AGRICULTURE DECISIONS

Volume 80

Book 1

Part I (General)

Pages 1 – 122

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2021

ANIMAL HEALTH PROTECTION ACT / PLANT PROTECTION ACT

DEPARTMENTAL DECISIONS

ANIMAL WELFARE ACT

DEPARTMENTAL DECISION

DAIRY PRODUCTION STABILIZATION ACT OF 1983

DEPARTMENTAL DECISION

HORSE PROTECTION ACT

COURT DECISION

--

DEFAULT DECISIONS

COMMERCIAL TRANSPORTATION OF EQUINES FOR SLAUGHTER ACT

DAIRY PRODUCTION STABILIZATION ACT OF 1983 /
DAIRY PROMOTION AND RESEARCH ORDER

--

MISCELLANEOUS ORDERS AND DISMISSALS

ANIMAL HEALTH PROTECTION ACT /
PLANT PROTECTION ACT

**ANIMAL HEALTH PROTECTION ACT /
PLANT PROTECTION ACT**

DEPARTMENTAL DECISIONS

In re: AMAZON SERVICES, LLC.
Docket No. 19-J-0146.
Initial Decision and Order.
Filed May 3, 2021.

PPA/AHPA.

John V. Rodriguez, Esq. for APHIS.
Lawrence H. Reichman, Esq., and Patrick Rieder, Esq., for Respondent.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

Decision and Order on the Record Granting Summary Judgment in Favor of Complainant

Introduction

This case was initiated via Complaint filed on September 4, 2019 by Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), alleging that Respondent Amazon Services LLC ("Amazon") violated the Plant Protection Act, as amended and supplemented (7 U.S.C. §§ 7701 *et seq*.) ("PPA") and the regulations issued thereunder (7 C.F.R. §§ 301.81 *et seq*.) ("Regulations"); and the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq*.) ("AHPA") and the regulations issued thereunder (9 C.F.R. Part 79 *et seq*.) ("Regulations").

On April 8, 2020 Respondent Amazon moved for summary judgment asserting there are no disputed issues of material fact and seeking an order that the Complaint allegations be dismissed as a matter of law.[1] On May 28, 2020 Complainant filed its response in opposition to that motion as well as a cross-motion for summary judgment, also asserting there are no disputed issues of material fact[2] and seeking an order that the Complaint

[1] *See* Amazon's Motion at 1.

[2] *See* Complainant's Motion at 11.

allegations be affirmed as a matter of law.

I agree with the parties that there are no disputed issues of material fact and that the issues in dispute between the parties are legal ones, which can and should be decided on these cross motions for summary judgment.

Amazon's Answer to the Complaint filed on October 11, 2019, admitted to the jurisdictional allegations but denied all other allegations in the Complaint. In its Motion for Summary Judgment, Amazon more specifically denies legal responsibility for the alleged violations by asserting that third-party sellers agree to the terms of the Amazon Business Solutions Agreement ("BSA"), which, Amazon contends, unambiguously provides that third-party sellers, not Amazon, are responsible for the importation of their products into the U.S., including meeting the legal requirements for such importation.[3] Amazon asserts that it did not "import" any of the products at issue as the term is defined in the Regulations; rather, each importation was carried out solely by third-party sellers and, therefore, under the Amazon BSA, the third-party sellers, not Amazon, are responsible.[4] I conclude that Amazon's contentions are untenable and inconsistent with the specific language, legislative history, and remedial purposes of the AHPA and PPA.

For the reasons set forth herein, summary judgment is granted in favor of the Complainant on all but one allegation.

Procedural Background

Complainant instituted this administrative enforcement proceeding under the AHPA and PPA by filing a complaint on September 4, 2019, alleging the following:

1. On or about March 24, 2015, Amazon imported and moved approximately17.930kg of beef tendon and 26.685kg of pork floss from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite

[3] Liu Decl. ¶ 13, Ex. 1.

[4] *See* Amazon's Motion at 1; Liu Decl. Ex. 1 at 33-34.

certificate.[5]

2. On or about March 24, 2015, Amazon imported and moved approximately 56.83kg of chicken feet from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.[6]

3. On or about March 24, 2015, Amazon imported and moved approximately 26.685kg of pork floss from China, a region where APHIS considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork and pork products were not accompanied by the requisite certificate.[7]

4. On or about March 24, 2015, Amazon imported and moved approximately 26.685kg of pork floss from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork and pork products were not accompanied by the requisite certificate.[8]

5. On or about March 26, 2015, Amazon imported and moved 15.55kg of chicken feet from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.[9]

6. On or about March 30, 2015, Amazon imported and moved 4.430kg of beef from China, a region where APHIS considers Rinderpest or

[5] Complaint at ¶ 2.1.

[6] *Id.* at ¶ 2.2.

[7] *Id.* at ¶ 2.3.

[8] *Id.* at ¶ 2.4.

[9] *Id.* at ¶ 2.5.

foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.[10]

7. On or about March 30, 2015, Amazon imported and moved approximately 19.07kg of chicken feet and 40.131kg of duck from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.[11]

8. On or about March 31, 2015, Amazon imported and moved approximately 11.16kg of beef from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.[12]

9. On or about June 5, 2015, Amazon failed to comply with the Secretary's quarantine hold, in violation of 7 U.S.C. § 8306(c), because twenty-one (21) packages were released into commerce after Amazon was issued three quarantine demands in the form of Emergency Action Notifications ("EANs") on May 26, 2015.[13]

10. On or about June 11, 2015, Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.[14]

11. On or about June 11, 2015, Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS

[10] *Id.* at ¶ 2.6.

[11] *Id.* at ¶ 2.7.

[12] *Id.* at ¶ 2.8.

[13] *Id.* at ¶ 2.9.

[14] *Id.* at ¶ 2.10.

considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork products were not accompanied by the requisite certificate.[15]

12. On or about June 11, 2015, Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork products were not accompanied by the requisite certificate.[16]

13. On or about June 29, 2015, Amazon imported and moved approximately 2.34kg of beef tendon, .22kg of beef jerky, 1.75kg of shredded beef jerky, 13.3kg of shredded beef, 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.[17]

14. On or about June 29, 2015, Amazon imported and moved approximately 1.3kg of duck wings, 4.78kg of duck necks, .2kg of sweet corn sausage with chicken, .87kg of spicy hot dog sausage with chicken, and 1.22kg of chicken claws from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.[18]

15. On or about June 29, 2015, Amazon imported and moved approximately 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork and

[15] *Id*. at ¶ 2.11.

[16] *Id.* at ¶ 2.12.

[17] *Id.* at ¶ 2.13.

[18] *Id.* at ¶ 2.14.

pork products were not accompanied by the requisite certificate.[19]

16. On or about June 29, 2015, Amazon imported and moved approximately 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork and pork products were not accompanied by the requisite certificate.[20]

17. On or about July 9, 2015 Amazon imported and moved approximately 21.5kg of duck wings, 2kg of duck tongues, 26.5kg of duck necks, and 11.6kg of duck gizzards from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.[21]

18. On or about March 18, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[22]

19. On or about May 11, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[23]

20. On or about May 13, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or

[19] *Id.* at ¶ 2.15.

[20] *Id.* at ¶ 2.16.

[21] *Id.* at ¶ 2.17.

[22] *Id.* at ¶ 2.18.

[23] *Id.* at ¶ 2.19.

seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[24]

21. On or about May 16, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[25]

22. On or about May 19, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[26]

23. On or about May 31, 2016, Amazon imported kaffir lime leaves, a plant or plant part of the subfamily *Aurantioideae*, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).[27]

As noted above, Amazon timely filed an Answer on October 11, 2019, generally denying the allegations in the Complaint. On October 17, 2019, I issued an Order Setting Deadlines for Submissions.

A telephone conference was held on February 12, 2020, during which the parties expressed an interest in filing dispositive motions and agreed that the issues to be resolved are likely regarding legal liability and not material facts, and such resolution could obviate the need for hearing.[28] Therefore, the Order Setting Deadlines for Submissions was lifted and a

[24] *Id.* at ¶ 2.20.

[25] *Id.* at ¶ 2.21.

[26] *Id.* at ¶ 2.22.

[27] *Id.* at ¶ 2.23.

[28] *See* Summary of February 12, 2020 Telephone Conference; Order Granting Respondent's Request to Lift Submissions Deadlines; and Scheduling Order at 2.

scheduling order for filing dispositive motions was set.[29]

In accordance with the scheduling order, Amazon filed a Motion for Summary Judgment ("Amazon's Motion") and Declarations of Patrick Rieder ("Rieder Decl.") and Vincent Liu ("Liu Decl.") on April 8, 2020; Complainant filed a Motion for Summary Judgement ("Complainant's Motion") on May 28, 2020; Amazon filed a Combined Reply in Support of Motion for Summary Judgment and Response to APHIS's Motion for Summary Judgment ("Amazon's Reply") and Second Declaration of Vincent Liu ("Second Liu Decl.") on August 11, 2020; and Complainant filed a Reply to Amazon Services LLC's Combined Reply in Support of Motion for Summary Judgement and Response to APHIS's Motion for Summary Judgement ("Complainant's Reply") on September 9, 2020.

Jurisdiction

The AHPA was promulgated to prevent, detect, control, and eradicate diseases and pests of animals in the U.S. 7 U.S.C. § 8301. The PPA was promulgated to help detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds for the protection of the agriculture, environment, and economy of the United State. 7 U.S.C. § 7701. Congress provided for enforcement of the AHPA and the PPA by the Secretary of Agriculture, USDA. 7 U.S.C. §§ 8301(5)(B), 8313, 7712(a), 7734.[30]

Summary of the Record

The following pleadings were filed to the record and were considered for the purposes of each party's motion for summary judgment and opposition to opposing party's motion, respectively.

- Complaint filed September 4, 2019.
- Answer filed October 11, 2019.
- Amazon's Motion for Summary Judgment filed on April 8, 2020.

[29] *Id.*

[30] *See also* 7 C.F.R. § 1.131.

Amazon submitted the following in support of its Motion for Summary Judgment:

- Declaration of Patrick Rieder In Support of Amazon Services LLC's Motion for Summary Judgment ("Rieder Decl."), dated March 31, 2020 (Patrick Rieder, Esq. with Perkins Coie LLP, legal counsel to Amazon), including forty-five (45) exhibits.[31]

[31] Rieder Decl. Ex. 1 (Officer Statement, Kathy J. Reyes, Customs and Border Patrol, dated April 15, 2015); Rieder Decl. Ex. 2 (Department of Homeland Security/Customs and Border Control Agriculture Specialist Statement, Yaan Cheng, dated July 10, 2015); Rieder Decl. Ex. 3 (USDA Report of Violation, dated April 15, 2015); Rieder Decl. Ex. 4 (Photo of seized packages, dated March 24, 2015); Rieder Decl. Ex. 5 (Customs and Border Control Agriculture Specialist Statement, Mohammed M. Ikram, dated April 22, 2015); Rieder Decl. Ex. 6 (Customs and Border Control Agriculture Specialist Statement, Fernando A. Orozco, dated March 27, 2015); Rieder Decl. Ex. 7 (Photos of shipping labels and bar code on seized package, dated March 26, 2015); Rieder Decl. Ex. 8 (Photos of shipping labels and bar code on seized package, dated March 26, 2015); Rieder Decl. Ex. 9 (Statement of Jessica Headen, Smuggling Interdiction and Trade Compliance Officer, USDA, not dated); Rieder Decl. Ex. 10 (Photos of seized packages and contents, dated March 26, 2015); Rieder Decl. Ex. 11 (USDA APHIS Officer Statement, Sylvia Shadman-Adolpho, dated January 11, 2016); Rieder Decl. Ex. 12 (Email correspondence from James Roberts (APHIS) to Derek Sparks (Amazon), dated January 15, 2016, and from Vincent Liu (Amazon) to James Roberts (APHIS), dated February 5, 2016); Rieder Decl. Ex. 13 (Affidavit of Gregory T. Soto, USDA Plant Protection and Quarantine, Smuggling Interdiction and Trade Compliance Officer, dated November 29, 2016); Rieder Decl. Ex. 14 (Email correspondence from Tim Abbot (Amazon) to John Rodriguez (USDA, OGC), dated August 23, 2016; between Liu Vincent (Amazon), Lawrence Reichman (Perkins Coie), and John Rodriguez (USDA, OGC), dated September 2, 2016, September 21, 2016, and September 22, 2016; and from Karen Kraubner-Lucas (USDA, APHIS) to James Roberts (USDA, APHIS) dated September 29, 2016); Rieder Decl. Ex. 15 (Commercial Invoices, all dated July 7, 2015); Rieder Decl. Ex. 16 (Request for Subpoena Duces Tecum, on APHIS Letterhead, no author identified, not dated); Rieder Decl. Ex. 17 (Compliance Officer Statement, John Presti, Customs and Border Protection, dated July 13, 2015); Rieder Decl. Ex. 18 (Letter "Re: Subpoena to Amazon.com, Inc., Dated April 29, 2016" from Lawrence H. Reichman, Perkins Cole); Rieder Decl. Ex. 19 (Agriculture Specialist Statement, Rodrigo S. Galimba, Customs and Border Protection, dated May 18, 2016); Rieder Decl. Ex. 20 (Photo of shipment

ANIMAL HEALTH PROTECTION ACT / PLANT PROTECTION ACT

- Declaration of Vincent Liu In Support of Amazon Services LLC's Motion for Summary Judgment ("Liu Decl."), dated April 7, year not indicated (Vincent Liu, Senior Corporate Counsel), including twenty-one (21) exhibits.[32]

---

label, dated March 24, 2016); Rieder Decl. Ex. 21 (Email correspondence between Cory Marker (APHIS) and Vincent Liu (Amazon), dated April 20, 2016, May 6, 2016, May 9, 2016, May 10, 2016, and May 11, 2016); Rieder Decl. Ex. 22 (Text of former 7 C.F.R. § 319.19, in effect before 2018); Rieder Decl. Ex. 23 (Text of 9 C.F.R. § 94.4); Rieder Decl. Ex. 24 (Text of 9 C.F.R. § 94.6); Rieder Decl. Ex. 25 (Text of 9 C.F.R. § 94.9); Rieder Decl. Ex. 26 (Text of 9 C.F.R. § 94.12); Rieder Decl. Ex. 27 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 28 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 29 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 30 (Photo of intercepted package, dated March 24, 2015); Rieder Decl. Ex. 31 (Photos of intercepted package shipping labels, dated March 24, 2015); Rieder Decl. Ex. 32 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 33 (Photo of intercepted package, dated March 26, 2015); Rieder Decl. Ex. 34 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 35 (Photos of shipping labels and bar codes, dated March 26, 2015); Rieder Decl. Ex. 36 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 37 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 38 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 39 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 40 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 41 (Photos of shipping labels and bar codes, dated April 2, 2015); Rieder Decl. Ex. 42 (Photo of shipping label); Rieder Decl. Ex. 43 (Photo of shipping label); Rieder Decl. Ex. 44 (Photos of shipping labels, dated March 24, 2016); Rieder Decl. Ex. 45 (Photos of shipping labels, dated March 24, 2016).

[32] Liu Decl. Ex. 1 (Amazon Business Solution Agreement or "BSA", in effect in 2015 and 2016); Liu Decl. Ex. 2 (Document establishing when third-party seller Yummy House Hong Kong agreed to the BSA, dated December 13, 2014); Liu Decl. Ex. 3 (Document establishing when third-party seller DD222 agreed to the BSA, dated June 18, 2013); Liu Decl. Ex. 4 (Document establishing when third-party seller X-Sampa Co. agreed to the BSA, dated July 1, 2012); Liu Decl. Ex. 5 (Copy of the Amazon Seller Central 2016 version of the "Delivering imports to Amazon" web page); Liu Decl. Ex. 6 (Copy of the Amazon Seller Central 2017 version of the "Important Information for International Sellers" web page); Liu Decl. Ex. 7 (Copy of the Amazon Seller Central 2016 version of the "Importing and Exporting Inventory" web page); Liu Decl. Ex. 8 (Copy of the Amazon Seller

- Complainant's Motion for Summary Judgement filed May 28, 2020, including ten (10) exhibits (starting at CX 90 and not consecutively numbered).[33]

Central 2016 version of the "Restricted products" web page); Liu Decl. Ex. 9 (Copy of the Amazon Seller Central 2016 version of "Animals & animal-related products" web page); Liu Decl. Ex. 10 (Copy of the Amazon Seller Central 2016 version of "Plant and seed products" web page); Liu Decl. Ex. 11 (Email correspondence between Cory Marker (APHIS) and Vincent Liu (Amazon), dated April 20, 2016, May 6, 2016, May 9, 2016, May 10, 2016, and May 11, 2016); Liu Decl. Ex. 12 (Details for trace, Request from SITC Internet Team, dated May 12, 2016); Liu Decl. Ex. 13 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 16, 2015); Liu Decl. Ex. 14 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 17, 2015); Liu Decl. Ex. 15 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 18, 2015); Liu Decl. Ex. 16 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 18, 2015); Liu Decl. Ex. 17 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 21, 2015); Liu Decl. Ex. 18 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 21, 2015); Liu Decl. Ex. 19(1) (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 22, 2015); Liu Decl. Ex. 19(2) (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 23, 2015); Liu Decl. Ex. 20 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 24, 2015); Liu Decl. Ex. 21 (Get Inbound Manifest Details, FBA Console, Prod US Amazon dated March 12, 2015)

Note: Liu Decl. contains two Ex. 19. The first, starting at pg. 128 of the PDF document, is designated Ex. 19(1), and the second, starting at pg. 134 of the PDF document, is designated as Ex. 19(2).

[33] CX 90 (Statement of APHIS Officer Sylvia Shadman-Adolpho, dated January 11, 2016); CX 91 (Emergency Action Notification to Amazon Fulfillment Center, Breinigsville, PA, dated5/26/2015); CX 92 (Emergency Action Notification to Amazon Fulfillment Center, Moreno Valley, CA, dated5/26/2015); CX 93 (Emergency Action Notification to Amazon Fulfillment Center, Moreno Valley, CA, dated5/26/2015); CX 101 (pictures of front and back of meat product packages); CX 102 (Emergency Action Notifications to General Warehouse, Passaic, NJ, dated 6/29/2015); CX 103 (Emergency Action Notification to Amazon Fulfillment Center, Murfreesboro, TN, dated 6/11/2015); CX 230 (Consent Agreement, Docket No. FIFRA-10-2018-0202, Environmental Protection Agency); CX 231 (Print out of https://sellercentral.amazon.com, "Getting started with Fulfillment by Amazon (FBA)"); CX 232 (Print out of https://sellercentral.amazon.com, "FBA features, services, and fees").

- Amazon's Combined Reply in Support of Motion for Summary Judgment and Response to APHIS's Motion for Summary Judgment filed August 11, 2020. In Support of Amazon's Response, it filed Second Declaration of Vincent Liu dated August 10, year not indicated (Vincent Liu, Senior Corporate Counsel).

- Complainant's Reply to Amazon Services LLC's Combined Reply in Support of Motion for Summary Judgement and Response to APHIS's Motion for Summary Judgement filed September 9, 2020.

Discussion

For the reasons discussed more fully herein, Amazon's attempt to insulate itself from the remedial protections the AHPA and the PPA provide to U.S. public and agriculture for Amazon's goods and products by means of its SBA cannot be sustained.[34]

---

[34] The PPA and AHPA are remedial legislation. *See Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943), *judgment entered sub nom. Sec. & Exch. Comm'n v. C M Joiner Leasing Corp*., 53 F. Supp. 714 (N.D. Tex. 1944) (discussing the difference between strict application of punitive legislation and more liberal application of "civil proceedings of a preventative or remedial nature"). Remedial legislation should be construed liberally. *See Walker*, 2010 WL 148860, at *14 (U.S.D.A. Jan. 13, 2010). "It is the Department's policy to construe remedial legislation broadly so as to effectuate Congressional policy in the regulated area." *Good*, 49 Agric. Dec. 156, 175 n.4 (U.S.D.A. 1990) (citing *Farrow*, 42 Agric. Dec. 1397 (U.S.D.A. 1983) [, *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985)]; *Norwich Veal & Beef*, *Inc.*, 38 Agric. Dec. 214 (U.S.D.A. 1978)). *See also Valkering, U.S.A., Inc. v. U.S. Dep't of Agric.*, 48 F.3d 305, 308 (8th Cir. 1995) ("the Secretary's interpretation of the regulation is consistent with the purpose of the PQA which is to 'prevent the introduction of injurious plant diseases or insect pests and avoid the spread of certain dangerous plant diseases or insect infestations.' H.R. Rep. No. 873, 97th Cong., 2d Sess. 1 (1982), U.S. Code Cong. & Admin. News 1982, p. 3852."); *Moore*, 50 Agric. Dec. 392, 401–02 (U.S.D.A. 1991) ("The definition of 'moved' in s 78.1 was amended in 1986 to include the phrase 'or otherwise aided, induced, or caused to be moved.' When adopting the final rule, the Department expressly rejected comments that the definition was too broad, 'pointing out that the amendment is *necessary to extend legal responsibility for violations to persons indirectly*

The AHPA authorizes the Secretary of Agriculture ("Secretary") to take decisive actions for "the prevention, detection, control, and eradication of diseases and pests of animals,"[35] and the PPA empowers the Secretary to prohibit or restrict the importation or movement of any plant or plant product when necessary to prevent introduction into the U.S. of any plant pest or noxious weed.[36] The AHPA is designed to protect, among other things, animal health, the health and welfare of the people of the U.S., and the economic interests of the livestock industry.[37] The powers of the Secretary are broad and include the authority to seize, quarantine, treat, destroy, or dispose of animals affected with, or exposed to, livestock diseases.[38] Through the APHIS, the Secretary is authorized to promulgate regulations the Secretary determines necessary to carry out the mission of the AHPA.[39] In accordance with the AHPA, the Secretary promulgated 9 C.F.R. Part 94, which restricts the importation of specified animals and animal products to prevent the introduction into the U.S. of various animal diseases, including, foot-and-mouth disease ("FMD"), Highly Pathogenic Avian Influenza ("HPAI"), classical swine fever ("CSF"), and swine vesicular disease ("SVD").

Similarly, under the PPA, the Secretary may issue regulations "to prevent the introduction of plant pests into the U.S. or the dissemination

---

responsible for unauthorized movement, i.e., a veterinarian who prepares false documents and a seller who promises to have animals tested, but does not.' 51 Fed. Reg. 32,574, 32,577 (1986). . . . Furthermore, *the legislation underlying the brucellosis regulations of s 78 is remedial in nature, and should be liberally construed to achieve the purposes of the regulatory program, which is to eradicate brucellosis*. *In re American Fruit Purveyor's, Inc*., 30 Agric. Dec. 1542 (1971). As testified to in some detail at the Oral Hearing by Dr. James Massman, the cooperation of all persons involved in the movement of restricted animals is paramount and critical to the success of the Brucellosis Eradication Program (Tr. 27-28).") (emphasis added); *Calabrese*, 51 Agric. Dec. 131, 132 (U.S.D.A. 1992) ("Remedial legislation should be liberally construed to achieve the Act's purpose."); *Lopez*, 44 Agric. Dec. 2201, 2209 (U.S.D.A. 1985) ("To achieve the remedial purposes of the Act, we must take a hard-nosed approach").

[35] 7 U.S.C. § 8301(1).

[36] 7 U.S.C. § 7712(a).

[37] 7 U.S.C. § 8301(1)(A)-(C).

[38] 7 U.S.C. § 8306(a).

[39] 7 U.S.C. § 8315.

of plant pests within the United States."[40] Pursuant to the PPA, the Secretary promulgated the *former* 7 C.F.R. § 319.19[41] which specifically prohibits the importation into the U.S. of any plant or plant product of certain varietals to prevent the introduction of citrus canker disease (*Xanthomonas citri (Hasse) Dowson*) and other citrus diseases.

The parties, each in submitting a motion for summary judgment, agree there are no genuine issues as to any material facts in the present case and largely concede that no hearing is needed.[42] The Department has long held that motions for summary judgment are appropriate where there is "no genuine issue as to any material fact" to be decided based on evidence beyond the pleadings, and the movant is entitled to judgment as a matter of law. [43]

Amazon offers numerous products on its online store at Amazon.com; however, there are millions of other individuals and entities like these subject "third-party sellers" that also offer products in the marketplace in Amazon's online store through its "Fulfillment by Amazon" ("FBA")

---

[40] 7 U.S.C. § 7711(a); https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/emergency-management/ct_fmd.

[41] Effective June 3, 2013 to April 17, 2018, *removed and reserved by* 83 Fed. Reg. 11855.

[42] *See* Amazon's Motion at 1; 1, fn. 2; 15. *See* Complainant's Motion at 10-11. Although Amazon, in its Motion at 1, fn. 2, states that it does not seek summary judgment as to the allegation in ¶ 2.9 of the Complaint "because that allegation involves different legal issues that may require fact-finding," in its Response to Complainant's Motion Amazon does not take issue with the facts but only interpretation of the law with regard to the allegation in ¶ 2.9 of the Complaint. I find, as to the allegation in ¶ 2.9 of the Complaint, no issue of material fact exists, and a hearing is not necessary to decide this allegation on the merits.

[43] *Agri-Sales, Inc.*, 73 Agric. Dec. 327, 328-30 (U.S.D.A. 2014), *aff'd* by the Judicial Officer and adopted as the final order in the proceeding, 73 Agric. Dec. 612 (U.S.D.A. 2014) (citing *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*, 868 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Program.[44] Complainant states that in the fourth quarter of 2019, it is estimated that fifty-three (53) percent of all units sold on Amazon.com were done so by third-party sellers;[45] that over 200,000 of these third-party sellers are located in China;[46] and that in 2018, the FBA Program generated over $42.75 billion in revenue, accounting for the second largest revenue segment of the online retail platform.[47]

The products at issue in this matter were imported into the U.S. to be sold and distributed as a part of Amazon's FBA Program.[48] As Complainant points out, Amazon neither disputes that it was aware of these products and expected them to be delivered to Amazon fulfillment centers in the U.S., where they were to be stored until purchased by customers on Amazon.com;[49] nor that, once purchased, Amazon was contractually obligated to transport the products to the buyers via interstate commerce if necessary.[50]

---

[44] *See* https://sell.amazon.com/fulfillment-by-amazon.html, Fulfillment By Amazon Program, How it Works (last visited April 15, 2021).

[45] *See* Complainant's Motion at 3 (citing J. Clement, *Third-party seller share of Amazon platform 2007-2020,* Statista (May 4, 2020)

https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/).

[46] *Id.* (citing Elizabeth Weise, *Made in China—and straight to your Amazon box,* USA Today (Jan. 26, 2017, 10:02 PM) https://www.usatoday.com/story/tech/news/2017/01/26/amazon-china-third-party-sellers-increasing-sales-logisticsfulfillment-by-amazon-fba/95164638/).

[47] *Id.* (citing J. Clement, *Third-party seller share of Amazon platform 2007-2020,* Statista (May 4, 2020), https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/).

[48] *See* Amazon's Motion at 3 (stating "This case concerns restricted plant and animal food products that three foreign, third-party sellers brought into the United States with the intent to utilize Amazon's fulfillment services.").

[49] *See* Liu Decl. Ex. 13-21. *But see* Amazon's Response at 11 claiming "even if Amazon were 'aware' that the third-party sellers intended to ship meat products from China (which it was not), that still does not show that Amazon was aware the third-party sellers intended to import them unlawfully." This claim that Amazon was not "aware" of the product shipments is not supported by the very evidence Amazon presents.

[50] *See* Amazon's Motion at 2 (stating "[under the FBA Program] third-party sellers send their products to an Amazon warehouse before selling the product. Amazon

Instead, Amazon contends these statutory and regulatory protections for U.S. public and agriculture do not apply to its multi-billion-dollar operation because only its third-party sellers are responsible for "importing" these harmful goods and products through its FBA Program.

As noted above, I find that this position is untenable and wholly inconsistent with the specific language, legislative history, and remedial purpose of the AHPA and PPA.

As detailed in Complainant's Motion for Summary Judgement and responsive pleadings, and uncontested by Amazon, the products were clearly prohibited from being imported into the U.S. under the AHPA and PPA.[51]

Regarding the allegations in paras. 2.1-2.8, 2.10-2.17, and 2.18-2.23 of the Complaint, the parties raise two legal issues: 1) whether the definition of "import" used in the statute (7 U.S.C. § 8302(a) or 7 U.S.C. § 7702, respectively) or that used in the Regulations (9 C.F.R. § 94.0 or 7 C.F.R. § 319.7, respectively) should be applied; and 2) whether Amazon can be liable for the "import" of the prohibited items as that term is defined. As to the allegation found in para. 2.9 of the Complaint, the parties raise one legal issue: whether Amazon can be liable for violating a quarantine hold if the items to be held were released after an oral commitment by Amazon to hold the items but prior to receipt of the written order to hold.

a. Plant Protection Act and Animal Health Protection Act Background

The Plant Protection Act ("PPA") was introduced in the Senate in April 1999 "[t]o streamline, modernize, and enhance the authority of the Secretary of Agriculture relating to plant protection and quarantine, and for other purposes."[52] The PPA was enacted into law in 2000 after

---

agrees to store the product and, when a customer buys the product from the third-party seller, Amazon ships the product to the customer").

[51] *See* Complainant's Motion at 13; Amazon's Response at 11.

[52] *See* H.R. 1504, S. 910, 106th Congress (1999), *available at* https://www.congress.gov/bill/106th-congress/house-bill/1504/text?r=57&s=1 (last visited Feb. 2, 2021).

seventeen (17) years of effort to modernize and streamline over ten (10) laws related to the protection of U.S. plants from pests and noxious weeds.[53] The definition of "import," incorporating the definition of "move," is found verbatim in the original bill text as the enacted text. It is clear from the legislative history that the PPA, and Congress's broad definition of "import," was designed in consideration of the vast global market and intended to cast a wide net by holding liable not only the person or person's actively moving or bringing restricted items into the U.S., but also including those who acted to further, or to aid, the movement of prohibited items into the U.S.[54]

Under the Regulations, 7 C.F.R. § 319.7,[55] the definition of "import," also incorporating the definition of "move," is verbatim to the definitions of "import" and "move" found in the statute, 7 U.S.C. § 7702.

The AHPA was introduced in the Senate in October 2001 to

---

[53] *See* Nat'l Plant Board, U.S. Dep't of Agric., *Safeguarding American Plant Resources: A Stakeholder Review of the APHIS-PPQ Safeguarding System* at 7 (1999), *available at* https://nationalplantboard.org/wp-content/uploads/docs/safe_main.pdf (last visited Feb. 4. 2021). *See also* Western Governors' Association, PowerPoint Presentation by Andrea Huberty, Director, Plant Health Programs, Plant Protection and Quarantine, APHIS *Plant Protection and Quarantine and the Plant Protection Act* at slide 5 (Apr. 25, 2019), *available at* https://westgov.org/images/editor/Andie_Huberty.pdf (last visited Feb. 4, 2021).

[54] *See* 7 U.S.C. § 7702; 146 Cong. Rec. S4416-01, S4434-35, 2000 WL 679383 (Mr. Graham stating, in support of the legislation, "this legislation includes a streamlined version of the Plant Protection Act. In 1988, I commissioned a study by the U.S. Department of Agriculture and the Animal and Plant Health Inspection Service (APHIS) to evaluate the viability of our nation's system of safeguarding America's plant resources from invasive plant pests. *In today's global marketplace where international travel is commonplace, the importance of APHIS' role in ensuring that invasive pests and plants do not enter our borders in paramount.* The passage of the Plant Protection Act was the number one recommendation of this report which included almost 300 individual recommended actions. Today, we are taking our first step toward a serious commitment to protecting American agriculture from the ravages of diseases like citrus canker or the Mediterranean fruit fly.") (emphasis added).

[55] *See* Amazon's Motion at 18 (citing 7 C.F.R. § 319.7 as applicable to the alleged violations in paragraphs 2.18 through 2.23 of the Complaint).

"consolidate and revise the authority of the Secretary of Agriculture relating to protection of animal health." The AHPA includes a broad definition of "import," similar to that found in the PPA, and incorporates the definition of "move" identical to that found in the PPA. Both definitions of "import" and "move" are found in the introduced text[56] as well as the final text enacted into law in 2002. Congress was intentional regarding those definitions it chose to include in the statute and those it chose to leave to the discretion of the Department.[57] Concerning the Regulations, as Complainant points out, "the definition for 'import' was added to 9 C.F.R. § 94.0 under a different authorizing statute over thirty-years prior, in 1989."[58] That part of the Regulations was subsumed under the authority of the AHPA, but nonetheless the AHPA makes clear Congress's intent to, here again, cast a wider net in its definition of "import" than the preceding legislation it replaced.[59]

---

[56] *See* S. 1482, 107th Congress (2001), available at https://www.congress.gov/bill/107th-congress/senate-bill/1482/text (last visited Feb. 2, 2021).

[57] *See* H.R. Conf. Rep. 107-424, 664, 2002 U.S.C.C.A.N. 141, 388 ("the managers were concerned that an overly broad definition [of "disease"] could result in litigation forcing the Agency to divert scarce resources to protecting against conditions which have little if anything to do with the scientific understanding of disease. Likewise, the managers were equally concerned that an arbitrarily narrow definition would limit the ability of the Agency to respond to as of yet unknown threats to animal health. The managers have therefore concluded that in order for the Agency to have maximum flexibility to focus it's [sic] resources and respond to new or emerging disease threats that a regulatory definition of disease should be left to the discretion of the Secretary.").

[58] Complainant's Response at 3 (citing 54 Fed. Reg. 7391-02).

[59] 9 C.F.R. § 94.0 was originally promulgated October 8, 1987, 52 Fed. Reg. 33800-01, 1987 WL 140986 (F.R.), under the authority of 7 U.S.C. 147a, 150ee, 161, 162, 450 (previously the Plant Quarantine Act); 19 U.S.C. 1306 (previously the Tariff Act of 1930); 21 U.S.C. 111, 114a, 134a, 134b, 134c, and 134f (previously Title 21. Food and Drugs; Chapter 4. Animals, Meats, and Meat and Dairy Products; Subchapter III. Prevention of Introduction and Spread of Contagion); 42 U.S.C. 4331, 4332 (National Environmental Policy); 7 CFR 2.17, 2.51, and 371.2(d). "Import was not included in the Regulations' definitions and was not added until 1989, 54 Fed. Reg. 7391-02. The previous authorities of 9 C.F.R. § 94.0 did not provide a definition for "import." However, noting, that the Plant Quarantine Act did provide for "liability of principal for act of agent." 7

b. Respondent Amazon Violated the AHPA and Regulations as Alleged in Paragraphs 2.1-2.8 and 2.10-2.17 of the Complaint

The allegations in paras. 2.1-2.8 and 2.10-2.17 concern violations under the AHPA and various Regulations (9 C.F.R. §§ 94.4, 94.6, 94.9, 94.12). These parts of the Regulations are similar in that they prohibit importation of certain animal product(s) that originate from areas where a specified disease exists without certification that confirms the product has been prepared prior to importation into the U.S. in a specified way that would prevent the transmission of such as disease through the product.[60] There is no dispute that restricted animal products subject to the AHPA and Regulations, as alleged in paras. 2.1-2.8, 2.10-2.12, and 2.17 of the Complaint,[61] were imported into the U.S. without the required certificates on the dates alleged in the Complaint and in violation of the Regulations as alleged in the Complaint.[62] As previously noted, the issue presented is not whether those prohibited items were imported. They were. The issue is whether Amazon is legally responsible for the "import" of those prohibited items as that term is defined in the AHPA and Regulations.

The AHPA defines "import" as "to *move* from a place outside the territorial limits of the United States to a place within the territorial limits of the United States."[63] The AHPA further defines "move" as: (A) to carry, enter, import, mail, ship, or transport; (B) to aid, abet, cause, or induce carrying, entering, importing, mailing, shipping, or transporting; (C) to offer to carry, enter, import, mail, ship, or transport; (D) to receive in order to carry, enter, import, mail, ship, or transport; (E) to release into the environment; or (F) to allow any of the activities described in this

---

U.S.C. § 153, Repealed. Pub. L. 106-224, Title IV, § 438(a)(1), June 20, 2000, 114 Stat. 454.

[60] *See* 9 C.F.R. §§ 94.4, 94.6, 94.9, 94.12.

[61] Amazon, in its Motion at 15, contends that there is no evidence to show that the packages found in the New Jersey warehouse, as alleged in ¶¶ 2.13-2.16, were ever imported. I will address these allegations in turn.

[62] *See* Amazon's Motion at 13 (citing Liu Decl. ¶ 29), 14 (citing Rieder Decl. Ex. 3-6), 15 (citing Rieder Decl. Ex. 13-14, 2).

[63] 7 U.S.C. § 8302(7) (emphasis added).

paragraph.[64]

Amazon's first legal contention is that the definition of "import" used in the Regulations (9 C.F.R. § 94.0), as opposed to that definition found in the AHPA statute (7 U.S.C. § 8302(a)), is controlling and should be applied without looking to the statutory definition in determining whether Amazon did in fact "import" the alleged restricted products. Amazon is in error. As Complainant pointed out,[65] the Supreme Court was definitive in its finding: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[66] Under the AHPA the intent of Congress is unambiguously expressed; Congress clearly defines the term "import," 7 U.S.C. § 8302(a)(7), incorporating the term "move," 7 U.S.C. § 8302(a)(12), as both terms should be used "[i]n this chapter" and "this

---

[64] 7 U.S.C. § 8302(12).

[65] Complainant's Motion at 18.

[66] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). *See also Time Warner Entm't Co., L.P. v. F.C.C.*, 56 F.3d 151, 190 (D.C. Cir. 1995) ("Had Congress not provided 'a precise definition ... for the exact term the Commission now seeks to redefine,' ACLU, 823 F.2d at 1568, the Commission's interpretation might well be entitled to deference. In the face of a clear statutory definition, however, there is no occasion for deference.") (citing *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989); *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 368, (1986); *Chevron*, 467 U.S. at 842–843).

Amazon's suggestion of regulatory interpretation, referencing *Kisor v. Wilkie*, 588 U.S.___, 139 S. Ct. 2400, 2446 (2019), (*see* Amazon's Motion at 19; Amazon's Response at 5, 7, 8) is not relevant here and misguided. Contrary to Amazon's use and understanding of *Kisor*, the Court there did not change the "'traditional tools' of construction" that it held must first be applied under *Chevron* (*see Kisor*, 139 S. Ct. at 2415 (citing *Chevron*, 467 U.S. at 843)), but determined, instead, whether *Auer* deference should apply to an agency's reasonable reading of genuinely ambiguous regulations. *See Kisor*, 139 S. Ct. at 2408(citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945)). First, there is no contention as to whether the Regulations at issue here are ambiguous. Second, Amazon is incorrect in stating, Amazon's Motion at Response at 7, that "Resort to extraneous terms, including those in the enabling statutes, is neither needed nor allowed." Applying Congresses intended and unambiguous definition is not "resort[ing] to extraneous terms" but is the correct "traditional tool" of construction under *Chevron*.

chapter. . . includes any regulation or order issued by the Secretary under the authority of this chapter," 7 U.S.C. § 8302(a)(16).

Amazon also misstates the operation of the AHPA and the Regulations promulgated thereunder. [67] While it is true that the AHPA authorized the USDA Secretary to promulgate regulations to effectuate the purpose of the Act (7 U.S.C. § 8303(b)), the AHPA also provides the Congressional purpose of the Act (7 U.S.C. § 8301), provides definitions applicable to the Act and any regulations promulgated thereunder (7 U.S.C. § 8302(a)(16)), and provides both criminal and civil penalties for the violation of the AHPA and Regulations (7 U.S.C. § 8313). The AHPA both creates the legal prohibition and authorizes the Secretary to regulate the legal prohibition within the Congressional purpose of the Act.

Amazon's second legal contention is that, despite whether "one uses the regulatory term 'bring into' or the statutory term 'move,'" the interpretation should be limited to "concrete and predictable actions one takes with respect to a package."[68] Amazon's contention cannot be applied here because of the specific language Congress used to define "import." Of the various meanings intentionally included in Congress's definition of "import" by way of the term "move," certain actions, such as "to release into the environment," are not necessarily "concrete and predictable actions one takes with respect to a package" as Amazon suggests. Further, while the statutory definition of "import," incorporating the definition of "move," is certainly broader than the regulatory definition found at 9 C.F.R. § 94.0, it is not conflicting and can be simultaneously applied, though there is no need to do so here.

Thus, the controlling definition of "import" applicable here under the AHPA incorporates the term "move" as it is defined in the AHPA.

---

[67] *See* Amazon's Response, at 3 (contending that the "enabling statute" is not the authority because it "not create regulatory duties" but that "the Agency implemented regulations to create duties, and the regulations exclusively define the scope of those duties."). *See also* Amazon's Response at 7 (contending that "The enabling statutes do not create any obligations or liability; rather, they authorize, but do not require, the Agency to promulgate regulations.")

[68] Amazon's Response at 3.

ANIMAL HEALTH PROTECTION ACT / PLANT PROTECTION ACT

Congress charged the Secretary with protecting the public and agriculture through the restriction of high-risk animal product importation and broadly defined "import" to include actors with various roles in the importation of restricted products.

Whether Amazon imported the products at issue is ultimately determined based on its involvement in the importation of the restricted products. Complainant contends,[69] and Amazon does not deny,[70] that

> Respondent was aware of these products and expected them to be delivered to Amazon fulfillment centers in the United States, where they were to be stored until purchased by customers on amazon.com. Once purchased, Respondent was contractually obligated to transport the products to the buyers, via interstate commerce if necessary.

Complainant also contends, and I agree, that "Respondent's active involvement in the importation of prohibited products renders it liable for violating the AHPA."[71]

Contrary to Complainant's contentions, Amazon did not "offer" or "receive" to "carry, enter, import, mail, ship, or transport imported goods"[72] As Amazon points out, Complainant fails to consider the rest of the definition of "import" ("from a place outside the territorial limits of the United States to a place within the territorial limits of the United States.").[73] While it is clear from the evidence that Amazon agreed to receive the shipment, and to transport the imported goods interstate, there

---

[69] Complainant's Motion at 10-11.

[70] *See* Amazon's Motion at 2 (explaining that, under the Fulfillment by Amazon program, "third-party sellers send their products to an Amazon warehouse before selling the product. Amazon agrees to store the product and, when a customer buys the product from the third-party seller, Amazon ships the product to the customer."). *See supra* note 49.

[71] Complainant's Motion at 13.

[72] Complainant's Motion at 24-25 (citing 7 U.S.C. §§ 8302(12)(C)-(D); 7702(9)(C)-(D)),

[73] Amazon's Response at 9-10 (citing 7 U.S.C. § 8302(a)(7)).

is no evidence or allegation that Amazon received the shipment outside U.S. territorial limits. Likewise, there is no evidence or even allegation that Amazon offered to "carry, enter, import, mail ship or transport imported goods" from outside the U.S. to inside the U.S. There is also no evidence showing that Amazon "allow[ed]" the importation; Amazon was not in a position of authority to "allow" importation of the restricted products.[74] Complainant's interpretation and application of the term "allow" is overbroad and out of context with respect to the statutory definition.

Of the six (6) possible definitions of "import," incorporating the term "move," the second definition is clearly applicable here; Amazon was involved in the importation of the restricted items by "[aid[ing], abet[ing], caus[ing], or induc[ing] [the] carrying, entering, importing, mailing, shipping, or transporting] from a place outside the territorial limits of the United States to a place within the territorial limits of the United States."

There is no question that Amazon had an ongoing business relationship with the foreign third-party sellers it intended to profit or otherwise benefit from and played a significant role in the sale and distribution of imported animal products: 1) Amazon knew shipments were coming from the foreign third-party seller Yummy House Products (*see* Liu Decl. Ex. 13-21); 2) Amazon was aware the type of products the third-party sellers offer (*see* CX 90 / Rieder Decl. Ex. 11 at 5);[75] and 3) although not necessary for liability, Amazon was aware of federal regulations concerning restricted animal and plant products (*see* Liu Decl. Ex. 6-10). Amazon is liable under the AHPA through its business dealings with foreign third-party sellers of foreign animal products.

Contrary to Amazon's contentions, Amazon's services are not "entirely unrelated to the acts of importation" because these products sold through its website marketplace must be imported for sale to U.S.

---

[74] *See* Complainant's Motion at 25-26 (contending that Amazon "allowed" by failing to place "significant obstacles in the way of these statutory violations.").

[75] CX 90 and Rieder Decl. Ex. 11 are the same document. In this document, at 5, it is stated that fifty-three (53) units of prohibited product were distributed to U.S. customers, showing that the shipments at issue were not the first units Amazon received from the foreign third-party sellers. *See supra* note 49.

customers.[76] Of this Amazon is or should be fully aware and cannot be allowed under the law to circumvent its statutory duties and obligations to the U.S. public though asserted private agreements.

Complainant contends that the services offered to foreign third-party sellers, such as Amazon's Fulfillment by Amazon ("FBA") service to "pick, pack, ship, and provide customer service for those products," encouraging customers to choose those products by providing free shipping, handling customer service and returns—as well as additional benefits such as access to millions of American and global customers, business growth and exposure—show that Amazon "induced" the importation of the restricted foreign animal products.[77]

Amazon contends that "APHIS cannot square the undisputed facts with its own misinterpretation of the word 'induce'" and relies *Chicago Lawyers' Comm. for Civil Rights v. Craigslist, Inc.*, which finds that the popular website Craigslist.com not liable for illegal activity conducted on its website.[78] I disagree with Amazon that this case is similar to that of *Craigslist*.[79] The nature and function of Amazon.com is wholly different

---

[76] Amazon in its Response, at 1-2, contends that "APHIS's expansive interpretation of 'import' has broad and disturbing ramifications" because "[i]t would base 'import' on a domestic business's offer of legitimate services that are entirely unrelated to the acts of importation" and "[s]uch an interpretation is hopelessly overbroad and would impose strict liability for the conduct of third parties."

[77] *See* Complainant's Motion at 19-25 (citing CX 231, 232; *Getting started with Fulfillment by Amazon*, Amazon Seller Central, https://sellercentral.amazon.com/gp/help/external/helppage.html?itemID=53921&language=en_US&ref=efph_53921_bred_201112670 (last visited May 28, 2020); *What is FBA?*, YouTube (Feb. 21, 2017) https://www.youtube.com/watch?v=1AVOHlpA9Mg&feature=emb_logo; *FBA features, services, and fees*, Amazon Seller Central, https://sellercentral.amazon.com/gp/help/help.html?itemID=201074400&language=en_US&ref=efph (last visited May 28, 2020); Liu Decl. Ex. 1 (Amazon Service Business Solutions Agreement ("BSA")).

[78] *See* Amazon's Response at 11 (citing *Chicago Lawyers' Comm. for Civil Rights v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2009)).

[79] Craigslist.com is a popular cite that functions like a classifieds page in a newspaper – users post items, services and a whole host of other wanted or for

from Craigslist.com. Amazon's website sells both its own and third-party products.[80] Under the FBA program, Amazon also offers to package/repackage (in Amazon boxes) third-party sellers' products and provides customer and return services.[81] For a customer that enters Amazon.com to purchase a product, receives that product in an Amazon box, and returns to Amazon.com for customer service, ratings of products and sellers, or any other needs related to that purchase, it is safe to say that customers rely on Amazon.com, as a reputable online store, to conduct due diligence to avoid offering unsafe, prohibited or illegal products on its website. In fact, Amazon recognizes that its customers trust Amazon to offer safe and legal products.[82]

Contrary to Amazon's contentions that "Amazon was merely the addressee,"[83] the record shows, as previously mentioned, that Amazon played a primary and significant role in the import of prohibited products. Amazon had previous and ongoing business dealings with these foreign third-party sellers.[84] Amazon previously profited from the sale of similar foreign animal products sold by the third-party sellers through its platform.[85] Amazon knew or should have known of the types of restricted foreign animal products sold by these sellers and of the incoming

---

sale ads. The function Craigslist.com makes clear to customers that they are dealing directly with third parties who use the platform.

[80] Amazon's Motion at 1.

[81] Amazon's Motion at 2-3; CX 231, 232.

[82] *See* Amazon's Motion at 13 (quoting and citing Liu Decl. Ex. 8: "Customers trust that they can always buy with confidence on Amazon. Products offered for sale on Amazon must comply with all laws and regulations and with Amazon's policies. The sale of illegal, unsafe, or other restricted products listed on these pages, including products available only by prescription, is strictly prohibited.").

[83] Amazon's Response at 4.

[84] Amazon's Motion at 5 (stating that Yummy House Hong Kong started doing business with Amazon December 13, 2014, and DD222 started doing business with Amazon June 18, 2013); Liu Decl. Ex. 2 (proof of Yummy House' BSA); Liu Decl. Ex. 3 (proof of DD222's BSA); CX 90 / Rieder Decl. Ex. 11 at 5 (stating fifty-three (53) prohibited units were shipped to U.S. customers).

[85] CX 90 / Rieder Decl. Ex. 11 at 5 (stating fifty-three (53) prohibited units were shipped to U.S. customers).

shipments. [86] Yet, Amazon failed to place stop guards that would prevent violations of the AHPA.[87]

Amazon's contentions it did not know that the foreign third-party sellers were not adhering to the AHPA and Regulations illustrates, instead of negates, Amazon's failure to prevent violations of federal regulations intended to protect the public to whom it markets, sells, and delivers potentially harmful products. By choosing to enter into agreements with foreign sellers to market, sell, and distribute foreign animal products subject to the AHPA and Regulations into American homes, Amazon takes a significant primary role in the importation of such products as that term is defined in the AHPA, and renders itself liable thereunder for violations of that statute.

Amazon contends that "APHIS offers no evidence that Amazon knew of any wrongdoing by the third-party sellers who sent the offending packages to the United States."[88] Amazon confuses the issues, as "knowledge" is not required to find violation of the AHPA and Regulations. The AHPA differentiates between "knowingly" violating the statute and Regulations with criminal penalties, 7 U.S.C. § 8313(a), but for civil penalties "knowledge" is not a required element for violation, 7 U.S.C. § 8313(b).[89] While the fact that Amazon knew or should have known that the foreign third-party sellers sold foreign meat products

---

[86] Liu Decl. Ex. 13-21 (Get Inbound Manifest Details, FBA Console, Prod US Amazon).

[87] Aside from its attempts to place all liability on third-party sellers through its BSA, Amazon offers no other evidence of polices or practices it has in place to ensure regulated plant and animal products are legal and safe for the market, sell, and shipment into American homes (such as flagging products that must enter its possession with proper documentation, or requiring third-party sellers to provide the contents of, and documentation for, expected shipments, etc.). Further, it is on no consequence that additional prohibited items were detected because of Amazon's assistance. *See* Amazon's Motion at 13; Liu Decl. at 7, ¶ 40. Amazon was responsible for not participating in the importation and introduction of those products into interstate commerce in the first place.

[88] Amazon's Response at 10.

[89] *See also* Complainant's Motion at 15-16 (citing *Lopez*., 44 Agric. Dec. 2201 (U.S.D.A. 1985); *Kaplinsky*., 47 Agric. Dec. 613, 629 (U.S.D.A. 1988); *Vallalta*, 45 Agric. Dec. 1421, 1423 (U.S.D.A. 1986)).

through its FBA program subject to federal regulation supports Amazon's involvement in the importation of such products, actual knowledge of the third-party sellers' "wrongdoing" is not necessary to determine a violation.

Further, the Department has liberally interpreted "induce," "aid," "abet," and "cause," to effectuate Congress's intent in remedial legislation.[90] The AHPA and Regulations, and the Department's previous interpretations of similar statutes and regulations,[91] do not require "actual knowledge" of "wrongdoing." The AHPA and Regulations do not require bad intent or any *mens rea* at all. These are not criminal statutes but administrative/regulatory laws. Even if the undersigned adopted a more robust definition of "aid and abet," *see Securities and Exchange Commission v. Apuzzo*,[92] there is no requirement for knowledge of

---

[90] *See Machado*, 42 Agric. Dec. 1454 (U.S.D.A. 1983) (where "Respondent Cozzi aided and abetted respondent Machado's fraud because *he failed to prevent the fraud against Imperial, in light of the information available to him and his sharing of the profits* of the fraud.") (emphasis added); *Moore*, *supra* note 34, 50 Agric. Dec. at 401 (Finding that the ALJ erred in finding Respondent did not "move" cattle because "compensation or the lack thereof is irrelevant in determining whether respondent Darrell Moore 'moved' the animals, as that term is defined in the regulations." Rather it was the role he played in arranging the transportation of the calves that determined whether he "otherwise aided, induced, or caused [the calves] to be moved."); *Casey*, 54 Agric. Dec. 91, 1995 WL 369434, *10 (U.S.D.A. 1995) ("Under that broad definition, Respondents' conduct in sending the 55 cows to a livestock auction market for slaughter, . . . is conduct that 'otherwise aided, induced' and 'caused to be moved' the two cows interstate, which movement violated the regulations.") (quoting and citing *Reed*, 52 Agric. Dec. 90, 99 ("In order to ensure that all parties involved in the interstate movement of livestock are responsive to the regulations, it is the policy of USDA to hold all parties involved in any interstate movement of cattle responsible for compliance.")).

[91] *See supra* note 89.

[92] *SEC v. Apuzzo*, 689 F.3d 204, 212 (2d Cir. 2012) (adopting Judge Learned Hand's standard for aider and abettor liability: "in addition to proving that the primary violation occurred and that the defendant had knowledge of it (the equivalent of the first two elements of *DiBella*)—must also prove 'that he in some sort associate[d] himself with the venture, that [the defendant] participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.'") (citing *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *Nye & Nissen v. United*

"wrongdoing," only of the violation which, in this case, is the importation of the prohibited products themselves of which Amazon was aware.[93] Only with such interpretation of the stature can the Congressional purpose of the AHPA be achieved.

Lastly, Amazon cannot be absolved of liability by contracting and relying on foreign entities or persons with whom it does business to follow U.S. laws and regulations.[94] Amazon's contractual relationship with its third-party sellers does not insulate it from the statutory and regulatory protections of the AHPA and PPA nor shield it from liability for the products and goods imported into the U.S. and distributed to U.S.

States, 336 U.S. 613, 619 (1949); *United States v. Irwin*, 149 F.3d 565, 569 (7th Cir. 1998)).

[93] *See supra* notes 49, 86.

[94] *See Valkering, U.S.A., Inc. v. U.S. Dep't of Agric*., 48 F.3d 305, 307 (8th Cir. 1995) (where respondent argued that it "played no role in the actual shipment of the trees, had delegated all responsibility for compliance with state and federal inspection requirements to Unique and Butternut, and was a wholesaler rather than a broker in the transactions" but the Court found that respondent is liable under the broad definition of "move" in the regulation and "[it] is irrelevant whether Valkering's involvement is characterized as that of a wholesaler or broker."); *Culbertson*, 53 Agric. Dec. 1030, 1030 (U.S.D.A. 1994) *rev'd on different point Culbertson vs. United States Dep't of Agric*., 54 Agric. Dec. 860 (U.S.D.A. 1995) ("A person who relies on others, including accredited veterinarians, to comply with the regulatory requirements does so at his or her peril.") ("Mr. Culbertson relied upon the cattle owner and accredited veterinarians to ensure that the cattle met testing requirements [, and he relied upon them at his peril, since the responsibility under the Act may not be delegated to others, even if they prove to be unreliable]."); *Lloyd Myers Co*., 51 Agric. Dec. 747, 769, 772 (U.S.D.A. 1992) ("There are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency.") (citing *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938); *FTC v. Standard Ed. Soc'y*, 302 U.S. 112, 119-20 (1937); *H.P. Lambert Co. v. Sec'y of Treas*., 354 F.2d 819, 822 (1st Cir. 1965); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965); *S.C. Generating Co. v. FPC*, 261 F.2d 915, 920 (4th Cir. 1958); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Keystone Mining Co. v. Gray*, 120 F.2d 1, 6 (3d Cir. 1941); *Ala. Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1938); *Tractor Training Serv. v. FTC*, 227 F.2d 420, 425 (9th Cir. 1955); *Goodman v. FTC*, 244 F.2d 584, 593-94 (9th Cir. 1957)).

consumers under Amazon's FBA program, generating more than $42.75 billion in revenue, from these transactions. But for the services that Amazon provides, the subject violations of the AHPA and PPA could not have occurred.

As Complainant pointed out, "nowhere in the Acts does Congress carve out an exception for corporations to shift culpability to third-parties."[95] Amazon may require third-party sellers to follow U.S. laws, regulations, and its policies; but ultimately Amazon is itself subject to federal laws and regulations where it does business.[96] Thus, I find that Amazon "imported" the items as alleged in the Complaint, paras. 2.1-2.8, 2.10-2.12, and 2.17.

Regarding paras. 2.13-2.16 of the Complaint, Amazon contends that "APHIS has failed to introduce any evidence that the products came from

---

[95] Complainant's Motion at 14.

[96] Amazon, in its Motion at 21-22, contends that "courts across the country have recognized Amazon's limited role in third-party sales" and cites to several products liabilities cases where it was found to have a limited or no liability in connection with unsafe products (citing *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766 (N.D. Ill. 2019); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018); *Stiner v. Amazon.com, Inc.*, 2019 Ohio 586, ¶ 33 (Ohio Ct. App. 2019); *Fox v. Amazon.com, Inc.*, M.D. Tenn. No. 3:16-CV-03013, 2018 WL 2431628, *8 (May 30, 2018); *Erie Ins. Co. v. Amazon.com Inc.*, D. Md. No. CV 16-02679-RWT, 2018 WL 3046243, *3 (Jan. 22, 2018); *Milo & Gabby LLC v. Amazon.com, Inc*., 693 F. App'x 879 (Fed. Cir. 2017); *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 542 (D. Md. 2016); *Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, D.N.J. No. CV 17-2738 (FLW) (LHG), 2018 WL 3546197, *10 (July 24, 2018)). However, this comparison is irrelevant here. This proceeding is brought pursuant to a federal remedial regulatory statute, not state tort law. Products liability cases, as Complainant points out in its Motion at 26, are subject to state law. Amazon reduces to a footnote or fails to mention other cases where it was held liable as a "seller" under state tort law (*see State Farm Fire and Casualty Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 694 (W.D. Wis. 2019); *Gartner v. Amazon.com, Inc.*, S.D. Tex., No. 4:18-CV-2242 (S.D. Tex. 2020); *McMillan v. Amazon.com, Inc*., 433 F. Supp. 3d 1034 (S.D. Tex. 2020). Nevertheless, Amazon, as a business engaging in interstate commerce, is subject to the AHPA and PPA, federal laws, and the regulations promulgated under each Act.

outside the United States." Amazon, *id*., states that "[u]nlike the products identified elsewhere in the Complaint, APHIS has not produced any shipping label for any of the products discovered in New Jersey" and contends that Complainant cannot show that the products were imported at all. Complainant asks the undersigned to "to conclude, by a preponderance of the evidence, that fungible items from the same Chinese seller (Yummy House Hong Kong) were transported into the United States in a manner consistent with the thirteen (13) parcels recovered in San Francisco" and to "to infer that the parcels were mis-labeled in a similar fashion, differing from what was on the manifest and creating a red-flag that Amazon should have investigated."

Amazon's contentions at once ignore the very record evidence it proffers and seems to require specific evidence (shipping labels) that is not required elsewhere in the AHPA or Regulations. Complainant, on the other hand, asks the undersigned to "infer" too much. Important here are only the facts conceded by both parties with the above interpretation and application of the statutory definition of "import." Rieder Decl. Exhibit 13 is an affidavit of Mr. Gregory T. Soto, an officer with the USDA, Plant Protection & Quarantine, Smuggling Interdiction and Trade Compliance ("SITC"). In his Affidavit, at 1, Mr. Soto states

> I went [to General V Warehouse] to perform a site visit for internet Traces #35480, 35481 and 35482. . . . Only 1 package from Trace 35480 was found. . . . However I did find 16 other non- compliant products containing swine, poultry and ruminant. Jihang (Jim) Chen , [sic] YMY Yummy House Hong Kong was the vendor for all of the products.

Mr. Soto also states, at 4-5:

> It is my understanding that General V Warehouse is not associated with YMY Yummy House Hong Kong or Amazon. It is not an Amazon Fulfillment Center. It was determined that YMY sends products from China to various Amazon Warehouse Distribution Centers in the United States. If there is a labeling issue (i.e. bar code or description) Amazon does not correct these problems.

> Amazon will return the product to the vendor. In lieu of returning the product to China, companies such as General V Warehouse accepts the products for corrective labeling, by applying the product with labels containing new bar codes and descriptions and then returns the product back to Amazon for order fulfillment, thereby eliminating the cost and time of shipping back to country of origin.

Last, Mr. Soto attests that he "examined the shipping labels on the boxes of non-compliant products at General V Warehouse. The products had been sent by commercial courier from at least 4 different Amazon warehouses in 4 different state (KY, MD, CA, PA)."

Not only did Amazon submit Mr. Soto's Affidavit, Amazon did not deny or contest the attestations contained therein, much less produce evidence to the contrary, evidence that, if it existed, would presumably be within Amazon's control and ability to produce. That failure is fatal to Amazon on summary judgment. Thus, the record evidence submitted by Amazon is that 1) Yummy House, the third-party seller from whom all products found in General V Warehouse came, is an entity in Hong Kong, therefore its products originated outside the U.S.;[97] and 2) the prohibited products obtained at General V Warehouse, confirmed to be from Yummy House Hong Kong, were sent from Amazon's warehouses at the request of Yummy House Hong Kong.[98] The deceitful labeling, brought up by both parties, is of no significance in finding the current violations; it merely provides circumstantial evidence that the third-party sellers were fully aware of the restrictions and purposely aimed to circumvent such restrictions. Nonetheless, as discussed *supra*, Amazon's "actual knowledge" of wrongdoing is not required to find a violation of the AHPA and Regulations.

Amazon's contention that the products from Yummy House Hong Kong cannot be "proven" to be imported is illogical and otherwise unsupported. The evidence, most notably the evidence submitted by

---

[97] Rieder Decl. Ex. 13 at 1; CX 90/Rieder Decl. Ex. 11 at 3

[98] Rieder Decl. Ex. 13 at 4-5; CX 90/Rieder Decl. Ex. 11 at 5; Liu Second Decl. at 2 ¶ 5.

Amazon, as to which no contrary evidence has been submitted, shows that the prohibited products found in General V Warehouse are Yummy House Hong Kong products, imported for sell through Amazon, but sent to General V Warehouse due to labeling issues or at the request of the third-party seller.[99] Thus, by the same reasoning provided above, Amazon "imported" the prohibited products as alleged in the Complaint, paras. 2.13-2.16. Complainant has carried its initial burden of proof on summary judgment by bringing forth sufficient uncontested evidence to prove its case. At that point, the burden shifted to Amazon to bring forth evidence to contravene Complainant's evidence. Amazon failed to do so. Unsupported contentions that there are material facts at issue are insufficient to support a finding there are material issues of fact. Therefore, here, Complainant prevails.

c. Respondent Amazon Violated the PPA and Regulations as Alleged in Paragraphs 2.18-2.23 of the Complaint

Amazon raises the same contentions as to Complaint paras. 2.18-2.23 without distinction between the AHPA and PPA.[100] However, under neither the PPA, nor the Regulations promulgated thereunder, is the term "import" defined as "to bring into the United States." The regulatory definition of "import," 7 C.F.R. § 319.7, is identical to the definition of "import" found in the statute, 7 U.S.C. § 7702, both incorporating the definition of "move."

Congress' unambiguous definition of "import" under the PPA is controlling.[101] Thus, the controlling definitions of "import" under the PPA incorporate the definition of "move." *See* 7 U.S.C. § 7702. Under the PPA, "move" means"

---

[99] *See supra* notes 97, 98.

[100] *See* Amazon's Motion at 18 ("Under the regulations promulgated by the USDA pursuant to . . . the Plant Protection Act, the term 'import' has a clear and unambiguous meaning: to bring into the United States"). As Complainant points out, Complainant's Response at 6, Amazon later concedes that the PPA has different terms, but fails to explain or correct its argument as to the definition of "import" under the PPA. S*ee* Amazon's Response at 2 n.1; 7 n.3.

[101] *See supra* note 66; PPA, 7 U.S.C. § 7702(19).

> (A) to carry, enter, import, mail, ship, or transport;
> (B) to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting;
> (C) to offer to carry, enter, import, mail, ship, or transport;
> (D) to receive to carry, enter, import, mail, ship, or transport;
> (E) to release into the environment; or
> (F) to allow any of the activities described in a preceding subparagraph.

Of the six (6) possible definitions of "import," incorporating the term "move," here again the second definition "[to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting] into . . . the territorial limits of the United States," is clearly applicable.[102]

The record shows that Amazon played a significant role in the import of prohibited products. Amazon had previous and ongoing business dealings with this foreign third-party seller.[103] Amazon likely previously profited from the sale of similar foreign plant products sold by the third-party seller through its platform.[104] Amazon knew or should have known of the types of restricted foreign animal products sold by these sellers and of the incoming shipments.[105]

As detailed previously, Amazon failed to place stop guards that would prevent violations of the PPA and cannot be absolved of liability by

---

[102] *See supra* page 24.

[103] Amazon's Motion at 5 (X-Sampa Co. began doing business with Amazon on July 1, 2012); Liu Decl. Ex. 4.

[104] *See* Liu Decl. at 6, ¶ 4 (stating "After APHIS agents notified Amazon that it had intercepted the products identified in Complaint paragraphs 2.18-2.23, Amazon promptly removed X-Sampa Co. Kaffir lime leaf products from Amazon.com, held the products in its warehouses for destruction, and then suspended the third-party seller account."). It is reasonable to deduce that X-Sampa Co. previously sold Kaffir lime leaf products through Amazon based on the facts that: 1) X-Sampa Co. began doing business with Amazon in July 2012; 2) the alleged violations were committed in March 2016; and 3) Amazon was holding Kaffir lime leaf products in its warehouses for distribution to customers.

[105] Liu Decl. Ex. 13-21 (Get Inbound Manifest Details, FBA Console, Prod US Amazon).

contracting and relying on foreign entities or persons with whom it does business to follow U.S. laws and regulations.[106] Amazon enabled and facilitated these statutory violations and cannot absolve itself of its statutory duties and the consequence of their violations through private agreements with others.[107] Thus, I find that Amazon "imported" the items as alleged in the Complaint, paras. 2.1-2.8, 2.10-2.12, and 2.17.

d. The Record Does Not Prove for Purposes of Summary Judgment That Amazon Violated the AHPA as Alleged in Paragraph 2.9 of the Complaint

The Complaint alleges, at para. 2.9, that

> On or about June 5, 2015, Respondents failed to comply with the Secretary's quarantine hold, in violation of 7 U.S.C. § 8306(c), because twenty-one (21) packages were released into commerce after Amazon was issued three quarantine demands in the form of Emergency Action Notifications (EANs) on May 26, 2015.

The AHPA, 7 U.S.C. § 8306(c), states in relevant part: "The Secretary, *in writing*, may order the owner of any . . . article . . . to maintain in quarantine . . . with respect to the . . . article . . . in a manner determined by the Secretary" (emphasis added).

The facts here are not in dispute.[108] On or about April 2 and 3, 2015, Complainant asked Amazon to "[d]etermine if other shipments of meat product from China from this vendor made it to [Amazon's] warehouses and, if so, place a *temporary stop sale or hold* on any product that is

---

[106] *See supra* notes 87, 94, 95, 96.

[107] *See Allen*, 78 Agric. Dec. 387, 421 (U.S.D.A. 2019) (finding that Petitioner could not "contractually shield himself from PACA liability" as his actions still resulted in PACA violations).

[108] *See* Amazon's Response at 14-15 (explaining the dates of hold and release of products, and receipt of EANs); Complainant's Response at 8 (Complainant does not contest the dates provided by Amazon).

currently in [Amazon's] warehouses" (emphasis added).[109] On April 13, 2015, Amazon agreed, during a conference call with Complainant, to place a hold on prohibited products currently in its warehouses.[110] On May 7, 2015, during another conference call, Amazon informed Complainant that "there were roughly 21 units on hold between 8 Amazon Fulfillment Centers."[111] On May 12, 2015, Complainant requested additional details about the products on hold, including the number of units on hold and warehouse locations of products on hold, to which Amazon replied the next day.[112] On May 13, 2015 Amazon released the products on hold at the Request of Yummy House Hong Kong after the "temporary hold" "expired."[113] On May 26, 2015 Complainant issued EANs to Amazon, written orders to hold products from Yummy House Hong Kong.[114] On June 5, 2015, Amazon notified Complainant that "the products on hold were erroneously released and that only 1 piece remained in their Murfreesboro, TN location."[115]

While it appears that Complainant is correct that Amazon's actions in releasing the prohibited products was "dangerous,"[116] Congress

---

[109] CX 90/ Rieder Decl. Ex. 11 at 1 (whether the request was made in writing or orally is not specified). No written request from those dates was provided by either party and Complainant states that the first request to hold was made orally. Complainant's Response at 8.

[110] *Id.* at 2.

[111] *Id.* at 3.

[112] *Id.*

[113] *See* Liu Second Decl. at 1-2, ¶¶ 4-5 (stating that Amazon "placed a temporary hold on 21 packages owned by Yummy House Hong Kong on or about April 2, 2015, meaning that the products could not be 'picked' to fill customer orders and the seller could not obtain their return. The temporary hold was in place for about 30 days, which is Amazon's standard practice, and expired on or about May 2, 2015. . . . After the temporary hold had expired, Yummy House Hong Kong submitted a request to Amazon to release all of its products located in Amazon warehouses and send them to a warehouse in New Jersey unaffiliated with Amazon. Amazon released Yummy House Hong Kong's property, as requested, on May 13, 2015, because there was no hold in place at the time.").

[114] CX 91-93.

[115] CX 90/ Rieder Decl. Ex. 11 at 3; Rieder Decl. Ex. 14 at 1.

[116] Complainant's Response at 8.

specifically required that hold orders be *written* and here the record does not show that any written hold orders or requests were issued prior to the release of the products.[117] As discussed herein, where Congress's intent is clear, an agency may not go beyond that Congressional intent.[118] APHIS knew the products were in Amazon's possession and the record on summary judgment reveals no reason a written order could not have been issued. Nearly a month and a half passed between APHIS being notified of the products held by Amazon and APHIS issuing the EANs. Amazon did not release prohibited items after receiving a written hold order. Thus, Complainant raises no issue of material fact about this allegation and has failed to prove that Amazon violated 7 U.S.C. § 8306(c).

I. *Penalty*

Complainant requests that a civil penalty of $1,000,000 be imposed against Amazon in consideration of "the nature, circumstance, extent, and gravity of the violation(s), as well as the Respondent's history of prior violations, degree of culpability, and other factors."[119] Complainant asks that the maximum civil penalty allowed under each statute be imposed to deter future violations.[120] Complainant contends that the violations are severe in that, should an outbreak of disease because by a prohibited product, such outbreak could cause billions of dollars in damage to the U.S. agriculture and economy. Complainant states that the requested penalty "is easily paid [by Amazon] and will not impact its ability to operate."[121]

Amazon contends that "APHIS's sanctions request is procedurally improper and unsupported and that a hearing must be held on the issue of

---

[117] 7 U.S.C. § 8306(c).

[118] *See supra* note 66.

[119] Complainant's Motion at 27 (citing 7 U.S.C. § 8313(b); 7 U.S.C. § 7734(b)).

[120] *Id.* at 29 (citing *Lopez*., 44 Agric. Dec. 2201, 2205 (U.S.D.A. 1985); *Gillette*, 75 Agric. Dec. 363, 395 (U.S.D.A. 2016); *Corona Distribs., Inc.*, 60 Agric. Dec. 274 (U.S.D.A. 2001).

[121] *Id.* at 32 (citing CX 230 (an Environmental Protection Agency consent agreement in a case against Amazon that resulted in a civil penalty of $1,215,700)).

penalty.[122] Amazon contends both Acts, 7 U.S.C. §§ 7734, 8313, require "notice and an opportunity for a hearing on the record" before a penalty can be imposed.[123] Amazon also contends there are "plenty of disputed facts that would require a hearing on any penalty . . . . [a]t bare minimum, a hearing is necessary to probe the evidence that APHIS apparently considered but did not share about the factors it identified as relevant" and so Amazon could present rebuttal evidence and evidence of mitigation.[124]

For the same reason a hearing is not needed to determine the violations, no hearing is needed to determine penalties. Amazon was provided with "notice" via Complaint filed on September 4, 2019, and an "opportunity for hearing," which it agreed was unnecessary by seeking summary judgment and conceding that "[t]here are no issues of material fact."[125] Amazon seems to request a subsequent hearing to determine penalties and to present evidence it has had the opportunity to provide.[126] Further, Amazon misunderstands the statute which directs that "the *Secretary* shall take into account" the factors outlined therein.[127] The Acts do not require Complainant to "share," or for Amazon to "probe," "evidence that APHIS apparently considered" in suggesting a penalty.[128] It is the undersigned's task to consider the factors provided in the statute when determining penalty.

---

[122] Amazon's Response at 15-16. (citing and quoting Complainant's Motion at 27-28, which cites and quotes 7 U.S.C. §§ 7734, 8313).

[123] *Id.*

[124] *Id.* (citing *Lopez*, 44 Agric. Dec. 2201, 2207 (Oct. 7, 1985)).

[125] *See* Amazon's Motion at 1. *See also supra* notes 43 (citing *Agri-Sales, Inc.*, 73 Agric. Dec. at 328-30, which states "an issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim. [Citation omitted.] The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. [Citation omitted.]") and 42.

[126] *See* Amazon's Response at 16 (stating that it would like to provide evidence of "mitigating factors" such as Amazon's actions to "suspended third-party seller accounts and reviewed its millions of product listings to confirm that items like the intercepted products were not offered for sale by other third-party sellers."). Amazon has already provided evidence on this point.

[127] 7 U.S.C. §§ 7734, 8313.

[128] *See* Amazon's Response at 16.

The AHPA and PPA both provide for civil penalties for violation of each.[129] Both statutes, verbatim, also provide the following "Factors for determining civil penalty[:]"

> In determining the amount of a civil penalty, the *Secretary shall* take into account the *nature, circumstance, extent, and gravity of the violation or violations* and the Secretary *may* consider, with respect to the violator—
> (A) ability to pay;
> (B) effect on ability to continue to do business;
> (C) any history of prior violations;
> (D) the degree of culpability; and
> (E) any other factors the Secretary considers appropriate.

7 U.S.C. §§ 7734(b)(2), 8313(b)(2) (emphasis added). The intent of remedial legislation, such as the AHPA and PPA, is only effectuated when the penalty serves as an "effective deterrent not only to the respondent but also to potential violators."[130]

The gravity of each violation is great. As noted throughout this Decision, the health and welfare of the U.S. public and agriculture is at stake. The importance of remedial laws such as the AHPA and PPA, and the Regulations promulgated under each, are in the forefront of safety considerations as to the damage potential outbreak of the very diseases these laws are meant to protect us from could do.[131]

Further, Amazon has millions of customers that rely and trust it to

---

[129] 7 U.S.C. §§ 7734, 8313.

[130] *See* Complainant's Response at 29 (citing *Lopez.*, 44 Agric. Dec. 2201, 2205 (U.S.D.A. 1985) (internal quotations omitted)) (also quoting and citing *Gillette*, 75 Agric. Dec. 363, 395 (U.S.D.A 2016); *Corona Distributors, Inc., and Reyna's Supermarket*., 60 Agric. Dec. 274 (U.S.D.A.
2001)).

[131] *See* Complainant's Response at 30-31 (explaining the potential monetary damages of possible Foot and Mouth Disease, Highly Pathogenic Avian Influenza, Classical Swine Fever, and African Swine Fever outbreaks).

provide safe and legal products on its platform.[132] As a large, reputable, and highly profitable company that not only conducts business in interstate commerce, but delivers products into millions of American homes each day, such violations should be considered severe.

As Complainant points out, the maximum civil penalty allowed under each Act is $500,000 for "all violations adjudicated in a single proceeding if the violations do not include a willful violation." As Complainant does not contend that Amazon's violations were willful, the maximum penalty allowed under the statutes is $1 million. There is no question that such penalty will not affect Amazon's ability to continue to do lawful business or that Amazon will be able to pay.[133] Knowledge is not a factor in this case.[134] While it is true that Amazon does not have a history of previous violations under the AHPA and PPA, I find that the gravity of the violations is nonetheless enough to merit the maximum civil penalty.

As discussed, Amazon, through the services it provides, has violated the AHPA and PPA by actively assisting foreign third-parties in the importing, entering, and movement of prohibited products, jeopardizing the health and welfare of the U.S. and hindering the Secretary's ability to safeguard the health and welfare of the country's agriculture. Inorder to ensure that the statutory and regulatory mandates of the AHPA and PPA are met, it is necessary to hold Amazon accountable for all regulatory and statutory violations.

Therefore, summary judgment is warranted, and a one-million dollar ($1,000,000) civil penalty is appropriate.

Findings of Fact

1. For products sold on Amazon.com, foreign third-party sellers have two options for delivering products to their customers: 1) they can

---

[132] *See supra* note 82.

[133] *See* Annie Palmer, *Amazon reports first $100 billion quarter following holiday and pandemic shopping surge*, CNBC (Feb. 2, 2021) available at https://www.cnbc.com/2021/02/02/amazon-amzn-earnings-q4-2020.html (last visited Feb. 22, 2021).

[134] *See supra* page 28.

handle the shipping arrangements themselves or they can contract for Amazon to "fulfill" the orders; or 2) they can send their products to one of Amazon's many fulfillment centers before selling the product. Amazon calls this service "Fulfillment by Amazon". Amazon's Motion at 2.

2. Amazon offers a number of services to third-party sellers both before and after shipment of the product, including agreeing to store, label, and market the product presale and transport the product, with free shipping where applicable, interstate once a customer buys the product off the Amazon marketplace. CX 231-232.

3. Between March 24 and March 31, 2015, APHIS agents seized approximately thirteen (13) parcels at an International Mail Facility in San Francisco, California. Rieder Decl. Ex. 3-6. Each box was addressed to "Jim Chen," and listed the address of an Amazon fulfillment center. Rieder Decl. Ex. 3. On the international shipping label, the sender provided false information about the contents of the boxes, referring to them as "rubber tube" (Rieder Decl. Ex. 7), "personal belongings" (Rieder Decl. Ex. 8), and other generic items. When government agents opened the boxes, they discovered beef, pork, and poultry products that lacked the certificates required for entry. Rieder Decl. Ex. 1; Ex. 9. The packaging on the products indicated they were sold under the Yummy House Hong Kong brand. Rieder Decl. Ex. 10.

4. Shortly after agents intercepted the Yummy House Hong Kong products, an APHIS investigator contacted the Amazon fulfillment center listed as the destination, notified Amazon about the intercepted packages, and asked for information about the seller. Rieder Decl. Ex. 11-12.

5. After investigating internally, Amazon provided information about the seller account, Yummy House Hong Kong, tied to the shipments and information about the seller's products in Amazon fulfillment centers throughout the U.S. Rieder Decl. Ex. 11-12.

6. On an April 13, 2015 conference call, Amazon agreed to place a hold on Yummy House Hong Kong products at all its fulfillment centers.

During this call, Amazon revealed that fifty-three (53) packages of seller's products had been shipped to U.S. customers from its fulfillment centers over a six-month period. CX 90.

7. On May 13, 2015, Amazon identified, to Complainant, twenty-one (21) packages associated with Yummy House Hong Kong located in fulfillment centers in California and Pennsylvania. CX 90.

8. On May 13, 2015 Amazon released the products on hold at the Request of Yummy House Hong Kong after the "temporary hold" "expired." Liu Second Decl. at 1-2, ¶¶ 4-5.

9. On May 26, 2015, Emergency Action Notifications ("EANs") were issued to Amazon expressly stating that the twenty-one (21) packages identified by Amazon on May 13, 2015 must not be moved, except as directed by an Agriculture Officer. CX 91-93.

10. On June 5, 2015, Amazon informed governmental personnel that the twenty-one (21) products held under quarantine were erroneously released, with one package being sent to a fulfillment center in Tennessee and the remainder being sent to an independent warehouse in New Jersey. Rieder Decl. Ex. 13-14.9

11. On June 11, 2015, one of the erroneously released packages from the May 26, 2015 quarantine hold (.5kg of pork floss sold by Yummy House Hong Kong) was found and destroyed by APHIS personnel at a fulfillment center in Murfreesboro, Tennessee. CX 103.

12. On June 29, 2015, USDA agents went to the independent warehouse in New Jersey and discovered Yummy House Hong Kong beef, poultry, and pork products described in Complaint paragraphs 2.13 to 2.16. Rieder Decl. Ex. 13. Only one of these products originated from the twenty-one (21) erroneously released products from the May 26, 2015 quarantine hold. CX 101-102.

13. On July 9, 2015, APHIS agents seized three boxes at an International Mail Facility in Los Angeles, California. Rieder Decl. Ex. 2. The sender's name was not legible on the shipping label, but the sender had mailed the packages to the address of an Amazon fulfillment center. Rieder Decl. Ex. 15-16. On the international shipping label, the

sender provided false information about the contents of the boxes, misidentifying them as a "gift box" and "plastic strip." Rieder Decl. Ex. 17. When government agents opened the boxes, they discovered poultry products without the requisite certificates. Rieder Decl. Ex. 1. Amazon later identified the seller account associated with the shipment as "Deng Dan," or "DD222." Rieder Decl. Ex. 18 at 2.

14. On March 29, 2016, APHIS agents seized three boxes at an International Mail Facility in San Francisco. Rieder Decl. Ex. 19. The boxes were sent by "Songkran Prommanee" and addressed to "Songkran Prommanee" at an address associated with an Amazon fulfillment center. Rieder Decl. Ex. 20. When government agents opened the boxes, they discovered various food products derived from Kaffir lime leaves, intended for commercial sale. Rieder Decl. Ex. 19; Ex. 21.

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in favor of Complainant on all but one allegation is appropriate.

3. On or about March 24, 2015, Respondent Amazon imported and moved approximately 17.930kg of beef tendon and 26.685kg of pork floss from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.

4. On or about March 24, 2015, Respondent Amazon imported and moved approximately 56.83kg of chicken feet from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.

5. On or about March 24, 2015, Respondent Amazon imported and moved approximately 26.685kg of pork floss from China, a region where APHIS considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork and pork products were not accompanied by the requisite certificate.

6. On or about March 24, 2015, Respondent Amazon imported and moved approximately 26.685kg of pork floss from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork and pork products were not accompanied by the requisite certificate.

7. On or about March 26, 2015, Respondent Amazon imported and moved 15.55kg of chicken feet from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.

8. On or about March 30, 2015, Respondent Amazon imported and moved 4.430kg of beef from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.

9. On or about March 30, 2015, Respondent Amazon imported and moved approximately 19.07kg of chicken feet and 40.131kg of duck from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.

10. On or about March 31, 2015, Respondent Amazon imported and moved approximately 11.16kg of beef from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.

ANIMAL HEALTH PROTECTION ACT / PLANT PROTECTION ACT

11. A violation of 7 U.S.C. § 8306(c) requires failure to comply with a *written* quarantine hold. Therefore, Respondent Amazon's release of the twenty-one (21) identified products as alleged in paragraph 2.9 of the Complaint on May 13, 2015 did not fail to comply with the Secretary's EANs (*written* quarantine holds) dated May 26, 2015.

12. On or about June 11, 2015, Respondent Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.On or about June 11, 2015, Respondent Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork products were not accompanied by the requisite certificate.

13. On or about June 11, 2015, Respondent Amazon imported and moved approximately .5kg of pork floss from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork products were not accompanied by the requisite certificate.

14. On or about June 29, 2015, Respondent Amazon imported and moved approximately 2.34kg of beef tendon, .22kg of beef jerky, 1.75kg of shredded beef jerky, 13.3kg of shredded beef, 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers Rinderpest or foot-and-mouth disease to exist, in violation of 9 C.F.R. § 94.4, because the cured or cooked meat was not accompanied by the requisite certificate.

15. On or about June 29, 2015, Respondent Amazon imported and moved approximately 1.3kg of duck wings, 4.78kg of duck necks, .2kg of sweet corn sausage with chicken, .87kg of spicy hot dog sausage with chicken, and 1.22kg of chicken claws from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not

accompanied by the requisite certificate.

16. On or about June 29, 2015, Respondent Amazon imported and moved approximately 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers classical swine fever to exist, in violation of 9 C.F.R. § 94.9, because the pork and pork products were not accompanied by the requisite certificate.

17. On or about June 29, 2015, Respondent Amazon imported and moved approximately 8.6kg of pork jerky, 17.1kg of pork skin, and 1.25kg of pig feet from China, a region where APHIS considers swine vesicular disease to exist, in violation of 9 C.F.R. § 94.12, because the pork and pork products were not accompanied by the requisite certificate.

18. On or about July 9, 2015 Respondent Amazon imported and moved approximately 21.5kg of duck wings, 2kg of duck tongues, 26.5kg of duck necks, and 11.6kg of duck gizzards from China, a region where APHIS considers Newcastle disease or highly pathogenic avian influenza to exist, in violation of 9 C.F.R. § 94.6, because the carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds were not accompanied by the requisite certificate.

19. On or about March 18, 2016, Respondent Amazon imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

20. On or about May 11, 2016, Respondent Amazon imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

21. On or about May 13, 2016, Respondent Amazon imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in

violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

22. On or about May 16, 2016, Respondent Amazon imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

23. On or about May 19, 2016, Respondent Amazon imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

24. On or about May 31, 2016, Respondents imported kaffir lime leaves, a plant or plant part of the subfamily Aurantioideae, in violation of 7 C.F.R. § 319.19(a), because the plant or plant part was not a fruit or seed and was imported for commercial sale rather than one of the excepted purposes listed in 7 C.F.R. § 319.19(b)-(d).

ORDER

1. Summary Judgment is hereby **GRANTED** in favor of Complainant on all but one allegation.

2. Respondent's Motion for Summary Judgment, requesting an order dismissing paragraphs 2.1 to 2.8 and paragraphs 2.10 to 2.23 of the Complaint as a matter of law is **DENIED**.

3. Respondent's request for a hearing only as to penalty is **DENIED**.

4. Amazon has violated the Plant Protection Act, as amended and supplemented (7 U.S.C. §§ 7701 *et seq*.) ("PPA") and the regulations issued thereunder (7 C.F.R. § 301.81 *et seq*.) and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.) ("AHPA") and the regulations promulgated thereunder (9 C.F.R. § 79 *et seq*.) and is therefore

assessed a civil penalty of $1,000,000 to be paid by[1] check/cashier's check or money order, which must include reference to the Docket No. 19-J-0146 and Reference Nos. CA150117-HS, CA150172-HS, and CA160219-HS, made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to:

USDA – APHIS – GENERAL
CA150117-HS, CA150172-HS, and CA160219-HS
P.O. Box 979043
St. Louis, MO 63197-9000

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

Copies of this Decision and Order shall be served by the Hearing Clerk upon all parties.

—

In re: MIDDLESEX LIVESTOCK AUCTION, LLC.
Docket No. 18-0034.
Decision and Order Amended on Remand from Judicial Officer.
Filed June 10, 2021.

AHPA.

Lauren C. Axley, Esq., for APHIS.
Ms. Lisa Scirpo, representative of Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

---

[1] Payment may also be made online or by phone. Online payment is made at https://www.pay.gov (click on Agency List; click on "A" in Index; click on Agriculture Department; click on Department of Agriculture; click on Animal and Plant Health Inspection Service – APHIS Customers (2nd listing); complete the required information and submit the form; enter payment information and submit your payment; print confirmation screen as your receipt). To make a credit card payment by phone call (612) 336-3264 to speak to a Debt Management Specialist - state your Reference Number CA150117-HS, CA150172-HS, and CA160219-HS; and submit your credit card information.

ANIMAL HEALTH PROTECTION ACT

Decision and Order AMENDED on Remand from the USDA Judicial Officer

Decision Summary

1. Middlesex Livestock Auction, LLC, during 2014, 2015, and 2016, violated the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.*) (frequently "AHPA"), by failing to comply with a regulation (9 C.F.R. §§ 79 *et seq.*) that required specific recordkeeping for the transfer of ownership of 3 goats and APHIS immediate access to inspect records.

2. This Decision and Order differs from my first Decision and Order issued on December 15, 2020: Decision and Order on the Written Record (Ruling GRANTING in part and DENYING in part APHIS's Motion for Summary Judgment), online at https://www.usda.gov/sites/default/files/documents/201215_DOonSummaryJudgment_AHPA_18-0034%20Middlesex%20Livestock%20Auction%2C%20LLC_Redacted.pdf.

3. My Order near the end of this document imposes a $7,000 civil penalty, total, for the violations described in paragraph 1 above (as did my first Decision and Order), but this Order allows Middlesex Livestock Auction, LLC, to pay installments of not less than $150 per month until the $7,000 civil penalty is paid in full.

Recent Procedural History

4. The USDA Judicial Officer issued, on March 26, 2021, his Order Remanding for Further Proceedings ("the Judicial Officer's Remand Order") regarding Docket No. 18-0034, Middlesex Livestock Auction, LLC, Respondent, online at https://www.usda.gov/sites/default/files/documents/210326_JORemand_AWA_18-0034%20-%20Middlesex%20Livestock%20Auction%5B86%5D.pdf.

5. In response to the Judicial Officer's Remand Order, I filed Directions on April 9, 2021; Middlesex Livestock Auction, LLC (frequently "Middlesex Livestock Auction" or Respondent) filed its Response on

May 10, 2021; and the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently "APHIS" or Complainant), filed Complainant's Response on June 10, 2021.

6. Having carefully considered the documents specified in paragraphs 4 and 5 above, I enter the following Findings of Fact, Conclusions, and Order.

Findings of Fact

7. Middlesex Livestock Auction, LLC, the Respondent, adds value to the community (the community is Connecticut and surrounds), providing a livestock market for goats (the subject of this case), and other livestock: sheep, cattle, rabbits, fowl, horses, for example. The responsibility for defending this administrative action falls to Ms. Lisa Scirpo alone.

8. Middlesex Livestock Auction, LLC, the Respondent, is a limited liability company with a mailing address of PO Box 404, Durham CT 06422; and a business location at 488 Cherry Hill Rd, Middlefield CT 06455.

9. Middlesex Livestock Auction, LLC, committed serious offenses when it failed to make records immediately available for inspection when APHIS requested access. These failures occurred 5 or more years ago, on multiple dates in 2015 and 2016, including September 11, 2015; April 21, 2016; May 4, 2016; and October 28, 2016.

10. Middlesex Livestock Auction, LLC, committed serious offenses when it failed to keep specified records relating to the transfer of ownership of 3 goats at issue in the Complaint, so that those 3 goats could be traced. The goats are identified by the numbers 886, 887, and 1831. Those recordkeeping failures happened 6 or more years ago. One of the 3 goats was sold in 2014 (on November 17, 2014); two of the 3 goats were sold in 2015 (on August 31, 2015).

Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

12. Middlesex Livestock Auction, LLC, is currently best represented by Ms. Lisa Scirpo alone, for purposes of this docket.

13. The specific recordkeeping required by the regulations at 9 C.F.R. §§ 79 *et seq.* for the transfer of ownership of 3 goats; and for APHIS immediate access to inspect records, is authorized under the Animal Health Protection Act. 7 U.S.C. §§ 8301 *et seq.*

14. Having the name and address of the buyer of each of the 3 goats in the records of Middlesex Livestock Auction, LLC, is essential to APHIS being able to trace the goats in the event of an outbreak of disease. APHIS is vigilant to prevent the spread of Scrapie, a degenerative and eventually fatal disease affecting the central nervous systems of sheep and goats. Title 9 Code of Federal Regulations Part 79 is entitled "Scrapie in Sheep and Goats." 9 C.F.R. §§ 79 *et seq.*

15. Middlesex Livestock Auction, LLC failed to comply with records requirements of the regulations at 9 C.F.R. §§ 79 *et seq.* as stated in Findings of Fact, paragraphs 9 and 10 above.

16. Middlesex Livestock Auction, LLC (a) has proved that the corona virus pandemic has impacted its ability to pay a $7,000 civil penalty, and (b) has proved that years of the Scirpo family sacrificing to keep the Auction business open to serve the community has also impacted its ability to pay a $7,000 civil penalty.

17. Middlesex Livestock Auction, LLC can and should pay a $7,000 civil penalty, total, for the violations described in paragraphs 9 and 10 above, because APHIS needs to rely on an auction's records in order to trace animals in the event of an outbreak of disease.

18. An adjustment to the $7,000 civil penalty that is warranted, is to authorize Middlesex Livestock Auction, LLC to pay its civil penalty in installments of not less than $150 per month until paid in full, based on its inability to pay the total civil penalty in a lump sum.

19. The following Order is authorized by the Act and warranted under the circumstances.

ORDER

20. Respondent Middlesex Livestock Auction, LLC shall pay a **civil penalty totaling $7,000 (seven thousand dollars)** in **installments of not less than $150 per month** until paid in full, beginning within **60 days** after this Decision and Order becomes final and effective (see below, for this Decision and Order becomes final and effective). The payment(s) shall be **paid by certified checks, cashier's checks, or money orders**, marked **Docket No. 18-0034**, payable to order of "**US Dept. of Agriculture**" and delivered to the following address:

    U.S. Department of Agriculture
    APHIS, U.S. Bank
    PO Box 979043
    St Louis MO 63197-9000

Prepayment may be made without penalty. Failure to keep current on the amount that would have been paid if installments had been paid when due, may result in the entire balance becoming payable at once.

Finality

This Decision and Order shall be final and effective without further proceedings 35 (thirty-five) days after service, unless appealed to the Judicial Officer by a party to the proceeding by filing with the Hearing Clerk within 30 (thirty) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). *See* Appendix A.

The most efficient way to file with the Hearing Clerk is to email, or to FAX if you prefer, using the information on the last page of this Decision and Order. If emailing or FAXing to the Hearing Clerk, submit once [NOT in quadruplicate]. Due to the corona virus pandemic and limited in-office staffing, filing via email with the Hearing Clerk at SM.OHA.HearingClerks@usda.gov is preferred. Or, use the FAX number for the Hearing Clerk, if you prefer. The Hearing Clerk receives FAXes sent to 1-844-325-6940 in an inbox on the computer, so coming into the

office is not required to retrieve the FAXes.

Copies of this "Decision and Order AMENDED on Remand from the USDA Judicial Officer" shall be sent by the Hearing Clerk to each of the parties.

The Hearing Clerk will use for the Respondent Middlesex Livestock Auction, LLC both certified mail and regular mail, and as a courtesy will email Ms. Lisa Scirpo at the email address she used to reach the Hearing Clerk.

___

DEPARTMENTAL DECISIONS

In re: CARRIE LEO, an individual, d/b/a CARING FOR COTTONTAILS WILDLIFE RESCUE & REHABILITATION, INC., a New York State corporation.
Docket No. 20-J-0118.
Decision and Order of the Judicial Officer.
Filed February 26, 2021.

AWA.

Administrative Procedure – Appeal, late – Date and time stamp – Filing deadline – Finality – Hearing Clerk's Office, hours and closing time of.

John V. Rodriguez, Esq., for APHIS.
Carrie Leo, *pro se* Respondent.
Initial Decision and Order by Channing D. Strother, Chief Administrative Law Judge.
Order entered by John Walk, Judicial Officer.

Order Denying Late Appeal

Summary of Procedural History

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) ("AWA"); the regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary

Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules of Practice"). The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant") initiated this matter on April 21, 2020 by filing an Order to Show Cause Why Animal Welfare Act License 21-C-0435 Should Not Be Terminated ("Order to Show Cause"). The Respondent filed an Answer to the Order to Show Cause on June 2, 2020. On June 19, 2020, the Complainant filed a Motion for Summary Judgment against Respondent. On July 30, 2020, the Respondent filed an answer to Complainant's Motion for Summary Judgment, wherein the Respondent raised affirmative defenses and set forth counter-motions for dismissal of the Order to Show Cause and summary judgment. The Complainant filed a response on August 3, 2020.

On September 8, 2020, Chief Administrative Law Judge Channing D. Strother ("CALJ Strother") issued the Decision and Order Granting Complainant's Motion for Summary Judgment and Denying Respondent's Cross-Motions for Dismissal of Order to Show Cause and Summary Judgment ("Decision and Order"). On September 9, 2020, the Office of the Hearing Clerk ("OHC" or "Hearing Clerk") served the Respondent with a copy of the Decision and Order by email and on September 12, 2020, OHC served the Respondent with a copy of the Decision and Order by certified mail. [1]

On October 8, 2020, the Respondent requested an extension of time to file an appeal petition and the Judicial Officer granted an extension to, and including, November 8, 2020. On November 9, 2020, at 5:02 p.m., the Respondent submitted a Petition for Review of Decision Made by Administrative Law Judge & Complaint of Deprivation of Rights ("Appeal Petition") by email to OHC. The Appeal Petition is date and time-stamped 8:30 a.m., November 10, 2020 by OHC. Complainant filed a response to the Appeal Petition on November 25, 2020 ("Complainant's Response to Petition for Review"). On December 1, 2020, Respondent filed a request by email for "an additional submission of a supplement to my appeal" ("Request to Supplement").

[1] *See* OHC Letter dated September 9, 2020; United States Postal Service Domestic Return Receipt for Article Number 7018 2290 0000 8607 1621.

Discussion

The Rules of Practice provide that an appeal of an administrative law judge's written decision must be filed within 30 days after service, as follows:

> Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

CALJ Strother's Decision and Order of September 8, 2020 in the above-captioned proceeding was served upon Respondent on September 9, 2020. The deadline to file an appeal to the Judicial Officer was 30 days from that date, October 9, 2020, pursuant to the Rules of Practice.[2]

However, Respondent made a request for extension of time. In her Notice of Request for Extension of Time to File Appeal, dated October 8, 2020, Respondent requested "only a 3-4 day extension ideally until 4:30 PM on Monday, October 12, 2020."[3] The former Judicial Officer generously granted a 30-day extension of time to November 8, 2020.[4]

On Saturday, November 7, 2020, Respondent sent an email to Complainant's counsel and OHC staff. She wrote:

> Since the Judge granted my request to have until the end of the 7th to submit my appeal, he probably wouldn't get it until Monday. May I have until Monday 8:00 AM to

[2] *See* 7 C.F.R. § 1.145(a).

[3] Notice of Request for Extension of Time to File Appeal.

[4] Order Granting Respondent's Request to Extend the Time to File an Appeal to the Judicial Officer.

send the appeal in?

See Attachment 2 to Complainant's Response to Petition for Review.

Where, as here, a filing deadline falls on a Sunday, the Rules of Practice provide that the time allowed for filing "shall be extended to include the next following business day."[5] Therefore, Respondent already had until 4:30 p.m. (before the time of closing of OHC) [6] on Monday, November 9, 2020, to submit her appeal.[7] However, Respondent did not submit her Appeal Petition until 5:02 p.m. on Monday, November 9, 2020, which is 32 minutes past the closing time of OHC.[8] Further, the Appeal Petition is date and time-stamped received at 8:30 a.m., November 10, 2020, which is the time the Appeal Petition was actually received by OHC. The Rules of Practice provide that "[a]ny document or paper required or authorized . . . to be filed shall be deemed to be filed at the time when it

[5] 7 C.F.R. § 1.147(h).

[6] As stated on OHC's website, "Hours for filing: 8:30 am to 4:30 pm (Eastern)." *See* https://oalj.oha.usda.gov/hearing-clerks-office. Further, OHC served Respondent with a letter that informed her in bold typeface that OHC's office hours are 8:30 a.m. to 4:30 p.m. and that submissions received after 4:30 p.m. would not be stamped until the following business day. *See* OHC's letter dated April 22, 2020; United States Postal Service Domestic Return Receipt for Article Number 7015 3010 0001 5187 9905.

[7] The Judicial Officer has consistently held that filings are due on the day of the deadline before OHC closes for purpose of receiving filings. *See Lang*, 7 Agric. Dec. 59, 61 n.2 (U.S.D.A. 1998) (denying as late a request for extension of time to respond to respondent's appeal petition made on the day of the filing deadline thirteen (13) minutes after OHC closed for the purpose of filing documents); *Lion Raisins, Inc.*, 68 Agric. Dec. 244, 286-87, and n.35 (U.S.D.A. 2009), 2009 WL 1064498, at *26, and n.35 (finding that respondents were required to file an appeal petition no later than 4:30 p.m. on the day of the deadline when OHC receives documents from 8:30 a.m. to 4:30 p.m.); *Stewart*, 60 Agric. Dec. 570, 607 (U.S.D.A. 2001) (finding that request for an extension of time made on the day of the deadline to file an appeal petition was timely when request was submitted prior to OHC closing at 4:30 p.m. for purpose of filing documents), *aff'd* 64 F. App'x 941, 944 (6th Cir. 2003) (unpublished); *Sergojan*, 2010 WL 3191858, at *2-3 (U.S.D.A. Aug. 3, 2010) (finding appeal petition submitted after 4:30 p.m. on the day of the deadline was untimely).

[8] *See* Attachment 3 to Complainant's Response to Petition for Review.

reaches the Hearing Clerk."[9] The Judicial Officer has held that "[t]he Hearing Clerk's date and time stamp establishes the date and time a document reaches the Hearing Clerk."[10]Accordingly, Respondent's Appeal Petition is deemed filed at 8:30 a.m. on November 10, 2020, the time it was received by OHC. However, even assuming *arguendo* that Respondent's Appeal Petition is deemed filed at 5:02 p.m. on November 9, 2020, that would still be after the filing deadline had passed. Therefore, I find Respondent's Appeal Petition is late.

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final. [11] The Rules of Practice make the administrative law judge's written decision final 35 days after the date of service thereof unless an appeal is filed

---

[9] 7 C.F.R. § 1.147(g).

[10] *Sergojan*, 2010 WL 3191858, at *3 (U.S.D.A. Aug. 3, 2010); *see also Lion Raisins, Inc.*, 68 Agric. Dec. 244, 287 (U.S.D.A. 2009), 2009 WL 1064498, at *26 ("The most reliable evidence of the date and time a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document.").

[11] *See Edwards*, 75 Agric. Dec. 280, 281-83 (U.S.D.A. 2016) (concluding that Judicial Officer had no jurisdiction to hear appeal of ALJ's decision granting summary judgment filed after the decision became final); *Nunez*, 63 Agric. Dec. 766, 769-71 (U.S.D.A. 2004), 2004 WL 2031430, at *2 (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on the day the ALJ decision and order became final); *Hamilton*, 45 Agric. Dec. 2395, 2395 (U.S.D.A. 1986) (dismissing appeal filed on the day the initial decision became final); *Petro*, 42 Agric. Dec. 921, 921 (U.S.D.A. 1983) (stating that the Judicial Officer lacks jurisdiction to hear an appeal after the administrative law judge's initial decision has become final and effective); *Veg-Pro Distrib.*, 42 Agric. Dec. 1173, 1174 (U.S.D.A. 1983) (denying appeal of ALJ's decision and order filed after it became final); *Noble*, 68 Agric. Dec. 1060, 1061-62 (U.S.D.A. 2009) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed November 24, 2009 after the ALJ's decision became final on November 23, 2009); *Rosberg*, 73 Agric. Dec. 551, 554 (U.S.D.A. 2014) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on July 29, 2014 after the ALJ's decision became final on July 28, 2014); *Britz*, 76 Agric. Dec. 26, 29 (U.S.D.A. 2017) (concluding that Judicial Officer had no jurisdiction to hear appeal petition filed one day after ALJ's decision and order became final).

pursuant to § 1.145.[12] CALJ Strother's Decision and Order also contained the following notice:

> This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondent unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Decision and Order at 25.

Here, because an extension was requested and granted, the Decision and Order of CALJ Strother became final at 4:31 p.m. on November 9, 2020, after the filing deadline, as extended, expired. [13] After that time, the Judicial Officer had no jurisdiction to hear Respondent's appeal.

As the Judicial Officer has explained:

> The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative

[12] 7 C.F.R. § 1.142(c)(4).

[13] *See Everflora, Inc.*, 57 Agric. Dec. 1314, 1314-15, and n.3 (U.S.D.A. 1998) (finding that after Judicial Officer extended filing deadline to August 3, 1998 and OHC closed at 4:00 p.m., the ALJ's decision became final at 4:01 p.m. on August 3, 1998 and motion for extension of time filed at 10:15 a.m. on August 4, 1998 was denied as late); *Gray*, 64 Agric. Dec. 1699, 1702-05 (U.S.D.A. 2005) (concluding the Judicial Officer had no jurisdiction to hear an appeal after an extension of time to file was granted to May 26, 2005 and the appeal was filed May 27, 2005, one day after the ALJ's decision became final); *Gilbert*, 63 Agric. Dec. 807, 811-14 (U.S.D.A. 2004) (finding that ALJ's decision became final on the day of the deadline, as extended by the Judicial Officer, and concluding that Judicial Officer lacked jurisdiction to hear appeal filed the day after the extended deadline).

law judge's decision has become final.

Britz, 76 Agric. Dec 26, 29 (U.S.D.A. 2017); *see also Anglen Produce, Inc.*, 46 Agric. Dec. 1239, 1239 (U.S.D.A. 1987) (denying request for extension to file an appeal because ALJ's decision became final before the request was made and Judicial Officer no longer had jurisdiction); *Hulings,* 44 Agric. Dec. 298, 299 (U.S.D.A. 1985) ("[S]ince the Decision and Order had already become final, the Judicial Officer lacked jurisdiction to grant an extension of time for filing an appeal."); *Houston Livestock Co., Inc.*, 63 Agric. Dec. 896, 897-99 (U.S.D.A. 2002), 2002 WL 31396962, at *1 ("[T]he Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final."). Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after CALJ Strother's Decision and Order became final.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondent's Appeal Petition, filed November 10, 2020, is denied.

2. Respondent's Request to Supplement filed December 1, 2020, is denied as moot.

3. CALJ Strother's Decision and Order as to Respondent Carrie Leo, doing business as Caring for Cottontails Wildlife Rescue & Rehabilitation, Inc., filed September 8, 2020, is the final decision in this proceeding.

—

DAIRY PRODUCTION STABILIZATION ACT OF 1983

DEPARTMENTAL DECISION

In re: DAKIN DAIRY FARMS, INC.
Docket No. 19-J-0147.
Decision and Order of the Judicial Officer.
Filed February 8, 2021.

DPSA.

Administrative Procedure – Appeal, late – Filing deadline – Finality.

Brian T. Hill, Esq. for AMS.
Jerry Dakin, representative of Respondent.
Initial Decision and Order by Channing D. Strother, Chief Administrative Law Judge.
Order issued by John Walk, Judicial Officer.

Order Denying Late Appeal

Summary of Procedural History

This is a proceeding under the Dairy Production Stabilization Act of 1983 (7 U.S.C. §§ 4501-4514) (Dairy Stabilization Act); the Dairy Promotion and Research Order (7 C.F.R. §§ 1150.01-1150.278) (Dairy Promotion Order); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) (Rules of Practice).[1]

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture (Complainant), initiated this proceeding by filing a complaint against Dakin Dairy Farms, Inc. (Respondent) on September 4, 2019. The Complaint alleged that Respondent willfully violated the Dairy Stabilization Act and Dairy Promotion Order. On December 16, 2019, Respondent filed an answer to the Complaint. Thereafter, on February 13, 2020, Complainant filed an amended complaint alleging additional violations by Respondent. Respondent was duly served with a copy of the Amended Complaint and did not file an answer thereto within the time prescribed by the Rules of Practice. On May 11, 2020, Complainant filed a Motion for Adoption of Decision and Order by Reason of Default (Motion for Default) and Proposed Decision and Order by Reason of Default (Proposed Decision). Respondent did not file

[1] Although the Dairy Stabilization Act is not one of the statutes listed in the Rules of Practice (*see* 7 C.F.R. § 1.131(a)), the "rules of practice shall also be applicable to . . . [o]ther adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration." 7 C.F.R. § 1.131(b)(4). Concurrence was granted to Complainant in this case. *See* August 6, 2019 Memorandum attached to Complaint.

objections to the Motion for Default or Proposed Decision. On August 11, 2020, Chief Administrative Law Judge Channing D. Strother (CALJ Strother) filed his Decision and Order Without Hearing by Reason of Default (Decision and Order), granting Complainant's Motion for Default.

The Office of the Hearing Clerk (OHC) served the Decision and Order upon the Respondent on August 21, 2020 by certified mail. On September 25, 2020, Respondent filed a letter with the subject "Dakin Dairy Farms, Inc., Respondent," which I construe as an appeal petition.

Discussion

Section 1.145(a) of the Rules of Practice provides that an administrative law judge's decision must be appealed to the Judicial Officer within thirty (30) days after service. 7 C.F.R. § 1.145(a). The record establishes that OHC served the Decision and Order upon Respondent on August 21, 2020.[2] Thirty (30) days from the date of service was September 20, 2020. Where, as here, a filing deadline falls on a Sunday, the Rules of Practice provide that the time allowed for filing "shall be extended to include the next following business day." 7 C.F.R. § 1.147(h). Accordingly, the time for Respondent to file an appeal petition expired at the close of business on September 21, 2020. Respondent filed its appeal petition on September 25, 2020. Therefore, I find Respondent's appeal petition is late.

It has continuously and consistently been held that under the Rules of Practice the Judicial Officer is without jurisdiction to hear an appeal after the decision of the administrative law judge (ALJ) becomes final.[3] The

[2] United States Postal Service Domestic Return Receipt for Article Number 7018 2290 0000 8607 0822.

[3] *Nunez*, 63 Agric. Dec. 766, 769-71 (U.S.D.A. 2004) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on the day the ALJ decision and order became final); *Hamilton*, 45 Agric. Dec. 2395, 2395 (U.S.D.A. 1986) (dismissing appeal filed on the day the initial decision became final); *Petro*, 42 Agric. Dec. 921, 921 (U.S.D.A. 1983) (stating that the Judicial Officer lacks jurisdiction to hear an appeal after it has become final and effective); *Veg-Pro Distrib.*, 42 Agric. Dec. 1173, 1174 (U.S.D.A. 1983) (denying appeal of ALJ's default decision and order filed after it became final); *Gray*, 64 Agric. Dec. 1699, 1702-05 (U.S.D.A. 2005) (concluding the Judicial Officer had no jurisdiction to hear an appeal that was filed one day after the ALJ's decision became final); *Noble*, 68 Agric. Dec. 1060, 1061-62 (U.S.D.A. 2009) (concluding that the Judicial Officer had no

ALJ's decision becomes final 35 days after the date of service thereof unless an appeal is made to the Judicial Officer pursuant to the applicable Rules of Practice. 7 C.F.R. § 1.139. CALJ Strother's Decision and Order contained the following notice to Respondent:

> This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Pursuant to the Rules of Practice, the Decision and Order as to Respondent became final on September 25, 2020, the day Respondent filed the appeal petition. Therefore, I have no jurisdiction to hear Respondent's appeal.

The Rules of Practice do not provide for an extension of time to file an appeal petition after an ALJ's decision becomes final.[4] The absence of such a provision in the Rules of Practice emphasizes that the Judicial Officer is without jurisdiction to extend the time for filing an appeal after the ALJ's decision becomes final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent to file an appeal petition after CALJ Strother's Decision and Order became final. Moreover, Respondent

---

jurisdiction to hear an appeal filed November 24, 2009 after the ALJ's decision became final on November 23, 2009); *Rosberg*, 73 Agric. Dec. 551, 554 (U.S.D.A. 2014) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on July 29, 2014 after the ALJ's decision became final on July 28, 2014); *Britz*, 76 Agric. Dec. 26, 29 (U.S.D.A. 2017) (concluding that Judicial Officer had no jurisdiction to hear appeal petition filed one day after ALJ's decision and order granting motion for default became final).

[4] *Anglen Produce, Inc.*, 46 Agric. Dec. 1239, 1239 (U.S.D.A. 1987) (denying request for extension to file an appeal because ALJ's decision became final before the request was made and Judicial Officer no longer had jurisdiction); *Hulings*, 44 Agric. Dec. 298, 299 (U.S.D.A. 1985) (stating that ". . . since the Decision and Order had already become final, the Judicial Officer lacked jurisdiction to grant an extension of time for filing an appeal."); *Houston Livestock Co., Inc.*, 63 Agric. Dec. 896, 897-99 (U.S.D.A. 2002), 2002 WL 31396962, at * 1 (stating that " . . . the Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final.").

did not request an extension of time to file an appeal petition and provided no explanation at all for missing the deadline. Therefore, even if I had jurisdiction, which I do not, I would deny the appeal petition as late filed.

ORDER

1. Respondent's appeal petition filed on September 25, 2020 is denied.

2. CALJ Strother's Decision and Order as to Respondent filed on August 11, 2020 is the final Order in this proceeding.

___

HORSE PROTECTION ACT

COURT DECISION

FLEMING v. USDA.
No. 17-1246.
Court Decision.
Decided February 16, 2021 (rehearing en banc denied April 13, 2021).

HPA:
Disqualification – Enforcement – Soring.

Administrative Procedure:
Administrative appeal procedures – Administrative law judges – Appointments Clause – Due process – Exhaustion – "For-cause" removal protection, dual layers of – Inferior officer – Issue exhaustion – Issues, preservation of – Judicial estoppel – Judicial Officer – Judicial review – *Lucia* – Preservation – Principal officer – Remedies, exhaustion of – Removal – Tenure protections.

[Cite as: 987 F.3d 1903 (D.C. Cir. 2021)].

United States Court of Appeals,
District of Columbia Circuit.

Petitioners appealed the Judicial Officer's affirmation of default orders, asserting the Administrative Law Judge who issued the initial decision was improperly appointed and that USDA Administrative Law Judges enjoy unconstitutional, dual-layer protection from removal. The Court found that because petitioners raised the removal issue for the first time on appeal and failed to do so before the Department's Judicial Officer, the Court could not rule on the issue. The Court also declined to address petitioners' arguments regarding the Judicial Officer's appointment and USDA's authorities under the Horse Protection Act; however, it ultimately concluded that the ALJs are inferior officers who can be appointed by Department heads, such as the Secretary. Accordingly, the Court granted the petition for review, vacated the underlying default orders, and remanded petitioners' cases to the Department to conduct new proceedings before a properly appointed ALJ.

OPINION

HON. SRI SRINIVASAN, CHIEF JUDGE, DELIVERED THE MAJORITY OPINION OF THE COURT.

The petitions for review in these cases ask us to set aside decisions of the Department of Agriculture imposing sanctions on petitioners for

violating the Horse Protection Act, 15 U.S.C. § 1821 *et seq*. After the petitions for review were filed, the Supreme Court decided *Lucia v. S.E.C.*, —— U.S. ——, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018), holding that the SEC's administrative law judges (ALJs) had not been appointed in compliance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. In light of *Lucia*, the government agrees with petitioners that the ALJ who presided over petitioners' cases was improperly appointed. The government moves for vacatur of the challenged orders and remand for new proceedings before constitutionally appointed ALJs.

Petitioners, however, oppose the government's motion, urging us first to address a number of additional challenges they advance. While we consider and reject one of those additional claims, we cannot consider another of the arguments because petitioners failed to present it before the agency, and we decline to consider the remaining ones in the present posture. We therefore grant the petitions for review and remand these cases so that petitioners may have new administrative hearings before validly appointed ALJs.

I.

A.

The Horse Protection Act, 15 U.S.C. § 1821 *et seq.*, imposes penalties on persons who enter a "sore" horse into shows or auctions. "Soring" refers to the practice of intentionally injuring a horse's forelimbs so that it will quickly lift its feet as a result of the pain, inducing it to walk with a high-stepping gait considered desirable for shows and exhibitions. *See Thornton v. USDA*, 715 F.2d 1508, 1510 (11th Cir. 1983). The Horse Protection Act forbids the practice of soring in order to prevent animal cruelty and protect the industry. *See id.* Any person who knowingly shows or exhibits a sore horse faces criminal and civil penalties, including temporary disqualification from shows and exhibitions. 15 U.S.C. § 1825(a)(1), (b)(1), (c).

The Department of Agriculture enforces the Horse Protection Act. The Department begins enforcement proceedings under the Act (and other statutes it administers) by filing an administrative complaint against suspected violators. *See* 7 C.F.R. §§ 1.131, 1.133(b)(1). The proceeding is

then assigned to an ALJ within the agency. *Id.* § 1.132. A respondent served with a complaint has twenty days to file an answer. *Id.* § 1.136(a). If no answer is filed, the ALJ may enter a default order. *See id.* §§ 1.136(c), 1.139. If an answer is filed, the ALJ holds a hearing and issues a decision. *Id.* §§ 1.141, 1.142.

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

B.

In 2017, the Department filed an administrative complaint against petitioners Jarrett Bradley, Joe Fleming, and Sam Perkins, alleging that each of them had entered sored horses into competition in violation of the Horse Protection Act. No petitioner filed a timely answer to the complaint against him, and the agency moved for default orders in each case. Petitioners then filed objections to the motions for default. Among petitioners' arguments, they contended that the presiding ALJ qualified as an "Officer[ ] of the United States" for purposes of the Constitution's Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and had not been appointed in compliance with the Clause. Without addressing that argument, the ALJ entered the requested default orders, assessing civil monetary penalties and temporarily disqualifying petitioners from participating in horse shows or exhibitions.

Petitioners appealed to the Judicial Officer, renewing their contention that the ALJ had been improperly appointed. Petitioners additionally argued that the Judicial Officer's own appointment was invalid under the Appointments Clause. The Judicial Officer declined to rule on the Appointments Clause challenge to the ALJ, finding that it "should be raised in an appropriate United States Court of Appeals." *Joe Fleming*, 76 Agric. Dec. 532, 535 (2017). With regard to the constitutionality of his own appointment, the Judicial Officer concluded that he had been lawfully

appointed. *Id.* at 538. After rejecting petitioners' remaining arguments, the Judicial Officer affirmed the default orders. Petitioners then sought review in our court.

C.

While the petitions for review were pending, the Supreme Court decided *Lucia v. S.E.C.*, —— U.S. ——, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018). *Lucia* considered whether ALJs working in the Securities and Exchange Commission had been appointed in violation of the Appointments Clause. *Id.* at 2051. For purposes of the Clause, federal workers fall into three categories: (i) principal officers, who must be appointed by the President with the advice and consent of the Senate; (ii) inferior officers, who can be appointed by the President, the head of a department, or a court of law; and (iii) non-officer employees, whose appointments are unaddressed (and thus unconstrained) by the Clause. *See id.* at 2051 & n.3. *Lucia* held that the ALJ in that case was an officer rather than an employee, and that his appointment was invalid because he had not been appointed by the President, a department head, or a court of law. *Id.* at 2055. The Court vacated the ALJ's order and remanded for proceedings before a properly appointed ALJ. *Id.* at 2055.

After *Lucia*, the government conceded that the ALJ who had decided petitioners' cases was, as petitioners argued, an inferior officer who had been improperly appointed. The government thus moved our court to impose the same remedy ordered in *Lucia*: vacatur of the challenged orders and remand for new hearings before a different, properly appointed ALJ.

Petitioners, however, oppose the government's motion, urging us to address a number of additional arguments before any remand. Specifically, petitioners argue, as they did before the Judicial Officer, that (i) the Judicial Officer, appointed as an inferior officer, is in fact a principal officer; (ii) the Department's ALJs also are principal officers, not just inferior officers as is now conceded by the government; and (iii) the Department lacked authority under the Horse Protection Act to disqualify petitioners from entering horses in shows and exhibitions. Petitioners also advance a new argument they have not previously raised: the Department's ALJs enjoy dual layers of "for-cause" protection against their removal, 5

U.S.C. §§ 1202(d), 7521, and those dual layers of protection unconstitutionally constrain the President's removal power under the Supreme Court's decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

The government argues that we should decline to address petitioners' additional arguments and should do no more than grant them relief based on *Lucia*. With regard to petitioners' new argument that the dual layers of for-cause-removal protections for ALJs are unconstitutional under *Free Enterprise*, the government contends that we cannot consider the argument because petitioners failed to raise it before the agency. If we were to reach the merits of that issue, the government submits that we should adopt a narrowing construction of one of the applicable layers of removal protections, *see* 5 U.S.C. § 7521, to avoid serious constitutional concerns. Petitioners, for their part, urge us to reject the government's proposed narrowing construction and declare the dual for-cause-removal protections unconstitutional.

Thus, no party takes the position that the dual protections would be valid under *Free Enterprise* without adopting the government's narrowing construction. Yet *Free Enterprise* left open whether its holding applies to the dual layers of for-cause protections for ALJs. *See Free Enterprise Fund*, 561 U.S. at 507 n.10, 130 S. Ct. 3138; *see also Lucia*, 138 S. Ct. at 2060–61 (Breyer, J., concurring in the judgment in part and dissenting in part). To ensure full consideration of that issue, we requested supplemental briefing from the parties and appointed an amicus curiae to argue that the dual layers of for-cause protections for the Department's ALJs are constitutional even if the government's narrowing construction were rejected.[*] In the supplemental briefing, the government reiterated and elaborated on its view that petitioners' forfeiture of that issue before the agency means that we cannot consider it.

We are ultimately persuaded by the government's position in that regard: petitioners did not raise the dual for-cause-removal issue before the agency, and we are powerless to excuse the forfeiture. We also decline to address the other additional arguments petitioners ask us to consider,

[*] The court thanks court-appointed amicus curiae Pratik A. Shah, aided by Z.W. Julius Chen and Rachel Bayefsky, for their assistance in presenting this case.

except we reject their contention that the Department's ALJs are principal officers. Petitioners of course remain free to raise any of the unaddressed arguments in the proceedings on remand.

II.

We begin with petitioners' argument that the dual layers of for-cause-removal protections for the Department's ALJs unconstitutionally limit the President's removal power under *Free Enterprise*. As the government has maintained from the outset, petitioners did not raise that issue before the ALJ or the Judicial Officer. The argument thus was forfeited before the agency. Petitioners ask us to excuse the forfeiture and address the argument because it presents a structural constitutional objection. *See, e.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 878–79, 111 S. Ct. 2631, 115 L. Ed.2d 764 (1991). We have no power to do so. Petitioners' argument is subject to a mandatory, non-excusable, issue-exhaustion requirement imposed by statute, and we therefore cannot consider the claim.

By way of overview, our analysis proceeds as follows. The statute governing judicial review of the Department's adjudications expressly requires exhaustion of "all administrative appeal procedures established by the [agency]." 7 U.S.C. § 6912(e). That provision imposes a mandatory exhaustion rule, such that a court cannot excuse a party's failure to exhaust, no matter the reason. And one of the "administrative appeal procedures" the Secretary has established is a requirement to raise each issue in an appeal before the Judicial Officer. The upshot is that the statute and regulatory procedures require litigants to exhaust issues before the agency and forbid us from excusing any failure to do so. We thus lack the power to consider petitioners' unexhausted argument that, under Free Enterprise, the Department's ALJs are unduly insulated from the President's authority to remove them from office.

First, section 6912(e) establishes a mandatory exhaustion requirement, leaving courts with no room to excuse a party's failure to exhaust. As the Supreme Court has recently made clear, "courts have a role in creating exceptions" to a statutory exhaustion provision "only if Congress wants them to." *Ross v. Blake*, —— U.S. ——, 136 S. Ct. 1850, 1857, 195 L. Ed.2d 117 (2016). "For that reason, mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial

discretion" to excuse the failure to exhaust, *id.*, even under "standard administrative-law exceptions" such as futility or hardship, *id.* at 1858 n.2. Although judge-made exceptions of that kind are available in the case of a judge-made exhaustion obligation, when an exhaustion requirement is imposed by statute, the only question is whether Congress intended any "limits on a [litigant's] obligation to exhaust." *Id.* at 1856.

Congress did not intend any such limits under section 6912(e). The Supreme Court's decision in *Ross* makes that clear. *Ross* considered the Prison Litigation Reform Act's exhaustion requirement, which provides in relevant part that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Court concluded that the statute's "mandatory language means a court may not excuse a failure to exhaust." *Ross*, 136 S. Ct. at 1856. The sole exception, the Court noted, would be if a prisoner could show, per the terms of the statute itself, that administrative remedies were not "available." *Id.* at 1858–59.

The language of section 6912(e) is equally mandatory and equally "rigorous." *Id.* at 1857. Just as section 1997e(a) states that "[n]o action shall be brought . . . until" administrative remedies are exhausted, section 6912(e) provides that, "before [a] person may bring an action," she "shall exhaust all administrative appeal procedures established by the Secretary." If section 1997e(a) admits of no exception (other than the textual qualifier that remedies must be "available"), then section 6912(e) too admits of no exception. Indeed, we have already stated that "the language of [section] 6912(e) is very similar to" section 1997e(a). *Munsell v. USDA*, 509 F.3d 572, 580 (D.C. Cir. 2007). In *Munsell*, we held that section 6912(e) imposes a "mandatory, but nonjurisdictional [exhaustion] requirement," *id.* at 581, including for "constitutional claims," *id.* at 592. Although we had no occasion to decide whether section 6912(e)'s exhaustion rule could be subject to any court-made exception, *see id.* at 579, the answer must be no after *Ross*.

According to petitioners, *Munsell*'s statement that section 6912(e) is "nonjurisdictional" means that courts retain the ability to excuse a failure to exhaust. That is incorrect. The Supreme Court's intervening decision in *Ross* clarified that even nonjurisdictional exhaustion requirements—such as sections 1997e(a) or 6912(e)—forbid judges from excusing non-

exhaustion. To be clear, there is still a material difference between jurisdictional exhaustion requirements and nonjurisdictional, mandatory requirements. A court must enforce a jurisdictional requirement even if no party raises the failure to exhaust. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 82, 130 S. Ct. 584, 175 L. Ed. 2d 428 (2009). By contrast, a nonjurisdictional, mandatory exhaustion requirement functions as an affirmative defense, and thus can be waived or forfeited by the government's failure to raise it. *See id.*; *Jones v. Bock*, 549 U.S. 199, 212, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). But if the government raises the exhaustion requirement, the court must enforce it. That is the case here.

Petitioners also claim that *Munsell* recognized a futility exception to section 6912(e)'s exhaustion mandate. In disposing of the appellant's claim in *Munsell*, the court stated that, because "the complaint and affidavits [could not] reasonably be construed to indicate that it would have been futile for *Munsell* . . . to pursue their administrative appeals on their constitutional claims . . ., [*Munsell*'s] failure to exhaust their administrative remedies is dispositive." 509 F.3d at 592. That statement, however, only assumed the existence of a futility exception without deciding the matter, and offered no reasoning or precedent justifying the assumption. *See id.* Elsewhere in the opinion, the court stated that it had no "need [to] decide whether the 'well established exemptions' to nonjurisdictional exhaustion requirements apply to § 6912(e)." *Id.* at 579 (quoting *Woodford v. Ngo*, 548 U.S. 81, 126, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) (Breyer, J., concurring in the judgment)). *Munsell* thus does not stand in the way of our conclusion that section 6912(e) leaves no latitude for judges to excuse non-exhaustion. And *Ross* compels that conclusion.

Second, section 6912(e)'s non-excusable exhaustion requirement includes a requirement to raise an issue before the Judicial Officer in order to preserve it for judicial review. In *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006), the Supreme Court held that section 1997e(a) (the exhaustion provision considered in *Ross*) requires "proper exhaustion"—*i.e.*, "using all steps that the agency holds out, and doing so properly (so that the agency addresses the issue on the merits)." *Id.* at 90, 126 S. Ct. 2378 (internal quotation marks omitted). The Court explained: "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function

effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90–91, 126 S. Ct. 2378. The Court specifically contemplated that agency issue-preservation rules fit within the requirements for "proper exhaustion," reasoning that "courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." *Id.* at 90, 126 S. Ct. 2378 (internal quotation marks omitted); *see id.* (proper exhaustion enables an agency to "address[ ] the issue on the merits"). Again, we find no basis for distinguishing section 1997e(a), which requires exhausting "such administrative remedies as are available," from the statute at issue here, which requires exhausting "administrative appeal procedures." If anything, the case for proper exhaustion is even stronger with section 6912(e), which does not require that administrative appeal procedures be "available."

Several Department regulations, considered in combination, establish the requirement to preserve individual issues before the Judicial Officer. *Cf. Sims v. Apfel*, 530 U.S. 103, 108, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000) ("[I]t is common for an agency's regulations to require issue exhaustion in administrative appeals."). To begin with, 7 C.F.R. § 1.145(a) requires that "[e]ach issue set forth in the appeal petition [to the Judicial Officer] and the arguments regarding each issue . . . shall be plainly and concisely stated." Section 1.145(b) then allows other parties to the proceeding to raise "any relevant issue . . . not presented in the appeal petition." *Id.* § 1.145(b). And section 1.145(e) states that the "[a]rgument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal." *Id.* § 1.145(e). The regulations link those requirements for proper exhaustion to judicial review by conditioning "judicial review" on bringing an appeal before the Judicial Officer. *Id.* §§ 1.139, 1.142(c)(4).

Together, those regulations require that all arguments be timely presented to the Judicial Officer, and they empower her to impose forfeiture as to arguments not timely presented. Thus, if a party raises a new issue at oral argument before the Judicial Officer, she may rule against the party on forfeiture grounds, even if the forfeited argument makes clear that the ALJ's decision is erroneous.

Our consideration of unpreserved issues would frustrate that scheme. In *Woodford*, the Supreme Court held that raising issues in an untimely administrative appeal was not proper exhaustion and thus did not preserve those issues for judicial review. The forfeiture here is even more pronounced, for petitioners never gave the Judicial Officer any opportunity to consider the issue they now seek to press. On deferential review under the APA, *see* 5 U.S.C. § 706, we could not conclude that a decision by the Judicial Officer was arbitrary and capricious in failing to identify, raise, and resolve *sua sponte* an issue never presented to her. Put differently, "[i]f a party flouts [agency] regulation[s] by failing to raise with the [agency] an issue that the party asserts in court, the court generally has no basis for 'setting aside' the [agency's] order (even assuming the administrative law judge erred)." *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 750 (6th Cir. 2019) (quoting 33 U.S.C. § 921(c)). Read against section 6912(e) and the background rule of proper exhaustion, the Department's regulations thus required petitioners to exhaust specific issues before the Judicial Officer as a prerequisite to judicial review.

Our court has interpreted similar sets of regulations to require petitioners to "afford [an agency] an opportunity to pass on [a particular issue] before seeking judicial review." *Vermont Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 157 (D.C. Cir. 2012). In *Vermont*, we considered Nuclear Regulatory Commission regulations obligating parties to (i) petition for Commission review "before seeking judicial review of an agency action" and (ii) provide a "concise statement why in the petitioner's view the [challenged] action is erroneous." *Id.* (citing 10 C.F.R. §§ 2.1212, 2.341(b)(2)(iii)). Vermont relied on an earlier decision from our court, *Environmentel, LLC v. FCC*, which had also interpreted materially identical regulations to impose an issue-exhaustion requirement. *See* 661 F.3d 80, 83–84 (D.C. Cir. 2011) (citing 47 C.F.R. § 1.115(a), 1.115(b)(1)). To the same effect, the Supreme Court's decision in *Sims v. Apfel* cited a rule requiring petitioners to the Labor Benefits Review Board to "list[ ] the specific issues to be considered on appeal" as a typical example of "an agency's regulations [that] require issue exhaustion in administrative appeals." 530 U.S. at 108, 120 S. Ct. 2080 (quoting 20 C.F.R. § 802.211(a)). These precedents make clear that the requirement in 7 C.F.R. § 1.145(a) to set forth "each issue . . . plainly and concisely" in an appeal petition to the Judicial Officer, together with the associated regulations enumerated above, mandate issue exhaustion.

Summing up the above two points, section 6912(e) requires parties to properly "exhaust all administrative appeal procedures established by the Secretary," and one such "administrative appeal procedure" is a requirement that parties raise an issue before the Judicial Officer. Section 6912(e) thus incorporates the Department of Agriculture's internal appeal rules, which have included a requirement to raise individual issues before the Judicial Officer since well before the statute's enactment.

To be sure, 7 C.F.R. § 1.145(e) allows the Judicial Officer to determine, *sua sponte*, "that additional issues should be argued" to her even if not raised by the parties. But that regulatory grant of discretion to the Judicial Officer does not confer like authority on us. As explained, if the Judicial Officer had rejected an argument on the ground that it was raised to her out of time—thereby declining to exercise her discretion to excuse a forfeiture—we could not set aside her decision as arbitrary just because we found the forfeited argument persuasive on the merits. And we certainly could not conclude that the Judicial Officer acted arbitrarily in failing to identify and consider an issue never presented to her. As a result, the fact that the Judicial Officer could have considered the dual for-cause-removal issue below, despite petitioners' failure to raise it, does not mean that we can similarly choose to address it.

It follows that we have no discretion to excuse petitioners' failure to raise before the agency their dual for-cause-removal claim. The statute leaves no room for us to disregard petitioners' noncompliance with its mandatory obligation to exhaust the agency's administrative-appeal procedures, including the regulations' issue-exhaustion requirement. Petitioners, though, can press their unexhausted claim in the proceedings before the agency on remand.

Our dissenting colleague agrees that, insofar as the agency's regulations require issue exhaustion, the statute incorporates that requirement as a mandatory one. Dissenting Op. at 1107. In her view, however, the regulations do not establish an issue-exhaustion requirement. But the pertinent regulations, as explained, *see* pp. at 1100–01 – ——, *supra*, are materially indistinguishable from ones held by our court to require issue exhaustion. *See Vermont*, 684 F.3d at 157; *Environmentel*,

661 F.3d at 84; *see also Sims*, 530 U.S. at 108, 120 S. Ct. 2080 (citing 20 C.F.R. § 802.211(a)).

Our colleague further submits that we should forgo requiring issue exhaustion for either of two reasons: (i) the unexhausted dual for-cause-removal claim involves a structural constitutional issue, or (ii) judicial estoppel principles weigh against enforcing issue exhaustion in the circumstances of this case. Dissenting Op. at 1109–13 – ——. The statute and incorporated regulations, however, do not contemplate any exception to the mandatory issue-exhaustion requirement for either of those reasons. And there is no "judicial discretion" to consider an unexhausted claim when facing a "mandatory exhaustion regime[ ]." *Ross*, 136 S. Ct. at 1857. As a result, even if the Supreme Court elected as a matter of judicial discretion to consider an unpreserved structural constitutional claim in *Freytag v. Commissioner*, 501 U.S. at 878–79, 111 S. Ct. 2631, the kind of discretion exercised in *Freytag* is unavailable when, as here, a statute establishes a mandatory issue-exhaustion requirement. No such exhaustion requirement was considered in *Freytag*. And while our court considered an unexhausted separation-of-powers issue in *Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2013), we did so pursuant to an exception contained in the terms of the statutory exhaustion requirement itself, *id.* at 497, not by forging our own exception as a matter of judicial discretion.

With respect to judicial estoppel, because it too is a creature of judicial discretion, *see Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 797 (D.C. Cir. 2010), we doubt it can overcome a statute's mandatory exhaustion obligation. In any event, our colleague's basis for applying judicial estoppel falls short. In her view, because a Department representative argued before the Judicial Officer that he lacked authority to decide constitutional challenges, the Department should be estopped from contending that petitioners should have raised their dual for-cause-removal claim to the Officer. Dissenting Op. at 1110–11 – ——. But while a Department representative did argue to the Judicial Officer that he lacked authority to decide constitutional claims, the representative also clarified that constitutional claims needed to be raised before the Officer to preserve them for judicial review. Dep't Resp. to Pet. Admin. Appeal, J.A. 247. And in any event, the Judicial Officer denied the suggestion that he lacked any authority to decide constitutional claims: he considered (and rejected) a

structural constitutional claim that his appointment had been inconsistent with the Appointments Clause. *Joe Fleming*, 76 Agric. Dec. at 538. Perhaps for that reason, petitioners have not raised judicial estoppel as a basis for us to reach the merits of their unexhausted dual for-cause-removal claim.

We finally address our colleague's suggestion that, if the statute in fact incorporates an issue-exhaustion requirement, we would be obligated to dismiss the petitions for review in their entirety rather than only decline to consider the unexhausted claim. Dissenting Op. at 1109–10. That notion appears to rest on the language of the statute, which calls for exhaustion "before the person may bring an action in . . . court." 7 U.S.C. § 6912(e). There is no reason to think, though, that a failure to exhaust as to one claim precludes judicial review of any and all claims (including ones for which the exhaustion requirement has been met). For instance, in *Environmentel*, the relevant regulation similarly required exhaustion as a "condition precedent to judicial review of any [agency] action." 661 F.3d at 84 (quoting 47 C.F.R. § 1.115(k)). And while we declined to consider two issues that had not been properly exhausted, we did not then dismiss the petition for review in its entirety: instead, we otherwise reviewed the challenged order and sustained it. *Id.* at 85–86. Here, we likewise cannot consider petitioners' unexhausted dual for-cause-removal claim, but we remain free to consider any claims they properly exhausted in the agency proceedings.

III.

Petitioners preserved the remainder of their claims before the agency, but they fare no better in terms of obtaining additional relief from our court at this time.

Petitioners first argue that the Department's ALJs are principal officers, and that the steps the Secretary of Agriculture has taken to redress the *Lucia* problem—namely, ratifying ALJs' appointments and administering new oaths of office, *Trimble*, 77 Agric. Dec. 15, 17 (2018)—are insufficient to allow any ALJ to hear petitioners' case on remand. We disagree. The ALJs are inferior officers who can be appointed by department heads like the Secretary.

An officer of the United States is "inferior" for purposes of the Appointments Clause if her "work is directed and supervised at some level by" principal officers. *Edmond v. United States*, 520 U.S. 651, 663, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997). Under *Edmond*, courts examine three factors in applying that test: (i) whether the officer is subject to supervision and oversight by a principal officer; (ii) whether the officer is subject to removal by a principal officer; and (iii) whether the officer has final decisionmaking authority. *See id.* at 664, 117 S. Ct. 1573; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339 (D.C. Cir. 2012).

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

Petitioners contend that the Judicial Officer's appellate review is insufficient to demonstrate the ALJs' inferior-officer status unless the Judicial Officer is a principal officer, because, petitioners say, an inferior officer's decisions must be subject to review by a principal officer. We do not decide whether the Judicial Officer is a principal officer (see below), but we reject petitioners' argument regardless. It is inconsistent with *Intercollegiate*, which found the officers at issue to be inferior even though they could make significant decisions without review by another officer. 684 F.3d at 1341–42. Moreover, the Secretary (a principal officer) has considerable influence over whether an ALJ's decision becomes the final decision of the agency. For one thing, the Secretary may, at his election, step in and act as final appeals officer in any case. *See* 7 C.F.R. § 2.12. For another, the Secretary may remove the Judicial Officer at will,

providing the Secretary "a powerful tool for control," *Edmond*, 520 U.S. at 664, 117 S. Ct. 1573. Indeed, the Supreme Court has suggested that an officer who may be removed at will by another officer is the latter's "alter ego" for constitutional purposes. *See Free Enter. Fund v. PCAOB*, 537 F.3d 667, 686 & n.1 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (collecting cases), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010). In short, the Department's ALJs are inferior officers.

Petitioners separately make two other arguments. We decline to consider either of them at this stage.

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

Petitioners also advance a statutory argument, contending that the agency lacks authority under the Horse Protection Act to disqualify them from events and impose civil fines in the same proceeding. We have no reason to address that argument at this stage as it does not bear on the lawfulness of the administrative process petitioners will undergo on remand. As with any of their other unresolved claims, petitioners can press it in the remaining proceedings.

* * * * *

For the foregoing reasons, we grant the petitions for review, vacate the underlying orders, and remand to the agency for further proceedings consistent with this opinion.

So ordered.

HON. NEOMI RAO, **CIRCUIT JUDGE**, CONCURRING IN PART AND DISSENTING IN PART:

This appeal raises an important structural constitutional question, namely whether administrative law judges, who are Executive Branch officers exercising significant executive power, can be insulated from the Chief Executive with two layers of for-cause removal protection. The Constitution and decisions of the Supreme Court provide a clear answer: such a double layer of independence contravenes the separation of powers and undermines the democratic accountability promoted by vesting all executive power in the President.

Rather than reach this question, the majority goes to great lengths to avoid it. In the majority's view, this court is barred from considering petitioners' challenge until the agency considers it first—despite the fact the agency has steadfastly maintained it cannot consider structural constitutional challenges until *we* reach them first. The court refuses to act before the agency, while the agency refuses to act before the court—trapping petitioners in an administrative-judicial hall of mirrors. It would be one thing if the governing statute or regulations compelled this result. They do not. It abdicates our judicial responsibility to duck a properly presented and serious constitutional challenge to the structure of administrative adjudication. I would therefore reach the merits of the petitioners' challenge and hold the tenure protections for administrative law judges unconstitutional.

I.

The proceedings in this case arose under the Horse Protection Act, a statute administered by the U.S. Department of Agriculture ("USDA" or "Department") that is designed to protect show horses from abusive trainers. *See* 15 U.S.C. §§ 1821–1831. To impose civil penalties under the Act, the USDA must first provide the accused with "notice and opportunity for a hearing before the Secretary." 15 U.S.C. § 1825(b)(1). The Secretary is not, however, required to personally preside over each proceeding. Instead, agencies may "appoint as many administrative law judges ["ALJs"] as are necessary" to conduct the hearings required by statute. 5 U.S.C. § 3105. Once appointed by the Secretary, an ALJ has a high degree of independence protected by two layers of for-cause removal

restrictions. The Secretary may remove an ALJ "only for good cause established and determined by the Merit Systems Protection Board ["MSPB"]." 5 U.S.C. § 7521(a). And the members of the MSPB are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

In the case before us, the USDA filed complaints alleging that petitioners "sored" Tennessee walking horses. Soring is a practice that involves deliberately injuring horses to force them to adopt a particular gait. The petitioners failed to answer the complaints in time, so the ALJ entered default orders imposing monetary sanctions and disqualifying the petitioners from horse competitions for several years. The petitioners proceeded to exhaust the available review procedures by appealing the orders to the Judicial Officer—an official who performs regulatory functions on behalf of the Secretary and reviews orders issued by the agency's ALJs. *See* 7 U.S.C. § 2204-2; 7 C.F.R. § 1.145. While the petitioners presented several constitutional challenges to the appointment of the ALJ and the Judicial Officer, they did not object to the ALJ's removal protections. The Judicial Officer, however, categorically refused to consider any constitutional challenges to the ALJ until a court addressed the merits of those challenges first. The Judicial Officer then affirmed the ALJ's orders.

The petitioners filed an appeal in this court. The appeal was held in abeyance pending the Supreme Court's resolution of *Lucia v. SEC*, which held that the ALJs of the Securities and Exchange Commission ("SEC") are officers of the United States who must be appointed in accordance with the Appointments Clause. —— U.S. ——, 138 S. Ct. 2044, 2055, 201 L. Ed. 2d 464 (2018). *See also* U.S. Const. art. II, § 2. No party disputes that under *Lucia*, ALJs of the USDA are officers of the United States, and I agree with the majority that these ALJs are inferior officers who must be appointed by the President or the head of a department. Maj. Op. at 1095 (remanding for "new administrative hearings before validly appointed ALJs"). It follows that the ALJ presiding below, who was hired by agency staff, was not constitutionally appointed.

In addition to the Appointments Clause question resolved by *Lucia*, the petitioners raise several other structural constitutional challenges before this court. Most important for our purposes, they argue that the two

layers of for-cause tenure protection insulating ALJs from removal are unconstitutional under *Free Enterprise Fund v. Public Company Accounting Oversight Board*. *See* 561 U.S. 477, 498, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (holding that it unconstitutionally infringes the President's executive power to insulate the Public Company Accounting Oversight Board ("PCAOB") with two layers of tenure protection). The USDA asks that we vacate and remand in light of the *Lucia* error and decline to reach the removal power issue; the petitioners, on the other hand, ask that we decide the question rather than remand to a decisionmaker who would still lack the constitutional authority to preside. The agency maintains that petitioners failed to exhaust their challenge to the removal protections before the agency and should be barred from raising it in this appeal. On the merits, the government's only defense of the ALJ's double layer of tenure protections is that the term "good cause" can be construed broadly to avoid the constitutional question and to allow for a measure of presidential control that satisfies constitutional requirements.

After the parties briefed and argued the additional questions raised by the petitioners, this panel appointed an amicus to defend the position that, assuming we reject the government's construction of the "good cause" standard set out in 5 U.S.C. § 7521(a), the double layer of for-cause protection is "nonetheless not 'incompatible with the Constitution's separation of powers' as applied to administrative law judges within the Department of Agriculture." Order at 1, *Fleming v. Dept. of Agric.*, No. 17-1246 (D.C. Cir. Dec. 6, 2019) (quoting *Free Enterprise Fund*, 561 U.S. at 498, 130 S. Ct. 3138). The court ordered a new round of briefing, again heard oral argument, and has received more than forty supplemental filings.

The majority now bends over backward to avoid the constitutional challenge to the ALJ removal protections. For the reasons discussed below, I would reach the question and hold the double layer of for-cause removal protection unconstitutional.

II.

Petitioners failed to raise their constitutional challenge to the ALJ's independence before the agency. The majority holds that the petitioners

may not raise their challenge to the double for-cause removal protections on appeal until they have exhausted the issue by presenting it to the agency. I disagree: no statute, nor any regulation, mandates issue exhaustion. The relevant statute, 7 U.S.C. § 6912(e), requires that parties exhaust all available *procedures*, but nothing in its text requires that a party exhaust specific *issues* by presenting them to the agency. And the relevant regulation, 7 C.F.R. § 1.145, does not bar the petitioners' challenge because it similarly does not mandate issue exhaustion. Moreover, in light of the importance of judicial review of structural constitutional issues, our precedents strongly favor, if not require, reaching such issues even when not exhausted before an agency. Finally, the USDA should be estopped from raising its exhaustion argument. Before the agency's adjudicators, the USDA successfully argued that constitutional challenges to the ALJ must first be decided by the courts. The agency should not now be able to argue the opposite, namely that this constitutional issue must first be decided by the agency. Exhaustion is simply not required here and therefore I would reach petitioners' substantial constitutional challenge to the ALJ removal protections.

A.

The USDA's exhaustion statute provides that "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against . . . the Department." 7 U.S.C. § 6912(e). Two aspects of this statute are particularly salient. First, we have held "that 7 U.S.C. § 6912(e) does not impose a *jurisdictional* exhaustion requirement" because it does "not contain the type of sweeping and direct language that would indicate a jurisdictional bar." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 575, 580 (D.C. Cir. 2007) (quoting *Ali v. Dist. of Columbia*, 278 F.3d 1, 5–6 (D.C. Cir. 2002)). Second, Section 6912(e) does not directly require parties to exhaust specific issues by presenting them to an agency before raising them in court—the statute requires only that a party exhaust available "appeal procedures."

This language reflects a well-established distinction in administrative law between issue exhaustion, which requires that a party raise specific arguments, and exhaustion of remedies, which requires that a party seek review after exhausting the available agency procedures. *Sims v. Apfel*,

530 U.S. 103, 107, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000). Section 6912(e) provides only for exhaustion of remedies, which is in sharp contrast to numerous statutes in which Congress has explicitly required a party to exhaust issues before an agency as a prerequisite to bringing a claim in court.[1] Section 6912(e) imposes no freestanding issue exhaustion requirement for petitioners to present their removal challenge to the agency.

Because the statute alone cannot support issue exhaustion, the majority must maintain that the statute bars our review by "incorporat[ing]" issue-exhaustion requirements found in the agency's regulations. Maj. Op. at 1100–01. I agree with the majority that issue exhaustion could be required under Section 6912(e), but *only if* the agency's regulations require such exhaustion. *See Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) (holding that a statutory exhaustion requirement similar to Section 6912(e) requires "compliance with an agency's deadlines and other critical procedural rules"); *Island Creek v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019) (explaining that under a similar statute, issue exhaustion is required only if "an agency's rules so require"); *see also Sims*, 530 U.S. at 113, 120 S. Ct. 2080 (O'Connor, J., concurring in part) (emphasizing that issue exhaustion is required when "a specific . . . regulation requir[es]" it, but not when a regulation "affirmatively suggest[s] that specific issues need not be raised"). The Department cannot prevail on exhaustion because its regulations do not mandate issue exhaustion.

The majority maintains that 7 C.F.R. § 1.145 requires that parties appeal specific issues to the Judicial Officer. Maj. Op. at 1097–98, 1099 –

[1] *See, e.g.*, 15 U.S.C. § 717r(b) ("No objection to the order of the [Federal Energy Regulatory] Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."); *see also* 29 U.S.C. § 160(e) ("No objection that has not been urged before the [National Labor Relations] Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); 30 U.S.C. § 816(a) ("No objection that has not been urged before the [Federal Mine Safety and Health Review] Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

1100. The plain meaning of this regulation, however, does not include issue exhaustion as a requirement for raising issues on judicial appeal. Rather, it establishes a series of ministerial requirements for administrative appeals to the Judicial Officer. The majority primarily relies on 7 C.F.R. § 1.145(e), which states that "[a]rgument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except . . . if the Judicial Officer determines that additional issues should be argued." 7 C.F.R. § 1.145(e). Section 1.145(e) is entirely silent with respect to judicial review—it states only that the "[s]cope of argument" before the Judicial Officer will be limited to issues raised on the parties' appeal to the Judicial Officer. Moreover, Section 1.145(e) does not require issue exhaustion, because it explicitly provides that the Judicial Officer may allow unraised issues to be argued.

Other subparts of the regulation impose various procedural rules for the administrative appeal, but no exhaustion requirement. For instance, Section 1.145(a) requires that "[e]ach issue set forth in the appeal petition [to the Judicial Officer] and the arguments regarding each issue . . . shall be plainly and concisely stated." 7 C.F.R. § 1.145(a). Section 1.145(b) provides for the timing and details of the response to the petition. The other provisions address such requirements as the format and timing of oral argument; appeals submitted for decision on the briefs; transmittal of briefs; and transcription of testimony. 7 C.F.R. § 1.145(c), (d), (h). The regulation simply does not create a mandatory issue exhaustion requirement, and the majority's contrary conclusion cannot be supported by the plain meaning of the regulation. Put another way, nothing in the regulation forecloses this court from excusing a failure to exhaust or from applying standard exceptions to exhaustion. *Cf. Ross v. Blake*, ––– U.S. –––, 136 S. Ct. 1850, 1858 n.2, 195 L. Ed. 2d 117 (2016) (noting that some statutory exhaustion provisions "might be best read to give judges the leeway to create exceptions or to . . . incorporate standard administrative-law exceptions" and that "[t]he question in all cases is one of statutory construction").

The majority largely ignores the non-mandatory terms in which 7 C.F.R. § 1.145(e) is written and instead emphasizes that the regulations "empower" the Judicial Officer "to impose forfeiture." Maj. Op. at 1100. Yet the majority fails to explain why such a power would be an "appeal

procedure[ ]" that requires exhaustion under Section 6912(e). Like courts, agency adjudicators have the power to reject arguments that are not raised. *See, e.g.*, *In re Laurel Baye Healthcare of Lake Lanier*, 352 NLRB 179 at *1 n.2 (2008), *vacated on other grounds*, *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) ("The respondent waived this argument by failing to raise it before the [administrative law] judge."). Nonetheless, the Supreme Court has concluded some agency regulations "do not require issue exhaustion." *Sims*, 530 U.S. at 108, 120 S. Ct. 2080. Thus, it is not enough that the agency has the power to rely on forfeiture. The majority must demonstrate that the agency's regulations require parties to affirmatively raise each argument they wish to preserve for judicial review. 7 C.F.R. § 1.145 does not. Instead the regulation explicitly states that a party may prevail on an argument regardless of whether it was raised.

The cases the majority relies upon cannot support its claim that the USDA's regulation requires issue exhaustion. Maj. Op. at 1100–01 – –––. For instance, unlike this case, *Environmentel, LLC v. FCC*, 661 F.3d 80 (D.C. Cir. 2011), involved a statute with a mandatory issue exhaustion requirement. *See* 47 U.S.C. § 405(a) ("The filing of a petition for reconsideration" shall be "a condition precedent to judicial review . . . where the party seeking such review . . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."). In light of the explicit statutory exhaustion requirement, the court easily concluded that "the full FCC must have the opportunity to review all cases and all aspects of those cases before parties may exercise their statutory right to appeal to this Court." *Environmentel*, 661 F.3d at 84.

Nor can the majority rely on *Vermont Department of Public Service v. United States*, because the court in that case did not hold that the regulations at issue imposed mandatory exhaustion. 684 F.3d 149 (D.C. Cir. 2012). Rather, it analyzed the issue under judge-made exhaustion doctrines, which give the court discretion to excuse failure to exhaust. *See id.* at 159 (Although a court "may, in its discretion, excuse exhaustion," the court "find[s] no such exculpatory circumstances here.") (quoting *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir.

2004)) (cleaned up).[2] It is the majority, then, that departs from precedent by disclaiming our discretion to excuse failures to exhaust.

Furthermore, when an agency's regulations are the basis for issue exhaustion, rather than the statute itself, arguments must be raised before the agency in the manner "appropriate under [the agency's] practice." *Woodford*, 548 U.S. at 90, 126 S. Ct. 2378 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952)) (emphasis omitted). In light of the USDA's stated policy not to consider structural constitutional challenges to ALJ decisionmaking authority absent a court ruling, 7 C.F.R. § 1.145 cannot require exhaustion of this issue. *See* J.A. 372–74. Where, as here, an agency chooses not to consider a certain class of claims, the agency's procedures cannot be said to require that parties exhaust those claims. To require exhaustion in such a case as a prerequisite for judicial review would be inconsistent with the underlying justifications for issue exhaustion, namely, giving the agency the chance to correct its mistakes and making judicial review more efficient. *Woodford*, 548 U.S. at 89, 126 S. Ct. 2378.

Finally, the majority is unwilling to accept the full consequences of its conclusion regarding issue exhaustion. Section 6912(e) imposes a mandatory exhaustion of remedies requirement—the failure to exhaust "appeal procedures" bars a judicial action against the Department. *See* 7 U.S.C. § 6912(e) ("[A] person shall exhaust all administrative appeal procedures . . . before the person may bring an action in a court of competent jurisdiction."). Under the majority's determination that the agency's appeal procedures have not been exhausted, petitioners should be barred from bringing this entire "action," not merely the unexhausted claim. *See* Maj. Op. at 1102–03. The majority cannot explain how the plain meaning of the statute allows petitioners to maintain part of their suit despite failing to exhaust the regulatory appeal procedures. The majority finds the statute unyielding—but then carves out exceptions to reach some, but not all, of petitioners' constitutional claims.

[2] The majority's reliance on dicta in *Sims* also does not support reading 7 C.F.R. § 1.145(e) to require exhaustion. Maj. Op. at 1100–01. In *Sims*, the Court merely mentioned a different regulatory provision, 20 C.F.R. § 802.211(a), in passing as an example of issue exhaustion. 530 U.S. at 108, 120 S. Ct. 2080. But *Sims* did not have occasion to interpret that regulation or the one at issue in this case.

B.

The majority's resolution also cannot be squared with the Supreme Court's repeated determination that structural constitutional challenges are an exception to general principles of exhaustion.[3] The failure to raise such important issues before an agency does not bar our review. Challenges to the double layer of for-cause removal protection go to the constitutional legitimacy and accountability of agency adjudication. *See Free Enterprise Fund*, 561 U.S. at 496, 130 S. Ct. 3138 (explaining that a double for-cause removal limitation "impair[s]" the President's "ability to execute the laws by holding his subordinates accountable for their conduct") (cleaned up). Because petitioners' claim here is a structural constitutional challenge, it can "be considered on appeal whether or not [it was] ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 879, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962) (noting "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"). As in *Freytag*, "we are faced with a constitutional challenge that is neither frivolous nor disingenuous," and the problem with two layers of for-cause removal protection "goes to the validity" of the ALJ adjudication in this case. 501 U.S. at 879, 111 S. Ct. 2631.

Similarly, petitioners' challenge "implicate[s] fundamental separation of powers concerns." *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014). In *Noel Canning*, this court excused exhaustion and reached the constitutional question, *id.* at 496–98, even though the Supreme Court had previously held that the relevant statute imposes a jurisdictional exhaustion requirement that deprives "the Court of Appeals [of] jurisdiction to review objections that were not urged before the

[3] The majority notably does not rely on judge-made exhaustion doctrines, which may be available "even in the absence of a statute or regulation." *Sims*, 530 U.S. at 109, 120 S. Ct. 2080. By forcing issue exhaustion into a statute and regulation that do not require it, the majority avoids having to determine whether the exceptions for structural constitutional issues are available. *Ross*, 136 S. Ct. at 1857 (noting that judge-made exhaustion requirements "remain amenable to judge-made exceptions"); *see also* Maj. Op. at 1098 ("[E]xceptions of that kind are available in the case of a judge-made exhaustion obligation.").

Board," *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982). Moreover, in *PHH Corporation v. CFPB*, the en banc court explained that "we cannot avoid the constitutional question" regarding the removal protections for the Director of the Consumer Financial Protection Bureau ("CFPB"), because a remand to the CFPB for further action "necessitate[d] a decision on the constitutionality of the Director's for-cause removal protection." 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc), *abrogated by Seila Law v. CFPB*, —— U.S. ——, 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020).

Our cases reinforce the importance of resolving constitutional questions in the circumstances of this case, in which petitioners have raised serious structural constitutional claims regarding the accountability of the ALJ adjudicating their case. The issues are pure questions of law that will not benefit from further development by the agency. Moreover, the majority's remedy requires a remand to the agency, which means that like in *PHH* we cannot avoid petitioners' constitutional claims about the adjudicator they will face on remand. Therefore, it is both necessary and appropriate for us to reach petitioners' constitutional challenge to the ALJ's double layer of for-cause removal protection.

C.

Although I think neither the statute nor the regulations require issue exhaustion, even assuming with the majority that USDA's regulations create a mandatory issue exhaustion requirement, the agency should be estopped from prevailing on its exhaustion argument before this court.

In this case, the petitioners are subject to regulatory requirements written, enforced, and adjudicated by the USDA; but the USDA insisted throughout the proceedings that constitutional claims must be brought first in this court. Now the agency says constitutional claims must be brought first before the agency. I would not allow the agency to duck and weave its way out of meaningful judicial review.

In an attempt to persuade the Judicial Officer not to reach several constitutional challenges to the ALJ's authority (challenges unrelated to the removal question now at issue), the USDA argued below that its Rules of Practice—which include 7 C.F.R. § 1.145—do not apply to

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

Indeed, the Judicial Officer adopted this exact reasoning and language, ruling that "administrative law judges should continue to preside over administrative proceedings . . . unless and until there is a final determination by the federal courts that they lack the authority to do so." J.A. 372. After successfully making its argument below, the Department does a 180 and argues to this court—and the majority agrees—that the agency's regulations require parties to exhaust structural constitutional challenges before the agency.

The government should be estopped from raising its exhaustion argument. As the majority and I agree, Section 6912 is a mandatory, but non-jurisdictional, exhaustion of remedies requirement. For us to enforce such a requirement, it must be raised by a party. Maj. Op. at 1098–99 – – ——. But the government should not be permitted to raise its exhaustion argument. Judicial estoppel of the agency's exhaustion argument is appropriate to prevent the agency "from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (citation omitted); *see also Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 734 (D.C. Cir. 2019) ("[M]ost circuits have applied judicial estoppel in cases where the first proceeding was before an agency . . . and no circuit has declined to do so.") (citations omitted). Since all agree that there is no jurisdictional exhaustion requirement the court must enforce *sua sponte*, even a mandatory exhaustion requirement does not prohibit us from reaching the merits

when the government is estopped from invoking exhaustion. Contrary to the majority's contention, Maj. Op. at 1101–02, judicial estoppel is precisely the kind of exception that even a mandatory exhaustion statute contemplates because such a statute requires exhaustion to be properly invoked by a party.

Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Moses v. Howard Univ. Hosp*., 606 F.3d 789, 797 (D.C. Cir. 2010) (quoting *Maine*, 532 U.S. at 750, 121 S. Ct. 1808). "[T]he circumstances under which judicial estoppel may appropriately be invoked are . . . not reducible to any general formulation of principle," *Maine*, 532 U.S. at 750, 121 S. Ct. 1808 (citation omitted), but courts often consider three factors: (1) whether the later position is "clearly inconsistent" with the earlier position; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750–51, 121 S. Ct. 1808 (cleaned up). These three factors are not "inflexible prerequisites or an exhaustive formula," and other "considerations may inform the doctrine's application." *Id.* at 751, 121 S. Ct. 1808.

The circumstances here amply meet these factors. First, the agency's position before this court that petitioners should have exhausted their ALJ removal argument before the agency is "clearly inconsistent" with its initial position that such structural constitutional questions must be first raised in court. J.A. 247. Second, the agency ultimately succeeded in persuading the Judicial Officer to decline to hear petitioners' constitutional challenge to the ALJ, and instead to proclaim that "challenges to the constitutionality of the [ALJs] and the administrative process should be raised in an appropriate United States Court of Appeals." J.A. 372. Finally, the agency would "derive an unfair advantage" if it is allowed to benefit from its change of position.[4] *Maine*, 532 U.S. at 751, 121 S. Ct. 1808.

[4] In a similar context, the Sixth Circuit invoked judicial estoppel and permitted a suit to go forward in the district court because an agency had previously prevailed by convincing the MSPB that the suit could go forward *only* in the district court. *Valentine-Johnson v. Roche*, 386 F.3d 800, 809–11 (6th Cir. 2004). The court refused to let the agency "ma[k]e a 180-degree change in its position" by

Shifting interpretations of agency regulations always carry the risk of "creat[ing] unfair surprise or upset[ing] reliance interests." *Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2421, 204 L. Ed. 2d 841 (2019); *see also Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016) (emphasizing the danger of unsettling reliance interests when an agency reverses position).

It would be contrary to basic principles of fairness to permit the government to prevail before this court by invoking conflicting interpretations of a regulation at different phases of the same litigation.[5] Our equitable discretion would be well exercised to hold agencies to their word, rather than encourage them to formulate and then reformulate their legal positions to conveniently support their litigating needs.

* * *

The majority approves the USDA's bait-and-switch, remanding petitioners' claims to the USDA without resolving the serious constitutional challenge to the ALJ's independence. After years of litigation, the petitioners, having already exhausted the agency's procedures once, must now return to make their constitutional arguments to an agency that has announced it will not consider constitutional arguments. Straining to avoid judicial decision, the majority places a

---

arguing that the suit could not proceed in district court because the plaintiff had failed to exhaust her administrative remedies. *Id*. at 810.

[5] After the agency argued that the Rules of Practice do not apply to constitutional arguments, it commented that parties should nonetheless preserve such arguments. J.A. 247 ("[I]t is well settled that constitutional issues should be raised in administrative proceedings, thereby preserving them for appeal."). These two propositions are consistent: regardless of whether 7 C.F.R. § 1.145(e) applies, judge-made exhaustion rules may require that parties present constitutional issues to an agency before raising them in court, at least as a general matter. *See Sims*, 530 U.S. at 109, 120 S. Ct. 2080. Thus, one stray statement encouraging parties to preserve constitutional arguments for judicial review does not nullify the agency's plain and unambiguous statement that a "constitutional challenge against the ALJs . . . is not . . . governed by the Rules of Practice." J.A. 247. Having clearly stated that position below, the agency should be precluded from arguing the precise opposite on appeal.

substantial burden on petitioners, horse trainers who have the temerity to challenge the constitutionality of government procedures.

When Congress requires issue exhaustion before an administrative agency, we must stay our hand. In this case, however, nothing in the relevant statute or regulation requires exhaustion. We should reach petitioners' structural constitutional claims even though they were not raised below. *Freytag*, 501 U.S. at 878–79, 111 S. Ct. 2631. Rather than send petitioners to argue before a decisionmaker who lacks the constitutional authority to preside, I would proceed to the merits.

III.

Under the text, structure, and original meaning of the Constitution, as well as Supreme Court precedent, it is unconstitutional to insulate Agriculture ALJs with two layers of removal protection.[6]

A.

The Constitution vests the executive power in a single person, the President. U.S. Const. art. II, § 1; *see also Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone."). The powers vested in the President and the unitary structure of the Executive Branch mean that the President must control execution of the laws. In order to "take care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the President must be able to direct his subordinates in how the laws will be executed. Because "removal at will" is "the most direct method of presidential control," *Seila Law*, 140 S. Ct. at 2204, "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties,'" *id.* at 2191 (quoting *Free Enterprise Fund*, 561 U.S. at 513–14, 130 S. Ct. 3138). Placing the removal power squarely in the President's hands preserves "the chain of dependence," such that "the lowest officers, the middle grade, and the highest, will

[6] Petitioners do not challenge the constitutionality of a single layer of for-cause removal protection, so I do not address this issue. *See* Petitioners Supp. Br. 35 (urging this court to hold that "the USDA ALJs' dual-level-tenure-protection contravenes separation of powers").

depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 518 (1789) (statement of J. Madison).

This chain of dependence promotes democratic accountability by ensuring the President is "a single object for the jealousy and watchfulness of the people." *The Federalist* No. 70, at 479 (Alexander Hamilton) (Cooke ed. 1961). Moreover, the removal power reinforces the independence of the Executive—the absence of such control "would undermine the separate and coordinate nature of the executive branch." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1228 (2014). While the President can and must rely on subordinates, the power to remove those subordinates is a "structural protection[ ] against abuse of power" that is "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).

The President's removal power derives from the text and structure of the Constitution and "has long been confirmed by history and precedent." *Seila Law*, 140 S. Ct. at 2197.[7] Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal power. The view that "prevailed" in the First Congress "as most consonant to the text of the Constitution" was that the Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power "remained with the President" unless "expressly taken away" by the Constitution. Letter from James Madison to Thomas Jefferson (June 30, 1789).

---

[7] *See generally* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 796 n.556 ("Most members of [the First] Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541, 597 (1994) ("[S]tructural reasons and a host of historical and textual arguments persuade us that the President must also have a removal power so that he will be able to maintain control over the personnel of the executive branch.").

The Supreme Court has repeatedly returned to that original meaning in recognizing that "[s]ince 1789, the Constitution has been understood to empower the President to keep . . . officers accountable—by removing them from office, if necessary." *Free Enterprise Fund*, 561 U.S. at 483, 130 S. Ct. 3138; *see also Bowsher*, 478 U.S. at 723–24, 106 S. Ct. 3181 (observing that the Decision of 1789 is "weighty evidence" of the scope of the removal power) (citation omitted); *Myers v. United States*, 272 U.S. 52, 111–36, 47 S. Ct. 21, 71 L. Ed. 160 (1926) (discussing the Decision of 1789 at length); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259, 10 L. Ed. 138 (1839) (noting that the First Congress's understanding became the "settled and well understood construction of the Constitution"). Consistent with this original public meaning, the Supreme Court has emphasized that the executive power vested in the President includes nearly unfettered power to remove officers of the Executive Branch.

Moreover, the Court has recognized only two judicially created exceptions to the general constitutional requirement of "the President's unrestricted removal power." *Seila Law*, 140 S. Ct. at 2192. These exceptions "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 2199–2200 (quoting *PHH Corp.*, 881 F.3d at 196 (Kavanaugh, J., dissenting)). First, the Court has held that Congress may "create expert agencies led by a *group* of principal officers removable by the President only for good cause." *Id.* at 2192 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L. Ed. 1611 (1935)). Second, the Court has held that Congress may provide limited "tenure protections to certain *inferior* officers with narrowly defined duties." *Id.* (citing *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988), *United States v. Perkins*, 116 U.S. 483, 6 S. Ct. 449, 29 L. Ed. 700 (1886)). The Supreme Court recently declined to elevate these exceptions "into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority." *Seila Law*, 140 S. Ct. at 2206 (cleaned up).

Of particular relevance to petitioners' challenge is *Free Enterprise Fund*, in which the Court explained that "Congress cannot limit the President's authority" by imposing "two levels of protection from removal for those who nonetheless exercise significant executive power." 561 U.S.

at 514, 130 S. Ct. 3138. That case involved members of the PCAOB, who could be removed by the SEC only "for good cause shown." 15 U.S.C. § 7211(e)(6). Commissioners of the SEC, the Court assumed, could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise Fund*, 561 U.S. at 487, 130 S. Ct. 3138 (quoting *Humphrey's Executor*, 295 U.S. at 620, 55 S. Ct. 869). Thus, two layers of for-cause removal protections insulated members of the PCAOB from presidential control.

The Court held that this "novel structure does not merely add to the Board's independence, but transforms it." *Id.* at 496, 130 S. Ct. 3138. "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. . . . He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Id.* Refusing to sanction innovative intrusions on the President's removal authority, the Court held that the independence created by a double layer of tenure protection was unconstitutional.

The Constitution's vesting of executive power in a single President, the structure of separate and independent powers, and longstanding Supreme Court precedent confirm that the President has broad power to remove executive officers. The Court has also reaffirmed that any judicially created exceptions to the removal power must be construed narrowly in light of the President's constitutional responsibility to execute the law.

B.

Under this framework, the "dual for-cause limitations on the removal" of ALJs "contravene the Constitution's separation of powers." *Free Enterprise Fund*, 561 U.S. at 492, 130 S. Ct. 3138.

First, ALJs are officers of the United States. As the government concedes and the majority agrees, this conclusion follows from the Court's decision in *Lucia*, because Agriculture ALJs are materially indistinguishable from SEC ALJs. For example, Agriculture ALJs have extensive control over hearings, including the authority to issue subpoenas, take and order depositions, admit or exclude evidence, and rule

upon motions. 7 C.F.R. § 1.144(c). The ALJ's decision becomes final absent an appeal. *Id.* § 1.142(c)(4), § 2.27(a)(1). Agriculture ALJs also have career appointments, 5 C.F.R. § 930.204(a), pursuant to an authorizing statute, *see* 5 U.S.C. § 3105. Since *Lucia*, no appellate court has found that a particular agency's ALJs are not officers. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (extending *Lucia* to apply to Social Security Administration ALJs). *See also* U.S. Dep't of Justice, Memorandum: Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (2018) at 2 ("[W]e conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause."). Following *Lucia*, Agriculture ALJs are inferior Executive Branch officers.

Second, as "Officers of the United States," ALJs exercise the Article II executive power on behalf of the President. To be sure, ALJs perform adjudicative functions and use adjudicatory procedures to execute the law. *See* 7 C.F.R. § 1.141. Whatever methods or functions are employed, however, officers of the Executive Branch cannot exercise anything but executive power:

> The [legislative power] is vested exclusively in Congress, the [judicial power] in the "one supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish." Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the "executive Power."

City of Arlington v. FCC, 569 U.S. 290, 304 n.4, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013) (citations omitted); *see also Freytag*, 501 U.S. at 912, 111 S .Ct. 2631 (Scalia, J., concurring in part) ("[T]he Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power.").[8] As Congress lacks the power to delegate to Executive Branch

[8] Justices of the Supreme Court who disagree about the permissible restrictions on the President's removal power agree that the heads of independent agencies exercise executive power, even when they adjudicate or enact regulations. *See Free Enterprise Fund*, 561 U.S. at 514, 130 S. Ct.

officers either the legislative power, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001), or the judicial power, *Stern v. Marshall*, 564 U.S. 462, 484, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), ALJs can exercise neither. *See also Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring in part and dissenting in part) (explaining that Congress cannot "create agencies that straddle multiple branches of Government . . . [f]ree-floating agencies simply do not comport with [the] constitutional structure").

Third, while "Congress may afford the officers of [Executive Branch adjudicative bodies] a measure of independence from other executive actors . . . they remain Executive–Branch officers subject to presidential removal." *Kuretski v. Comm'r*, 755 F.3d 929, 944 (D.C. Cir. 2014). As officers exercising the executive power, Agriculture ALJs must be accountable to the President. To secure the requisite constitutional accountability, officers must be in the chain of command to the President, with control generally provided by removal at will. *See Seila Law*, 140 S. Ct. at 2191.

Yet despite being Executive Branch officers wielding the executive power on behalf of the President, Agriculture ALJs are not subject to the President's control, either directly or through the Secretary of Agriculture. Congress insulated ALJs with two layers of for-cause removal protection: an agency may remove an ALJ "only for good cause established and determined by the [MSPB]," 5 U.S.C. § 7521(a), and members of the MSPB "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d).

ALJs have not always enjoyed such double layered independence. Prior to 1946, ALJs enjoyed no tenure protections at all and "were in a dependent status" vis-à-vis their agency. *Ramspeck v. Fed. Trial Exam'rs*

3138 (observing that PCAOB members with adjudicatory functions "exercise significant executive power"); *id.* at 516, 130 S. Ct. 3138 (Breyer, J., dissenting) (framing the question as the President's power to dismiss "executive Branch officials"); *see also Seila Law*, 140 S. Ct. at 2234 n.7 (Kagan, J., concurring in part and dissenting in part) (disagreeing with the majority regarding the scope of the removal power but noting that "today we view *all* the activities of administrative agencies as exercises of the executive power") (cleaned up).

Conf., 345 U.S. 128, 130, 73 S. Ct. 570, 97 L. Ed. 872 (1953). The Administrative Procedure Act ("APA") in 1946 first provided that ALJs may be removed only for good cause, a development designed to promote "independence and tenure within the existing Civil Service system." *Id.* at 132, 73 S. Ct. 570. Congress ensured ALJs were "removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission." Administrative Procedure Act, Pub. L. No 79-404, § 11, 60 Stat. 237 (1946). The members of the Civil Service Commission, however, were removable at will by the President. *See* 5 U.S.C. § 632 (1946) ("The President may remove any Commissioner."). So ALJs were protected by a single for-cause removal restriction.

It was not until 1978 that Congress established the Merit Systems Protection Board, the members of which can be removed only for cause, to replace the Civil Service Commission. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 1202(d), 92 Stat. 1111. These amendments also placed ALJs within the control of the MSPB, creating the double layer of for-cause removal protection. Thus, the double layered independence for ALJs is a relatively recent innovation. *Cf. Seila Law*, 140 S. Ct. at 2202 ("The CFPB's single-Director structure is an innovation with no foothold in history or tradition.").

When the two for-cause removal restrictions are combined, neither the President nor the Secretary has any meaningful power to remove ALJs from office—for any reason, much less for "simple disagreement with [their] policies or priorities." *Free Enterprise Fund*, 561 U.S. at 502, 130 S. Ct. 3138. Because adjudication is the sole mechanism by which the USDA can execute statutes like the Horse Protection Act, *see* 15 U.S.C. § 1825(b)(1), an ALJ's double layer of independence deprives the President of any effective control over enforcement of such statutes. The two layers insulating Agriculture ALJs from removal are materially identical to the two layers that protected members of the PCAOB—an ALJ may be removed only for cause by a Board whose members may be removed only for cause.[9] This is an unconstitutional infringement of the President's executive power.

[9] In *Free Enterprise Fund*, the Supreme Court explicitly stated that it was "*not* address[ing]" the question of the constitutionality of double layer removal protections for ALJs. 561 U.S. at 507 n.10, 130 S. Ct. 3138 (emphasis added).

While the Court has recognized that an inferior officer may be insulated from removal in some circumstances, *see Seila Law*, 140 S. Ct. at 2199 (citing *Morrison*, 487 U.S. at 662–63, 696–97, 108 S. Ct. 2597), that narrow exception to the President's removal power does not extend to two layers of for-cause tenure protection. A second layer of for-cause protection "contravene[s] the Constitution's separation of powers," because it results in officers who are "not accountable to the President, and a President who is not responsible for" his officers. *Free Enterprise Fund*, 561 U.S. at 492, 495, 130 S. Ct. 3138.

Under the double tenure protection in Section 7521(a), the Secretary cannot remove an ALJ who fails to follow the policy directives of the agency—the "second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so." *Id.* at 497 n.4, 130 S. Ct. 3138. This limitation on the President's oversight of the execution of the laws "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 498, 130 S. Ct. 3138. Thus, statutory insulation of ALJs with two layers of for-cause removal protection impedes the President's control over execution of the laws and violates the Constitution's structure of separate and independent powers.

C.

The government and court-appointed amicus raise a number of arguments in support of removal protections for Agriculture ALJs. They focus primarily on the ALJ's adjudicatory role and scope of responsibility, as well as the Secretary's remaining oversight powers. At root, these arguments assume that ALJs are categorically different from other Executive Branch officers. Yet such a principle is incompatible with the

---

The Court later said in *Lucia* that "[n]o court has addressed th[e] question" of whether an ALJ's tenure protections are constitutional, explicitly leaving the question open once again. 138 S. Ct. at 2050 n.1. Court-appointed amicus is therefore mistaken in asserting that the Court exempted ALJs from its holding in *Free Enterprise Fund*. *See* Appointed Amicus Rep. Br. 2. The open question is squarely presented in this case.

Constitution and recent Supreme Court decisions. As the Court recognized in *Lucia*, ALJs are "officers" for the purposes of the Appointments Clause. 138 S. Ct. at 2049, 2054. They must therefore be "officers" for the purposes of the President's removal power. The principle of "adjudicatory independence" pressed by amicus is explicitly protected in the Constitution by the life tenure and irreducible salaries guaranteed to Article III judges, *see* U.S. Const. art. III, § 1; however, any principle of adjudicatory independence for ALJs must be understood in the context of executive power exercised within the Executive Branch. In that context, the President has the constitutional power and responsibility for overseeing execution of the laws, a power generally backed by the threat of removal. Any insulation Congress creates for agency adjudication must be compatible with the Constitution's vesting of all executive power in the President.

Neither the government nor the court-appointed amicus demonstrates how two layers of for-cause removal protections for ALJs are compatible with the Constitution and the Supreme Court's precedents confirming the centrality of the President's removal authority to the separation of powers.

1.

Dodging the constitutional question, the government insists that we can and must interpret the double for-cause removal protection in Section 7521(a) to avoid running afoul of Article II. To reach this result, the government maintains that the "good cause" standard can be read to allow removal of ALJs for "misconduct, poor performance, or failure to follow lawful directions, but not for reasons that are invidious or otherwise improper in light of their adjudicatory function," and that such a reading would be sufficient to protect the President's executive power. Gov't Supp. Br. 31.

The Supreme Court, however, has repeatedly declined to read statutory removal restrictions contrary to their conventional and longstanding meaning, a meaning that includes a measure of independence from policy direction. As the Court has explained, "removal restrictions set forth in the statute mean what they say," and for-cause provisions generally do not permit removal based on "simple disagreement with . . . policies or priorities." *Free Enterprise Fund*, 561 U.S. at 502, 130 S. Ct.

3138. In *Seila Law*, the Court likewise rejected constructions of "good cause" to allow for greater presidential control, because "we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority." 140 S. Ct. at 2207; *see also id.* at 2206 (noting that the government's saving construction would conflict with *Humphrey's Executor*, which "implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy"); *Free Enterprise Fund*, 561 U.S. at 503 n.7, 130 S. Ct. 3138 (finding the government's construction of good cause "implausibl[e]"); *PHH Corp.*, 881 F.3d at 191 n.16 (Kavanaugh, J., dissenting) ("[F]or-cause removal restrictions attached to independent agencies ordinarily prohibit removal except in cases of inefficiency, neglect of duty, or malfeasance.").[10]

The government also fails to provide any criteria for separating what it considers "legitimate reasons" for removal from the invidious ones. Gov't Supp. Br. 32. *Cf. Seila Law*, 140 S. Ct. at 2206 (noting that the CFPB's defenders failed to articulate "any workable standard derived from the statutory language" for their interpretation of good cause). The government's ahistorical and unconventional interpretation would create substantial uncertainty about the degree of permissible presidential control of ALJs and run afoul of the separation of powers. Enforcing the President's constitutional power of removal through case-by-case statutory interpretation would leave courts to make the ultimate assessment of "good cause" for removal. Such a scheme would undermine the President's independent constitutional authority to ensure faithful execution of the law by controlling and directing his subordinates.

Thus, I would reject the government's attempt to reconstruct "good cause" removal protections in a manner contrary to longstanding Supreme

[10] Moreover, the MSPB's assessments of good cause in ALJ removal proceedings are reviewed by the Federal Circuit, which, like the Supreme Court, has maintained that the good cause standard does not permit removal based only on policy disagreements. *See Berlin v. Dep't of Labor*, 772 F.3d 890, 894 (Fed. Cir. 2014) (holding that an agency may not remove an ALJ if it would "constitute an improper interference with the ALJ's performance of his quasi-judicial functions") (citing *Brennan v. Dep't of Health & Human Servs.*, 787 F.2d 1559, 1563 (Fed. Cir. 1986)).

Court precedent. The double for-cause removal protection is not amenable to an interpretation that allows us to avoid the constitutional question.

2.

The court-appointed amicus argues that two layers of for-cause removal protection are constitutional because "removal protections for Executive Branch officials with adjudicatory roles have become firmly ensconced in constitutional law." Appointed Amicus Br. 7. This claim, however, relies on an outdated distinction between adjudication and other executive functions in order to justify restrictions on the President's removal power.

While *Humphrey's Executor* upheld removal restrictions for a so-called independent agency exercising "quasi-legislative" and "quasi-judicial" functions, 295 U.S. at 629, 55 S. Ct. 869 (1935) (cleaned up), the Supreme Court has repudiated this reasoning. In *Morrison v. Olson*, for example, the Supreme Court explicitly departed from its earlier reliance "on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved":

> [T]he determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.

487 U.S. at 689–90, 108 S. Ct. 2597. Whatever an official's functions may be, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Id.* at 691, 108 S. Ct. 2597; *see also Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring in part and dissenting in part) (explaining that "the Court's premise [in *Humphrey's Executor*] was entirely wrong" because "[t]he Constitution does not permit the creation of officers

exercising 'quasi-legislative' and 'quasi-judicial powers' in 'quasi-legislative' and 'quasi-judicial agencies'").

In line with this reasoning, the Court has invalidated for-cause removal limitations for executive officers who perform judicial functions. It struck down the double layer of removal protection for members of the PCAOB because they were executive officers, despite their judicial functions. *See Free Enterprise Fund*, 561 U.S. at 498, 130 S. Ct. 3138. Similarly, the Court invalidated the removal restrictions for the Director of the CFPB, irrespective of his adjudicatory functions. *Seila Law*, 140 S. Ct. at 2193 (detailing the CFPB's "extensive adjudicatory authority").

Admittedly, the ALJs at issue here have only adjudicatory functions, whereas the CFPB Director and the members of the PCAOB performed adjudicatory as well as other functions. *See* Appointed Amicus Br. 4; Appointed Amicus Rep. Br. 12. Yet this makes no constitutional difference. The Court has emphasized that officers exercise the executive power, irrespective of what functions they perform. *See Freytag*, 501 U.S. at 901, 907, 111 S. Ct. 2631 (Scalia, J., concurring in part) (contending that the Tax Court, despite having exclusively adjudicatory functions, is an executive "department," the head of which is "answerable to the President"). Moreover, even if some for-cause limitations on removal of ALJs may fit under the exception for inferior officers in *Morrison*, a question not presented here, the arguments raised by amicus regarding "adjudicatory independence" cannot justify a *double layer* of removal protection, which the Supreme Court specifically held unconstitutional in *Free Enterprise Fund*.

The cases reinforce that regardless of their particular functions—adjudication, rulemaking, prosecution, etc.—officers within the Executive Branch exercise the executive power. The President or someone directly accountable to him must have the power to control officers executing the law, and ALJs are no exception.

3.

The court-appointed amicus also argues that two layers of for-cause removal protection are acceptable because Agriculture ALJs "do not wield expansive enforcement or policymaking powers." Appointed Amicus Br.

24. This argument just reframes the previous argument—namely, because ALJs are not exercising traditional executive functions, they may be insulated from the President's control. Even on functionalist grounds, however, amicus is mistaken.

As the Supreme Court noted in *Lucia*, ALJ adjudication *is* an enforcement power. 138 S. Ct. at 2049 (explaining that ALJ adjudication is simply "one way" agencies "enforce the nation's ... laws"). In enforcing the law, ALJs play a substantial role in formulating an agency's policy. While ALJs cannot promulgate department-wide regulations, they nonetheless "determine, on a case-by-case basis, the policy of an executive branch agency." *Sec'y of Educ. Rev. of ALJ Decisions*, 15 Op. O.L.C. 8, 15 (1991). Moreover, as the Court has recognized, ALJs have "significant discretion" when exercising their "important functions." *Lucia*, 138 S. Ct. at 2053 (citing *Freytag*, 501 U.S. at 882, 111 S. Ct. 2631).

In particular, the Horse Protection Act requires ALJs, who act on behalf of the Secretary, to make discretionary decisions that necessarily implicate policy determinations. For instance, in determining the size of a monetary penalty, Agriculture ALJs must weigh subjective factors such as the "nature, circumstances, extent, and gravity of the" offense at issue. 15 U.S.C. § 1825(b)(1). The ALJs must then evaluate the accused's "degree of culpability, any history of prior offenses, ability to pay, [the punishment's] effect on ability to continue to do business, and such other matters as justice may require." *Id.* The ALJs also have broad discretion to disqualify horse trainers from their occupation. *Id.* § 1825(c). Because ALJs have such wide discretion to determine violations of the law and craft penalties—penalties that the Department may have to defend in court as appropriate and legal executions of the law—their deliberations necessarily include sensitive policy decisions. Contrary to amicus' representations, such policymaking discretion, in which an officer must choose between a range of lawful options, is an exercise of executive power and therefore must be subject to the President's control.

At bottom, however, the Constitution does not separate functions, but powers. Amicus' arguments thus fail for a fundamental reason. ALJs are executive officers exercising an aspect of the executive power vested in the President. Yet an ALJ's discretion is insulated from the supervision of both the President and the Secretary of Agriculture. If the Secretary

disagrees with an ALJ's policy preferences—for instance, if he thinks the ALJ routinely imposes overly harsh, or insufficiently harsh, penalties—the double layer of for-cause removal protection means that the Secretary has virtually no power to remove the ALJ and replace him with an officer willing to carry out the administration's policy preferences. Indeed, according to the court-appointed amicus, one of the primary benefits of tenure protections is to block the Secretary from removing "an ALJ for failure to render a decision favoring the agency's policy positions." Appointed Amicus Br. 16. This naturally raises the question, whose policy positions should the ALJ promote if not the agency for which he works?

No one questions that ALJs have an obligation to follow the law, but discretionary decisions implicating agency policy cannot be doubly insulated from democratic control without transgressing the vesting of executive power in the President and the Constitution's careful separation of powers.

4.

The court-appointed amicus also minimizes the independence of Agriculture ALJs by focusing on the Secretary's other oversight tools. First, the amicus notes that because the Secretary has the statutory authority to preside over each case himself, he need not use ALJs in the first place. *See* 15 U.S.C. § 1825(b)(1). Second, the Secretary has the power to review ALJ decisions de novo—a responsibility he has delegated to the agency's Judicial Officer. *See* 7 U.S.C. § 2204-2; 7 C.F.R. § 1.145.

These oversight mechanisms cannot compensate for the loss of control that follows from the double restraints on the removal power. Amicus' arguments minimizing the importance of ALJ authority and independence cannot be reconciled with *Lucia*, which held that ALJs are "officers" of the United States, meaning that by definition they exercise significant authority under the laws of the United States. Specifically, the Court concluded that ALJs in the SEC wield "significant authority" in executing the law even though the Commissioners, like the Secretary, are free to review and reverse decisions by ALJs. *Lucia*, 138 S. Ct. at 2052–54. The Court emphasized the fact that an ALJ's decision can become final if the "SEC declines review," an important "last-word capacity." *Id.* at 2054. The same is true of decisions rendered by Agriculture ALJs. *See* 7 C.F.R.

§ 2.27(a)(1) (providing that "decisions shall become final" unless appealed to the Secretary). ALJs wield meaningful, independent power despite existing forms of oversight.

The decisions of Agriculture ALJs may be countermanded by other officers, but that is not sufficient to place ALJs within the chain of command to the President. De novo review by the Secretary or Judicial Officer cannot replace control through the removal power. As the Supreme Court recognized in *Free Enterprise Fund*, "[b]road power over Board functions is not equivalent to the power to remove Board members." 561 U.S. at 504, 130 S. Ct. 3138. The constitutionally required control cannot be exercised through micromanaging the ALJ's activities, or even by promulgating regulations to govern or limit the ALJ's discretion. *Id.* Control over subordinates can be practically exercised in a variety of ways, but the removal power is the necessary constitutional minimum because it recognizes that the President sets the policies of the Executive Branch and remains accountable to the people for ensuring that his officers follow those policies. *See, e.g.*, *Myers*, 272 U.S. at 117, 47 S. Ct. 21 (concluding that the removal power is "essential to the execution of the laws"); *id.* at 245, 47 S. Ct. 21 (Brandeis, J., dissenting) (concluding that the "ability to remove a subordinate executive officer" is "essential [to] effective government").

Removal creates the proper chain of command. Proper supervision of ALJs cannot mean that the Secretary of Agriculture must adjudicate or review every case under the Horse Protection Act and countless other statutes. "[T]he various 'bureaucratic minutiae' a President might use to corral agency personnel [are] no substitute for at will removal." *Seila Law*, 140 S. Ct. at 2207 (quoting *Free Enterprise Fund*, 561 U.S. at 500, 130 S. Ct. 3138); *see also Bowsher*, 478 U.S. at 726, 106 S. Ct. 3181 ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.") (cleaned up). While the Secretary has some mechanisms to oversee the ALJs, such limited checks cannot provide the essential democratic accountability that follows from being removable at will.

5.

Finally, the court-appointed amicus argues that "[d]isposing of safeguards for ALJ adjudicatory independence would raise serious due process concerns." Appointed Amicus Br. 17. The scope of due process protections, however, must be understood in light of the particular context of Executive Branch adjudication. Outside Article III courts, the balancing test in *Mathews v. Eldridge* governs "what process is due." 424 U.S. 319, 349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The Supreme Court has explained that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *see also UDC Chairs Chapter, Am. Ass'n of Univ. Profs. v. Bd. of Trustees of Univ. of Dist. of Columbia*, 56 F.3d 1469, 1472 (D.C. Cir. 1995) (quoting *Morrissey*, 408 U.S. at 483, 92 S. Ct. 2593); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1521 (2020) (explaining that "[b]oth judicial and executive bodies can engage in the procedure of adjudication, but they do so pursuant to different kinds of power"). As amicus properly recognizes, "the requirements of due process in administrative adjudication are not identical to those applicable to Article III judges." Appointed Amicus Br. 18.

Whatever the scope of such administrative due process requirements, they are not undermined through adjudication by a politically accountable officer. Administrative adjudication has historically been undertaken by heads of agencies and administrative law judges who were removable at will. In this case, Congress vested the power to adjudicate cases under the Horse Protection Act in the Secretary of Agriculture, who is of course removable at will by the President. Amicus defends the ALJ removal protections by relying on the fact that the Secretary can lawfully preside over USDA hearings. Yet if the Secretary can preside, it cannot violate due process for the presiding ALJ to also be subject to removal at will (or to be protected by only one layer of for-cause removal protection). Furthermore, prior to the APA's enactment, the removal and promotion of administrative adjudicators were "determined by the ratings given them by the agency." *Ramspeck*, 345 U.S. at 130, 73 S. Ct. 570. The lack of adjudicatory independence prior to the APA, however, posed no constitutional problems. *See Marcello v. Bonds*, 349 U.S. 302, 311, 75 S. Ct. 757, 99 L. Ed. 1107 (1955) (holding that it does not violate due process to have an adjudicator who is "subject to the supervision and control of officials in the Immigration Service charged with investigative and

prosecuting functions"). Even after the APA's enactment, three decades elapsed before ALJs were afforded a *double layer* of for-cause protection from removal.

Generalized claims of due process for administrative adjudication cannot overcome the constitutional requirement that the President must have the power to control officers who execute the law and to remove them if necessary. That principle applies with equal force to ALJs who execute the law through adjudication.

* * *

The law is clear: "[T]ext, first principles, the First Congress's decision in 1789, [and precedent] all establish that the President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206. The double layer of for-cause removal protection insulating the Agriculture ALJs violates the Constitution's separation of powers. Officers executing the law must be accountable to the President and, through this chain of command, to the people. I would therefore hold 5 U.S.C. § 7521(a) unconstitutional as applied to ALJs within the USDA.

IV.

The final issue is remedial—how much of the statute to hold unconstitutional and what relief to provide to the petitioners. When holding a statute unconstitutional, we should "refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987) (citation omitted); *see also Seila Law*, 140 S. Ct. at 2209 (finding the statute's "provisions are capable of functioning independently," and therefore invalidating only the removal restrictions while leaving the rest of the statute intact); *id.* (explaining that without the removal restrictions, "the constitutional violation would disappear").

Because petitioners challenged only the constitutionality of two layers of removal protection, I would go no further than to invalidate one of the for-cause removal limits. The most straightforward way to accomplish this result is to hold the statute unconstitutional insofar as it requires the MSPB to determine whether there is good cause to remove the ALJ—the

provision stating that cause will be "established and determined by the [MSPB] on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). This would leave one layer of for-cause protection—the Secretary alone would be responsible for determining whether there is good cause to remove an ALJ. This holding would cure the constitutional defect identified by *Free Enterprise Fund* because it eliminates the double for-cause framework insulating an executive officer from oversight.[11]

Section 7521(a) is unconstitutional as applied to the Agriculture ALJs, and therefore the orders against the petitioners must be vacated. Remand to the agency for further proceedings must be to a properly appointed ALJ, as the majority holds, and also to an ALJ not subject to a double layer of for-cause removal protection[12]

* * *

The majority allows the government to argue before the agency that constitutional questions should be left to the courts and then argue before this court that constitutional questions should be left to the agency. We should not allow the agency to have its cake and eat it too. The petitioners properly presented their constitutional challenge to this court, and no rule of law requires that the argument be presented to the agency first. In the wake of *Seila Law*, *Free Enterprise Fund*, and *Lucia*, there can be no doubt that Agriculture ALJs enjoy an unconstitutional degree of freedom from oversight. Insulating ALJs with two layers of tenure protection

[11] I do not address the constitutionality of any other language in Section 7521(a), including whether it is constitutional for the statute to provide that the Secretary may remove an ALJ "only for cause"—i.e., whether a single layer of for-cause removal protection is constitutional.

[12] One potential complication with a remand is that if the Secretary removes an ALJ, the ALJ could seek judicial review in the U.S. Court of Federal Claims. 28 U.S.C. § 1491(a). That court's decisions are reviewed by the Federal Circuit, *see* 28 U.S.C. § 1295(a)(3), which, in turn, is not bound by this court's precedents and could reach a different conclusion about the lawfulness of Section 7521(a). For practical purposes, then, ALJs could remain protected by the dual layer despite a decision from this court holding such a scheme unconstitutional. This issue was not briefed by the parties, and it is unnecessary to opine on such hypotheticals here.

dissipates the executive power and runs afoul of separation of powers. Petitioners should not have to relitigate their claims before an agency adjudicator who lacks the requisite constitutional accountability. I respectfully dissent.

___

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: [https://www.usda.gov/oha/services/decisions-and-determinations].

COMMERCIAL TRANSPORTATION OF EQUINES FOR SLAUGHTER ACT

In re: TONY KENDALL COOK.
Docket No. 20-J-0140.
Default Decision and Order.
Filed January 26, 2021.

DAIRY PRODUCTION STABILIZATION ACT OF 1983 / DAIRY PROMOTION AND RESEARCH ORDER

In re: AMARILLO USA, INC.
Docket No. 20-J-0105.
Default Decision and Order.
Filed January 5, 2021.

—

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://www.usda.gov/oha/services/decisions-and-determinations.

ANIMAL HEALTH PROTECTION ACT / PLANT PROTECTION ACT

In re: MIDDLESEX LIVESTOCK AUCTION, LLC.
Docket No. 18-0034.
Miscellaneous Order of the Judicial Officer.
Filed March 26, 2021.

AHPA.

Lauren C. Axley, Esq., for APHIS.
Lisa Scirpo, representative of Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order issued by John Walk, Judicial Officer.

Order Remanding for Further Proceedings

Relevant Procedural History

This is a proceeding under the Animal Health Protection Act ("AHPA" or "Act") (7 U.S.C. § 8301 *et seq.*); the regulations promulgated thereunder (9 C.F.R. § 79 *et seq*.) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) and 9 C.F.R. § 70.1. The Administrator of the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") initiated this administrative enforcement proceeding on May 21, 2018 by filing a Complaint alleging that Middlesex Livestock Auction, LLC ("Respondent") (1) sold a goat as a cash sale without keeping a record relating to the transfer of ownership, in violation of 9 C.F.R. § 79.2(d), on November 17, 2014; (2) sold two goats as a cash sale without keeping a record relating to the transfer of ownership, in violation of 9 C.F.R. § 79.2(d) on August 31, 2015; and (3)

failed to make records available to United States Department of Agriculture ("USDA") officials when requested on multiple dates in 2015 and 2016, in violation of 9 C.F.R. § 79.2(d)(3).

On July 3, 2018, Respondent, through its representative, Lisa Scirpo ("Ms. Scirpo"), filed an Answer admitting the record keeping violations and alleging factors in mitigation of a fine.

On June 21, 2019, Complainant filed a Motion for Summary Judgment and Proposed Decision and Order. Complainant's Motion for Summary Judgment ("Motion for Summary Judgment") recommended the assessment of a civil penalty in the amount of $17,500 against the Respondent.

On July 1, 2019 Respondent sent an email to the Hearing Clerk's Office alleging that it could not pay the fine recommended in the Motion for Summary Judgment.

On July 10, 2019, the parties participated in a telephone conference with Administrative Law Judge Jill S. Clifton ("ALJ"), wherein Respondent contested the proposed penalty which Respondent asserted that it could not pay.[1]

On August 8, 2019 the Hearing Clerk's Office served Respondent's response to Complainant's Motion for Summary Judgment ("Response to Motion for Summary Judgment") on the parties. Respondent challenged the assessment of the recommended fine and alleged an inability to pay the civil penalty. Complainant filed a reply thereto on September 6, 2019.

On December 15, 2020, the ALJ issued a Decision and Order on the Written Record, granting in part and denying in part APHIS's Motion for Summary Judgement ("Decision and Order"). The Decision and Order found that Respondent violated the AHPA as alleged in the Complaint. However, the ALJ concluded that Respondent "does not have the cash

[1] *See* Confirmation that Time is Extended to August 14, 2019, by 4:30 p.m., as Ordered During Dial-in Telephone Conference.

flow to withstand the $17,500 civil penalty recommended by APHIS."[2] The Decision and Order assessed on Respondent a $7,000 civil penalty to be paid within 90 days after the Decision and Order became final and effective.

On December 23, 2020, Respondent filed a timely appeal of the Decision and Order to the Judicial Officer ("Appeal Petition"). Complainant filed a response thereto on January 15, 2021 ("Response to Appeal Petition").

Discussion

The Appeal Petition seeks relief from the assessment of the $7,000 civil penalty.[3] In support of reducing the civil penalty, Respondent alleges that it is unable to pay, arguing that it is in debt and that its operations have been impacted by the Coronavirus pandemic.[4]

AHPA, as adjusted in 2010 by 7 C.F.R. § 3.91(b)(2)(vi), permits the Secretary to impose a civil penalty of up to $300,000 for each violation committed by any business, but not more than $500,000 in any single adjudication. 7 U.S.C. § 8313(b)(1)(A). Therefore, the total maximum civil penalty Respondent can be assessed for its violations adjudicated in

[2] Decision and Order at 4.

[3] *See* Appeal Pet. ("We are asking to forgive this fine because we cannot possibly pay this.").

[4] Respondent raises two additional allegations in its Appeal Petition. First, Respondent alleges that the record keeping violations involved only two goats because "the 3rd goat was purchased by Fred Robinson of Mass." Appeal Pet. In his declaration made under penalty of perjury, USDA Investigator James J. Finn stated that he reviewed Respondent's records for the relevant dates that reflected "a goat identified as 313 was . . . sold to Freddy Robinson of Rhode Island." Mot. for Summ. J. CX 27 at 1. Goat 313 is not at issue in the Complaint and not relevant to this proceeding. The goats subject to the Complaint are identified by the numbers 886, 887, and 1831. *See* Complaint at 3. Second, Respondent also states in the Appeal Petition that "[a]s far as the fine goes . . . new Holland sales stable . . . sells 3000 to 4000 goats an [sic] lambs weekly an [sic] more then [sic] half are not tagged!" Appeal Pet. This allegation which purports to relate to another establishment not at issue in the Complaint is not relevant to this proceeding.

this proceeding is $500,000. The Act provides both mandatory and discretionary factors to determine a civil penalty as follow:

> In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator –
>
> (A) the ability to pay;
> (B) the effect on ability to continue to do business;
> (C) any history of prior violations;
> (D) the degree of culpability; and
> (E) such other factors as the Secretary considers to be appropriate.

7 U.S.C. § 8313(b)(2).

Complainant recommended the assessment of a $17,500 civil penalty against Respondent. In support of this recommendation, Complainant submitted the declaration of Koren Moore Custer, Doctor of Veterinary Medicine, and New England Area Veterinarian in Charge for Veterinary Service for APHIS at USDA ("Dr. Custer").[5] Dr. Custer's declaration addressed the application of each of the mandatory factors to Respondent's violations and considered the discretionary factor that Respondent had no prior history of violations that resulted in a civil penalty.[6]

The ALJ concluded in the Decision and Order that Respondent "does not have the cash flow to withstand the $17,500 civil penalty recommended by APHIS" and denied summary judgment as to the recommended civil penalty amount.[7] Respondent was ordered to pay $7,000 in civil penalty – a 60% reduction from Complainant's recommended amount – within 90 days after the Decision and Order becomes final and effective.[8] The Appeal Petition seeks relief from the civil penalty, alleging that Respondent is unable to pay even the amount

[5] Decl. of Koren Moore Custer.

[6] *Id.* at 5-7.

[7] Decision and Order at 4-5.

[8] *Id*. at 5.

assessed by the ALJ. Complainant opposes any reduction of the $7,000 civil penalty assessed in the Decision and Order but does not appeal it.[9]

A violator's ability to pay is a discretionary factor that may be considered to determine the amount of a civil penalty. The burden is on the party that asserts an inability to pay to come forward with evidence to substantiate its claim.[10] Respondent makes several new claims for the first time on appeal to support its contention that it is unable to pay, including that Respondent is in debt and Respondent's business operations have been impacted by the Coronavirus pandemic. Respondent offers to provide new evidence about its debt. However, it is well settled that factual allegations cannot be raised for the first time on appeal that could have been raised in proceedings before the administrative law judge.[11] The Appeal Petition suggests that Ms. Scirpo may not have fully appreciated the extent of Respondent's debt. However, as its representative, Ms. Scirpo was responsible to know Respondent's financial condition, including information about its debts and to raise evidence thereof to support its claim about the ability to pay during proceedings before the ALJ. It is now too late for Respondent to offer new evidence about its debt

[9] Response to Appeal Pet. at 7 n.2.

[10] *See Holt*, 49 Agric. Dec. 853, 865 (U.S.D.A. 1990), 1990 WL 322149, at *9 ("[W]ith respect to ability to pay . . . it is the position of this Department that it is the responsibility of the respondents to come forward with some evidence indicating an inability to pay."); *Samuel*, 57 Agric. Dec. 905, 912-13 (U.S.D.A. 1998), 1998 WL 556345, at *4 (rejecting claim of inability to pay because respondent failed to produce necessary evidence); *Essary*, 75 Agric. Dec. 204, 209-10 (U.S.D.A. 2016), 2016 WL 3434034, at *4 ("[T]he burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty."); *Jenne*, 74 Agric. Dec. 118, 128 (U.S.D.A. 2015), 2015 WL 1776433, at *6 (rejecting the claim of inability to pay because respondent failed to present evidence he was not able to pay the civil penalty).

[11] *See Glick*, 55 Agric. Dec. 275, 282 (U.S.D.A. 1996), 1996 WL 119673, at *6 ("The Respondent had an opportunity to raise the facts set forth in his Appeal Petition earlier in this proceeding. It is well settled that Respondent cannot raise new issues on appeal or present new facts for the first time on appeal to the Judicial Officer.") (citations omitted); *See also Burnette Foods, Inc.*, 74 Agric. Dec. 413, 424 (U.S.D.A. 2015), 2015 WL 9500722, at *8 ("It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.")

for the first time on appeal when it had the opportunity to raise it earlier in the proceeding.[12]

Respondent also alleges for the first time on appeal that the Coronavirus pandemic ("Coronavirus pandemic" or "COVID-19") has impacted its ability to pay the $7,000 civil penalty. The national emergency concerning COVID-19 was declared on March 13, 2020.[13] Complainant points out that Respondent had time to raise the impact of the Coronavirus pandemic on its business because the ALJ did not issue the Decision and Order until December 15, 2020. However, just because "the pandemic began to affect daily life in the United States beginning in March 2020"[14] does not mean that the financial impact on Respondent had materialized or was immediately felt at that time. Based on the unique circumstances involving the Coronavirus pandemic, I find that Respondent had good reason why it could not raise evidence of the impact of COVID-19 on its ability to pay during proceedings before the ALJ. Although this is a close question, I note that Complainant does not object to a limited remand to consider this issue.

Therefore, I find that a remand to the ALJ to take evidence on whether the Coronavirus pandemic impacted Respondent's ability to pay and to

---

[12] *See Glick*, 55 Agric. Dec. 275, 282 (U.S.D.A. 1996), 1996 WL 119673, at *6 ("The facts concerning Respondent's assets and financial condition and his ability to pay a civil penalty, which are set forth for the first time on appeal, come too late."); *Daul*, 45 Agric. Dec. 556, 565 (U.S.D.A. 1986), 1986 WL 74680, at *6 ("These facts, which are set forth for the first time on appeal, come much too late."); *Jenne*, 74 Agric. Dec. 156, 158-60 (U.S.D.A. 2015) (Order Den. Pet. to Reopen Hearing) (denying petition to reopen hearing to offer new evidence that could have been adduced earlier in the proceeding before the administrative law judge).

[13] Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 18, 2020). The World Health Organization declared COVID-19 a pandemic two days before the national emergency declaration on March 11, 2020. *See* WHO-Director General's Opening Remarks at the Media Briefing on COVID-19-11 March 2020, World Health Organization (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[14] Response to Appeal Petition at 8 (emphasis added).

determine what adjustment of the civil penalty, if any, is warranted based on the findings is appropriate. Further, I find it is also appropriate on remand to consider whether the civil penalty should be paid in installments based on Respondent's ability to pay.

ORDER

This proceeding is remanded to the ALJ to take evidence on whether the Coronavirus pandemic has impacted Respondent's ability to pay the $7,000 civil penalty, to determine what adjustment of the civil penalty, if any, is warranted based on the findings, and to consider whether Respondent should pay the civil penalty in installments because of its ability to pay.

—

In re: AMAZON SERVICES, LLC.
Docket No. 19-J-0146.
Miscellaneous Order of the Judicial Officer.
Filed May 18, 2021.

PPA/AHPA.

Initial Decision and Order by Channing D. Strother, Chief Administrative Law Judge.
Order issued by John Walk, Judicial Officer.

Order Granting Unopposed Motion to Extend Time to File Appeal Petition and Supporting Brief and Response Thereto

On May 18, 2021, Amazon Services LLC ("Respondent") filed its Unopposed Motion to Extend Time to File Appeal Petition and Supporting Brief and Response Thereto ("Respondent's Motion"). Respondent seeks an extension of time to file an appeal petition and accompanying brief, and to request oral argument, through and including July 20, 2021, and to extend APHIS's ("Complainant") time to respond through and including September 28, 2021. For good reason shown, Respondent's Motion is GRANTED. The time for Respondent to file its Appeal Petition and Supporting Brief, and to request oral argument, is extended to **July 20, 2021 at 4:30 p.m. (Eastern)** and the time for filing Complainant's

response thereto is extended to **September 28, 2021 at 4:30 p.m. (Eastern).**

___

ANIMAL WELFARE ACT

In re: MICHAEL TODD, an individual; ALL THINGS WILD, INC., an Illinois corporation, d/b/a ALL THINGS WILD COUNTRY LINE FARMS & PONIES; and MICHAEL TODD, an individual d/b/a ALL THINGS WILD COUNTRY LINE FARMS & PONIES.
Docket Nos. 18-0067; 18-0068; 18-0069.
Order Denying Motion to Reopen Proceeding, to Rehear/Reargue, and Take Further Evidence.
Filed February 25, 2021.

In re: WILLIAM BRACKSTON LEE, III, an individual, d/b/a LAUGHING VALLEY RANCH.
Docket No. 13-0343.
Order Dismissing Complaint with Prejudice.
Filed March 12, 2021.

FEDERAL CROP INSURANCE ACT

In re: LONNIE TRAVIS JOHNSON.
Docket No. 19-J-0096.
Order of Dismissal (Without Prejudice).
Filed April 8, 2021.

HORSE PROTECTION ACT

In re: JARRETT BRADLEY, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; and SAM PERKINS, an individual.
Docket Nos. 17-0120; 17-0123; 17-0128.
Miscellaneous Order of the Judicial Officer.
Filed June 11, 2021.

HPA.

Initial Decisions and Orders by Bobbie J. McCartney, Chief Administrative Law Judge.

Remand Order entered by John Walk, Judicial Officer.

Order Remanding Cases to the Chief Administrative Law Judge for Further Proceeding

Preliminary Statement

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821 *et seq.*) ("Horse Protection Act"); the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice"). On January 11, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("Complainant") instituted this Proceeding by filing a Complaint alleging that Respondents Jarrett Bradley, Joe Fleming dba Joe Fleming Stables, and Sam Perkins violated the Horse Protection Act.

None of the three Respondents filed an Answer in response to the Complaint within the time required by the Rules of Practice. On April 11, 2017, then Chief Administrative Law Judge Bobbie J. McCartney filed default decisions and orders against Respondents Jarrett Bradley, Joe Fleming dba Joe Fleming Stables, and Sam Perkins. On May 10, 2017, the three Respondents appealed to the Judicial Officer. The then Judicial Officer William G. Jenson affirmed the default decisions and orders.

The three Respondents each filed a Petition for Review of the agency decisions and orders in the United States Court of Appeals for the District of Columbia Circuit. *See Fleming v. United States Department of Agriculture*, 987 F.3d 1093 (D.C. Cir. 2021), *reh'g en banc denied*, No. 17-1246 (D.C. Cir. Apr. 13, 2021) (*per curiam*) The D.C. Circuit Court of Appeals found that after the petitions for review were filed, the Supreme Court decided the case of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), "holding that the SEC's administrative law judges (ALJs) had not been appointed in compliance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2." The D.C. Circuit Court of Appeals also noted that the government acknowledged that the presiding Administrative Law Judge ("ALJ") in this Proceeding was improperly appointed and moved for remand and vacatur to allow new proceedings before properly appointed ALJs. On February 16, 2021, the D.C. Circuit Court of Appeals granted the petitions

for review, vacated the underlying agency decisions and orders, and remanded the cases to USDA for new administrative hearings for Respondents Jarrett Bradley, Joe Fleming dba Joe Fleming Stables, and Sam Perkins before validly appointed ALJs. The D.C. Circuit Court of Appeals issued its mandate on April 21, 2021.

On May 12, 2021, Complainant filed Notice to the Court Re: Remand of Decisions Against Certain Respondents and Request for Recaptioning of Case, advising that Complainant is reviewing options for moving the case forward and making a request to recaption the case to list only the three Respondents whose default decisions and orders were remanded.

ORDER

The cases as to Jarrett Bradley, Joe Fleming dba Joe Fleming Stables, and Sam Perkins is hereby remanded to Chief Administrative Law Judge Channing D. Strother for proceedings consistent with the February 16, 2021, Order of the D.C. Circuit Court of Appeals.

Complainant's request to recaption the case to list only Respondents Jarrett Bradley, Joe Fleming dba Joe Fleming Stables, and Sam Perkins for all future matters is GRANTED.

___

CONSENT DECISIONS

ANIMAL WELFARE ACT

In re: ATTILA MOLNAR.
Docket No. 20-J-016.
Consent Decision and Order.
Filed March 22, 2021.

In re: WILLIAM BRACKSTON LEE, III, an individual, d/b/a LAUGHING VALLEY RANCH.
Docket No. 14-0021.
Consent Decision and Order.
Filed April 22, 2021.

FEDERAL MEAT INSPECTION ACT

In re: PUDLINER PACKING, LLC.
Docket No. 21-J-0014.
Consent Decision and Order.
Filed February 11, 2021.

In re: HARRY HERPE, d/b/a NOB HILL PIZZA.
Docket No. 21-J-0034.
Consent Decision and Order.
Filed February 19, 2021.

In re: E.L. BLOOD & SON, INC.
Docket No. 21-J-0016.
Consent Decision and Order.
Filed May 7, 2021.

In re: NEW ENGLAND MEAT PACKING, LLC; and MEMET BEQIRI.
Docket Nos. 21-J-0011; 21-J-0012.
Consent Decision and Order.
Filed May 21, 2021.

CONSENT DECISIONS

FOOD AND NUTRITION ACT

In re: STATE OF MAINE, DEPARTMENT OF HEALTH AND HUMAN SERVICES.
Docket No. 20-J-0145.
Consent Decision and Order.
Filed May 27, 2021.

POULTRY PRODUCTS INSPECTION ACT

In re: HARRY HERPE, d/b/a NOB HILL PIZZA.
Docket No. 21-J-0016.
Consent Decision and Order.
Filed February 19, 2021.

In re: NEW ENGLAND MEAT PACKING, LLC; and MEMET BEQIRI.
Docket Nos. 21-J-0011; 21-J-0012.
Consent Decision and Order.
Filed May 21, 2021.

___