No. 23-5844

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES D. MCCONNELL,

Plaintiff-Appellant,

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-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
CASE NO. 4:23-CV-00024-TRM-SKL

PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

DAVID BROILES
2400 Indian Cove St.
Ft. Worth, TX 76801
(817) 246-7801

JOSHUA M. ROBBINS
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
(202) 945-9524
JRobbins@pacificlegal.org
Counsel for Plaintiff-Appellant

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Sixth Circuit

Case Number: 23-5844

Case Name: *McConnell v. U.S Dept. Of Agriculture, et al.*

Name of counsel: Joshua M. Robbins

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellant James D. McConnell makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such a corporation and the nature of the financial interest:

   No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions and Statutes

Regulations

Other Authorities

INTRODUCTION

Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, Plaintiff-Appellant James "Jimmy" Dale McConnell requests an injunction of the U.S. Department of Agriculture ("USDA") adjudication—HPA Docket Nos. 16-0169 and 17-0207—in which he is currently defending himself against allegations that he violated the Horse Protection Act ("HPA") (the "USDA Adjudication"). Mr. McConnell filed suit to stop the USDA Adjudication because it is unconstitutionally structured. He is currently appealing on an expedited basis the district court's denial of a preliminary injunction. But the briefing schedule extends beyond the resumption of the hearing in the USDA Adjudication on November 6, 2023. Given the impending hearing and to avoid further irreparable harm, Mr. McConnell is seeking an injunction pending appeal simultaneously in the district court and in this Court.

JURISDICTION

This Court has jurisdiction to hear appeals from "[i]nterlocutory orders of the district courts of the United States ... refusing ... injunctions." 28 U.S.C. § 1292(a)(1).

FACTS AND PROCEDURAL HISTORY

I. USDA's In-House Adjudication Process

The USDA operates an internal administrative hearing process to adjudicate its civil enforcement actions pursuant to several statutes. 7 C.F.R. §§ 1.131, 1.133. Administrative law judges ("ALJs") make the initial decision in each adjudication.

7 C.F.R. § 2.27(a)(1). Those decisions can only be appealed to USDA's Judicial Officer. 7 C.F.R. §§ 1.145, 2.35. Judicial Officer decisions are "final for purposes of judicial review." 7 C.F.R. §§ 1.139, 1.142(c)(4), 1.145(i). The Secretary cannot review the Judicial Officer's final decisions. 7 U.S.C. § 2204-3; *see also Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986).

The Secretary created the position of Judicial Officer and delegated to him final decision-making authority in many USDA adjudications—including enforcement of the HPA. 7 C.F.R. § 2.35; *see also, e.g.*, 10 Fed. Reg. 13,769 (Nov. 9, 1945). The Secretary delegated that authority pursuant to general Congressional authorizations. 7 U.S.C. § 2204-2; Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (June 5, 1953), *reprinted as amended in* 5 U.S.C. app. at 159–60. Judicial Officers are also appointed by the Secretary. Ex. D at 8, Defs.' Resp. to Mot. Prelim. Inj., R. 24, Page ID # 744; Brief for Respondent at 27, *Fleming v. USDA*, 987 F.3d 1093 (D.C. Cir. 2021) (No. 17-1246) 2019 WL 2562656, at *27.

II. Mr. McConnell's HPA Adjudication

One of the statutes enforced through USDA's adjudication process is the HPA. 7 C.F.R. § 1.131. The HPA prohibits, among other things, the showing or exhibition of horses whose legs have been injured to exaggerate their gaits for advantage in competitions (i.e., "sore" horses). 15 U.S.C. §§ 1821(3); 1822(2); 1824(2). The Secretary can impose civil monetary penalties of up to $2,000 per violation and

disqualify violators from participation in horse shows and sales after notice and a hearing. 15 U.S.C. § 1825(b) and (c). The Secretary has directed those hearings to occur through USDA's adjudication process and the Judicial Officer. *See* 7 C.F.R. §§ 1.131, 1.144–45, 2.27, 2.35.

Mr. McConnell is currently defending himself in USDA's internal adjudication process against allegations that he violated the HPA. Compl., R.1, Page ID ## 9–10. Mr. McConnell has denied all nine allegations pending against him. Ex. C at 2, McConnell Decl., R. 17-1, Page ID ## 418–19.

Mr. McConnell repeatedly tried to convince the USDA ALJ to dismiss the claims against him because the adjudication process is unconstitutionally structured. Ex. B at 6–8, Mem. ISO Mot. Prelim. Inj., R. 17, Page ID ## 399–401. But the ALJ either disclaimed the authority to resolve Mr. McConnell's constitutional challenges or refused to decide those claims until after the merits of the HPA allegations are adjudicated. *Id.* After *Axon Enterprises, Inc. v. FTC*, 143 S. Ct. 890 (2023), permitted constitutional challenges in federal court to ongoing agency adjudications, Mr. McConnell brought this case.

III. Procedural History

On July 14, 2023, Mr. McConnell filed a Complaint seeking injunctive relief from the USDA Adjudication. Compl., R. 1 Page ID ## 1–30. Mr. McConnell raised four claims: (1) USDA's Judicial Officer is an employee who is unconstitutionally

making final adjudicatory decisions for USDA and improperly supervises USDA ALJs; (2) USDA ALJs are unconstitutionally protected from removal by two layers of tenure protection; (3) Mr. McConnell is entitled to a jury trial on the claims against him under the Seventh Amendment; and (4) Article III requires that USDA's claims against Mr. McConnell be heard in an Article III court. *Id.* at Page ID ## 17–25. He filed a motion for a preliminary injunction on July 20, 2023, on Counts I, III, and IV of the complaint. Mot. Prelim. Inj., R. 14, Page ID ## 58–60; Ex. B, Mem. ISO Mot. Prelim. Inj., R. 17, Page ID ## 394–417.

On September 13, 2023, the district court denied Mr. McConnell's motion for a preliminary injunction. Ex. F, Mem. Op., R. 30, Page ID ## 825–40. The district court held that Mr. McConnell had not demonstrated that he was likely to succeed on the merits of his constitutional claims. Ex. F at 5–14, Mem. Op., R. 30, Page ID ## 829–38. Because the court concluded that Mr. McConnell was not suffering a constitutional deprivation, it concluded that he was necessarily also not suffering an irreparable injury and an injunction of an animal protection statute would not be in the public interest. Ex. F at 14–16, Mem. Op., R. 30, Page ID ## 838–40. On September 19, 2023, the ALJ in the USDA Adjudication set the hearing to resume on November 6, 2023. Ex. A.

On September 21, 2023, Mr. McConnell noticed his appeal of the denial of the preliminary injunction. Ex. G, Not. Appeal, R. 33, Page ID ## 843–45. On

October 5, 2023, the Court granted Mr. McConnell's motion to expedite his appeal in part, setting a briefing schedule that runs until December 1, 2023, and reserving for the merits panel decisions on oral argument and any expedition of a decision. Doc. 14.

Mr. McConnell appreciates the expedited briefing schedule. Nevertheless, Mr. McConnell is suffering ongoing harm from being subjected to the unconstitutionally structured USDA Adjudication—a harm that will be exacerbated by the November 6, 2023, hearing. So, on October 6, 2023, Mr. McConnell moved in the district court for an injunction pending appeal. Mot. Inj. Pending Appeal, R. 37, Page ## 854–56; Ex. H, Mem. ISO Mot. Inj. Pending Appeal, R. 38, Page ID ## 857–66. As of this filing, the district court has not yet ruled on Mr. McConnell's motion. He now files this motion for an injunction pending appeal in light of the impracticability of waiting for a decision from the district court given the fast-approaching November 6, 2023, hearing. *See* Fed. R. App. P. 8(a)(2)(A).

ARGUMENT

I. The Court Can Consider Mr. McConnell's Motion Now

Federal Rule of Appellate Procedure 8(a) permits parties to seek "an order ... granting an injunction while an appeal is pending." "[O]rdinarily" a party must seek an injunction first in the district court. Fed. R. App. P. 8(a)(1). But a party may seek relief from this Court if "moving first in the district court would be

impracticable" or the district court denied the motion or otherwise did not provide the party's requested relief. Fed. R. App. P. 8(a)(2)(A).

In an effort to comply with Rule 8(a)(1), Mr. McConnell first moved for an injunction pending appeal in the district court on October 6, 2023. But there is a substantial chance that if Mr. McConnell waits until the district court issues a decision, it will be too late to seek relief from this Court before the November 6, 2023, hearing. Less than four weeks remain for USDA to respond in the district court, the district court to issue its opinion, the parties to brief a motion in this Court, and this Court to issue its decision before the hearing resumes. Because of this short timeline, it is impracticable for Mr. McConnell to move for a stay here only after his district court motion is denied. *See* Fed. R. App. P. 8(a)(2)(A).

II. The USDA Adjudication Should Be Stayed Because Mr. McConnell's Appeal Is Likely to Succeed

The Court must consider four factors before issuing a motion for an injunction pending appeal: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "[A] movant need not always establish a high probability of success on the merits." *Id.* "The probability of success that must be demonstrated is inversely proportional

to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Id.* The movant must show "at a minimum, 'serious questions going to the merits.'" *Id.* at 154. The amount of the injury is determined by evaluating "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Id.*

A. Mr. McConnell is Likely to Succeed on the Merits of His Appeal

Mr. McConnell is likely to prevail on appeal on at least his claim that USDA's Judicial Officer is unconstitutionally exercising principal officer authority. His appeal, at a minimum, raises "serious questions going to the merits" that are sufficient to grant an injunction pending appeal given the certainty of Mr. McConnell's injury. *See Griepentrog*, 945 F.2d at 154; *see infra* Part II.B.

An officer of the United States has two features: (1) he "must occupy a 'continuing' position established by law" and (2) he "'exercis[es] significant authority pursuant to the laws of the United States.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). The Appointments Clause authorizes two methods of appointment for officers. U.S. CONST. art. II, § 2, cl. 2. Any officer may be appointed by the President "with the Advice and Consent of the Senate." *Id.* "[I]nferior Officers"—if Congress so designates—may be appointed by "the President alone," "the Courts of Law," or "the Heads of Departments." *Id.*

All parties and the district court agree that the Judicial Officer functions as an officer of the United States. Ex. F at 5–9, Mem. Op., R. 30, Page ID ## 829–33; Ex. B at 10, Mem. ISO Mot. for Prelim. Inj., R. 17, Page ID # 403; Ex. D at 8, Resp. to Mot. Prelim. Inj., R. 24, Page ID # 744. Indeed, his authority to "[a]ct[] as final deciding officer in [USDA] adjudicatory proceedings subject to" the Administrative Procedure Act is precisely the type of "significant authority" that must be exercised by an officer. 7 C.F.R. § 2.35; *Lucia*, 138 S. Ct. at 2051. All parties further agree that the Judicial Officer was not appointed by the President and confirmed by the Senate. Ex. B at 10–11, Mem. ISO Mot. Prelim. Inj., R. 17, Page ID ## 403–04; Ex. D at 8, Defs.' Resp. to Mot. Prelim. Inj., R. 24, Page ID # 744. For the Judicial Officer to properly exercise his authority, "the nature of [his] responsibilities" must be "consistent with [his] method of appointment." *United States v. Arthrex*, 141 S. Ct. 1970, 1980 (2021). It is not.

1. The Judicial Officer Functions as a Principal Officer Without a Proper Appointment.

An officer of the United States is an inferior officer only if he is sufficiently "'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate'" (i.e., a principal officer). *Arthrex*, 141 S. Ct. at 1978, 1980. *Arthrex* provides the sufficiency of supervision test for an executive branch adjudicative officer. It held that the "'power to render a final decision'" in an adjudication "without any [] review by" a principal

officer is inconsistent with an appointment as an inferior officer. *Id.* at 1981. *Arthrex* was concerned with inferior officers exercising "'significant authority' in adjudicating the public rights of private parties, while [] their decisions [are insulated] from review and their offices from removal." *Id.* at 1986. "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" in an adjudication. *Id.* at 1985–86. Consistent with *Arthrex*, the Judicial Officer is acting as a principal officer, but without being properly appointed by the President and confirmed by the Senate. *See id.*

Instead of applying *Arthrex* to the Judicial Officer, the district court applied the three factors considered in *Edmond v. United States*, 520 U.S. 651 (1997): whether the officer (1) must follow "regulations promulgated by an agency head," (2) "can be removed at will," and (3) has his decisions reviewed by a superior officer. Ex. F at 6, Mem. Op., R. 30, Page ID # 830. The district court reasoned that this three-part analysis "must" be strictly applied because *Arthrex* "reaffirm[ed] and appl[ied] the rule from *Edmond*." Ex. F at 6, 8, Mem. Op., R. 30, Page ID ## 830, 832 (quoting *Arthrex*, 141 S. Ct. at 1988 (Roberts, C.J., plurality opinion)). But this was an error.

While *Edmond* can be neatly packaged as a three-factor test, *Arthrex* did not apply the case that way. 141 S. Ct. at 1980. *Arthrex* described the *Edmond* test as the broad principle that "[a]n inferior officer must be 'directed and supervised at some

level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id. Edmond* is also aligned with *Arthrex* on the importance of principal officer review. *Id.* at 1981; *Edmond*, 520 U.S. at 665. Both cases held that "[w]hat is significant" for inferior officer status in adjudications is the availability of principal officer review. *Edmond*, 520 U.S. at 665; *Arthrex*, 141. S. Ct. at 1981. So, while *Edmond* remains good law, such a rigid application of its three factors here is unwarranted.

But regardless of which test is applied, the Judicial Officer is not sufficiently supervised by a principal officer.

a. The Judicial Officer's Decisions Are Not Reviewed by a Principal Officer.

The Secretary cannot review adjudicative decisions of the Judicial Officer in HPA cases. 7 U.S.C. § 2204-3; Ex. F at 7, Mem. Op., R. 30, Page ID # 831. The Secretary's delegation of authority to the Judicial Officer was pursuant to a statute that prohibits retroactive revocation of that delegation. 7 U.S.C. § 2204-3. Any effort by the Secretary to change a decision of the Judicial Officer once made is effectively a retroactive revocation. *Id.*

Additionally, this Court has already determined that the Secretary's intervention in the adjudication process to reverse the decision of a Judicial Officer is a due process violation. *Utica Packing*, 781 F.2d at 78. "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." *Id.*

The Secretary is also prohibited by regulation from reviewing decisions of the Judicial Officer. 7 C.F.R. §§ 1.139, 1.142(c)(4), 1.145(i), 2.35. Orders of the Judicial Officer are "final for purposes of judicial review." 7 C.F.R. § 1.145(i). And the USDA's rules of procedure do not provide any avenue for the Secretary to review decisions of the Judicial Officer. 7 C.F.R. § 1.130 *et seq.* The Secretary "is obliged to follow" his established rules of practice. *Ballard v. Comm'r*, 544 U.S. 40, 59 (2005).

The district court agreed with Mr. McConnell "that the Judicial Officer's decisions are not reviewable by the Secretary." Ex. F at 7, Mem. Op., R. 30, Page ID # 831. It nonetheless concluded that this Court already decided in *Varnadore v. Sec'y of Lab.*, 141 F.3d 625, 631 (6th Cir. 1998), that the Secretary's inability to review Judicial Officer decisions "does not defeat inferior-officer status." Ex. F at 7, Mem. Op., R. 30, Page ID # 831. But *Varnadore* is not good law on this question after *Arthrex*. *See Miller v. Caudill*, 936 F.3d 442, 447–48 (6th Cir. 2019) ("[P]ublished precedent binds all future panels unless ... it conflicts with intervening [] Supreme Court precedent."); *see supra* Part II.A.1. And *Varnadore* was not good law when it was decided less than a year after *Edmond* because it ignored *Edmond*'s supervision analysis entirely. *See The Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686,

720–21 (6th Cir. 2016) ("[B]inding circuit precedent" can be revisited where it "overlooked earlier Supreme Court authority."); *Varnadore*, 141 F.3d at 631.

There is no principal officer review of the Judicial Officer's adjudicative decisions. 7 U.S.C. § 2204-3. So, the Judicial Officer functions as a principal officer. *See Arthrex*, 141 S. Ct. at 1981.

b. Removability and Administrative Oversight Provide Insufficient Supervision of the Judicial Officer.

The remaining two factors considered in *Edmond*—administrative oversight and removability—provide the Secretary with insufficient supervision of the Judicial Officer to offset the lack of principal officer review. 520 U.S. at 664. The insufficiency of that supervision is evident when the circumstances here are compared to *Edmond* and *Arthrex*.

In *Edmond*, the military judges at issue (1) were subject to a supervisor's procedural rules, (2) were removable "without cause," and (3) had their decisions reviewed by a superior court under certain circumstances. 520 U.S. at 664–65. The military judges were constitutionally appointed inferior officers. *Id.* at 666.

In *Arthrex*, the administrative patent judges at issue (1) were subject to substantial administrative oversight; (2) could only be removed "'for such cause as will promote the efficiency of the service,'" and (3) made final decisions on patentability without review by a superior. 141 S. Ct. at 1977, 1980, 1982. This arrangement violated the Appointments Clause. *Id.* at 1985.

Arthrex and *Edmond* reached opposing conclusions about whether inferior officers were properly appointed. *Edmond*, 520 U.S. at 666; *Arthrex*, 141 S. Ct. at 1985. *Edmond* had no restrictions on removal and principal officer review, whereas *Arthrex* had restrictions on both. *Edmond*, 520 U.S. at 664–65; *Arthrex*, 141 S. Ct. at 1981–82. But the remedy in *Arthrex* was to eliminate *only* the restriction on principal officer review, *not* the removal protection. *Id.* at 1986–87 (Roberts, C.J., plurality opinion); *id.* at 1997 (opinion of Breyer, J., concurring in part and dissenting in part). So, the determinative factor for inferior officer status of adjudicative officers is principal officer review.

Here, the Judicial Officer is subject to administrative oversight from the Secretary through USDA's Uniform Rules of Practice. 7 C.F.R. § 1.131. The Judicial Officer is also removable at will by the Secretary and may have his delegated authority revoked at any time. 7 U.S.C. § 2204-2. But the Judicial Officer's decisions cannot be reviewed by the Secretary or another principal officer. *See supra* Part II.A.1.a. An inferior officer that is removable but whose decisions are not subject to principal officer review is precisely the path *Arthrex* declined to take. 141 S. Ct. at 1987 (Roberts, C.J., plurality opinion); *see also id.* at 1997 (Breyer, J., concurring in part and dissenting in part). So, despite administrative oversight and removability, the lack of principal officer review means the Judicial Officer is improperly appointed. *See id.* at 1981, 1985.

2. The Judicial Officer Does Not Hold an Office Created By Statute

Even if the Judicial Officer functions only as an inferior officer, which USDA and the district court both conceded he must at least be doing, he still cannot exercise that authority because Congress did not create an office for the Judicial Officer. *See Lucia*, 138 S. Ct. at 2053. In other words, Congress did not establish the Judicial Officer's position, and thus the Secretary was not at liberty to delegate his principal officer responsibilities to the Judicial Officer. *See id.*

Longstanding Supreme Court and Sixth Circuit precedent establish that the Appointments Clause requires officers to hold offices created by *statute*. *Burnap v. United States,* 252 U.S. 512, 516–18 (1920); *Beal v. United States*, 182 F.2d 565, 568 (6th Cir. 1950). In *Beal*, this Court held that "an office of the United States does not exist unless it is created by some specific Act of the Congress." 182 F.2d at 568. And in *Lucia,* the Supreme Court reaffirmed that an officer "hold[s] a continuing office established by law," when his "appointment is to a position created by statute, down to its duties, salary and means of appointment." 138 S. Ct. at 2053 (citation omitted). As a result, any interim decisions suggesting otherwise, such as *Varnadore*, 141 F. 3d at 631, are not binding on the Court.[1] *Miller*, 936 F.3d at 447 ("[W]hen [] published opinions conflict, the earliest opinion normally controls.").

[1] *Varnadore* held that the Department of Labor's Administrative Review Board ("ARB")—a regulatory creation that made final decisions regarding wage and

The lack of a statutorily created office is doubly problematic for an inferior officer appointed by a head of a department. The Appointments Clause only permits inferior officers to be appointed by a head of a department if Congress "vest[ed]" that authority in him "by law." U.S. CONST. art. II, § 2, cl. 2.

The Judicial Officer is solely a creation of the Secretary, not Congress. 7 C.F.R. § 2.35; 10 Fed. Reg. 13,769. And the Secretary appoints the Judicial Officer. Ex. D at 8, Defs.' Resp. Mot. Prelim Inj., R. 24, Page ID # 744. But nothing in § 2204-2 or Reorganization Plan No. 2 of 1953—the statutes pursuant to which the Judicial Officer was delegated his authority—establishes the "duties, salary, and means of appointment" of the Judicial Officer; the position is not even mentioned. *Lucia*, 138 S. Ct. at 2053; 7 U.S.C. § 2204-2; 18 Fed. Reg. 3219–21; 7 C.F.R. § 2.35. 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 when it enacted § 2204-2. *In re World Wide Citrus*, 50 Agric. Dec. 319, 335–44 (U.S.D.A. May 9, 1991).

---

hour cases—was comprised of inferior officers. 141 F.3d at 629–31. But that holding is inconsistent with *Beal*, 182 F.2d at 568, and *Lucia*, 138 S. Ct. at 2053. *Varnadore* also did not consider whether the positions at issue were established by law and the party who raised the Appointments Clause challenge failed "to explain the[] relevance" of the Clause to the case. 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 … so decided as to constitute precedent." (quotation marks omitted)).

Finally, USDA conceded that the Judicial Officer does not hold an office established by *Congress*. Ex. D at 8, Mem. Resp. Mot. Prelim. Inj., R. 24, Page ID # 750 ("The administrative-adjudications system was not foisted upon the Secretary by Congress, but is a mechanism of the Secretary's own creation."). And the issue went unaddressed in the district court's opinion, despite Mr. McConnell raising it in both of his briefs. Ex. B at 9–10, Mem. ISO Mot. Prelim. Inj., R. 17, Page ID ## 402–03; Ex. E at 2–3, Reply ISO Mot. Prelim. Inj., R. 25, Page ID # 804–05; Ex. F at 5–11, Mem. Op., R. 30, Page ID # 829–35. The district court erred by ignoring this dispositive question—and USDA's concession—when it denied Mr. McConnell's motion for a preliminary injunction. Ex. F at 5–11, Mem. Op., R. 30, Page ID # 829–35.

Mr. McConnell is likely to succeed on the merits of this argument and that is sufficient to justify a preliminary injunction. *See Lucia*, 138 S. Ct. at 2051.

3. USDA ALJs Are Improperly Supervised Inferior Officers

Even if this Court concludes that the Judicial Officer is only an inferior officer, that necessarily creates another constitutional problem. The ALJs, whose decisions the Judicial Officer, *not* the Secretary, reviews, lack oversight from a properly appointed official. The Secretary simply cannot delegate his supervision of inferior officers to *yet another* inferior officer. *See Arthrex*, 141 S. Ct. at 1980.

The parties do not dispute that USDA's ALJs are inferior officers. Ex. B at 12–13, Mem. ISO Mot. Prelim. Inj., R. 17, Page ID ## 405–06; Ex. D at 13–16, Defs.' Resp. Mot. Prelim. Inj., R. 24, Page ID # 749–52; *see also Lucia*, 138 S. Ct. at 2051, 2053. But assuming the Judicial Officer is also an inferior officer, USDA ALJs must be sufficiently "directed and supervised" by the Secretary to constitutionally exercise inferior officer authority. *Arthrex*, 141 S. Ct. at 1980.

USDA ALJs are nominally supervised through the Judicial Officer and the Secretary. 7 C.F.R. §§ 1.131, 1.145, 2.35. The Secretary, however, only supervises the USDA ALJs through the Uniform Rules of Practice. 7 C.F.R. § 1.131. USDA ALJs are not removable at will; they enjoy dual-layer tenure protection through the Merit Systems Protection Board. 5 U.S.C. § 7521(a); 5 U.S.C. § 1202(d). And the Judicial Officer exclusively reviews their initial decisions. 7 C.F.R. § 1.145.

The district court erred in holding that the Secretary is also able to review USDA ALJ initial decisions. Ex. F at 9–10, Mem. Op., R. 30, Page ID ## 833–34. The only means the Secretary has to review USDA ALJ initial decisions is to revoke the authority of the Judicial Officer in a given case after the ALJ's initial decision, but before the Judicial Officer issues a final decision. 7 U.S.C. §§ 2204-2, 2204-3. Such a move ignores USDA's established adjudication process, 7 C.F.R. § 1.145, which the Secretary is "obliged to follow," *Ballard*, 544 U.S. at 59.

A post-initial decision revocation also denies the respondent due process. *See Utica Packing*, 781 F.2d at 78. The "'basic requirement'" of a "'fair trial in a fair tribunal'" "applies to administrative agencies which adjudicate." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). The "risk of unfairness [is] 'intolerably high'" if the Secretary, as a "disappointed litigant," can replace the judge with *himself* while the proceedings are ongoing. *Utica Packing*, 781 F.2d at 78. While *Utica Packing* involved the Secretary's replacement of the Judicial Officer after the Judicial Officer's decision, it is equally true that "[a]ll notions of judicial impartiality would be abandoned" if the Secretary could cut out the Judicial Officer after seeing the ALJ's initial decision to ensure a desired outcome. *Id.*

Without the ability to review USDA ALJ decisions, the Secretary does not have sufficient authority to supervise the ALJs on his own. *See Arthrex*, 141 S. Ct. at 1985–86. So, even if the Judicial Officer is an inferior officer, USDA's adjudication process is still unconstitutionally structured because the ALJs are improperly supervised. *See Arthrex*, 141 S. Ct. at 1980–81, 1985–86.

B. Mr. McConnell's Irreparable Harm Is Certain

Without an injunction pending appeal, Mr. McConnell is certain to suffer irreparable harm from the ongoing USDA Adjudication and the hearing set to resume on November 6, 2023. Ex. C at 2, McConnell Decl., R. 17-1, Page ID # 419. While Mr. McConnell's appeal is proceeding on an expedited basis, the briefing will not be

complete until nearly a month after the resumption of the hearing. Doc. 14. Mr. McConnell continues to suffer a "here-and-now injury" by being subjected to the "unconstitutionally structured" USDA Adjudication. *Axon*, 143 S. Ct. at 903–04; Ex. C at 2, McConnell Decl., R. 17-1, Page ID # 419. And that injury "cannot be undone" once it has taken place. *Id.* at 904.

The certainty of Mr. McConnell's injury and its nature as a violation of structural constitutional protections also reduces the likelihood of success he must show to obtain an injunction pending appeal. *See Griepentrog*, 945 F.2d at 153–54. Here, there is no doubt that Mr. McConnell will suffer an irreparable injury if he is correct on his constitutional claims. *See Axon*, 143 S. Ct. at 903–04. Any injury to USDA from an injunction pending appeal should it ultimately prevail will be minimal because briefing will be complete by December 1, 2023. Doc. 14. Additionally, the ALJ expects the hearing process to extend into 2024, resuming at a date yet to be determined. Ex. A. So, the USDA Adjudication will carry on for months irrespective of an injunction pending appeal.

Additionally, because Mr. McConnell's injury will result from a constitutional violation, it is substantial. *Cf. Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("'[S]tructural principles secured by the separation of powers protect the individual as well.'"). And no further proof of injury is needed because "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v.*

Husted, 697 F.3d 423, 436 (6th Cir. 2012). Under these circumstances, Mr. McConnell need only show—and has shown—that there are "'serious questions going to the merits'" raised by his appeal. *See Griepentrog*, 945 F.2d at 154; *see supra* Part II.A.

C. An Injunction Pending Appeal Will Not Cause Harm to Third Parties

Enjoining the USDA Adjudication pending Mr. McConnell's appeal will not cause third parties to suffer any harm. The USDA Adjudication is a civil enforcement action brought against Mr. McConnell, so only the parties to the USDA Adjudication will be directly affected by an injunction pending appeal. To the extent an injunction pending appeal in this case has ancillary effects on other HPA enforcement actions, third parties will benefit from the injunction of an adjudication process that is likely to be held unconstitutional. *See Weaver v. Univ. of Cincinnati*, 942 F.2d 1039, 1047 (6th Cir. 1991); *supra* Part II.A.

D. An Injunction Is in the Public Interest

Because Mr. McConnell has demonstrated that he is likely to succeed on the merits of his constitutional claims on appeal, an injunction pending that appeal is in the public interest. *See Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). "[N]o cognizable harm results from stopping unconstitutional conduct, so 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Id.* Any public interest in enforcing the HPA is of no moment under these circumstances

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. OSHA*, 142 S. Ct. 661, 666 (2022) (refusing to "weigh [] tradeoffs" where an agency plainly overstepped its authority).

CONCLUSION

For the forgoing reasons, Mr. McConnell respectfully requests that the Court enter an injunction pending appeal of his USDA Adjudication (HPA Docket Nos 16-0169 and 17-0207).

DATED: October 10, 2023.

Respectfully submitted,

/s/ *Joshua M. Robbins*

JOSHUA M. ROBBINS
Virginia Bar No. 91020
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Telephone: (202) 945-9524
JRobbins@pacificlegal.org

DAVID BROILES
2400 Indian Cove St.
Ft. Worth, TX 76801
(817) 246-7801

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,128 words excluding the parts exempt by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Local Rule 32(b)(1)

This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: October 10, 2023

/s/ *Joshua M. Robbins*
JOSHUA M. ROBBINS
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023, I electronically transmitted the foregoing document to the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system and transmittal of a Notice of Docket Activity was sent to counsel of record.

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

EXHIBIT A
No. 23-5844

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; and	HPA Docket No. 17-0195
Taylor Walters, an individual,	HPA Docket No. 17-0211
Respondents.	

2023 November 6 thru 9 Hearing Resumed Segment Will Be By Zoom;
2023 October Hearing Segments Are Canceled; and
the Joint Motion filed September 15, 2023 is GRANTED

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*

L. Thomas Austin, Esq., Dunlap TN 37327; and David Broiles, Esq., Fort Worth, TX 76108, for the Respondents (named in the caption).

1. My name is Judge Jill S. Clifton, and I am a United States Administrative Law Judge who works for the United States Department of Agriculture.

2. I GRANT the Parties' "Joint Motion to Cancel the October 2023 Hearings and to Conduct All Future Hearings in this Matter Remotely Via Zoom or Microsoft Teams" filed on September 15, 2023.

3. The Hearing Resumed SEGMENT that would have been 2023 October 16 through 20 is CANCELED and is expected to be RESCHEDULED for 2024 to be heard REMOTELY by Zoom.

---

[1] The Complainant is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or Complainant).

4. The Hearing Resumed SEGMENT set for **2023 November 6 thru 9** (Mon-Thurs) REMAINS SCHEDULED. This Hearing Resumed SEGMENT will NOT be in person in Shelbyville, Tennessee, but instead will be heard REMOTELY, by Zoom.

5. We will log-on to Zoom the first day at 9:30 a.m. Central time. Once we have tested sound quality and have heard the voices of participants, we will go on record. Log-on time for remaining days may be earlier if so determined by agreement. We will log-off each day by 5:00 p.m. Central time or earlier.

6. 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 David Jones if he is available.

7. 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 November 6 thru 9 Hearing Resumed Segment Will Be By Zoom; 2023 October Hearing Segments Are Canceled; and the Joint Motion filed September 15, 2023 is GRANTED" shall be sent to each of the parties by the Hearing Clerk.

Issued this 19th day of September 2023

Digitally signed by Jill S Clifton
Date: 2023.09.19 07:30:46 -04'00'

Jill S. Clifton
Administrative Law Judge

Hearing Clerk
U.S. Department of Agriculture
Stop 9203 South Building Room 1031-S
1400 Independence Ave SW
Washington, DC 20250-9203
1-202-720-4443
FAX 1-844-325-6940
sm.oha.HearingClerks@usda.gov

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
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 NOVEMBER 6 THRU 9 HEARING RESUMED SEGMENT WILL BE BY ZOOM; 2023 OCTOBER HEARING SEGMENTS ARE CANCELED; AND THE JOINT MOTION FILED SEPTEMBER 15, 2023 IS GRANTED has been furnished and was served upon the following parties on September 19, 2023 by the following:

USDA (OGC) - Electronic Mail
Thomas Bolick, OGC
Thomas.Bolick@usda.gov
Danielle Park, OGC
Danielle.Park@usda.gov
Donna Erwin, OGC
Donna.Erwin@usda.gov
Carla Wagner, OGC
Carla.Wagner@usda.gov

USDA (APHIS) - Electronic Mail
IESLegals@usda.gov
AC.CAS.mailbox@usda.gov

Respondents Counsel – Electronic Mail
David Broiles
Davidbroiles@gmail.com
L. Thomas Austin
Austinlaw@bledsoe.net

Respectfully Submitted,

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 B
No. 23-5844

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*
JOSHUA M. ROBBINS*
Virginia Bar No. 91020
JOHN KERKHOFF*
Ohio Bar: 0097134
CALEB KRUCKENBERG*
D.C. BAR NO. 1617890
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Telephone: (916) 309-6930
JRobbins@pacificlegal.org

JKerkhoff@pacificlegal.org
CKruckenberg@pacificlegal.org

DAVID BROILES*
Texas Bar No. 03054500
2400 Indian Cove St.
Ft. Worth, TX 76108
Telephone: (817) 246-7801
davidbroiles@gmail.com

Attorneys for Plaintiff
**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
4700 River Road
Riverdale, MD 20737

U.S. Department of Agriculture
1400 Independence Ave., S.W.
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

EXHIBIT C
No. 23-5844

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

EXHIBIT D
No. 23-5844

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 Secretary of Agriculture; KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service Defendants.	Case No. 4:23-cv-00024-TRM-SKL

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The Horse Protection Act (HPA), 15 U.S.C. §§ 1821–1831, imposes penalties on individuals who show or exhibit horses (usually known as Tennessee Walking Horses) that have been deliberately injured, or "sored," to make them walk in a desirable way. Congress passed this bulwark against animal cruelty and destructive practices in the horse industry more than 50 years ago and charged the Secretary of Agriculture with carrying out the provisions of the Act.

The Secretary is, of course, assisted in his duties by the other officials of the U.S. Department of Agriculture (USDA), including USDA's Judicial Officer and its administrate law judges (ALJs). If the agency has reason to believe that an individual has violated the HPA, USDA may institute administrative enforcement proceedings before an ALJ. 7 C.F.R. §§ 1.131(a), 1.135. If either party disagrees with the ALJ's ruling, it may appeal to USDA's Judicial Officer, to whom the Secretary has, in accordance with statute, delegated the task of

hearing and deciding administrative appeals. *See* 7 U.S.C. § 2204-2; 7 C.F.R. § 2.35. After that, the losing party may avail itself of judicial review in the federal courts of appeal.

USDA has reason to believe that Plaintiff has violated the HPA nearly a dozen times by showing and exhibiting sored horses, showing and exhibiting horses bearing substances that might cause or mask soring of horses, and failing to provide required information to the agency. USDA instituted enforcement proceedings against Plaintiff, and the ALJ overseeing the case has set a continuation of the hearing to begin on October 10.

Plaintiff moves for a preliminary injunction to enjoin the administrative proceedings against him. He argues that USDA's Judicial Officer is an improperly appointed principal officer who, in turn, improperly supervises USDA's ALJs. He also argues that the administrative proceedings violate his Seventh Amendment right to a jury trial and should instead take place in the first instance in an Article III court. He claims that being subject to administrative proceedings constitutes irreparable harm and seeks an injunction before the administrative hearing is slated to continue.

But Plaintiff satisfies none of the requirements for the extraordinary relief he seeks. *First*, he is unlikely to succeed on the merits of any of the above claims. The Judicial Officer is a properly appointed inferior officer who is supervised by the Secretary, a principal officer, and, crucially, removable at will. As an inferior officer, the Judicial Officer may review decisions made by the ALJs, who remain subject to the Secretary's direction and control both directly and through the Judicial Officer. And in enacting the Horse Protection Act and the attendant penalties for HPA violations, Congress created public rights that may be enforced without a jury trial and outside of an Article III court.

Second, Plaintiff fails to demonstrate irreparable harm absent the injunction he seeks. Although he has pleaded an Article III injury, that merely entitles him to file the instant lawsuit. *Axon Enter. v. FTC*, 143 S. Ct. 890, 903 (2023). If that were enough, any movant with standing to sue would establish irreparable harm for the purposes of a preliminary injunction, and that is not the case.

Finally, the public interest and the balance of the harms favor Defendants. Enjoining the administrative proceedings interferes with the execution of duly enacted federal laws designed to protect horses and the walking-horse industry as a whole and reflects the will of the people carried out by Congress. For the foregoing reasons and as explained further below, Plaintiff's motion for a preliminary injunction should be denied.

I. STATUTORY AND REGULATORY BACKGROUND

A. Horse Protection Act

Congress passed the Horse Protection Act in 1970 and strengthened the act in 1976 to regulate the cruel, unfair, and destructive practice of "showing of horses that had been 'sored.'" *Fleming v. USDA*, 713 F.2d 179, 182 (6th Cir. 1983); *see also Thornton v. USDA*, 715 F.2d 1508, 1511 (11th Cir. 1983) (quoting H.R. Rep. No. 91-1597, at 3 (1970)). "Sored" horses are horses that have been deliberately injured to artificially create the distinctive walk that wins horse shows and is desired at exhibitions. As the Sixth Circuit explains, "Tennessee Walking Horses are best known for their high step and exaggerated gait. This characteristic, while partially natural, is usually developed and enhanced by careful training." *Fleming*, 713 F.2d at 181. However, "[t]he desired characteristic may also be induced by creating tenderness or soreness in the horse's front legs through use of chemical blistering agents, chains, tacks or other devices. The practice of artificially inducing the high stepping characteristic . . . is known as 'soring.'" *Id.* at 181–82.

"The Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry." *Thornton*, 715 F.2d at 1511 (citing Horse Protection Act Amendments of 1976, H.R. Rep. No. 94-1174, *reprinted in* 1976 U.S. Code Cong. & Ad.News 1696, 1699); *see also* 15 U.S.C. § 1822 (Congressional Statement of Findings). As relevant here, the HPA prohibits showing or exhibiting a sored horse and prohibits entering a sored horse in an event in order to show or exhibit the horse. 15 U.S.C. § 1824(2). A person who knowingly violates that statutory provision may face criminal fines and imprisonment. *Id.* § 1825(a)(1). And any statutory violation established after "notice and opportunity for a hearing before" the Secretary of Agriculture is subject to a civil penalty. *Id.* § 1825(b)(1). The Secretary, after "notice and an opportunity for a hearing," may also order violators to be disqualified from participating in horse shows and exhibitions for a period of years. *Id.* § 1825(c).

B. USDA's Administrative-adjudications Process

If USDA has reason to believe[1] that a person has violated the HPA, it may institute administrative proceedings by filing a complaint. 7 C.F.R. § 1.133(b)(1); *see also id.* § 1.135. Once served with the complaint, the person has 20 days to file an answer admitting or denying

[1] USDA, with the assistance of licensed, certified, individuals appointed by the horse industry, gathers evidence of soring by conducting physical inspections at horse shows, exhibitions, sales, and auctions. 9 C.F.R. §§ 11.7, 11.20. The applicable regulations specify how to identify signs of soring. For example, the inspector "shall digitally palpate the front limbs of the horse from knee to hoof, with particular emphasis on the pasterns and fetlocks," "examine the posterior surface of the pastern by picking up the foot and examining the posterior (flexor) surface," and "apply digital pressure to the pocket (sulcus), including the bulbs of the heel, and continue the palpation to the medial and lateral surfaces of the pastern, being careful to observe for responses to pain in the horse." *Id.* § 11.21(a)(2).

the allegations; failure to timely file an answer results in default. *Id.* § 1.136. The proceeding is assigned to an ALJ who holds a hearing and issues a decision. *Id.* §§ 1.141-1.142; *see also id.* § 1.132 (defining "Judge" as used in USDA regulations to mean an ALJ).

Any party who disagrees with the ALJ's decision may appeal to the Judicial Officer. § 1.145(a). The Judicial Officer exercises authority delegated by the Secretary, 7 U.S.C. § 2204-2, to act as the final deciding officer within the agency in adjudicative proceedings under the Administrative Procedure Act, the HPA, and other statutes. *See* 7 C.F.R. § 1.131, 2.35(a)(1)-(2). The Judicial Officer receives the parties' briefs, may hold oral argument, and issues a final decision on behalf of the Secretary that is subject to judicial review. *Id.* § 1.145. Further, persons assessed a penalty may seek judicial review in the court of appeals where they reside or have a place of business, or in the D.C. Circuit Court of Appeals. 15 U.S.C. § 1825(b)(2).

II. PROCEDURAL HISTORY

In 2016, USDA initiated enforcement proceedings against Plaintiff James D. McConnell for violating the HPA.[2] 2016 USDA Compl., Ex. 1. Currently, nine alleged HPA violations are pending against Plaintiff. *See* Pl.'s Mot. Prelim. Inj., Ex. 4 at 2 (March 3, 2023 Notice of Violations that Complainant Has Retained and Intends to Try), ECF No. 14-7. USDA alleges that, on multiple occasions, Plaintiff entered or showed a sored horse, entered or showed a horse

[2] As noted in the 2017 complaint, Plaintiff also entered into a consent decision and order in two HPA administrative proceedings and was ordered "to be disqualified for sixteen months and assess[ed] a [] civil penalty." 2016 USDA Am. Compl. ¶ 7 n.5. USDA also alleges that "[b]etween 1999 and 2011, various horse industry organizations have issued their own suspensions" to Plaintiff and that Plaintiff has "received multiple letters of warning from APHIS [(USDA's Animal and Plant Health Inspection Service)] notifying them in writing of noncompliance with the HPA." 2016 USDA Compl. ¶¶ 12–13; *see also* 2016 USDA Am. Compl. ¶¶ 8–17 (alleging that Plaintiff received numerous official warnings for having entered sore horses and horses bearing prohibited substances in horse shows).

bearing a substance that might cause or mask soring of horses, and failed to provide required information to USDA.[3] *See* 2016 Am. USDA Compl. ¶¶ 18, 22, 27, 32, 36–39 (Ex. 2); *see also* 2017 USDA Compl. ¶ 102 (Ex. 3). An in-person administrative hearing is scheduled to continue on October 10, 2023. Pl.'s Mot. Prelim. Inj., Ex. 14 at 1–2 (2023 October and November Segments, Hearing RESUMED Notice), ECF No. 14-17.

On July 14, 2023, Plaintiff filed the instant action. Compl. ECF No. 1. Plaintiff brings four claims. In Count One, Plaintiff alleges that the USDA Judicial Officer "is not properly appointed as a principal officer of the United States under the Appointments Clause," *id.* ¶ 135 (citing U.S. Const. art. II, § 2), and that his "status as either an employee or an improperly appointed officer of the United States leaves USDA ALJs without the constitutionally requisite principal officer supervision, *id.* ¶ 138; *see also id.* ¶¶ 118–45. In Count Two, Plaintiff alleges that the ALJ overseeing his case "is unconstitutionally protected from removal by the President," *id.* ¶ 156, because "USDA ALJs enjoy two layers of tenure protection from removal by the President," *id.* ¶ 149; *see also id.* ¶¶ 146–58. Count Three argues that USDA's civil administrative enforcement proceedings under the HPA "den[y] [Plaintiff] his Seventh Amendment right to jury trial." *Id.* ¶ 178; *see also id.* ¶¶ 159–78. And Count Four alleges that "it is unconstitutional for the claims against [Plaintiff] to be adjudicated outside of an Article III court." *Id.* ¶ 198; *see also id.* ¶¶ 179–98. Plaintiff seeks declaratory relief and an injunction prohibiting USDA from enforcing the HPA against him "under USDA's current administrative

[3] Plaintiff has attached only excerpts of USDA's 2016 Amended Complaint and 2017 Complaint. *See* ECF No. 14-4, 14-5. Because the excerpts omit substantive procedural history and allegations against Plaintiff, Defendants attach full copies of those complaints here. *See* Exs. 1–3.

enforcement scheme" and "without a jury outside of an Article III court." *Id.* Request for Relief 1–7.

On July 20, 2023, Plaintiff filed a motion for a preliminary injunction. Pl.'s Mot. Prelim. Inj., ECF No. 14 ("Pl.'s Mot."). Plaintiff moves for emergency relief on three of his four claims: Counts One, Three, and Four. *See* Mem. in Supp. of Pl.'s Mot. Prelim. Inj. at 9–20, ECF No. 17 ("Pl.'s Mem."); Compl. ¶¶ 118–45, 159–98. Plaintiff asks this Court to "enjoin[] the USDA from proceeding against him," *id.* at 22, and notes that an in-person hearing in the underlying administrative proceeding is set to continue on October 10, 2023. *Id.* at 7.

III. LEGAL STANDARDS

A preliminary injunction is an "extraordinary and drastic remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (citations omitted). Courts consider four factors when determining whether a plaintiff has fulfilled its burden: "(1) whether the party moving for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019) (citing *Benisek v. Lamone*, 138 S. 1942, 1943-44 (2018)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where, as here, the federal government is the defendant, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]he proof required for [a] plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

IV. ARGUMENT

A. Plaintiff is unlikely to succeed on any of his claims.

i. USDA's Judicial Officer is properly appointed.

Plaintiff first contends that USDA's Judicial Officer is an improperly appointed principal officer in violation of Article II's Appointments Clause. Pl.'s Mem at 9–14; *see also* Compl. ¶¶ 118–45. But the Judicial Officer is an inferior officer because his delegation may be revoked, his decisions are subject to the Secretary's review, and he may be terminated at will. In turn, the Judicial Officer properly reviews decisions made by USDA's ALJs, who ultimately are subject to the Secretary's supervision and direction.

a. The Judicial Officer is an inferior officer.

The Appointments Clause specifies how the President may appoint officers who assist him in carrying out his responsibilities. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1978 (2021). Officers of the United States are persons who hold a continuing position established by federal law, and who exercise significant authority on behalf of the United States pursuant to federal law. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). *Principal* officers must be appointed by the President with the advice and consent of the Senate, while *inferior* officers may be appointed by the President alone, the head of the department, or a court. *Id.* (citing Art. II, § 2, cl. 2).

Contrary to Plaintiff's contention, the Judicial Officer is an inferior officer properly appointed by the Secretary and subject to his supervision. Inferior officers are those "officers whose work is directed and supervised at some level by others who were appointed by" the President with Senate confirmation. *Edmond v. United States*, 520 U.S. 651, 663 (1997). Here, the Secretary has delegated to the Judicial Officer the authority to act as an adjudicator under the Administrative Procedure Act, the Horse Protection Act, and other statutes. 7 U.S.C. § 2204-2; 7

C.F.R. § 2.35(a). The Secretary, however, retains "supervision and control" of the Department's general functions and is merely "assisted" in those functions by certain general officers, including the Judicial Officer. 7 C.F.R. § 2.4. To that end, the Secretary may revoke the delegation to the Judicial Officer and adjudicate these matters personally.[4] *Id.* § 2.12. The Judicial Officer must also obey the Secretary's regulations governing adjudicatory procedures, *see* 60 Fed. Reg. 8446 (Feb. 14, 1995), and the Secretary's substantive regulations implementing the HPA, *see* 15 U.S.C. § 1828; 9 C.F.R. §§ 11.1–11.41.

Most importantly, the Judicial Officer serves at will. *Fleming v. USDA*, 987 F.3d 1093, 1103 (D.C. Cir. 2021); *see also Utica Packing Co. v. Block*, 781 F.2d 71, 76 (1986); *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 441, 445 (5th Cir. 2022) (holding that removal limitations must be established by "very clear and explicit language in the statute" and that without such limitations, removal is at will (citation omitted)). At-will removal ensures that the Judicial Officer is subordinate to a superior, since the authority to remove at will is "a powerful tool for control" and grants the principal officer "administrative oversight over" inferior officers. *Edmond*, 520 U.S. at 664. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), is instructive. There, the Court rejected the claim that members of the Public Company Accounting Oversight Board could not serve as inferior officers, *id.* at 510, because earlier in its decision, the Court had severed the Board members' removal restrictions, so they were removable at will by the Securities and Exchange Commission, *id.* at 508–10.

[4] For example, the Secretary may assume direct control over a case after the Judicial Officer has rendered a decision, *see* 7 U.S.C. § 2204-4, and thereafter hear a reconsideration motion a party filed after the Secretary assumed control.

Given that removal authority, the Court had "no hesitation in concluding that under *Edmond* the Board members are inferior officers." *Id.* at 510.

Further, the Sixth Circuit concluded that a similarly situated appeals panel, the Department of Labor's Administrative Review Board, consisted of properly appointed inferior officers. *Varnadore v. Sec'y of Lab.*, 141 F.3d 625, 631 (6th Cir. 1998). Like the Judicial Officer, the Administrative Review Board was appointed by and "subject to removal [at will] by the Secretary" of Labor. *Id.* at 629–30; *see also* 61 Fed. Reg. 19,979. And like the Judicial Officer, "[t]he ARB acts for the Secretary, and is responsible for 'issuing final agency decisions on questions of law and fact arising in review or on appeal' in certain [administrative] cases." *Varnadore*, 141 F.3d at 629–30 (quoting 61 Fed. Reg. 19,978).

Plaintiff dismisses *Vardamore* in a footnote, claiming that the Sixth Circuit's opinion is no longer binding because of the Supreme Court's decision in *Arthrex*. *Arthrex* concerned Administrative Patent Judges (APJs) appointed by the Secretary of Commerce and empowered, when assigned to three-judge panels, to hear challenges to previously issued patents in an adversarial proceeding "which resembles civil litigation in many respects." 141 S. Ct. at 1977. Although a dissatisfied litigant could request rehearing by a panel, under the statutory scheme "[n]either the Secretary nor Director," the supervising principal officer, "had the authority to review [APJs'] decisions or to remove them at will." *Id.* at 1978. Moreover, the APJs were not removable at will because "the Secretary can fire them" only "for such cause as will promote the efficiency of the service." *Id.* at 1982 (citing 5 U.S.C. § 7513(a)). APJ decisions were final for the Executive Branch and could be appealed only to the Court of Appeals for the Federal Circuit. *Id.* at 1978. *Arthrex* held that this novel structure, where "Congress has assigned APJs 'significant authority' in adjudicating the public rights of private parties[] while also insulating

their decisions from review and their offices from removal," was inconsistent with the Appointments Clause. *Id.* at 1986 (citation omitted).

According to Plaintiff, *Arthrex* overruled decades of precedent without saying so by considering only whether the officer in question issued "a final decision binding the Executive Branch." *Arthrex*, 141 S. Ct. at 1985; Pl.'s Mem. at 11 n.1. But Plaintiff ignores *Arthrex* itself, where the Supreme Court held that the Constitution "forbids the enforcement of *statutory* restrictions on" principal officers that prevent them from reviewing an inferior officer's decision. *Arthrex*, 141 S. Ct. at 1988 (emphasis added). In reaching that conclusion, *Arthrex* emphasized that the APJ system was a novel departure from historical precedent, under which Congress had traditionally "left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit." *Id.* at 1983; *see also id.* at 1984 (distinguishing other agency adjudicative procedures where the Department Head "can review *or implement a system for reviewing*" the decisions of subordinates) (emphasis added). Thus, where Congress has vested adjudicatory authority in the Secretary—as it has done here, *see* 15 U.S.C. § 1825(b)-(c)—the Secretary may constitutionally delegate that adjudication to a subordinate. Indeed, that is how adjudication constitutionally works across the federal government, including the millions of adjudications at the Social Security Administration, which the Commissioner of Social Security may and has properly delegated to subordinates.

As the D.C. Circuit recently concluded, "the majority opinion in *Arthrex* expressly *disclaimed* that its decision 'set forth an exclusive criterion' to distinguish principal officers from inferior ones." *Bahlul v. United States*, No. 22-1097, 2023 WL 4714324, at *7 (D.C. Cir. July 25, 2023) (emphasis added) (quoting *Arthrex*, 141 S.Ct. at 1985). Moreover, while *Arthrex* certainly focused on the statutory prohibition on the Patent Director's ability to review the PTAB's

decisions, "the case still considered each of the three factors that were central to *Edmond*: degree of oversight and removability, as well as final decision-making authority."[5] *Id.* at *7 (citing *Arthrex*, 141 S. Ct. at 1980–83). Indeed, the Court specifically noted that PTAB officers could be fired only for cause, *Arthrex*, 141 S. Ct. at 1982, whereas here, the Judicial Officer is subject to removal at the Secretary's discretion.[6] Thus, under the Supreme Court's and the Sixth Circuit's precedents, the Judicial Officer is an inferior officer whose work "is directed and supervised at some level" by the Secretary, who has been appointed by the President with Senate confirmation. *Edmond*, 520 U.S. at 663.

---

[5] The Sixth Circuit recently identified an "inconsistency" in the Supreme Court's interpretation of the Appointments Clause in the context of "officials temporarily filling the vacancies of principal officers," and specifically in how the Supreme Court in *Morrison*, *Edmond*, and *Arthrex* considered the unreviewability of an officer's actions to determine whether the officer is a principal or inferior officer. *Rop v. Fed. Hous. Fin. Agency* 50 F 4th 562, 570 n.2 (6th Cir. 2022), *cert. denied sub nom. Rop v. Hous. Fin. Agency*, No. 22-730, 2023 WL 3937607 (U.S. June 12, 2023). The court also noted other circuit courts' attempts to harmonize the case law. *Id.* (citing *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000)). Any uncertainty in the case law, however, cautions against granting a preliminary injunction here.

[6] In *Utica Packing Co. v. Block*, the Sixth Circuit recognized a limit to the Secretary's otherwise "total discretion in selecting and appointing," and, conversely, removing, a Judicial Officer. 781 F.2d at 76. In *Utica Packing*, the Judicial Officer issued a "final decision in a case" that dismissed the complaint, and only then did the Secretary revoke the Judicial Officer's delegation and assign the matter to a different official who "had never performed adjudicatory, regulatory or legal work." *Id.* at 72, 74. The Sixth Circuit held that replacement of the Judicial Officer after the issuance of a final decision created an impermissible appearance of bias and violated due process. *Id.* at 77–78. That conclusion is consistent with the Supreme Court's seminal decision on the President's removal authority in *Myers v. United States*, 272 U.S. 52, 135 (1926), which similarly noted that "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect the interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." Consistent with those limitations, the Secretary retains the requisite supervision and control of the Judicial Officer for Appointments Clause purposes.

b. USDA's ALJs are properly supervised.

In his preliminary-injunction brief, Plaintiff also argues, seemingly as a separate claim, that USDA's ALJs are improperly supervised inferior officers because their decisions are generally reviewed by the Judicial Officer and not the Secretary himself. Pl.'s Mem. at 9–11. However, Plaintiff does not raise any such claim in his Complaint. *See* Compl. ¶¶ 118–98 (directing only one claim specifically at USDA's ALJs, an attack on ALJ's for-cause removal protections).[7] He may not do so for the first time in his preliminary-injunction motion. *Sides v. Wetzel*, No. 2:20-CV-1168, 2021 WL 1566415, at *2 (W.D. Pa. Mar. 8, 2021) ("Injunctive relief is not an appropriate means by which to raise and litigate new claims."), *report and recommendation adopted,* No. 2:20-CV-1168, 2021 WL 1216534 (W.D. Pa. Mar. 31, 2021); *cf. Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (denying preliminary injunction where "new assertions might support additional claims … [but] cannot provide the basis for a preliminary injunction in this lawsuit"); *Bell v. Young*, No. 1:16 CV 1135, 2019 WL 6221388, at *2 n.23 (N.D. Ohio Mar. 26, 2019), ("It is well-settled that a plaintiff cannot amend the complaint through briefs . . . ." (citation omitted)), *report and recommendation adopted*, No. 1:16CV1135, 2019 WL 4727339 (N.D. Ohio Sept. 27, 2019).

Even if Plaintiff's attack on USDA's ALJs can be construed as an extension of his challenge to the Judicial Officer's appointment, USDA's ALJs are properly supervised. In contending that, under *Arthrex*, the ALJs lack requisite "principal officer supervision," Pl.'s Mem. at 12, Plaintiff again misreads the *Arthrex* decision. Critically, in *Arthrex,* a *statute* expressly precluded the relevant principal officer, the USPTO Director, from unilaterally

[7] As noted *supra*, Plaintiff did not move for a preliminary injunction on the basis of this removal challenge. *See generally* Pl.'s Mem.

reviewing PTAB decisions. *See* 35 U.S.C. § 6(c). The Supreme Court held that "[t]he Constitution . . . forbids the enforcement of *statutory* restrictions on the Director that insulate the decisions of [the PTAB judges] from his direction and supervision." *Arthrex*, 141 S. Ct. at 1988 (emphasis added). In reaching this conclusion, the Supreme Court emphasized that the PTAB's structure was a novel departure from historical precedent, under which Congress had traditionally "left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit." *Id.* at 1983; *see also id.* at 1984 (distinguishing the PTAB from other agency adjudicative procedures where the Department Head "can review *or implement a system for reviewing*" the decisions of subordinates (emphasis added)). In short, the problem in *Arthrex* was not that the Director had delegated the authority to review PTAB decisions but rather that he had been statutorily "restrain[ed]" from reviewing those decisions, which broke the "chain of command" between the Director and his subordinates. *Id.* at 1981, 1988.

USDA's system for adjudicating claims bears no resemblance to the adjudicative scheme at issue in *Arthrex*. The Secretary is responsible for carrying out the provisions of the HPA, *see* 15 U.S.C. §§ 1825(b)–(c), 1828; *see also id.* § 1822(5), in addition to his myriad other responsibilities, *see, e.g.*, 7 U.S.C. §§ 1011, 3121. The Secretary cannot possibly perform all of these tasks alone, and so has delegated authority over adjudicating certain matters to subordinate adjudicators including the Judicial Officer and the Office of Administrative Law Judges; 7 C.F.R. § 2.35 (Judicial Officer); *id.* § 2.27 (Office of Administrative Law Judges). The administrative-adjudications system was not foisted upon the Secretary by Congress, but is a mechanism of the Secretary's own creation. USDA's adjudicative system thus follows what *Arthrex* described as the historically grounded model of an agency head "exercise[ing] direction

and control" in determining "the structure of administrative adjudication." 141 S. Ct. at 1983; *see also id.* at 1984 (citing with approval the Board of Immigration Appeals, a creature of regulation, whose officers may render immigration decisions on behalf of the Attorney General). There is thus no break in the chain of command between the Secretary and his subordinates.

Both before and after *Arthrex*, courts of appeals have distinguished between *statutory* restraints on a principal officer's review and *regulatory* delegations of authority to an inferior officer. Before *Arthrex*, the D.C. Circuit held that special prosecutors were inferior officers under *Edmond* "because the limitations on the Attorney General's oversight and removal powers are in regulations that the Attorney General can revise or repeal," *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019), and post-*Arthrex* decisions are in accord, *see, e.g.*, *In re Palo Alto Networks, Inc.*, 44 F.4th 1369 (Fed. Cir. 2022) (holding USPTO Director's delegation of review authority to PTAB was compatible with *Arthrex*).

Regardless, USDA's ALJs are not, as Plaintiff would have it, "exclusively supervised" by the Judicial Officer. Pl.'s Mem. at 12. The D.C. Circuit's decision in *Fleming v. United States Department of Agriculture*, 987 F.3d at 1103–04, is instructive. That court examined USDA's ALJ scheme in detail and concluded that the ALJs were properly appointed because they "are subject to substantial oversight by the Secretary," and they "must follow the Secretary's procedural and substantive regulations." *Id.* at 1103 (citing *Edmond*, 520 U.S. at 664). "And the ALJs' decisions may be appealed to the Judicial Officer, whom the Secretary can remove at will . . . . Moreover, the Secretary (a principal officer) has considerable influence over whether an ALJ's decision becomes the final decision of the agency." *Id.* at 1103. For example, he may,

"at his election, step in and act as final appeals officer in any case."[8] *Id.* (citing 7 C.F.R. § 2.12). "In short, the Department's ALJs are inferior officers." *Id.* at 1104; *cf. Amador Duenas v. Garland*, No. 18-71987, 2023 WL 4777912, at *3 (9th Cir. July 27, 2023) (concluding that immigration judges (IJs) and the panel hearing administrative appeals of IJ decisions, the Board of Immigration Appeals, were both inferior officers in the Department of Justice and properly appointed by the Attorney General). Thus, Plaintiff is unlikely to prevail on his claim that the Judicial Officer was improperly appointed.

ii. USDA's administrative-adjudications scheme violates neither the Seventh Amendment nor Article III.

Plaintiff is also unlikely to succeed in his final two claims, which contend that USDA's administrative-adjudication system violates the Seventh Amendment right to a jury trial and infringes on the federal judiciary's purview under Article III. Pl.'s Mem. at 14–20.

The Seventh Amendment preserves the "right of trial by jury" in "suits at common law, where the value in controversy shall exceed twenty dollars." *See also Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 659 (6th Cir. 1996). The Supreme Court's precedents establish, however, that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" *Oil States Energy Servs. LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989)); *accord Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 450–55 (1977).

Because the question of whether a Seventh Amendment right to trial by jury overlaps considerably with the question of whether a matter was properly assigned to a non-Article III

[8] *See supra* note 4.

court, Defendants analyze Plaintiff's last two claims together. *See Oil States*, 138 S. Ct. at 1379; *Granfinanciera*, 492 U.S. at 53–54.

In determining whether an adjudication involves an exercise of judicial power, the Supreme Court has distinguished between "public rights" and "private rights." *Oil States*, 138 S. Ct. at 1373 (citation omitted). As to matters involving "public rights," the Supreme Court's precedents "have given Congress significant latitude to assign adjudication of [such] rights to entities other than Article III courts." *Id.*

"Public rights" are those "arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'" *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932)). They are rights "integrally related to particular Federal Government action." *Id.* at 490–91. The Supreme Court first recognized the category of public rights in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), where it held that "Congress may set the terms of adjudicating a suit" when the suit could be brought only because the federal government had chosen to allow it by waiving sovereign immunity. *Stern*, 564 U.S. at 489.

Since *Murray's Lessee*, the Supreme Court has applied the public-rights doctrine in a variety of contexts. The Supreme Court has identified applicable public rights as being, for example, where "resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at 490; *see Crowell*, 285 U.S. at 46 (upholding adjudication by administrative agency where questions of fact were "peculiarly suited to examination and determination by an administrative agency specially assigned to that task"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852–56 (1986) (upholding

CFTC adjudication of claim given the "particularized" nature of the area of law governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise" (citation omitted)). The Supreme Court has similarly explained that public rights arise where "the claim at issue derives from a federal regulatory scheme." *Stern*, 564 U.S. at 490; *see Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584–85 (1985) (channeling disputes about compensation to arbitration does not violate Article III where right to compensation results from federal regulatory scheme).

By contrast, "private rights" involve "the liability of one individual to another under the law as defined." *Stern*, 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 50). "Private rights" cases involve disputes between "two private parties," not disputes with the government. *Id.* at 493; *see also, e.g.*, *TrinCo Inv. Co. v. United States*, 140 Fed. Cl. 530, 538 (Fed. Cl. 2018) ("The case before this Court fits the classic definition of public right in that it is a dispute between the government and an individual, not between private parties.").

Under the public-rights framework, USDA administrative adjudications under the Horse Protection Act involve public rights that Congress has created and, thus, are beyond the scope of the Seventh Amendment. In establishing the HPA in 1970, Congress used its constitutional "power to regulate commerce among the several states," *Atlas Roofing*, 430 U.S. at 456; 15 U.S.C. § 1822, to solve a problem identified only "about 20 years" earlier: that the "proud, high skipping gait" prized in Tennessee walking horses "could . . . be created artific[i]ally . . . [i]f the front feet of the horse were deliberately made sore." S. Rep. No. 91-609, at 1 (1969). The Commerce Committee stated that the HPA "should help end the unnecessary and inhumane practice of soring horses—something the Tennessee walking horse exhibitors have not done by themselves." *Id.* at 2; *see also* H.R. Rep. No. 94-1174, at 5 (1976) (describing the need for the

original legislation as well as the need for a stronger version of the HPA, given that the "intended effect of the law was vitiated by a combination of factors"). To that end, Congress "created new statutory obligations" in the HPA, provided penalties for violations of those obligations, and entrusted to the Secretary "the function of deciding whether a violation has in fact occurred." *Atlas Roofing*, 430 U.S. at 450; *cf. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, U.S. Dep't of Lab.*, 518 F.2d 990, 1002 (5th Cir. 1975) (citing with approval the HPA as one of the "numerous statutes permitting civil penalties to be imposed by the administrative agency for violations of its regulation or orders" without running afoul of the Sixth Amendment's right to a jury trial), *aff'd*, 430 U.S. 442.

Plaintiff claims that "[a]n action to enforce" the statutes he is accused of violating "is analogous to two common-law claims: fraud and breach of contract." Pl.'s Mem. at 15. But Plaintiff fails to establish any serious overlap or similarity between the HPA violations of which he is accused and the elements of common-law fraud or breach of contract. USDA alleges that Plaintiff violated the HPA by entering in a show or showing a horse that has been sored, 15 U.S.C. § 1824(2); entering in a show or showing a horse bearing a prohibited substance, *id.* § 1824(7); and failing to provide required information to regulatory authorities, *id.* § 1824(9); *see also* 2016 Am. USDA Compl. ¶¶ 18, 22, 27, 32, 36–39; 2017 USDA Compl. ¶ 102. None of the HPA violations alleged against Plaintiff require an intentional, material misrepresentation—an essential element of common-law fraud.[9] Moreover, an HPA violation in no way depends on the

---

[9] In Tennessee, the elements of common-law fraud have been described as follows:

> When a party intentionally misrepresents a material fact or produces a false impression in order to mislead another or to obtain an undue advantage over him, there is a positive fraud. The representation must have been made with knowledge of its falsity and with a fraudulent intent. The representation must have been to an

existence of a valid and enforceable agreement, which is essential to a breach-of-contract claim. *See generally id.* § 1824. That various walking-horse competition groups obligate participants to refrain from behavior prohibited under federal law does not, as Plaintiff would have it, suggest that the HPA is unconstitutional, *see* Pl.'s Mem. at 15–16—it merely reflects that certain walking-horse competition standards align with the HPA.[10]

More fundamentally, Congress's power to assign an enforcement proceeding to a non-Article III tribunal does not depend on the extent to which that proceeding merely resembles common-law actions. "Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Granfinanciera*, 492 U.S. at 52 (emphasis omitted).

> existing fact which is material and the plaintiff must have reasonably relied upon that representation to his injury.

First Nat. Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991) (citation omitted).

[10] In *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 454 (5th Cir. 2022), a divided panel of the Fifth Circuit held that securities enforcement actions by the SEC implicate the right to a jury trial because they are "analogous" to common law fraud actions. *Jarkesy*, 34 F.4th at 458. That analysis is wrong for the reasons explained by Judge Davis in his dissent, *id.* at 466–73, and by the dissent from denial of rehearing en banc by Judges Haynes, Stewart, Dennis, Graves, and Higginson, 51 F.4th 644, 645 (5th Cir. 2022). In any event, the panel's analysis is not binding on this Court and the Supreme Court granted certiorari to determine whether *Jarkesy*'s analysis is consistent with the Supreme Court's Seventh Amendment precedents. *SEC v. Jarkesy*, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023).

Even applying *Jarkesy* does Plaintiff no benefit here, because "Congress created a new cause of action, and remedies therefor, unknown to the common law," when it enacted the HPA "because traditional rights and remedies were inadequate to cope with a manifest problem." *Id.*, 34 F.4th at 453.

In *Atlas Roofing*, for example, the Supreme Court held that an agency could conduct adjudications to enforce federal workplace-safety rules, even though workplace-safety disputes historically had been resolved through "common-law actions for negligence and wrongful death." 430 U.S. at 445. Any analogy between USDA adjudications under the HPA and common-law fraud or breach of contract actions, even if apt, would therefore be beside the point.

B. Plaintiff fails to establish irreparable harm.

Plaintiff's preliminary-injunction request also fails to demonstrate irreparable harm absent relief. Plaintiff's only explicit assertion of harm is in paragraph 12 of his declaration; he states that he has "expended significant time and resources defending [himself] in the internal adjudication process against the Pending Allegations." Pl.'s Mot., McConnell Decl. ¶ 12, ECF 14-2. Assertions of *past* harm, however, are insufficient to prove that Plaintiff will suffer irreparable harm in the absence of preliminary injunctive relief. *A.M.C. v. Smith*, 620 F. Supp. 3d 713, 739 (M.D. Tenn. 2022); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

Plaintiff also states that that he "object[s] to having to defend [himself] against the Pending Allegations in an improperly constituted agency adjudication process outside of an Article III court without a jury as a fact-finder." *Id.* ¶ 11. In his brief, Plaintiff relies on the latter sentence to argue that he has established irreparable harm based on *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S.Ct. 890 (2023). Pl.'s Mem. at 20. In *Axon*, the Supreme Court stated that "being subjected to unconstitutional agency authority" was "a here-and-now injury" that could not be "remed[ied] once the proceeding [was] over." 143 S. Ct. at 903. But Plaintiff overreads *Axon*, which stands for the simple proposition that a district court has jurisdiction to hear separation-of-powers challenges to the structure of a federal agency. *Id.* at 897 ("Our task today is not to resolve those [structural constitutional] challenges; rather, it is to decide where

they may be heard."). It does not hold (as Plaintiff contends) that a plaintiff's allegations of violations of Article II or Article III *ipso facto* constitute irreparable harm.

On Plaintiff's reading of *Axon*, he has automatically satisfied his burden of establishing irreparable harm simply because his alleged injury—a structural challenge to administrative procedures—"cannot be undone" once the proceeding is over. Pl.'s Mem. at 20 (quoting *Axon*, 143 S. Ct. at 904). But *Axon* did not squarely address a claim for an injunction. Nor did the Court in *Axon* utter the phrase "irreparable harm." That is because *Axon* answered a narrow jurisdictional question that has no relevance to whether Plaintiff has established irreparable harm. Put differently, *Axon* holds that a party alleging a structural violation of the Constitution can collaterally challenge an ongoing administrative proceeding in district court on that basis—just as Plaintiff is doing here—and nothing more.

Plaintiff also contends that by simply alleging a constitutional violation, his irreparable injury is to be presumed. *See* Pl.'s Mem. 20. But "[i]rreparable harm is an 'indispensable' requirement for a preliminary injunction, and 'even the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'" [11] *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quoting *D.T.*, 942 F.3d at 326–27). Plaintiff falls far short of that requirement here.

---

[11] While the Sixth Circuit has presumed irreparable injury in the context of threats to specific individual rights such as the right to vote, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012), and the right to be free from the establishment of religion, *ACLU of Ky. v. McCreary Cnty,* 354 F.3d 438, 445 (6th Cir. 2003), the structural, separation-of-powers challenge that predominates here is distinct. Plaintiff's Seventh Amendment claim, an asserted violation of the individual right to a civil jury trial, is the only claim that comes close to the rights at issue in *Obama* and *ACLU*, *see generally* Compl., and he is unlikely to succeed on that claim, as explained *supra*.

C. Balance of Harms

The third and fourth injunctive factors, the balance of harms and the public interest, "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. These factors also weigh in Defendants' favor.

As mentioned above, Congress enacted the HPA and assigned USDA adjudicative and enforcement functions under the Act to "help end the unnecessary and inhumane practice of soring horses—something the Tennessee walking horse exhibitors have not done by themselves." S. Rep. No. 91-609, at 2; *see also* H.R. Rep. No. 91-1597, at 3 (1970). The obligations, prohibitions, and administrative procedures in the Act "should destroy the incentive . . . for owners and trainers to painfully mistreat [the] magnificent animals" that are Tennessee walking horses. S. Rep. No. 91-609, at 2; *see also* H.R. Rep. No. 91-1597, at 3. Enjoining the administrative proceedings at issue would frustrate those Congressional objectives, preventing USDA from "effectuating statutes enacted by representatives of [the] people," and causing the United States to "suffer[] a form of irreparable injury" as a result. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted); *see also Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) ("[T]he public interest necessarily weighs against enjoining a duly enacted statute."). Accordingly, the balance of the equities counsels against Plaintiff's requested relief.

V. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for a preliminary injunction.

Dated: August 10, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHRISTOPHER HALL
JULIE STRAUS HARRIS
Assistant Branch Directors
Civil Division

/s/ *Vinita B. Andrapalliyal*
VINITA B. ANDRAPALLIYAL
(Admitted in New York)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-0845
Fax: (202) 616-8470
E-mail: vinita.b.andrapalliyal@usdoj.gov

Attorneys for Defendants

EXHIBIT E
No. 23-5844

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff James "Jimmy" Dale McConnell replies to Defendants' Memorandum in Response to Plaintiff's Motion for Preliminary Injunction. ECF No. 24 ("Defs.' Resp."). The U.S. Department of Agriculture's ("USDA") ongoing prosecution of Mr. McConnell for alleged violations of the Horse Protection Act ("HPA") in an unconstitutionally structured adjudication process, without a jury, and outside of an Article III court irreparably harms him. Mr. McConnell is also likely to succeed on the merits, and enjoining this adjudication process is in the public interest.[1]

[1] Defendants attached complete copies of three USDA complaints to their response purportedly because Mr. McConnell's "excerpts omit substantive procedural history and allegations against [him]." Defs.' Mem. at 6 n.3; ECF Nos. 24-1, 24-2, 24-3. Mr. McConnell excerpted exhibits where possible—and omitted the inoperative August 31, 2016 Complaint—pursuant to the Court's instruction to "submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the Court." Electronic Case Filing Rules and Procedures 4.7. Defendants rely on the complete versions of the complaints almost exclusively for a gratuitous description of allegations against Mr. McConnell that are not "directly germane" to this case. Defs.' Mem. at 5 n.2.

ARGUMENT

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

The final decision-maker in the USDA's scheme—the Judicial Officer—is a mere employee who holds no "'Office[] of the United States'" "'established by Law,'" as the Appointments Clause requires. ECF No. 17 ("Pl.'s Mem.") at 9–10. Defendants concede that point. Defs.' Resp. at 14. That alone renders the entire process unconstitutional. And even assuming the Judicial Officer holds an office, *United States v. Arthrex* requires that each of his adjudicative decisions be subject to review by a principal officer. 141 S. Ct. 1970, 1985 (2021); Pl.'s Mem. at 9–12.

1. Defendants Concede That the Judicial Officer Does Not Hold an Office

The Appointments Clause requires all officers, even inferior ones, to *at least* hold an office "created by statute." *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018); U.S. Const. art. II, § 2, cl. 2. Defendants assert that the Judicial Officer is an inferior officer. Defs.' Resp. at 8. Given that the Judicial Officer issues final adjudicative decisions, he should be a principal officer. Pl.'s Mem. at 9–11. Either way, the Judicial Officer must hold a statutorily created office for his role to comply with the Appointments Clause. *Lucia*, 138 S. Ct. at 2053. But he does not. Pl.'s Mem. at 9–10.

Defendants concede that point, thus waiving any opposition. *See* Defs.' Resp. at 14; *Taylor v. Unumprovident Corp.*, 2005 WL 3448052, at *2 (E.D. Tenn. Dec. 14, 2005); *see also* E.D. TN. LR 7.2. Defendants acknowledge that officers must "hold a continuing position established by federal law." Defs.' Resp. at 8. And they concede that USDA's "administrative-adjudications system was not foisted upon the Secretary by Congress, but is a mechanism of *the Secretary's own creation*." *Id.* at 14 (emphasis added). That concession dooms Defendants' case. At a minimum, Defendants' failure to respond to this argument waives any argument to the contrary. *See Taylor*, 2005 WL 3448052, at *2; Defs.' Resp. at 8–16. Given Defendants' waiver, Mr. McConnell is likely

to succeed on the merits of Count I of the Complaint and is entitled to a preliminary injunction on that basis. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

2. The Appointments Clause Requires Principal Officer Review of Adjudication Decisions

Even if the Judicial Officer properly held an inferior office, he unconstitutionally exercises principal officer power. *Arthrex*, 141 S. Ct. at 1985; Pl's. Mem. at 10–12. Defendants argue that the Judicial Officer is an inferior officer—and may issue final decisions for USDA—because he is removable by the Secretary, can have his authority revoked by the Secretary, and is subject to the Secretary's regulations. Defs.' Resp. at 8–16. But both the Supreme Court and statutes foreclose this argument. *Arthrex*, 141 S. Ct. at 1986–87; 7 U.S.C. § 2204-3. And Defendants' attempt to narrow *Arthrex*'s application to only statutory restrictions fails to save the day. *See* Defs.' Resp. at 8–16.

a. The Secretary Cannot Review Judicial Officer Decisions

Final agency adjudication decisions cannot be insulated from principal officer review. *Arthrex*, 141 S. Ct. at 1988. If the Judicial Officer is not a principal officer, then some other principal officer must have the ability to review—and change—the Judicial Officer's decisions. *Id.* But no one does. Pl.'s Mem. at 10–12. Defendants point to the Secretary, arguing that he can supervise the Judicial Officer. Defs.' Resp. at 8–12. But Defendants do not identify any permissible means by which the Secretary can review the Judicial Officer's decisions. Defs.' Resp. at 4–5, 8–9. Their only example appears in a footnote asserting that the Secretary may take over a case and hear a motion for reconsideration after the Judicial Officer issues a final decision. Def.'s Resp. at 9 n.4. But the Judicial Officer's final decision is "considered as having been performed by the Secretary" and the Secretary is statutorily prohibited from retroactively revoking his delegation. 7 U.S.C. § 2204-3; *see also Utica Packing Co. v. Block*, 781 F.2d 71, 76 (6th Cir. 1986) ("[The]

claim that the Secretary's delegation can be withdrawn before reconsideration any time he disagrees with the Judicial Officer's conclusions ... cannot be accepted."). Defendants' proposed review method is functionally a retroactive revocation and is—as Defendants effectively acknowledge—foreclosed by Sixth Circuit precedent. *See Utica Packing*, 781 F.2d at 76, 78; Defs.' Resp. at 12 n.6. Moreover, the regulation on which Defendants rely for the Secretary's revocation authority—7 C.F.R. § 2.12—is inapplicable to the Judicial Officer, who received his authority pursuant to 7 U.S.C. § 2204-2 with its attendant restriction on retroactive revocations, 7 C.F.R. § 2.35(a); 7 U.S.C. § 2204-3. A proposal for the Secretary to "evade a statutory prohibition on review" "is not the solution. It is the problem." *Arthrex*, 141 S. Ct. at 1981.

The Secretary's *general* ability to revoke his delegation of decision-making authority to the Judicial Officer does not solve the *specific* problem that a principal officer *cannot* review the Judicial Officer's decisions. *See Arthrex*, 141 S. Ct. at 1988. *Arthrex* illustrates the point. There, the principal officer could not review a subordinate's decision once the decision was made. *Id.* at 1986–87. The statutory limit on retroactive revocation by the Secretary imposes the same restriction here. 7 U.S.C. § 2204-3. And a revocation at any other point during an adjudication changes the Secretary's established rules of practice, which he "is obliged to follow." *Ballard v. Comm'r*, 544 U.S. 40, 59 (2005). So, the Secretary's revocation authority may be exercised only independently of a case and thus operates as a kind of removal authority. Removability without principal officer review is insufficient supervision for the Judicial Officer in an adjudication given "the nature of [his] duties." *Arthrex*, 141 S. Ct. at 1987.

b. Removability Is Not Determinative of the Judicial Officer's Status

The mere removability of the Judicial Officer is not a substitute for principal officer review. *See Arthrex*, 141 S. Ct. at 1987. Defendants emphasize that *Arthrex* addressed an adjudicatory scheme that "insulat[ed inferior officers'] decisions from review and their offices from removal."

Id. at 1986; Defs.' Resp. at 10–11. But the Court declined the government's proposal to eliminate the removal restrictions and instead removed the statutory bar against principal officer review. *Arthrex*, 141 S. Ct. at 1986–87. So, removability cannot be the "most important[]" factor if the Court was comfortable leaving the removal restrictions in place. *Id.*; Defs.' Resp. at 9. In *Free Enterprise Fund v. PCAOB*, the Court concluded that Public Company Accounting Oversight Board members were inferior officers because they were removable *and* their "issuance of rules or [] imposition of sanctions" was subject to the approval of the SEC (i.e., principal officer review). 561 U.S. 477, 486, 510 (2010). Principal officer review is the feature that is "'significant' to the outcome" in adjudication cases. *Arthrex*, 141 S. Ct. at 1981. Removability cannot be a substitute for principal officer review here. *See id.* at 1986–87.

c. USDA's Rules of Practice and Substantive Regulations are Insufficient Supervision

Defendants also argue that the Secretary's promulgation of "regulations governing adjudicatory procedures" and "substantive regulations implementing the HPA" are part of the Secretary's "'supervision and control'" of the Judicial Officer. Defs.' Resp. at 9. But the ability of the Secretary to issue regulations governing USDA adjudications is insufficient supervision without principal officer review. *Arthrex*, 141 S. Ct. at 1980. Additionally, USDA's regulations implementing the HPA were not issued by the Secretary, but by a unit of the Animal and Plant Health Inspection Service—a regulatory creation. *See, e.g.*, 44 Fed. Reg. 25,172, 25,184 (Apr. 27, 1979) (signed by Acting Deputy Administrator, Veterinary Services); *see also* 37 Fed. Reg. 6327 (Mar. 28, 1972); *Vessels in Foreign & Domestic Trades*, 13 Cust. B. & Dec. 76, 77 (1979).

The USDA Rules of Practice also provide no means for the Secretary to review administrative law judge ("ALJ") or Judicial Officer decisions. *See, e.g.*, 7 C.F.R. § 1.144–46. Cases proceed from the ALJ, to the Judicial Officer, to the federal courts. Pl's. Mem. at 3–5; Defs.'

Resp. at 4–5. The Secretary, as an "interested person," may not have any ex parte communications with the Judicial Officer or an ALJ about "the merits of [a] proceeding." 7 C.F.R. § 1.151(b). And the Judicial Officer must decide appeals based on the closed record and "matter[s] of which official notice is taken." *Id.* § 1.145(i); *see also* 5 U.S.C. § 556(e). Defendants also cannot rely on regulations to "evade" the prohibition on retroactive revocations of delegation in the statute pursuant to which the Judicial Officer was delegated his authority. *Arthrex*, 141 S. Ct. at 1981; 7 U.S.C. § 2204–3; 7 C.F.R. § 2.35.

d. **Arthrex's *Application Is Not Limited to Statutory Adjudication Schemes***

As discussed above, the primary impediment to principal officer review in USDA adjudications is statutory. *See supra* Part A.2.a. Principal officer review in adjudications requires a review of the actual decision issued by a subordinate. *Arthrex*, 141 S. Ct. at 1988. But the Secretary cannot revoke his delegation of final decision-making authority to the Judicial Officer once the Judicial Officer has issued his final decisions. 7 U.S.C. § 2204–3. So, any review of Judicial Officer decisions by the Secretary is statutorily foreclosed.[2] *Id.*

Regardless, *Arthrex* did not limit itself to statutory restrictions nor did it approve of delegations of principal officer authority without principal officer review. 141 S. Ct. at 1983–85; Defs.' Resp. at 11, 13–14. "[T]he structure of administrative adjudications [can be left] up to agency heads." *Id.* at 1983. But those "internal procedures" must be developed in accordance with the "traditional rule that a principal officer ... makes the final decision on how to exercise executive power." *Id.* at 1983–84. Principal officer review has been a feature of executive branch decision-making "[s]ince the founding," appearing in "[e]arly congressional statutes" and "carr[ying]" "into the modern administrative state." *Id.* at 1983. Agencies are not free to use their regulatory powers

[2] No statutory restriction on principal officer review is discussed in *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 629–31 (6th Cir. 1998).

to eliminate it. *See id.* at 1988. Here, the Secretary's adjudication scheme does not follow the traditional rule. *See, e.g.*, 7 C.F.R. § 1.145(i). That decision is not immune from *Arthrex* because it appears in a regulation. *See* 141 S. Ct. at 1983–85.

Defendants identify the Social Security Administration ("SSA") as an example of an adjudication system in which the decision-making has been "properly delegated to subordinates." Defs.' Resp. at 11. But Defendants do not cite any authority supporting their comparison. *Id.* The comparison to USDA's adjudication process is inapt because the SSA's "proceedings are inquisitorial rather than adversarial." *Carr v. Saul*, 141 S. Ct. 1352, 1359 (2021) (quoting *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000)); 20 C.F.R. § 404.900(b) ("[W]e conduct the administrative review process in an informal, non-adversarial manner."). Thus, the structure of SSA proceedings has no bearing on the constitutionality of the Judicial Officer and his role in USDA's adversarial adjudication proceedings.[3] 15 U.S.C. § 1825(b) and (c); 7 C.F.R. § 1.141.

3. USDA ALJs Are Not Properly Supervised

USDA ALJs are also improperly supervised by the Judicial Officer. Pl's. Mem. at 12–14. Defendants repeat their claims that (1) *Arthrex* is limited to statutory restrictions on principal officer review and (2) *Arthrex* recognizes that USDA's current adjudicatory scheme is "historically grounded." Defs.' Resp. at 13–15. That is wrong, as explained above. *See supra* Part A.2. And Defendants' caselaw lends them no support. *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019), and *In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1375 (Fed. Cir. 2022), are

[3] Defendants also state that *Arthrex* "cit[ed] with approval the Board of Immigration Appeals." Defs.' Resp. at 15. *Arthrex* actually referenced the Executive Office for Immigration Review, which the Court described as "under [the] control of [the] Attorney General." 141 S. Ct. at 1984. Regardless, the Attorney General may direct the Board of Immigration Appeals to refer any decision to him for review, and there is no statutory bar on his doing so. *See* 8 C.F.R. § 1003.1(h); 8 U.S.C. § 1103(g)(2). USDA's regulations provide no such review mechanism for the Secretary, and, in fact, a statute bars such reassignment in an existing case. 7 C.F.R. § 1.145; 7 U.S.C. § 2204-3.

inapposite because the Secretary is prohibited by both statute and regulation from reviewing final decisions of the Judicial Officer. 7 U.S.C. § 2204-3; *see supra* Part A.2.

The Secretary is no substitute for adequate supervision of USDA ALJs. Pl.'s Mem. at 12–14. He does not—indeed, *cannot*—review ALJs' initial decisions. *Id.*; *see supra* Part A.2.a; *Utica Packing*, 781 F.2d at 76, 78. And once more, Defendants' caselaw misses the mark. *Fleming v. Dep't of Agriculture* was decided before *Arthrex* and relied on an earlier D.C. Circuit case for the proposition that an officer is "inferior even though [he] could make significant decisions without review by another officer." 987 F.3d 1093, 1103–04 (D.C. Cir. 2021) (citing *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012)). *Intercollegiate* is no longer good law with respect to final adjudication decisions after *Arthrex*. 141 S. Ct. at 1980, 1985.

Mr. McConnell made this argument clearly—in his Complaint and his brief. Mr. McConnell placed this argument under a separate heading in his brief for clarity, but that does not convert it into a separate, unpled claim. *See* Compl. ¶¶ 138–45. Defendants cite cases addressing situations in which plaintiffs attempted to allege entirely new conduct in a preliminary injunction motion or other brief that was not pled in the complaint and are therefore inapposite. Defs.' Resp. at 13. Mr. McConnell raised the right claim. He included it in his brief. And he is entitled to relief.

B. Mr. McConnell Established an Irreparable Injury

Mr. McConnell faces an ongoing irreparable injury from the unconstitutional USDA adjudication process. Pl.'s Mem. at 20–21. Defendants completely disaggregate the harm in a constitutional case from the existence of a constitutional violation. Defs.' Resp. at 21–22.[4] But that

[4] Defendants also wrongly assert that Plaintiff only asserted past harm. Defs.' Resp. at 21. Plaintiff included in paragraph 12 of his declaration that he is "currently preparing for the upcoming

is impossible to do and is why "'the likelihood of success on the merits often will be the determinative factor'" for preliminary injunction motions involving "constitutional violation[s]." *Obama for Am.*, 697 F.3d at 436. Still, the likelihood of success is weighed together with the certainty of Mr. McConnell's irreparable injury. *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997); Pl.'s Mem. at 20–21.

Defendants attempt to wish away *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023), because it did not address a preliminary injunction motion. Defs.' Resp. at 21–22. But *Axon* could hardly have been clearer that the harm in challenges to unconstitutional agency adjudications is irreparable. 143 S. Ct. at 903–04. In fact, it is precisely *because* those subjected to an unconstitutional adjudication process suffer irreparable harm that district courts have jurisdiction to review those claims. *Id.* at 902–04. There is no way for Mr. McConnell to be made whole after the fact. *Id.* at 903–04. Defendants concede, as they must, that Mr. McConnell's claims implicate constitutional violations. Defs.' Resp. at 22 n.11. But if he nevertheless must go forward in the adjudication, he has no recourse, and no damages are available if it is later found to be unconstitutional. *See* 5 U.S.C. § 702 (allowing only relief "other than money damages"); *Hall v. Edgewood Partners Ins. Ctr.*, 878 F.3d 524, 530 (6th Cir. 2017) (non-compensable injury is irreparable harm).

And yet, Defendants maintain that "structural, separation-of-powers challenge[s]" are not entitled to the same presumption of irreparable harm as claims involving other constitutional violations, such as a curtailment of the right to vote or a violation of the Establishment Clause. Defs.' Resp. at 22 n.11. But "'structural principles secured by the separation of powers protect the

---

hearing ... scheduled to begin on October 10, 2023." Decl. of Jimmy McConnell ¶ 12, ECF No. 17-1. That ongoing harm can be remedied with a preliminary injunction.

individual as well.'" *Stern v. Marshall*, 564 U.S. 462, 483 (2011). Assuming Mr. McConnell's case can be adjudicated in the executive branch, he is entitled to have it heard by properly appointed officers to ensure that the exercise of executive power maintains "its legitimacy and accountability to the public." *Arthrex*, 141 S. Ct. at 1979. Defendants concede that the Seventh Amendment protects an individual right to a jury trial. Defs.' Resp. at 22 n.11. And the preservation of the judicial power under Article III ensures that Mr. McConnell's case will be decided by judges with "'[c]lear heads ... and honest hearts.'" *Stern*, 564 U.S. at 484. In fact, "the right to be free from the establishment of religion," Defs.' Resp. at 22 n.11, is the product of a structural restriction on the power of federal and state governments, *see ACLU v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003). Violations of structural constitutional protections are entitled to a presumption of irreparable harm just like any other constitutional violation. *See id.*; *Stern*, 564 U.S. at 483.

C. A Preliminary Injunction Is in the Public Interest

Defendants rely on two inapposite cases regarding the injunction of "duly enacted statute[s]" to claim that the balance of equities and public interest weigh against a preliminary injunction. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021); Defs.' Resp. at 23. Mr. McConnell is not seeking to enjoin the enforcement of the HPA, he is requesting an injunction of USDA's pursuit of alleged HPA violations through an unconstitutional process against *him in particular*. Pl.'s Mem. at 8. Moreover, a likely constitutional violation is a sufficient basis to find a preliminary injunction is in the public interest. *Obama for Am.*, 697 F.3d at 436–37; *ACLU*, 354 F.3d at 462.

CONCLUSION

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

DATED: August 17, 2023

Respectfully submitted,

/s/ *Joshua M. Robbins*
JOSHUA M. ROBBINS*
Virginia Bar No. 91020
CALEB KRUCKENBERG*
D.C. Bar No. 1617890
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Telephone: (916) 309-6930
JRobbins@pacificlegal.org
CKruckenberg@pacificlegal.org

DAVID BROILES*
Texas Bar No. 03054500
2400 Indian Cove St.
Ft. Worth, TX 76108
Telephone: (817) 246-7801
davidbroiles@gmail.com

Attorneys for Plaintiff
**admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2023, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system, which will send notice of this submission to all counsel of record.

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

EXHIBIT F
No. 23-5844

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

JAMES D. MCCONNELL, *Plaintiff*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, THOMAS JAMES VILSACK, in his official capacity, and KEVIN SHEA, in his official capacity, *Defendants*.	)	Case No. 4:23-cv-24 Judge Travis R. McDonough Magistrate Judge Susan K. Lee

MEMORANDUM OPINION

Before the Court is Plaintiff James McConnell's motion for a preliminary injunction (Doc. 14) against Defendants United States Department of Agriculture ("USDA"), Thomas Vilsack, the United States Secretary of Agriculture, and Kevin Shea, Administrator of the Animal and Plant Health Inspection Service ("APHIS"), requesting that the USDA be enjoined from enforcing the Horse Protection Act ("HPA"), 15 U.S.C. § 1821 *et seq.*, against Plaintiff via its administrative process. For the reasons set forth below, Plaintiff's motion for preliminary injunction (Doc. 14) will be **DENIED**.

I. BACKGROUND

Plaintiff James McConnell is a licensed horse trainer who owns and operates Formac Stables, Inc. ("Formac Stables"), in Shelbyville, Tennessee. (Doc. 1, at 3.) Formac Stables boards and trains Tennessee Walking Horses on behalf of the horses' owners. (*Id.*) Tennessee Walking Horses are shown in competitions across the southeastern United States and are known for their "distinctive gait." (*Id.* at 5.) A horse can be forced to perform this gait by the practice

of "soring." (*Id.*) "Soring" is the deliberate injury of a horse by a variety of means, including applying blistering agents, burns, cuts, or nails and screws which cause the horse pain and distress when walking. 15 U.S.C. § 1821(3). Congress passed the HPA to end the "cruel and inhumane" practice of soring and to prevent sored horses from "compet[ing] unfairly" with horses that were not subjected to soring. *Id.* § 1822. The HPA prohibits, in relevant part, the "showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." *Id.* § 1824(2)(A).

The HPA is enforced by the USDA and authorizes the Secretary of Agriculture ("the Secretary"), after notice and hearing, to assess violators a civil monetary penalty. *Id.* § 1825(c). The Secretary may also disqualify the violator from showing or exhibiting horses for a period of years. *Id.* The USDA begins enforcement proceedings by filing an administrative complaint against alleged violators. 7 C.F.R. § 1.131, 2.27. The proceeding is then assigned to a USDA Administrative Law Judge ("ALJ"). *Id.* Either party may request a hearing before the ALJ. *Id.* §§ 1.141, 1.142. The ALJ conducts the hearing and issues a decision. *Id.* A party may appeal the decision of the ALJ to the USDA Judicial Officer. *Id.* § 1.145(a).

Under the 1940 Schwellenbach Act, the Secretary may delegate his authority to review the decisions of the ALJs to no more than two "officers or employees" who may be assigned "appropriate titles." 7 U.S.C. § 2204-2. The Secretary "may at any time revoke the whole or any part of a delegation or designation made by him." *Id.* However, a revocation of authority "shall not be retroactive," and any decision made by the delegee "shall be considered as having been performed by the Secretary." *Id.* § 2204-3. The officer to whom the Secretary has delegated his authority is called the Judicial Officer. 7 C.F.R. § 1.132. Upon consideration of an appeal of the ALJ's decision, the Judicial Officer issues a final decision. *Id.* § 1.145(i). Only

decisions of the Judicial Officer are final for purposes of judicial review. *Id.* §§ 1.139, 1.142(c)(4). A party may petition the Judicial Officer for a rehearing or reconsideration of his decision, which the Judicial Officer has the discretion to grant or deny. *Id.* § 1.146.

The USDA filed two complaints against Plaintiff in 2016 and 2017, respectively. (Doc. 1, at 10.) The USDA alleges that Plaintiff violated the HPA by entering in a show or showing a horse that has been sored, entering in a show or showing a horse bearing a prohibited substance, and failing to provide required information to regulatory authorities. (Doc. 24, at 19.) As a result, nine alleged HPA violations are pending against Plaintiff. (Doc. 1, at 10.)

Plaintiff filed this action on July 14, 2023. (Doc. 1.) He then moved for a preliminary injunction. (Doc. 14.) Plaintiff argues that the USDA's administrative structure described above is facially unconstitutional. (Doc. 17, at 9.) Specifically, he argues that the process "violates the Appointments Clause, the Seventh Amendment, and Article III." *Id.*

II. STANDARD OF REVIEW

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In the Sixth Circuit, a district court is not required to hold an evidentiary hearing on a motion for preliminary injunction when the material facts are not in dispute. *Id.* at 553. Here, the parties agree that Plaintiff's motion raises purely legal issues and that no material facts are in dispute. (Doc. 28.)

The Court considers the following factors when evaluating a motion for 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 the issuance of the injunction.

Id. at 542 (citations omitted).

The Sixth Circuit has noted that "when a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (citations omitted). Furthermore, the Court need not "make specific findings concerning each of the four factors . . . if fewer factors are dispositive of the issue." *Id.* (citations omitted). However, "it is generally useful for the district court to analyze all four of the preliminary injunction factors." *Id.* (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 n.3 (6th Cir. 2000)). "Rather than function as "rigid and unbending requirements[,]" the factors "simply guide the discretion of the court." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992).

"The party seeking a preliminary injunction bears the burden of justifying such relief." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021) (citations omitted). While a party seeking a preliminary injunction need not "prove [its] case in full at a preliminary injunction hearing," *Tenke,* 511 F.3d at 542 (citations omitted), a preliminary injunction is an "extraordinary and drastic remedy." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). A preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)), and "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739.

III. ANALYSIS

A. Likelihood of Success on the Merits

Plaintiff asserts that several aspects of the USDA's administrative proceedings are unconstitutional. He argues: (1) the position of Judicial Officer violates the Appointments Clause; (2) USDA ALJs are improperly supervised inferior officers; and (3) he has the right to a jury trial in an Article III court. (Doc. 17, at 9.) Plaintiff has not carried his burden of demonstrating that he has a strong likelihood of success on any of these grounds.

i. Judicial Officer

Plaintiff first argues that the position of Judicial Officer violates the Appointment Clause because the Judicial Officer either (1) exercises principal-officer power as "merely an employee," or (2) is a principal officer who has not properly been appointed by the President and confirmed by the Senate. (Doc. 17, at 9–10.) Both arguments turn on one question: is the Judicial Officer an inferior officer?

The Appointments Clause provides, in part, that "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 the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. However, "[o]nly the President, with the advice and consent of the Senate, can appoint noninferior officers." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). An officer may be "inferior" rather than "principal" even if they exercise "significant authority pursuant to the laws of the United States." *Edmond v. United States*, 520 U.S. 651, 662 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). Whether an officer is an inferior officer who may be appointed by an agency head "depends on whether he has a superior other than the President." *Arthrex*, 141 S. Ct. at 1980 (internal quotations omitted) (quoting *Edmond*, 520 U.S. at 662). "An inferior officer must be

'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id.* (quoting *Edmond*, 520 U.S. at 663).

To determine whether an officer is "effectively supervised," courts must apply the test set forth in *Edmond*. *Id.* Under this test, sufficiency of supervision is determined by looking primarily at whether (1) the officer is bound to follow regulations promulgated by an agency head, (2) the officer can be removed at will and without cause by the agency head, and (3) the agency head can review the decisions of the officer. *See id.* (laying out the factors considered under *Edmond*). Still, there is no "exclusive criterion for distinguishing between principal and inferior officers." *Edmond*, 520 U.S. at 661. As a result, "the line between 'inferior' and 'principal' officers is one that is far from clear." *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 570 (6th Cir. 2022) (quoting *Morrison v. Olson*, 487 U.S. 654, 671 (1988)), *cert. denied*, 143 S. Ct. 2608 (2023).

Applying *Edmond* to the present case, the Secretary likely has a high enough degree of supervision and control over the Judicial Officer for the Judicial Officer to qualify as "inferior." The Secretary may promulgate regulations which the Judicial Officer must follow. 15 U.S.C. § 1828; 7 C.F.R. § 1.131; *see Edmond*, 520 U.S. at 662 (finding that the ability of the Judge Advocate General to "prescribe uniform rules of procedure" weighed in favor of inferior-officer status); *see also Morrison*, 487 U.S. at 671–672 (finding that independent counsel being bound to "comply to the extent possible with the policies of the [Department of Justice]" weighed in favor of inferior-officer status). Furthermore, the Judicial Officer is removable at will, and the Secretary may revoke his delegation of authority to the Judicial Officer at any time. 7 U.S.C. § 2204-2. While not dispositive, the Supreme Court has repeatedly emphasized that "[t]he power to remove officers at will and without cause is a powerful tool for control." *Free Enter. Fund v.*

Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 510 (2010) (internal quotations and citations omitted). In the recent Supreme Court decision, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, removability was the decisive factor for determining whether officers were inferior. *See id*. at 510 (concluding that under *Edmond*, officials were inferior "[g]iven that the Commission … possess[es] the power to remove Board members at will, and given the Commission's other oversight authority").

It is true that the Secretary may not "retroactively" revoke his delegation of authority and that the Judicial Officer's decisions are not reviewable by the Secretary. 7 U.S.C. § 2204-3; *see Utica Packing Co. v. Block*, 781 F.2d 71, 74 (6th Cir. 1986) ("Since the Judicial Officer acts for the Secretary, the only post-decision proceeding open to the USDA is a petition to the Judicial Officer for reconsideration."). However, the Sixth Circuit has explained that the fact that the Secretary cannot review the Judicial Officer's decisions does not defeat inferior-officer status. In *Varnadore v. Secretary of Labor,* 141 F.3d 625 (6th Cir. 1998), the Sixth Circuit examined the Department of Labor's Administrative Review Board ("ARB"). Like the Judicial Officer, "the ARB acts for the Secretary and is responsible for issuing *final agency decisions* on questions of law and fact arising in review or on appeal." *Id*. at 630 (emphasis added) (internal quotations omitted). Nonetheless, the court determined that "the members of the ARB are, at most, the type of 'inferior' officers that the Appointments Clause allows the heads of departments . . . to appoint" and that "the Appointments Clause was not offended by the creation of the ARB."[1] *Id*. at 631–32.

[1] Plaintiff argues that *Varnadore* is no longer good law as it conflicts with *Arthrex*. (Doc. 17, at 11 n.1). For the reasons discussed below, the Court cannot agree.

Plaintiff leans heavily on the Supreme Court's recent decision in *Arthrex*, in arguing that the Judicial Officer is improperly appointed. Plaintiff argues *Arthrex* established a de facto bright-line standard that a person is a principal officer who must be appointed by the President and confirmed by the Senate if he can issue a final agency decision which is not subject to review. (Doc. 17, at 11.) If true, *Arthrex* would essentially overrule *Edmond*. *See Edmond* 520 U.S. at 661 (Holding that there is not an "exclusive criterion for distinguishing between principal and inferior officers"). However, a close reading of *Arthrex* suggests *Edmond* remains the law. In fact, *Arthrex* explicitly states just that.

In *Arthrex*, the Supreme Court held that the Patent Trial and Appeal Board's Administrative Patent Judges ("APJs") violated the Appointments Clause. *Arthrex*, 141 S. Ct. at 1985. In doing so, the court emphasized that "[w]hat matters is that the Director have the discretion to review decisions rendered by APJs." *Id.* at 1988. The court also stated that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch." *Id*. at 1985. Such a sweeping statement, standing alone, seems to support Plaintiff's position that *Edmond* no longer controls. However, in the very next line, the court noted that "we do not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.'" *Id*. (quoting *Edmond*, 520 U.S. at 661). The court goes on to declare that "we reaffirm and apply the rule from *Edmond*." *Id.* at 1988.

Indeed, *Arthrex* applies *Edmond* by considering the fact that the APJs were bound by regulations promulgated by the PTO Director and that APJs were not removable at will. *Arthrex*, 141 S. Ct. at 1982 ("Nor are APJs 'meaningfully controlled' by the threat of removal from

federal service. . . ."). If reviewability were the sole test, there would be no reason for the court to have considered APJ's removability and control by regulations.

This Court takes *Arthrex* at its word that *Edmond* remains the test and that reviewability is not the sole consideration.[2] Even if Plaintiff's reading of *Arthrex* ultimately prevails, the present state of the law cuts against Plaintiff at the preliminary-injunction phase as the burden is on him to make a clear and strong showing of likelihood of success on the merits. *See Pub. Int. Rsch. Grp. of Mich. (Pingam) v. Brinegar*, 517 F.2d 917, 918 (6th Cir. 1975) (finding that the district court "clearly acted within the scope of a proper exercise of discretion in refusing to grant a preliminary injunction" when "the possibility that the appellants would succeed on the merits was at best uncertain and problematical"). Plaintiff, therefore, has not made a strong showing of likelihood of success on the merits on this ground.

ii. **ALJs**

Plaintiff next argues that USDA ALJs are improperly supervised inferior officers. (Doc. 17, at 12.) As noted above, the key inquiry is whether the ALJs are subject to adequate supervision by a principal officer. This again requires the Court to apply the *Edmond* test described above.

Under *Edmond*, the Secretary likely exercises sufficient supervision and control over the ALJs. The Secretary has the power to issue binding procedural and substantive regulations. 15

[2] Plaintiff is also saddled with unfavorable precedent, as the only circuit court opinion which examined in depth the effect of *Arthrex* on the *Edmond* test concluded that *Arthrex* did not lay down a new rule solely concerned with reviewability. In *Bahlul v. United States*, No. 22-1097, 2023 WL 4714324 (D.C. Cir. July 25, 2023), the D.C. Circuit noted that, "[d]espite the language in *Arthrex* [emphasizing reviewability], that case still considered each of the three factors that were central to *Edmond*: degree of oversight and removability, as well as final decision-making authority." 2023 WL 4714324, at *7. The court concluded that *Arthrex* was "not sufficiently clear to justify overturning the law of the circuit" given that it "explicitly denied that it relied on an 'exclusive criterion' to hold that the Patent Judges were principal officers." *Id*. at *8.

U.S.C. § 1828; 7 C.F.R. § 1.131. Perhaps most importantly, the Secretary has the statutory authority to "at any time revoke the whole or any part of a delegation or designation made by him" to the Judicial Officer to review the decisions of the ALJs. 7 U.S.C. § 2204-2. This means that the Secretary can step in and review the decisions of an ALJ before it is reviewed by the Judicial Officer.[3] *See Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021) (Finding that "the Secretary may, at his election, step in and act as final appeals officer in any case"). Furthermore, because the Secretary can remove the Judicial Officer at will and the Judicial Officer typically reviews the decisions of the ALJs, this is yet another tool to oversee the ALJs. 7 U.S.C. § 2204-2. At least one circuit court has concluded that USDA ALJs are properly supervised inferior officers. Applying *Edmond*, the D.C. Circuit found "little difficulty classifying the Department's ALJs as inferior officers." *Fleming*, 987 F.3d at 1103.

It is true that the ALJs may be dismissed only for cause by the Merit Systems Protection Board, which itself consists of members who themselves can only be dismissed for cause. 5 U.S.C. § 7521(a); 5 U.S.C. § 1202. While this dual-layer, for-cause removal protection does raise questions about whether the Secretary has adequate control, it is still likely that the ALJs are inferior officers properly supervised by the Secretary. This is especially true if Plaintiff is correct that the touchstone of inferior-officer status is reviewability.

[3] Plaintiff insists that the Secretary cannot review ALJs' initial decisions, citing *Utica Packing Co. v. Block*, 781 F.2d 71, 74 (6th Cir. 1986). (Doc. 25, at 8.) However, *Utica Packing* held only that the Secretary violated due process by creating an unacceptable "appearance of bias" when he removed a Judicial Officer *after* he had issued a final decision and appointed a new unqualified and apparently biased Judicial Officer to *rehear* the case. 781 F.2d at 74–78. The decision does not address whether the Secretary could step in before the Judicial Officer has taken up an appeal of an ALJ's decision. The 1940 statute seems to plainly authorize this move and the logic of *Utica Packing* does not bar it since the same appearance of bias would not be present. 7 U.S.C. § 2204-2.

Because the Secretary likely has sufficient ability to supervise and rein in the ALJs, Plaintiff has failed to make a strong showing that he is likely to succeed on the merits of this claim.

iii. **Jury Trial in an Article III Court**

Finally, Plaintiff argues that he is entitled to a jury trial and that he is entitled to have his case heard in an Article III court. (Doc. 17, at 14, 19.) These claims rise and fall together. *See Oil States Energy Servs. LLC v. Greene's Energy Grp.*, LLC, 138 S. Ct. 1365, 1379 (2018) (citations omitted) ("[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.") (internal quotations and citations omitted).

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. A jury trial may be required for claims created by statute when the action is "analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987). A statutory claim is analogous to a common law claim if: (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 (monetary) remedy. *Id.* at 417–18 (citations omitted).

However, even if the statutory claim is analogous to a common law claim, the "public-rights" doctrine may still allow the claim to be heard before an administrative agency without a jury. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 51 (1989). The Supreme Court held in *Granfinanciera* that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at

common law.'" *Id*. (citation omitted). This is true even when the cause of action is "closely analogous" to common law claims. *Id.* at 52. Public rights are not always clearly defined but generally concern actions "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (internal quotations and citations omitted). Public rights are implicated when "the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at 490.

There is no need to go beyond the first step of the analysis here. Plaintiff argues that an action to enforce the HPA is analogous to both common law fraud and breach of contract and that the remedy under the HPA is legal since the Secretary can assess civil fines. (Doc. 17, at 14–15.) While it is true that civil penalties can be assessed under the HPA, the statute is not analogous to common-law claims for fraud or breach of contract. Instead, it is a distinct cause of action created by Congress and properly assigned to a federal agency to administer within its area of expertise. Common law fraud in Tennessee requires: (1) an intentional misrepresentation, (2) of a material fact, (3) which the defendant knows to be false, (4) which is made with fraudulent intent, (5) which produces a false impression, (6) which is made in order to mislead another or to obtain an undue advantage over him, (7) upon which the plaintiff must have reasonably relied, (8) resulting in an injury to the plaintiff.[4] *First Nat. Bank of Louisville v.*

[4] Plaintiff offers a slightly different formulation of common law fraud 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.

Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991). The parts of the HPA Plaintiff is alleged to have violated require proof of none of these elements.[5] The HPA notably does not require any false statements or misrepresentation, nor does it require any injury to a third party. Simply because it is possible to commit both common law fraud and violate the HPA at the same time does not mean the claims are analogous. Similarly, the elements of common law breach of contract in Tennessee are: "[1] the existence of a valid and enforceable contract, [2] a deficiency in the performance amounting to a breach, and [3] damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011). Again, none of these elements must be proven to prove a violation of the HPA. While a violation of the HPA may also breach the competition contracts Plaintiff entered, this does not automatically make the two analogous. If this were indeed the standard for establishing if a federal law was analogous to a common law claim, then any law, no matter what conduct it concerned, would be equivalent to common law breach of contract whenever a contract required compliance with a federal law, or incorporated a federal standard.[6]

(Doc. 17, at 15 (citing *Edwards v. Travelers Ins. of Hartford*, 563 F.2d 105, 110–13 (6th Cir. 1977).) Under either formulation, the result is the same.

[5] USDA alleges that Plaintiff violated the HPA by: (1) entering in a show or showing a horse that has been sored, 15 U.S.C. § 1824(2); (2) entering in a show or showing a horse bearing a prohibited substance, *id.* § 1824(7); and (3) failing to provide required information to regulatory authorities, *id*. § 1824(9). (Doc. 24, at 19.)

[6] Even if the HPA were analogous to common law claims, the HPA falls squarely within the public-rights exception. The enforcement of the HPA is an action brought by the federal government against an individual. Furthermore, the HPA is a part of federal administrative scheme regulating animal welfare which relies on USDA adjudications. Plaintiff notes the extended time that his own case has been under investigation. However, this is a facial attack to the USDA's administrative proceedings and, in general, there is no reason for the Court to believe that the agency process is anything but a "prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell v. Benson*, 285 U.S. 22, 46 (1932); *see also Atlas Roofing Co., Inc. v. Occupational Safety &*

Plaintiff has not clearly demonstrated that he is likely to succeed on this ground either.

B. Irreparable Injury

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992)). When a plaintiff's "constitutional rights are threatened or impaired, irreparable injury is presumed." *Vitolo v. Guzman*, 999 F. 3d 353, 360 (6th Cir. 2021). However, this presumption is not due when it is unlikely a plaintiff's constitutional claims will succeed on the merits. *See Overstreet,* 305 F.3d at 578 ("[I]t is unlikely that [Plaintiff] will be able to demonstrate that he has a cognizable constitutional claim. Thus, his argument that he is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit.")

The sole risk of injury that Plaintiff asserts is being "forced to defend himself" in the agency proceedings against him which he claims are unconstitutionally structured. (Doc. 17, at 20.) Plaintiff asserts a violation of his constitutional rights, but, since Plaintiff has not established that he is likely to succeed on the merits, a presumption of irreparable harm is not due. *See, e.g.*, *Overstreet*, 305 F.3d at 578. Accordingly, Plaintiff has not established he will suffer irreparable harm.

C. Harm to Others & Public Interest

The third and fourth factors of the preliminary injunction analysis—harm to others and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556

Health Rev. Comm'n, 430 U.S. 442, 445 (1977) (upholding agency adjudications of workplace safety violations despite the existence of "state common-law actions for negligence and wrongful death").

U.S. 418, 435 (2009). "[T]he public interest is served by preventing the violation of constitutional rights." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (citations omitted). However, a mere assertion that a constitutional right is violated does not mandate a finding that an injunction is in the public interest. *See Overstreet*, 305 F.3d at 566 ("[W]hile the public clearly has interest in vindicating constitutional rights, it is unlikely that [the plaintiff] can demonstrate that any constitutional rights are implicated.") Furthermore, it is in the public interest to enforce legitimate laws that implicate a matter of public importance. *See Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) ("[T]he public interest necessarily weighs against enjoining a duly enacted statute, and our assessment that the appellants will likely prevail on the merits tips the public-interest factor further in their favor.").

Preventing the abuse of horses by swift enforcement of the HPA is clearly in the public interest, and the enforcement of the HPA in this case has proceeded at more of a trot than a gallop.[7] Plaintiff and Defendants agree that the practices the HPA seeks to address are of legitimate and serious public concern. Plaintiff calls horse soring an "unfortunate practice" carried out by "[a]busive trainers" (Doc. 17 at 2), while Defendants call the HPA a "bulwark against animal cruelty and the destructive practices in the horse industry." (Doc. 24, at 1.)

Plaintiff correctly notes that the public interest is served by preventing the violation of constitutional rights. (Doc. 17, at 21.) However, Plaintiff has failed to demonstrate that he is likely to succeed on the merits of his claims and therefore has not demonstrated that an

[7] As Plaintiff notes, the enforcement actions against him began in 2013. (Doc. 1, at 10.) It is not fully clear to the Court what caused this delay, but it does not appear to be simply due to neglect on the part of Defendants. Plaintiff's hearing before the ALJ is set for October 10, 2023. (Doc. 17, at 7.) It makes no sense to pull back the reins now, with the parties in the home stretch of the administrative proceedings.

injunction is in the public interest. The equities favor Defendants since the swift enforcement of the HPA is in the public interest.

IV. CONCLUSION

For the aforementioned reasons, Plaintiff's preliminary-injunction motion (Doc. 14) is hereby **DENIED**.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

EXHIBIT G
No. 23-5844

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

NOTICE OF APPEAL

Plaintiff James "Jimmy" Dale McConnell, pursuant to 28 U.S.C. § 1292(a)(1), appeals to the United States Court of Appeals for the Sixth Circuit from the order Memorandum Opinion denying Motion for Preliminary Injunction (ECF No. 30), entered on September 13, 2023.

DATED: September 21, 2023

Respectfully submitted,

/s/ *Joshua M. Robbins*
JOSHUA M. ROBBINS*
Virginia Bar No. 91020
CALEB KRUCKENBERG*
D.C. Bar No. 1617890
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Telephone: (916) 309-6930
JRobbins@pacificlegal.org
CKruckenberg@pacificlegal.org

DAVID BROILES*
Texas Bar No. 03054500
2400 Indian Cove St.
Ft. Worth, TX 76108
Telephone: (817) 246-7801
davidbroiles@gmail.com

Attorneys for Plaintiff
**admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2023, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system, which will send notice of this submission to all counsel of record.

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

EXHIBIT H
No. 23-5844

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 MOTION FOR AN INJUNCTION PENDING APPEAL

Pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, Plaintiff James "Jimmy" Dale McConnell moves for an injunction pending interlocutory appeal of the U.S. Department of Agriculture's ("USDA") ongoing adjudication proceeding—HPA Docket Nos. 16-0169 and 17-0207—in which Mr. McConnell is defending himself against allegations that he violated the Horse Protection Act ("HPA") (the "USDA Adjudication"). Mr. McConnell sought expedited consideration of his appeal from the U.S. Court of Appeals for the Sixth Circuit. That motion was granted in part, but the Sixth Circuit set a briefing schedule that extends beyond the resumption of the hearing in the USDA Adjudication on November 6, 2023.

Unless the USDA Adjudication is enjoined, Mr. McConnell will not have an opportunity to obtain relief from the ongoing irreparable injury of the USDA Adjudication based on his constitutional claims prior to the November 6, 2023, hearing. Given the certainty of the harm to

Mr. McConnell if his constitutional claims are correct, he requests that this Court enjoin the USDA Adjudication pending his appeal.

FACTS AND PROCEDRUAL HISTORY

Mr. McConnell is currently defending himself in a USDA Adjudication that has been ongoing since 2013. ECF No. 1 ¶¶ 67–68 (Compl.). USDA's Animal and Plant Health Inspection Service is currently pursuing nine alleged violations of the HPA against Mr. McConnell in the USDA Adjudication. ECF No. 17-2 ¶ 3 (McConnell Decl.). Mr. McConnell filed the above captioned action on July 14, 2023, raising four claims that the USDA Adjudication is unconstitutionally structured. ECF No. 1 ¶¶ 118–198.

On July 20, 2023, Mr. McConnell moved for a preliminary injunction of the USDA Adjudication on three of the four counts in his complaint. ECF No. 14 (Plf's. Mot. Prelim. Inj.). The Court denied that motion on September 13, 2023. ECF. No. 30 (Mem. Op.). On September 19, 2023, the administrative law judge ("ALJ") in the USDA Adjudication cancelled the hearing segments scheduled for October 2023 and set the hearing to resume on November 6, 2023. Ex. A at 2 (Sept. 19, 2023, ALJ Order re Hearing Schedule). On September 21, 2023, Mr. McConnell noticed his interlocutory appeal of the denial of a preliminary injunction, ECF No. 33, and it was docketed in the Sixth Circuit the same day, *McConnell v. USDA, et al.*, Case No. 23-5844 (6th Cir.).

On September 22, 2023, Mr. McConnell sought expedited consideration of his appeal prior to the resumption of the USDA Adjudication hearing on November 6, 2023. Ex. B (Plaintiff-Appellant's Motion for Expedited Consideration). On October 5, 2023, the Sixth Circuit granted in part Mr. McConnell's motion to expedite setting the following briefing schedule: Mr. McConnell's brief is due by October 27, 2023, the Defendants' brief is due by November 17, 2023, and Mr. McConnell's reply brief is due by December 1, 2023. Ex. C (Order re Plaintiff-Appellant's

Motion for Expedited Consideration). The Sixth Circuit will separately decide when and whether oral argument will occur and whether to expedite a decision. *Id.*

Mr. McConnell now moves for an injunction pending appeal given that the expedited briefing schedule in his appeal extends beyond the resumption of the hearing in the USDA Adjudication. Mr. McConnell will also file a motion for an injunction pending appeal in the Sixth Circuit pursuant to Rule 8 of the Federal Rules of Appellate Procedure as soon as practicable.

ARGUMENT

Federal Rule of Civil Procedure 62(d) allows a district court to "grant an injunction" "[w]hile an appeal is pending from an interlocutory order ... that ... refuses ... an injunction." The factors the Court must consider under either Rule 62(d) or Federal Rule of Appellate Procedure 8(a) are: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

"[A] movant need not always establish a high probability of success on the merits" to obtain an injunction pending appeal. *Id.* "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Id.* The movant must show "at a minimum, 'serious questions going to the merits.'" *Id*. at 154. The amount of the injury is determined by evaluating "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Id.*

Mr. McConnell attempted to obtain relief from the USDA Adjudication prior to the resumption of the hearing through an expedited appeal. Ex. B. But the Sixth Circuit's expedited briefing schedule extends beyond the resumption of the hearing in the USDA Adjudication on

November 6, 2023. Ex. C. To avoid the ongoing irreparable harm Mr. McConnell is suffering from the USDA Adjudication—and the exacerbation of that harm from the November 6, 2023, hearing—Mr. McConnell now seeks to enjoin the USDA Adjudication pending his expedited appeal.

A. Mr. McConnell Is Likely to Prevail on the Merits of His Appeal

Mr. McConnell is likely to prevail on appeal on his arguments that USDA's Judicial Officer is exercising principal-officer authority in violation of the Appointments Clause. The Court applied the wrong test for distinguishing between inferior and principal officers, requiring strict application of the three factors used in *Edmond v. United* States, 520 U.S. 651 (1997), instead of the broader "directed and supervised" test as applied to executive branch adjudications in *United States v. Arthrex*, 141 S. Ct. 1970, 1980 (2021). ECF No. 30 at 6–9. Additionally, while the Court held that the Judicial Officer is an inferior officer, it did not consider that the Judicial Officer does not hold an office created by statute as required by the Appointments Clause. *See* ECF No. 30 at 5–11; *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). These two issues raise, at a minimum, "serious questions going to the merits" that are sufficient to grant an injunction pending appeal given the certainty of Mr. McConnell's injury and the minimal harm a short delay will cause Defendants. *See Griepentrog*, 945 F.2d at 154; *see infra* Part B.

First, the Court erred by not applying *Arthrex*'s principal officer review test for executive branch adjudication positions to the Judicial Officer. *See* ECF No. 30 at 5–11. In denying Mr. McConnell's preliminary injunction motion, the Court held that it "must apply" the three factors in *Edmond*, 520 U.S. at 664–65. ECF No. 30 at 6. But *Edmond* did not set forth "an exclusive criterion for distinguishing between principal and inferior officers." *Id.* at 661. *Arthrex* recognized this and described *Edmond* more broadly as requiring an inferior officer to be "directed and

supervised 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*, 520 U.S. at 663). While *Arthrex* also disclaimed that it was "'set[ing] forth an exclusive criterion,'" it nevertheless held that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" where that officer is "adjudicating the public rights of private parties." *Id.* at 1985–86. That is the rubric under which the Judicial Officer's status should have been analyzed.

If Mr. McConnell is correct that *Arthrex* requires principal officers to issue final decisions in executive branch adjudications, he will prevail on his Appointments Clause claim because the Judicial Officer was not appointed by the President and confirmed by the Senate. *See id.*; 7 C.F.R. § 2.35. Moreover, this Court suggested that Mr. McConnell's view of *Arthrex* may still "ultimately prevail[]." ECF No. 30 at 9. Now, the Sixth Circuit has decided that expedited briefing of Mr. McConnell's appeal is necessary. Ex. C. Thus, the question Mr. McConnell has raised regarding the appropriate officer-status test for executive branch adjudications is sufficiently serious to warrant an injunction pending appeal. *See Griepentrog*, 945 F.2d at 154.

Second, the Court did not address the dispositive question of whether the Judicial Officer holds an office created by statute. *See* ECF No. 30 at 5–11. The Appointments Clause requires that "Officers of the United States" hold offices "established by Law." U.S. CONST. art. II, § 2, cl. 2. An office is "established by law" when it is "created by statute, down to its 'duties, salary, and means of appointment.'" *Lucia*, 138 S. Ct. at 2053; *see also Burnap v. United States,* 252 U.S. 512, 516–18 (1920); *Beal v. United States*, 182 F.2d 565, 568 (6th Cir. 1950) ("[A]n office of the United States does not exist unless it is created by some specific Act of the Congress").

There is no statute creating the office of Judicial Officer. The Judicial Officer was created by the Secretary pursuant to statutes permitting the Secretary to delegate his authority to officers

or employees within USDA. 7 U.S.C. § 2204-2; Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (June 5, 1953), *reprinted as amended in* 5 U.S.C. app. at 145–46; 7 C.F.R. § 2.35. The Defendants conceded this point. ECF No. 24 at 14 ("The administrative-adjudications system was not foisted upon the Secretary by Congress, but is a mechanism of the Secretary's own creation."). Without an office, the Judicial Officer cannot lawfully act as any officer of any kind—he is an employee exercising the authority of an officer. *Lucia*, 138 S. Ct. at 2053. And such employees cannot exercise significant executive authority, such as the Judicial Officer's responsibility for entering final decisions in adjudications of USDA civil enforcement actions. *See id.* at 2053–54; 7 C.F.R. § 2.35. Moreover, the absence of a statutorily created office necessarily means that Congress has not "vest[ed]" the authority to appoint the Judicial Officer in the Secretary as the Appointments Clause requires for an inferior officer to be appointed by a head of department. U.S. CONST. art. II, § 2, cl. 2. So, even if the Court is correct that the Judicial Officer is an inferior officer, his appointment is improper. *Id.*; ECF No. 30 at 5–9. Mr. McConnell is likely to succeed on the merits of this issue on appeal as well.

B. Mr. McConnell's Irreparable Harm Is Certain

Without an injunction pending appeal, Mr. McConnell is certain to suffer irreparable harm from the ongoing USDA Adjudication and the hearing set to resume on November 6, 2023. While the Sixth Circuit has agreed to consider Mr. McConnell's appeal on an expedited basis, the briefing will not be complete until nearly a month after the resumption of the USDA adjudication hearing. Ex. C. Mr. McConnell continues to suffer a "here-and-now injury" by being subjected to the "unconstitutionally structured" USDA adjudication. *See Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 903–04 (2023). And that injury "cannot be undone" once it has taken place. *See id.* at 904.

The certainty of Mr. McConnell's injury and its nature as a violation of structural constitutional protections also reduces the probability of success he must show to obtain an injunction pending appeal. *See Griepentrog*, 945 F.2d at 153–54. Here, there is no doubt that Mr. McConnell will suffer an irreparable injury if he is correct on his constitutional claims and the USDA Adjudication continues to go forward. *See Axon*, 143 S. Ct. at 903–04. Any injury to Defendants from an injunction pending appeal will be minimal because briefing will be complete by December 1, 2023, reducing the length of any delay of the USDA Adjudication should Defendants prevail. Ex. C. Additionally, the ALJ expects the hearing process to extend into 2024, resuming at a date yet to be determined. Ex. A at 1. So, the USDA Adjudication will carry on for months irrespective of an injunction pending appeal. Additionally, because Mr. McConnell's injury will result from a constitutional violation, it is substantial. *Cf. Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("'[S]tructural principles secured by the separation of powers protect the individual as well.'"). And no further proof of injury is needed because "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Under these circumstances, Mr. McConnell need only show—and has shown—that there are "'serious questions going to the merits'" raised by his appeal. *See Griepentrog*, 945 F.2d at 154; *see supra* Part A.

C. An Injunction Pending Appeal Will Not Cause Harm to Third Parties

Enjoining the USDA Adjudication pending Mr. McConnell's appeal will not cause third parties to suffer any harm. The USDA Adjudication is a civil enforcement action brought against Mr. McConnell, so only the parties to the USDA Adjudication will be directly affected by an injunction pending appeal. To the extent an injunction pending appeal in this case has ancillary effects on other HPA enforcement actions, third parties will benefit from the injunction of an

unconstitutional adjudication process. *See Weaver v. Univ. of Cincinnati*, 942 F.2d 1039, 1047 (6th Cir. 1991).

D. An Injunction Pending Appeal Is in the Public Interest

Because Mr. McConnell has demonstrated that he is likely to succeed on the merits of his constitutional claims on appeal, an injunction pending that appeal is in the public interest. *See Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). "[N]o cognizable harm results from stopping unconstitutional conduct, so 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Id.* Any public interest in enforcing the HPA is of no moment under these circumstances 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. OSHA*, 142 S. Ct. 661, 666 (2022) (refusing to "weigh [] tradeoffs" where an agency plainly overstepped its authority).

CONCLUSION

For the foregoing reasons, Mr. McConnell respectfully requests that the Court enter an injunction pending appeal of his USDA Adjudication (HPA Docket Nos. 16-0169 and 17-0207).

DATED: October 6, 2023

Respectfully submitted,

/s/ Joshua M. Robbins
JOSHUA M. ROBBINS*
Virginia Bar No. 91020
CALEB KRUCKENBERG*
D.C. Bar No. 1617890
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
Telephone: (202) 945-9524
JRobbins@pacificlegal.org
CKruckenberg@pacificlegal.org

DAVID BROILES*
Texas Bar No. 03054500
2400 Indian Cove St.
Ft. Worth, TX 76108
Telephone: (817) 246-7801
davidbroiles@gmail.com

Attorneys for Plaintiff
**admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system, which will send notice of this submission to all counsel of record.

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