# No. 21-2661

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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**IN RE: ESTABLISHMENT INSPECTION OF:**
**ANTHONY MARANO COMPANY**
**3000 SOUTH ASHLAND AVENUE, #100**
**CHICAGO, ILLINOIS 60608**

**APPEAL OF: ANTHONY MARANO COMPANY**

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Appeal from the United States District Court for the Northern District of Illinois
Case No. 21-mc-00499
The Honorable Virginia M. Kendall, Judge Presiding

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## BRIEF OF APPELLEE MARTIN J. WALSH, UNITED STATES SECRETARY OF LABOR

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Date: December 20, 2021

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## APPELLEE'S JURISDICTIONAL STATEMENT

The jurisdictional summary in Appellant Anthony Marano Company's (AMC) brief is not "complete and correct" with respect to this Court's appellate jurisdiction. *See* Circuit Rule 28(b) (requiring appellee's brief to disclose jurisdictional inaccuracies). AMC asserts incorrectly that this Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291, which grants the Court jurisdiction to consider "final decisions" of the district courts. The district court's August 26, 2021 order denying AMC's motion to stay and quash an OSHA administrative warrant is not, however, a "final decision" because it did not end the litigation below: the Secretary's cross-motion for contempt remains pending before the district court. *See* Supp. App. 45.[1] Nor is the August 26, 2021 order a collateral order subject to immediate review under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because AMC has other available remedies absent this premature appeal. Moreover, even if the August 26, 2021 order were final, under this Court's decision in *In re Establishment Inspection of Kohler, Co.*, 935 F.2d 810 (7th Cir. 1991), the Court lacks jurisdiction over AMC's challenge to

[1] Unless included in the Appendix ("App.") filed by AMC in this Court, references to the record below are to pages in the Supplemental Appendix ("Supp. App.") that the Secretary has filed along with this brief. Certain references to the district court record below are to "Dist. Ct. ECF," followed by the record number, and references to documents filed with this Court are to "ECF" followed by the document number.

the administrative warrant because the company has failed to exhaust its administrative remedies. *See* 29 U.S.C. § 659(a) ("No objection that has not been urged before the Commission shall be considered by the court . . . . ").

## STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction over this appeal where the August 26, 2021 district court order denying AMC's motion to stay and quash an OSHA administrative warrant was a collateral order that did not resolve all the parties' claims below and AMC has other available remedies to challenge the warrant.

2. Even assuming that the August 26, 2021 order resolved all of the parties' claims below, whether AMC may seek review of the OSHA administrative warrant at this time where employers are required to exhaust their administrative remedies before challenging the warrant in federal court.

3. Assuming the Court's jurisdiction over the merits, whether the district court properly determined that probable cause supported the administrative warrant where OSHA's warrant application contained specific evidence of safety violations at AMC's worksite and provided reasonable administrative standards for conducting the inspection.

4. Whether the district court correctly found OSHA's warrant to be reasonable in scope where the warrant outlined a limited inspection of alleged unsafe work

practices, areas and/or conditions relating to the subject matter of the underlying safety complaint related to forklifts, along with any violations "in plain view."

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

Congress enacted the Occupational Safety and Health Act of 1970 ("the OSH Act" or "the Act") "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). To achieve the OSH Act's purposes, covered employers are required to provide employees with workplaces that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm" and to "comply with occupational safety and health standards promulgated under this [Act]." 29 U.S.C. § 654(a).

Congress explicitly emphasized in the Act that the statutory objectives must be accomplished, among other ways, "by providing an effective enforcement program . . . ." 29 U.S.C. § 651(b)(10). For the Secretary of Labor to conduct an effective enforcement program, he must determine whether safety and health hazards exist in the workplace. To do so, section 8(a) of the Act authorizes compliance officers from the Department of Labor's Occupational Safety and

Health Administration ("OSHA")[2] "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or…workplace...to inspect and investigate…in a reasonable manner…any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein . . . . ." *Id.* § 657(a).

Section 8(f)(1) of the Act also provides for complaint-based inspections. *Id.* § 657(f)(1). Under that section, OSHA is required to conduct a "special inspection" as soon as practicable whenever OSHA receives a written employee complaint that reasonably leads the agency to believe that a violation exists at a workplace. *Id.* § 657(f)(1).

If an employer does not consent to an inspection, OSHA must obtain an administrative warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978); *see also* 29 C.F.R. § 1903.4 (recognizing OSHA may pursue "compulsory process" if an employer declines to permit an inspection). The Supreme Court has described two ways of making an adequate showing to obtain such an inspection warrant: (1) "specific evidence of an existing violation," or (2) "'reasonable legislative or

[2] The Secretary of Labor has delegated his authority and responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020). The Secretary uses the terms "Secretary" and "OSHA" interchangeably in this brief.

administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Barlow's, Inc.*, 436 U.S. at 320-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

If an inspection and investigation reveal recognized hazards or other violations of OSHA standards, the Act authorizes OSHA to issue citations and impose civil penalties. 29 U.S.C. §§ 658, 659, 666. Where the employer timely contests a citation or penalty, the Commission is required to "afford an opportunity for a hearing," and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." *Id*. § 659(a), (c). Hearings are presided over by a Commission administrative law judge ("ALJ"). *Id*. § 661(j). A party dissatisfied with the decision of the ALJ may petition the Commission for discretionary review. *Id*. §§ 659(c), 661(i). Final decisions of the Commission, whether by virtue of a denial of such petition or after the Commission grants review and issues a decision, are reviewable in the courts of appeals. *Id*. §§ 659(c), 660(a), (b).

## II. Factual Background and Proceedings Below

### A. OSHA Receives An Employee Complaint Alleging Safety Violations Related to Forklifts Used at the AMC Worksite.

AMC is a fresh fruit and vegetable merchant wholesaler. Supp. App. 5. On July 7, 2021, OSHA received a telephonic employee complaint alleging that in March of 2021, an employee operating a forklift at AMC's worksite injured

another employee. App. 9-10; Supp. App. 5, 11. The complaint alleged that the injured employee was cleaning up debris in the loading dock area when he was struck in the back by a forklift that was being operated in reverse and that the blow caused him to fall forward and hit his head on the vertical side post of a trailer. Supp. App. 5, 11. Emergency Medical Services ("EMS") transported the injured employee to a local hospital where he was treated for back, head, and neck injuries. Supp. App. 5, 11.

The local OSHA Area Office determined that the complaint identified alleged hazards covered by OSHA's *Local Emphasis Program for Powered Industrial Trucks* ("Emphasis Program"), which include forklifts. Supp. App. 5-6. As stated in the Emphasis Program, OSHA identified powered industrial truck hazards as a major source of injuries and fatalities to operators and other employees who work in, on, or near such vehicles. Supp. App. 39-40. The Emphasis Program thus requires OSHA Area Offices to conduct inspections of powered industrial truck operations both whenever a complaint alleges powered industrial truck hazards and whenever a worksite is being inspected for other reasons:

> Any referral or complaint classified by OSHA as "serious" which alleges a hazard or a condition that may be a violation of the powered industrial truck standard or a potentially fatal "struck/caught/fall hazard" associated with the operation of a powered industrial vehicle (e.g., struck by falling load, struck against, caught between, caught in, or fall hazard) in general industry or construction will be activated for

> inspection. Additionally, any ongoing inspection where powered industrial vehicles are observed in use will be expanded to evaluate possible violations of the powered industrial truck standard. . . . Inspections meeting the criteria set forth in this [Emphasis Program] will also evaluate safety and health hazards in or around loading docks or other designated loading and unloading areas where powered industrial trucks are in use (Including, but not limited to: loading docks, shipping and receiving areas, yard areas, and other locations where vehicles are loaded and unloaded).

Supp. App. 38.

Pursuant to the "Complaint and Referral Processing" provisions of OSHA Directive CPL 02-00-164, OSHA's Field Operations Manual ("FOM"), the July 7, 2021 complaint met the criteria for conducting an on-site inspection[3] because it alleged forklift-related hazards covered by the Emphasis Program. *See* Supp. App. 5, 11.

### B. OSHA Attempts to Investigate the Alleged Violations at AMC's Worksite; AMC Refuses Entry and Demands that OSHA Obtain an Administrative Search Warrant.

On July 9, 2021, OSHA compliance safety and health officer (CSHO) Eloise Minett-Jackson went to the AMC worksite to investigate the AMC

[3] OSHA's FOM makes a distinction between "formal" complaints, which are in writing and signed by a current employee, and "non-formal" complaints, which do not meet these requirements. *See* Supp. App. 17 (OSHA's FOM, Chapter 9, Section I.A.1). The July 7, 2021 complaint was a "non-formal" complaint because it was not in writing or signed by the employee. *See* Supp. App. 12, 17. Unlike formal complaints, which automatically trigger an on-site OSHA inspection, OSHA conducts on-site inspections based on non-formal complaints only when they meet at least one of criteria listed in the FOM. *See* Supp. App. 17, 19.

employee's complaint. Supp. App. 6-7. When CSHO Minett-Jackson arrived at the worksite, even prior to exiting her vehicle, an on-site AMC representative along with AMC's attorney Robert Marcus, who was on speakerphone, informed CSHO Minett-Jackson that they were denying entry and that she would need a warrant to conduct the inspection. Supp. App. 7.

CSHO Minett-Jackson contacted OSHA Assistant Area Director Michael Taylor ("AAD Taylor") via telephone, and he informed the AMC representatives that OSHA wished to investigate the employee complaint related to the forklift accident. Supp. App. 7. AMC's attorney told CSHO Minett-Jackson to leave or the company would call the Chicago Police Department.[4] She left the premises immediately. App. 14; Supp. App. 7.

[4] Previously, in November of 2018, OSHA opened an inspection at the AMC worksite and issued various safety-related citations; AMC contested these citations and they are being separately litigated before a Commission ALJ. *See* Dist. Ct. ECF No. 12 at 3. CSHO Minett-Jackson was not involved in this prior OSHA inspection and related litigation. *See id.* at 20 (Declaration of CSHO Minett-Jackson, ¶ 5). OSHA's attempted July 9, 2021 inspection was based on the July 7, 2021 complaint only, and is wholly unrelated to the other, ongoing litigation.

### C. OSHA Obtains an Administrative Search Warrant to Inspect AMC's Worksite and Attempts to Execute the Warrant; AMC Again Denies Entry Despite the Duly Issued Warrant.

On July 28, 2021, OSHA applied in district court for an administrative warrant to conduct an inspection at the worksite.[5] *See* Supp. App. 4-41. That same day, United States Magistrate Gabriel A. Fuentes of the United States District Court for the Northern District of Illinois Eastern Division issued the requested warrant. App. 13; Supp. App. 1-2. The warrant authorized OSHA to enter AMC's worksite "during regular working hours to conduct an inspection and investigation in a reasonable manner and to a reasonable extent, including but not limited to the alleged unsafe work practices, areas and/or conditions relating to operation and maintenance of forklifts." Supp. App. 1. It also authorized OSHA to inspect "any hazardous work areas, procedures and/or working conditions within the plain view of the [CSHO]," as well as "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials

[5] The OSH Act does not authorize Commission ALJs to issue and enforce administrative warrants. *See generally* 29 U.S.C. § 661; *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1067 (11th Cir. 1982) ("OSHRC may not issue its own warrants."). However, OSHA may obtain administrative inspection warrants from a United States magistrate judge pursuant to the Magistrates Act of 1976, 28 U.S.C. §§ 636(a)(1), (b)(3). *See Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1341 (7th Cir. 1979) (establishing that magistrates have the authority to issue OSHA warrants).

therein, particularly as they relate to whether" AMC is complying with the OSH Act. Supp. App. 2.

OSHA attempted to execute the warrant on August 2, 2021. App. 13. CSHO Minett-Jackson and AAD Taylor arrived at AMC's worksite accompanied by two Federal Marshals. *Id.* Once OSHA and the Federal Marshals parked and exited their vehicles, Jason Nitti, AMC's Vice President of Operations, met them outside and told them he was denying entry into the building. *Id.* CSHO Minett-Jackson handed a copy of the warrant to Mr. Nitti, who contacted AMC's attorney by phone. App. 14.

Mr. Nitti began video recording OSHA and the Federal Marshals on his phone. *Id.* CSHO Minett-Jackson explained to AMC the purpose of the inspection, which was to investigate an accident involving a forklift truck that occurred in March 2021, and informed the AMC representatives about OSHA's Emphasis Program on Powered Industrial Vehicles. *Id.* AMC's attorney Robert Marcus then arrived on site and reiterated that AMC was denying entry; he further stated that AMC would be filing a motion to quash the warrant. *Id.* OSHA and the Federal Marshals left without executing the warrant. *Id.*

**D. The Warrant-Related Proceedings in District Court**

On August 4, 2021, AMC filed an emergency motion in district court to stay the warrant and unseal the warrant application. Dist. Ct. ECF No. 8. AMC

claimed that a stay was warranted for AMC to be "provided with any and all documentation supporting OSHA's request for the Warrant"; for the district court to consider AMC's "position that no probable cause exists to support warrant"; and so that the district court could "rule on the forthcoming Motion to Quash." *Id.* at 3.

On August 5, 2021, the Secretary filed his response to AMC's emergency stay motion, along with a cross motion for certification of contempt for AMC's refusal to comply with the warrant. *See* Dist. Ct. ECF No. 12. The Secretary explained that AMC lacked a right to pre-enforcement review of the warrant because the employer may file a suppression motion in any subsequent Commission proceeding, and that the warrant in any event was supported by probable cause. *See id.*

Magistrate Fuentes held a telephonic hearing on August 6, 2021. *See* App. 47. During the hearing, Magistrate Fuentes provisionally granted AMC's request to unseal the warrant application materials, but directed the following:

> For the reasons stated on the record, the motion is granted in part insofar as its request to unseal the application materials is provisionally granted. However, the case will not be unsealed until the Court receives and reviews a set of warrant materials with proposed redactions, from [OSHA], and submitted *ex parte*, by no later than 5:00 p.m. on 8/09/21. The remainder of the motion is taken under advisement. The Court will enter a ruling on the motion as expeditiously as possible. The cross motion for certification of contempt is also taken under advisement.

*Id.*

On August 10, 2021, AMC filed with Magistrate Fuentes a motion to quash the administrative warrant. *See* Dist. Ct. ECF No. 18. AMC claimed that the warrant should be quashed because OSHA lacked "specific evidence of an existing violation" at its worksite, *see id.* at 5-9, and because the warrant exceeded the scope of the alleged employee complaint, *see id.* at 9-11. AMC also asserted that OSHA improperly attempted to use its Emphasis Program to expand a complaint-based inspection. *See id.* at 13-15.

On August 20, 2021, Magistrate Fuentes issued a memorandum opinion and order denying AMC's emergency motion for a stay and motion to quash.[6] *See* App. 9-46; *see also* App. 7 (Notice of Docket Entry, dated August 20, 2021, related to Magistrate Fuentes's decision). Magistrate Fuentes determined that AMC had no pre-execution right to judicial review of the administrative inspection warrant and that, in any event, AMC failed to meet its burden of establishing any of the equitable factors to justify a stay of the warrant. App. 16. In denying AMC's request for a stay, Magistrate Fuentes found that AMC's motion to quash would likely fail on the merits because the warrant was issued upon a sufficient showing of administrative probable cause and because the warrant was otherwise

[6] Magistrate Fuentes denied AMC's emergency motion to unseal the unredacted warrant application, but granted the request to unseal a *redacted* version of the application materials because the substance of the application already had been revealed to AMC and was addressed in AMC's publicly filed emergency stay motion and motion to quash. Supp. App. 43.

reasonable and not overbroad. App. 34. AMC appealed Magistrate Fuentes's decision to District Court Judge Virginia M. Kendall on August 23, 2021. *See* Dist. Ct. ECF No. 26.

After holding a telephonic hearing on August 24, 2021, Judge Kendall issued an order, entered on August 26, 2021, denying both AMC's motion to stay and its motion to quash and adopting Magistrate Fuentes's decision. *See* App. 1 (Judge Kendall's August 26, 2021 Order, adopting Magistrate Fuentes's decision). Judge Kendall construed Magistrate Fuentes's August 20, 2021 decision as a Report and Recommendation and found "that it is thorough, well−reasoned and correct," and therefore adopted Magistrate Judge Fuentes's conclusion that there is no pre−enforcement right to judicial review of administrative inspection warrants in the Seventh Circuit and that the employee complaint in any event provided OSHA with sufficient probable cause for the warrant. *Id.* Judge Kendall noted that "AMC offers no evidence or case law tending to show that the complaint−which pertained to an AMC employee suffering bodily injuries from a forklift accident−was insufficient to show probable cause." *Id.* Upon AMC's oral motion, however, Judge Kendall "stay[ed] this order until [AMC] has the opportunity to appeal this Court's decision." *Id.* Judge Kendall also stated that she would take the Secretary's motion for contempt certification under advisement and

referred briefing on that separate matter back to Magistrate Fuentes.[7] *See* App. 5 (Transcript of August 24, 2021 Hearing, p. 15:19-25).

**E. AMC's Premature Appeal to This Court.**

On September 2, 2021, AMC filed a notice of appeal and docketing statement, *see* ECF No. 1-1, seeking appellate review in this Court of the August 26, 2021 order denying the company's motions to stay and quash the warrant. On September 16, 2021, pursuant to Circuit Rule 3(c)(1), the Secretary filed an Appellee Docketing Statement objecting to the Court's jurisdiction. *See* ECF No. 7. Per the Court's instructions, *see* ECF Nos. 8, 10, the parties filed opposing statements addressing this Court's jurisdiction to review the district court's August 26, 2021 order. *See* ECF Nos. 9, 11. On October 25, 2021, the Secretary filed a motion to dismiss for lack of jurisdiction, ECF No. 15; the Court denied the motion but instructed the Secretary to raise his jurisdictional argument in his responsive brief. ECF No. 16.

## SUMMARY OF THE ARGUMENT

This Court should summarily dismiss this matter because it lacks jurisdiction over AMC's premature appeal. The district court's August 26, 2021 order denying

[7] On September 2, 2021, the Secretary filed a motion with Judge Kendall to lift the stay on execution of the warrant and to proceed with the pending contempt proceeding, or in the alternative, for an order tolling the statute of limitations. *See* Dist. Ct. ECF No. 33. That motion also remains pending in the district court.

AMC's motions to stay and quash is not an appealable "final decision," for purposes of 28 U.S.C. § 1291, because it did not resolve all of the parties' claims. Although the order resolved AMC's motions to stay and quash the administrative warrant, it did not end the litigation with respect to the Secretary's cross-motion for contempt, which remains pending before the district court. Nor is the August 26, 2021 order the rare type of collateral order subject to immediate review; AMC has multiple avenues to challenge the administrative warrant absent this premature appeal, including in the pending district court contempt proceedings.

The Court also lacks jurisdiction because AMC does not have a constitutional pre-execution right to judicial review of an OSHA administrative warrant. The Fifth Circuit's holding in *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198 (5th Cir. 2007), consistent with this Court's decision in *In re Establishment Inspection of Kohler, Co.*, 935 F.2d 810 (7th Cir. 1991), confirms that OSHA is legally entitled to execute the warrant and the employer must then exhaust its administrative remedies before mounting a challenge in federal court.

Even assuming that the Court had jurisdiction at this stage of the proceedings, the Court should deny AMC's appeal because the district court properly found that the OSHA administrative warrant satisfied the Fourth Amendment's probable cause and reasonableness requirements. OSHA's warrant application included a detailed description of the complaint and furnished

sufficient specific evidence of potential forklift safety violations at AMC's worksite, and also provided reasonable administrative standards for conducting the inspection.

## STANDARD OF REVIEW

The Court reviews a district court's factual findings for clear error and legal conclusions *de novo*. *United States v. Pittman*, 642 F.3d 583, 585-86 (7th Cir. 2011). Thus, the Court reviews deferentially the district court's probable cause determinations; it will reverse only upon a finding of clear error.[8] *United States v. Spears*, 965 F.2d 262, 269 (7th Cir. 1992), *cert. denied*, 506 U.S. 989, 113 S.Ct. 502, 121 L.Ed.2d 438 (1992); *In re Midwest Instruments Co.*, 900 F.2d 1150, 1153 (7th Cir. 1990) (stating that the appellate court should apply the same standard of review to the determination of administrative probable cause as for criminal probable cause). "The probable cause inquiry is practical, not technical," and the court is to consider the totality of the circumstances. *United States v. Wiley*, 475 F.3d 908, 915 (7th Cir. 2007). "[D]oubtful" cases will be resolved in favor of

[8] In *Ornelas v. U.S.*, 517 U.S. 690 (1996), the Supreme Court observed that "[w]hile the Seventh Circuit uses the term 'clear error' to denote the deferential standard applied when reviewing determinations of reasonable suspicion or probable cause, [] the preferable term is 'abuse of discretion.'" *Id.* at 694 n.3 (citation omitted). ""Clear error' is a term of art . . . and applies when reviewing questions of fact." *Id.*

upholding the warrant. *United States v. Griffin*, 827 F.2d 1108, 1111 (7th Cir. 1987) (citations omitted).

Additionally, review of a magistrate judge's probable cause determination on an OSHA warrant application is at least as deferential as review of the issuance of criminal warrants, if not more so, because the statutory objective of the OSH Act "is preventive, not remedial." *Midwest Instruments*, 900 F.2d at 1153. "The reasonableness required of an OSHA warrant should thus be interpreted with this policy in mind and with a careful eye toward not requiring so much of an OSHA warrant application that the Fourth Amendment becomes an obstacle to common sense." *Id.* And, when reviewing whether administrative probable cause is satisfied, courts shall only consider the evidence before the magistrate at the time of the application for the inspection warrant. *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980); *W. Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 959 (11th Cir. 1982) (judicial review of the sufficiency of the application must be strictly confined to information brought to the magistrate's attention); *Brock v. Gretna Mach. & Ironworks, Inc.*, 769 F.2d 1110, 1114 (5th Cir. 1985) (review of the validity of a search warrant must be based on information provided by the application or in conjunction with the application).

## ARGUMENT

### I. AMC's Appeal to this Court is Premature and Should Be Dismissed for Lack of Jurisdiction.

The Court should dismiss AMC's premature appeal for lack of jurisdiction. The district court's August 26, 2021 order denying AMC's motions to stay and quash is not an appealable "final decision" under 28 U.S.C. § 1291 because the order did not dispose of the Secretary's related motion for certification of contempt. Nor does the August 26, 2021 order meet the requirements for immediate collateral-order review outlined in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). And, contrary to AMC's assertions, the potential basis for jurisdiction discussed in *U.S. v. Ryan*, 402 U.S. 530 (1971) is inapplicable because the company has multiple available remedies absent this premature appeal and thus denial of immediate review in this case would not render impossible review of AMC's claims.

#### A. The District Court's August 26 Order Is Not an Appealable Final Decision Under 28 U.S.C. § 1291 Because It Did Not Adjudicate the Secretary's Related Contempt Motion.

This Court's appellate jurisdiction is limited to "final decisions of the district courts." 28 U.S.C. § 1291. A "final decision" is typically one "by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). Unless an exception applies, a decision is "final" and appealable under 28 U.S.C. § 1291 only if it ends the litigation on the

merits for all claims and all parties. *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 273-74 (1991); *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018). Hence, orders resolving fewer than all the claims in a case are not "final" for purposes of appeal. *Helcher v. Dearborn Cnty.*, 595 F.3d 710, 717 (7th Cir. 2010).

In this case, the August 26, 2021 order that AMC has appealed is not "final" because it did not resolve all the parties' claims. Although the August 26, 2021 order adjudicated AMC's motions for a stay and to quash, it did not end the litigation with respect to the Secretary's related motion for contempt proceedings.[9] *See* App. 5 (Transcript of August 24, 2021 Hearing, p. 15:19-25); Supp. App. 44-45; *cf. Matter of Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1129 (7th Cir. 1988) (finding district judge's order upholding an inspection warrant and ordering employer to permit execution or to pay a civil contempt penalty to be final appealable decision under 28 U.S.C. § 1291 because it was "the last order

[9] Although Magistrate Fuentes correctly noted that "the filing of a notice of appeal deprives the district court of jurisdiction over the *issues* presented on the appeal," Supp. App. 45 (Dist. Ct. ECF No. 35 (citation omitted and emphasis added)), AMC's instant appeal to this Court does not deprive the district court of jurisdiction over the contempt matter because the issue of contempt and the issues on appeal are related, but ultimately separate, matters. *See, e.g.*, *Matter of Consolidated Rail Corporation*, 631 F.2d 1122, 1125 (3d Cir. 1980) (noting that the district court can simply continue the Secretary's contempt petition—without losing jurisdiction—pending the employer's premature appeal of a denial of a motion to quash).

contemplated in the district court proceeding, and no other proceeding is pending" in the district court or another forum).

The Third Circuit dismissed a premature appeal under identical circumstances in *Matter of Consolidated Rail Corporation*, 631 F.2d 1122 (3d Cir. 1980). There, OSHA obtained a warrant authorizing a general inspection of a Conrail locomotive repair plant. *Id.* at 1123. Conrail refused to allow the inspection and filed a motion to quash the warrant. *Id.* OSHA then asked the district court to hold Conrail in civil contempt of the warrant. *Id.* The district court denied Conrail's motion to quash, but continued the show cause hearing on the contempt petition pending Conrail's appeal, and issued a stay of the inspection warrant. *Id.* The Third Circuit held that "until there has been an adjudication of contempt, the court's order denying the motion to quash the inspection warrant is not a final judgment within the scope of 28 U.S.C. § 1291." *Id.* at 1125.

The Third Circuit in *Matter of Consolidated Rail* further elaborated that the action in the district court began as "an independent proceeding by Conrail to quash an administrative warrant in which the Secretary petitioned for adjudication of civil contempt." *Id.* Accordingly, "if the court enters the judgment of contempt sought by the Secretary, there will be no further action for [the district court] to take," and therefore, [t]he judgment of contempt and the sentence, if any, will be the *final* judgment in the case." *Id.* (emphasis added). Likewise, the district court

in this case will not issue a "final" appealable judgment until it adjudicates the Secretary's pending contempt motion.

### B. The District Court's Non-Final Order Is Not Immediately Appealable Under *Cohen* or *Ryan* Because AMC May Obtain Meaningful Review of Its Claims Absent this Premature Appeal.

AMC also cannot avail itself of Supreme Court precedent that in rare cases permits immediate appeals from collateral orders. The Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), established the collateral order doctrine, which carves out a "small class" of non-final orders that are deemed final and immediately appealable. *Doe v. Vill. Of Deerfield*, 819 F.3d 372, 375 (7th Cir. 2016) (citing *Cohen*, 337 U.S. at 546-47). To be immediately appealable under the "collateral order doctrine," a non-final order must "(1) be conclusive on the issue presented; (2) resolve an important question separate from the merits of the underlying action; and (3) be 'effectively unreviewable' on an appeal from the final judgment of the underlying action." *Id.* (citation omitted).

As discussed in the Secretary's previous filings, *see* ECF No. 7 at 5-8, AMC has made no showing that the district court's August 26, 2021 order meets any of the *Cohen* elements. Most importantly, AMC cannot establish that the August 26, 2021 order is "effectively unreviewable on appeal" because AMC has several other available remedies absent this premature appeal to the Court. In the related contempt proceedings before the district court, AMC may defend against a civil

contempt citation on the ground that the administrative inspection warrant was erroneously issued. *See, e.g.*, *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978) (holding that employer was "entitled to argue for reversal of the district court's citation for civil contempt on the asserted bases that the magistrate's warrant did not comply with the Fourth Amendment"). Moreover, if the district court issues a contempt order against AMC for refusing to comply with the administrative warrant, the matter will be ripe for review and the company may appeal that final order (which necessarily involves the underlying probable cause finding) to this Court.

Alternatively, if AMC complies with the warrant and the resulting OSHA inspection uncovers evidence to support citations for violations of the OSH Act, AMC may contest the citations and move to suppress the evidence before the Commission. *See In re Establish Inspection of Metal Bank of Am.*, 700 F.2d 910, 915-16 (3d Cir. 1983) (acknowledging that once the warrant inspection takes place the employer may seek suppression of evidence in the Commission). If the Commission denies the motion to suppress and affirms a citation against AMC, the company may assert the denial of the motion to suppress as a ground for appeal (to the court of appeals) from the Commission's final judgment. *See* 29 U.S.C. § 660(a). Therefore, the district court's August 24, 2021 order will not evade review.

AMC's reliance on *United States v. Ryan*, 402 U.S. 530 (1971), AMC Br. 1-2, is unavailing. The Supreme Court in *Ryan* simply held that a denial of a motion to quash a grand jury subpoena *duces tecum* was not immediately appealable because "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." 402 U.S. at 532 (citing *Cobbledick v. United States*, 309 U.S. 323 (1940)). *Ryan* further noted that the denial order at issue did not fall within the ambit of the "*limited* class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Id.* at 533-34 (emphasis added). The Supreme Court noted that the limited class of cases included a denial of a motion for the return of seized property where there was no criminal prosecution pending against the movant, and an order directing a third party to produce exhibits that were the property of appellant. *See id.* at 533 (citing relevant cases). No such special circumstances warranting immediate review are present in this case, and the Court should therefore dismiss AMC's appeal for lack of jurisdiction.

## II. AMC Is Not Entitled to Pre-Enforcement Review of the OSHA Administrative Warrant and Must First Exhaust Administrative Remedies Before Challenging the Validity of the Warrant in Federal Court.

The Court lacks jurisdiction over AMC's appeal for another reason: the company must first exhaust its administrative remedies and may not obtain review of an administrative search warrant, via a motion to quash, before it is executed.[10] As the Fifth Circuit explained in *Trinity Marine*, AMC's remedy for any alleged Fourth Amendment violation necessarily follows execution of the warrant. *See Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198 (5th Cir. 2007) (holding as a matter of first impression that the Constitution does not forbid execution of an OSHA inspection warrant by force and an employer has no constitutional right to a pre-execution contempt hearing to challenge the warrant); *see also U.S. v. Found. Foods Grp., Inc.*, No. 2:21-CV-124-RWS-JCF, 2021 WL 4900948, at *1 (N.D. Ga. Oct. 18, 2021) (order adopting report and recommendation denying a motion to quash based on *Trinity Marine*).

[10] Alternatively, as discussed *supra* pp. 21-22, AMC may present arguments against the validity of the warrant in the pending contempt proceedings initiated by the Secretary in the district court. *E.g.*, *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978) (holding that employer may not assert its defenses to OSHA's enforcement action "by means of [an] independent action," but could nonetheless challenge the validity of OSHA's warrant in defending against a civil contempt citation in the district court); *see also Kohler*, 935 F.2d at 812 (acknowledging that the employer in *Blocksom* was able to "avoid the exhaustion requirement by challenging a civil contempt citation [commenced by OSHA]").

This Court should follow the sound reasoning articulated by the Fifth Circuit in *Trinity Marin*e, as it comports with both the principles enunciated by the Supreme Court in *Barlow's,* as well as this Court's holding in *In re Establishment Inspection of Kohler, Co.*, 935 F.2d 810 (7th Cir. 1991), that employers must exhaust their administrative remedies before challenging an inspection warrant in federal court, even if OSHA has yet to commence administrative proceedings against the employer.

### A. This Court Should Adopt the Fifth Circuit's Holding in *Trinity Marine* that Employers Can Only Challenge the Validity of an OSHA Warrant Post-Execution.

While this Court has not ruled directly on this precise issue, the Fifth Circuit in *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198 (5th Cir. 2007), comprehensively addressed—and forcefully rejected—a claim that employers have an affirmative, constitutional right to contest an administrative warrant's validity in federal court *before* it is executed. The Fifth Circuit held that OSHA warrants, "like criminal warrants, can be executed by means of reasonable force" before the employer has an opportunity to challenge the warrant's validity in a contempt hearing. *Id.* at 202.

In *Trinity Marine*, after the employer (Trinity) denied OSHA entry to conduct a warrant inspection of its facility, the agency obtained assistance from Federal Marshals who informed the employer that they would be arrested unless

they permitted the inspection. *Id.* at 201. Trinity ultimately permitted the inspection under protest and OSHA later issued citations based on evidence obtained from the search.[11] *Id.* The employer contested the citations and raised a constitutional challenge before an ALJ, contending that the search's illegality should result in the suppression of evidence. *Id.* The ALJ rejected Trinity's arguments and that decision became a final order of the Commission. *Id.*

Trinity appealed to the Fifth Circuit, arguing that "before an inspection pursuant to an administrative warrant takes place," an employer has "a constitutional right—an amalgam of the Fourth and Fifth Amendments—to contest an administrative warrant's validity in federal court," and that OSHA violated this right by forcefully executing the inspection warrant before commencing a contempt proceeding to allow the company the opportunity to challenge the warrant. *Id.* at 202, 207. In denying Trinity's petition for review, the Fifth Circuit concluded that "Trinity's so-called right finds no support in the Constitution's text or history and has never been blessed by the Supreme Court." *Id.* at 202. Indeed, the court noted that administrative warrants are subject to the lesser administrative

[11] Trinity filed an emergency motion in federal court to enjoin the inspection, contending that the warrant lacked probable cause and that forceful execution of an administrative warrant is unconstitutional. 512 F.3d at 201. OSHA, however, completed the inspection before the district court could hold a hearing on Trinity's motion. *Id.* OSHA then successfully argued to the district court that because the warrant had been executed, Trinity was required to exhaust its administrative remedies, and OSHA was not required to start a contempt proceeding. *Id.*

probable cause standard, per the Supreme Court's decision in *Barlow's*, and, unlike with criminal warrants, are subject to the exhaustion-of-administrative-remedies doctrine, meaning that "an employer is required to raise any challenges to the search before [the Commission], with review ultimately by the court of appeals." *Id.* at 203.

Significantly, the Fifth Circuit also rejected Trinity's argument that a constitutional pre-execution right to contest the administrative warrant's validity in a contempt proceeding must exist "[o]therwise an unconstitutional search could escape federal court review if OSHA merely declines to issue citations, leaving no administrative forum to hear the claim." *Id.* The court firmly stated that Trinity's argument "makes no sense" and found that "the best reading of the leading Supreme Court case on point, [*Barlow's*], is decidedly against Trinity's claim." *Id.*

In making this determination, the *Trinity Marine* court emphasized two salient points. First, by adopting a less stringent standard of proof for administrative warrants, the Supreme Court in *Barlow's* necessarily meant that "an administrative warrant is a less protective form of warrant." *Id.* at 209. Therefore, it would be anomalous for the target of the less intrusive administrative inspection to have a *greater* right to challenge the warrant than the target of the more intrusive (criminal warrant) search of a private home. *See id.* at 209 & n.15; *see also Found. Foods Grp., Inc.*, 2021 WL 4900948, at *5 ("FFG does not explain how a *Bivens*

action and suppression motion can be adequate remedies in the criminal context but not in the OSHA context, nor could it.")[12]; *Donovan v. Hackney, Inc.*, 583 F. Supp. 773, 778 n. 3 (W.D. Okla. 1984), *aff'd*, 769 F.2d 650, 653 n.2 (10th Cir. 1985) (same).

Second, the Fifth Circuit found that any purported constitutional violations resulting from an OSHA inspection could be adequately addressed by a post-execution *Bivens* action, rather than a pre-enforcement challenge:

> Just as in the criminal context where a search by federal officers violates a suspect's constitutional rights but no charges are filed, a victim of an unconstitutional administrative search can affirmatively bring the grievance before a federal tribunal by means of a *Bivens* suit. There is no danger of an unremedied constitutional wrong.

*Id.* at 203. The Fifth Circuit's reasoning and ultimate conclusion that employers lack a constitutional right to pre-execution review of an OSHA warrant are sound and apply with equal force to cases, such as this one, where an employer attempts to assert its constitutional challenge through a motion to quash in federal court. *E.g.*, *Found. Foods Grp., Inc.*, 2021 WL 4900948, at *5 (recognizing that "*Trinity Marine* principles and analysis apply with equal force to FFG's Motion to Quash").

[12] In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a federal cause of action for damages against the government when a federal agent acting under color of federal authority violates a plaintiff's Fourth Amendment rights.

These principles require that AMC first assert any challenge to the warrant's validity in the administrative fora following OSHA's execution of the warrant or in the district court's underlying contempt proceedings.[13]

### B. This Court's Decision in *Kohler* Likewise Confirms that No Pre-Execution Right to Judicial Review Exists.

The district court's decision below that AMC lacks a constitutional right to pre-execution review of the administrative warrant, App. 1 (August 26 Order), 5 (Transcript of August 24, 2021 Hearing, p. 14:18-23), 20-31 (Magistrate Fuentes's decision), is also consistent with *In re Establishment Inspection of Kohler, Co.*, 935 F.2d 810 (7th Cir. 1991), in which this Court held that employers must exhaust their administrative remedies before challenging an OSHA inspection warrant in federal court. In *Kohler*, OSHA obtained a warrant authorizing a "comprehensive"

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[13] *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (finding no deprivation of due process because the prescribed procedures not only provide the claimant with an effective process for asserting his claim but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final). Importantly, the public interest in having OSHA execute a warrant without undue delay or advance notice to the employer far outweighs the employer's interest in having the validity of a warrant issued by a neutral magistrate fully litigated before an inspection takes place. *See* 29 U.S.C. § 657(a) (authorizing OSHA "to enter without delay and at reasonable times" any workplace and "inspect and investigate" the workplace); *id.* § 666(f) (criminal penalty for unlawful advance notice of inspection); *Barlow's*, 436 U.S. at 323 (warrants "provide assurances from a *neutral* officer that the inspection is reasonable under the Constitution, is authorized by statute" (emphasis added)); *Marshall v. Shellcast Corp.*, 592 F.2d 1369, 1371 (5th Cir. 1979) ("Congress considered the 'element of surprise' a crucial component of OSHA searches.").

inspection of Kohler's manufacturing plant. *Id.* at 811. Kohler refused OSHA access to the plant notwithstanding the warrant and filed a motion to quash the warrant in district court; meanwhile, OSHA moved to hold Kohler in contempt. *Id.* The district court denied both of those motions, ordering Kohler to submit to the inspection, and while the district court was considering Kohler's motion to stay the denial of the motion to quash pending appeal, Kohler relented and allowed the inspection – but only until the district court ultimately granted Kohler's motion to stay the inspection. *Id.* OSHA conducted its inspection after the Seventh Circuit lifted the stay and Kohler appealed the district court's denial of its motion to quash. *Id.*

In dismissing Kohler's appeal, this Court, as Magistrate Fuentes correctly observed, "flat-out said it had no jurisdiction to hear the federal court appeal [of the district court's refusal to quash the warrant] with the employer's administrative remedies unexhausted." App. 23; *see also Kohler*, 935 F.2d at 812 (Under the OSH Act, "we are without jurisdiction to consider Kohler's challenge to the warrant that authorized OSHA's inspection." (citing 29 U.S.C. § 659)). Specifically, the OSH Act requires parties to contest OSHA citations before the Commission prior to obtaining judicial review, 29 U.S.C. § 659, and if the employer contests a citation and the Commission affirms the citation in a final

order, the employer may obtain judicial review of the Commission's final order in the appropriate court of appeals, *id.* § 660(a).

This Court in *Kohler* noted that in conferring federal appellate jurisdiction on such challenges by employers, the OSH Act also provides that "no objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Id.* § 660(a); *Kohler*, 935 F.2d at 812. Accordingly, the *Kohler* panel concluded that employers must raise their Fourth Amendment objections to an OSHA inspection warrant in any subsequent Commission proceeding.[14] *Id.* at 812-13. Furthermore, the panel reasoned that the rationale for applying the doctrine of administrative exhaustion is "even stronger in the context of a case, like this one, that raises a constitutional question, because the exhaustion requirement enables courts to avoid deciding cases on constitutional grounds unnecessarily." *Id.*

[14] As Magistrate Fuentes correctly noted, App. 22-23, *Kohler* abridged an earlier Seventh Circuit decision, *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373 (7th Cir. 1979), which had held that constitutional challenges to warrant validity could not be subjected to the exhaustion requirement because the Commission at the time had a policy of not considering Fourth Amendment questions. *See Kohler*, 935 F.2d at 813. The *Kohler* Court properly found *Weyerhaeuser* no longer applicable because the Commission had begun to consider constitutional challenges to OSHA inspection warrants. *See* App. 22-23; *Kohler*, 935 F.2d at 813 (citing cases).

Significantly, *Kohler* emphasized that the exhaustion requirement applies regardless of whether OSHA has commenced administrative proceedings against the employer: "That there are as yet no administrative proceedings at which Kohler can raise its fourth amendment objections to OSHA's inspection does not spare Kohler from the exhaustion requirement." *Id.* at 812. Because "the only remaining relevance of [Kohler's] objections derives from the possibility of a *future* OSHA proceeding utilizing evidence acquired in the ... inspection," [] "the objections should [] be addressed first in the [Commission] proceedings." *Id.* (citation omitted and emphasis added).

*Kohler*'s rationale for applying the administrative exhaustion doctrine even *before* OSHA initiates administrative proceedings strongly supports requiring that employers raise any challenges to the warrant *after* OSHA executes the warrant (or in any related contempt proceedings initiated by OSHA). There is no danger of leaving employers without a forum to present their constitutional challenges after the warrant is executed. Sufficient post-execution relief is available to employers in the form of a motion to suppress evidence resulting from the inspection, *e.g., Metal Bank of Am.*, 700 F.2d at 915-16, exhausting administrative remedies before the Commission prior to appellate judicial review, *see* 29 U.S.C. §§ 659(a), 660(a), or an action for damages under *Bivens, see Trinity Marine*, 512 F.3d at 203.

AMC contends that *Kohler* is inapplicable because in that case OSHA had already executed the inspection warrant by the time the Court could review the district court's denial of its motion to quash. *See* AMC Br. 14-17 & n2. As an initial matter, AMC ignores that Kohler, like AMC in this case, moved to quash the warrant *before* it was executed and that this Court in *Kohler* applied the exhaustion requirement even though OSHA had not yet issued citations. *See Kohler*, 935 F.2d at 811-12. But more importantly, the thrust of the *Kohler* holding was that the OSH Act requires administrative warrant-related relief to be addressed in the first instance by the Commission, not by the court of appeals, and that allowing federal court review of an employer's motion to quash before it was presented to the Commission would enable employers to circumvent the statutory exhaustion requirement. *See id.* at 812. As Magistrate Fuentes's correctly noted, "[t]his holding falls well short of imposing any requirement that federal courts entertain challenges to the constitutional validity of administrative inspection warrants before the Secretary has a chance to execute them – instead, *Kohler* supports the opposite proposition." App. 23; *see also* App. 1, 5 (Transcript of August 24, 2021 Hearing, p. 14:9-10). Hence, whether the employer's motion to quash comes before or after the warrant's execution is of no moment; in either case, the OSH Act's exhaustion requirement mandates that employers first bring any challenge to the Commission.

**C. The Cases AMC Cites Are Inapposite and Unpersuasive.**

The cases AMC relies on, AMC Br. 12, in asserting a pre-execution right to judicial review of administrative warrants are inapposite or lack persuasive value. For example, *In the Matter of Establishment Inspection of Gilbert & Bennett Mfg., Co.*, 589 F.2d 1335 (7th Cir. 1979), decided less than a year after *Barlow's*, involved an employer that refused to comply with an OSHA warrant and filed a motion to quash before the warrant was executed. Although the panel in that case undertook a probable cause analysis before holding that the employer's motion was properly denied, the issue of whether the employer had a right to pre-execution review was not raised by the parties and therefore the court never addressed it. *See id.* at 1338-40. The same is true of the other Seventh Circuit cases that AMC cites: *Rockford Drop Forge Co. v. Donovan*, 672 F.2d 626 (7th Cir. 1982)[15]; *In the Matter of Establishment Inspection of Cerro Copper Prod. Co.*, 752 F.2d 280 (7th

[15] In rejecting the employer's claim that OSHA's *ex parte* warrant was invalid because it had requested that the agency give advance notice of an application for an inspection warrant, the Court in *Rockford* noted that "[a]dvance notice is unnecessary to protect an employer because he may," among other things, "move before the district court to quash a warrant prior to its execution." *Rockford*, 672 at 631. A closer reading of the Court's opinion, however, reveals that this passing reference is *dictum* because advanced notice is foreclosed by the Act itself and by the Supreme Court in *Barlow's*. *See id.* at 630 (citing *Barlow's*, 436 U.S. at 316 and section 2(b)(10) of the OSH Act, 29 U.S.C. § 651(b)(10), which states that OSHA's enforcement program must "include a prohibition against giving advance notice of any inspections and sanctions for any individual violating this prohibition").

Cir. 1985); *In the Matter of Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994). Indeed, as Magistrate Fuentes correctly noted, the Seventh Circuit has never expressly found that employers have a *right* to judicial review of administrative warrants before their execution. *See* App. 20-28.

AMC also relies heavily on a pair of pre-*Kohler* Third Circuit opinions – *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128 (3d Cir. 1979) and *Matter of Establishment Inspection of Metal Bank of America, Inc.*, 700 F.2d 910 (3d Cir. 1983) – to argue that when an administrative warrant is issued, the employer *must* obtain pre-execution judicial review of the warrant to preserve its rights. AMC Br. 12-13. However, these two decisions simply observed that reversal of a district court's refusal to quash an OSHA warrant will not accord the employer "any actual, affirmative relief" when the warrant "has already been fully executed, and cannot now 'be recalled or quashed.'" *Metal Bank of Am.*, 700 F.2d at 913 (citing *Babcock & Wilcox*, 610 F.2d at 1134).

Further compounding AMC's misreading of these cases, the Third Circuit in each case determined "whether the appropriate forum for such a decision [on the employer's motion to suppress], in the first instance, is the district court or the Review Commission, *for adjudication of this matter is constrained by the doctrine of exhaustion of administrative remedies*…." *Babcock & Wilcox*, 610 F.2d at 1134-35 (emphasis added); *see also Metal Bank of Am.*, 700 F.2d at 915-16

("Metal Bank must raise the challenges made in its motion to quash in the first instance before the Review Commission."). In both cases, the Third Circuit determined that the Commission ultimately should decide "the propriety of the warrant" and whether evidence obtained through it could be used in the administrative proceedings.[16] *Babcock & Wilcox*, 610 F.2d at 1136; *Metal Bank of Am.*, 700 F.2d at 915-16. Hence, rather than support AMC's position, these cases confirm that employers must exhaust their administrative remedies before challenging OSHA administrative warrants in federal court.

[16] In *dictum*, the Third Circuit in *Metal Bank of America* stated that "before an OSHA warrant is executed an employer may move to quash and may appeal the denial of its motion without having to exhaust its administrative remedies before the [] Commission." 700 F.2d at 914 n.5. Aside from being non-binding, the Third Circuit's conclusion was also based on the outdated—and incorrect—premise that employers cannot challenge the validity of an OSHA warrant in Commission proceedings. *See id.* ("Exhaustion is thus not required as 'the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury.'" (citing *Babcock*, 610 F.2d at 1138)). As discussed *supra* p. 31 n.14, this reasoning is no longer applicable because the Commission will indeed address constitutional challenges to an OSHA warrant. *See Kohler*, 935 F.2d at 813 (citing cases); App. 22 (noting that the Commission "had begun to consider constitutional challenges to OSHA inspection warrants"); *see also Baldwin Metals Co. v. Donovan*, 642 F.2d 768, 773, 775 (5th Cir. 1981) (applying administrative exhaustion doctrine to employer challenges to OSHA warrants where there was "no evidence that agency review before [the Commission] would be futile" and because employers would suffer "no irreparable injury" since "judicial review of the allegedly unconstitutional warrants is provided in the appellate review of [Commission] decisions by a federal circuit court of appeals").

## III. Even Assuming the Court Had Jurisdiction, the District Court Properly Upheld the Validity of the Administrative Warrant.

Even if the Court had jurisdiction over AMC's appeal, the Court should affirm the district court's determination that the magistrate judge properly issued the administrative warrant "upon a showing of administrative probable cause under *Barlow's*." App. 32. OSHA's warrant application furnished sufficient specific evidence of safety violations at AMC's worksite and further demonstrated that the requested inspection was part of reasonable administrative plans (*i.e.*, OSHA's FOM and Emphasis Program). Moreover, the warrant appropriately authorized only a limited-scope inspection to investigate the alleged unsafe work practices, areas, or conditions related to operation and maintenance of forklifts, safety concerns in plain view, and whether AMC was complying with the OSH Act.

### A. The District Court Correctly Found that OSHA Established Probable Cause to Inspect AMC's Worksite in Response to an Employee Complaint.

The district court correctly found that OSHA's warrant application contained ample evidence demonstrating probable cause to issue the warrant. When an employer does not consent to an OSHA inspection, the Fourth Amendment requires that OSHA obtain an inspection warrant supported by probable cause. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324-25 (1978). However, the Supreme Court has held that "[p]robable cause in the criminal law sense is not required" for an administrative inspection warrant. *Id.* at 320-23. Instead, "reasonableness is…

the ultimate standard" and turns on whether "a valid public interest justifies the intrusion" contemplated by the warrant. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); *see also See v. City of Seattle*, 387 U.S. 541, 545 (1967) (warrant for administrative entry evaluated "against a flexible standard of reasonableness").

In *Barlow's*, the Supreme Court explained that OSHA may establish administrative probable cause for an inspection warrant based on: (1) "specific evidence of an existing violation," or (2) "'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Barlow's*, 436 U.S. at 320-21 (quoting *Camara*, 387 U.S. at 538). Here, the district court properly found that OSHA adequately established in its warrant application "specific evidence" of existing violations of OSHA's powered industrial truck standard. In addition, the warrant application demonstrated that the employee complaint was properly handled under OSHA's FOM and its Emphasis Program, which contain reasonable administrative standards for conducting the inspection at AMC's worksite. The district court therefore properly denied AMC's motion to quash.

### 1. OSHA's Warrant Application Furnished Sufficient Specific Evidence of An Existing Violation.

To establish administrative probable cause for an inspection warrant, OSHA does not need to prove that "the conditions in violation of [the OSH Act] exist on

the premises." *Barlow's*, 436 U.S. at 320; *see also Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir. 1979) ("The requirements of administrative probable cause are less stringent than those governing criminal probable cause."); *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir. 1979) (rejecting application of criminal probable cause standard for complaint-based OSHA inspections). And, when OSHA's warrant application is based upon "specific evidence" of violations such as an employee complaint, the agency's evidence need not "show a probability of a violation," but merely "support a reasonable suspicion of a violation." *U.S. v. Establishment Inspection of: Jeep Corp.*, 836 F.2d 1026, 1027 (6th Cir. 1988); *W. Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982); *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1318 (7th Cir. 1980). In other words, "[t]he facts offered must be sufficient to warrant further investigation or testing." *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981). Here, the allegations in OSHA's warrant application, including the detailed description of the safety complaint, furnished sufficient "specific evidence" and were "enough to warrant further investigation" of AMC's worksite. *Id.*

With respect to warrant applications based upon an employee complaint, this Court has explained that the agency's application must, at a minimum, "inform the Magistrate of the substance of the employee complaints, so that the Magistrate may

exercise independent judgment as to whether an inspection is justified, rather than acting as a mere rubber stamp validating the decision already reached by the Secretary." *Burkart Randall*, 625 F.2d at. 1319. The Tenth Circuit has stated that ideally, the warrant materials should set forth who at OSHA received the complaint, the source of the complaint (*i.e.*, whether "the source [is] an employee, a competitor, a customer, a casual visitor . . . or someone else"), the "underlying facts and surrounding circumstances the complainant provided to OSHA," the "steps [OSHA] took to verify the information in the complaint," and any personal observations by the affiant of the premises and past violations, among other aspects. *Marshall v. Horn Seed Co.*, 647 F.2d 96, 103 (10th Cir. 1981).

Notably, the court in *Horn Seed* emphasized it "only require[s] that each warrant application relate what information OSHA has regarding each of these aspects, not that OSHA must always have or have done each of these things." *Id.* The *Horn Seed* court also stated that OSHA is not always required to "have taken steps to verify the complaint." *Id.* If OSHA determines that the complaint "carries its own indicia of sincerity and reliability, OSHA will not be saddled with the burdensome task of undertaking unnecessary corroborative efforts." *Id*. at 194. If a magistrate agrees, as in this case, that the complaint "appears genuine and provides some basis for believing that a violation may exist on the premises," a warrant may be issued. *Id.*; *see also Weyerhaeuser Co. v. Marshall*, 592 F.2d 373,

377 (7th Cir. 1979) ("[OSHA's] application need not set forth factors bearing on the credibility of the unidentified complainant . . . ."); *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1339 (7th Cir. 1979) ("*Camara* and *Barlow's* do not require that the warrant application set forth the underlying circumstances demonstrating the basis for the conclusion reached by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person.").

Tested against the above standards, the allegations in OSHA's warrant application provided more than enough "specific evidence" to meet administrative probable cause for inspecting AMC's worksite. The warrant application was based on a complaint from an AMC employee received on July 7, 2021, which detailed the time and date and general description of the accident. *See* Supp. App. 4-6, 11-13. The application informed the magistrate who at OSHA received the complaint, *see* Supp. App. 12 (providing official ID number of OSHA personnel), and the source of the complaint, *see* Supp. App. 5 (noting that the complaint came "from one of AMC's current employees who was knowledgeable of specific alleged hazardous conditions at AMC's worksite"). Specifically, the employee complaint alleged:

> On or about March 26, 2021, at approximately 12:30 PM, Driver #1 was cleaning up debris in the loading dock area when Driver #1 was struck in the back by a forklift, which was operated in reverse. Driver #1's head hit the vertical side post of the rear end of a trailer. Driver #1

> was transported by EMS to a local hospital and treated for head, neck, and back injuries.

Supp. App. 11. OSHA repeated the employee's detailed allegations in its sworn warrant application. Supp. App. 5. CSHO Minett-Jackson also declared in the sworn application that: (1) based on her training and experience, the accident described in the complaint may involve violations of OSHA's safety standards for powered industrial vehicles; (2) the agency is not aware of evidence that the complainant is seeking to harass the employer; (3) on July 9, 2021, AMC denied CSHO Minett-Jackson entry into its workplace and demanded that the agency obtain a warrant to conduct the inspection. Supp. App. 5-7.

As Magistrate Fuentes correctly found, OSHA "presented what [it] had to the magistrate judge . . . in the Warrant Application." App. 34; *see also Horn Seed*, 647 F.2d at 103 (OSHA need only provide "what information [it] has regarding each [aspect of the complaint]). And, even though the employee complaint carried its "own indicia of sincerity and reliability," *Horn Seed*, 647 F.2d at 104, OSHA took steps to verify the allegations in the complaint by, as Magistrate Fuentes observed, "call[ing] the complaint back for further details on the injury."[17] App. 34; *see also* Supp. App. 12 (noting that OSHA "Called Source

[17] AMC makes no attempt to deny that the forklift accident alleged in the complaint occurred. In fact, the company has admitted on multiple occasions that it is familiar with the incident to which the complaint refers. *See* Dist. Ct. ECF No.

for more info/Discussed incident/injury"). Moreover, as the Magistrate Judge properly concluded, "the driver was struck for one or more possible reasons, many of which, alone or in combination, would have presented an existing violation" of OSHA's powered industrial truck standard. App. 35-36 (listing potential violations stemming from the forklift accident). OSHA's application therefore furnished the magistrate "sufficient factual data to conclude that a search was reasonable and that a warrant should issue." *Burkart Randall*, 625 F.2d at. 1319; *see, e.g.*, *Matter of Midwest Instruments Co.*, 900 F.2d 1150, 1153–54 (7th Cir. 1990) (upholding warrant where the agency's application set forth the employee complaint in its entirety and described the employees who were being injured, where they were being injured, the type of injuries, the number of injuries and the believed cause of these injuries).

Magistrate Fuentes also correctly found that the details in OSHA's warrant application in this case are "greater than those held sufficient by the Seventh Circuit in *Burkart*, which vaguely described 'various hygiene hazards' including 'unsanitary' eating areas and 'inadequate' fire escapes." App. 37; *Burkart Randall*, 625 F.2d at 1315 n.1, 1319. OSHA's warrant application in *Burkart*, like

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12 at 21 (Declaration of CSHO Minett-Jackson, ¶10). At the hearing on August 6, 2021, AMC also acknowledged it knew of the incident and was preserving evidence related to the incident. App 2-4.

in this case, recited the allegations in the complaint and, in an oath by the CSHO, stated that OSHA had determined from this information that reasonable grounds existed to believe that safety violations would be found on Burkart's premises. *Id.* at 1319. While the application in that case was "far from a model of specificity and clarity," this Court found the information in the warrant application sufficient to establish administrative probable cause. *Id.* at 1320.

Significantly, this Court in *Burkart* rejected the employer's argument that OSHA lacked probable cause because the application failed to demonstrate the "underlying factual basis for the complainants' allegations." 625 F.2d at 1320. This Court explained that the magistrate "need not be presented with enough evidence to allow him to verify or reevaluate the observations of the employee-informants," and stated that the oath of the CSHO was entitled to "great[] weight" and therefore provided sufficient support for the warrant application. *Id.* Furthermore, in rejecting the employer's claim that the warrant application was fatally deficient in detail and specificity, this Court explained that only a "few additional facts" need be added to a conclusory application to "satisfy the 'specific evidence' manner of establishing probable cause." *Id.* (citation omitted).

Here, OSHA's warrant application certainly contains more than a "few additional facts." *Burkart Randall*, 625 F.2d at 1320. Not only does it include an oath from the CSHO specifying the potential violations alleged in the complaint, it

also includes specifics about a workplace accident from an employee with first-hand knowledge of the conditions. *See* App. 38; Supp. App. 5. Hence, the warrant application here is not properly comparable to applications that contain only a conclusory statement that a complaint was received or those that merely contain "unreliable boilerplate." *See Weyerhaeuser*, 592 F.2d at 377. The facts OSHA offered here are more than enough "to warrant further investigation," *Horn Seed Co.*, 647 F.2d at 102, and were therefore "enough to establish the requisite degree of administrative probable cause" to inspect AMC's worksite. App. 38.

Moreover, the magistrate judge correctly found *Matter of Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994), inapplicable. App. 38-39. The panel in that case expressed a concern that disgruntled employees could be an insufficiently reliable source of information for complaints, so "OSHA may not rely solely on an employee complaint but must instead make an independent investigation to verify the truthfulness of the allegations," which could include "interviewing the complainant, interviewing other employees, checking medical records when possible, or contacting the employer to allow it to explain and/or respond to the alleged unsafe conditions." 13 F.3d at 1166. Notwithstanding this language, this Court in *Kelly-Springfield* affirmed the district court's denial of the employer's motion to quash, in part, because OSHA conducted a follow-up investigation that consisted of more

interviews of the single, individual complainant who triggered the investigation. *Id.* at 1162-63. This Court upheld the initial probable cause determination for the inspection warrant on the ground that "there is no evidence of intentional or reckless disregard for the truth on the part of the affiant in securing the warrant." *Id.* at 1169. Similarly, AMC has offered no evidence of intentional or reckless misrepresentations in the warrant application. And, as discussed above, OSHA contacted the injured employee to verify the complaint.

AMC attempts to negate the district court's probable cause determination by contending that the Secretary improperly withheld the employee complaint and the underlying warrant application from the company. *See* Br. 21-24. However, AMC fails to explain why its access to this material has any bearing on whether OSHA furnished the *magistrate judge* sufficient administrative probable cause to support the warrant. *See Burkart Randall*, 625 F.2d at 1319 ("In determining whether this [administrative probable cause] standard was satisfied in this case, [the reviewing court] may consider only the evidence *before the Magistrate* at the time of application for the inspection warrant." (emphasis added)).

AMC's reliance on 29 C.F.R. § 1903.11(a) is likewise unavailing. *See* AMC Br. 22. Section 1903.11(a) states that "[a] copy [of the complaint] shall be provided the employer or his agent by the Area Director or Compliance Safety and Health Officer *no later than at the time of inspection*." 29 C.F.R. § 1903.11(a)

(emphasis added). AMC cannot repeatedly obstruct OSHA's ability to initiate the inspection and then claim a right to a copy of the complaint under § 1903.11(a). Furthermore, OSHA's FOM clarifies that a copy of the complaint is given during opening conference. *See* OSHA Directive CPL 02-00-164, OSHA's FOM, Chapter 3, Section V.A.[18] But OSHA has been unable to initiate the inspection and conduct an opening conference because AMC has gone to great lengths to prevent the inspection from taking place. Hence, absent Magistrate Fuentes's August 20, 2021 order unsealing the redacted warrant materials, *see* App 7, there was no requirement for OSHA to provide a copy of the complaint or any other underlying warrant materials to AMC.[19]

[18] Available at https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-3.

[19] AMC claims its motion to unseal was "provisionally granted" on August 6, 2021, but the magistrate judge's August 6 order clearly indicates that the Secretary was only required to submit the warrant materials with proposed redactions to the court for Magistrate Fuentes's review by close of business on August 9, 2021. *See* App. 47. The Secretary complied with this order on August 9, 2021, and was not required to provide AMC with the redacted warrant application until compelled to do so pursuant to Magistrate Fuentes's August 20, 2021 order, *see* App. 7, which was entered at 5:08 PM Central Time. The Secretary promptly provided the redacted warrant materials to AMC's counsel the following workday, on August 23, 2021, via the district court's ECF system, *see* Dist. Ct. ECF No. 25 (Docket Entry: "Redacted Application for Inspection Warrant"), and again via email later that day.

AMC also claims that the CSHO's recorded statements while attempting to execute the warrant demonstrate that OSHA did not properly investigate the complaint and that they negate any finding of "specific evidence" of an existing violation. *See* Br. 22-23. As an initial matter, this court cannot consider any evidence outside the information provided to the magistrate in conjunction with the warrant application, including the videotaped evidence AMC submitted related to the attempted inspection on August 2, 2021 (Dist. Ct. ECF No. 15). *See Burkart Randall*, 625 F.2d at 1319 ("[W]e may consider only the evidence before the Magistrate at the time of application for the inspection warrant."). Furthermore, and as previously noted, *see supra* p. 42, OSHA took steps to verify the complaint even though it is not required to do so when, as in this case, it receives a complaint that it determines is genuine and reliable. *See Horn Seed*, F.2d at 104.

In any event, the video does not support AMC's assertions. As Magistrate Fuentes explained, although the CSHO "professed [a] lack of knowledge, on the video, about where she was to search . . . she explained in the same breath that she did not *yet* know the precise location of the *loading dock area* where the forklift injury occurred." App. 41 (emphasis added). It is unreasonable to expect OSHA to know all the details related to the complaint or the inner workings of the company's 625,000 square foot facility prior to conducting the inspection. *See, e.g.*, *Donovan v. Burlington N. Inc.*, 694 F.2d 1213, 1216 (9th Cir. 1982) (finding

warrant based on complaint alleging ventilation defects in large freight-yard to be reasonable even though it did not specify precise location of alleged defects); *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979) (acknowledging that OSHA need not know "the exact location of violations . . . prior to entering the establishment").

AMC's reliance on a statement from an unpublished Eleventh Circuit decision that "the existence of a hazard [does not] necessarily establish[] a violation," *U.S. v. Mar-Jac Poultry, Inc.*, 756 Fed. App'x 856 (11th Cir. 2018), also fails. *Mar-Jac Poultry* is inapposite because in the instant case OSHA established probable cause based on detailed and verified allegations in an employee complaint, rather than injury and illness logs. *See, e.g.*, *Donovan v. Fed. Clearing Die Casting Co.*, 655 F.2d 793, 797 & n.10 (7th Cir. 1981) ("[E]vidence of employee complaints…may …justify a finding of 'specific evidence' to support a showing of probable cause."). And, unlike *in Mar-Jac*, OSHA is not attempting to expand a specific-evidence inspection into a wider inspection of the employer's workplace. *See Mar-Jac Poultry*, 756 Fed. App'x at 859 (noting OSHA sought a warrant to inspect the Mar-Jac facility with respect to hazards directly related to the accident as well as six other hazards implicated by OSHA injury and illness logs).

### 2. OSHA's Warrant Application Provided Reasonable Administrative Standards for Conducting the Inspection.

Although this enforcement matter arose from specific evidence contained in an employee complaint (justifying the issuance of the warrant on that basis alone), OSHA's warrant application also provided reasonable administrative standards for conducting the inspection at AMC's worksite, in accordance with the second prong in *Barlow's*. *See Barlow's*, 436 U.S. at 321, 323 (explaining, with respect to the second method of demonstrating administrative probable cause, that "[a] warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" satisfies the Fourth Amendment). In order to establish administrative probable cause using the second method provided by *Barlow's*, this Court has two requirements: (1) a reasonable legislative or administrative inspection program must exist; and (2) the desired inspection falls within the program. *In the Matter of Establishment Inspection of: Northwest Airlines, Inc.*, 587 F.2d 12, 14-15 (7th Cir. 1978). The Seventh Circuit requires the program to be identified in the warrant application. *Id.* at 15.

Here, OSHA's warrant application identified and attached the complaint-handling provisions of OSHA's FOM and explained how the July 7, 2021 complaint met the criteria for an on-site inspection under the FOM because it

alleged hazards covered by an Emphasis Program. *See* Supp. App. 5-8, 19. The warrant application also identified and attached the applicable Emphasis Program on Powered Industrial Vehicles, which provides that OSHA will schedule for inspection "all serious complaints and referrals, alleging a hazard or condition that may be a violation of the powered industrial truck standard or a potentially fatal 'struck/caught/fall hazard' associated with the operation of a powered industrial vehicle." Supp. App. 40-41. Thus, because the complaint alleged an employee was injured by another employee operating a forklift, the complaint falls within Emphasis Program. Supp. App. 5-6.

AMC cites to two inapplicable, out-of-circuit decisions to support its argument that these administrative programs are not derived from neutral sources as contemplated by *Barlow's* because they "were triggered by an employee complaint." *See* AMC Br. 29-33 (citing *Trinity Industries Inc. v. OSHRC*, 16 F.3d 1455, 1460 (6th Cir. 1994) and *In re Crider Poultry, Inc.*, 2010 WL 1524571 (S.D. Ga. 2010), *report and recommendation adopted*, 2010 WL 1524584 (S.D. Ga.)). The panels in these cases found that an emphasis program was not a reasonable administrative plan because it authorized a comprehensive, full-scope inspection triggered by an employee complaint. *Trinity Industries*, 16 F.3d at 1460; *Crider Poultry, Inc.*, 2010 WL 1524571 at *6. The panels stated that "a complaint inspection must bear an appropriate relationship to the violation alleged in the

complaint." *Trinity Industries*, 16 F.3d at 1460; *Crider Poultry, Inc.*, 2010 WL 1524571 at *5. *But see Burkart Randall*, 625 F.2d at 1324 ("Our examination of these competing positions and of the policies underlying the Act and the warrant requirement convinces us that the better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints."). Ultimately, the administrative plan was deemed unreasonable because it allowed for expansion of a limited, complaint-based inspection to a full-scope inspection. *Trinity Industries*, 16 F.3d at 1460; *Crider Poultry*, 2010 WL 1524571 at *6-7.

That is not the case here. OSHA is not attempting to conduct a full-scope inspection of AMC's worksite, and the applicable Emphasis Program does not authorize a full-scope inspection. Instead, the Emphasis Program explicitly provides that the inspection will address limited issues related to the complaint:

> all complaint items, all aspects of the powered industrial truck standard, powered industrial vehicles and associated hazards, collection of OSHA 300 data and hours worked for the previous three years plus the current year, an evaluation of the employer's safety and health program in accordance with the FOM, an evaluation of safety and health hazards at the employer's loading dock or other designated loading and unloading areas where powered industrial vehicles are used (including loading docks, shipping and receiving areas, yard areas, and other locations where vehicles are loaded and unloaded.)

Supp. App. 41. The areas, conditions, and equipment to be inspected under the Emphasis Program bear "an appropriate relationship to the violation alleged in the

complaint" (*i.e.*, hazards resulting from unsafe operation of a forklift). *Trinity Industries*, 16 F.3d at 1460. Therefore, the warrant authorizing a limited-scope inspection of the "alleged unsafe work practices, areas and/or conditions relating to operation and maintenance of forklifts" meets the neutral administrative program and *Barlow's* second prong. Supp. App. 1.

AMC argues, without citing any legal authority, that the Emphasis Program is not based on neutral criteria because it requires OSHA to initiate an inspection when it receives a complaint alleging a hazard that *the agency* classifies as "serious." AMC Br. 29-30. As AMC notes, the Emphasis Program defines a serious hazard as one that has a "substantial probability that death or serious physical harm could result." Supp. App. 38. The company, however, ignores that this definition comes from the OSH Act itself and that OSHA receives deference in determining whether a reported accident relates to a "serious" violation. *See* 29 U.S.C. § 666(k) (A "serious" violation exists where "there is a substantial probability [of] death or serious physical harm[.]"); *Illinois Power Co. v. OSHRC*, 632 F.2d 25, 28 (7th Cir. 1980) ("[A]lthough the fact of an accident may not be sufficient to prove the likelihood of an injury, it is at least *prima facie* evidence of a likelihood [] and the rest may be supplied by common sense or an understanding of physical law."). "It is settled, moreover, that '(i)f evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or

utterly implausible concurrence of circumstances, the [agency's] expert determination of likelihood should be accorded considerable deference by the courts.'" *Illinois Power*, 632 F.2d at 28 (citation omitted).

The July 7, 2021 complaint that triggered the requested inspection here alleged that the employee suffered back, head and neck injuries, and was transported by EMS to a local hospital, Supp. App. 11; without question, the complaint therefore identified a hazard that had a substantial probability of death or serious physical harm. Therefore, OSHA properly determined, based on the alleged forklift accident in the complaint, along with "common sense [and] an understanding of physical law," *Illinois Power Co.*, 632 F.2d at 28, that the complaint alleged a sufficiently "serious" hazard and that warranted an inspection of AMC's worksite.

### B. The Scope of the Warrant Was Reasonable Under the Circumstances and Not Overbroad.

Also contrary to AMC's assertions, OSHA's warrant "does not far exceed[] the scope of the alleged complaint." AMC Br. 26. The express language of the warrant here authorizes a limited-scope inspection of the "alleged unsafe work practices, areas and/or conditions *relating to operation and maintenance of forklifts*" and any matters "in plain view." Supp. App. 1. A warrant expressly limited in scope to the subject matter of the complaint and any concerns in plain view is patently reasonable. *See Rockford Drop Forge Co. v. Donovan*, 672 F.2d

626, 631 (7th Cir. 1982) (the plain view doctrine allows OSHA to inspect hazardous conditions and areas alleged in the complaint as well as "areas in plain view" of the compliance officer).

Nonetheless, AMC alleges that, given the size of its worksite and that OSHA does not know the precise location where the injury occurred, a search of "all areas and conditions relating to the operation and maintenance of forklifts" is overbroad and bears no relationship to the complaint. AMC Br. 25-27. However, this Court holds that when "the exact location of violations cannot be known prior to entering the establishment, a narrow, restricted warrant would severely defeat the purposes of the Act." *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979).

AMC also claims the warrant "vastly exceeds the scope" of the employee complaint because it also authorizes OSHA to inspect matters relating to whether AMC is complying with the OSH Act's general duty clause. AMC Br. 28; *see* Supp. App. 2. However, AMC's objection is foreclosed by *Gilbert & Bennett*, in which this Court upheld an OSHA warrant authorizing an "admittedly broad" inspection of "all pertinent conditions, structures, . . . equipment, materials, and all other things . . . bearing on whether th[e] employer" was complying with the OSH Act's general duty clause and OSHA's safety and health standards. *Gilbert & Bennett*, 589 F.2d at 1343. The Seventh Circuit determined that the scope of

OSHA's warrant "must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment." *Id.* OSHA's warrant in this case satisfies these limitations.[20] *See also Burkart* 625 F.2d at 1324 (holding that since a general inspection is permissible in cases where there is no specific reason to suspect that violations will be found at a particular facility (*i.e.*, during administrative plan inspections), it would be "anomalous" to hold that only a limited inspection may be conducted where there is a "particularized probable cause to believe that violations will be found in the specific facility to be inspected [(*i.e.*, during complaint-based inspections)]").[21]

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[20] Nonetheless, if this Court finds that the actual language of the warrant is overboard because it extends to areas and things other than the subject matter of the complaint and matters in plain view, the Court should not invalidate the warrant in its entirety; instead, the Court should simply limit the warrant's scope to those areas "susceptible to constitutional interpretation." *Rockford,* 672 F.2d at 631; *Donovan v. Fall River Foundry Co.*, 712 F.2d 1103, 1112 (7th Cir. 1983) (acknowledging that "to avoid further disputes" the Court can "limit the warrant's scope to those [complaint] areas").

[21] AMC also argues that the district court erred in adopting the Magistrate's memorandum opinion without providing it 14 days to file objections and that this purported procedural error deprived it of *de novo* review before the district court under the Federal Magistrate's Act and Federal Rule of Civil Procedure 72. *See* AMC Br. 33-41. However, the record demonstrates that Judge Kendall properly construed Magistrate Fuentes's opinion as a Report and Recommendation, under Rule 72, rather than a final disposition. App. 4-5 (Transcript of August 24, 2021 Hearing, p. 16:7-8: "I am going to treat the 8/20/21 memorandum and opinion as a report and recommendation."). Consistent with this determination, Judge Kendall

## CONCLUSION

For the foregoing reasons, the Court should dismiss AMC's appeal.

Respectfully submitted,

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applied *de novo* review to Magistrate Fuentes's probable cause determination. *See id.* (pp. 16:8-17:18 (analyzing the probable cause issue anew)). In addition, AMC cannot reasonably claim prejudice because although AMC did not file formal "objections" with the district court, it filed a written emergency motion that included the company's specific objections to the magistrate's opinion. *See* Dist. Ct. ECF No. 26.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation prescribed in 7th Circuit Rule 32(b), because it contains 13,850 words, excluding the material referenced in Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, with 14-point Times New Roman.

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Date: December 20, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of December, 2021, I served the foregoing Brief for Appellee Martin J. Walsh, U.S. Secretary of Labor, via the Court's electronic-filing system on all parties of record, including the following attorneys for Appellant Anthony Marano Company:

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