U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

DALE GOURNEAU,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2023-0034

ALJ CASE NO. 2021-FRS-00018
ALJ EVAN H. NORDBY

DATE: June 24, 2025

Appearances:

For the Complainant:
Frederic A. Bremseth, Esq.; *Bremseth Law Firm, PC;* Minnetonka, Minnesota

For the Respondent:
Bryan P. Neal, Esq.; *Holland & Knight, LLP*; Dallas, Texas

Before JOHNSON, Chief Administrative Appeals Judge, and THOMPSON, KAPLAN, BURRELL, and KIKO, Administrative Appeals Judges

NOTICE OF REFERRAL TO THE SECRETARY

SUMMARY

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA).[1] On May 4, 2023, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (ALJ Decision) concluding that Respondent BNSF Railway Company terminated Complainant Dale Gourneau's employment in violation of the FRSA after he reported hazardous safety

---

[1] 49 U.S.C. § 20109; 29 C.F.R. Part 1982 (2024).

and security conditions. Consistent with the remedies provided in the FRSA, the ALJ ordered Respondent to reinstate Complainant, seal portions of his employment record, post a copy of the decision, and pay Complainant back pay, pre- and post-judgment interest, compensatory damages, punitive damages, and reasonable attorneys' fees and costs. Respondent appealed the ALJ Decision to the Administrative Review Board (ARB or Board). On May 21, 2025, the Board issued a Decision and Order (D. & O.), affirming the ALJ's Decision, including the remedies.

On June 4, 2025, Respondent filed a Petition for Further Review by the Secretary of Labor (Petition for Secretarial Review) with the Board. Notably, Respondent does not seek review of the factual findings or legal conclusions in the ALJ Decision or in the Board's D. & O. It does not ask the Secretary to reconsider, for example, whether Complainant reported hazardous safety or security conditions, whether Respondent retaliated against Complainant due to his protected activity, or whether the damages awarded were appropriate under the circumstances. Instead, Respondent argues that the FRSA's statutory adjudication provisions, under which FRSA claims must be adjudicated within the Department of Labor in the first instance, violate the Seventh Amendment to the United States Constitution and the Constitution's separation of powers mandates. Respondent primarily relies on the Supreme Court's decision in *SEC v. Jarkesy*,[2] which is discussed in more detail below.

Pursuant to Secretary's Order No. 01-2020, the Board hereby provides notice to the Secretary that it believes that the issue raised by Respondent presents a question of law that may be of exceptional importance and may warrant review by the Secretary.[3] If the Secretary considers this matter, the Board urges the Secretary to conclude that the statutory adjudication provisions contained in the FRSA do not violate the Constitution. Under the current Administration, and represented by the Department of Justice, as discussed in detail below, the Department of Labor has taken the position in pending litigation in United States District Courts that similar whistleblower programs falling under the Secretary's jurisdiction: (1) do not implicate the Seventh Amendment right to a jury trial; and, moreover (2) fall within the "public rights" exception, which exempt them from any right to a jury trial in an

[2] 603 U.S. 109 (2024).

[3] *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020) at ¶6(b)(1).

Article III court.[4] Other federal courts and Department ALJs have reached the same result.[5]

The Board agrees with the reasoning articulated by the Department of Labor and other tribunals in those proceedings, and believes the reasoning extends to the FRSA as well. Concluding otherwise would be inconsistent with the position the Department has already taken in these other, similar cases, would contradict the weight of authority in similar circumstances, and would leave employees like Complainant who blow the whistle on dangerous conditions without meaningful recourse and hinder the fundamental purpose of the FRSA whistleblower and anti-retaliation program of preserving the safety and security of the nation's railways.

BACKGROUND

1. Factual Background

Complainant worked as a carman for Respondent from 2002 until his employment was terminated on January 22, 2020. As a carman, Complainant was responsible for inspecting train cars as they arrived at the train yard. Complainant had a clean disciplinary record—save for one unexcused absence due to the passing of his mother—and was known as a "tenacious safety advocate."

In August and September 2019, Complainant raised several safety concerns at Respondent's yard. First, in approximately August of 2019, Complainant raised an issue with his supervisor and a general foreman regarding the administration of Respondent's "Broken Wheel Club" program, an incentive program that encouraged

---

4 *Perdue Farms Inc. v. Chavez-DeRemer*, No. 5:24-cv-00477-BO-RJ (E.D.N.C. filed Aug. 20, 2024) (Food Safety Modernization Act); *Comcast Corp. v. U.S. Dep't of Lab.*, No. 1:24-cv-01401-PTG-IDD (E.D. Va. filed Aug. 9, 2024) (Sarbanes-Oxley Act).

5 *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195 (2d Cir. 1993) (Surface Transportation Assistance Act); *Skidmore v. ACI Worldwide, Inc.*, No. 8:08CV01, 2010 WL 2900113 (D. Neb. July 20, 2010) (Sarbanes-Oxley Act); *Schmidt v. Levi Strauss & Co.*, 621 F.Supp.2d 796 (N.D. Cal. 2008) (Sarbanes-Oxley Act); *Walton v. Nova Info. Sys.*, 514 F.Supp.2d 1031 (E.D. Tenn. 2007) (Sarbanes-Oxley Act); *Murray v. TXU Corp.*, No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (Sarbanes-Oxley Act); *Wyderka v. Energy Transfer Co.*, ALJ No. 2023-PSI-00001 (ALJ Jan. 15, 2025) (Pipeline Safety Improvement Act); *Slade v. Norax, LLC*, ALJ No. 2024-FDA-00020 (ALJ Oct. 11, 2024) (Food Safety Modernization Act); *Drake v. Morinda Holdings*, ALJ No. 2023-SOX-00023 (ALJ Sept. 4, 2024) (Sarbanes-Oxley Act).

employees to report defects with wheels to prevent derailments. If an employee reported a defect and the person who administered the program found it eligible, the employee could receive $500. Complainant discovered that management in his district was not submitting the carmen's reported wheel defects for compensation, and reported this concern to his supervisor.

On September 3, 2019, Complainant raised several more safety concerns. That morning, Complainant raised concerns pertaining to road conditions, including washboarding, potholes, and missing blue flags. Later that shift, Complainant noticed that some of the cars on a train were missing the required federal consolidated stencil to identify the cars. He reported these issues as well. Finally, later that day, while waiting for a train to pass, Complainant heard a sound that indicated a train's running boards were broken. Three total broken running boards were identified, which Complainant also reported.

After Complainant reported these safety issues, and despite Complainant's clean disciplinary record, Respondent charged Complainant with committing safety violations on two occasions in quick succession—the first on September 3, 2019 (the same day he reported poor road conditions, stencil violations, and broken running boards), and the second on January 3, 2020. Respondent suspended Complainant after the first alleged safety violation, and terminated his employment after the second alleged safety violation.

2. Procedural Background

Complainant filed a complaint with the Department's Occupational Safety and Health Administration (OSHA) on February 25, 2020, alleging Respondent retaliated against him in violation of the FRSA. OSHA dismissed Complainant's complaint on January 25, 2021, and Complainant requested a hearing with an ALJ.

On May 4, 2023, the ALJ issued the ALJ Decision in favor of Complainant. The ALJ found that Complainant engaged in several instances of protected activity, including when he reported concerns about the administration of the "Broken Wheel Club" program in August 2019, and when he reported dangerous road conditions, stencil violations, and broken running boards on September 3, 2019. The ALJ also found that Complainant's protected activity was a contributing factor to the adverse employment actions that he suffered, based on temporal proximity, evidence of pretext, Respondent's inconsistent application of its policies, Respondent's antagonism or hostility towards Complainant and its change in attitude towards

Complainant after he engaged in protected activity, and the falsity of Respondent's explanation for taking adverse action against Complainant. The ALJ further found that Respondent did not prove that it would have taken the same adverse action against Complainant absent his protected activity because Respondent did not prove that it applied its rules consistently.

Having found for Complainant, the ALJ ordered the following remedies: (1) reinstatement; (2) $318,979.98 in back pay wages and $39,679.74 in prejudgment interest, with backpay and post-judgment interest to continue to accrue through the date of payment; (3) $70,000 in compensatory damages; (4) $150,000 in punitive damages; (5) reasonable attorney's fees and costs; (6) the sealing of all documents relating to the incidents, charges, and adverse actions addressed in the ALJ Decision; and (7) the posting of the ALJ Decision for at least 60 days in a place and manner that is usual and customary for employees to gather and review employment related information.

Respondent appealed the ALJ Decision to the Board. On May 21, 2025, the ARB affirmed, concluding that the ALJ's findings were supported by substantial evidence. The ARB agreed with the ALJ that Complainant engaged in protected activity when he, among other things, reported that managers were not administering a program designed to prevent trail derailments, that conditions existed such that train cars might not be properly inspected or a hazard on a train car might not be properly identified, and that conditions existed that risked physical harm to railway workers.[6] The ARB also affirmed the ALJ's holding that Complainant's protected activity contributed to the adverse action taken against him, and that Respondent failed to establish its same-action defense.[7] Finally, the ARB affirmed the damages awarded by the ALJ, including reinstatement, back wages, and punitive damages due to Respondent's reckless disregard of Complainant's rights.[8]

On June 4, 2025, Respondent filed the Petition for Secretarial Review. Complainant filed a response in opposition to the Petition for Secretarial Review on June 13, 2025. As noted above, Respondent is not contesting the case on the merits,

---

[6] *Gourneau v. BNSF Ry. Co.*, ARB No. 2023-0034, ALJ No. 2021-FRS-00018, slip op. at 17-19 (ARB May 21, 2025).

[7] *Id.* at 20-27.

[8] *Id.* at 27-35.

but instead is only raising the issue of the constitutionality of the FRSA's adjudicatory scheme.

SECRETARY'S DISCRETION TO REVIEW ARB DECISIONS

A party to a case before the Board may, within 14 calendar days after the Board issues its decision, request that the Board refer the case for further review by the Secretary of Labor.[9] However, the circumstances under which we may refer the case to the Secretary are extremely narrow. Per the Secretary's delegation of authority to the Board, we may only refer the case to the Secretary if a majority of the Board determines that the case involves: (1) a question of law, (2) that is of "exceptional importance," and (3) that warrants Secretary review.[10] If the Board refers the matter to the Secretary, the Secretary retains the discretion to decline, accept, or take no action on the Board's referral, as the Secretary deems appropriate.[11]

Neither the Board nor the Secretary have precisely defined "exceptional importance." Respondent asserts that the Constitutional issue presented is a matter of "exceptional importance" warranting Secretary review.[12] Complainant counters that because of a recent "slew of *Jarkesy*-related attacks," Respondent's argument to the Secretary is common and is, per the Supreme Court, a "standard" question of administrative and constitutional law, detached from considerations of agency policy.[13] Thus, Complainant contends this issue is, by definition, "unexceptional."[14]

While we recognize and appreciate Complainant's argument,[15] given the Constitutional issues involved, the Board has voted to refer this matter to the Secretary who may, in her complete discretion, decline, accept, or take no action on

---

9 Secretary's Order No. 01-2020 at ¶6(b)(1).

10 *Id.*

11 *Id.*

12 Petition for Secretarial Review at 2-3.

13 Response to BNSF's Petition for Further Review at 6 (citing *Axon Enter. v. FTC*, 598 U.S. 175, 178 (2023)).

14 *Id.*

15 Indeed, the Board has received several *Jarkesy*-based challenged in the last year under various whistleblower and immigration enforcement programs adjudicated by the ARB.

the Board's referral. To the extent the Secretary accepts this case for review, the Board offers the following analysis for the Secretary's consideration.

DISCUSSION

1. FRSA, *Jarkesy*, and Respondent's Constitutional Challenge

A. Overview of the FRSA

Congress has explicitly delegated to the Secretary of Labor authority over a host of whistleblower and anti-retaliation laws dealing with various sectors and industries, including railroads,[16] commercial trucking,[17] airlines,[18] public transportation,[19] maritime and shipping,[20] automotive,[21] securities and finance,[22] food safety,[23] pipeline safety,[24] and nuclear energy and the environment.[25] The thrust of each of these statutes is the same—to protect the safety and security of the American workforce and public by offering protection to those who would "blow the whistle" on hazardous, deadly, and/or illegal conditions and conduct.

Congress enacted the FRSA in 1970 "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving

---

[16] FRSA, 49 U.S.C. § 20109; 29 C.F.R. Part 1982.

[17] Surface Transportation Assistance Act, 49 U.S.C. § 31105; 29 C.F.R. Part 1978.

[18] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; 29 C.F.R. Part 1979.

[19] National Transit Systems Security Act, 6 U.S.C. § 1142; 29 C.F.R. Part 1982.

[20] Seaman's Protection Act, 46 U.S.C. § 2114; 29 C.F.R. Part 1986.

[21] Motor Vehicle and Highway Safety Improvement Act of 2012, Section 31307 of the Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; 29 C.F.R. Part 1988.

[22] Sarbanes-Oxley Act, 18 U.S.C. § 1514A; 29 C.F.R. Part 1980; Consumer Financial Protection Act, 12 U.S.C. § 5567; 29 C.F.R. Part 1985.

[23] Food Safety Modernization Act, 21 U.S.C. § 399d; 29 C.F.R. Part 1987.

[24] Pipeline Safety Improvement Act, 49 U.S.C. § 60129; 29 C.F.R. Part 1981.

[25] Energy Reorganization Act, 42 U.S.C. § 5851; Clean Air Act, 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Solid Waste Disposal Act, 42 U.S.C. § 6971; Toxic Substances Control Act, 15 U.S.C. § 2622; 29 C.F.R. Part 24.

any carrier of hazardous materials."[26] To this end, the FRSA includes a robust whistleblower protection and anti-retaliation program, which provides that a railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part," to the employee engaging in any one of the numerous protected activities.[27] As stated by OSHA, "FRSA promotes safety in railroad operations and reduces railroad-related accidents by protecting employees from retaliation for engaging in protected activities . . . ."[28]

The activities protected by the FRSA are enumerated in the statute and include various activities relating to safety and security on the nation's railways. They include: (1) providing information or directly assisting in any investigation regarding conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) providing information or directly assisting in any investigation regarding conduct which the employee reasonably believes constitutes gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security; (3) refusing to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security; (4) notifying, or attempting to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness; (5) cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; (6) furnishing information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; (7) reporting, in good faith, a hazardous safety or security condition; (8) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties; and (9) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures and

---

[26] Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, § 101, 84 Stat. 971, 971 (codified as amended at 49 U.S.C. § 20101).

[27] 49 U.S.C. § 20109(a).

[28] Investigator's Desk Aid to the Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision (2019), https://www.osha.gov/sites/default/files/FRSA-Desk-Aid-FINAL-12-20-2019.pdf.

the employee believes that the equipment, track, or structures are in a hazardous safety or security condition.[29]

The FRSA and its implementing regulations provide for a carefully crafted adjudication process that whistleblowers must follow when raising a complaint under the statute.[30] Complaints are routed, in the first instance, through the Department of Labor to allow the Department the opportunity to investigate the complaint, intervene where appropriate, and adjudicate the dispute.

Any employee who alleges a violation of the FRSA's anti-retaliation provisions must first file a complaint with the Secretary of Labor, via OSHA.[31] OSHA investigates the complaint to determine whether there is reasonable cause to believe that retaliation occurred.[32] If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided.[33] The relief may include reinstatement, back pay, compensatory damages, other equitable remedies, punitive damages not to exceed $250,000, and reasonable attorneys' fees and costs.[34] OSHA may also assist the parties in settling the case.[35] A sizeable percentage of all cases filed with OSHA are resolved at this stage of the adjudicatory process with the Department's early involvement.[36]

---

29 49 U.S.C. § 20109(a)-(b).

30 The FRSA adopts the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b). 49 U.S.C. § 20109 (d)(2).

31 49 U.S.C. §§ 20109(d)(1); 42121(b)(1); 29 C.F.R. § 1982.103.

32 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.104(b)-(e).

33 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.105(a).

34 49 U.S.C. § 20109(e); 29 C.F.R. § 1982.105(a)(1).

35 49 U.S.C. § 42121(b)(3)(A); 29 C.F.R. § 1982.111(d)(1). Nearly 18% of all FRSA complaints filed with OSHA in Fiscal Year 2023 settled without further adjudication. OHSA WHISTLEBLOWER STATISTICS FY2018-FY2023, https://www.whistleblowers.gov/factsheets_page/statistics/FY2023 (last visited June 23, 2025).

36 OSHA statistics reflect that it issued 177 total determinations in FRSA cases in Fiscal Year 2023. *Id.* The Office of Administrative Law Judges docketed 73 FRSA cases (approximately 41% of the total disposed of by OSHA) in Fiscal Year 2023.

Either the employee or the employer may object to OSHA's findings within 30 days and request a hearing before an ALJ.[37] Although the employee and the employer are parties to the action, the Assistant Secretary for Occupational Safety and Health may also, in her discretion, participate as a party or as an amicus curiae.[38]

The ALJ then conducts an adversarial, evidentiary, de novo proceeding in which the parties have the opportunity to exchange discovery and introduce evidence and testimony at a trial.[39] If the ALJ determines that the employee has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint, and that the employer has not demonstrated by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity, the ALJ, like OSHA, may order reinstatement, back pay, compensatory damages, other equitable remedies, punitive damages, and reasonable attorneys' fees and costs.[40]

Either party may then appeal the ALJ's decision to the ARB within 14 days.[41] The ARB reviews the record prepared by the ALJ,[42] the petition for review, and the parties' briefs, and issues a decision on behalf of the Secretary.[43] As with OSHA and the ALJ, the ARB may order reinstatement, back pay, compensatory damages, other equitable remedies, punitive damages, and reasonable attorneys' fees and costs.[44]

---

[37] 29 C.F.R. § 1982.105(c), .106(a). If objections are not filed, OSHA's findings become the final order of the Secretary. *Id.* § 1982.105(c).

[38] *Id.* § 1982.108(a)(1).

[39] *Id.* § 1982.107.

[40] *Id.* § 1982.109(a)-(b), (d).

[41] *Id.* § 1982.109(e), .110(a). If an appeal is not filed, the ALJ's decision becomes the final order of the Secretary. *Id.* § 1982.109(e).

[42] The ARB reviews questions of fact under a substantial evidence standard, and reviews questions of law de novo. *Id.* § 1982.110(b); *Klinger v. BNSF Ry. Co.*, ARB No. 2023-0003, ALJ No. 2016-FRS-00062, slip op. at 5 (ARB July 23, 2024) (citations omitted).

[43] 29 C.F.R. § 1982.110(a)-(c).

[44] *Id.* § 1982.110(d).

Either party may appeal the ARB's decision to an appropriate United States Court of Appeals within 60 days.[45] Additionally, parties may request, and the Secretary in her discretion may take, further review of the ARB's decision.[46] Parties may also settle their case at any point during the adjudication phase, subject to approval by the ALJ or ARB, as appropriate.[47] If the Secretary has not issued a final order within 210 days of the filing of the original OSHA complaint, the employee may also bring a de novo action in the appropriate United States District Court.[48]

B. *SEC v. Jarkesy*

Last year, the Supreme Court decided *SEC v. Jarkesy*, holding that an administrative action brought by the Securities and Exchange Commission (SEC) against George Jarkesy was unconstitutional.[49] In that case, the SEC accused Jarkesy of violating antifraud provisions of the Securities Act, the Securities and Exchange Act, and the Investment Advisers Act, and issued a preliminary order imposing civil money penalties (CMPs).[50]

At that point, the SEC had a choice—it could either pursue the action against Jarkesy through its own internal adjudicatory proceedings, or it could bring the same action in federal court.[51] The SEC opted to proceed internally with an administrative tribunal.[52] An SEC ALJ heard the matter and issued an initial agency decision in favor of the SEC.[53] The Commission then reviewed the ALJ's decision and found Jarkesy liable for securities fraud.[54] The final order imposed a CMP of $300,000 on Jarkesy, among other sanctions.[55]

---

45 49 U.S.C. § 20109(d)(4); 29 C.F.R. § 1982.112(a).

46 Secretary's Order No. 01-2020 at ¶6.

47 49 U.S.C. § 42121(b)(3); 29 C.F.R. § 1982.111(d)(2).

48 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114(a).

49 603 U.S. at 140-41.

50 *Id.* at 118-19.

51 *Id.* at 116-17.

52 *Id.* at 119.

53 *Id.*; *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022).

54 *Jarkesy*, 603 U.S. at 119.

55 *Id.*

Jarkesy petitioned for review in the Fifth Circuit Court of Appeals. A divided panel granted the petition and vacated the final order, concluding that Jarkesy was "deprived of [his] constitutional right to a jury trial."[56] The SEC then petitioned for certiorari. A divided Supreme Court affirmed the Fifth Circuit.

Consistent with precedent, the *Jarkesy* Court split the issue presented into two questions: first, whether the SEC adjudication "implicated" the Seventh Amendment right to a jury trial, and, second, if it did, whether the "'public rights' exception to Article III jurisdiction appli[ed]."[57]

On the first issue—whether the action "implicated" the Seventh Amendment—the Seventh Amendment extends to a statutory claim if it is "legal in nature," as opposed to equitable in nature.[58] To determine whether a claim is "legal in nature," courts must consider both (1) the nature of the cause of action, and (2) the remedy it provides.[59]

Regarding the nature of the cause of action, Supreme Court precedent dictates that courts must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of courts of law and equity."[60] Only if the cause of action "was tried at law at the time of the founding or is at least analogous to one that was," will it be considered "legal in nature" and implicate the right to a jury trial.[61]

Regarding the remedy, which the Supreme Court considers the more important factor, courts must likewise consider whether the remedy sought is legal or equitable in nature.[62] In *Jarkesy*, the Court recognized that a cause of action does not become "legal in nature" simply because it seeks monetary relief. Instead, what matters is whether the monetary remedy is designed to punish or deter the

---

56 *Jarkesy*, 34 F.4th at 451.

57 *Jarkesy*, 603 U.S. at 120.

58 *Id.* at 122.

59 *Id.* at 122-23.

60 *Tull v. U.S.*, 481 U.S. 412, 417 (1987).

61 *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (citation and quotation omitted).

62 *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

wrongdoing—which would make it a legal remedy—or whether it instead is a make-whole remedy designed to "restore the status quo"—which would make it an equitable remedy.[63] If the monetary relief "serve[s] a remedial purpose"—i.e., it makes the complainant whole—the Seventh Amendment is not implicated.[64]

If, "on balance," the nature of the cause of action and the remedy sought implicate the Seventh Amendment, the court must next determine whether the case falls under the public rights exception.[65] Under the public rights exception, "Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."[66]

In *Jarkesy*, the Supreme Court explained that "public rights" are those that "historically could have been determined exclusively by [the executive and legislative] branches."[67] In contrast, "private rights" are "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."[68] However, seemingly "private rights" adjudicated between private parties may still fall within the "public rights" exception. In prior cases, the Court has stated that the crucial question in such cases, where the government is not a party to the action, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is **<u>so closely integrated into a public regulatory scheme as to be a matter</u>**

---

63 *Jarkesy*, 603 U.S. at 123.

64 *Id.* (citation and quotation omitted).

65 *Granfinanciera*, 492 U.S. at 42.

66 *Id.*; *accord id.* at 51 ("Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders."); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977) ("[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.' . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.").

67 *Jarkesy*, 603 U.S. at 128 (citation and quotations omitted).

68 *Id.* at 127-28 (citations and quotations omitted).

appropriate for agency resolution with limited involvement by the Article III judiciary."[69]

Applying this framework, the *Jarkesy* Court first considered whether the SEC fraud claim "implicated" the Seventh Amendment. On this issue, the Court determined that "the remedy is all but dispositive."[70] For the alleged fraud, the SEC sought CMPs to punish and deter Jarkesy, rather than to restore the status quo. In particular, the Supreme Court observed that the statute tied the availability of CMPs to the defendant's culpability, deterrence, and recidivism, evidencing a "need to punish the defendant rather than to restore the victim . . . ."[71] The Supreme Court also determined that the nature of the statutory fraud claim at issue "confirm[ed]" that the action was "legal in nature."[72] The Court determined there was a "close relationship between the causes of action in this case and common law fraud . . . ."[73]

Having found that the case "implicated" the Seventh Amendment, the Supreme Court turned to the question of whether the cause of action was subject to the public rights exception.[74] The Supreme Court determined that the SEC's action against Jarkesy "target[ed] the same basic conduct as common law fraud, employ[ed] the same terms of art, and operat[ed] pursuant to similar legal principles."[75] Thus, the case involved purely "private rights," that must proceed in an Article III court.

---

69 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593-94 (1985) (emphasis added).

70 *Jarkesy*, 603 U.S. at 123.

71 *Id.* at 123-24.

72 *Id.* at 125.

73 *Id.*

74 *Id.* at 127.

75 *Id.* at 134 (citation omitted).

C. Respondent's Argument

Relying heavily on *Jarkesy*,[76] Respondent contends that the FRSA's agency adjudication scheme violates the Seventh Amendment because it deprives Respondent of a jury trial.[77] First, Respondent argues that a retaliation claim under the FRSA is "legal in nature." It asserts that a FRSA retaliation claim is, "at its core, a tort claim," which requires a jury trial under common law.[78] Respondent also argues that the FRSA whistleblower provision provides "legal" remedies.[79] Thus, it argues that the FRSA, like the statutory fraud claims in *Jarkesy*, implicates the Seventh Amendment. Respondent also argues that FRSA whistleblower claims do not involve "public rights," as they concern "a dispute between two private parties as to which any remedy or relief goes only to a private party."[80]

2. The Department's Position Has Been that Similar Anti-Retaliation Programs Do Not Require a Jury Trial, and the Secretary Should Take the Same Position Here

The Department, under the current Administration, has taken the position in two recent cases in United States District Courts that anti-retaliation statutes similar to the FRSA that require adjudication through the Department do not

---

[76] In *Jarkesy*, the SEC served as both prosecuting party and decisionmaker in the adjudication, and, additionally, had ultimate discretion in deciding whether to pursue the statutory fraud claims in-house or in federal court. *Id.* at 116-17; *see also id. at* 141-43 (Gorsuch, J., concurring) (criticizing the administrative scheme, noting that the "new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves" and that "[g]oing in, then, the odds were stacked against Mr. Jarkesy."). This prompted the Fifth Circuit to not only have concerns about the implications of the Seventh Amendment, but also have concerns about the unconstitutional delegation of legislative power to the SEC. *Jarkesy*, 34 F.4th at 459. Those circumstances differ greatly from whistleblower protections programs like the FRSA, where the Secretary, via ALJs and the ARB, generally only serves as the decisionmaker in a defined, trial-like adjudicatory process.

[77] Petition for Secretarial Review at 4-5.

[78] *Id.* at 8-10.

[79] *Id.* at 10-11.

[80] *Id.* at 11-13. Respondent likewise argues that the FRSA adjudicatory scheme violates separation of powers principles, because it should be assigned to adjudication by an Article III court. *Id.* at 13-15. Respondent observes, though, that *Jarkesy* recognized that the Seventh Amendment and separation-of-powers issues are largely intertwined, as both "turn[ ] mainly on the proper reach of the 'public rights' doctrine . . . ." *Id.* at 14.

implicate or violate the Seventh Amendment and do not require jury trials, even post-*Jarkesy*.[81] The Board urges the Secretary to take the same position with respect to the FRSA.

First, in 2015, Craig Watts, a poultry farmer for Perdue Farms Inc. (Perdue), filed a retaliation complaint with OSHA under the Food Safety Modernization Act (FSMA),[82] alleging that Perdue retaliated against him after he accused the company of sending him sick and dying birds that it refused to help treat. Second, in May 2022, two former employees of Comcast Corporation (Comcast)—Lawrence Gloss and Travis Rosiek—filed retaliation complaints with OSHA under the Sarbanes-Oxley Act (SOX),[83] alleging that Comcast constructively discharged them after they raised concerns that Comcast had violated federal securities laws. In 2024, Watts's, Gloss's, and Rosiek's claims were each proceeding before Department ALJs under administrative adjudication provisions effectively identical to those under the FRSA.

After the Supreme Court issued *Jarkesy*, however, Perdue and Comcast sought to short-circuit the administrative process by filing claims in the United States District Courts for the Eastern District of North Carolina and the Eastern District of Virginia, respectively. Just as Respondent argues in the present case, Perdue and Comcast argued in their respective pleadings that the Department's adjudication proceedings under the FSMA and SOX were unconstitutional because they deprived the companies of their right to a jury trial under the Seventh

---

[81] The Department filed the Motion to Dismiss in the *Perdue Farms* on March 12, 2025, under the current Administration. Government Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, and Opposition to Plaintiff's Motion for Summary Judgment, *Perdue Farms*, No. 5:24-cv-00477-BO-RJ, ECF No. 54. The Department filed the Motion to Dismiss in *Comcast* on October 22, 2024, under the prior Administration. Defendant's Motion to Dismiss, *Comcast*, No. 1:24-cv-01401-PTG-IDD, ECF No. 23. However, the Department has since reaffirmed its position in support of the Motion to Dismiss in a subsequent filing, under the current Administration. Defendant's Response to Plaintiff's Notice of Supplemental Authority at 1-2, *Comcast*, No. 1:24-cv-01401-PTG-IDD, ECF No. 38. The Department also moved to dismiss *Perdue Farms* and *Comcast* for lack of jurisdiction, but that issue is not relevant here.

[82] 21 U.S.C. § 399d.

[83] 18 U.S.C. § 1514A.

Amendment.[84] The Department, represented by the Department of Justice and applying the framework articulated in *Jarkesy* and its predecessors, filed motions to dismiss in both actions, arguing that the companies were not entitled to jury trials under either statute.[85]

First, the Department argued that the nature of the relief sought and the nature of the claims themselves both indicated that the FSMA and SOX were equitable, rather than legal, in nature, and thus did not implicate the Seventh Amendment or trigger a right to a jury trial. First, the Department argued that the nature of the FSMA and SOX actions indicated that they were equitable in nature, because they lacked a close analogue to a legal cause of action that existed at common law in the 18th century when the Seventh Amendment was adopted.[86] The Department observed that "history confirms that wrongful discharge"—the closest common law analogue the companies offered in those cases—"has no roots in 18th century common law; rather, it is a mid-20th century innovation."[87]

Regarding the relief sought, the Department observed that *Jarkesy* emphasized that "[w]hat determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to restore the status quo."[88] In contrast to the CMPs at issue in *Jarkesy*, which were designed to punish the offender, the FSMA and SOX both provide that a prevailing

---

84 Complaint for Declaratory and Injunctive Relief at 1-2, *Perdue Farms*, No. 5:24-cv-00477-BO-RJ, ECF No. 6; Complaint for Declaratory and Injunctive Relief at 3, *Comcast Corp.*, No. 1:24-cv-01401-PTG-IDD, ECF No. 1.

85 Both motions remain pending.

86 Government Defendants' Memorandum in Support of Their Motion to Dismiss, or in the Alternative, for Summary Judgment, and Opposition to Plaintiff's Motion for Summary Judgment (*Perdue* Memo.) at 14-16, *Perdue Farms*, No. 5:24-cv-00477-BO-RJ, ECF No. 55; Defendant's Memorandum of Law in Support of Their Motion to Dismiss (*Comcast* Memo.) at 16-17, *Comcast*, No. 1:24-cv-01401-PTG-IDD, ECF No. 24.

87 *Perdue* Memo. at 15 (citations omitted); *accord Comcast* Memo. at 16-17 (citations and quotations omitted) ("In other words, the common law did not give Comcast's former employees any right to relief for whistleblower retaliation in this context. This right derives exclusively from [SOX], which establishes an equitable cause of action and provides relief solely to restore the status quo.").

88 *Perdue* Memo. at 12 (quoting *Jarkesy*, 603 U.S. at 123); *Comcast* Memo. at 15 (quoting *Jarkesy*, 603 U.S. at 123).

whistleblower may be awarded all "relief necessary to make the employee whole."[89] Thus, the Department argued, "the statutory remedies authorized by [the FSMA and SOX] are designed merely to 'restore the status quo' for the prevailing whistleblower, so the Seventh Amendment is not implicated."[90]

Accordingly, the Department argued the FSMA and SOX claims were not "legal in nature," and therefore did not need to be tried before a jury under the Seventh Amendment.

Additionally and alternatively, the Department also argued that the FSMA and SOX complaints both involved the adjudication of "public rights" that need not be litigated before a jury in an Article III court.[91] Citing Supreme Court precedent exploring the bounds of the public rights exception, the Department argued that the FSMA and SOX both shared common public-rights characteristics, including, importantly, that they were "closely integrated into a public regulatory scheme."[92]

Regarding the FSMA, the Department stated that the Federal Food, Drug, and Cosmetic Act (FDCA) was intended, among other things, "to protect public health by ensuring that foods are safe, wholesome, sanitary, and properly labeled."[93] "Congress passed the FSMA to strengthen the FDCA and included a variety of statutory provisions focused on preventing food-borne illness," "to encourage compliance and reporting of non-compliance, and to deter violations of

---

89 *Perdue* Memo. at 12 (citing 21 U.S.C. § 399d(b)(4)(B)); *Comcast* Memo. at 15 (citing 18 U.S.C. § 1514A(c)(1)-(2)). The FSMA provides that the Secretary may grant a prevailing complainant make-whole relief in the form of an order to abate the violation; to reinstate the whistleblower; to provide him or her with relief, including back pay, to restore the terms, conditions, and privileges associated with his or her employment; and, in appropriate circumstances, to reimburse reasonable attorneys' fees and litigation costs. 21 U.S.C. § 399d(b)(3)(B)-(C). SOX similarly provides that the Secretary may grant a prevailing complainant make-whole relief in the form of reinstatement; back pay, with interest; and compensation for any special damages sustained as a result of the discrimination, including reasonable attorneys' fees and costs. 18 U.S.C. § 1514A(c)(2).

90 *Perdue* Memo. at 12 (quoting *Jarkesy*, 603 U.S. at 123); *Comcast* Memo. at 15 (quoting *Jarkesy*, 603 U.S. at 123).

91 *Perdue* Memo. at 16-21; *Comcast* Memo. at 17-20.

92 *Perdue* Memo. at 17; *Comcast* Memo. at 18.

93 *Perdue* Memo. at 17 (citing 21 U.S.C. § 393(b)(2)(A)).

Congress's food safety scheme."[94] Likewise, the Department observed that SOX "was enacted '[t]o safeguard investors in public companies and restore trust in financial markets following the collapse of Enron Corporation.'"[95] As with the FSMA, "[b]ecause 'then-existing law' did not protect whistleblowers like those at Enron (and those at Comcast today), Congress passed the 'self-consciously novel' whistleblower provisions of [SOX] to protect employees of publicly traded companies who report fraud and violations of SEC rules and regulations internally and to the government."[96] Thus, the Department argued that both the FSMA and SOX established novel protections which are "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution" under the public rights exception.[97]

The ARB agrees with the Department's reasoning in *Perdue Farms* and *Comcast*, and urges the Secretary to apply the same reasoning to the similar FRSA whistleblower program. As with the FSMA and SOX, the FRSA is not "legal in nature," and thus does not implicate the Seventh Amendment right to a jury trial. Additionally, like the FSMA and SOX, the FRSA is "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution" under the public rights exception.

A. The FRSA Does Not Implicate the Seventh Amendment

As articulated in *Jarkesy* and as argued by the Department in *Perdue Farms* and *Comcast*, a statutory claim does not implicate the Seventh Amendment unless it is "legal in nature." The FRSA is not "legal in nature," because (1) it is not analogous to a legal claim arising under 18th-century common law and (2) it provides equitable remedies.

---

94 *Id.* (citing 21 U.S.C. §§ 341-350m, 399d(a)(1)); *accord id.* at 18 (citing 156 CONG. REC. H8861, H8889 (statement of Rep. Lee)) ("Indeed, Congress identified the prior absence of whistleblower protection as a significant deficiency in the law which increased the potential for future 'outbreaks' of foodborne illness, and thus found it 'most vital [to] afford those people who may know information about certain food the opportunity to inform authorities about any concerns they may have' via Section 399d.").

95 *Comcast* Memo. at 18-19 (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014)).

96 *Id.* at 19 (quoting *Jarkesy*, 603 U.S. at 137; *Lawson*, 571 U.S. at 435).

97 *Perdue* Memo. at 18 (citing *Thomas*, 473 U.S. at 594); *Comcast* Memo. at 19 (quoting *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1200-01 (2d Cir. 1993)).

i. *The FRSA claim, like FSMA and SOX claims, is not analogous to a cause of action at common law*

Just like the FSMA and SOX claims in *Perdue Farms* and *Comcast*, the FRSA retaliation claim at issue here is not closely analogous to a legal cause of action at common law, as it existed in the 18th century.[98] As the Department stated in *Perdue Farms*, "history confirms that wrongful discharge has no roots in 18th century common law; rather, it is a mid-20th century innovation."[99] The FRSA, "bring[s] no common law soil with [it]."[100] Thus, unlike in *Jarkesy*, there is no "close relationship" between a FRSA whistleblower or retaliation claim and a 18th-century common law cause of action that might render this action "legal in nature."

Respondent attempts to draw a parallel between a FRSA retaliation claim and a traditional tort claim.[101] The defendant made the same argument in *Perdue Farms*, even citing many of the same cases Respondent cites here.[102] The Department was not persuaded by the defendant's analogy in that case, and should not change its position with respect to the FRSA claim here.[103] As the Department

---

98 Respondent cites authority for the proposition that wrongful discharge claims are "a tort so widely accepted in American jurisdictions today we are confident that it has become part of our evolving common law." Petition for Secretarial Review at 8 (citations omitted). Whether it has *become* part of the common law is not relevant for the Seventh Amendment analysis; instead, as the Supreme Court has emphasized, the cause of action must have existed in (or have a close analogue to) common law at the time the Seventh Amendment was adopted to implicate the right to a jury trial. *Tull*, 481 U.S. at 417-18. And, contrary to the authority cited by Respondent in its Petition for Secretarial Review, some jurisdictions, like those in *Perdue Farms* and *Comcast*, do not recognize a common law wrongful discharge claim, even today.

99 *Perdue* Memo. at 15 (citing Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 232 (1983); Donald G. Kempf, Jr. & Robert L. Taylor, *Wrongful Discharge: Historical Evolution, Current Developments, and a Proposed Legislative Solution*, 28 SAN DIEGO L. REV. 117, 121-23 (1991)); *accord Comcast* Memo. at 16-17.

100 *Jarkesy*, 603 U.S. at 137. In this way, this case is akin to *Atlas Roofing*, involving the Occupational Safety and Health Act (OSH Act). 430 U.S. 442. Similar to how the *Jarkesy* Court later characterized the OSH Act, the FRSA "did not borrow its cause of action from the common law." *Jarkesy*, 603 U.S. at 136.

101 Petition for Secretarial Review at 8-10.

102 Plaintiff Perdue Farms Inc.'s Memorandum in Support of its Motion for Summary Judgment at 13-15, *Perdue Farms*, No. 5:24-cv-00477-BO-RJ, ECF No. 49.

103 *Perdue* Memo. at 14-16.

recognized in *Perdue Farms* and *Comcast*, the common law of the 18th century did not give employees any right to relief for whistleblower retaliation in this, or any similar context. The right to raise a retaliation claim, instead, derives entirely from the FRSA—a purely modern creation. Thus, the FRSA is not closely analogous to a cause of action at common law, as it existed in the 18th century.

ii. The FRSA claim, like the FSMA and SOX claims, provides equitable remedies

As the Supreme Court stated in *Jarkesy*, "[w]hat determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to 'restore the status quo.'"[104] Like the FSMA and SOX, the FRSA provides make-whole relief that is designed to "restore the status quo" to a prevailing complainant. Thus, it does not implicate the Seventh Amendment.

The FRSA provides that "[a]n employee prevailing in any action under [the FRSA] shall be entitled to **<u>all relief necessary to make the employee whole</u>**."[105] This language tracks almost verbatim the remedial provisions under both the FSMA ("The court shall have jurisdiction to grant **<u>all relief necessary to make the employee whole</u>** . . . ."[106]) and SOX ("An employee prevailing in any action under [SOX] shall be entitled to **<u>all relief necessary to make the employee whole</u>**."[107]). The specific remedies identified in the FRSA also largely track those identified in the FSMA and SOX. For example, all three statutes provide that a prevailing complainant should be reinstated and should receive back pay.[108] All three statutes also provide for classes of compensatory damages to make the employee whole after suffering unlawful discharge or other retaliation.[109]

---

[104] *Jarkesy*, 603 U.S. at 123 (quoting *Tull*, 481 U.S. at 422).

[105] 49 U.S.C. § 20109(e)(1) (emphasis added).

[106] 21 U.S.C. § 399d(b)(4)(B) (emphasis added).

[107] 18 U.S.C. § 1514A(c)(1).

[108] 18 U.S.C. § 1514A(c)(2)(A)-(B); 21 U.S.C. § 399d(b)(3)(B)(ii), (b)(4)(B)(i)-(ii); 49 U.S.C. § 20109(e)(2)(A)-(B).

[109] 18 U.S.C. § 1514A(c)(2)(C) (providing for "compensation for any special damages sustained as a result of the discrimination"); 21 U.S.C. § 399d(b)(3)(B)(iii) (providing for "compensatory damages"), (b)(4)(B)(iii) (providing for "compensation for any special damages sustained as a result of the discharge or discrimination"); 49 U.S.C. § 20109(e)(2)(C) (providing for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination").

In *Perdue Farms* and *Comcast*, the Department argued that these precise remedies are the type of make-whole relief that fall outside the ambit of the Seventh Amendment.[110] The Department's position is consistent with *Jarkesy*, and should be extended to the FRSA here. These remedies, unlike the penalties identified in *Jarkesy* that were characterized by culpability and deterrence, are designed to restore a prevailing complainant to the status quo ante. They attempt, in equity, to place him or her back into the position he or she would have been in but-for the retaliation. As the Department stated in *Perdue Farms* and *Comcast*, these remedies are "purely equitable when . . . they are statutorily made an integral part of overall relief designed to make an employee whole."[111] Indeed, Respondent does not challenge the widely-accepted fact that reinstatement and back pay, at the very least, are equitable remedies.

Of course, a prevailing complainant in an action under the FRSA may also recover punitive damages, a remedy which is not available under the FSMA or SOX.[112] We recognize, as Respondent argues in its Petition for Secretarial Review, that punitive damages are likely a legal remedy, as defined in *Jarkesy* and its predecessors, because such damages are designed to punish and deter the respondent, rather than to make the complainant whole.[113] However, the availability of punitive damages, in and of itself, does not mean that FRSA claims are facially unconstitutional or must be adjudicated before a jury under the Seventh Amendment. As noted above, it is well-settled that Congress may properly assign claims involving public rights to adjudication by an executive agency, even if those

---

110 *Perdue* Memo. at 11-14; *Comcast* Memo. at 15-16.

111 *Perdue* Memo. at 12 (citing *West v. Gibson*, 527 U.S. 212, 217 (1999); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 572 (1990)); *Comcast* Memo. at 15 (same).

112 49 U.S.C. § 20109(e)(3).

113 *See* Petition for Secretarial Review at 10-11. Respondent argues that the statutory compensatory damages are also legal in nature. *Id.* As noted above, however, the Department has taken the position in *Perdue Farms* and *Comcast* that similar compensatory damages provisions are equitable in nature. S*ee also Int'l Union of Operating Eng'rs, Stationary Eng'rs Local 39 v. Nat'l Lab. Relations Bd.*, 127 F.4th 58, 81-83 (9th Cir. 2025) (affirming NLRB's position that damages for "direct or foreseeable pecuniary harms suffered by affected" persons is a type of make-whole relief, consistent with and vindicating public rights). We acknowledge this area is unsettled.

claims might otherwise be legal in nature.[114] As set forth in Section 2.B., *infra*, FRSA retaliation claims, like the FSMA and SOX retaliation claims in *Perdue Farms* and *Comcast*, involve public rights and are properly assigned to the Secretary for agency adjudication, even if they involve claims featuring legal remedies.[115]

---

[114] *Granfinanciera*, 492 U.S. at 42 n.4 ("If a claim that is legal in nature asserts a 'public right,' . . . then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency . . . .").

[115] Additionally, claims under the FRSA in which complainants do not request punitive damages, and instead only request the other, equitable remedies available under the statute, can still be adjudicated internally at the Department of Labor without a jury. Federal courts routinely recognize that claims under which both equitable and legal remedies are typically available and which would otherwise implicate the Seventh Amendment right to a jury trial may be adjudicated without a jury where the complainant only seeks equitable relief. *E.g., La Dolfina S.A., LLC v. Meeker*, No. 20-82231-CIV-CANNON/Reinhart, 2024 WL 3299559, at *1 (S.D. Fla. Apr. 1, 2024) (citations omitted) ("Plaintiffs have withdrawn their request for monetary damages and now seek only equitable relief . . . . And because there is no Seventh Amendment right to a jury for purely equitable claims, the Court must adjudicate those claims . . . ."); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 LAK, 2013 WL 5526287, at *2 (S.D.N.Y. Oct. 7, 2013) (citations and quotations omitted) ("[I]t is well settled that when a party withdraws its damages claims and pursues only equitable relief, a jury trial is no longer available and issues must be tried by the court. Given Chevron's unequivocal commitment to seek in this action only equitable relief, that is the end of the matter."); *see also Del Monte Dunes at Monterey*, 526 U.S. at 726 n.1 (Scalia, J., concurring) (citations omitted) ("Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit—so that I can file a tort action seeking only an injunction against a nuisance. If I should do so, the fact that I seek only equitable relief would disentitle me to a jury . . . ."). Thus, although Complainant sought punitive damages here, complainants in FRSA actions generally are free to seek only equitable remedies while eschewing punitive or other legal damages. Those claims, then, can be properly adjudicated by the Department of Labor without a jury, consistent with Constitutional principles.

Likewise, the Department may decline to issue punitive or other legal damages, and only issue equitable damages, to the extent it, or a federal court of competent jurisdiction, determines legal damages cannot be properly awarded without a jury trial under the Seventh Amendment. Indeed, the Department took this very position in *Perdue Farms*, stating that, even if it were determined that a SOX claim included both equitable and legal components and thus implicated the Seventh Amendment, "[a]ny relief should be limited to enjoining DOL from imposing legal remedies administratively, allowing the administrative proceeding to continue as to all other remedies." *Perdue* Memo. at 21. Consistent with this theory, the ARB is aware of at least one ALJ who declined to issue punitive damages in a claim arising under the National Transit Systems Security Act of 2007, another anti-retaliation statute similar to the FRSA, based on his reading of *Jarkesy*, but awarded other, equitable remedies available under the statute, including reinstatement, back pay, and

B. The FRSA Falls Under the Public Rights Exception

Finally, the FRSA, like the FSMA and SOX, falls within the public rights exception, allowing it to be properly adjudicated by the Secretary even if it might otherwise implicate the Seventh Amendment. As noted above, the Supreme Court has long-recognized that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[116] In such cases, even private disputes between parties that might otherwise be considered "legal in nature" may be properly assigned for agency adjudication, without a jury and without violating the Constitution.[117]

In *Thomas v. Union Carbide Agricultural Products Co.*,[118] for example, the Supreme Court held that a seemingly "private" cause of action litigated strictly between two private parties and involving a matter of compensation to be paid from one private party to the other, fell within the public rights exception. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires manufacturers seeking to register a pesticide to submit research data to the Environmental Protection Agency (EPA) concerning the product's health, safety, and environmental effects.[119] The EPA may use previously submitted data when considering a new application for registration of a similar product by another applicant, if the new applicant compensates the original applicant for the use of their data.[120] In the

---

non-economic compensatory damages. *Inganamorte v. MTA Long Island R.R.*, ALJ No. 2022-NTS-00002, slip op. at 46-51 (ALJ Oct. 31, 2024). Thus, even accepting Respondent's argument that some of the relief provided by the FRSA is legal in nature, there is no basis to declare the FRSA facially unconstitutional in its entirety.

116 *Thomas*, 473 U.S. at 593-94.

117 *Id.; see also Granfinanciera*, 492 U.S. at 53-55 (reaffirming that disputes between private parties may nonetheless involve public rights).

118 As noted by the dissent in *Jarkesy*, the majority did not substantively discuss, let alone disturb or overrule, *Thomas* or cases like it in which the Supreme Court held that a private federally created action that was closely integrated into a public regulatory scheme could be adjudicated without a jury in a non-Article III forum. *Jarkesy*, 603 U.S. at 185 (Sotomayor, J., dissenting). In fact, the majority specifically noted that it was not attempting to "definitively explain" the distinction between public and private rights in *Jarkesy*. *Id.* at 131.

119 *Thomas*, 473 U.S. at 571.

120 *Id.* at 572.

event of a dispute between the parties as to the proper amount of compensation, FIFRA required the parties to engage in binding arbitration, subject to limited judicial review.[121] A manufacturer challenged the statutory arbitration provision, arguing, as Respondent does here, that the statute violated Article III of the Constitution by assigning adjudication of a private right to a non-Article III tribunal.[122]

The Supreme Court rejected the manufacturer's argument, finding that the arbitration provision fell within the public rights exception. Critically, the Supreme Court recognized that although the arbitration was, on the surface, conducted between private parties and concerned the compensation owed from one litigant to the other in a private transaction, the right created by FIFRA "bears many of the characteristics of a 'public' right."[123] The use of data to support applications, the Supreme Court explained, "serves a public purpose as an integral part of a program safeguarding the public health."[124] The Supreme Court elaborated:

> The near disaster of the FIFRA 1972 amendments [before binding arbitration was required] and the danger to public health of further delay in pesticide registration led Congress to select arbitration as the appropriate method of dispute resolution. Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme.[125]

The Department has taken the same view of the FSMA and SOX, categorizing both anti-retaliation statutes as integral to regulatory schemes safeguarding the public.[126] With respect to the FSMA, the Department explained that whistleblower protection was key to "encourage compliance and reporting of non-compliance, and to deter violations of Congress's food safety scheme," and to correct "a significant deficiency in the law which increased the potential for future

---

121 *Id.* at 573.

122 *Id.* at 576.

123 *Id.* at 589.

124 *Id.*

125 *Id.* at 590.

126 *Perdue* Memo. at 16-21; *Comcast* Memo. at 17-20.

'outbreaks' of foodborne illness."[127] Likewise, with respect to SOX, the Department explained that whistleblower protection was key to breaking the "corporate code of silence that discouraged employees from reporting fraudulent behavior," and correcting a "significant deficiency in the law, for in complex securities fraud investigations, employees are [often] the only firsthand witnesses to the fraud."[128]

The same goals underlie the FRSA. The FRSA was first enacted in 1970 "to promote safety in all areas of railroad operations and to reduce railroad-related accidents . . . ."[129] The first iteration of the FRSA, though, did not include any whistleblower protection or anti-retaliation provisions. In 1980, Congress amended the FRSA to include an anti-retaliation provision, subject to mandatory dispute resolution under the Railway Labor Act.[130] However, this early anti-retaliation protection was ineffectual. Between 1980 and 2007, only seven retaliation cases were filed, and only one was successful.[131]

Consequently, Congress held a series of hearings in 2007 "signal[ing] increasing public and Congressional concern with rail safety, including chronic under-reporting of rail injuries, widespread harassment of employees reporting work-related injuries, and interference with medical treatment of injured employees."[132] Testimony and reports before Congress identified numerous management policies that deterred employees from reporting on-the-job injuries.[133] As one commentator summarized:

> As a result of these hearings, the House Transportation and Infrastructure Committee received evidence confirming that (1) railroad accidents, incidents, and

---

[127] *Perdue* Memo. at 17-18 (citations omitted).

[128] *Comcast* Memo. at 19 (citations and quotations omitted).

[129] Federal Railroad Safety Act (FRSA) of 1970, Pub L. No. 91-458, § 101, 84 Stat. 971, 971 (codified as amended at 49 U.S.C. § 20101).

[130] Federal Railroad Safety Act (FRSA) of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (codified as amended at 49 U.S.C. § 20109(a)).

[131] Christopher W. Bowman, *Whistleblower Protections of the Federal Rail Safety Act: An Overview*, 8 WM. MITCHELL J. L. & PRACTICE 1, 1 (2015) (citation omitted).

[132] *Santiago v. Metro-N. Commuter R.R. Co., Inc.*, ARB No. 2010-0147, ALJ No. 2009-FRS-00011, slip op. at 12 (ARB July 25, 2012) (citing various Congressional hearings).

[133] *Id.* at 12-13 (citations omitted).

> injuries were being underreported to the Federal Railroad Administration; (2) management practice of harassment of injured railroad employees was epidemic in the railroad industry; (3) the GAO, National Transportation Safety Board, and Department of Transportation concluded that inaccurate reporting compromised rail safety; and (4) railroad employees were pressured not to report injuries by their supervisors whose compensation was partially based on limiting the number of FRA injury reports.[134]

The House Committee concluded that underreporting "denie[d] regulators [and Congress] a full understanding of the nature and extent of safety problems in the rail industry, and that is vital to improving safety."[135] Members of Congress also expressed that reform was needed to "address[ ] long-neglected failings and shortcomings of safety in the rail sector that will make the railroad safer in the future; that will make jobs for workers in that sector safer in the future; [and] that will make safer passage through towns through which railroads pass, often with toxic substances [or] toxic chemicals."[136]

Recognizing that the existing anti-retaliation measures were insufficient to address these concerns, Congress significantly expanded whistleblower protections with amendments to the FRSA in 2007 and 2008. Among other things, those amendments extended FRSA liability to contractors, subcontractors, officers, and employees of the rail carrier, expanded the scope of protected activity under the statute, and transferred enforcement authority to the Secretary of Labor.[137] As the Board has previously observed, this history reflects "a progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting."[138]

---

134 Bowman, *supra* note 131, at 1-2 (citation omitted).

135 *The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads Before the Comm. on Transp. & Infrastructure*, 110th Cong. 1 (2007) (statement of James Oberstar, Chairman, Comm. on Transp. & Infrastructure).

136 153 CONG. REC. H11671, H11671 (2007) (statement of Rep. Oberstar).

137 *Santiago*, ARB No. 2010-0147, slip op. at 13. In fact, the 2007 amendments were part of a larger effort to revamp laws involving the security of the nation's infrastructure. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007).

138 *Santiago*, ARB No. 2010-0147, slip op. at 15.

As with the FSMA and SOX, the history of the FRSA reflects that its anti-retaliation provisions are not merely an avenue for redressing private grievances or a claim for wrongful discharge, as asserted by Respondent; they are, instead, an integral component of the broader public FRSA statutory scheme designed to protect the safety and security of the nation's railways. As Complainant aptly summarized, "**[t]hese systems are designed to protect the public and the employees in an industry with a potential for high magnitude catastrophic accidents**."[139] Congress determined that the safety and security of the nation's railways would be improved if employees were empowered to report violations of the FRSA, without fear as to whether they would be retaliated against for doing so. Thus, the anti-retaliation provisions, though outwardly entailing litigation between private parties, in fact are designed to protect employees who report hazardous and deadly conditions on the nation's railways, encourage compliance and proper reporting of hazardous conditions, illnesses, and injuries, and deter violations of FRSA's railway-safety scheme.[140] Consequently, the anti-retaliation provision falls squarely within the public rights exception, which exempts these proceedings from the requirement that they be tried before a jury in an Article III court.[141]

3. Federal Courts and ALJs Have Also Held that Similar Anti-Retaliation Programs Under the Secretary's Jurisdiction Are Not Unconstitutional

Consistent with the Department's position in *Perdue Farms* and *Comcast*, federal courts have concluded that whistleblower and anti-retaliation programs like the FRSA that have been delegated to the Secretary of Labor by Congress may be adjudicated internally at the Department of Labor without a jury. For example, several District Courts, consistent with the Department's position in *Comcast*, have ruled that SOX does not implicate the Seventh Amendment right to a jury trial, and, moreover, falls within the public rights exception. In *Schmidt v. Levi Strauss*

---

[139] Response to BNSF's Petition for Further Review at 8 (emphasis added).

[140] *See Thomas*, 473 U.S. at 583 ("Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts."), 586 (rejecting the notion that a claim must be considered a private right unless the federal government is a party of record).

[141] *See Atlas Roofing*, 430 U.S. at 444-45, 461 (classifying the OSH Act, which was passed in (1) response to the "'drastic' national problem" of rising work-related deaths and injuries, and (2) in recognition of the lack of adequate common-law actions to adequately remedy protect workplace safety, as exempt from the Seventh Amendment because it involved public rights).

& Co.,[142] for example, the Northern District of California recognized that SOX's remedial provisions, which provide for reinstatement, back pay, and other "out-of-pocket" costs, were all restitutionary in nature, seeking only to "restor[e] the status quo and order[ ] the return of that which rightfully belongs to the [plaintiff]."[143] These restitutionary remedies, the court concluded, "historically . . . fall[ ] within the realm of the court of equity."[144]

The *Schmidt* court also determined that SOX claims fall within the public rights exception. Like the Department in *Comcast*, the court determined that SOX involves private rights that "are so closely integrated into a public regulatory scheme that Congress's assignment [to the Secretary] is constitutional."[145] Other District Courts have concluded that SOX claims do not need to be tried before a jury.[146]

Likewise, the Second Circuit Court of Appeals has ruled that claims arising under the Surface Transportation Assistance Act (STAA)[147] also fall within the public rights exception.[148] The Second Circuit reasoned that "[t]he public interest to be protected in this case is safety on the nation's highways. To protect that interest, Congress has created an extensive public regulatory scheme that includes parts of the STAA."[149] Thus, the Second Circuit concluded that the plaintiff's STAA

---

142 621 F.Supp.2d 796 (N.D. Cal. 2008).

143 *Id.* at 803 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)).

144 *Id.* (citing *Porter*, 328 U.S. at 402). We note that the *Schmidt* court determined that a SOX retaliation claim was closely analogous to a "claim of wrongful discharge which existed at common law," suggesting the claim was legal in nature. *Id.* at 801-02. Consistent with the Department's reasoning in *Perdue Farms* and *Comcast*, we disagree with the *Schmidt* court on that point. In any event, because the remedies were equitable in nature, the *Schmidt* court determined that "a balance of the two factors weighs against there being a right to a jury trial . . . ." *Id.* at 805-06.

145 *Id.* at 807 ("[SOX] serves to encourage compliance, encourage reporting of non-compliance, and deterring violations. Thus, [SOX] may be reasonably interpreted as being closely integrated into a public regulatory scheme.").

146 *E.g., Skidmore v. ACI Worldwide, Inc.*, No. 8:08CV01, 2010 WL 2900113 (D. Neb. July 20, 2010); *Walton v. Nova Info. Sys.*, 514 F.Supp.2d 1031 (E.D. Tenn. 2007); *Murray v. TXU Corp.*, No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005).

147 49 U.S.C. § 31105.

148 *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1200-01 (2d Cir. 1993).

149 *Id.*

retaliation claim "may seemingly subject [the defendant] to the enforcement of merely private rights, [but] we hold that those rights are integrated sufficiently closely into a public regulatory scheme as to be appropriate for agency resolution."[150]

Department ALJs have also concluded that whistleblower and anti-retaliation programs like the FRSA do not implicate the Seventh Amendment and, moreover, fall within the public rights exception. For example, ALJs have thoroughly reviewed the anti-retaliation provisions of SOX, the FSMA, and the Pipeline Safety Improvement Act,[151] concluding that each provide make-whole, equitable remedies and are closely integrated in public regulatory schemes.[152]

As the weight of this authority, and the analysis provided by each tribunal, demonstrates, the Department's position in *Perdue Farms* and *Comcast* is correct, and should be extended to the FRSA as well.

4. Declaring the FRSA Unconstitutional Would Leave Complainants Without Meaningful Recourse and Harm Railway Safety

In addition to the legal analysis set forth above, the Board notes the practical implications of Respondent's argument. In arguing that the FRSA is unconstitutional, Respondent effectively asks the Secretary to cease all Department adjudication under the statute. This would leave complainants who have been retaliated against without any meaningful recourse or remedy. In *Jarkesy*, the statutory fraud program at issue provided the SEC with the option to either pursue a claim against the offender in-house or in federal court. While the SEC may no longer prosecute claims in-house post-*Jarkesy*, the SEC retains the ability to prosecute fraudsters in federal court. Here, though, agency adjudication is the exclusive avenue for complainants under the FRSA. If the Secretary declines to

---

150 *Id.* at 1201.

151 49 U.S.C. § 60129.

152 *Wyderka v. Energy Transfer Co.*, ALJ No. 2023-PSI-00001, slip op. at 6-10 (ALJ Jan. 15, 2025) (Pipeline Safety Improvement Act); *Slade v. Norax, LLC*, ALJ No. 2024-FDA-00020, slip op. at 3-6 (ALJ Oct. 11, 2024) (FSMA); *Drake v. Morinda Holdings*, ALJ No. 2023-SOX-00023, slip op. at 4-8 (ALJ Sept. 4, 2024) (SOX).

adjudicate these claims, complainants will be, effectively, left without meaningful recourse.[153]

Ceasing adjudication under the statute would also harm railway safety. As emphasized above in Section 2.B., Congress added and expanded whistleblower protections under the FRSA to "address[ ] long-neglected failings and shortcomings of safety in the rail sector . . . ."[154] If the Department declines to adjudicate whistleblower claims, whistleblowers like Complainant will be left without meaningful protection, and the harms that plagued the rail sector before the anti-retaliation measures were added and bolstered, including chronic and significant underreporting of dangerous conditions and injuries, could reemerge.

5. Complainant Raises Other Arguments That May Bear on the Secretary's Analysis

Complainant raises additional arguments in its response in opposition to Respondent's Petition for Secretarial Review that may bear on the Secretary's analysis. For example, Complainant argues that Respondent waived its right to raise its constitutional challenge by failing to present it either to OSHA or the ALJ, and by raising it for the first time only in a cursory fashion before the Board.[155] Additionally, Complainant contends that administrative agencies lack jurisdiction to declare acts of Congress unconstitutional.[156] Because these arguments do not

---

[153] The FRSA provides that if the Secretary has not issued a final decision within 210 days after the filing of a complaint with OSHA, a complainant may remove his or her case to federal district court. 49 U.S.C. § 20109(d)(3). Thus, if a complainant files a FRSA complaint with OSHA and the Secretary declines to take any action on it whatsoever, the complainant could eventually pursue his or her claims in federal court. However, this would lead to a de facto seven-month hiatus on every single FRSA claim before it could even begin to be adjudicated. This would be entirely inconsistent with the foundational principle of American jurisprudence that justice delayed is justice denied.

[154] 153 CONG. REC. H11671, H11671 (2007) (statement of Rep. Oberstar).

[155] Response to BNSF's Petition for Further Review at 8-10.

[156] *Id.* at 3-4. Respondent asserts that members of the Executive Branch have the power "to decline to act under, approve, or defend in court directions from Congress to exercise the judicial power of the United States," and that "the President has expressly directed all heads of executive agencies to review the legality of actions taken under their responsibility in light of the intervening legal developments on which BNSF's arguments rely." Petition for Secretarial Review at 2-3. Because the FRSA and the authority delegated to the Secretary under the statute are consistent with the Constitution, there is no conflict with separation of powers or the Administration's policies.

directly bear on whether the issue presented is of "exceptional importance," the Board has elected not to address them in this case. However, the Board highlights them because they may bear on the Secretary's discretionary decision as to whether to accept this case for review.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge