UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
REGION 5

In the Matter of: Ro Cher Enterprises, Inc. d/b/a Door and Window Warehouse Outlet, Inc.; Door and Window Warehouse, Co.; and/or Door and Window Superstore, Respondent.	**Docket Number:** TSCA-05-2023-0004

UNOPPOSED MOTION FOR STAY OF PROCEEDINGS

Respondent Ro Cher Enterprises, Inc., pursuant to 40 C.F.R. § 22.16, asks the Court to temporarily stay this proceeding for two independent reasons: (1) the parties have discussed and continue to discuss potential settlement; and (2) Respondent Ro Cher has filed a collateral action in federal court challenging the authority of this proceeding. A stay of this proceeding will conserve the parties' and the Court's resources and will prejudice neither the parties nor the general public.

Ro Cher has conferred with Complainant. With regard to the relief sought in this Motion, Complainant agrees only that a time limited stay of the proceedings is necessary to continue good-faith settlement discussions and believes 90 days is sufficient for that purpose.

BACKGROUND

Complainant filed a Complaint and Notice of Opportunity for Hearing in April 2023. Dkt. No. 1. Ro Cher could no longer afford attorney's fees, and its owner submitted a written response to the Complaint. Dkt. No. 2. The Court found that this response did not meet the Rules of Practice and ordered a proper answer. After some

delay, Ro Cher retained pro bono counsel and now must respond by November 22, 2023, to this Court's Order to Show Cause (Dkt. Nos. 6, 12) for failure to answer.

Complainant alleges that Ro Cher violated the Toxic Substances Control Act (TSCA) by failing to have an EPA certificate (concerning the renovation of certain housing and facilities constructed before 1978) and by failing to provide lead-hazard pamphlets to the owners of seven residences where renovations were carried out. Compl. ¶¶72, 82. Complainant does not allege that Ro Cher's asserted TSCA violations pose a current or future lead-based threat to the public.

Since lawyers for Ro Cher entered their appearances in this matter, they and Complainant's counsel have discussed settlement, and they continue to engage in good-faith settlement discussions.

Separately, Ro Cher filed a complaint in federal court raising constitutional challenges to this administrative proceeding. *See Ro Cher Enters., Inc. v. EPA*, No. 1:23-cv-16056 (N.D. Ill. filed Nov. 16, 2023). In that lawsuit, Ro Cher alleges Appointments Clause challenges to ALJ Biro and members of the Environmental Appeals Board; and deprivation of Ro Cher's rights under Article III and the Fifth (Due Process of Law), Seventh (right to a jury), and Eighth (right against excessive fines) Amendments.

As explained below, Ro Cher's structural separation-of-powers claims—*i.e.*, the Appointments Clause challenges—and its Article III claim could become moot if this proceeding ends before the federal court resolves the claims. As the Supreme Court recently explained, structural separation-of-powers claims are "impossible to remedy

once the [administrative] proceeding is over" because a "proceeding that has already happened cannot be undone." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). Therefore, post-hearing judicial review of those claims "would come too late to be meaningful." *Id*.

LAW & ARGUMENT

A temporary stay is warranted here

The authority to grant a stay is a matter of discretion with the Court. *See In the Matter of John Crescio*, No. 5-CWA-98-004, 1999 WL 362862, *1 (EPA ALJ Feb. 26, 1999) (citing *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936)). EPA ALJs typically consider the following factors:

> whether or not the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay, and of adverse effect on the judge's Docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing.

Id. (citation omitted).

These factors favor a stay here. First, a stay will serve the interests of judicial economy for two reasons: (1) the parties are engaged in good-faith settlement discussions, and a stay allows for those discussions to continue without litigating a matter that would become moot upon settlement; and (2) Ro Cher has filed a collateral action in federal court that could, similarly, make litigation in this forum unnecessary—at least for the time being. Ro Cher intends to seek expedited consideration of its constitutional claims in federal court. If Ro Cher succeeds on its claims there, this proceeding would then be either delayed (until the alleged Appointments Clause defects are remedied) or obviated (if Ro Cher succeeds on its claim that this matter should be

heard in the first instance in an Article III court). The stay would, therefore, preclude unnecessary expense and effort by the parties and this Court. And, in light of the weighty issues Ro Cher raises in its federal action, Ro Cher submits that the requested delay is neither an unreasonable nor unnecessary delay.

Second, a stay would impose no hardship on the parties or the general public. The parties will continue to discuss settlement in good faith, and neither party has an interest in expending time and resources unnecessarily. Further, as noted above, Ro Cher's alleged violations of the TSCA do not involve any threat of current or future lead exposure. Therefore, the public will not be harmed by a stay.

Third, Ro Cher submits that a stay will not adversely affect the Court's docket; to the contrary, a settlement and/or a ruling in Ro Cher's favor in federal court could obviate the need for litigating this matter here.

Finally, this case presents no risk of lost records or unavailability or witnesses. The dispute is relatively discrete, and it involves few documents and few witnesses, if any.

Therefore, the factors considered by EPA ALJs support a stay here.

EPA ALJs and federal courts have enjoined proceedings in similar circumstances

The resolution of issues, in a separate forum, that bear on this proceeding regularly supports the issuance of temporary injunctive relief. For example, this Court granted a stay with respect to all questions of liability and the penalty, until the Department of Justice, Office of Legal Counsel, issued an opinion as to EPA's authority to assess penalties against federal facilities for alleged violations of underground-

storage tank requirements. *See In the Matter of U.S. Dep't of the Navy, Naval Air Station Oceana*, No. RCRA-III-9006-062, 1999 WL 504716 (EPA ALJ July 6, 1999); *see also Crescio*, 1999 WL 362862 (granting seven-month stay or until decision by Environmental Appeals Board, whichever came first, as EAB was addressing same Clean Water Act issue pending in administrative proceeding).

Federal courts—including the Supreme Court and the Court for the Northern District of Illinois—have issued or affirmed injunctions in cases raising separation-of-powers challenges. In *Youngstown Sheet & Tube Co. v. Sawyer*, steel-mill owners challenged President Truman's executive order seizing their mills on the ground that the order was not authorized by an act of Congress or any constitutional provision. 343 U.S. 579, 582–83 (1952). The Supreme Court rejected the government's argument that the President's unconstitutional order did not inflict irreparable harm and affirmed the district court's preliminary injunction. *Id.* at 584–85, 589; *see id.* at 660 (Burton, J., concurring) (The "President's order . . . invaded the jurisdiction of Congress [and] violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.").

The Ninth Circuit reached a similar result in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020). There, the court considered a challenge to the Executive Branch's attempt to fund construction of a border wall with funds appropriated for other purposes. *Id.* at 882. The challengers' claim was based on the Appropriations Clause, "'a bulwark of the Constitution's separation of powers.'" *Id.* at 887 (citation omitted). The

court affirmed the district court's order finding irreparable harm and granting a permanent injunction based on the separation-of-powers claim. *Sierra Club*, 963 F.3d at 887, 895–97.[1]

In the two cases underlying the Supreme Court's landmark decision in *Axon*, both the Fifth and Ninth Circuits had stayed administrative proceedings. *See* Exs. 1 (Order in *Axon Enters., Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020)) & 2 (Order in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019)). The Northern District of Texas also issued a pre-*Axon* order preliminarily enjoining the Federal Deposit Insurance Corporation from continuing its administrative enforcement proceeding against the plaintiff, who brought constitutional claims similar to those raised by Ro Cher in federal court here. *Burgess v. FDIC*, 639 F.Supp.3d 732 (N.D. Tex. 2022). Since the Supreme Court's decision in *Axon*, other Circuit courts have enjoined administrative proceedings to protect challengers' structural constitutional claims. *See, e.g.*, *Alpine Secs. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023); and Ex. 3 (Order in *Morris & Dickson v. DEA*, No. 23-60284 (5th Cir. June 16, 2023)).

And, finally, the Court for the Northern District of Illinois—where Ro Cher's separation-of-powers lawsuit is pending—has issued injunctions in similar circumstances. *See City of Evanston v. Barr*, 412 F.Supp.3d 873, 886–87 (N.D. Ill. 2019) (granting permanent injunction for violations of Separation of Powers, Spending

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

Clause, and Tenth Amendment); *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 946, 950–51 (N.D. Ill. 2017) (granting preliminary injunction for alleged constitutional violation).

Accordingly, the requested stay makes particularly good sense here.

CONCLUSION

For the foregoing reasons, Respondent Ro Cher Enterprises, Inc. respectfully asks the Court to stay this proceeding pending the resolution of the constitutional challenges in federal court or, alternatively, to stay the motion for 90 days to facilitate continued settlement discussions between the parties.

DATED: November 20, 2023.

Respectfully submitted,

s/ Molly E. Nixon

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In the Matter of Ro Cher Enterprises, Inc., d/b/a Door and Window Warehouse Outlet, Inc.; Door and Window Warehouse, Co.; and/or Door and Window Superstore, Respondent.

Docket No. TSCA-05-2023-0004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent on this 20th day of November 2023, to the following parties in the manner indicated below.

s/ Molly E. Nixon
Molly E. Nixon

Copy by OALJ E-Filing System to:
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EXHIBIT - 1

FILED

OCT 2 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 20-15662

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

ORDER

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

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

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

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

EXHIBIT - 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10396

MICHELLE COCHRAN,

Plaintiff - Appellant

v.

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

Defendants - Appellees

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

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

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

EXHIBIT - 3

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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June 16, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

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

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Shea E. Pertuit

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

Mr. Daniel J. Aguilar
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Mr. Timothy J. Shea
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United States Court of Appeals for the Fifth Circuit

No. 23-60284

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

Petitioner,

versus

DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

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

UNPUBLISHED ORDER

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

PER CURIAM:

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

No. 23-60284

In the
United States Court of Appeals
for the Fifth Circuit

MORRIS & DICKSON CO., LLC,

Petitioner,

v.

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

On Petition for Review of an Order of the
Drug Enforcement Agency

OPPOSED MOTION FOR STAY PENDING PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED PERSONS

No. 23-60284, *Morris & Dickson Co., LLC v. U.S. Drug Enforcement Administration*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Petitioner Morris & Dickson Co., LLC is a Louisiana limited liability company. Its parent company is Morris & Dickson Holding Co. L.L.C., a Louisiana limited liability company.

2. The owners of Morris & Dickson Holding Co. L.L.C. are individual members of the Dickson family and their trusts. *See* 5th Cir. R. 28.2.1 ("If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.").

3. Respondent United States Drug Enforcement Administration is a federal agency.

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Dated: June 2, 2023

/s/ Jeffrey R. Johnson
Counsel of Record for Petitioner Morris & Dickson Co., LLC

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MOTION FOR STAY PENDING PETITION FOR REVIEW

On May 30, 2023, the United States Drug Enforcement Administration entered a Final Order revoking Morris & Dickson Co., LLC's registrations to distribute controlled substances. 88 Fed. Reg. 34,523 (May 30, 2023) (the "Order," or Ex. A). Unless stayed, the Order will force Morris & Dickson to close after more than 180 years in business. Ex. A, 34,542-43. Not only is the Order's harm impending, concrete, and catastrophic—but it is also the product of a clearly unconstitutional proceeding.

The Order is set to take effect August 28, 2023. But it is necessary for Morris & Dickson to seek a stay now. Absent one soon, as DEA itself acknowledges, Morris & Dickson's "customers and their patients" will take the next 90 days to "find new suppliers" ahead of the Order going into effect. Ex. B, 34,522. Moreover, in filing now, Morris & Dickson ensures that this Court may have adequate time to consider this motion in an orderly and prompt manner—and avoid the emergency briefing that would necessarily follow should current settlement talks falter, and the Order ultimately go into effect. (Counsel for Morris & Dickson have consulted with counsel for DEA, and it opposes this request.)

BACKGROUND

Morris & Dickson is a wholesale drug distribution company headquartered in Shreveport, Louisiana. Founded in 1841, it remains family owned. It is operated by highly experienced industry professionals. It employs more than six hundred people, and provides pharmaceuticals to thousands of healthcare providers across 29 states.

Before this episode (which occurred more than five years ago), Morris & Dickson had never faced any DEA enforcement action, fine, or penalty in the history of its DEA registrations. And during the relevant period, Morris & Dickson had a productive working relationship with DEA. Between 2014 and 2017, DEA completed a number of audits and reviews of Morris & Dickson, all without issue. In fact, DEA's former Head of its Diversion Control Division later testified that Morris & Dickson's compliance efforts during this time were "passionate, direct, [and] sincere." *See* Ex. C, 861:13-17, 862:12-14.

Nonetheless, on May 2, 2018, DEA suspended Morris & Dickson's registrations through an Order to Show Cause ("OTSC") and Immediate Suspension of Registration ("ISO"), alleging primarily that Morris & Dickson had failed to maintain effective controls against diversion. But

the Western District of Louisiana soon enjoined the ISO on the ground it was likely arbitrary and capricious. *Morris & Dickson Co., LLC v. Sessions*, No. 18-cv-605, 2018 WL 2393013 (W.D. La. May 8, 2018).

Because DEA's OTSC remained in effect, however, Morris & Dickson requested an administrative hearing so that it could contest DEA's charges. DEA assigned Administrative Law Judge Charles Dorman.

Before ALJ Dorman, Morris & Dickson repeatedly raised constitutional challenges to DEA's ALJ appointment and removal processes. *See, e.g.*, Ex. D, 37; Ex. E, 1; Ex. F, 21:1-15. The Supreme Court soon endorsed the former (and withheld judgment on the latter), holding in *Lucia v. SEC* that the SEC's ALJs were "inferior officers" under Article II and thus must be appointed by the President or a Head of Department. 138 S. Ct. 2044, 2055 (2018).

On the heels of *Lucia,* Morris & Dickson noted again in August 2018 that ALJ Dorman had been unlawfully appointed by the DEA Administrator, and suggested that it would file a motion on those grounds if the matter proceeded. Ex. D, 37; Ex. H, 36:7-37:2. Despite Morris & Dickson's concerns, ALJ Dorman continued to preside—holding

hearings, considering submissions, and making significant decisions about the proposed evidence and proposed stipulations of fact. *See, e.g.*, Ex. H, 6:23-7:23 (evidentiary rulings); Ex. I, 4-6 (making relevancy determinations); Ex. J, 2 (excluding stipulations and directing the parties to prepare submissions); *see also, e.g.*, Ex. K (Morris & Dickson supplementing summary of witness' anticipated testimony based on ALJ's prehearing ruling); Ex. L (submitting evidence pursuant to ALJ's order). Much of this occurred before ALJ Dorman's appointment was purportedly ratified by then-Attorney General Sessions on October 25, 2018.

On October 26, 2018, Morris & Dickson filed suit in the Western District of Louisiana to enjoin DEA's administrative proceedings. Ex. E, 1. ALJ Dorman then stayed proceedings pending resolution. Ex. M, 3. Before the Western District, Morris & Dickson alleged that DEA ALJs were not properly appointed, and enjoyed unconstitutional protections against removal. Ex. E, 1.

In December 2018, the District Court dismissed the complaint for lack of jurisdiction, ruling that Morris & Dickson had to proceed through the administrative process first. *Morris & Dickson Co. v. Whitaker*, 360

F. Supp. 3d 434, 452 (W.D. La. 2018). That jurisdictional holding was indisputable error under *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890 (2023).

At the restarted administrative proceedings in May 2019, Morris & Dickson renewed its constitutional objections. Ex. F, 21:1-15. In August 2019, ALJ Dorman issued his recommendation, where he proposed revoking Morris & Dickson's DEA registrations. Ex. G, 158.

All the while, Morris & Dickson completely redesigned its compliance regime—spending millions of dollars enhancing its system to a "best in class" standard—and continued to effectively serve the region (including throughout the COVID-19 pandemic). Hatcher Decl. ¶ 22. Morris & Dickson also tried to resolve this matter through settlement. From August 2018 through November 2019, it offered several proposals to DEA. Walden Decl. ¶ 3. Between January 2022 and July 2022 Morris & Dickson and DEA engaged in more productive negotiations, and on three occasions traveled to Virginia for in-person meetings. *Id.* ¶¶ 4-6. By November 18, 2022, the parties had made meaningful headway, and DEA conveyed it could likely agree to one of Morris & Dickson's key requirements. *Id.* ¶ 7. On May 19, 2023, following an unusual six-month

lull in settlement talks, DEA informed Morris & Dickson that it was prepared to resume discussions. *Id.* ¶¶ 10-11.

Inexplicably, however, just one hour later on May 19, the Administrator served Morris & Dickson with a copy of the Order, which adopted the ALJ's recommendation and revoked Morris & Dickson's registrations. *Id.* ¶ 12. The Order came nearly four years after the ALJ issued his recommendation—as well as after Morris & Dickson had overhauled its compliance system; helped Louisiana navigate the COVID-19 pandemic; and appointed a new, experienced Chief Executive Officer, General Counsel, and Chief Compliance Officer. Hatcher Decl. ¶ 22.

On May 20, 2023, Morris & Dickson asked DEA to stay its Order pending this Court's review. On May 23, 2023, the Administrator declined to do so, but delayed its effective date to 90 days after publication. Ex. B, 34,522. The Administrator based this decision on the "potential need for [Morris & Dickson's] customers … to find new suppliers given the revocation of [its] registrations" and the "possibility for renewed settlement negotiations." *Id.*

Given the Order's publication, however, Morris & Dickson cannot wait further without risking near-certain ruin. Absent some assurance Morris & Dickson will be able to challenge the Order in court, its customers will undoubtedly move to find new suppliers in the coming months—as DEA itself acknowledges. *Id.*; Hatcher Decl. ¶¶ 12-15; Casida Decl. ¶¶ 6-11; Hunter Decl. ¶¶ 8-10. To ensure the Order does not destroy the Company before it is declared unlawful, Morris & Dickson seeks a stay. *See, e.g.*, Order, *Masters Pharm., Inc. v. DEA*, No. 15-1335 (D.C. Cir. Oct. 14, 2015) (per curiam) (granting similar stay).

LEGAL STANDARD FOR MOTION TO STAY

This Court considers four factors to determine whether to stay an agency order pending review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 188 (5th Cir. 2023). The first two factors "are the most critical," and the last two merge when the government is the

party opposing the stay request. *Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

ARGUMENT

Morris & Dickson now faces commercial annihilation if this Court does not stay the agency's unlawful Order pending review. DEA stands to lose only the immediate implementation of a sanction that it waited nearly four years to impose and had no authority to issue.

I. MORRIS & DICKSON IS LIKELY TO SUCCEED ON THE MERITS

Morris & Dickson is likely to succeed on the merits by showing both (A) that DEA conducted an unlawful proceeding before an unconstitutional ALJ, and (B) that the Administrator acted arbitrarily and capriciously. A movant need only present "a substantial case … when a serious legal question is involved." *Campaign for S. Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014). Morris & Dickson's case is overwhelming.

A. Morris & Dickson Is Entitled To A New Hearing Before A Constitutional Tribunal

DEA conducted its hearing before an ALJ who is unconstitutionally insulated from removal through a double layer of "for cause" protection,

and who DEA retained in violation of the Appointments Clause. Those defects warrant a stay of the Order that emerged from them. *See, e.g.*, *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (staying penalty due to Appointments Clause challenge); Order, *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019) (per curiam) (same for administrative proceeding).

1. DEA ALJs Are Unconstitutionally Insulated

Article II vests "[t]he executive Power" in the President, including ultimate authority to remove officers to ensure that the law is "faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3. The Supreme Court has held that the Executive's removal power may not be frustrated by more than one layer of "for cause" protection. *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010). And this Court has held that two layers of "for cause" protection insulating ALJs are unconstitutional. *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

DEA ALJs' tenure protections are plainly unlawful under *Jarkesy*. There, this Court held that the multiple layers of "for cause" protection insulating SEC ALJs from executive supervision violated Article II. *Id.* at 463. It did so because SEC ALJs "perform substantial executive

functions," yet multiple layers of "for cause" protection impede the President from having "sufficient control over the performance of [those] functions." *Id.*

There is no material difference between SEC ALJs and DEA ALJs. Here, as there, DEA ALJs "exercise considerable power over administrative case records." *Id.* at 464. Here, as there, DEA ALJs "control[] the presentation and admission of evidence." *Id.* And here, as there, DEA ALJs "perform substantial executive functions." *Id.* at 463. The Government has conceded as much, accepting such ALJs as inferior officers. Ex. N, 3.

DEA ALJs enjoy too the same double-layer insulation that this Court held unconstitutional in *Jarkesy*. First, under the Administrative Procedure Act, DEA ALJs (like SEC ALJs) may be removed only "for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a); *see also Jarkesy*, 34 F.4th at 464 (identifying this as one layer of "for cause" protection). Second, Merit System Protection Board members, in turn, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d); *see also Jarkesy*, 34 F.4th at 465 (identifying this as second

layer). Put together, DEA ALJs are insulated by two layers of "for cause" protection. That is unconstitutional—a point the Order does not acknowledge, let alone try to address.

2. ALJ Dorman's Unlawful Insulation Requires a New Hearing

The proper remedy for this sort of removal problem is a new hearing before a new, proper adjudicator. Under the Supreme Court's precedents, a new hearing is the traditional remedy for separation-of-powers defects in adjudications. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). That is so because such a defect—whether sounding in removal or appointment—is akin to structural error; "it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Here, much as Article III's tenure protections are supposed to guarantee judges exercise independent judgment, Article II's unitary structure is supposed to guarantee ALJs exercise their power under the auspices of the President. When ALJs are insulated from that hierarchy, their judgment is inherently compromised—corrupting the adjudication

and necessitating a new hearing. *Cf. Stern v. Marshall*, 564 U.S. 462, 502-03 (2011); *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986).

Because this matter arises under the APA and in the distinct context of direct review of an specific agency adjudication, this case is thus different in kind from *Collins v. Yellen* (a non-APA case where the Court was asked to unwind the implementation of a hundred-billion-dollar contract years after it had gone into effect), 141 S. Ct. 1761, 1787-89 (2021), or *Community Financial Services Ass'n of America, Ltd. v. CFPB* (where this Court was asked to vacate a generally applicable notice-and-comment regulation), 51 F.4th 616, 633 (5th Cir. 2022). And more fundamental, here, unlike those cases, the removal restriction is not severable from the officer's authority to act. *See Collins*, 141 S. Ct. at 1787-88 & n.23. Congress vested DEA ALJs with power *because* of their independence; their adjudicative authority rises (and falls) with their tenure protections. A court may not "blue-pencil" the statutory scheme Congress designed, all to fashion a fundamentally *different* scheme in the name of saving part of the *existing* one. *Free Enter. Fund*, 561 U.S. at 509-10; *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1482-84 (2018).

At minimum, in this context, the burden is on the Government—not Morris & Dickson—to demonstrate that any removal defect was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Recall, Morris & Dickson was (erroneously) barred from pursuing a pre-enforcement challenge to the ALJ's constitutional status. If Morris & Dickson is *also* forced to now show prejudice after-the-fact to obtain relief—a nebulous and difficult counterfactual inquiry—the unconstitutional removal restrictions at issue may well escape judicial scrutiny entirely, contrary to precedent. *Lucia*, 138 S. Ct. at 2055 n.5.

3. ALJ Dorman's Unconstitutional Appointment Similarly Demands a New Hearing

The Appointments Clause independently requires a new hearing. All agree ALJ Dorman is an inferior officer, and thus his initial appointment by the DEA Administrator violated the Constitution. Ex. N, 3. And all agree the remedy for such an Appointments Clause problem is ordinarily a new hearing before a properly appointed ALJ. *Lucia*, 138 S. Ct. at 2055 & n.5.

It is no answer to this defect to say that ALJ Dorman was ratified midway through proceedings, or that his actions before ratification were

too trivial to trigger *Lucia*'s remedy. This because ALJ Dorman took significant steps *before* he was purportedly ratified. *Supra* at 3 (collecting examples). This is thus a straightforward case under *Lucia*. There, the Supreme Court made plain that parties must receive one hearing before an ALJ who has been previously untainted by the merits. But here, ALJ Dorman had already grappled with the merits before he was purportedly ratified. *See, e.g.*, Ex. H, 19:12-25:24. Given this exposure, it is impossible to say he had the open mind required by *Lucia*. *See* 138 S. Ct. at 2055 n.5. A new hearing is necessary.

DEA engages with none of this. Ex. A, 34,542-43. Instead, the Order's primary (really only) argument is that Morris & Dickson waived its Appointments Clause challenge—the very challenge it voiced repeatedly to ALJ Dorman, and even sued over in federal court. *Id.* at 34,542. That is wrong.[1]

[1] It bears note that the Attorney General's purported ratification of ALJ Dorman's appointment is deeply suspect. There is no evidence to support a finding that ratification occurred, let alone evidence that ALJ Dorman took his constitutionally required oath upon receipt of the ratification paperwork; that he received a commission from the President; or that he engaged in any ceremony signifying his appointment.

For starters, DEA should not even be heard to press this argument. In convincing the Western District of Louisiana to dismiss Morris & Dickson's request to enjoin the administrative process, DEA asserted over and again that "if [Morris & Dickson] does not prevail before the Administrator, its appointment and removal claims will be subject to review in a court of appeals." Dkt. 24 at 12, *Morris & Dickson Co., LLC v. Sessions*, No. 18-cv-1406 (W.D. La. Nov. 1, 2018). The district court agreed, rejecting Morris & Dickson's jurisdictional arguments largely because "Morris & Dickson's separation-of-powers challenges w[ould] have their day in court." *Morris & Dickson Co.*, 360 F. Supp. 3d at 448. Having wrongly convinced the district court to take that path, *see Axon*, 143 S. Ct. at 897, DEA cannot renege on its promise that Morris & Dickson's challenge could be heard now.

In any event, DEA is incorrect—Morris & Dickson repeatedly raised this objection. As detailed above, it noted its constitutional concerns and suggested it would file a motion on the point before ALJ Dorman on August 3, 2018, Ex. D, 37; *filed suit* against DEA raising these constitutional claims on October 26, 2018, Ex. E, 1; obtained a stay of

ALJ proceedings on such grounds, Ex. M, 3; and renewed its objections before ALJ Dorman on May 13, 2019, Ex. F, 21:1-15.

DEA says Morris & Dickson somehow waived its constitutional claims by not "formally request[ing] reassignment" after the administrative proceedings resumed, and suggests all Morris & Dickson needed to do to get a new ALJ was ask. Ex. A, 34,542. That blinks reality. During the litigation where Morris & Dickson sued to raise this very issue, DEA *took the position* ALJ Dorman could continue to preside once proceedings resumed—a position it apparently maintains today. *See* Dkt. 24 at 14 n.5, *Morris & Dickson Co.*, No. 18-cv-1406, *supra* (arguing that ratification "cure[d] any constitutional defect"); Ex. A, 34,542 (same). In other words, the Agency had already told Morris & Dickson that formally seeking reassignment would be rejected. Morris & Dickson was thus under no obligation to pursue that "futil[e]" course. *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021).

All told, the Agency cites nothing for its counterintuitive view of waiver. Nor could it. A party that repeatedly raises an objection—to say nothing of suing in federal court over it—does not waive that objection. And in all events, the Supreme Court has emphasized that it is

"appropriate for courts to entertain constitutional challenges to statutes … even when those challenges were not raised in administrative proceedings." *Id.* at 1360. Either way, waiver poses no bar to Morris & Dickson's constitutional claims.

B. The Order Is Arbitrary and Capricious

The Order is also arbitrary and capricious twice over. To start, the Order is flawed on its own terms. Namely, it uses the wrong frame of reference—it is entirely *backward-looking*—and fails to meaningfully analyze whether Morris & Dickson's current, reformed operations are inconsistent with the public interest *going forward*, as is statutorily required. That omission is telling but not surprising: In waiting four years to issue the Order so as to allow for a settlement (and in delaying the Order's effective date for the same reasons), DEA has effectively conceded Morris & Dickson's revised operations pose no *prospective* threat to the public interest. Indeed, Morris & Dickson has affirmatively benefited the public in recent years (especially during COVID-19), through its enhanced compliance procedures. Nowhere does the Order adequately explain why *those* procedures should be stopped—and that is facially deficient.

Although these defects are sufficient to stay the Order, they are compounded by the specter that the Order's stated rationale is pretextual. The Order justifies its timing and scope on the ground settlement talks had broken down between DEA and Morris & Dickson. Ex. A, 34,540-41 n.92. But that is just not true; and every indication is the real impetus behind the Order was an attempt to get ahead of an upcoming story from the Associated Press. Morris & Dickson plans to seek discovery on these points, should DEA not include all relevant materials in the record. *See, e.g.*, *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (administrative record includes "all documents and materials directly or indirectly considered by agency decision-makers").

1. The Order Is Unreasoned on Its Own Terms

The Administrator may revoke a company's registrations if doing so "is" inconsistent with the public interest. 21 U.S.C. § 823(b). As such, the public interest analysis is necessarily forward-looking. *See Hassman v. Off. of the Deputy Adm'r*, 515 F. App'x 667, 668 (9th Cir. 2013) (touchstone of analysis is "misconduct in the future"); *see also, e.g.*, *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 221 (D.D.C. 2012)

("past misconduct" cannot constitute "sole basis" for decision). But here, the Order is wholly backward-looking, and fails to give a reasoned explanation for why revoking Morris & Dickson's registrations *is* in the public interest *going forward*.

That defect is particularly glaring given DEA's conduct here: What the Order *says* is irreconcilable with what the Administrator *has done*. Once more, in light of ongoing settlement negotiations, the Administrator waited *four years* to issue the Order—during which Morris & Dickson operated safely and effectively. Hatcher Decl. ¶ 20. Moreover, the Administrator extended the effective date of the Order to 90 days so that "renewed settlement negotiations" could potentially succeed. Ex. B, 34,522.

If Morris & Dickson's current operations truly threatened the public interest, the Administrator would not have waited a presidential term to reach a decision, nor delay that decision in hopes of a settlement. Rather, DEA's actions reveal that a *reformed* Morris & Dickson—not a *closed* one—is what is in the public interest. At minimum, the Order needed to offer some reasoned explanation to square its edict with its actions. It does not.

Worse, the Order—with its backward-looking lens—fails to meaningfully engage with the fact Morris & Dickson *has* reformed over the last number of years. As detailed above, and as even ALJ Dorman acknowledged, Morris & Dickson has implemented an "impressive" array of remedial measures that have reformed its operations. Ex. A, 34,539. And as noted too, the efficacy of those remedial measures is not theoretical—they *have worked* for the last few years, including under the unprecedented demands of the recent pandemic.

The Administrator instead gave short-shrift to these remedial measures on the ground Morris & Dickson showed inadequate remorse. *Id.* at 34,537-38. But that is both wrong, and nonsensical. The best evidence of Morris & Dickson's commitment to reform is the fact it *has* reformed. The record includes ample, undisputed evidence of Morris & Dickson revamping its compliance regime—including, for instance, testimony by Louis Milione, a former Head of DEA's Diversion Control Division, emphasizing the efficacy of these new efforts. *Id.* at 34,524, 34,539-40. And it would have included more, had the ALJ not wrongly excluded or discounted significant exculpatory evidence as to Morris &

Dickson's anti-diversion measures. *See, e.g.*, Ex. O, 25-27; Ex. P, 15-18, 24-28.

It was arbitrary and capricious to write off (or ignore) this evidence. *See, e.g.*, *Jones Total Health Care Pharmacy, LLC v. DEA*, 881 F.3d 823, 833 (11th Cir. 2018) ("Of course, corrective measures undertaken by a pharmacy are certainly relevant to whether it can be trusted with a registration"). DEA proceedings are intended to be "non-punitive." *Howard N. Robinson, M.D.; Decision & Order*, 79 Fed. Reg. 19,356, 19,369 (Apr. 8, 2014). And again, the inquiry is what is in the public interest *going forward*. Accordingly, if a company has changed its practices, a reasoned decision must analyze how those changes bear on the public interest *in the future*. *See Leo R. Miller, M.D.; Revocation of Registration*, 53 Fed. Reg. 21,931, 21,932 (June 10, 1988).

Last, the above errors all came to a head in the Administrator's decision to opt for the most severe sanction possible—revocation—rather than an alternative enforcement sanction—such as leadership changes or third-party monitors. *See* Ex. O, 33-34 (chronicling lesser penalties for similar registrants). The Order states in a single line that DEA has "considered" alternative sanctions (Ex. A, 34,540-41 n.92), but offers no

explanation for why those sanctions are inadequate. That would be arbitrary and capricious in its own right; all the more so given DEA's conduct. Again, the Administrator's *stated preference* is for this matter to settle. *Id.*; Ex. B, 34,522. That is, the Administrator *wants* Morris & Dickson to *continue operating*, just under certain conditions. A reasoned decision must explain why DEA cannot accomplish through order what it wishes to gain through settlement, and why revocation is appropriate even though—on DEA's own account—something less is ultimately what benefits the public most. The Administrator makes no effort to address, let alone answer, this tension.

The APA "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The Order fails that command at each turn.

2. The Order Is Likely Pretextual

Independent from these facial defects is the fact the Order's rationale is likely pretextual, rendering it again arbitrary and capricious. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-76 (2019). After four years of waiting, the Administrator justified releasing the Order—and revoking Morris & Dickson's registrations—on the ground settlement

talks had broken down. *See* Ex. A, 34,540-41 n.92. But that is just not true. Walden Decl. ¶¶ 4-7, 10. Indeed, just an hour before the Order was released, Morris & Dickson's counterparty at DEA stated DEA was ready to reopen settlement negotiations. *Id.* ¶¶ 10-11.

So what changed? Days before the Order was released, a reporter at the Associated Press—armed with a leaked copy of the ALJ's recommendation—had contacted the agency (and soon Morris & Dickson) to inquire about why the Administrator had not yet acted. *Id.* ¶¶ 8, 10. By all signs, and without notifying other internal stakeholders, the Administrator—who was already facing increased press scrutiny for other reasons[2]—immediately finalized and published the Order. *See id.* ¶¶ 11-12.

There is serious reason to think the Administrator's offered reason—that settlement talks had broken down—is not the real reason. For one, its premise is not true. And more telling, it defies credulity to say that the above timeline is coincidental. Rather, the Order is likely

[2] Joshua Goodman & Jim Mustian, *DEA chief faces probe into 'swampy' hires, no-bid contracts*, AP News (Apr. 19, 2023), https://apnews.com/article/dea-corruption-fentanyl-cocaine-drugs-contracts-milgram-7fd24fe46c4b664f285773798357d418.

pretextual; an effort to avoid press criticism rather than render a reasoned administrative decision.

II. MORRIS & DICKSON WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Absent a stay, revoking Morris & Dickson's registrations will cause immediate and irreversible harm that a later judicial decision cannot remedy.

To start, allowing the Order to go into effect will likely have catastrophic consequences on Morris & Dickson's business operations. This because stripping Morris & Dickson of its DEA registrations will effectively prevent it from selling *any* pharmaceuticals. In the healthcare industry—due to market conditions and contracting practices—pharmacies and other providers buy controlled and non-controlled substances *together* from their primary distributor, with whom they have a nearly exclusive relationship. Hatcher Decl. ¶ 12. Accordingly, depriving Morris & Dickson of the ability to sell controlled substances will cause its customers to purchase *all* of their pharmaceuticals elsewhere. *Id.* ¶¶ 12-15. Importantly, that the Order's effective date is 90 days from publication is no help on this score—absent a stay, Morris

& Dickson's customers will begin finding new suppliers immediately, rather than scramble three months from now. *Id.* ¶ 13; Casida Decl. ¶¶ 6-11; Hunter Decl. ¶¶ 8-10; *see also* Ex. B, 34,522.

Forcing Morris & Dickson to close its doors after over 180 years is obvious irreparable harm. More, it would be near impossible to reconstitute Morris & Dickson after its forced dissolution, because of reputational harm and the loss of goodwill. And *even if* Morris & Dickson managed to stay in business, it would be unable to recover any monetary damages—for reputational harm, lost sales, disrupted business relationships—given DEA's sovereign immunity. *See Armendariz-Mata v. U.S. DOJ, DEA*, 82 F.3d 679, 682 (5th Cir. 1996).

Given all this, even DEA has effectively conceded Morris & Dickson is entitled to a stay at this juncture. In opposing Morris & Dickson's requested injunction to stop DEA's administrative process, DEA alleged Morris & Dickson did not face immediate "reputational injury" or "loss of employment opportunities" at *that* time. Dkt. 24 at 20-21 & n.9, *Morris & Dickson Co.*, No. 18-cv-1406, *supra*. But in the next breadth, DEA conceded that, if Morris & Dickson *later* faced revocation, it could "secure

judicial review before ever losing its registration." *Id.* at 21. DEA was right then.

III. THE PUBLIC INTEREST FAVORS A STAY AND DEA WILL SUFFER NO PREJUDICE FROM ONE

Morris & Dickson has demonstrated a likelihood of success on the merits and irreparable harm, the two "most critical" stay factors. *Nken*, 556 U.S. at 434. The public interest also plainly favors a stay, and DEA will not suffer any prejudice from a modest delay of the sanction it waited four years to impose.

Granting a stay serves the public interest. Foremost, a stay would help avoid tremendous disruption to medical care throughout the nation. Again, Morris & Dickson provides pharmaceuticals to thousands of hospitals, pharmacies, and other providers in 29 states, some of which are the most medically underserved in the country. Hatcher Decl. ¶ 9. It also employs hundreds of people, all of whom would be potentially out of a job without this Court's intervention. *Id.*

What's more, a stay would ensure that Morris & Dickson receives at least one opportunity to vindicate its constitutional rights in federal court. Morris & Dickson tried to protect those rights in federal court prior

to the administrative hearing, but the District Court erroneously forced Morris & Dickson to proceed first through DEA. Absent a stay, and if forced to close, Morris & Dickson will be unable to press its constitutional claims in court. But it is not in the public interest to allow administrative agencies to escape review by shuttering their targets. *See*, *e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

On the other side of the ledger, DEA cannot maintain there is now an immediate need to shut Morris & Dickson down. One more time, DEA waited nearly four years to act on ALJ Dorman's recommendation. And the Administrator delayed the Order's effective date even more, to 90 days. Ex. B, 34,522. Indeed, DEA has never seriously suggested that there is a genuine risk of Morris & Dickson—operating now under its redone compliance regime—doing anything besides continuing to serve the public.

CONCLUSION

This Court should stay DEA's Order pending the Court's review of Morris & Dickson's petition.

Dated: June 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,162 words, as counted by Microsoft Word, excluding the parts of the motion excluded by Federal Rule of Appellate Procedure 32(f).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word in Century Schoolbook Std 14-point font.

Dated: June 2, 2023

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CERTIFICATE OF ELECTRONIC SUBMISSION

I certify that: (1) any required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission of this document is an exact copy of any corresponding paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: June 2, 2023

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CERTIFICATE OF SERVICE

I certify that on June 2, 2023, the foregoing motion was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: June 2, 2023

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