IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RO CHER ENTERPRISES, INC., Plaintiff, v. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** ET AL., Defendants.	**CASE NO. 1:23-CV-16056** JUDGE STEVEN C. SEEGER MAGISTRATE JUDGE HEATHER K. MCSHAIN

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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BACKGROUND & INTRODUCTION

Plaintiff Ro Cher Enterprises, Inc. is a small, family business that sells doors and windows, primarily from its showroom in Downers Grove, Illinois. *See* Verified Complaint (Compl.) ¶¶10–12. The company finds itself subject to an in-house administrative enforcement action. *In the Matter of Ro Cher Enter., Inc.*, EPA Dkt. No. TSCA-05-2023-0004 (*Ro Cher Matter*). EPA claims that Ro Cher violated the Toxic Substances Control Act (TSCA) by not having an EPA renovator certificate and by failing to provide seven homeowners with lead-hazard pamphlets. Compl. ¶¶ 18, 28; *id.* Ex. 1 (EPA Admin. Compl.) ¶¶ 72, 82. But Ro Cher is a retailer; it does not and did not perform renovations. Compl. ¶¶ 13–15. And EPA does not allege that lead or any "toxic substance" was mishandled. EPA nonetheless seeks an order—from itself, through its in-house action—imposing penalties against Ro Cher of up to $46,989 per violation per day. Compl. Ex. 1, EPA Admin. Compl. ¶¶ 34, 88.

EPA's in-house action is unlawful because the agency suffers from structural, separation-of-powers defects. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). EPA's proceeding thus inflicts upon Ro Cher "here-and-now" irreparable constitutional injuries. *Id*. As long as the proceeding continues, so does Ro Cher's harm. *Id*. at 192. And if EPA's proceeding concludes, Ro Cher's injury—being "subject[] to an unconstitutionally structured decisionmaking process"—would be complete. *Id*. At that point, Ro Cher's separation-of-powers injuries would be "impossible to remedy" since a "proceeding that has already happened cannot be undone." *Id*. at 191. Ro Cher therefore asks this Court to preliminarily enjoin EPA's in-house proceeding, so that Ro Cher can obtain judicial review of its constitutional claims before it's "too late." *Id*.

Ro Cher is likely to succeed on the merits of its structural, separation-of-powers claims. EPA's structural defect flows first from an Appointments Clause violation. Susan L. Biro, purportedly EPA's Chief Administrative Law Judge, was designated (by herself) to preside over the *Ro Cher Matter*, Compl. ¶ 49, but she was never validly appointed to the ALJ office. This structural defect deprives EPA of constitutional authority to proceed against Ro Cher "at all," *Axon*, 598 U.S. at 192. Separately, the *Ro Cher Matter* denies Ro Cher its Seventh Amendment right to a jury, another structural protection of Americans' liberty.

The equities favor Ro Cher. The public interest will be served by stopping EPA from continuing its in-house action because it is always in the public interest to prevent unlawful government action. Indeed, agencies may not act unlawfully, even for desirable ends. And EPA does not claim any present or ongoing harm to the public. Accordingly, this Court should enjoin the *Ro Cher Matter*.

STANDARD OF REVIEW

A plaintiff is entitled to a preliminary injunction if it shows: (1) a likelihood of success on the merits; (2) a likelihood it will suffer irreparable harm in the absence of preliminary relief, *i.e.*, that remedies at law are inadequate; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). When the government is the defendant, the last two elements merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

LAW & ARGUMENT

I. PLAINTIFF IS LIKELY TO SUCCEED ON ITS APPOINTMENTS CLAUSE CLAIM

The Appointments Clause "prescribes the exclusive means of appointing 'Officers'" of the United States. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *see also Freytag v. Comm'r*, 501 U.S. 868, 881 (1991). All officers must be appointed by Presidential nomination and Senate confirmation (PAS), unless Congress "by Law" vests the power to appoint "inferior" officers in the President alone, a head of department, or a court of law. U.S. CONST. art. II, § 2, cl. 2; *Edmond v. United States*, 520 U.S. 651, 660 (1997). Regulated parties are "entitled to a hearing before [] properly appointed" officials. *Ryder v. United States*, 515 U.S. 177, 188 (1995).

Here, Ms. Biro was not PAS appointed; no law vests anyone with the power to appoint EPA ALJs; and, even if such a law did exist, EPA ALJs are inadequately supervised by PAS officers. Therefore, Ms. Biro lacks the authority to preside over the *Ro Cher Matter*.

A. EPA ALJs are executive officers of the United States

An officer of the United States, as opposed to an employee, is a government official who holds a "continuing" office vested with "significant authority" under federal law. *Lucia*, 138 S. Ct. at 2051 (simplified). EPA ALJs have continuing positions pursuant to 5 C.F.R. § 930.204(a) ("career appointment"). And EPA ALJs wield "significant discretion when carrying out important functions" under federal law. *Lucia*, 138 S. Ct. at 2053 (cleaned up). Indeed, as the chart below shows, the powers of EPA ALJs are substantively indistinguishable from those of SEC ALJs at issue in *Lucia*:

EPA ALJs	SEC ALJs
EPA ALJs "[c]onduct administrative hearings . . . ." 40 C.F.R. § 22.4(c)(1).	SEC ALJs may conduct trials. *Lucia*, 138 S. Ct. at 2053.
EPA ALJs "[a]dminister oaths and affirmations and take affidavits," *id.* § 22.4(c)(3), and "[r]ule upon motions, requests, and offers of proof, and issue all necessary orders," *id.* § 22.4(c)(2).	SEC ALJs "administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel." *Id.* (cleaned up).
EPA ALJs may "[a]dmit or exclude evidence." *Id.* § 22.4(c)(6).	SEC ALJs may "rule on the admissibility of evidence." *Id.*
EPA ALJs may "[o]rder a party . . . to produce" discovery, and if the party fails without good cause, "draw adverse inferences . . . ." *Id.* § 22.4(c)(5).	SEC ALJs may "enforce compliance with discovery orders." *Id.* (citation omitted).
EPA ALJs "shall issue an initial decision" with "findings of fact, conclusions regarding all material issues of law or discretion," and a "recommended civil penalty assessment . . . ." *Id.* § 22.27(a).	SEC ALJs may "issue decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* (citation omitted).
EPA ALJs may "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues . . . ." *Id.* § 22.4(c)(10).	SEC ALJs have "the 'authority to do all things necessary and appropriate to discharge his or her duties' and ensure a 'fair and orderly' adversarial proceeding." *Id.* at 2049 (citations omitted).
If the Environmental Appeal Board does not review, an EPA ALJ's initial decision "shall become a final order 45 days after its service upon the parties," *id.* § 22.27(c), and EPA's "final Agency action," *id.* § 22.31(a).	If the SEC declines review, an SEC ALJ's initial decision "'becomes final' and is 'deemed the action of the Commission.'" *Id.* at 2054 (citations omitted).

And, because EPA ALJs serve in the Executive Branch, they are *executive* officers of the United States. *U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021).

B. Ms. Biro was not validly appointed as a principal officer

The distinction between inferior and principal officers depends on "how much power an officer exercises free from control by a superior." *Arthrex*, 141 S. Ct. at 1982.

A principal officer, "in the context of [the Appointments] Clause," must be a Presidentially appointed and Senate-confirmed (PAS) officer. *Edmond*, 520 U.S. at 663. An inferior officer is one who is adequately controlled by a PAS officer. *Arthrex*, 141 S. Ct. at 1982. To distinguish between principal and inferior officers, courts apply "the governing test from *Edmond*," which turns on three factors: whether a PAS officer (1) exercises "administrative oversight" over the other officer, (2) has authority to remove the other officer without cause, and (3) "could review the [officer's] decisions." *Arthrex*, 141 S. Ct. at 1980, 1982 (simplified). Here, because EPA ALJs are *not* adequately controlled by any PAS officer, EPA ALJs are *principal* officers.

First, EPA ALJs are subject to only minimal administrative oversight by a PAS officer. In *Arthrex*, the Supreme Court considered whether administrative patent judges (APJs) in the U.S. Patent & Trademark Office were adequately controlled by a PAS officer. There, the PTO Director (a PAS officer) "fixed the rate of pay for APJs, controlled the decision whether to institute" adjudications and "selected the APJs" to conduct them, "promulgated regulations governing" adjudications, "issued prospective guidance on patentability issues, and designated past [agency] decisions as 'precedential' for future panels." 141 S. Ct. at 1980 (cleaned up). Here, EPA's Administrator (a PAS officer) has less administrative oversight than the PTO Director. *See, e.g.*, 5 U.S.C. § 5372 (ALJ pay fixed by statute, not by EPA Administrator); 85 Fed. Reg. 31,172, 31,175 (June 11, 2021) (repealing provision that had given Administrator some power to declare precedential decisions); 40 C.F.R. § 22.21(a) (Chief ALJ assigns ALJ for hearings). Accordingly, there is insufficient PAS-officer control over EPA

ALJs to make them inferior officers under the first *Edmond* factor.

Second, EPA ALJs are not removable at will. They may be removed only for good cause, which must be determined by the Merit Systems Protection Board. 5 U.S.C. § 7521(a). Good-cause findings (by the MSPB) are also required for certain suspensions, reductions in grade or pay, and even furloughs. *Id.* § 7521(b). This *Edmond* factor also supports the conclusion that EPA ALJs are principal officers.

Finally, and most importantly (*see Arthrex*, 141 S. Ct. at 1980), no PAS executive officer has the right to review ALJ decisions. Rather, if an ALJ's decision is administratively appealed, it is reviewed by the Environmental Appeals Board. 40 C.F.R. § 22.4(a)(1). But the members of this Board are not PAS officers. *See id.* § 1.25(e)(1) (noting that Board members are "designated" by the Administrator). And EPA's Administrator may not review anything unless the Board "in its discretion" permits such review. *Id.* § 22.4(a)(1). Critically, if an ALJ's decision is not appealed, it becomes the final decision of EPA and, thus, the Executive Branch. *Id.* § 22.27(c).

The EPA's structure in this respect mirrors the PTO's structure in *Arthrex*, in which the Supreme Court explained that the PTO Director "is the boss, *except* when it comes to *the one thing* that makes the APJs officers exercising 'significant authority' in the first place—their power to issue decisions on patentability." 141 S. Ct. at 1980 (emphasis added) (citation omitted). No PAS officer "within the Executive Branch 'directs and supervises' the work of APJs in that regard." *Id.* (cleaned up) (quoting *Edmond*, 520 U.S. at 663). Therefore, as in *Arthrex*, EPA ALJs "have the power to render a final decision on behalf of the United States" without review by

PAS officers. *Id*. at 1981 (simplified).

Accordingly, like the APJs in *Arthrex*, EPA ALJs are *principal* officers who must be PAS appointed. U.S. CONST. art. II, § 2, cl. 2. Because Ms. Biro was selected for her position by EPA's Administrator, Compl. ¶ 50, Ro Cher is likely to prevail on its Appointments Clause challenge, *id*. ¶¶ 82–97.

C. EPA is structurally unconstitutional even if the EPA ALJ office is not a principal office

The government may argue that Ms. Biro was validly appointed as an inferior officer pursuant to 5 U.S.C. § 3105, which provides that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." This argument fails for two reasons.

1. EPA ALJs are insufficiently supervised

Assuming (for now) that § 3105 authorized EPA's Administrator to appoint Ms. Biro as an inferior officer, EPA remains structurally unconstitutional. As just explained, EPA ALJs "have the power to render a final decision on behalf of the United States" without review by PAS officers. *Arthrex*, 141 S. Ct. at 1981 (simplified). As *Arthrex* held, inferior officers are not permitted to issue final decisions on behalf of the Executive Branch without review by a PAS officer. *Id*. at 1980–82. *See* Exhibit 1 (Order, *Space Exploration Techs. Corp. v. Bell*, No. 1:23-cv-00137, slip op. at 3–5 (S.D. Tex. Nov. 8, 2023) (granting preliminary injunction)). Therefore, even if Ms. Biro was properly appointed as an inferior officer, EPA's structure still violates the Constitution's structure.

2. Section 3015 does not vest appointment power

But, ultimately, EPA's Administer was not authorized to appoint Ms. Biro to office. A department head may appoint inferior officers only if Congress "by Law" so provided. U.S. CONST. art. II, § 2, cl. 2. Here, (a) statutory history, (b) statutory text, and (c) the canon of constitutional avoidance require that § 3105 not be read as vesting anyone with appointing power. Instead, § 3105 merely authorizes agencies to assign *already-appointed* ALJs to ALJ-office vacancies or hearings. As the Supreme Court said in a similar context, there is "no other way to interpret [§ 3105] that would make it consistent with the Constitution." *Edmond*, 520 U.S. at 658.

a. Section 3105 was enacted in 1966, *see* Pub. L. No. 89-554, 80 Stat. 378, 415, and non-substantively amended 12 years later, *see* Pub. L. No. 95-251, 92 Stat. 183 (1978) (changing "hearing examiners" to "administrative law judges"). Congress's actions thus came long before the Supreme Court first suggested that ALJs are officers subject to the Appointments Clause, *see Freytag*, 501 U.S. 868 (1991), and almost a half-century before the Court's 2018 *Lucia* decision firmly established that conclusion. Thus, when Congress enacted and amended § 3105, it all but certainly considered ALJs to be non-officer employees. *Cf. Edmond*, 520 U.S. at 654 (noting then-recent Supreme Court decisions cast doubt on the validity of past "assignments").

b. The text of § 3105 confirms this conclusion, as the alternative reading would violate the express terms of the Appointments Clause. That is, if Congress intended § 3105 to vest appointment power in every federal "agency," this power would be vested in "each authority of the Government of the United States, whether or not it

is within . . . another agency," including every agency and sub-agency within a department. 5 U.S.C. § 551(1) (defining "agency"). Under that interpretation, the power to appoint inferior officers would extend far beyond "the President alone, [] the Courts of Law, or [] the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. Congress could not have intended such a sweeping and obviously unconstitutional power, and § 3105 must not be interpreted that way.

c. The Supreme Court's *Edmond* decision supports Ro Cher's reading. In *Edmond*, petitioners who were convicted by courts-martial challenged the authority of the Coast Guard Court of Criminal Appeals on the ground that two of its judges had been improperly appointed by the Secretary of Transportation. 520 U.S. at 655–56. There was no dispute that the Coast Guard court was part of the Transportation Department, or that a law (49 U.S.C. § 323(a)) authorized the Secretary to appoint officers. *Id.* at 656. But petitioners claimed that § 323(a) was merely a default statute and that a more specific law (10 U.S.C. § 866(a)) vested the appointment power exclusively in the military's Judge Advocates General (JAGs). *Id.* The Supreme Court rejected that interpretation. The Court explained that since JAGs were not the President, heads of department, or courts of law, Congress could not have vested JAGs with the power "to 'appoint' even inferior officers of the United States." *Id.* at 658. The challengers' interpretation "would [have] render[ed] [10 U.S.C. § 866(a)] clearly unconstitutional—which [the Court] must of course avoid doing if there is another reasonable interpretation available." *Id.* (citations omitted). The Court instead interpreted § 323(a) to authorize the Secretary—head of the department—to make those

appointments, consistent with the Appointments Clause. *Id.*

Interpreting § 3105 to vest an appointment power in all federal agencies would render it unconstitutional—an interpretation that must be avoided, particularly because a reasonable alternative exists. *Edmond*, 520 U.S. at 658. Section 3105 may be, and under the Appointments Clause must be, reasonably interpreted as providing the means for agencies to either assign *already-appointed* ALJs to individual matters or fill ALJ vacancies, while the Appointments Clause separately provides the "default manner of appointment for inferior officers"—PAS appointment. *Id.* at 660.

This two-step arrangement mirrors the assignment process for Senior Executive Service (SES) members, "high-level positions in the Executive Department, [] for whom" PAS appointment "is not required." *U.S. v. Fausto*, 484 U.S. 439, 441 n.1 (1988) (citation omitted). The Office of Personnel Management qualifies individuals for the SES,[1] after which they may be assigned to fill vacancies. Under both the § 3105 and SES arrangements, therefore, a separate authority first approves individuals for certain positions, and agencies then fill vacancies with the approved individuals.

D. Summing up: Ms. Biro was not validly appointed to office

The EPA ALJ office is a *principal* executive office. Therefore, individuals may not serve in that office unless they are Presidentially appointed and Senate confirmed. U.S. CONST. art. II, § 2, cl. 2. Because Ms. Biro was not so appointed to the

[1] *See OPM Senior Executive Service Desk Guide*, U.S. Office of Personnel Mgmt. 2-3 (2020), https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/ses-desk-guide.pdf (last visited Dec. 21, 2023).

ALJ office, she was not validly appointed. Alternatively, even if the EPA ALJ office is an inferior office *and* the Administrator is authorized to appoint ALJs, EPA's structure remains constitutionally defective due to the lack of PAS-officer oversight. Either way, Ro Cher is likely to succeed on its Appointments Clause claim.

II. PLAINTIFF IS LIKELY TO SUCCEED ON ITS SEVENTH AMENDMENT CLAIM

EPA's in-house proceeding denies Ro Cher its constitutional right to a jury trial—another structural guarantee of Americans' liberty. *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1278 (2014) (quoting Justice Scalia's testimony to the Senate Judiciary Committee that the civil and criminal jury "absolutely is a structural guarantee of the Constitution"); *cf. also Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (The Sixth Amendment right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.") (citations omitted). One of the causes of the American Revolution was the Crown's "depriving us in many cases, of the benefits of Trial by Jury." U.S. Code, Organic Laws, Decl. of Independence (1776); *see also* THE FEDERALIST NO. 83 ("The objection to the plan of the [constitutional] convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.") (Hamilton). Without the promise of a Bill of Rights—perhaps especially without a guarantee for civil jury trials—the proposed constitution likely would not have been ratified. *Id.*

The Seventh Amendment provides: "In 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. Juries are required for all civil actions (over $20), including statutory actions, analogous to suits at common law. *Tull v. United States*, 481 U.S. 412, 417 (1987). To determine whether an action is so analogous, courts (A) "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and (B) "determine whether [the remedy sought] is legal or equitable in nature." *Id.* at 417–18 (citations omitted). The remedy factor is the more important. *Id.* at 421 (citation omitted).

A. EPA alleges a legal, common law claim

EPA's action—like its action in *Tull*—is analogous to a common-law action in debt. *See id.*, 481 U.S. at 418. There, EPA sought a civil penalty against Edward Tull based on the allegation that he violated the Clean Water Act by unlawfully dumping fill in wetlands. *Id.* at 414–15. The district court, without a jury, found that he had illegally filled wetlands and issued a $325,000 penalty. *Id.* at 415. The court of appeals affirmed, holding that Tull was not entitled to a jury. *Id.* at 416.

The Supreme Court reversed. It explained that a "civil penalty suit was," before the Seventh Amendment was adopted, "a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418 (citations omitted). And "[a]ctions by the Government to recover civil penalties under statutory provisions [] historically have been viewed as one type of action in debt requiring trial by jury." *Id.* at 418–19.

Here, EPA seeks to recover civil penalties under the statutory provisions of the TSCA. EPA's action, therefore, is a type of action in debt that requires trial by jury.

B. EPA seeks a legal remedy

"Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull*, 481 U.S. at 422 (citations omitted). Indeed, a critical "characteristic of the remedy of civil penalties is that it exacts punishment—a kind of remedy available *only* in courts of law." *Id*. at 422 n.7 (emphasis added); *see Pernell v. Southall Realty,* 416 U.S. 363, 370 (1974) ("Where an action is simply for . . . the recovery of a money judgment, the action is one at law.") (cleaned up).

Here, the TSCA authorizes EPA to seek a civil penalty against Ro Cher of up to $46,989 per violation per day. Compl., Ex. 1, EPA Admin. Compl. ¶¶ 34, 88; *see* 15 U.S.C. § 2615(a); 40 C.F.R. § 19.4. The amount depends on "the nature, circumstances, extent, and gravity" of the violations. 15 U.S.C. § 2615(a)(2)(B). Therefore, EPA's requested remedy here is entirely legal; it seeks no equitable remedy.

C. *Atlas Roofing* does not alter the conclusion

Defendants will likely, but mistakenly, rely on *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). There, the Supreme Court held that Congress could, consistent with the Seventh Amendment, "assign" "public rights" cases to administrative forums "with which the jury would be incompatible." *Id*. at 450 (footnote omitted). Public rights cases were described as those "in which the Government sues in its sovereign capacity to enforce public rights created by statute" within Congress's lawful power. *Id.* To decide whether a jury trial could

be dispensed with, courts were to consider both the nature of the claim at issue and Congress's chosen forum. *Id.* at 460–61. This holding has been significantly narrowed, if not completely overruled, by later Supreme Court decisions.

First, the Supreme Court no longer gives Congress's chosen forum dispositive weight. Instead, as noted above, the Court considers the nature of the claim and the claim's remedy; if both are legal, especially if the remedy is legal, the case must be heard by a jury. *Tull*, 481 U.S. at 417–19. Thus, "'legal claims are not magically converted into equitable issues by their presentation to a court of equity,' . . . nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989) (citation omitted). The author of the *Atlas Roofing* opinion acknowledged (but disagreed with) this post-*Atlas Roofing* analysis. *See id.* at 79–82 (White, J., dissenting).

Further, decisions both before and after *Atlas Roofing* contradict that opinion's reliance on the statutory basis of claims as a reason to disregard the Seventh Amendment. *See, e.g.*, *Curtis v. Loether*, 415 U.S. 189, 194 (1974) ("The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (noting "many of our recent Seventh Amendment cases" (that required a jury) "involved modern statutory rights unknown to 18th-century England") (citations omitted).

Finally, while Justice White, in his *Granfinanciera* dissent, found some support for his view in then more-recent Supreme Court decisions, the Court's current emphasis on the *nature* of the claim at issue harkens back to the Court's original understanding. In 1830, Justice Story wrote for the Court that "[s]uits at common law" refers "not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined[.]" *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

EPA's case against Ro Cher is just such a case. The Defendants will no doubt claim that this is a "public rights" case on the ground that the Government has sued "in its sovereign capacity to enforce public rights created by [a] statute[]." *Atlas Roofing*, 439 U.S. at 450. Aside from the circularity and lack of definition of "public rights," the Supreme Court has since confirmed that the public rights doctrine does not allow Congress "to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera*, 492 U.S. at 51–52. "[T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Id.* at 52 (discussing *Atlas Roofing*).

The nature of EPA's claims and remedies is legal. Thus, the claims would have been heard in common law courts when the Seventh Amendment was adopted. *See Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (The Seventh Amendment applies to "statutory causes of action "'analogous to common-law causes

of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.""") (citations omitted).

* * *

EPA's action requires the determination of Ro Cher's private, legal rights, EPA seeks legal remedies, and therefore Ro Cher is entitled to a jury trial. Ro Cher is thus likely to succeed on its claim that EPA's administrative proceeding violates Ro Cher's Seventh Amendment right to a jury. Compl. ¶¶ 154–62. *See Burgess v. FDIC*, 639 F.Supp.3d 732, 747–50 (N.D. Tex. 2022) (granting preliminary injunction, based on Seventh Amendment claim, to enjoin FDIC from continuing administrative enforcement action); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) ("Because the SEC was seeking both legal and equitable relief, . . . Lipson was entitled to and received a jury trial.") (citations omitted); *Jarkesy v. SEC*, 34 F.4th 446, 451–59 (5th Cir. 2022) (SEC action violated Seventh Amendment), *pet. for rehearing en banc denied*, 51 F.4th 644 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

III. WITHOUT AN INJUNCTION, RO CHER WILL SUFFER IRREPARABLE HARM, BECAUSE RO CHER HAS NO ADEQUATE REMEDY AT LAW

As the Seventh Circuit has confirmed, when an alleged deprivation of a constitutional right is involved, no further showing of irreparable harm is required. *See Ezell,* 651 F.3d at 699 (reversing district court and finding irreparable harm for violation of Second Amendment, which like the First Amendment, protects "intangible and unquantifiable interests"); *see also Free the Nipple–Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) ("[W]ell-settled law supports the constitutional-violation-as-irreparable-injury principle.") (citations omitted); *Burgess*, 639

F.Supp.3d at 749 (same regarding Seventh Amendment right). As then-Judge Kavanaugh explained, "[i]rreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency . . . ." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted).

Here, Ro Cher is being regulated—indeed, is subject to an in-house enforcement action—by an unconstitutionally structured agency. EPA is thus inflicting upon Ro Cher structural, separation-of-powers injuries. This "harm may sound a bit abstract; but th[e Supreme] Court has made clear that it is 'a here-and-now injury'" for which there is no legal remedy. *Axon*, 598 U.S. at 191 (quoting *Seila Law*, 140 S. Ct. at 2196). And the Supreme Court rejects the argument that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010).

Further, as the Supreme Court recently emphasized, Ro Cher's harm is "impossible to remedy once the [EPA's administrative] proceeding is over" because a "proceeding that has already happened cannot be undone," and "[j]udicial review of [Ro Cher's] structural constitutional claims would come too late to be meaningful." *Axon*, 598 U.S. at 191; *see also Cochran v. SEC*, 20 F.4th 194, 208 n.12 (5th Cir. 2022) (en banc), *aff'd sub nom. Axon*, 598 U.S. 175. Therefore, only injunctive relief—to prevent future harm—is available to Ro Cher.

And injunctions are proper in these kinds of cases. In *Youngstown Sheet & Tube Co. v. Sawyer*, for example, steel-mill owners challenged President Truman's

executive order seizing their mills on the ground that the order was not authorized by an act of Congress or any constitutional provision. 343 U.S. 579, 582–83 (1952). The Supreme Court rejected the government's argument that the President's unconstitutional order did not inflict irreparable harm and affirmed the district court's preliminary injunction. *Id.* at 584–85, 589; *see id.* at 660 (Burton, J., concurring) (The "President's order . . . invaded the jurisdiction of Congress [and] violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.").

Circuit courts, including the Seventh Circuit, have affirmed injunctions issued for separation-of-powers violations. *See City of Chicago v. Sessions*, 888 F.3d 272, 291 (7th Cir. 2018) (subsequent history concerning other issues omitted); *Sierra Club v. Trump*, 963 F.3d 874, 887, 895–97 (9th Cir. 2020) (affirming permanent injunction for violation of the Appropriations Clause, "'a bulwark of the Constitution's separation of powers'") (citation omitted).[2]

In the two cases underlying the Supreme Court's landmark decision in *Axon*, both the Fifth and Ninth Circuits had stayed administrative proceedings. *See* Exs. 2 (Order in *Axon Enters., Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020)) & 3 (Order in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019)). Since *Axon*, several courts have enjoined administrative proceedings to protect challengers' structural constitutional claims. *See* Ex. 4 (Order in *Morris & Dickson v. DEA*, No. 23-60284 (5th Cir.

[2] The Supreme Court vacated the Ninth Circuit's judgment on other grounds, 142 S. Ct. 46 (2021), because President Biden assured the Court that no tax-payer dollars would be diverted to the border wall, *see* Petitioners' Mtn. to Vacate and Remand in Light of Changed Circumstances, *Biden v. Sierra Club*, No. 20-138, 2021 WL 2458459 (U.S. June 11, 2021).

June 16, 2023)); *see also Alpine Secs. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023); *Burgess*, 639 F.Supp.3d 732. This Court, too, has issued an injunction in similar circumstances. *See City of Evanston v. Barr*, 412 F.Supp.3d 873, 886–87 (N.D. Ill. 2019) (permanent injunction for violating Separation of Powers).

IV. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION

A party seeking a preliminary injunction must demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. And these factors support Ro Cher's request for an injunction.

First, the government "does not have an interest" in enforcing an arrangement "that is likely constitutionally infirm." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Instead, "the public interest will perforce be served by enjoining" these "invalid" arrangements. *Id.* (simplified). The Supreme Court has held that when an agency exceeds its authority, the court should not "weigh . . . tradeoffs" between its intended effect and harms. *NFIB v. OSHA*, 595 U.S. 109, 120 (2022).

"[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (citation omitted). "When a law is likely unconstitutional, the interests of those the government represents, such as voters, do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (cleaned up), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

In any event, EPA cannot show any injury to the public here. Ro Cher's alleged TSCA violations occurred in the past, and EPA does not allege that Ro Cher mishandled any toxic substances or that Ro Cher's (alleged) conduct causes ongoing harms.

Finally, only an injunction will allow Ro Cher to pursue its constitutional challenges before it's "too late" to obtain "meaningful" judicial relief. *Axon*, 598 U.S. at 191.[3] Allowing Ro Cher to pursue its constitutional claims would, in turn, further the Supreme Court's marked interest in "creating 'incentives'" for parties "'to raise'" structural constitutional challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up) (quoting *Ryder*, 515 U.S. at 183).

In short, as then–Judge Kavanaugh stated, "[t]he public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

CONCLUSION

For the foregoing reasons, Plaintiff Ro Cher respectfully requests a preliminary injunction enjoining EPA's administrative enforcement proceeding. *In the Matter of Ro Cher Enter., Inc.*, EPA Dkt. No. TSCA-05-2023-0004.

[3] In the *Ro Cher Matter*, Ro Cher's motion to stay, pending this litigation, was treated as a request for an extension and granted in part. The matter thus remains open.

DATED: December 22, 2023.

Respectfully submitted,

s/ Oliver J. Dunford

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Motion for Preliminary Injunction

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

SPACE EXPLORATION TECHNOLOGIES, CORP. aka SpaceX, "Plaintiff,"	§	
v.	§	Civil Action No. 1:23-cv-00137
CAROL BELL, et al., "Defendants."	§	

ORDER

Before the Court is Plaintiff's "Motion for Preliminary Injunction" ("Motion") (Dkt. No. 11), Defendant's "Response to Plaintiff's Motion" (Dkt. No. 20), Plaintiff's "Reply in Support of its Motion" (Dkt. No. 24), and Defendant's "Surreply in Opposition to Plaintiff's Motion" (Dkt. No. 26). Plaintiff's Motion (Dkt. No. 11) is **GRANTED in part** for these reasons:

I. BACKGROUND

Congress made it unlawful for an employer to discriminate based on national origin or citizenship status in the hiring or firing of any applicant or employee in 8 U.S.C. § 1324b. The Department of Justice's ("DOJ") Immigrant and Employee Rights Section ("IER") enforces § 1324b by bringing administrative proceedings against an alleged wrongdoer. Dkt. No. 11 at 10; Dkt. No. 20 at 3. The Office of the Chief Administrative Hearing Officer ("OCAHO") administrative law judges ("ALJ") adjudicate § 1324b proceedings. Dkt. No. 11 at 10; Dkt. No. 20 at 3. The U.S. Attorney General appoints OCAHO ALJs. Dkt. No. 11 at 10; Dkt. No. 20 at 3. An ALJ assigned to hear a § 1324b action has "all appropriate powers necessary to conduct fair and impartial hearings." 28 C.F.R. § 68.28. After a hearing ends, the ALJ issues a "final" decision that may be appealed only to a U.S. court of appeals. 8 U.S.C. § 1324b(g)(1); 28 C.F.R. § 68.57.

The IER filed an administrative complaint (Dkt. No. 11-2) against Plaintiff in August 2023 alleging Plaintiff violated 8 U.S.C. § 1324b. *Id.* OCAHO ALJ Defendant Carol Bell presides over these administrative proceedings. Dkt. No. 11-1 at ¶ 18. The IER seeks civil penalties, backpay, and the reinstatement of aggrieved applicants from Plaintiff. Dkt. No. 11-2 at 16.

In October 2023, almost a month after Plaintiff sued, the Executive Office of Immigration Review ("EOIR") published an interim final rule ("IFR") "to provide that the Attorney General may, in his discretion, review decisions and orders of ALJs in the OCAHO in cases arising under

§ 1324b". 88 Fed. Reg. 70,586-01 (Oct. 12, 2023) (to be codified at 28 C.F.R. pt. 68). The IFR became effective immediately. *Id.*

Plaintiff now moves for a preliminary injunction to halt the administrative proceedings.

II. LEGAL STANDARD

Granting a preliminary injunction is the "exception rather than the rule." *House of the Homeless, Inc. v. Widnall*, 94 F.3d 176, 180 (5th Cir. 1996). "A plaintiff seeking a preliminary injunction must clearly show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017). The moving party bears the burden of proving each element. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

III. DISCUSSION

a. Plaintiff's request for a hearing is denied.

Plaintiff requests that the Court hold a hearing. The Court rules on opposed motions by submission, L.R. 6(B), and it need not hold a hearing on a motion for preliminary injunction if there is no dispute of fact. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). Finding no dispute of fact, Plaintiff's request for a hearing is **DENIED.**

b. Plaintiff has standing to bring its Appointments Clause and removal claims.

Defendants argue Plaintiff lacks standing to bring its Appointments Clause and removal claims because Plaintiff has failed to show an injury-in-fact. Dkt. Nos. 20 & 26.

To establish Article III standing, Plaintiff must show, among other things, that it has suffered an injury in fact. *Wendt v. 24-Hour Fitness USA, Inc.*, 821 F.3d 547, 550 (5th Cir. 2016). An injury-in-fact constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

To have standing to bring Plaintiff's removal claim, Plaintiff must show that "the unconstitutional removal provision inflicted harm." *Collins v. Yellen*, 141 S. Ct. 1761, 1783, 1788-89 (2021). Proceeding before "an unaccountable ALJ" "is a here-and-now injury" "that is impossible to remedy once the proceeding is over." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598

U.S. 175, 191 (2023). Thus, if Plaintiff can show that OCAHO ALJs are unconstitutionally insulated from removal, Plaintiff will be harmed by having to proceed before an unaccountable ALJ. Plaintiff therefore has standing to bring its removal claim.

Similarly, Plaintiff's injury-in-fact in its Appointments Clause claim is also facing unlawful agency authority because § 1324b does not provide for the Attorney General's review of OCAHO ALJs' decisions. Defendants argue that the IFR cures the constitutional defect with § 1324b, and thus Plaintiff is not harmed by the IFR. Dkt. No. 20. But Plaintiff alleges the IFR expressly conflicts with § 1324b, and thus Plaintiff is still ultimately subjected to unconstitutional agency authority. *Id.* Plaintiff's injury must be traceable "to allegedly unlawful conduct of the defendant, not to the provision of law that is challenged." *Collins*, 141 S. Ct. at 1779. Plaintiff's "concrete injury flows directly from" the allegedly unlawful administrative proceedings, and the IFR does not "operate independently" from those proceedings. *Id.*; *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022). Plaintiff has therefore alleged an injury-in-fact and has standing to bring its Appointments Clause claim.

c. Plaintiff is entitled to an injunction on its Appointments Clause claim.

i. Plaintiff is likely to succeed on the merits of its claim that Section 1324b violates the Appointments Clause because OCAHO ALJs' decisions are not subject to review by the Attorney General.

Under the Appointments Clause, the President must appoint all federal "principal officers" with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. But Congress may allow the head of a department to appoint "inferior officers." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979, 210 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 660 (1997)). An inferior officer must be "directed and supervised" by a principal officer. *Arthrex, Inc.*, 141 S. Ct. at 1980 (citing *Edmond*, 520 U.S. at 662).

OCAHO ALJs are appointed by the Attorney General (a principal officer), so they are "inferior officers" who must be "directed and supervised" by the Attorney General. Dkt. No. 11 at 5; Dkt. No. 20 at 3. In other words, the Attorney General must be able to review the decisions of OCAHO ALJs to comply with the Appointments Clause. *Arthrex, Inc.*, 141 S. Ct. at 1980-82 (holding that it violated the Appointments Clause for inferior adjudicative officials to render decisions that are not subject to review by a principal officer). Based on § 1324b's plain language,

broader context, and legislative history, it is clear the decisions of OCAHO ALJs are not subject to the Attorney General's review.

Section 1324b requires an OCAHO ALJ to issue "an order, which shall be final unless appealed as provided under subsection (i)." 8 U.S.C. § 1324b(g)(1). Subsection (i) provides that the forum for an aggrieved party to "seek a review of such order" lies exclusively "in the United States court of appeals" "60 days after the entry of such final order." *Id.* § 1324b(i). It does not affirmatively provide for the Attorney General to review OCAHO ALJ decisions. *Id.*

The broader context of the statute also reinforces the plain text interpretation. Section 1324b is between Sections 1324a (governing unlawful employment of aliens) and 1324c (governing document fraud), which specifically provide for "administrative appellate review" of ALJ decision by the Attorney General. 8 U.S.C. §§ 1324a(e)(7), 1324c(d)(4). Congress' decision not to provide for "administrative appellate review" by the Attorney General in 1324b must therefore be viewed as intentional. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022).

The statute's legislative history also clarifies that Congress did not intend for the Attorney General to have the authority to review OCAHO ALJ decisions. H.R. Rep. No. 99-682, 14 (1986) ("[T]he amendment makes clear that an [ALJ]'s order in a discrimination case . . . is a final agency order and is enforceable immediately unless appealed in accordance with provisions specified."). Congress made clear that "once an ALJ issues his/her order, it becomes a final agency order," and it did not mention further review by the Attorney General. *Id.*

Indeed, until recently the DOJ advised that ALJ orders in § 1324b cases were not subject to the Attorney General's review. 88 Fed. Reg. 70,586-01; *see Amazon Web Servs. Inc.*, 14 OCAHO no. 1381h, 2 (2021). Defendants argue that the recently published IFR saves § 1324b because it advises that §1324b should be read to "expressly account for review of ALJ decisions by the Attorney General." Dkt. No. 20; 88 Fed. Reg. 70586-01. But the new IFR conflicts with the plain language of § 1324b, which only provides for review in an Article III court.[1] Thus, the IFR is unlawful, and § 1324b proceedings are unconstitutional because the Attorney General is not allowed to review OCAHO ALJs' decisions. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457,

[1] "Review outside Article II . . . cannot provide the necessary [executive] supervision" to comply with the Appointments Clause. *Arthrex*, 141 S. Ct. at 1982.

472 (2001) (holding that an agency could not "cure" an unlawful statute "by adopting in its discretion a limiting construction of the statute").

For these reasons, Plaintiff has shown that it is likely to succeed on the merits of its Appointments Clause claim.

ii. Plaintiff is likely to obtain the remedy it seeks because the unconstitutional provisions of § 1324b are not severable.

Plaintiff has also shown that it is necessary to stay the administrative proceedings because the unconstitutional provisions of § 1324b are not severable. Section 1342b contains no express severability clause. The Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (quoting *R.R. Ret. Bd., v. Alton R. Co.*, 295 U.S. 330, 362 (1935)).

Section 1324b provides for "Review of final orders." 8 U.S.C. § 1324b(i). "[A]ny person aggrieved by such final order may seek review of such order in the United States court of appeals." *Id.* There is no provision that affirmatively authorizes the Attorney General to review OCAHO ALJ decisions under Section 1324b. Thus, no provision exists that could be severed to enable administrative review. *Compare with Arthrex, Inc.*, 141 S. Ct. at 1987 (holding that the appropriate remedy for administrative patent judges whose decisions were not subject to review by the Director of the Patent and Trademark Office was to sever the provision of the statute that affirmatively provided for review by Patent Trial and Appeal Board members).

Interpreting § 1324b to not provide for further administrative review also reflects Congress' intent. H.R. Rep. No. 99-682, 14 (1986) ("[T]he amendment makes clear that an [ALJ]'s order in a discrimination case . . . is a final agency order and is enforceable immediately unless appealed in accordance with provisions specified."). Congress made clear that "once an ALJ issues [their] order, it becomes a final agency order" and did not mention further review by the Attorney General. *Id.* "A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019).

For these reasons, Plaintiff has shown it is likely the statute cannot be severed in a way to provide for further administrative review. Thus, an injunction is an appropriate remedy.

iii. Plaintiff will likely suffer irreparable injury if the administrative proceedings are not enjoined.

Plaintiff has also shown that without an injunction it is "likely to suffer irreparable harm." *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013). Irreparable harm refers to harm for which there is no adequate remedy at law. *Id.* The party seeking a preliminary injunction must prove irreparable harm is likely, not merely possible. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Deprivation of a constitutional right "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice, and Procedure § 2948.1 at 160–161 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Plaintiff is being subjected "to unconstitutional agency authority," which "is impossible to remedy once the proceeding is over." *Axon Enterprise, Inc.*, 598 U.S. at 191.

For these reasons, Plaintiff has shown it is likely to suffer irreparable harm absent an injunction.

iv. The balance of the harms and the public interest weigh in Plaintiff's favor.

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 U.S. 418, 435 (2009).

Defendants do not allege any harm that they would suffer if an injunction were issued. Dkt. No. 20. By contrast, Plaintiff will have to participate in unconstitutional proceedings. The balance of harms thus weighs Plaintiff's favor.

The public interest factor also weighs in Plaintiff's favor. "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Burgess v. Fed. Deposit Ins. Corp.*, 639 F. Supp. 3d 732, 749 (N.D. Tex. 2022) (quoting *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 840 (N.D. Tex. 2022) ("An injunction does not disserve the public interest when it prevents constitutional deprivations."). Because OCAHO ALJ decisions are not subject to the Attorney General's review,

Plaintiff is being subjected to unlawful agency action. There is thus no public interest in the ALJ administrative hearing.

For these reasons, the Court finds that Plaintiff is entitled to an injunction staying the ALJ administrative proceedings.

d. Plaintiff is not entitled to an injunction on its removal claims because the unconstitutional provisions, if any, are severable.

The Constitution gives the President the general authority to remove executive branch officers at will. *Seila*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138 (2010)). But Congress may provide tenure protections to certain inferior officers with narrowly defined duties. *Id.* at 2129.

OCAHO ALJs are removable "by the agency in which the [ALJ] is employed only for good cause established and determined by the Merit Systems Protection Board ["MSPB"] on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a); *see* 28 C.F.R. § 68.26. The MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Plaintiff argues this unconstitutionally insulates OCAHO ALJs from removal because they are the types of officers the President must be able to remove at will.

Even if this is true,[2] the Court can sever the unconstitutional statutory provisions. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). Statutes are generally severable if "the remainder of the law is capable of functioning independently and thus would be fully operative as a law." *Barr*, 140 S. Ct. at 2353. It is "unusual" for the remaining law to be inoperative. *Id.* at 2352.

Severing both removal restrictions would make OCAHO ALJs accountable to the President, so there is no need to stay proceedings an OCAHO ALJ may conduct. Dkt. No. 11 at 27. *See Collins*, 141 S. Ct. at 1788 (holding that a properly appointed officer's insulation from removal does not undermine the officer's authority "to carry out the functions of the office.").

For these reasons, the Court finds that Plaintiff has not shown it is entitled to an injunction instead of severance on its removal claim.

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[2] *See K&R Contractors, LLC v. Keene*, No. 20-202, 2023 WL 7312503, at *9 (4th Cir. Nov. 7, 2023) (recognizing the split between the Fifth and Ninth circuits about whether the dual for-cause limitations on the removal of ALJs in 5 U.S.C. §§ 1202(d) and 7521 are constitutional).

e. Plaintiff is not entitled to an injunction on its Article III and Seventh Amendment claims because it is unlikely to succeed on the merits of these claims.

Under Article III, the judicial power of the United States is vested in the Supreme Court, "and in such inferior Courts" Congress may establish. U.S. Const. art. III, § 1. The Seventh Amendment guarantees a right to civil jury trials over "suits at common law" where the value in controversy exceeds twenty dollars. U.S. Const. amend. VII. But Congress may create new statutory duties for civil penalties to enforce "public rights" that are not subject to the Seventh Amendment. *Atlas Roofing Co., Inc., v. OSHA*, 430 U.S. 442, 450, 460-61 (1977).

Even if claims under § 1324b are "suits at common law," Congress created a new statutory duty that protects public rights. Finding that existing statutory and common law remedies were insufficient, Congress enacted § 1324b to "augment the goals found in Title VII of the Civil Rights Act" "by extending the prohibition against national origin discrimination to employers with less than fifteen, but more than three, employees." *Gen. Dynamics Corp. v. United States*, 49 F.3ed 1384, 1385 (9th Cir. 1995). Section 1324b also "prohibits employer discrimination based on citizenship status, a proscription not encompassed by other anti-discrimination statutes." *Id.*

Section 1324b also protects public rights. Other courts have found that administrative claims in which immigration and employment laws are intertwined, like § 1324b claims, implicate public rights. *E.g.*, *Frank's Nursery, LLC v. Walsh*, No. CV H-21-3485, 2022 WL 2757373, at *8 (S.D. Tex. July 14, 2022) (rejecting Article III challenge to agency adjudication of alleged violations of immigrant workplace protections); *Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, No. 1:21-CV-16625, 2023 WL 4784204, at *6 (D.N.J. July 27, 2023) (same); *Noriega-Perez v. United States*, 179 F.3d 1166, 1175 (9th Cir. 1999) (rejecting Article III challenge to agency adjudication of violations of 8 U.S.C. § 1324c); *see also Curtis*, 415 U.S. at 193 (recognizing that the Seventh Amendment does not apply to Title VII cases). Because § 1324b proceedings concern both immigration and employment law, the Court finds § 1324b proceedings protect public rights and are thus excepted from the Seventh Amendment.

For these reasons, Plaintiff is not likely to succeed on the merits of its Article III and Seventh Amendment claims.

IV. CONCLUSION

For these reasons, Plaintiff's Motion (Dkt. No. 11) is **GRANTED in part and DENIED in part.** The Court holds that 8 U.S.C. § 1324b does not allow "administrative appellate review" by the Attorney General of OCAHO ALJ final orders. The Court **STAYS** the following administrative proceedings: *United States of America v. Space Exploration Technologies Corp. d/b/a SpaceX*, 2023-B-00082. The injunction becomes effective immediately and remains in effect pending the final disposition of this lawsuit. The Court waives the security requirement of Fed. R. Civ. P. 65(c).[3]

Signed on this 8th day of November, 2023.

Rolando Olvera
United States District Judge

[3] Neither party raised the security requirement, so no security is ordered. *See Nat'l Ass'n for Gun Rts., Inc. v. Garland*, No. 4:23-CV-00830-O, 2023 WL 6613080, at *22 (N.D. Tex. Oct. 7, 2023).

Plaintiff Ro Cher Enterprises, Inc.
Motion for Preliminary Injunction

Exhibit 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, a federal administrative agency; JOSEPH J. SIMONS, in his official capacity as Commissioners of the Federal Trade Commission; NOAH PHILLIPS, in his official capacity as Commissioners of the Federal Trade Commission; ROHIT CHOPRA, in his official capacity as Commissioners of the Federal Trade Commission; REBECCA SLAUGHTER, in her official capacity as Commissioners of the Federal Trade Commission; CHRISTINE WILSON, in her official capacity as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

No. 20-15662

D.C. No. 2:20-cv-00014-DWL
District of Arizona,
Phoenix

ORDER

Before: SILER,* LEE, and BUMATAY, Circuit Judges.

In response to appellant's motion to stay the Federal Trade Commission administrative trial set to begin on October 13, 2020 (Docket Entry No. 38), we

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

grant a temporary stay of the order to preserve the status quo pending consideration of the appeal on the merits. See *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Plaintiff Ro Cher Enterprises, Inc.
Motion for Preliminary Injunction

Exhibit 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10396

MICHELLE COCHRAN,

Plaintiff - Appellant

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; WILLIAM P. BARR, U. S. ATTORNEY GENERAL, in his Official Capacity,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8 is GRANTED.

Plaintiff Ro Cher Enterprises, Inc.
Motion for Preliminary Injunction

Exhibit 4

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 16, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-60284 Morris & Dickson v. DEA
Agency No. 88 Fed. Reg. 34523

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: Shea E. Pertuit
Shea E. Pertuit, Deputy Clerk
504-310-7666

Mr. Daniel J. Aguilar
Mr. Dayle Elieson
Ms. Anita J. Gay
Ms. Hallie Hoffman
Mr. Jeffrey Johnson
Mr. Joshua Marc Salzman
Mr. Timothy J. Shea
Ms. Anna Manchester Stapleton

United States Court of Appeals for the Fifth Circuit

No. 23-60284

MORRIS & DICKSON COMPANY, L.L.C.,

Petitioner,

versus

DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

Petition for Review from an Order of the
Drug Enforcement Agency
Agency No. 88 Fed. Reg. 34523

UNPUBLISHED ORDER

Before HAYNES, ENGELHARDT, and OLDHAM, *Circuit Judges*.

PER CURIAM:

On the showing made, IT IS ORDERED that Petitioner's opposed motion for stay pending appeal is GRANTED.