layer of tenure protection contravenes the

Constitution's separation of powers. The minor premise: USDA ALJs are officers of the United States who have two layers of tenure protection. The Conclusion: USDA ALJs serve as officers in violation of the Constitution's separation of powers.

There can be no dispute, after *Lucia v. SEC* and *Fleming v. USDA*, that USDA ALJs are officers of the United States. That leaves only the major premise to challenge. Complainant made no effort to challenge the Supreme Court decisions that inferior officers who adjudicate agency cases cannot have two levels of tenure protection from presidential removal from office. Nor can they.

In November 2017, the Solicitor General of the United States raised the dual tenure constitutional issue when the government conceded that SEC ALJs were officers. Justice Breyer expressed concern that "to hold that the administrative law judges are Officers of the United States is, perhaps, to hold that their removal protections are unconstitutional." *Lucia* v. SEC, 138 S.Ct. 2044, 2060 (2018) (Breyer, J., concurring in part and dissenting in part.) His concern arose because the Court had previously held that the Constitution permits Congress to impose "limited restrictions on the President's removal power" – i.e., "only one level of protected tenure separat[ing] the President from an officer exercising power. *Free Enter. Fund* v. *Public. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495 (2010)." *Free Enterprise Fund* declared unconstitutional the dual tenure protection of the PCAOB inferior officers who adjudicated the agency's complaints. *Free Enterprise Fund* did

not decide whether ALJs dual tenure protection was unconstitutional, see footnote 10, because whether ALJs were officers – not mere employees – had not been decided.

Since the Supreme Court and D.C. Circuit have decided that USDA ALJs are officers, it is incumbent on Complainant to point out what distinguishes the USDA's adjudicators from the PCAOB adjudicators and to show why the *Free Enterprise* legal principle does not control. Failing that, *Free Enterprise Fund* dictates a decision that USDA ALJs serve in contravention of the separation of powers doctrine. When an officer's two for-cause removal restrictions are combined, neither the President nor the Secretary has any meaningful power to remove ALJs from office—for any reason, much less for "simple disagreement with [their] policies or priorities." *Id.* at 502.

Seila Law LLC v. Consumer Finance Protection Bureau, 140 S. Ct. 2183, 2191 (2020), affirmed the deciding principle in *Free Enterprise Fund*, and extended its holding by declaring unconstitutional one level of tenure protection for a principal officer who headed an independent agency.

> Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010), we reiterated that,

> "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties," *id.*, at 513–514, 130 S.Ct. 3138. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

Not only has the Supreme Court held two levels of tenure protection for officers' removal unconstitutional, the USDA in *Fleming* agreed. It told the Court that as presently construed, under 5 U.S.C. §7521, its ALJs' dual level tenure protection was unconstitutional.

However, the USDA contended the Court could avoid this conclusion by construing 5 U.S.C. §7521 to avoid declaring the statute unconstitutional. There were two parts to the USDA proposed construction of §7512 to avoid the separation of powers conflict. The USDA's new construction of §7521 proposed: (a) construe "good cause" to include failure to follow directions, and (b) limit the MSPB's authority to determine "good cause" by permitting it to only determine if the agency is acting in "good faith." USDA Brief at 38-39.

It is one thing for the USDA to ask an Article III court to construe statutory language, a power courts sometimes invoke. It is another thing for the USDA, in an agency proceeding, to ask an ALJ to construe statutes that do not fall within the agency's jurisdiction. That is why the USDA cannot get around the unconstitutionality of §7521 in these cases. No agency, except the Merits System Protection Board, has that authority.

In *Fleming*, the USDA admitted that the "removal restrictions for administrative law judges (ALJs) contained in § 7521 would raise to grave constitutional concerns if certain ambiguous statutory phrases were construed in a manner that unduly infringes on the authority of the President and Heads of Departments to hold accountable those subordinate officials entrusted with exercising significant executive power." February 27, 2020, Respondent's Supplemental Brief, page 1. The Agency's proposed construction of §7521 has not been adopted by the MSPB, Federal Circuit or any lawful authority.

The USDA unequivocally acknowledged that "[t]he MSPB's Construction of Section 7521 Would, if Accepted, Violate Article II." USDA Supplemental Brief at 18. The D.C. Circuit rejected the USDA request to reconstrue "good cause" in §7521, and appointed an amicus to defend the constitutionality of §7521. The amicus rejected the USDA's proposed reinterpretation of §7521. In response, the USDA concluded:

> Finally, if this Court nonetheless rejects the government's statutory construction of Section 7521, and rejects amicus's categorical defense of the statute, then the Court would be left with a question of law to remedy the constitutional infirmity. In that event, it would be appropriate to sever whatever portion or portions of Section 7521 cannot be interpreted, even under the principle of constitutional avoidance, to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies.

Respondent' Supplemental Brief at 36.

In the administrative proceeding, the options available to an ALJ are more limited, and less onerous. There is no option for anyone in the USDA to reconstrue 5 U.S.C. §7521. That authority is assigned solely to another executive agency, the Merits System Protection Board. Nor does a USDA ALJ, or any agency officer, have the authority to declare unconstitutional a statute vested in another executive agency. The only option is for the ALJ to decide whether she has the authority to grant the requested relief. If the ALJ concludes she lacks such authority, she must dismiss the cases, which may later be filed in a lawful tribunal.

Judge Rao's dissent in *Fleming* speaks directly to ALJs' tenure protections. While not binding, her reasoning is instructive. She concluded that the Supreme Court had recognized that an inferior officer may be insulated from removal in some circumstances, *see Seila Law*, 140 S. Ct. at 2199. But that narrow exception to the President's removal power does not extend to two layers of for-cause tenure protection. A second layer of for-cause protection "contravene[s] the Constitution's separation of powers," because it results in officers who are "not accountable to the President, and a President who is not responsible for" his officers. *Free Enterprise Fund*, 561 U.S. at 495. USDA ALJs serve as officers in contravention of separation of powers. USDA ALJS and the Judicial Officer are not lawfully appointed to make final adjudicatory decisions binding on the agency or respondents.

These constitutional issues must be decided now. To require Respondents to

go through hearings on the remaining 18 allegations— only to have a court vacate the ALJ's or Judicial Officer's order as happened in *Fleming*— is "necessary" only if it is more important to protect the Agency's adjudicatory scheme than to ensure Respondents' constitutional right to a trial before a lawful tribunal is protected.

CONCLUSION

Respondents request the Judge enter the following order.

1. Dismiss with prejudice the allegations requested by Complainant. The order should specifically recite and identify the dismissed allegations.

2. Decline to retain for hearing the allegations Complainant request be retained, thereby protecting Respondents' right to hearing before a lawful tribunal.

3. Grant Respondents' motion to dismiss all pending allegations in the complaints because the authority to whom the cases have been assigned lacks lawful authority to grant the relief Complainant seeks.

Respectively Submitted,

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March 28, 2022

Exhibit 10
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**
Respondents	

RESPONDENTS' REQUEST FOR RECONSIDERATION AND RESPONDENTS' SPECIFIC RESPONSES TO ALJ'S REQUESTS IN THE 2022 RULINGS

I. ALJs can reconsider their orders and rulings and change or modify them at any time prior to issuing an initial decision.

Contrary to Complainant's Response to the Judge's Rulings filed April 26, 2022, in which Complainant asserts that "[t]here is nothing to reconsider," there are important issues to be considered. First, the ALJ's authority to decide these HPA enforcement proceedings; second, whether Complainant has established subject matter jurisdiction under 5 U.S.C. §1825(c) necessary to pursue disqualification penalties; and third, issues raised by the 2022 Rulings that should be addressed before the cases are heard and decided.

decisions, there need not be a rule authorizing a Judge to reconsider decisions made in proceedings prior to issuing an initial decision.[1]

II. The Judge should reconsider her decision to "Hear and Decide" the merits in the cases until she decides whether she is constitutionally appointed and whether her dual-level tenure protection contravenes Article Two's separation of powers.

Respondents submitted a motion to dismiss arguing that (1) because no principal officer reviews the USDA ALJs' initial decisions or Judicial Officer's decision, they serve in violation of the Appointments Clause, and (2) because ALJs have dual-level tenure protection, they serve in contravention of Article II's separation of powers. Since submitting that motion a relevant decision was issued on March 18, 2022. *Consumers' Research v. Consumer Product Safety Commission*, Case No. 6:21-cv-256-DJK (E.D. Tex.). The district court held that the five commissioners of the CPSC, all principal officers appointed by the president with the Senate's consent, served in violation of Article II's separation of powers because they had one level of tenure protection from removal by the President. Some relevant excerpts are quoted below, with the slip opinion page number in brackets.

> The Constitution vests all power—and responsibility—to execute the law in a single President. Because this monumental responsibility is too great for any one person, the President must delegate power to subordinate officers. For a century, the Supreme

[1] This is established by the fact that on April 29,2022, at the request of Complainant, Judge Clifford reconsidered her original orders, finding good cause to permit responses by May 11, 2022, instead of May 4, 2022.

Court has recognized that this ability to delegate executive power implies a right to remove subordinates for any reason to ensure that "the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (quoting 1 Annals of Cong. 499 (1789) (J. Madison)). [P.1]

***

Limiting the President's removal power insulates executive officers from accountability—both to the President and the governed. If the removal power is restricted, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for [executive officers'] breach of faith." *Free Enter. Fund*, 561 U.S. at 496. Such officers "would be immune from Presidential oversight, even as they exercised power in the people's name." *Id*. at 497. They would also be unaccountable to the people, who "do not vote for the 'Officers of the United States.'" *Id*. at 497–98 (quoting U.S. CONST. art. II, § 2, cl. 2). "That is why the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" *Id*. at 498 (quoting 1 Annals of Cong., at 499 (J. Madison)); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (opinion of Kagan, J.) ("[A]gencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public."). [PP. 16-17]

***

Finally, last year the Court held in *Collins v. Yellen*, that *Humphrey's Executor* did not save a removal restriction on the Director of the Federal Housing Finance Agency ("FHFA"). 141 S. Ct. at 1770. "*Seila Law* is all but dispositive." *Id*. at 1783. Like the Bureau in *Seila Law*, the FHFA is tasked with "broad investigative and enforcement authority" and may hold hearings, issue subpoenas, remove or suspend corporate officers, issue cease-and-desist orders, and bring civil actions in federal court. *Id*. at 1772. Also like the Bureau, the FHFA "is an agency led by a single Director," and the statute "restricts the

President's removal power." *Id*. at 1784. The removal restriction was thus unconstitutional, even if the FHFA exercised less executive power than the Director of the Bureau in *Seila Law*. *See id.* at 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry."). [PP. 22-23]

***

The Commission also holds the power to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *See* 140 S. Ct. at 2200. Indeed, the Commission "by one or more of its members" may "conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." 15 U.S.C. § 2076(a); *see also* 16 C.F.R. § 1025.1 (establishing rules for adjudication). And as the Supreme Court said in *Seila Law*, agency adjudication in this form "*must be*" an exercise of executive authority. 140 S. Ct. at 2198 n.2 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013)).

Finally, the Commission holds the "quintessentially executive power not considered in *Humphrey's Executor*" to file suit in federal court "to seek daunting monetary penalties against private parties" as a means of enforcement. *Seila Law*, 140 S. Ct. at 2200; *see also* 15 U.S.C. § 2076(b)(7)(A) (authorizing the Commission to initiate and prosecute civil actions). Each violation of the Commission's rules carries "a civil penalty not to exceed $100,000," up to a total of $15 million for all related violations, with the ability to adjust for inflation. 15 U.S.C. § 2069(a)(1); (a)(3)(A). [p. 24]

***

Article II vests the executive power in the President, who must "take Care that the Laws be faithfully executed." *See, e.g.*, *Humphrey's Executor*, 295 U.S. at 627 (citing the "illimitable power of removal by the Chief Executive."); *Free Enter. Fund*, 561 U.S. at 492 (citing the Take Care Clause); *Seila Law*, 140 S. Ct. at 2197 (same). The President cannot effectively fulfill that duty when Congress restricts his removal power. *Myers*, 272 U.S. at 164 ("[T]o hold otherwise would make it

> impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed."); *Free Enter. Fund*, 561 U.S. at 492 (same); *Seila Law*, 140 S. Ct. at 2197 (same). Thus, an unrestricted removal power is "the general rule." *Seila Law*, 140 S. Ct. at 2198; *see also Free Enter. Fund*, 561 U.S. at 513–14. And the *Humphrey's Executor* exception applies only to multimember commissions that do not exercise substantial executive authority—and thus do not interfere with the President's duty to "take care that the laws be faithfully executed." *See Humphrey's Executor*, 295 U.S. at 628; *Wiener*, 357 U.S. at 354–55. [P. 27]
>
> ***
>
> "The President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206; *see also Free Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 164.The Court may uphold a restriction on that removal power in only two limited situations. *See Seila Law*, 140 S. Ct. at 2199–200; *see also Morrison*, 487 U.S. at 691; *Humphrey's Executor*, 295 U.S. at 632. Neither is present here. Accordingly, the Court holds that the restriction on presidential removal established by 15 U.S.C. § 2053(a) violates Article II of the U.S. Constitution. [p. 28]

The Supreme Court in *Free Enterprise Fund* held that two levels of tenure protection for inferior officers was unconstitutional. However, for inferior officers, one-level of tenure protection is permissible. Judge Clifton has, by statute, two-levels of tenure protection as an inferior officer. Worse yet, because Judge Clifton's initial decisions are reviewable only by the Judicial Officer, an inferior officer, her decisions become final without possible review by a principal officer. Only an officer appointed by the President with Senate consent can serve as a final decision maker. Judge Clifford functions as a principal officer, though she has not been lawfully appointed as one.

Respondents request Judge Clifford reconsider her decisions to "Hear and Decide" the merits of the Complaint and Amended Complaint as to their liability. The two constitutional issues should be decided before any other proceedings because they go to the authority of the Judge to decide the cases and grant relief. And, clearly, under binding Supreme Court precedent, USDA ALJs and the Judicial Officer lack that authority.

III. The Complainant has not pled (and cannot prove) the HPA jurisdictional prerequisites for assessing disqualification penalties under 15 U.S.C. §1825(c).

A. The plain language of §1825(c) does not permit disqualification of those who have not been found to have violated §1825(b) in a final order issue by the Secretary.

Before deciding what cases should be heard and tried, a decision is also required about whether jurisdiction exists to assess disqualification penalties under 15 U.S.C. §1825(c) against Respondents, who have not previously been found to have violated the Act under §§1825(a) or (b) or paid a fine assessed under that section.[2] The 2017 Complaint and 2016 Amended Complaint contain no allegations that any Respondent has been convicted under §1825(a) or had a fine assessed or paid a fine under §1825(b). Pleading and proving these jurisdictional prerequisites is required before a disqualification can be sought or assessed.

[2] See McConnell's, Formac's, and Alexander's motion to dismiss filed March 16, 2017, paragraph 109 and Andrews' and Walters' motion to ismiss file March 16, 2017, paragraph 109.

motions apply to all cases, and challenge the authority to the USDA's adjudicatory system's constitutionality and its jurisdiction and constitutionality over §1825(c). Decisions on these issues should dispose of all the cases.

Further, Respondents' legal issues addressing the foreign substance and false information allegations would streamline, or eliminate, those specific cases and should be determined before any hearing and decision on the merits. A briefing schedule for submission of those issues should be established. Finally, decisions on the issues raised by Respondents could facilitate the parties' efforts to reach fair settlements, eliminating the necessity for a merits hearing and decision.

Respectively Submitted,

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CERTIFICATE OF SERVICE

I served this document by email filing to the Hearing Clerk's office on May 11, 2022.

__s/ Karin Cagle_____

Exhibit 11

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**
Respondents	

Respondents' Request for a Jury Trial

Congress gave the USDA substantial power to enforce the Horse Protection Act. But the Constitution constrains those powers by protecting individual rights. This request concerns the nature and extent of those constraints in HPA cases in which the USDA seeks penalties. Respondents contend the USDA's in-house adjudication of Respondents' cases will violate their Seventh Amendment right to a jury trial under the Rules of Practice, 7 C.F.R. §1.130 et seq. [1]

[1] Respondents' Request for a Jury Trial is based on the recent Fifth Circuit decision in *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446 (5th Cir. 2022). Respondents liberally adapt that decision to their cases.

"Thomas Jefferson identified the jury 'as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.'" *Jarkesy* at *2. John Adams called trial by jury "the heart and lungs of liberty." *Id.* Civil juries serve as a check on government power. *Id*. at 3. The Seventh Amendment guarantees Respondents a jury. The USDA's enforcement actions are akin to traditional actions at law to which the jury-trial right attaches. Because such claims do not concern public rights alone, neither Congress, nor an agency acting pursuant to congressional authorization, can assign the adjudication of such claims to an agency adjudicator. "Trial by jury therefore is a 'fundamental' component of our legal system 'and remains one of our most vital barriers to governmental arbitrariness.'" *Id.*(quoting *Reid v. Covert*, 354 U.S. 1, 9–10 (1957)).

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *Jarkesy* at *3, U.S. Const. amend. VII. "The Supreme Court has interpreted 'Suits at common law' to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption." *Tull v. United States*, 481 U.S. 412, 417 (1987). "The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies*.*" *Jarkesy* at *3. "[T]he Court

has specifically held that, under this standard, the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties." *Id.*

Whether Congress may properly assign an action for administrative adjudication depends on whether the proceedings center on "public rights."[2] "[I]n cases in which 'public rights' are being litigated[,] e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the fact finding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* In describing proper assignments, the Supreme Court has identified situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated." *Id*.

The Supreme Court refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). There, the

[2] "Wrongs are divisible into two sorts or species; private wrongs and public wrongs. The former are an infringement or privation of private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Blackstone Commentaries, Ch. 1, p.1.

Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns "traditional legal claims" to an administrative tribunal. *Id.* at 52. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54.

The analysis involves two stages. First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. *See Tull,* 481 U.S. at 417. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. *See Granfinanciera*, 492 U.S. at 54, and *Atlas Roofing*, 430 U.S. 442, 455 (1977). Here, the relevant considerations include: (1) whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem; and (2) whether jury trials would 'go far to dismantle the statutory scheme' or 'impede swift resolution' of the claims created by statute." *Jarkesy* at *4 (quoting *Granfinanciera*, 492 U.S. at 60–63(quoting *Atlas Roofing*, 430 U.S. at 454 n.11)).

The rights that the USDA seeks to vindicate in its enforcement actions here arise "at common law" for purposes of the Seventh Amendment. The USDA has

charged Respondents with deceitful and fraudulent conduct. The HPA does not prohibit treating horses cruelly or abusively. Such conduct is prohibited only when a sored horse is entered into a competitive event, thus affecting the private rights of fellow-competitors to a fair competition. Congress' focus in the HPA is on "horses shown or exhibited which or sore, *where such soreness improves the performance of such horse, to compete unfairly with horses which are not sore*." 15 U.S.C. §1822(2) (Emphasis added).

Soring a horse to gain an unfair advantage in an event is deceitful conduct, a variety of fraud. The Supreme Court has looked to common-law principles to interpret the meaning of fraud and misrepresentation. *See, Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (relying on "common-law deceit and misrepresentation actions" to interpret the statutory securities-fraud action). *Jarkesy* at *5. The HPA prohibits such fraudulent conduct by those who enter a sore horse to cheat, deceive and compete fraudulently against the other competitors.

"Fraud prosecutions were regularly brought in English courts at common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the common-law courts' jurisdiction over 'actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party')." *Jarkesy* at 4. And the Supreme

Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims. *Tull,* 481 U.S. at 418–19. Thus, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422.

Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalty action the USDA brought in this case. *Jarkesy* at *4.

Other courts have similarly applied *Tull.* The Seventh Circuit followed the Supreme Court's lead in *Tull,* and "specifically said that when the SEC brings an enforcement action to obtain civil penalties under a statute, the subject of the action has the right to a jury trial. *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002)." *Jarkesy* at *4. "Some district courts have applied *Tull* similarly. *See, e.g., SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (explaining that 'whether the facts are such that the defendants can be subjected to a civil penalty ... is a question for the jury, [and] the determination of the severity of the civil penalty to be imposed ... is a question for the Court, once liability is established'); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (applying *Tull* for the proposition that civil penalties are 'legal, as opposed to equitable, in nature,' and that it therefore 'was

[the defendant's] constitutional right to have a jury determine his liability, with [the court] thereafter determining the amount of penalty, if any')." *Jarksey* at *4. The actions the USDA has brought against Respondents are not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Deceptive practices are fraud actions, and are not new actions unknown to the common law. *Id* at *5.

"Common-law courts have heard fraud actions for centuries, even actions brought by the government for fines. *See* Blackstone, *supra* at *42; *see also Tull*, 481 U.S. at 422 ('A civil penalty was a type of remedy at common law that could only be enforced in courts of law.')." *Id*. "The traditional elements of common-law fraud are (1) a knowing or reckless material misrepresentation, (2) that the tortfeasor intended to act on, and (3) that harmed the plaintiff." *Id.*

Those who attempt to enter sore horses for a competitive advantage are making a material misrepresentation that they will be competing fairly. The other competitors, who have not cheated, rely on this representation to ensure a fair competition. Indeed, in events where management employs an HIO to provide DQP inspectors, the entry form requires the entrant to expressly agree that the horse is and will be HPA compliant. Finally, a competitor who enters a horse that is not sore is at a competitive disadvantage, and is injured by having to compete against a sored horse.

Surely Congress believes the HPA serves the public interest and the U.S. economy overall, not just individual parties. "Yet Congress cannot convert any sort of action into a 'public right' simply by finding a public purpose for it and codifying it in federal statutory law. *See Granfinanciera*, 492 U.S. at 61 (explaining 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')." *Jarkesy* at *6.

Private suits by one competitor against another competitor for deceitfully entering a sore horse "likely would have a similar public purpose—they too would serve to discourage and remedy fraudulent behavior in securities markets. That does not mean such suits concern public rights at their core." *Id.* The enforcement actions seeking penalties in these cases are ones for competition fraud, which is nothing new and nothing foreign to Article III tribunals and juries.

Respondents have a Seventh Amendment right to a jury to adjudicate the facts underlying any potential HPA liability that justifies penalties. Respondents request a jury trial. Denial of a jury trial, with a trial before a ALJ, would be unconstitutional.

Respectively Submitted,

s/ Karin Cagle
Karin Cagle, Lead Counsel
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817-7215127

s/ David Broiles
David Broiles
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817-246-7801

June 14, 2022

CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc. .	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walters	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the RESPONDENT'S REQUEST FOR A JURY TRIAL has been furnished and was served upon the following parties on June 15, 2022 by the following:

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Respondents Counsel – Electronic Mail
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David Broiles
davidbroiles@gmail.com

Respectfully Submitted,

CAROLINE HILL Digitally signed by CAROLINE HILL
Date: 2022.06.15 08:35:43 -04'00'

Caroline Hill, Hearing Clerk
USDA/Office of Administrative Law Judges
Hearing Clerks' Office, Rm. 1031-S
1400 Independence Ave., SW
Washington, DC 20250-9203

Exhibit 12
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

James Dale McConnell, a/k/a Jimmy McConnell, an individual;	)	HPA Docket No. 16-0169
	)	HPA Docket No. 17-0207
	)	
Formac Stables, Inc., a Tennessee corporation;	)	HPA Docket No. 16-0170
	)	HPA Docket No. 17-0204
	)	
Christopher Alexander, an individual;	)	HPA Docket No. 17-0195
Kelsey Andrews, an individual;	)	HPA Docket No. 17-0198
and		
Taylor Walters, an individual,	)	HPA Docket No. 17-0211
	)	
Respondents.	)	

RESPONDENTS' IDENTIFICATION OF ISSUES FOR FEBRUARY 28, 2023, TELEPHONE CONFERENCE

In anticipation of the February 28, 2022, telephone conference, Respondents are identifying some issues they believe should be discussed by the parties and Judge Clifton. These issued were discussed in a phone

conference by counsel for the parties on February 7, 2023. Future discussions are anticipated.

1. On March 8, 2022, Complainant filed its Motion to Dismiss Certain Violations with Prejudice, in which Complainant identified 23 allegations in these consolidated cases that should be dismissed with prejudice. On April 11 and 13, 2022, Judge Clifton issued three rulings in which she identified the remaining allegations she proposed to retain and try. The rulings covered the cases Complainant proposed to try; however, no ruling was issued dismissing the allegations Complainant had moved to dismiss. Respondents request a ruling be issued granting Complainant's March 8, Motion to Dismiss, dismissing with prejudice the 23 allegations Complainant move to dismiss on March 8, 2022.

2. On May 11, 2022, Respondents filed a request for reconsideration of the April 11 and 13, 2022 rulings, with specific responses to Judge Clifton's rulings. Respondents requested Judge Clifton reconsider her rulings that she intended to hear and decide Complainant's remaining allegations without first deciding whether USDA ALJs and the Judicial

Officer are constitutionally appointed. Respondents' position is set forth in their February 24, 2022, Motion to Dismiss: the USDA's Administrative Law Judges and Judicial Officer Have No Lawful Authority to Grant the Relief Complainant Requests. The motion identifies court decisions since 2017 that require disqualification of all USDA ALJs and the Judicial Officer. Judge Clifton, in her April 11 and 13, 2022, rulings, indicated that the rulings did not address Respondents' Motion to Dismiss, but only the Complainant's March 8 Motion to Dismiss. Respondents object to having to prepare for trial and being put to trial without resolution of their Motion to Dismiss.

3. *Cochran v. SEC*, SCOTUS # 21-1239, is an appeal by the SEC from a 5th Circuit en banc decision holding that the respondent in an SEC ALJ administrative proceeding can file a lawsuit in a United States district court seeking declaratory relief that structural and constitutional defects concerning the ALJs' status render a trial before an ALJ unlawful and issuing an injunction against further ALJ proceedings. SCOTUS granted cert and held oral argument on Nov. 7, 2022. An opinion is anticipated

before July 2023. It would be advisable to wait for this decision before setting a trial schedule.

4. In *In re: Self*, 17-0036, the Respondent's motion to preclude disqualifications was certified to the Judicial Officer, who decided the issue January 18, 2023. In the above styled cases the Respondents filed identical motions and documents regarding the application of 15 U.S.C. § 1825(c). The documents filed by the parties in *Self* in the proceedings before the Judicial Officer are not a part of the record in these above-styled cases. They should be. Further, in light of the Judicial Officer's ruling, Respondents request that Judge Clifton rule on the Motion to exclude disqualification penalties.

4. Before discussing setting hearings, Respondents request Judge Clifton rule on their June 5, 2022, Request for Jury Trial. That motion was based on *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), SCOTUS App. # 22-A596. On October 21, 2022, the 5th Circuit denied the SEC's Petition for Rehearing in banc. On January 13, 2023, the Supreme Court extended the time for the SEC to file a petition of writ of cert. to February 17, 2023.

On February 17, the SEC filed its cert petition. It would be advisable to wait until this case is decided before holding hearings on the merits.

5. Respondents request reconsideration of the Judge's rulings identifying the cases to be set by group. Respondents believe that APHIS should complete its evidence in the cases it identifies as retained and partially tried from the December hearings. The most logical process is to organize by testifying witness. Dr. Rhyner has yet to testify and his testimony is necessary as to three of the identified cases: She's Happy, Happy, Happy (08/27/16), Master Jimmy Mac (08/31/2016), and Putting Cash on the Line (08/31/2016). With this approach the government can close out its proceedings in these four cases and rest.

6. Since the hearings in December 2019, events impacted further hearings. A significant report was issued in 2021: "National Academies of Sciences, Engineering, and Medicine 2021: A Review of Methods for Detecting Soreness in Horses." For example, that Report concludes the present scar rule is based on a "fallacy" in assuming "examination of gross lesions can accurately and reliably correlate with the true underlying

Respectively Submitted,

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February 10, 2023

CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc. .	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walters	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the RESPONDENTS' IDENTIFICATION OF ISSUES FOR FEBRUARY 28, 2023, TELEPHONE CONFERENCE has been furnished and was served upon the following parties on February 10, 2023 by the following:

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Respondents Counsel – Electronic Mail
Karin Cagle
kcaglelaw@gmail.com
David Broiles
davidbroiles@gmail.com

Respectfully Submitted,
ELIUTH MORON
Digitally signed by ELIUTH MORON
Date: 2023.02.10 15:36:57 -05'00'

Eliuth Morón, Assistant Hearing Clerk
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Washington, DC 20250-9203

Exhibit 13
(Pagination Added)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: James Dale McConnell,	**HPA Docket No. 16-0169**
a/k/a Jimmy McConnell, an individual;	**HPA Docket No. 17-0207**
Formac Stables, Inc.,	**HPA Docket No. 16-0170**
	HPA Docket No. 17-0204
Christopher Alexander, an individual;	**HPA Docket No. 17-0195**
Kelsey Andrews, an individual;	**HPA Docket No. 17-0198**
Taylor Walters, an individual.	**HPA Docket No. 17-0211**
Respondents	

RESPONDENTS' RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The cases identified above have been consolidated for all purposes. On January 19, 2023, the presiding ALJ issued an order requesting the parties indicate when they were available for a phone conference to set a hearing on the merits. The hearing was set for February 28, 2023. On February 10, 2023, Respondents filed an identification of the issues to be discussed at the phone conference. Item two requested the Judge reconsider her rulings that she intended to "hear and decide the complainant's allegations" and objected to her first deciding whether USDA ALJs and the Judicial Officer are constitutionally appointed as set forth in respondents'

motion to dismiss filed February 24, 2022. The Judge stated she would hold the hearing on the merits until a higher authority said she could not.

Item 4 requested the Judge rule on their June 5, 2022, Request for a Jury Trial. This item was not discussed during the phone conference and the Judge has not ruled on the motion. However, on April 13, 2023, in her Prehearing Deadlines and Other Instructions the Judge did not identify any time in which a jury could be picked. This is consistent with the USDA's Rules of Practice, which do not provide for jury trials.

Item 3 dealt with *Cochran v. SEC*, #21-1239, pending in the Supreme Court. That case was decided by the Supreme Court on April 14, 2023. It held that respondents in administrative enforcement proceedings should not be subjected to the constitutional injury of having to go through an administrative hearing on the merits without a decision on whether the agency's enforcement scheme is constitutional. Further, the Court held the respondent making a structural constitutional challenge can file suit in district court seeking a declaratory judgment and injunction to avoid being put through an unconstitutional hearing.

On February 28, 2023, the Judge set these cases for trial on the merits beginning October 10, 2023, through the week of November 6, 2023. Respondents object to the hearing be conducted by an ALJ not lawfully appointed and whose tenure protection contravenes separation of powers and to an adjudicative scheme

where the Judicial Officer makes final decisions but is not appointed by the President with Senate confirmation. Respondent's object to the denial of their right to a jury trial.

Respectively Submitted,

s/ Karin Cagle
Karin Cagle, Lead Counsel
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s/ David Broiles
David Broiles
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May 3, 2023

PX3

CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc. .	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walters	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the RESPONDENTS' RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL, has been furnished and was served upon the following parties on May 4, 2023 by the following:

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Respondents Counsel – Electronic Mail
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David Broiles
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Respectfully Submitted,

ASHLI PRESSEY Digitally signed by ASHLI PRESSEY
Date: 2023.05.04 08:36:38 -04'00'

Ashli Pressey, Legal Assistant
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Washington, DC 20250-9203

Exhibit 14

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	
James Dale McConnell, a/k/a Jimmy McConnell, an individual;	HPA Docket No. 16-0169 HPA Docket No. 17-0207
Formac Stables, Inc., a Tennessee corporation;	HPA Docket No. 16-0170 HPA Docket No. 17-0204
Christopher Alexander, an individual;	HPA Docket No. 17-0195
Kelsey Andrews, an individual; and	HPA Docket No. 17-0198
Taylor Walters, an individual,	HPA Docket No. 17-0211
Respondents.	

2023 October and November Segments, Hearing RESUMED Notice

Appearances:

Thomas N. Bolick, Esq., and Danielle Park, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave SW, Washington DC 20250, for the Complainant (APHIS);[1] *and*

Karin Cagle, Esq., Fort Worth, TX 76014, and David Broiles, Esq., Fort Worth, TX 76108, for each Respondent (named in the caption).

1. On February 28, 2023, I, Judge Jill S. Clifton, held a Dial-In telephone conference with counsel for APHIS, Mr. Thomas N. Bolick and Ms. Danielle Park; and counsel for the Respondents, Ms. Karin Cagle and Mr. David Broiles.[2] During the call, I scheduled the resumed hearing in this matter.

2. These three HEARING RESUMED SEGMENTS will be held in Shelbyville, Tennessee:

---

[1] The Complainant is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or Complainant).

[2] Ms. Marilyn "Nita" Kennedy, OALJ Administrative Management Specialist, and Ms. Erin Hoagland, Esq., OALJ Attorney Advisor, also participated in the call.

2023 October 10 thru 13 (Tues-Fri);
2023 October 16 thru 20 (Mon-Fri); and
2023 November 6 thru 9 (Mon-Thurs),

going on record each day at **9:30 am local time (Central)**,
and going off record each day by **5:00 pm local time (Central)**.

Ms. Kennedy is requested, when obtaining space in Shelbyville, Tennessee, to determine if we might return to the "Board Room," 100 Public Square, Shelbyville, Tennessee, where we completed 9 days of this Hearing on December 13, 2019. I believe we were given the use of that space by the Bedford County Mayor.

3. This will be an in-person, face-to-face Hearing, with all participants including the judge and the court reporter in the same room. On the first day of each segment, I ask the parties and counsel to arrive 15-30 minutes early, to work with the court reporter to set up the room, and to identify participants, by supplying business cards or the like, for the transcript.

Enough copies of a party's exhibits should be brought to the Hearing so that there will be the record copy (ordinarily used by witnesses), and there will also be a judge's copy (so that the judge can follow along), in addition to the copies used by the parties and counsel. Updated, correct witness and exhibits lists should be brought for the court reporter and the judge (and should have already been provided to other counsel).

4. Subpoenas and Subpoenas Duces Tecum for my issuance shall bear the name of Secretary of Agriculture Thomas J. Vilsack. The contact information of counsel requesting issuance of the Subpoena shall be on the Subpoena. The "back side" of the Subpoena shall be included, including the space for certification by me that "the person named herein was in attendance as a witness." It is the responsibility of counsel to prepare Subpoena forms and Subpoena Duces Tecum forms in enough time to obtain my signature and serve. Ms. Marilyn "Nita" Kennedy will email you the current electronic versions of the forms (including the application) for completion by counsel, if you ask her. Hearing room identification is required to prepare the Subpoenas.

5. You may contact Ms. Marilyn "Nita" Kennedy:

marilyn.kennedy@usda.gov 1-202-720-8423 phone
1-844-332-7965 FAX

In exigent circumstances counsel may contact Hearing Clerk Caroline Hill by telephone number 1-202-720-4443.

6. Hearing testimony will be transcribed. A copy of the transcript may be purchased by

making arrangements with the court reporter at the Hearing.

7. The parties are expected to use the contact information for the Hearing Clerk contained on the last page of this order, to file with the Hearing Clerk. The most efficient way to file with the Hearing Clerk is to email, or to FAX if you prefer, using the information on the last page of this order. If emailing or FAXing to the Hearing Clerk, submit once [NOT in quadruplicate].

8. Counsel shall promptly notify their clients, potential witnesses, and other essential participants of this Hearing setting. The parties through counsel shall alert one another of any conflicts. Any objections to the setting or the dates of the Hearing shall be filed promptly with the Hearing Clerk with proposed solutions.

9. The Hearing Clerk is requested to assign, for continuity, this RESUMED Hearing to the same court reporter that completed 9 days of this Hearing on December 13, 2019: Heritage Court Reporting Agency, and I request Reporter David Jones if he is available.

Further, I request that the transcript pages be numbered in sequence to the pages of the December 13, 2019 transcript (perhaps Tr. 1866 was the last page?) [I expect EVERY Tr. page to be numbered, contrary to customary numbering, including the cover page (top page) and the certification page signed on behalf of Heritage Court Reporting Agency.]

Copies of this order "2023 October and November Segments, Hearing RESUMED Notice" shall be sent by the Hearing Clerk to each of the parties.

Issued this 7th day of March 2023

Digitally signed by Jill S Clifton
Date: 2023.03.07 15:34:12 -05'00'

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
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CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc. .	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walters	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the 2023 OCTOBER AND NOVEMBER SEGMENTS, HEARING RESUMED NOTICE has been furnished and was served upon the following parties on March 7, 2023 by the following:

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Respondents Counsel – Electronic Mail
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David Broiles
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Respectfully Submitted,
ASHLI PRESSEY
Digitally signed by ASHLI PRESSEY
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USDA/Office of Administrative Law Judges
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Exhibit 15
(Pagination Added)

Case No. 4:23-cv-00024-TRM-SKL

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	
James Dale McConnell, also known as Jimmy McConnell, an individual;	HPA Docket No. 16-0169 HPA Docket No. 17-0207
Formac Stables, Inc., A Tennessee corporation;	HPA Docket No. 16-0170 HPA Docket No. 17-0204
Christopher Alexander, an individual;	HPA Docket No. 17-0195
Kelsey Andrews, an individual; and	HPA Docket No. 17-0198
Taylor Walters, an individual,	HPA Docket No. 17-0211
Respondent.	

COMPLAINANT'S RESPONSE TO: RESPONDENTS' RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTUTIONAL RIGHT TO A JURY TRIAL; AND RESPONDENTS' SUPPLEMENTAL CORRECTION TO THEIR RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTUTIONAL RIGHT TO A JURY TRIAL

On February 28, 2023, Administrative Law Judge (ALJ) Jill S. Clifton scheduled hearings to resume in the matter captioned above in Shelbyville, Tennessee, beginning the week of October 8, 2023, and running through the week of November 6, 2023, if necessary. On May 3, 2023, respondents filed Respondents' Renewed Objections to (1) a Hearing before the ALJ Who Is Not Lawfully Appointed and Infringes Separation of Powers and (2) to the Judicial Officer Who Is Not Lawfully Appointed and (3) to the Denial of the Constitutional Right to a Jury Trial (Respondents' Renewed Objections) and on May 4, 2023, respondents filed Respondents' Supplemental Correction to their Renewed Objections to (1) a Hearing before the ALJ Who Is Not Lawfully Appointed and Infringes Separation of Powers and (2) to the Judicial

Officer Who Is Not Lawfully Appointed and (3) to the Denial of the Constitutional Right to a Jury Trial (Respondents' Corrected Objections) in the matter captioned above. Complainant hereby files its response to both filings.

I. Respondents' Challenges to the Constitutionality of USDA's Administrative Enforcement Scheme Belong in Federal Court

Respondents note that in Axon Enterprise, Inc. v. Fed. Trade Comm'n, 143 S.Ct. 890 (2023),[1] the U.S. Supreme Court held that "respondents in administrative enforcement proceedings should not be subjected to the constitutional injury of having to go through an administrative hearing on the merits without a decision on whether the agency's enforcement scheme is constitutional." Respondents' Renewed Objections at 2. Respondents have raised two specific constitutional objections to USDA's administrative enforcement scheme in the matter captioned above—they believe that Judge Clifton is not lawfully appointed and that her double tenure protections render her presiding over an administrative hearing in this or any other matter an infringement of the Constitution's separation of powers. Id. They likewise believe that the Judicial Officer (JO) is not lawfully appointed because he is not a Presidential appointee who is confirmed by the U.S. Senate. Id. at 2-3. Citing to their Identification of Issues for February 28, 2023, Telephone Conference (Respondents' Issues List) that they filed in this matter on February 10, 2023, they note that item 2 on their list "requested [that Administrative Law Judge (ALJ) Jill S. Clifton] reconsider her rulings that she intended to 'hear and decide the complainant's allegations' and objected to her not first deciding whether USDA ALJs and the Judicial Officer are constitutionally appointed as set forth in respondents' motion to dismiss filed February 24, 2022." Respondents' Corrected Objections at 1-2. To date, however, Judge Clifton has not ruled on the constitutionality of her appointment or that of the JO.

[1] Respondents refer to this case as Cochran v. SEC, No. 21-1239, in Respondents' Renewed Objections.

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Judge Clifton is correct not to do so. When the U.S. Supreme Court issued its decision in Axon Enterprise, Inc. on April 14, 2023, it held, among other things, that administrative proceedings are not the proper forum in which to determine the constitutionality of an ALJ's appointment. Id. at 905 (quoting Carr v. Saul, 141 S.Ct. 1352, 1360 (2021) ("For that reason, we observed two Terms ago, 'agency adjudications are generally ill suited to address structural constitutional challenges'—like those maintained here."). It further held that such claims "are collateral to any decisions the [agency] could make in individual enforcement proceedings. And they fall outside the [agency's] sphere of expertise. Our conclusion follows: The claims are not 'of the type' the statutory review schemes reach. A district court can therefore review them." Id. at 906 (internal citations omitted). As with the matter before the Court in Axon Enterprise, Inc., respondents' challenges to the constitutionality of Judge Clifton's appointment and those of her fellow ALJs are (1) "collateral" to any decision that Judge Clifton could make in the present matter, (2) outside USDA's "sphere of expertise", and (3) "are not 'of the type' the statutory review schemes reach." Accordingly, Judge Clifton cannot properly decide the constitutionality of her own appointment or those of the Department's other ALJs.

Although the Supreme Court in Axon Enterprise, Inc. did not specifically address the appropriate forum for deciding the constitutionality of the JO's appointment, such a challenge constitutes the same kind of structural constitutional challenge as the ALJ's appointment challenge at issue in that case. Therefore, it logically follows that if, per Axon Enterprise, Inc., Judge Clifton cannot decide the constitutionality of her own appointment or that of her fellow ALJs, she also cannot decide the constitutionality of the JO's appointment.

Furthermore, complainant notes that, in accordance with the U.S. Supreme Court's ruling in Lucia v. Sec. and Ex. Comm'n, 138 S.Ct. 2044, 2055 (2018), Judge Clifton was reappointed to

her position as ALJ by the Secretary of Agriculture on July 24, 2017.[2] *See* Attachment I, Statement of Secretary of Agriculture Sonny Perdue, dated December 5, 2017. Respondents' insistence that Judge Clifton must rule on the constitutionality of her appointment and that of the JO before this matter proceeds to hearing is misplaced. They correctly note that the Supreme Court held in Axon Enterprise, Inc. that a "respondent making a structural constitutional challenge can file suit in district court seeking a declaratory judgment and injunction to avoid being put through an unconstitutional hearing." Respondents' Renewed Objections at 2. However, as of the filing of this response, respondents have not filed suit in federal district court either to challenge the constitutionality of USDA's administrative enforcement scheme or to enjoin USDA from proceeding to hearing in this matter. Nor has anyone else made such challenges to either USDA's administrative enforcement scheme or a substantially similar enforcement scheme in federal court. Instead, respondents have asked Judge Clifton to decide "whether the agency's enforcement scheme is constitutional," in complete disregard of the Supreme Court's holding in Axon Enterprise, Inc. that an administrative proceeding is not the proper forum to hear such a challenge. Accordingly, respondents' objection to having to go through an administrative hearing in the present matter before their constitutional challenges to the appointments of USDA's ALJs and JO are resolved has been presented in the wrong forum and has no merit. See Axon Enterprise, Inc., 143 S.Ct. at

[2] The Supreme Court in Lucia stated that ALJs are inferior officers of the United States who must be appointed by the President, a Cabinet-level officer, or a court of law, in accordance with the Appointments Clause of the Constitution of the United States of America (Art. 2, § 2, cl. 2). Lucia, 138 S.Ct. at 2051. It held that the Securities and Exchange Commission (SEC) ALJ who heard and initially decided the matter that was before the Court had not been properly appointed under the Appointments Clause and remanded the SEC matter for rehearing by a properly appointed ALJ. Id. at 2055. However, it also stated that the SEC ALJ who heard and decided the initial matter could not re-hear it, even if he were constitutionally re-appointed. Id. Judge Clifton was re-appointed as an ALJ by Secretary Perdue on July 24, 2017, more than two years before any hearings were conducted in the matter captioned above, and she has not issued an initial decision on the merits in this matter. Therefore, her re-appointment by the Secretary should not be a bar to her continuing to preside over this matter.

906 ("All three *Thunder Basin* factors thus point in the same direction—toward allowing district court review of Axon's and Cochran's claims that the structure, or even existence, of an agency violates the Constitution. For the reasons given above, those claims cannot receive meaningful judicial review through the FTC Act or Exchange Act.").

II. Complainant's Response to Respondents' Objection to an ALJ's Dual Tenure Protection and their Request for a Jury Trial Should be Delayed Until After the Supreme Court Decides Jarkesy or, in the Alternative, Complainant Should be Given 60 Days to Respond

As previously noted, respondents also object to Judge Clifton reconvening a hearing in this matter on the ground that she is an ALJ "whose tenure protection contravenes separation of powers." Respondents' Renewed Objections at 2. They further object "to the denial of their right to a jury trial." Id. at 3. Both of these objections are predicated on the decision of the Court of Appeals for the Fifth Circuit in Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), which held that the Securities and Exchange Commission (SEC) ALJs are, per Lucia, inferior officers who perform substantial executive functions and thus must be wholly under the control of, and accountable to, the President, but that the existence of a double layer of protection against for-cause removal impermissibly impedes that control and accountability. Id. at 464. The Fifth Circuit also held that plaintiff Jarkesy was entitled to a jury trial because the Seventh Amendment of the Constitution of the United States of America ensures the right to a jury trial in suits at common law and suits brought under statutes that seek "common-law-like legal remedies." Id. at 452. Respondents previously raised these two objections in the present matter in Respondents' Request to File a Supplemental Authority to Respondents' Argument that USDA ALJ's Dual-Tenure Protection Contravenes Article II's Separation of Powers, filed June 3, 2022 (Respondents' Supplemental Authority), and Respondents' Request for a Jury Trial, filed June 15, 2022.

On July 7, 2022, complainant filed a Request to Postpone its Combined Responses to Respondents' Argument that USDA ALJ's Dual-Tenure Protection Contravenes Article II's Separation of Powers and Request for a Jury Trial. Complainant noted that on July 5, 2022, the SEC filed in the Fifth Circuit a petition for hearing en banc of Jarkesy, and complainant requested permission to file its response to the aforementioned filings either after the Fifth Circuit denied the en banc petition or granted the same and rendered its decision. Id. at 2. On July 8, 2022, Judge Clifton granted complainant's request via email.

Complainant notes that the Fifth Circuit denied the SEC's en banc petition on October 21, 2022, and the agency filed a petition for a writ of certiorari with the U.S. Supreme Court on April 10, 2023. The Supreme Court accepted certiorari and docketed the Jarkesy decision on April 12, 2023. Letter from the Office of the Clerk, Supreme Court of the United States, to the Clerk, United States Court of Appeals for the Fifth Circuit, dated April 12, 2023, Case No. 20-61007, ECF No. 153.

Similar to complainant's arguments in its July 7, 2022 filing requesting postponement of filing a response, any response complainant might file to Respondents' Supplemental Authority and Request for Jury Trial, and their renewal of the objections set forth therein, necessarily will be impacted by the Supreme Court's decision in Jarkesy, the predicate for respondents' requests. Therefore, complainant respectfully requests that it be permitted to postpone its response to these objections until after the Supreme Court decides Jarkesy. In the alternative, complainant respectfully requests that it be granted sixty (60) days from the date of an Order issued on this request to respond to these objections.

III. Conclusion

For the aforementioned reasons, respondents' objections have no merit and the hearing in the matter captioned above should proceed as currently scheduled.

Respectfully submitted,

Thomas N. Bolick
Counsel for Complainant

Danielle Park
Danielle Park
Counsel for Complainant

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ATTACHMENT

I

PX8

I, Sonny Perdue, Secretary of Agriculture, conducted a thorough review of the qualifications of this Department's administrative law judges. I affirm that in a ceremony conducted on July 24, 2017, I ratified the agency's prior written appointments of Chief Administrative Law Judge Bobbie McCartney, and Administrative Law Judges Jill S. Clifton and Channing Strother before administering their oath of office by making the following statement:

> **"I hereby ratify the appointments of Bobbie McCartney, Jill Clifton, and Channing Strother as United States Administrative Law Judges for the United States Department of Agriculture and hereby renew their oaths of office."**

Signed this 5th day of December, 2017, in Washington, D.C.

Sonny Perdue
Secretary
United States Department of Agriculture

Attachment 1

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CERTIFICATE OF SERVICE

Respondents:	**Docket Numbers**
James Dale McConnell a/k/a Jimmy McConnell	16-0169 17-0207
Formac Stables, Inc.	16-0170 17-0204
Christopher Alexander	17-0195
Kelsey Andrews	17-0198
Taylor Walters	17-0211

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the COMPLAINANT'S RESPONSE TO: RESPONDENTS' RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTUTIONAL RIGHT TO A JURY TRIAL; AND RESPONDENTS' SUPPLEMENTAL CORRECTION TO THEIR RENEWED OBJECTIONS TO (1) A HEARING BEFORE THE ALJ WHO IS NOT LAWFULLY APPOINTED AND INFRINGES SEPARATION OF POWERS AND (2) TO THE JUDICIAL OFFICER WHO IS NOT LAWFULLY APPOINTED AND (3) TO THE DENIAL OF THE CONSTUTIONAL RIGHT TO A JURY TRIAL with ATTACHMENTS has been furnished and was served upon the following parties on May 22, 2023 by the following:

USDA (OGC) - Electronic Mail
Thomas N. Bolick, OGC
Thomas.Bolick@usda.gov Danielle
Park, OGC Danielle.Park@usda.gov
Donna Erwin, OGC
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Respectfully Submitted,

ASHLI PRESSEY Digitally signed by ASHLI PRESSEY
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Ashli Pressey, Legal Assistant
USDA/Office of Administrative Law Judges
Hearing Clerk's Office, Rm. 1031-S
1400 Independence Ave., SW
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Exhibit 16

Case No. 4:23-cv-00024-TRM-SKL

2016 Mississippi Charity Horse Show—ENTRY FORM

March 31– April 2, 2016—Kirk Fordice Equine Center—Jackson, MS

Class No.	Entry No.	Horse / Reg. No.	Exhibitor & Complete Address	Trainer & Complete Address	Trainer's License No.	Owner & Complete Address	Entry Fee
6	354	2088 7351 She's Limit Less	Jimmy Mc Connell 3034 Walker Tanner Rd Union City, TN 38261	Jimmy Mc Connell 3034 Walker Tanner Rd Union City, TN 38261	38119	Kelsey Andrews P.O. Box 283 Desert Creek Ranch Mission, CA 93372	

I hereby certify that every horse is eligible as entered and sound and I agree to abide by the Rules of the SHOW, Inc. and this show. All decisions of the SHOW, Inc. and this show will be final. Exhibitor, trainer or agent must sign entry blank or class sheet. If not signed, the first entrance into the ring as an exhibitor shall be construed as acceptance of this and all other SHOW, Inc. and this show's rules. SHOW, Inc., this show and any of its employees, agents, volunteers, or sponsors will not be responsible for any accident, theft, injury or any other mishap that occurs at the Mississippi Charity Horse Show.

OWNER OF RECORD IS SUBJECT TO BE VERIFIED THROUGH TWHBEA, THE OFFICIAL BREED REGISTRY.

I hereby agree to the above and agree to abide by its contents.

Trainer, Agent or Exhibitor (Please Print): Jimmy Mc Connell

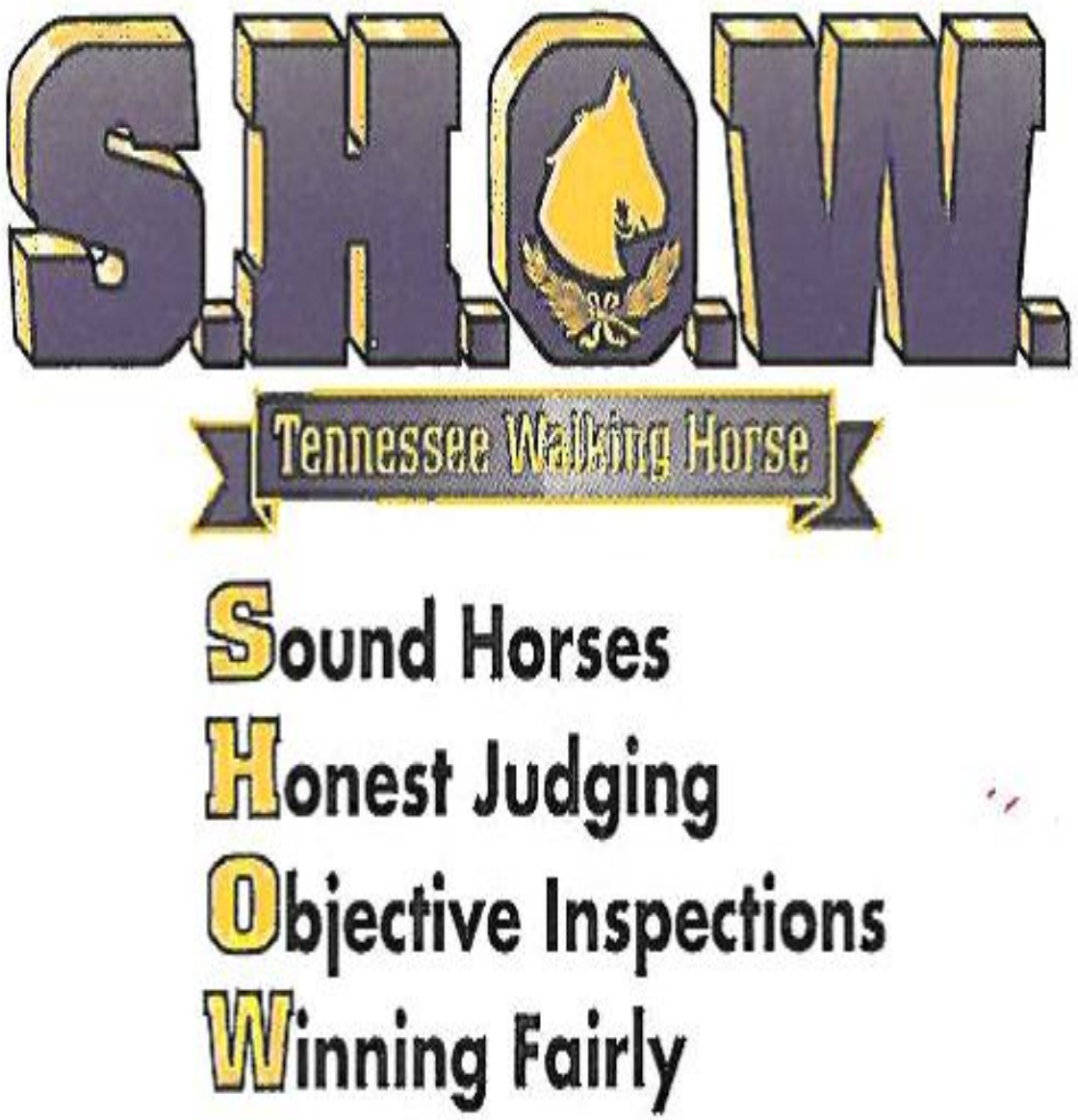
Signature: Jimmy Mc Connell

Address: _____

Phone: _____

Exhibit 17
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL



RULE BOOK – HPA COMPLIANCE SECTION

Revised January 2011

III. DEFINITIONS

A. Affiliated/Sanctioned Sales. All sales which have been accepted for this privilege by SHOW or any other of the recognized organizations that license DQPs, and publish a current rule book.

B. Affiliated/Sanctioned Shows. All shows which have been accepted for this privilege by SHOW or any other of the recognized organizations that license DQPs and judges, and publish a current rule book.

C. Designated Qualified Person (DQP). A person licensed by SHOW to detect or diagnose horses which are in violation and to otherwise inspect horses for the purposes of enforcing the Horse Protection Act and SHOW Rules.

D. Exhibitor. Any rider, driver, handler, or contestant who shows or exhibits any horse in a horse show, horse exhibition, horse sale, or horse auction, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be exhibited, sold or auctioned.

E. Exhibiting. For horse show purposes, exhibiting means showing in competition at a horse show, exhibiting a horse at a sale, presenting the National Colors at a horse show or other event, or any other public exhibition of a horse.

F. Hearing Committee. The Hearing Committee is established to hear any appeal of alleged violations, impose penalties, and any other matters that SHOW may direct.

G. Horse Protection Act (HPA). The federal Horse Protection Act of 1970, as amended by the Horse Protection Act Amendments of 1976, 15 U.S.C. §§ 1821 *et seq.*

H. Non-Affiliated Show. A show that is not affiliated with an organization that licenses DQPs and judges, and publishes a current rule book.

I. Owner. For horse show purposes, the term "owner" means the person shown as the owner by the records of the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA) and/or a person who has a bona fide lease as approved and on file with TWHBEA on said horse, or who has legal title.

J. Show Employees. For horse show, sale or exhibition purposes, the term "show employees" shall include and refer to the following: Managers, Announcers, Ringmasters, Secretaries, Gate Attendants, Ring Clerks, Farriers, and other persons engaged directly by the show.

K. Show/Sale/Exhibition Management. For horse show, sale or exhibition purposes, the term "show management" shall refer to the personnel representing the sponsoring organization.

L. Show Officials. For horse, sale or exhibition show purposes, the term "show officials" shall include and refer to the following: Directors, Officers, Chairman of the Show Committee, Judges, DQPs, Veterinarians, and Timekeepers.

M. Sore. When used to describe a horse, sore means: (1) an irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse; (2) any burn, cut, or laceration has been inflicted by a person on any limb of a horse; (3) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse; or (4) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or

practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

N. Suspensions. All SHOW penalties, including fines and suspensions will apply to any event regardless of affiliation or non-affiliation.

IV. MEMBERSHIP AND AFFILIATION RULES

A. PROCEDURES FOR AFFILIATING OR SANCTIONING A SHOW OR SALE

1. Any show desiring to affiliate or sanction may apply, upon its agreeing to use only SHOW licensed judges and approved Designated Qualified Persons (DQPs) in all saddle, breeding, model, halter and equitation classes and to abide by all the Rules, regulations and procedures of SHOW. When the request for affiliation is received, an application form and all necessary information will be promptly forwarded to Show Management. The appropriate fee, if any, must be included with any application submitted.

2. Any sale desiring to affiliate or sanction may apply, upon its agreeing to use only approved DQPs and to abide by all the Rules, regulations and procedures of SHOW, and the request for affiliation is received, an application form and all necessary information will be promptly forwarded to Sale Management. The appropriate fee, if any, must be included with any application submitted.

3. To allow Affiliation or Sanctioning approval, application should be made not less than 30 days prior to the show date, unless good cause can be shown or as approved by the CEO of SHOW.

4. Show Management must ensure that all participants agree to be subject to the SHOW Rule Book.

5. Show or Sale Management shall furnish SHOW within 15 days after the show the following:

(a) Payment of inspection fees, if any.

(b) Copy of a properly executed class sheet, showing all entries and class winners, including complete names and addresses of both owners and trainers on all horses inspected. Class sheet must also include the Horse Card number or if no Horse card provided, the registered name and number of the horse, the trainer's license number, and the exhibitor/rider name. (Not required of Sale Management.)

(c) Show or Sale Manager's Report on the form furnished by SHOW.

(d) Copy of Premium List and/or Program or Sale Catalogue.

(e) Judges' Cards if the show utilized more than one judge.

(f) Show Management agrees to pay all DQP fees and expenses and further agrees to accept whichever DQP's are assigned by SHOW.

B. INSPECTION FEES

Any show or sale agreeing to affiliate and/or sanction hereby agrees to collect for SHOW all appropriate inspection fees, if any. A schedule of SHOW inspection fees will be provided in the Show Manager's informational materials sent by SHOW.

C. PRIVILEGES OF AN AFFILIATED OR SANCTIONED SHOW OR SALE

the extremity caused by such items as tight bandages or injuries above the pastern resulting in fluids gravitating to the pastern area.

(vi) Other evidence of inflammation: These may include without limitation pain, heat, redness, swelling, ulceration, and/or excessive loss of hair loss.

(c) Inspection Procedures for Scar Rule Compliance

DQPs may examine for scar rule compliance during the physical examination phase of the inspection process or separately. The DQP should observe the horse's foot while on the ground, noting the general appearance of the pastern area, if it is it properly conditioned, well-groomed, etc. While holding up the horse's foot, the DQP shall first examine the anterior, lateral and medial surfaces of the pastern. The area's proper anatomical limits shall be defined, laterally and medially, by the palpable posterior of the two pastern bones (long and short). These surfaces must comply with the definitions above.

The DQP shall then examine the posterior (flexor) surface of the pastern, that surface not previously defined as anterior, anterior-lateral or anterior-medial. The flexor surface must also comply with the definitions above.

In evaluating all of the pastern surfaces for the purposes of scar rule compliance, the DQP shall take into consideration the horse's age, in awareness of the fact that the amount and degree of allowable suspect or questionable tissue which is not obviously and flagrantly in violation may be expected to increase linearly with the horse's age.

VI. VIOLATIONS AND PENALTIES

A. AFFECTED INDIVIDUALS, FIRMS, CORPORATIONS OR PARTNERSHIPS

The provisions of these Rules shall apply to all owners, exhibitors, agents, trainers, managers, show or sale officials, show or sale employees, members of the families or employees of the above, participating either individually, or as a member of an entity, or any person who acts in a manner in violation of the Rules of SHOW, or is deemed prejudicial to its best interest, and therefore subject to penalty.

1. Any act at a SHOW affiliated or sanctioned show, sale or exhibition in violation of the Rules of SHOW by a member of the family or employee of a person participating or exhibiting in the show, sale or exhibition who is described in the paragraph above, may be deemed to have been committed by such person and subject him or her to penalty.

2. Any person, firm, corporation or partnership or any other entity granted any right, privilege, authorization, or license, or accepting any benefit from SHOW shall be deemed to have contractually agreed to fully cooperate with all duly appointed committees, agents and employees in enforcement of all Rules, regulations, suspensions and orders of SHOW.

3. Any person, firm, corporation, partnership, or other entity granted any right, privilege, authorization, or license, or accepting, receiving, or exercising the same, may be required to give evidence or testimony in any investigation, hearing, trial, or other proceeding held by duly appointed representatives of SHOW in connection with investigation of possible violation and enforcement of these Rules.

4. Any violations and penalties shall apply equally to all horse shows, sales and exhibitions affiliated with SHOW.

5. By applying for and accepting the horse card, entry form, affiliation document or any other indication of participation in SHOW or any of its inspections, sales or exhibitions, the owner, trainer, exhibitor and their agents, employees, officers, representatives and successors in interest are deemed by said participation

to agree to be bound by the rules, policies and procedures of SHOW, as the same may be changed from time to time, and to agree to hold SHOW, its officers, directors and employees harmless in all respects.

B. VIOLATIONS

A violation is any act committed at a SHOW affiliated or sanctioned event, prejudicial to the best interest of SHOW, including but not limited to:

1. Violation of the Rules of SHOW

2. Disqualification by a Show manager or official

3. The following specific acts:

(a) Providing false information of any nature or kind to any show management or sale official, DQP, or SHOW official.

(b) Acting or inciting or permitting any other to act in a manner contrary to the Rules of SHOW, or in a manner deemed improper, unethical, dishonest, unsportsmanlike or intemperate, or prejudicial to the best interest of SHOW.

(c) Committing any act or making any remark considered offensive and/or having been made with intent to influence or cast aspersions on the inspections or judging of a SHOW affiliated or sanctioned event.

(d) Failing, as a Judge or DQP, to perform duties at a show or sale, or affiliated or sanctioned event in accordance with the Rules.

(e) Failing, as an exhibitor or his representative, to sign the entry blank of a show in which he competes.

(f) Physically assaulting and/or treating a horse cruelly, which is intended to inflict pain on the horse.

(g) Failing to obey any penalty or suspension imposed by SHOW.

(h) Influencing or attempting to influence by any means or manner any DQP in determining the eligibility of any horse at any affiliated show or event.

(i) Influencing or attempting to influence by any means or manner any Judge of any affiliated show.

(j) Inserting any object or material between the pad and the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances used to maintain adequate frog pressure or sole consistency so long as such acceptable hoof packing has not been altered or changed in any manner so as to cause soring as defined in the HPA.

(k) Verbal or physical abuse directed to anyone representing SHOW, Show or Sale Management, Judges, DQP, Director of DQP Service Coordinators, USDA, Employees or Directors, while functioning in any official capacity at, or pertaining to, any horse show, sale, or exhibition

(l) Showing or attempting to exhibit a horse while on suspension

(m) Misrepresentation of a horse's identity, name, height, age, eligibility for the class, registered or recorded name, registration number, owner of record, or other information on any entry blank, or

substitution in the show ring of any entry other than the one named for the class in question. This shall result in the exhibitor's forfeiture of any ribbon, trophy, cash prize and other award won by such misrepresented or substituted animal, and shall render the exhibitor liable for further penalty. .

(n) Voluntarily removing a horse from the ring without the permission of a judge, for which the exhibitor and all animals under his care and training may be disqualified from all future classes at that show by Show Management and caused to forfeit all prizes and entry fees for the entire show.

4. Foreign Substance. Foreign substance found on the pastern of a horse.

5. Distraction Violations. Using whips, cigarette smoke and/or actions and paraphernalia in an attempt to distract a horse during examination is prohibited, including presenting a horse in any manner, or the custodian doing anything, that might cause the horse to not react to the DQPs inspection

6. Full Blinders. Full Blinders of any type on a horse on the show grounds.

7. Skin cracked open (open lesions) one fore-foot. A horse that has skin cracked open or open lesions in the pastern area of one fore-foot is in violation of SHOW rules. A horse found with this violation cannot show for the remainder of the day.

8. Unacceptable horse (one limb). An unacceptable horse, one limb, is a horse that presents only an inconsistent non-repetitive response in one limb, but nevertheless the response gives the DQP concern as to the soundness of that limb. A horse found to be unacceptable in one limb, pre or post-show shall not be allowed to show for the remainder of the day.

9. Unilateral Sore. The inspection procedure of a unilateral sore horse will not be different from the inspection procedure for the determination of a bilateral sore horse except that the findings are limited to one foot.

10. Scar Rule. In accordance with the HPA, any horse foaled on or after October 1, 1975, is subject to the terms and conditions of the Scar Rule. (For the complete Scar Rule definition, please refer to the HPA.)

11. Other

(a) Failure to have the horse inspected before entering the show or sale ring.

(b) Failure to have horse inspected before being placed on exhibition.

(c) Failure to report back to DQP immediately after a class if required or requested.

(d) Heavy/Improper action device or devices, post show. Any action device not meeting the requirements set forth in the Rules herein.

(e) Working a flat-shod horse on the show or sale grounds with any action devices.

(f) Removing the action devices on a horse being re-inspected before instructed by the DQP to do so.

(g) Working a horse on the show or sale grounds with more than one pair of action devices on the horse, or action devices in excess of the permitted weight or configuration.

(h) Illegal Shoeing – Pre or Post Show Shoeing not meeting the requirements set forth by SHOW.

(i) On the show grounds of a SHOW affiliated event, possession and/or application of any irritating or blistering agent or any substance, the application, infliction or injection of which can reasonably be

expected to cause physical pain, distress, inflammation or lameness to the horse. Such substances include, but are not limited to the use of plastic wrap on the forelimbs of any horse.

12. Pressure Shoeing. Horse shod or trimmed, or any material added to sole, hoof, or hoof wall in such a manner that will cause such horse to suffer or can reasonably be expected to suffer pain, distress, inflammation or lameness when walking, trotting, or otherwise moving.

14. Fractious-Unruly Horse. Any horse that cannot be thoroughly inspected by the DQP in a manner to sufficiently determine compliance with the Horse Protection Act and Regs and SHOW rules shall be prohibited from showing or exhibiting, but shall not otherwise be penalized.

15. Any person found in violation, by SHOW of rules regarding remuneration of an amateur for exhibiting a horse.

16. Any person found in violation, by SHOW of rule governing Amateur Owned and Trained classes.

17. Any person found violating rules governing artificial marking or appliances shall be subject to penalties found in the Additional Penalties Section of this rule book as determined by SHOW.

18. Bad Image: Horse which does not lead freely to and from inspection, and about the show, sale, or exhibition ground. A horse which displays, by leading or stance, an excessive or exaggerated deviation from the normal Walking Horse stance or gait.

19. **Bilateral sore.** Any horse that presents a consistent reproducible (non-random) response to pain from any flexion or palpation in both front limbs.

20. Failure to pass the hoof test

21. In addition to all the above if any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving; or uses any other actions or paraphernalia to distract a horse during examination; or engages in any other act or behavior that assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties while conducting an inspection or reviewing any activity on the show grounds shall be subject to a suspension and penalty at the discretion of SHOW up to and including a lifetime suspension.

C. PENALTIES

ALL VIOLATIONS SHALL CARRY THE FINES AND SUSPENSIONS AS FOUND IN THE PENALTY MATRIX OR AS DESCRIBED FURTHER HEREINAFTER. ANY VIOLATION NOT DESCRIBED IN THIS RULEBOOK OR NOT HAVING AN ASSIGNED PENALTY PURSUANT TO THE PENALTY MATRIX ATTACHED OR AS MODIFIED FROM TIME TO TIME BY SHOW SHALL BE PENALIZED AT THE DISCRETION OF SHOW IN ACCORDANCE WITH THE PROCEDURES SET FORTH HEREIN, BY A FINE OF NOT LESS THAN $100.00, AND/OR BY A SUSPENSION OF NOT LESS THAN 1 DAY AND UP TO LIFE. SHOW MAY PUBLISH A NEW PENALTY MATRIX AT ANY TIME SO LONG AS IT GIVES PUBLIC NOTICE OF THE SAME AND 5 DAYS ADVANCE NOTICE.

D. ADDITIONAL PENALTIES

Additional penalties, not specifically covered in the Penalty matrix, may be levied against any person, firm, or corporation deemed in violation of any rule or regulation of SHOW as follows:

Exhibit 18
(Excerpted
and Pagination Added)

Case No. 4:23-cv-00024-TRM-SKL

RULE BOOK – HPA COMPLIANCE SECTION

Revised September 2013

III. DEFINITIONS

A. Affiliated/Sanctioned Sales. All sales which have been affiliated with SHOW or any other of the recognized organizations that license DQPs.

B. Affiliated/Sanctioned Shows. All shows which have been affiliated with SHOW or any other of the recognized organizations that license DQPs.

C. Designated Qualified Person (DQP). A person licensed by SHOW to detect or diagnose horses which are in violation and to otherwise inspect horses for the purposes of enforcing the Horse Protection Act and SHOW Rules.

D. Exhibitor. Any rider, driver, handler, or contestant who shows or exhibits any horse in a horse show, horse exhibition, horse sale, or horse auction, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be exhibited, sold or auctioned.

E. Exhibiting. For horse show purposes, exhibiting means showing in competition at a horse show, exhibiting a horse at a sale, presenting the National Colors at a horse show or other event, or any other public exhibition of a horse.

F. Hearing Committee. The Hearing Committee is established to hear any appeal of alleged violations, impose penalties, and any other matters that SHOW may direct.

G. Horse Protection Act (HPA). The federal Horse Protection Act of 1970, as amended by the Horse Protection Act Amendments of 1976, 15 U.S.C. §§ 1821 *et seq.*

H. Non-Affiliated Show. A show that is not affiliated with an organization that licenses DQPs and judges, and publishes a current rule book.

I. Owner. For horse show purposes, the term “owner” means the person shown as the owner by the records of the Tennessee Walking Horse Breeders’ and Exhibitors’ Association (TWHBEA) and/or a person who has a bona fide lease as approved and on file with TWHBEA on said horse, or who has legal title.

J. Show Employees. For horse show, sale or exhibition purposes, the term “show employees” shall include and refer to the following: Managers, Announcers, Ringmasters, Secretaries, Gate Attendants, Ring Clerks, Farriers, and other persons engaged directly by the show.

K. Show/Sale/Exhibition Management. For horse show, sale or exhibition purposes, the term "show management" shall refer to the personnel representing the sponsoring organization.

L. Show Officials. For horse, sale or exhibition show purposes, the term "show officials" shall include and refer to the following: Directors, Officers, Chairman of the Show Committee, Judges, DQPs, Veterinarians, and Timekeepers.

M. Sore. When used to describe a horse, sore means: (1) an irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse; (2) any burn, cut, or laceration has been inflicted by a person on any limb of a horse; (3) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse; or (4) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

DQPs may examine for scar rule compliance during the physical examination phase of the inspection process or separately. The DQP should observe the horse's foot while on the ground, noting the general appearance of the pastern area, if it is it properly conditioned, well-groomed, etc. While holding up the horse's foot, the DQP shall first examine the anterior, lateral and medial surfaces of the pastern. The area's proper anatomical limits shall be defined, laterally and medially, by the palpable posterior of the two pastern bones (long and short). These surfaces must comply with the definitions above.

The DQP shall then examine the posterior (flexor) surface of the pastern, that surface not previously defined as anterior, anterior-lateral or anterior-medial. The flexor surface must also comply with the definitions above.

In evaluating all of the pastern surfaces for the purposes of scar rule compliance, the DQP shall take into consideration the horse's age, in awareness of the fact that the amount and degree of allowable suspect or questionable tissue which is not obviously and flagrantly in violation may be expected to increase linearly with the horse's age.

VI. VIOLATIONS AND PENALTIES

A. AFFECTED INDIVIDUALS, FIRMS, CORPORATIONS OR PARTNERSHIPS

The provisions of these Rules shall apply to all owners, exhibitors, agents, trainers, managers, show or sale officials, show or sale employees, members of the families or employees of the above, participating either individually, or as a member of an entity, or any person who acts in a manner in violation of the Rules of SHOW, or is deemed prejudicial to its best interest, and therefore subject to penalty.

1. Any act at a SHOW affiliated show, sale or exhibition in violation of the Rules of SHOW by a member of the family or employee of a person participating or exhibiting in the show, sale or exhibition who is described in the paragraph above, may be deemed to have been committed by such person and subject him or her to penalty.

2. Any person, firm, corporation or partnership or any other entity granted any right, privilege, authorization, or license, or accepting any benefit from SHOW shall be deemed to have contractually agreed to fully cooperate with all duly appointed committees, agents and employees in enforcement of all Rules, regulations, suspensions and orders of SHOW.

3. Any person, firm, corporation, partnership, or other entity granted any right, privilege, authorization, or license, or accepting, receiving, or exercising the same, may be required to give evidence or testimony in any investigation, hearing, trial, or other proceeding held by duly appointed representatives of SHOW in connection with investigation of possible violation and enforcement of these Rules.

4. Any violations and penalties shall apply equally to all horse shows, sales and exhibitions affiliated with SHOW.

5. By applying for and accepting the horse card, entry form, affiliation document or any other indication of participation in SHOW or any of its inspections, sales or exhibitions, the owner, trainer, exhibitor and their agents, employees, officers, representatives and successors in interest are deemed by said participation to agree to be bound by the rules, policies and procedures of SHOW, as the same may be changed from time to time, and to agree to hold SHOW, its officers, directors and employees harmless in all respects.

B. VIOLATIONS

A violation is any act committed at a SHOW affiliated event, in violation of the HPA or its regulations or prejudicial to the best interest of SHOW, including but not limited to:

1. Violation of the Rules of SHOW

2. Disqualification by a Show manager or official

3. The following specific acts:

(a) Providing false information of any nature or kind to any show management or sale official, DQP, or SHOW official.

(b) Acting or inciting or permitting any other to act in a manner contrary to the Rules of SHOW, or in a manner deemed improper, unethical, dishonest, unsportsmanlike or intemperate, or prejudicial to the best interest of SHOW.

(c) Committing any act or making any remark considered offensive and/or having been made with intent to influence or cast aspersions on the inspections or judging of a SHOW affiliated event.

(d) Failing, as a Judge or DQP, to perform duties at a show or sale, or affiliated event in accordance with the Rules.

(e) Failing, as an exhibitor or his representative, to sign the entry blank of a show in which he competes.

(f) Physically assaulting and/or treating a horse cruelly, which is intended to inflict pain on the horse.

(g) Failing to obey any penalty or suspension imposed by SHOW.

(h) Influencing or attempting to influence by any means or manner any DQP in determining the eligibility of any horse at any affiliated show or event.

(i) Influencing or attempting to influence by any means or manner any Judge of any affiliated show.

(j) Inserting any object or material between the pad and the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances used to maintain adequate frog pressure or sole consistency so long as such acceptable hoof packing has not been altered or changed in any manner so as to cause soring as defined in the HPA.

(k) Verbal or physical abuse directed to anyone representing SHOW, Show or Sale Management, Judges, DQP, Director of DQP Service Coordinators, USDA, Employees or Directors, while functioning in any official capacity at, or pertaining to, any horse show, sale, or exhibition

(l) Showing or attempting to exhibit a horse while on suspension

(m) Misrepresentation of a horse's identity, name, height, age, eligibility for the class, registered or recorded name, registration number, owner of record, or other information on any entry blank, or substitution in the show ring of any entry other than the one named for the class in question.

(n) Voluntarily removing a horse from the ring without the permission of a judge, for which the exhibitor and all animals under his care and training may be disqualified from all future classes at that show by Show Management.

4. Foreign Substance. Foreign substance found on the pastern of a horse.

5. Distraction Violations. Using whips, cigarette smoke and/or actions and paraphernalia in an attempt to distract a horse during examination is prohibited, including presenting a horse in any manner, or the custodian doing anything, that might cause the horse to not react to the DQPs inspection

6. Full Blinders. Full Blinders of any type on a horse on the show grounds.

7. Skin cracked open (open lesions) one fore-foot. A horse that has skin cracked open or open lesions in the pastern area of one fore-foot is in violation of SHOW rules. A horse found with this violation cannot show for the remainder of the day.

8. Unacceptable horse (one limb). An unacceptable horse, one limb, is a horse that presents only an inconsistent non-repetitive response in one limb, but nevertheless the response gives the DQP concern as to the soundness of that limb. A horse found to be unacceptable in one limb, pre or post-show shall not be allowed to show for the remainder of the day.

9. Unilateral Sore. The inspection procedure of a unilateral sore horse will not be different from the inspection procedure for the determination of a bilateral sore horse except that the findings are limited to one foot.

10. Scar Rule. In accordance with the HPA, any horse foaled on or after October 1, 1975, is subject to the terms and conditions of the Scar Rule. (For the complete Scar Rule definition, please refer to the HPA.)

11. Other

(a) Failure to have the horse inspected before entering the show or sale ring.

(b) Failure to have horse inspected before being placed on exhibition.

(c) Failure to report back to DQP immediately after a class if required or requested.

(d) Heavy/Improper action device or devices, post show. Any action device not meeting the requirements set forth in the Rules herein.

(e) Working a flat-shod horse on the show or sale grounds with any action devices.

(f) Removing the action devices on a horse being re-inspected before instructed by the DQP to do so.

(g) Working a horse on the show or sale grounds with more than one pair of action devices on the horse, or action devices in excess of the permitted weight or configuration.

(h) Illegal Shoeing – Pre or Post Show Shoeing not meeting the requirements set forth by SHOW.

(i) On the show grounds of a SHOW affiliated event, possession and/or application of any irritating or blistering agent or any substance, the application, infliction or injection of which can reasonably be expected to cause physical pain, distress, inflammation or lameness to the horse. Such substances include, but are not limited to the use of plastic wrap on the forelimbs of any horse.

12. Pressure Shoeing. Horse shod or trimmed, or any material added to sole, hoof, or hoof wall in such a manner that will cause such horse to suffer or can reasonably be expected to suffer pain, distress, inflammation or lameness when walking, trotting, or otherwise moving.

14. Fractious-Unruly Horse. Any horse that cannot be thoroughly inspected by the DQP in a manner to sufficiently determine compliance with the Horse Protection Act and Regs and SHOW rules shall be prohibited from showing or exhibiting, but shall not otherwise be penalized.

15. Any person found in violation, by SHOW of rules regarding remuneration of an amateur for exhibiting a horse.

16. Any person found in violation, by SHOW of rule governing Amateur Owned and Trained classes.

17. Any person found violating rules governing artificial marking or appliances shall be subject to penalties found in the Additional Penalties Section of this rule book as determined by SHOW.

18. Bad Image: Horse which does not lead freely to and from inspection, and about the show, sale, or exhibition ground. A horse which displays, by leading or stance, an excessive or exaggerated deviation from the normal Walking Horse stance or gait.

19. **Bilateral sore.** Any horse that presents a consistent reproducible (non-random) response to pain from any flexion or palpation in both front limbs.

20. Failure to pass the hoof test

21. In addition to all the above if any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving; or uses any other actions or paraphernalia to distract a horse during examination; or engages in any other act or behavior that assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties while conducting an inspection or reviewing any activity on the show grounds shall be subject to a suspension and penalty at the discretion of SHOW up to and including a lifetime suspension.

C. PENALTIES

ALL VIOLATIONS SHALL CARRY THE FINES AND SUSPENSIONS AS FOUND IN THE PENALTY MATRIX OR AS DESCRIBED FURTHER HEREINAFTER. ANY VIOLATION NOT DESCRIBED IN THIS RULEBOOK OR NOT HAVING AN ASSIGNED PENALTY PURSUANT TO THE PENALTY MATRIX ATTACHED OR AS MODIFIED FROM TIME TO TIME BY SHOW SHALL BE PENALIZED AT THE DISCRETION OF SHOW IN ACCORDANCE WITH THE PROCEDURES SET FORTH HEREIN, BY A FINE OF NOT LESS THAN $100.00, AND/OR BY A SUSPENSION OF NOT LESS THAN 1 DAY AND UP TO LIFE. SHOW MAY PUBLISH A NEW PENALTY MATRIX AT ANY TIME SO LONG AS IT GIVES PUBLIC NOTICE OF THE SAME 5 DAYS IN ADVANCE.

D. ADDITIONAL PENALTIES

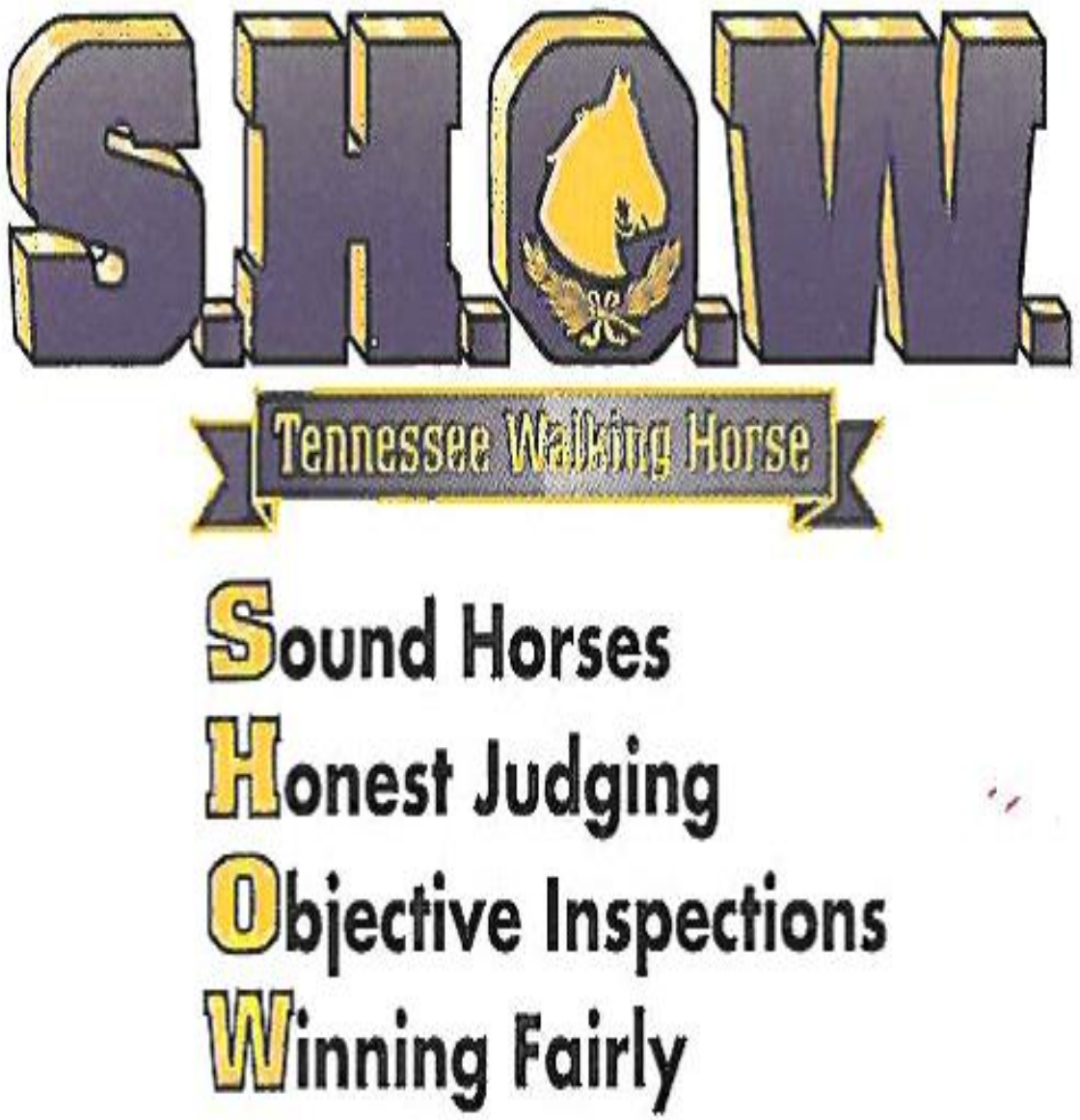
Additional penalties, not specifically covered in the Penalty matrix, may be levied against any person, firm, or corporation deemed in violation of any rule or regulation of SHOW as follows:

1. Suspension from all Affiliated Shows, sales or exhibitions for a period of not less than one (1) day and up to life.

2. Fine of not less than $100.

Exhibit 19
(Excerpted)

Case No. 4:23-cv-00024-TRM-SKL



RULE BOOK – HPA COMPLIANCE SECTION

Revised February 2016

III. DEFINITIONS

A. Affiliated/Sanctioned Sales. All sales which have been affiliated with SHOW or any other of the recognized organizations that license DQPs.

B. Affiliated/Sanctioned Shows. All shows which have been affiliated with SHOW or any other of the recognized organizations that license DQPs.

C. Designated Qualified Person (DQP). A person licensed by SHOW to detect or diagnose horses which are in violation and to otherwise inspect horses for the purposes of enforcing the Horse Protection Act and SHOW Rules.

D. Exhibitor. Any rider, driver, handler, or contestant who shows or exhibits any horse in a horse show, horse exhibition, horse sale, or horse auction, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be exhibited, sold or auctioned.

E. Exhibiting. For horse show purposes, exhibiting means showing in competition at a horse show, exhibiting a horse at a sale, presenting the National Colors at a horse show or other event, or any other public exhibition of a horse.

F. Horse Protection Act (HPA). The federal Horse Protection Act of 1970, as amended by the Horse Protection Act Amendments of 1976, 15 U.S.C. §§ 1821 *et seq.*

G. Non-Affiliated Show. A show that is not affiliated with an organization that licenses DQPs and judges, and publishes a current rule book.

H. Owner. For horse show purposes, the term "owner" means the person shown as the owner by the records of the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA) and/or a person who has a bona fide lease as approved and on file with TWHBEA on said horse, or who has legal title.

I. Show Employees. For horse show, sale or exhibition purposes, the term "show employees" shall include and refer to the following: Managers, Announcers, Ringmasters, Secretaries, Gate Attendants, Ring Clerks, Farriers, and other persons engaged directly by the show.

J. Show/Sale/Exhibition Management. For horse show, sale or exhibition purposes, the term "show management" shall refer to the personnel representing the sponsoring organization.

K. Show Officials. For horse, sale or exhibition show purposes, the term "show officials" shall include and refer to the following: Directors, Officers, Chairman of the Show Committee, Judges, DQPs, Veterinarians, and Timekeepers.

L. Sore. When used to describe a horse, sore means: (1) an irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse; (2) any burn, cut, or laceration has been inflicted by a person on any limb of a horse; (3) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse; or (4) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

The DQP shall then examine the posterior (flexor) surface of the pastern, that surface not previously defined as anterior, anterior-lateral or anterior-medial. The flexor surface must also comply with the definitions above. The DQP should spread the skin on the pastern to determine if it can be flattened or smoothed out and determine if what appears to be a scar is uniformly thickened epithelium, a wrinkle, callous, corn or other allowable change in the tissue as a result of the friction of the action device or some other reason that does not violate the HPA.

In evaluating all of the pastern surfaces for the purposes of scar rule compliance, the DQP shall take into consideration the horse's age, in awareness of the fact that the amount and degree of allowable suspect or questionable tissue which is not obviously and flagrantly in violation may be expected to increase linearly with the horse's age.

VI. RULES AND VIOLATIONS

A. AFFECTED INDIVIDUALS, FIRMS, CORPORATIONS OR PARTNERSHIPS

The provisions of these Rules shall apply to all owners, exhibitors, agents, trainers, managers, show or sale officials, show or sale employees, members of the families or employees of the above, participating either individually, or as a member of an entity, or any person who acts in a manner in violation of the Rules of SHOW, or is deemed prejudicial to its best interest.

1. Any person, firm, corporation or partnership or any other entity granted any right, privilege, authorization, or license, or accepting any benefit from SHOW shall be deemed to have contractually agreed to fully cooperate with all duly appointed committees, agents and employees in enforcement of all Rules, regulations, suspensions and orders of SHOW.

2. By applying for and utilizing the entry form, affiliation document or any other indication of participation in SHOW or any of its inspections, sales or exhibitions, the owner, trainer, exhibitor and their agents, employees, officers, representatives and successors in interest are deemed by said participation to agree to be bound by the rules, policies and procedures of SHOW, as the same may be changed from time to time, **and to agree to hold SHOW, its officers, directors and employees harmless in all respects.**

B. VIOLATIONS

A violation is any act committed at a SHOW affiliated event prejudicial to the best interest of SHOW, including but not limited to:

1. Violation of the Rules of SHOW

2. Disqualification by a Show manager or official

3. The following specific acts:

(a) Providing false information of any nature or kind to any show management or sale official, DQP, or SHOW official.

(b) Acting or inciting or permitting any other to act in a manner contrary to the Rules of SHOW, or in a manner deemed improper, unethical, dishonest, unsportsmanlike or intemperate, or prejudicial to the best interest of SHOW.

(c) Committing any act or making any remark considered offensive and/or having been made with intent to influence or cast aspersions on the inspections or judging of a SHOW affiliated event.

(d) Failing, as a Judge or DQP, to perform duties at a show or sale, or affiliated event in accordance with the Rules.

(e) Failing, as an exhibitor or his representative, to sign the entry blank of a show in which he competes.

(f) Physically assaulting and/or treating a horse cruelly, which is intended to inflict pain on the horse.

(g) Influencing or attempting to influence by any means or manner any DQP in determining the eligibility of any horse at any affiliated show or event.

(h) Influencing or attempting to influence by any means or manner any Judge of any affiliated show.

(i) Verbal or physical abuse directed to anyone representing SHOW, Show or Sale Management, Judges, DQP, Director of DQP Service Coordinators, USDA, Employees or Directors, while functioning in any official capacity at, or pertaining to, any horse show, sale, or exhibition.

(j) Inserting any object or material between the pad and the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances used to maintain adequate frog pressure or sole consistency so long as such acceptable hoof packing has not been altered or changed in any manner so as to cause soring as defined in the HPA.

(k) Showing or attempting to exhibit a horse while on USDA disqualification.

(l) Misrepresentation of a horse's identity, name, height, age, eligibility for the class, registered or recorded name, registration number, owner of record, or other information on any entry blank, or substitution in the show ring of any entry other than the one named for the class in question.

(m) Voluntarily removing a horse from the ring without the permission of a judge, for which the exhibitor and all animals under his care and training may be disqualified from all future classes at that show by Show Management.

4. Foreign Substance. Foreign substance found on the pastern of a horse.

5. Distraction Violations. Using whips, cigarette smoke and/or actions and paraphernalia in an attempt to distract a horse during examination is prohibited, including presenting a horse in any manner, or the custodian doing anything, that might cause the horse to not react to the DQPs inspection

6. Full Blinders. Full Blinders of any type on a horse on the show grounds.

7. Skin cracked open (open lesions) one fore-foot. A horse that has skin cracked open or open lesions in the pastern area of one fore-foot is in violation of SHOW rules. A horse found with this violation cannot show for the remainder of the day.

8. Unacceptable horse (one limb). An unacceptable horse, one limb, is a horse that presents only an inconsistent non-repetitive response in one limb, but nevertheless the response gives the DQP concern as to the soundness of that limb. A horse found to be unacceptable in one limb, pre or post-show shall not be allowed to show for the remainder of the day.

9. Unilateral Sore. The inspection procedure of a unilateral sore horse will not be different from the inspection procedure for the determination of a bilateral sore horse except that the findings are limited to one foot.

10. Scar Rule. For the complete Scar Rule definition, please refer to the HPA.

11. Other

(a) Failure to have the horse inspected before entering the show or sale ring.

(b) Failure to have horse inspected before being placed on exhibition.

(c) Failure to report back to DQP immediately after a class if required or requested.

(d) Heavy/Improper action device or devices, post-show. Any action device not meeting the requirements set forth in the Rules herein.

(e) Working a flat-shod horse on the show or sale grounds with any action devices.

(f) Removing the action devices on a horse being re-inspected before instructed by the DQP to do so.

(g) Working a horse on the show or sale grounds with more than one pair of action devices on the horse, or action devices in excess of the permitted weight or configuration.

(h) Illegal Shoeing – Pre or Post Show Shoeing not meeting the requirements set forth by SHOW.

(i) On the show grounds of a SHOW affiliated event, possession and/or application of any irritating or blistering agent or any substance, the application, infliction or injection of which can reasonably be expected to cause physical pain, distress, inflammation or lameness to the horse. Such substances include, but are not limited to the use of plastic wrap on the forelimbs of any horse.

12. Pressure Shoeing. Horse shod or trimmed, or any material added to sole, hoof, or hoof wall in such a manner that will cause such horse to suffer or can reasonably be expected to suffer pain, distress, inflammation or lameness when walking, trotting, or otherwise moving.

14. Fractious-Unruly Horse. Any horse that cannot be thoroughly inspected by the DQP in a manner to sufficiently determine compliance with the Horse Protection Act and Regs and SHOW rules shall be prohibited from showing or exhibiting, but shall not otherwise be penalized.

15. Any person found in violation, by SHOW of rules regarding remuneration of an amateur for exhibiting a horse.

16. Any person found in violation, by SHOW of rule governing Amateur Owned and Trained classes.

17. Any person found violating rules governing artificial marking or appliances shall be subject to penalties found in the Additional Penalties Section of this rule book as determined by SHOW.

18. Bad Image: Horse which does not lead freely to and from inspection, and about the show, sale, or exhibition ground. A horse which displays, by leading or stance, an excessive or exaggerated deviation from the normal Walking Horse stance or gait.

19. **Bilateral sore.** Any horse that presents a consistent reproducible (non-random) response to pain from any flexion or palpation in both front limbs.

20. Failure to pass the hoof test

21. Anyone who engages in any other act or behavior that assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties while conducting an inspection or reviewing any activity on the show grounds shall be subject to a suspension and penalty at the discretion of SHOW up to and including a lifetime suspension.

Kiren Mathews

From: tned_cm-ecf@tned.uscourts.gov
Sent: Friday, July 21, 2023 8:21 AM
To: tned_Courtmail@tned.uscourts.gov
Subject: Activity in Case 4:23-cv-00024-TRM-SKL McConnell v. United States Department of Agriculture et al Memorandum in Support of Motion

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U.S. District Court - Eastern District of Tennessee

Notice of Electronic Filing

The following transaction was entered by Robbins, Joshua on 7/21/2023 at 11:21 AM EDT and filed on 7/21/2023

Case Name: McConnell v. United States Department of Agriculture et al
Case Number: 4:23-cv-00024-TRM-SKL
Filer: James D McConnell
Document Number: 17

Docket Text:

MEMORANDUM in Support of Motion re [14] MOTION for Preliminary Injunction filed by James D McConnell. (Attachments: # (1) Declaration of McConnell, # (2) Declaration of Broiles, # (3) Exhibit 1, # (4) Exhibit 2, # (5) Exhibit 3, # (6) Exhibit 4, # (7) Exhibit 5, # (8) Exhibit 6, # (9) Exhibit 7, # (10) Exhibit 8, # (11) Exhibit 9, # (12) Exhibit 10, # (13) Exhibit 11, # (14) Exhibit 12, # (15) Exhibit 13, # (16) Exhibit 14, # (17) Exhibit 15, # (18) Exhibit 16, # (19) Exhibit 17, # (20) Exhibit 18, # (21) Exhibit 19)(Robbins, Joshua)

4:23-cv-00024-TRM-SKL Notice has been electronically mailed to:

David Broiles davidbroiles@gmail.com

John Kerkhoff jkerkhoff@pacificlegal.org

Joshua M Robbins jrobbins@pacificlegal.org, cpiett@pacificlegal.org, incominglit@pacificlegal.org

4:23-cv-00024-TRM-SKL Notice has been delivered by other means to:

Caleb Kruckenberg
Pacific Legal Foundation

3100 Clarendon Blvd
Suite 610
Arlington, VA 22201

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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Original filename:n/a
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Original filename:n/a
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