IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) PROCRAFT MASONRY, LLC, *Plaintiff,* v. (1) DEPARTMENT OF JUSTICE, (2) ATTORNEY GENERAL MERRICK GARLAND, in his official capacity, (3) DEPARTMENT OF HOMELAND SECURITY, and (4) SECRETARY ALEJANDRO MAYORKAS, in his official capacity, *Defendants.*	Civil Action No. 23-cv-00393-JFJ

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

INTRODUCTION

1. This case is about a Tulsa small business—Plaintiff ProCraft Masonry, LLC—that is facing unconstitutional agency enforcement of $31,325.70 in fines for 14 paperwork errors on Form I-9s.

2. Form I-9 is intended to guard against the hiring and employment of unauthorized workers. But Defendant Department of Homeland Security (DHS) does not allege ProCraft did that.

3. DHS instead sent ProCraft a notice, with the result that ProCraft, unless it appealed, would have to pay fines of $24,613.05 because 11 employees allegedly signed their forms more than three days after they started working; another $2,237.55 because one employee

allegedly signed her own form; and another $4,475.10 because two employees allegedly presented the wrong kind of government-issued identification card.

4. The fines for those paperwork errors would likely shutter ProCraft.

5. Worse yet, federal statutes and regulations provide that the only way that ProCraft can defend itself against these devastating fines is by litigating in unconstitutional agency enforcement proceedings that are held in the Defendant Department of Justice's (DOJ) agency courts.

6. The fines implicate ProCraft's private rights, namely its property right to its money. Therefore, ProCraft's case must be adjudicated by an Article III court with a Seventh Amendment jury available. Since DHS and DOJ's (together, the "Agencies") administrative system for adjudicating fines for Form I-9 errors instead involves agency bureaucrats and no jury at all, the Agencies' imminent adjudication of ProCraft's case violates Article III and the Seventh Amendment to the U.S. Constitution.

7. Even if it did not violate those constitutional provisions, the Agencies' administrative system for adjudicating fines for Form I-9 errors still would violate Article II because DOJ's administrative law judges (ALJs) enjoy an impermissible dual layer of protection from removal by the President.

8. As a result, the Agencies' administrative system for adjudicating fines for Form I-9 errors should be declared unconstitutional and enjoined.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201, and 2202 and 5 U.S.C. § 702.

10. Venue lies in this Court pursuant to 28 U.S.C. §§ 1391(b), (e). A substantial part of the events giving rise to the claim occurred in this judicial district, which also is where Plaintiff ProCraft Masonry, LLC is principally located.

THE PARTIES

11. Plaintiff ProCraft Masonry, LLC is an Oklahoma small business that is wholly owned by its sole member, Danny R. Barbee. ProCraft provides brick-, stone-, and blockmasonry services on smaller commercial and residential construction projects in and around Tulsa.

12. Defendant U.S. Department of Justice is the main law enforcement agency of the federal government. Its Office of the Chief Administrative Hearing Officer (OCAHO) is located within DOJ's Executive Office for Immigration Review, and OCAHO agency judges adjudicate fines for Form I-9 errors.

13. Defendant Attorney General Merrick Garland is sued only in his official capacity as the head of the agency responsible for adjudicating fines for Form I-9 errors.

14. Defendant U.S. Department of Homeland security is responsible for, among other things, customs and immigration enforcement. Its subagency Immigration and Customs Enforcement is responsible for investigating Form I-9 compliance and prosecuting fines for Form I-9 errors in DOJ's agency courts.

15. Defendant Secretary Alejandro Mayorkas is sued only in his official capacity as the head of DHS, the agency responsible for investigating Form I-9 compliance and prosecuting fines for Form I-9 errors.

REGULATORY BACKGROUND

Relevant Statutes

16. Congress first authorized the creation of Form I-9 in 1986, when it enacted the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359. *See* 8 U.S.C. § 1324a(b).

17. Every employer must use Form I-9 to verify the identity and employment authorization for all employees hired on or after November 6, 1986, who are working in the U.S. 8 U.S.C. §§ 1324a(a)(1)(B), 1324a(b)(1).

18. Congress directed that Form I-9 and its requirements be evaluated and potentially updated. *See* 8 U.S.C. § 1324a(d). Form I-9 itself was updated, for example, in July 2017, August 2019, and August 2023.

19. The employee must attest to their authorization to work in the U.S. and sign Section 1 of Form I-9, and the employee must present documentation to establish their identity and employment authorization so that the employer may complete Section 2 of Form I-9. 8 U.S.C. § 1324a(b)(2).

20. Congress specifies that employees may present a document from one category to prove both employment authorization and identity, *id.* § 1324a(b)(1)(B) ("List A"), or may present a combination of one document evidencing employment authorization, *id.* § 1324a(b)(1)(C) ("List C"), and another document establishing identity, *id.* § 1324a(b)(1)(D) ("List B"). However, the Attorney General "may prohibit or place conditions" on the use of any such documents. *Id.* § 1324a(b)(1)(E).

21. The employer must retain the completed form for three years after hiring the employee, or for one year after their employment ends, whichever is later. 8 U.S.C. § 1324a(b)(3).

22. Congress directed that employers who attempted in good faith to comply but who still committed technical or procedural violations should be entitled to good faith compliance, except where the employer fails to correct the error within ten business days of notice or where the employer is a serial offender. *See id.* § 1324a(b)(6).

23. Congress authorized the Attorney General to "establish procedures" for investigating and prosecuting potential violations of employers' Form I-9 obligations. *See id.* § 1324a(e).

24. Congress specifically required the Attorney General's procedures to include an Administrative Procedure Act hearing before an ALJ who must issue a written decision (*id.* § 1324a(e)(3)) and options for administrative appellate review and appellate review by a U.S. Court of Appeals (*id.* § 1324a(e)(7), (8)). Congress provided as well that, if an employer fails to comply with an order entered against it, the Attorney General may bring a civil action in federal court to force compliance with the order, but in that civil action "the validity and appropriateness" of the order "shall not be subject to review." *Id.* § 1324a(e)(9).

25. Congress also established a statutory range of penalties, as well as factors to guide setting penalties within that range. *Id.* § 1324a(e)(5).

Employers' Form I-9 Obligations

26. The Form I-9 process is complex, time-consuming, and especially burdensome for small businesses.

27. The form, which takes between 25 and 34 minutes to complete, must be completed within three business days of the employee's first day of employment.[1]

[1] Form I-9 at 1, available at https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf; I-9 Instructions at 2, 8, available at https://www.uscis.gov/sites/default/files/document/forms/i-9instr.pdf.

28. The employer or its authorized representative must be physically present to verify the documents, unless the employer participates in E-Verify and uses a qualifying alternative procedure to remotely examine documents.

29. DHS's Handbook for Employers M-274 ("I-9 Handbook") contains over 150 pages of explanations about employers' various I-9 obligations.[2]

30. The Instructions on Form I-9 itself span 8 pages.[3]

31. Section 13.0 of the I-9 Handbook, which describes acceptable documentation, is more than 3,000 words and approximately 34 pages.[4]

32. Section 13.0 nonetheless warns employers it "does not provide all of the variations of a particular document" and that "new versions of a document may become available."[5]

33. What constitutes acceptable documentation is not always straightforward.

34. Acceptable documents are not necessarily issued by a governmental authority.

35. For some employees, DHS allows employers to accept a "School ID card with a photograph," a "School record or report card," or a "Day care or nursery school record."[6]

36. Acceptable documents are not necessarily issued by an American government either.

37. A "[d]river's license issued by a Canadian government authority" may be used to verify an employee's identity.[7]

---

[2] Handbook For Employers M-274 ("I-9 Handbook"), available at https://www.uscis.gov/book/export/html/59502.
[3] https://www.uscis.gov/sites/default/files/document/forms/i-9instr.pdf.
[4] I-9 Handbook § 13.0.
[5] *Id.*
[6] *Id.*
[7] *Id.*

38. Foreign passports and immigrant visas also may establish both identity and employment authorization if they bear the appropriate temporary authorization stamps.[8]

39. But genuine identification documents issued by foreign governmental authorities are not necessarily sufficient to establish an employee's identity.

40. There are different rules about acceptable documentation based on the employee's age, on whether they have a disability, and on whether the employee is an American citizen, a noncitizen national, a lawful permanent resident, or another kind of noncitizen.[9]

41. There are different rules about acceptable documentation for noncitizen employees based on their country of origin and on their type of employment authorization.[10]

42. There are different rules about whether employers may accept photocopies of a document.[11]

43. The employee may provide an "acceptable receipt" in lieu of any particular document for a limited period of time.[12]

44. The employer's various Form I-9 obligations are continuing.

45. An employer must, for example, periodically re-examine the documents evidencing the employee's authorization to work and update Form I-9, such as when an employee's original documentation, work authorization, or "acceptable receipt" are going to expire, or when the employer rehires employees under certain circumstances.[13]

46. Knowing when and how to reverify documents also can be complex for employers.

---

[8] Form I-9 at 2.
[9] I-9 Instructions at 2-3.
[10] *Id.* at 3.
[11] *Id.* at 4.
[12] Form I-9 at 2.
[13] I-9 Instructions at 4.

47. Employers may have to reverify with different documents, since employees may present any kind of documentation they choose and since the employers cannot require the employee to present any specific document.[14]

48. The employer must reverify the employee's authorization to work no later than the expiration date of the employee's documentation or the expiration date of the employee's existing employment authorization (e.g., their visa), whichever is earlier.

49. There are exceptions even to these rules.

50. For example, employers are not required to reverify some documentation if it is presented by some employees, such as U.S. citizens, noncitizen nationals, or lawful permanent residents.[15]

51. Some documentation of an employee's authorization to work does not expire at all, such as unrestricted social security cards, and employers are not required to reverify those documents.[16]

52. Also, in some instances, the employee's employment authorization may expire, but the employer cannot determine when.

53. Employees who are "[r]efugees, asylees, and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau," for example, are directed to enter "N/A" on the relevant Form I-9 field.[17]

54. So, too, are "other noncitizens authorized to work whose employment authorization does not have an expiration date."[18]

---

[14] *Id.* at 5; I-9 Handbook § 7.1; *id.* § 7.3 Tables 4 and 5; *id.* § 8.1 (discussing "Employers of Individual Referred by a State Employment Agency").
[15] I-9 Instructions at 5.
[16] *Id.*
[17] *Id.* at 3.
[18] *Id.*

55. Form I-9 prohibits employers from requesting documents to verify the employee's citizenship or immigration status, including the expiration date (if any) of the employee's existing authorization to work.[19]

56. Therefore, although Form I-9 requires employers to reverify documents before the expiration of the employee's work authorization, employers may not know when that is and are prohibited from asking to verify it.

57. Employers also must complete a new Form I-9 for any rehired employee if more than three years have passed since the original Form I-9.

58. If less than three years have elapsed since the employee's last Form I-9, the rules are more complex.

59. Within three years of the last Form I-9, employers are not required to reverify a rehired employee's identification documents unless the employee has legally changed their name.

60. Within three years of the last Form I-9, employers are not required to reverify the rehired employee's documents showing they are authorized to work unless reverification would otherwise be required, such as when the employee's documents or employment authorization are expiring.

61. Whatever the circumstances, when completing or updating Form I-9, an employer "must accept" documents presented by an employee if they "reasonably appear[] to be genuine and to relate to" the person presenting them.[20]

62. That is fraught for employers.

[19] Form I-9 at 1.
[20] I-9 Instructions at 1, 5.

63. Form I-9 strictly limits the information employers can provide to, or request from, employees.

64. Employers are instructed that they "must allow all employees to choose which acceptable documentation to present"[21] and may not request documents to verify the employee's citizenship or immigration status.[22]

65. If the employer requests different documents than those chosen by the employee, the employer may face discrimination charges.[23]

66. If the employer rejects "documents that reasonably appear to be genuine and to relate to the person presenting them," the employer may face discrimination charges.[24]

67. But if the employer rejects the employee's documents, Form I-9 provides no guidance about what to do next. Form I-9 says only that the employer must give the employee another opportunity to present documents.[25]

68. Errors and mistakes on Form I-9 are unsurprisingly common.

69. In a March 2017 U.S. House Committee on Small Business hearing, a witness from the Society for Human Resource Management testified about Form I-9's complexities and estimated that, on average, small businesses he worked with had errors on 75 percent of their Form I-9s.[26]

70. Even minor errors on Form I-9 can have severe consequences.

---

[21] *Id.* at 1.
[22] Form I-9 at 1.
[23] *Id.*; I-9 Handbook § 11.2 ("Unfair Documentary Practices").
[24] I-9 Handbook § 11.2.
[25] I-9 Instructions at 3.
[26] Statement of Frank Cania on behalf of Society for Human Resource Management, Submitted to U.S. House Committee on Small Business, Hearing on Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced? (Mar. 29, 2017), available at https://www.congress.gov/115/meeting/house/105794/witnesses/HHRG-115-SM00-Wstate-CaniaF-20170329.pdf.

DHS Investigations of Form I-9 Compliance

71. DHS audits employers for compliance with their Form I-9 obligations.

72. DHS may order employers to produce Form I-9s and related documentation.

73. When DHS requests to review Form I-9s and related documentation, the employer must make it available within three business days or face an alleged violation of the Form I-9 retention requirements.

74. DHS may follow up and request additional information from the employer.

75. If DHS determines the employer's Form I-9s contain procedural or technical paperwork errors, DHS must notify the employer and allow them ten business days to correct the error.

76. Employers may correct the alleged error by, for example, re-examining documents to verify the identity and employment authorization of a current or former employee.

77. If the employer corrects the error within ten business days, then DHS withdraws the alleged violation; if not, then DHS stands by the alleged violation.

78. If DHS determines an error on the Form I-9 was part of a pattern or practice or that the error was non-technical and non-procedural, DHS does not give the employer an opportunity to correct it.

DHS's Prosecution of Fines for Form I-9 Errors in DOJ's Agency Courts

79. DHS's investigation culminates with a Notice of Intent to Fine ("Notice"), which formally initiates agency enforcement proceedings.

80. The Notice identifies the alleged Form I-9 violations, the relevant employees, and the employer's fine for the alleged violations.

81. To contest the Notice, an employer must request a hearing in DOJ's Office of the Chief Administrative Hearing Officer.

82. Failure to request a hearing in response to the Notice results in the agency entering a final order requiring the employer to pay the fines in the Notice.

83. Put another way, employers who wish to defend against DHS's allegations may not opt out of DOJ's agency courts.

84. The employer may simply pay the Notice's fine or negotiate with DHS to settle for some lesser amount.

85. If the employer opts to contest the Notice, DHS files a complaint with DOJ's Office of the Chief Administrative Hearing Officer (OCAHO) alleging the facts and violations in the Notice.

86. The Chief Administrative Hearing Officer is selected by the Director of the Executive Office for Immigration Review who, in turn, is appointed by the Attorney General.

87. After receiving the complaint, the Chief Administrative Hearing Officer assigns it to an OCAHO ALJ.

88. Each OCAHO ALJ is appointed under 5 U.S.C. § 3105.

89. The ALJs do not enjoy the tenure and salary protections of Article III judges, but they may be removed only with the approval of the Merit Systems Protection Board. 5 U.S.C. §§ 7521(a), (b).

90. The MSPB must first determine there is "good cause" to remove the ALJ. *Id.*

91. Meanwhile, members of the Merit Systems Protection Board may themselves only be removed for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

92. The appointed OCAHO ALJ then presides over the enforcement proceedings, which are governed by detailed procedures. *See* 28 C.F.R. Part 68.

93. The ALJ must hold a hearing.

94. The ALJ's hearing does not include a right to trial by jury.

95. The ALJ must issue a written decision.

96. Either DHS or the employer may then request an internal appellate review by the Chief Administrative Hearing Officer, which may also initiate review *sua sponte*.

97. If the ALJ's decision is not reviewed, it becomes an enforceable final order.

98. If the ALJ's decision is reviewed, the Chief Administrative Hearing Officer may affirm, reverse, or otherwise modify the ALJ decision, including by ordering a remand to the ALJ.

99. Either DHS or the employer may appeal the Chief Administrative Hearing Officer's decision for review by Defendant Attorney General.

100. The Attorney General may also initiate review *sua sponte* of any case pending before an ALJ or the Chief Administrative Hearing Officer.

101. When the Attorney General takes over review of a case, there is no timeframe for rendering the decision.

102. If the Chief Administrative Hearing Officer's decision is not reviewed by the Attorney General, it becomes the agency's final order.

103. If the Attorney General issues a decision in any Form I-9 enforcement proceeding, it becomes the agency's final order.

104. DOJ decides whether decisions in Form I-9 enforcement proceedings are published and, in turn, precedential in future cases.

105. When DOJ's agency judges determine a paperwork violation occurred, the final order directs the employer to pay a fine based on a statutory range of $272 to $2,701 per violation.

106. The agency's final order may be appealed to the appropriate U.S. Circuit Court of Appeals, which reviews the order only for compliance with the Administrative Procedure Act's highly deferential standard.

107. If an employer fails to comply with a final order after the time to appeal, the Attorney General may file a civil action in federal district court to enforce the order.

108. The employer may not challenge the validity of the underlying order in such a civil action, including any of the alleged Form I-9 errors.

FACTUAL BACKGROUND

DHS Intends to Fine ProCraft Over $31,000 for Paperwork Errors

109. ProCraft is a small business providing brick-, stone-, and blockmasonry services on commercial and residential construction projects in the Tulsa area.

110. Danny Barbee founded ProCraft in 2010 after decades of working as a bricklayer.

111. Diana Barbee is ProCraft's Administrative Director and is married to Danny.

112. In early March 2020, Diana was working at ProCraft's office when two agents from DHS's Homeland Security Investigations appeared.

113. The agents demanded I-9 Forms for all ProCraft's current employees.

114. ProCraft timely provided these Form I-9s.

115. DHS said nothing further to ProCraft for two years and three months.

116. Then, in June 2022, an auditor from DHS demanded more documents. He acknowledged "[m]uch of the information is old (2020)," but he still demanded the documents because "it remains the data that we are working with as the case was dated from that time period."

117. Diana provided additional documents within a week.

118. The same week, the DHS auditor responded that three ProCraft employees had potentially presented inadequate I-9 documentation when they were hired years before.

119. The DHS auditor gave ProCraft ten business days to provide additional documentation for each of the three employees.

120. One of the employees was still employed, but the other two had left ProCraft more than a year earlier—when DHS's investigation had already been pending for more than a year.

121. DHS's auditor concluded the current employee's documentation was sufficient but the two former employees' documentation was not, and he told ProCraft it would receive letters to that effect.

122. DHS did not send those letters until March 2023, which was nine months later.

123. After two more months of silence, on May 12, 2023, a DHS agent arrived at ProCraft's office to serve ProCraft with a Notice of Intent to Fine ("Notice"). A true and correct copy of that Notice is attached to this Complaint as Exhibit A.

124. The Notice charged ProCraft with 14 Form I-9 paperwork errors.

125. Eleven of those alleged Form I-9 errors were because employees allegedly failed to sign the form within three days.

126. Another alleged error was because Diana allegedly signed her own Form I-9.

127. Those twelve alleged paperwork errors are "technical or procedural failure[s]" that are eligible for good faith compliance under 8 U.S.C. § 1324a(b)(6).

128. ProCraft is not alleged to be a "pattern or practice violator" excluded from good faith compliance under 8 U.S.C. § 1324a(b)(6).

129. ProCraft should have been given ten business days to correct these twelve alleged Form I-9 errors to achieve good faith compliance and, thereby, avoid fines for the alleged errors. 8 U.S.C. § 1324a(b)(6).

130. DHS did not give ProCraft any opportunity to correct these twelve alleged paperwork errors before DHS included them in the Notice.

131. The final two alleged Form I-9 errors appear to relate to the two former ProCraft employees whose documentation DHS flagged during the investigation.

132. Those two employees allegedly presented unrestricted social security cards to establish their authorization to work in the United States. 8 U.S.C. § 1324a(b)(1)(C)(i); Form I-9 at 2. They allegedly presented a Mexican passport and a Mexican Consular ID, respectively, to establish their identities.

133. Although the employees' documents reasonably appeared to be genuine and reasonably appeared to relate to the employees presenting them, DHS's Notice alleged that ProCraft should not have accepted the employees' identifying documents.

134. The Notice did not charge ProCraft with actually hiring or employing unauthorized workers.

135. DHS's Notice ordered ProCraft to pay $2,237.55 for each of the 14 alleged violations, which comprised a total fine of $31,325.70.

136. The Notice did not explain how DHS calculated the fine.

137. The Notice directed ProCraft to submit a written request for a hearing before an ALJ within 30 days if it wanted to contest the Notice.

138. The Notice warned that "[i]f a written request for a hearing is not received on a timely basis, ICE will issue a final and unappealable order in 45 days directing you to pay a fine in the amount specified in the Notice." Exhibit A at 3.

ProCraft's Hearing Request and DHS's Response

139. ProCraft timely requested a hearing to contest the Notice.

140. The next month, June 2023, DHS emailed ProCraft to determine who should be the company's point of contact during the agency enforcement proceedings.

141. ProCraft authorized the agent to speak with Diana.

142. Another two months went by before DHS emailed ProCraft again.

143. On August 9, 2023, DHS acknowledged ProCraft wanted to contest the Notice but urged the business to settle instead. A true and correct copy of this communication is attached as Exhibit B.

144. DHS warned ProCraft that failing to settle meant a long, costly battle before DOJ's agency courts.

145. DHS's agent warned that "a complaint will be filed with the Office of the Chief Administrative Hearing Officer (OCAHO)," which will be followed by "a full discovery request," including "interrogatories, subpoenas, etc." and which would "generally take a year or more" before ProCraft would even "reach a point where a hearing on the merits can be scheduled at a later date."

146. The DHS agent then offered "a 10% reduction off the original NIF [Notice of Intent to Fine]."

147. ProCraft declined to settle and, as a result, faces the Agencies' imminent and unconstitutional enforcement proceedings in DOJ's agency courts.

CLAIMS

Count I:
The Agencies' Form I-9 Enforcement Proceedings Violate Article III
(5 U.S.C. § 706(2)(B))

148. The allegations of ¶¶ 1-147 are incorporated here in full.

149. Article III, Section 1 of the U.S. Constitution states that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III further provides for various protections for the judges of these Article III courts in order to guarantee judicial independence.

150. Under Article III, this "judicial Power shall extend to *all* Cases, in Law and Equity, arising under . . . the Laws of the United States" (emphasis added).

151. Applying these provisions, the Supreme Court has held that cases implicating an individual's "private rights" must be tried before an Article III court.

152. The "private rights" inquiry calls for a historical analysis that asks whether a case involves issues of the sort that historically would have been adjudicated in the courts—like a person's life, liberty, or property—or whether, instead, it involves issues that historically could have been resolved by the executive without any need for judicial involvement—like public rights that belong to the people at large or governmental privileges.

153. An order to pay a fine implicates private rights because fines would historically have been imposed in the common law courts. *See Tull v. United States*, 481 U.S. 412 (1987); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

154. More broadly, an order to pay a fine to the government as a penalty affects a person's private rights because it results in the confiscation of their private property.

155. Because ProCraft would be forced to pay money to the government as a fine, the Agencies' enforcement proceedings implicate ProCraft's private rights.

156. Therefore, the alleged violations in ProCraft's Notice of Intent to Fine must be adjudicated before an Article III court.

157. The ALJs and other agency judges who preside over the Agencies' system for adjudicating alleged Form I-9 errors are not Article III judges. Nor do they have the salary or tenure protections of Article III judges.

158. As a result, the Agencies' system for adjudicating alleged Form I-9 errors violates Article III and should be declared unconstitutional and enjoined.

Count II:
The Agencies' Form I-9 Enforcement Proceedings Violate the Seventh Amendment
(5 U.S.C. § 706(2)(B))

159. The allegations of ¶¶ 1-147 are incorporated here in full.

160. The Seventh Amendment to the U.S. Constitution provides that, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

161. Just as private rights may be deprived only by an Article III court, the Supreme Court has held that actions implicating a litigant's private rights trigger the Seventh Amendment right to trial by jury. Thus, the Seventh Amendment right applies to those actions that historically would have been litigated before a jury at common law.

162. An order to pay a fine implicates private rights because fines would historically have been imposed in the common law courts. *See Tull v. United States*, 481 U.S. 412 (1987); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted* 143 S. Ct. 2688 (2023).

163. More broadly, an order to pay money to the government as a fine affects a person's private rights because it results in the confiscation of their private property.

164. Because ProCraft would be forced to pay money to the government as a fine, the Agencies' enforcement proceedings implicate ProCraft's private rights.

165. Therefore, the alleged violations in ProCraft's Notice of Intent to Fine must be adjudicated in a forum where ProCraft's Seventh Amendment right to a jury trial is preserved.

166. The Agencies' system for adjudicating alleged Form I-9 errors does not include a right to trial by jury.

167. As a result, the Agencies' system for adjudicating alleged Form I-9 errors violates the Seventh Amendment and should be declared unconstitutional and enjoined.

Count III:
The ALJs Who Preside Over the Agencies' Form I-9 Enforcement Proceedings Enjoy Unconstitutional Protection from Removal
(5 U.S.C. § 706(2)(B))

168. The allegations of ¶¶ 1-147 are incorporated here in full.

169. In addition to violating the structural provisions of Article III, as well as the Seventh Amendment, the ALJs in DOJ's Office of the Chief Administrative Hearing Officer *also* violate structural provisions governing the executive branch under Article II.

170. The Constitution vests "[t]he executive Power . . . in a President" who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1; *id.* § 3. The President is charged with overseeing executive officers and, to wield that authority, must have the ability to remove executive-branch officers. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

171. By contrast, the ALJs who preside over adjudications of alleged Form I-9 errors enjoy an unconstitutional dual-layer of protection from removal. ALJs can be removed only for good cause, which must be found by the Merit Systems Protection Board, 5 U.S.C. § 7521(a), (b), and members of the Merit Systems Protection Board can themselves only be removed upon a finding of "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d).

172. This unconstitutional protection from removal necessarily affects the ALJs' adjudication of cases alleging Form I-9 errors, which involve innumerable rulings and decisions by the ALJ that affect litigants' rights in large and small ways.

173. As a result, the Agencies' system for adjudicating alleged Form I-9 errors also violates the structural constitutional provisions of Article II and should be declared unconstitutional and enjoined.

REQUEST FOR RELIEF

In light of the foregoing, Plaintiff ProCraft Masonry respectfully requests the following relief:

A. An injunction prohibiting the Defendants from adjudicating ProCraft's liability or punishment for the Form I-9 errors alleged in the Notice of Intent to Fine;

B. A declaration that the Defendant Agencies' system for adjudicating alleged Form I-9 errors violates Article III of the U.S. Constitution;

C. A declaration that the Defendant Agencies' system for adjudicating alleged Form I-9 errors violates the Seventh Amendment to the U.S. Constitution;

D. A declaration that the Defendant Agencies' system for adjudicating alleged Form I-9 errors violates Article II of the U.S. Constitution;

E. An award of Plaintiff's costs and expenses of this action, together with reasonable attorneys' fees, under the Equal Access to Justice Act or otherwise; and

F. Any other legal or equitable relief to which Plaintiff may show itself to be justly entitled.

Dated: September 12, 2023

Respectfully submitted,

/s/ Heather M. Cook
Heather M. Cook
(OK Bar No. 32602)
HEATHER COOK PLLC
220 East Eufaula Street
Norman, OK 73069
(405) 615-3107
heather@heathercooklaw.com

Robert M. Belden*
(DC Bar No. 1035488)
Jared A. McClain*
(DC Bar No. 1720062)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
rbelden@ij.org
jmcclain@ij.org

Robert E. Johnson*
(Ohio Bar No. 0098498)
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd., #256
Shaker Heights, OH 44120
(301) 602-5654
rjohnson@ij.org

**Pro Hac Vice to be filed*

Counsel for Plaintiff