UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LORI CHAVEZ-DEREMER, Secretary of Labor**,** United States Department of Labor**,** Complainant**,** v. **BERGLUND CONSTRUCTION COMPANY,** and its successors**,** Respondent.	OSHRC Docket No. 25-0584 Inspection No. 1781065

SECRETARY OF LABOR'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT

The Complainant, **LORI CHAVEZ-DEREMER**, Secretary of Labor, United States Department of Labor ("Secretary"), by the undersigned attorney, and pursuant to 29 Code of Federal Regulations ("C.F.R.") § 2200.40, of the Rules of Procedure of the Occupational Safety and Health Review Commission ("OSHRC") responds in opposition to Respondent's Motion to Dismiss the Secretary's complaint.

INTRODUCTION

On June 13, 2025, the Secretary filed the complaint in this matter. On July 21, 2025, Respondent filed a motion to dismiss the complaint. As basis for its motion, Respondent argues 1) Administrative Law Judges ("ALJs") are appointed by the OSHRC in violation of the Appointments Clause in Article II of the Constitution; 2)

OSHA Area Directors serve as "officers" but are not engaged in accordance with the Appointments Clause; and 3) the Seventh Amendment provides employers with the right to a jury trial for claims that are legal in nature, including citations alleging violations of the Section 5(a)(1) of the OSH Act – the General Duty Clause.

The Secretary of Labor opposes the motion and further states the Commission lacks authority to rule on Respondent's facial constitutional challenges to the OSH Act. Moreover, on the merits, Respondent's challenges fail for several reasons. First, the Commission ALJ was properly appointed. Second, OSHA Area Directors are "non-officer employees" to whom the Appointments clause does not apply. Finally, general duty clause violations of the OSH Act do not implicate the Seventh Amendment, and Respondent is not entitled to a trial by jury on the Secretary's claim.

ARGUMENT

I. The Commission Lacks Authority to Rule on Berglund's Facial Constitutional Challenges to the OSH Act.

The crux of Berglund's claims is that the OSH Act's administrative enforcement scheme "runs afoul," Motion at 3, of the U.S. Constitution; specifically, the Appointments Clause, Article II, and the Seventh Amendment. The problem for Berglund is that "[n]o administrative tribunal has the authority to declare unconstitutional the Act which it is called upon to administer."[1] *Buckeye Indus., Inc. v.*

[1] Berglund alleges that its claims raise both "facial" and "as applied" challenges to the constitutionality of the OSH Act. *See, e.g.,* Motion at 3 ("The Secretary's claims must be dismissed because the structure of the proceedings before the Commission are

Sec'y of Labor, 587 F.2d 231, 235 (5th Cir. 1979). For nearly sixty years, the Supreme Court has held fast to this point.[2] And for more than forty, the Commission has recognized that it has "no authority to consider . . . issues involving the constitutionality of its enabling legislation." *Daniel Int'l Corp.*, No. 15690, 1981 WL 18905, at *7 (OSHRC May 28, 1981), *rev'd on other grounds*, 683 F.2d 361 (11th Cir. 1982). Accordingly, the Court should decline to address the merits of Berglund's arguments, deny the motion to dismiss, and proceed with adjudication of this enforcement action.

II. On the Merits, Berglund's Challenges Fail.

A. The Commission ALJ Was Properly Appointed.

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unconstitutional on its face and in its application to Berglund."), at 6, 7 (claiming that "OSHA Area Directors are not appointed in accordance with the Appointments Clause," but also arguing that "the citation and proposed penalty are void" because "the Area Director who issued the citation in this matter was not constitutionally appointed"). But the substance of Berglund's arguments is that *all* claims alleging violations of the general duty clause entitle the cited employer to a jury trial, and that *all* Commission ALJs and OSHA Area Directors are unconstitutionally appointed. *See id.* at 4-10. When making these arguments, Berglund relies on facts that are common to all general duty clause claims and all Commission ALJs and OSHA Area Directors, and points to nothing unique about this particular claim, the Commission ALJ assigned to this matter, or the particular OSHA Area Director who issued the contested citation. Berglund's arguments are thus properly construed as facial challenges to the constitutionality of the OSH Act and its enforcement scheme.

[2] *See, e.g.*, *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring) (noting that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (same).

Article II prescribes that Congress may "vest the Appointment" of "inferior Officers" solely "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Although Commission ALJs are inferior officers, *see Lucia v. SEC*, 585 U.S. 237, 248-49 (2018), the ALJ to whom this case is assigned was properly appointed. Berglund's claim that the OSH Act is unconstitutional because the statute authorizes an individual who is not the "Head[ ] of [the] Department[ ]"—namely, the Chairman of the Commission—to appoint Commission ALJs, Motion at 3, 5-6; *see* 29 U.S.C. § 661(e), overlooks that the full Commission ratified the appointment of the ALJ.

First, the Commission is clearly a "Department" for purposes of the Appointments Clause, a fact which Berglund initially admits, Motion at 3 ("the full Commission is the Head of the Department"), but shortly thereafter disputes. *Id.* at 4, 5. It "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).[3] Like the SEC, *id.*; *Lucia*, 585 U.S. at 243, and

[3] In *Freytag v. Commissioner*, 501 U.S. 868 (1991), on which Berglund relies, Motion at 5, the Supreme Court determined that an Article I tax court did not constitute a "Departmen[t]," but "specifically reserved the question whether a 'principal agenc[y], such as ... the Securities and Exchange Commission,' is a 'Departmen[t]' under the Appointments Clause." *Free Enter.*, 561 U.S. at 510 (citing *Freytag*, 501 U.S. at 887 n.4). The Court subsequently held in *Free Enter.* that "for the purposes of the Appointments Clause," the SEC "constitutes a 'Departmen[t]'" because it "is a freestanding component of the Executive Branch, not subordinate to or contained

the Federal Mine Safety and Health Review Commission, *Jones Bros.*, 898 F.3d at 679, the Commission is a congressionally created principal agency within the Executive Branch and is therefore a "Department" for purposes of the Appointments Clause. *See Occupational Safety and Health Review Commission*, available at https://perma.cc/44GZ-RH6M ("[The Commission] is a completely independent agency that is not part of the Department of Labor or OSHA. This ensures that OSHA's enforcement actions are carried out in accordance with the law.").

Second, even if Berglund were correct that the full Commission is the "Head" of the Department, Motion at 3, 6, the Supreme Court has held that an inferior-officer appointment complies with the Appointments Clause when the Head of the Department ratifies an appointment previously made by another individual. *See, e.g., Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. __, 145 S.Ct. 2427, 2461 (2025) (members of a task force were properly appointed where the Secretary of the Department of Health and Human Services ratified appointments previously made by another individual); *Edmond v. U.S.*, 520 U.S. 651, 654, 666 (1997) (finding appointments constitutionally valid where Secretary of Transportation adopted previously made appointments to Coast Guard Court of Military Review). Circuit courts have held the same. *See, e.g., Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13

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within any other such component." 561 U.S. at 511. *Free Enter.* compels the same conclusion for the Commission.

(D.C. Cir. 2019) (explaining that the court has "repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting a claim, resolves the claim on the merits by 'remedying the defect' (if any) from the initial appointment") (cleaned up).

Here, Chief ALJ Bell was initially appointed by the Chairman of the Commission in accordance with the OSH Act, *see* 29 U.S.C. § 661(e), and that appointment was subsequently ratified by the full Commission. *See* Ex. 1 (OSHRC Memo re Appointment of Administrative Law Judges), p. 3. The full Commission ratification predated the initiation of this Commission proceeding. Accordingly, Berglund's request to dismiss this matter based on the constitutionality of the ALJ's appointment fails.

Although Berglund's arguments focus on the appointment of Commission ALJs, *see* Motion at 6-8, Berglund also alleges in passing that Commission ALJs are "unconstitutionally insulated," *id.* at 4, "by three layers of for-cause removal protections." *Id.* at 3. Berglund's undeveloped *ipse dixit* fails because it has failed to allege that it suffered any compensable harm due to Commission ALJs' removal protections.

The Supreme Court made clear in *Collins v. Yellen* that a party raising a challenge under Article II is entitled to relief only when it can show that the challenged protection caused it "compensable harm," 594 U.S. at 259, such as where "the President had attempted to remove [the officer] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," or where "the President had made a public statement expressing displeasure with actions taken by [the officer] and had asserted that he would remove [the officer] if the statute did not stand in the way." *Id.* at 259–60. Under *Collins* and its progeny, "an impermissible insulation provision does not, on its own, cause harm." *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 615 (3d Cir. 2024) (citing *Kaufmann v. Kijakazi*, 32 F.4th 843, 850 (9th Cir. 2022)), *cert. denied*, 145 S. Ct. 984 (2024). A party's "mere allegation that the unconstitutional provision inherently caused them harm is insufficient." *Id.*[4]

Despite Berglund's claim that Commission ALJs' removal protections "eviscerate any lines of accountability to the President and ultimately to the voters," Motion at 3, it does not allege, let alone establish, a causal "link" between the removal provisions and any tangible harm. *CFPB*, 96 F.4th at 615 (citation omitted). It does not suggest that the President has attempted to remove any Commission ALJ, much less that he was frustrated from doing so by any statutory provision, or that the President has expressed displeasure with any action taken by those officials. Per *Collins*, Berglund's removal argument cannot succeed.

[4] The *Collins* requirement to establish compensable harm "remains the same whether the petitioner seeks retrospective or prospective relief." *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023) (per curiam); *accord Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 765 (10th Cir. 2024), *cert denied*, 145 S. Ct. 1047 (2025); *CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 180-81 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2579 (2024).

B. OSHA Area Directors Are Not Officers to Whom the Appointments Clause Applies.

Berglund's next argument—that OSHA Area Directors are unconstitutionally appointed, Motion at 7—fares no better. It rests on the faulty premise that OSHA Area Directors are "officers" within the meaning of the Appointments Clause. Because OSHA's Area Directors are among the "broad swath" of the federal workforce who are "non-officer employees" to whom the Appointments Clause does not apply, *Lucia*, 585 U.S. at 245, this argument fails.

The Supreme Court has long recognized that most federal employees are not officers to whom the Appointments Clause applies. *Free Enter.*, 561 U.S. at 506 n.9. To qualify as an officer, an individual must (1) "occupy a 'continuing' position" that is part of the federal government for constitutional purposes and (2) "exercis[e] significant authority pursuant to the laws of the United States." *Lucia*, 585 U.S. at 245 (citations omitted). The "significant authority" requirement reflects the historical understanding that "[a] public office is the right, authority and duty, created and conferred by law, by which . . . an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890); s*ee also Martin v. United States*, 168 F. 198, 202 (8th Cir. 1909) ("Greater importance, dignity, and independence mark the position of an officer than that of an employe[e].").

The Justice Department's Office of Legal Counsel recently clarified that "the Executive Branch has long recognized that employees occupying subordinate positions within the federal government who have not been directly vested with statutory or regulatory responsibilities, but who merely assist or act as the agents of superior officers vested with such responsibilities, need not be appointed as officers of the United States." *The Test for Determining "Officer" Status Under the Appointments Clause*, 2025 WL 293746, at *13 (O.L.C. Jan. 16, 2025). That long-held position is "consistent with Supreme Court precedent." *Id.* For example, in *Steele v. United States*, the Court explained that deputies appointed by U.S. Marshals to assist in the enforcement of the peace are "not in the constitutional sense [ ] officer[s]," even though a deputy serving in that role "is called upon to exercise great responsibility and discretion in the service" of the superior Marshal. 267 U.S. 505, 508 (1925); *see also United States v. Smith*, 124 U.S. 525, 531, 532 (1888) (a clerk in the office of the collector of customs was not an officer requiring appointment by a head of department because he was not "charged by some act of [C]ongress with duties" but rather "discharg[ed] only such duties as may be assigned to him by" the officer that he served).

OSHA Area Directors are such non-officer federal employees. They serve in continuing positions, but do not "exercise[e] significant authority pursuant to the law of the United States." *Lucia*, 585 U.S. at 245. At bottom, they are subordinate agents of the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) within the U.S. Department of Labor. The OSH Act confers on the Secretary of Labor the authority to carry out the statute's rulemaking and enforcement responsibilities, *see, e.g.,* 29 U.S.C. §§ 651(b)(3), 655, 657-59, and the Secretary has delegated to the Assistant Secretary "the authority and assigned responsibility for administering the safety and health . . . activities of the Department of Labor" under the OSH Act. Sec'y's Order No. 07-2025, 90 Fed. Reg. 27878 (June 30, 2025) (sec. 4(A)(1)(a)); Sec'y's Order No. 08-2020, 85 Fed. Reg. 58393 (Sept. 18, 2020) (same). The Assistant Secretary relies on subordinates like OSHA's Area Directors to assist with the execution of that delegated responsibility. Moreover, OSHA's Area Directors do not hold offices created by statute or regulation[5] but are instead civil service positions of the agency's own creation.

OSHA's Area Directors operate under the close control of their superiors and in a chain of command that leads directly to the Assistant Secretary, who is "appoint[ed] by the President, by and with the advice and consent of the Senate," 29

[5] Berglund is incorrect in its assertion that "[t]he position of Area Director is created by regulation." Motion at 6 (citing 29 C.F.R. § 1903.22). Part 1903 "prescribe[s] rules and *** general policies for enforcement of the inspection, citation, and proposed penalty provisions of the [OSH] Act," 29 C.F.R. § 1903.1, and § 1903.22(e) provides a definition of "Area Director" to clarify that term's meaning when it is used in the provisions of Part 1903. *See, e.g.,* §§ 1903.7(a), 1903.12(a). That § 1903.22(e) does not "create" a specific position is clear from the definition itself, which defines "Area Director" as including not just any "employee or officer regularly or temporarily in charge of an Area Office," but also "any employee or officer exercising supervisory responsibilities over an Area Director." 29 C.F.R. § 1903.22(e).

U.S.C. § 553, in accordance with the Appointments Clause. The Assistant Secretary is assisted by two Deputy Assistant Secretaries, one of whom is responsible for overseeing the Regional Administrators who manage OSHA's ten regional offices.[6] Regional Administrators[7] and their subordinates at the regional offices oversee the activities of approximately 100 OSHA Area Offices, *see* OSHA Offices By State, https://www.osha.gov/contactus/bystate (last visited Sept. 10, 2025), each of which is managed by an Area Director. Area Directors, who are classified and paid at the "GS-14" grade of the General Schedule, report to the applicable regional office's Deputy Regional Administrator, who reports to the Regional Administrator for the specific Region, who reports to the Deputy Assistant Secretary, who reports to the

[6] *See* OSHA Organizational Chart, https://www.osha.gov/orgchart (last visited Sept. 10, 2025); OSHA Directive No. ADM 4-0.3, *Redelegation of Authority and Responsibility of the Assistant Secretary for Occupational Safety and Health* (March 6, 2003), sec. IX.A., IX.L, and X. (providing that "OSHA's Deputy Assistant Secretary shall report to the Assistant Secretary" and is "redelegated authority to act on all matters within the Assistant Secretary's delegation," "Regional Administrator[s] shall report to the Assistant Secretary and shall have responsibility *** to act for the Assistant Secretary under Section[s] 8(a) and (b), 9, 10, and 17 of the Act for inspection and enforcement activities," and "Regional Administrators may redelegate the authorities *** consistent with OSHA Instructions and Directions and the application of customary and sound management practices"), available at: https://www.osha.gov/enforcement/directives/adm-01-00-003 (last visited Sept. 10, 2025).

[7] Regional Administrators are members of the Senior Executive Service and are appointed by the Secretary through a merit staffing process. *See* Ex. 2 (Declaration of William Donovan, Regional Administrator); U.S. Office of Personnel Management, *Senior Executive Service* https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history (last visited Sept. 10, 2025).

Assistant Secretary. Ex. 2. The Assistant Secretary, of course, reports to the Secretary of Labor. *Id.*; *supra* p. 8.

As part of their civil-service responsibilities, Area Directors oversee workplace inspections, including supervising the compliance safety and health inspectors (CSHOs) who conduct those inspections. Area Directors execute their role under the oversight and control of their superiors in the chain of command. Their enforcement activities are conducted, for example, in accordance with the detailed policies and procedures that the Assistant Secretary imposes on them via enforcement directives and other policy communications.[8] In myriad circumstances, they are expressly required by the Field Operations Manual to consult with or obtain approval from their Regional Administrator before taking further action.[9] And they are also obliged

[8] Principally, OSHA's Field Operations Manual (FOM), available at: https://www.osha.gov/fom (last visited Sept. 10, 2025), gives detailed instructions to Area Directors on, for example, how they are to schedule and prioritize inspections, *see* FOM, Ch. 2, sec. IV., conduct inspections, *id.* at Ch. 3, analyze evidence and find violations, *id.* at Ch. 4, and propose penalties for violations, *id.* at Ch. 6.

[9] *See, e.g., id.* at Ch. 4, sec. III.D.1 (requiring Area Director to "consult with the Regional Administrator or designee" "[i]f there is a question as to whether a standard applies"), Ch. 11, sec. D.2.b. (requiring Regional Administer agreement to identify a violation as potentially warranting criminal penalties under 29 U.S.C. § 666(e)); *see also, e.g.,* Ch. 4, sec. III.F.2 ("The Regional Administrator or designee and RSOL shall be consulted prior to the issuance of all Section 5(a)(1) citations where complex issues or exceptions to the outlined procedures are involved."); Ch. 5, sec. I. (requiring "Area Directors shall follow all Regional consultation procedures *** when an inspection involves important or novel facts or presents potentially complex litigation issues"), Ch. 11, sec. D.2.b. (requiring Area Directors to consult with the Regional Administrator if an employer does not eliminate an imminent danger condition); Ch. 15, sec. I.C.-D. (permitting Area Directors authority to "routine administrative

to schedule and conduct inspections in accordance with National and Regional Emphasis Programs, and follow detailed review and clearance procedures when handling potentially significant or novel cases,[10] all of which their superiors establish.[11]

So, while it is true that Area Directors manage an OSHA Area Office's enforcement activities, *see* Motion at 7, Area Directors have not been delegated wholesale authority to carry out those enforcement activities however they see fit. Rather, Area Directors operate as agents of the Assistant Secretary and with significantly curtailed discretion. Such subordinates are not "officers" within the

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subpoenas" but reserving authority for other types of subpoenas to the Regional Administrator); sec. III.G. (requiring consultation with Regional Administrator before requesting for a U.S. Marshal to accompany a CSHO when presenting a warrant to an employer).

[10] Potentially "significant" or "novel" enforcement cases require extensive regional and national office review and approval before citations and proposed penalties can be issued. *See, e.g.,* OSHA Directive No. CPL 02-00-002A, *Processing Significant and Novel Enforcement Cases*, Region 9 (July 8, 2022), available at: https://www.osha.gov/sites/default/files/enforcement/directives/CPL-02-00-002A.pdf (last visited Sept. 10, 2025). Such cases include "egregious" cases in which OSHA is considering issuing penalties for instance-by-instance violations. *See id.* at sec. VIII.A.IV.; OSHA Directive No. CPL 02-00-080, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties*, (Oct. 21, 1990), available at: https://www.osha.gov/enforcement/directives/cpl-02-00-080 (last visited Sept. 10, 2025).

[11] *See* FOM, Ch. 2, sec. VI.D. and E.; Directives – NEP, https://www.osha.gov/enforcement/directives/nep (last visited Sept. 10, 2025); Directives – Regional, https://www.osha.gov/enforcement/directives/lep (last visited Sept. 10, 2025).

meaning of the Appointments Clause, even if they may exercise some discretion when acting on behalf of superiors.[12] Even when an Area Director signs a citation that becomes a final order for want of timely contest by the employer, Motion at 7 (citing 29 U.S.C. § 659(a)), the Area Director does not *independently* exercise sovereign power but rather executes the task as an agent of the Assistant Secretary and within the discretionary limits that the Area Director's superiors have imposed.

As such, Area Directors bear little resemblance to the independent decision-makers that the Supreme Court has determined to be inferior officers for purposes of the Appointments Clause. For example, in *Freytag*, the Court determined that special tax judges were officers because they were directly authorized by Congress to execute the "important functions" involved in adjudicating formal adversarial proceedings that imposed civil liability on private individuals and exercised "significant discretion" when doing so. 501 U.S. at 881-82; *see also Lucia*, 585 U.S. at 246-49 (finding that SEC ALJs were inferior officers for similar reasons). In contrast, OSHA Area Directors assist in enforcement of the OSH Act as agents of the Assistant Secretary and subject

[12] Berglund's contrary suggestion that the category of "officer" includes any federal employee who exercises "substantial federal authority" in a manner that is "not merely ministerial," Motion at 7, cannot be squared with Supreme Court precedent, *see, e.g., Free Enter.*, 561 U.S. at 506 n.9 ("dramatically" more than ninety percent of "persons rendering service to the government undoubtedly are" "agent[s] or employee[s]," rather than "officers"); *supra* p. 8, and, if accepted, Berglund's position would ostensibly require many thousands of federal employees to be appointed in accordance with the Appointments Clause.

to the extensive instructions and limitations that the Assistant Secretary imposes. *See The Test for Determining "Officer" Status Under the Appointments Clause*, 2025 WL 293746 at *13; *Steele*, 267 U.S. at 508; *cf.* Restatement (Third) of Agency § 1.01 cmt. f(1) (2006) (Third Restatement) (power of a principal to control their agent includes the ability "[to] state[] what the agent shall or shall not do, in specific or general terms" and "to give interim instructions or directions to the agent").

Because OSHA Area Directors act only as agents of the Assistant Secretary, they are not "officers" for purposes of the Appointments Clause.[13] Accordingly, Berglund's argument that OSHA Area Directors are unconstitutionally appointed fails.

C. OSHA Enforcement Need Not Occur in Federal Court.

The Supreme Court has squarely rejected Berglund's argument that the Seventh Amendment guarantees employers the right to a jury trial. Motion at 8-10. The Seventh Amendment preserves the "right of trial by jury" in "suits at common law," U.S. Const. amend. VII, but that right only "extends to a particular statutory claim if the claim is 'legal in nature.'" *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024) (quoting

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[13] Berglund suggests that *Simplex Time Recorder Co. v. Sec'y of Labor* held otherwise. *See* Motion at 7. But *Simplex* did not consider whether an Area Director was an "officer" for purposes of the Appointments Clause; rather, the Court considered whether a Commission ALJ erred in striking from an employer's witness list several Department leaders and managers, including an Area Director, who "had no first-hand knowledge of the facts of this case" and the employer sought to question "on purely discretionary decisions concerning enforcement of the OSH[ ] Act." 766 F.2d 575, 586-87.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)). And regardless of whether a claim is "legal in nature," "Congress may assign [a] matter for [an initial] decision to an agency without a jury" under the "public rights exception," consistent with the Seventh Amendment and Article III. *Id.* at 126-27 (citation omitted).

Here, Supreme Court precedent establishes that the public rights exception applies to OSHA's claim that Berglund violated 29 U.S.C. § 654(a)(1). And even if the public-rights exception did not apply, no Seventh Amendment right attaches to OSHA's claim because it is not legal in nature.

1. 29 U.S.C. § 654(a) Involves Public Rights.

The Constitution vests Article III courts with the judicial power of the United States, while simultaneously authorizing adjudications of non-Article III matters by the Executive Branch. U.S. Const., Art. III. § 1. "[S]ince the beginning of the Republic," actors within the Executive Branch have "conduct[ed] adjudications," which may take "'judicial' forms" but are ultimately "exercises of . . . the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). OSHA enforcement is precisely the sort of executive-power exercise that may occur through administrative proceedings.

In delineating which matters may be adjudicated by the Executive, the Supreme Court has distinguished "public rights" from "private rights." *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018). Private rights, "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," are generally reserved to Article III courts. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). But for public rights, "the mode of determining matters . . . is completely within congressional control," and Congress may decide the matter itself, "delegate that power to executive officers, or may commit it to judicial tribunals." *Crowell v. Benson*, 285 U.S. 22, 50 (1932); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 451(1929). Where a claim involves public rights, "no involvement by an Article III court in the initial adjudication is necessary." *Jarkesy*, 603 U.S. at 128. So long as "Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States*, 584 U.S. at 345 (quotation marks omitted).

Longstanding Supreme Court precedent establishes that an OSHA claim concerns public rights. In *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), the Supreme Court explained that "when 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.'" *Id.* at 455 (citations omitted). The Court went on to determine that an OSHA claim alleging that an employer violated the OSH Act concerns public rights. It did so because Congress found "existing state statutory remedies as well as state common-law actions for negligence and wrongful death to be inadequate to protect the employee population," and therefore "created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions." *Atlas Roofing,* 430 U.S. at 445; *see also id.* at 461 (the OSH Act "created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved"). The Court concluded that an OSHA claim is not "a suit at common law or in the nature of such a suit," but rather a "statutory proceeding" that was "unknown to the common law," *id.* at 454 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48, 57 S.Ct. 615, 629 (1937)), and the public rights exception therefore applies to it, *id.* at 461.

Berglund questions whether *Altas Roofing* is "still good law" after *Jarkesy.* Motion at 9-10. But *Jarkesy* disturbed neither *Atlas Roofing* nor the long-held principle that Congress may delegate the power to adjudicate public rights to executive officers. *Jarkesy* clarified that two types of claims fall within the public rights exception: (1) matters that "historically could have been determined exclusively by [the Executive and Legislative B]ranches" such as immigration, foreign commerce, relations with Indian tribes, and matters involving public benefits, 603 U.S. at 128 (citation omitted; alteration in original); and (2) any other claims that were "unknown to the common law," *id.* at 137-38 (citing *Atlas Roofing*, 430 U.S. at 461). The Court then concluded that when Congress "create[s] claims whose causes of action are modeled on common law fraud[,] . . . that provide a type of remedy available only in law courts," and that impose "a punitive remedy," those matters remain private rights that must be adjudicated in an Article III court. *Id.* at 134-36.

At no point did *Jarkesy* overrule *Atlas Roofing*. *Id.* at 136. In contrast to the SEC's claims, which were "in the nature of a common law suit," *id.* at 137-38 (citing *Atlas Roofing,* 430 U.S. at 461), *Jarkesy* recognized that "Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law.'" *Id.* The Court described the OSH Act as a "self-consciously novel" "federal regulatory regime created to promote safe working conditions," "[t]he purpose of [which] was *not* to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law." *Id.* at 137 (emphasis added). Instead, Congress "intended the agency to 'develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems.'" *Id.* (alteration in original) (quoting 29 U.S.C. § 651(b)(5)). The Court also highlighted the OSH Act's requirement that employers comply with OSHA standards, noting that OSHA "standards bring no common law soil with them," and "[r]ather than reiterate common law terms of art . . . resemble[ ] a detailed building code." *Id.*

Jarkesy thus did not disturb *Atlas Roofing*.[14] *See id.* at 138; *see also Axalta Coating Systems LLC v. FAA*, No. 23-2376, --- F.4th ---, 2025 WL 1934352, at *4 (3d. Cir. July

[14] Berglund offers no substantive argument in support of its clam that *Jarkesy* partially "overruled" *Atlas Roofing* by "abrogating the 'public rights' exception when alleged General Duty Clause violations are at issue," Motion at 10, but, to be sure, *Jarkesy* only confirmed that Congress appropriately assigned all claims alleging violations of 29 U.S.C. § 654 to the Commission "because OSHA claims were 'unknown to the common law,'" 603 U.S. at 138.

15, 2025) (*Jarkesy* "applied, but did not abrogate, the public rights doctrine" and "distinguished, but did not overrule, [the] holding in *Atlas Roofing*"). Berglund's Seventh Amendment argument cannot overcome the Supreme Court's twice-over determination that "Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law.'" *Id.* at 138 (citation omitted); *accord Atlas Roofing*, 430 U.S. at 461.

Similarly unavailing is Berglund's assertion that the public-rights exception does not apply because "alleged violations of the General Duty Clause are essentially common law negligence claims." Motion at 9. Again, the Supreme Court has twice rejected that OSHA claims are akin to, or derived from, common law claims. *Atlas Roofing*, 430 U.S. at 445, 461; *Jarkesy*, 603 U.S. at 120, 137 (reaffirming that Congress did not create "novel" OSHA claims "to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law," which distinguishes OSHA claims from the instant federal securities fraud claims that "replicate[d] common law fraud").

Moreover, enforcing a violation of the OSH Act's general duty clause is clearly not "in the nature of an action at common law." *Jarkesy*, 603 U.S. at 128. To start, "[a] hallmark . . . in determining if a suit concerns private rights is whether it is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Id.* (citations and internal quotation marks omitted); *see also Tull v. United States*, 481 U.S. 412, 417 (1987). Berglund passingly compares OSHA claims to a section of current New York State labor law, Motion at 9, but makes no attempt to connect a claim that an employer violated the OSH Act's general duty clause to an 18th-century common law ancestor. In fact, negligence claims did not exist as a separate tort during the relevant time period. *See* PROSSER, PROSSER AND KEETON ON TORTS § 28, p. 160, 161 (5th ed. 1984) (explaining that "negligence took shape as a separate tort only during the earlier part of the nineteenth century," and "its rise coincided in a marked degree with the Industrial Revolution").

Nor would a comparison to a modern negligence claim support Berglund's belief that an OSHA claim alleging a violation of 29 U.S.C. § 654(a)(1) is "a common law suit in all but name." *Jarkesy*, 603 U.S. at 136. Negligence claims involve a "duty that runs to each worker individually and is actionable by each employee upon each breach," *Arcadian Corp.*, No. 93-3270, 1995 WL 17049978, at *5 (OSHRC Sept. 15, 1995), and are "concerned with providing for after-the-fact payment of damages by one whose negligence caused [an] injury," *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1371 n.11 (5th Cir. 1978). In other words, a negligence cause of action arises after an individual has been harmed, and the focus is on compensating the harmed individual (or their heirs) rather than correcting the unsafe condition that caused the harm.

In contrast, an employer violates the OSH Act's general duty clause by exposing employees to unsafe working conditions. The employer is liable for the violation regardless of whether any employee suffers an injury due to those conditions. *See REA Exp., Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir. 1974); *see also Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987) (the Act's "purpose is neither punitive nor compensatory, but rather forward-looking, *i.e.*, to prevent the first accident"). "[T]here is no private right of action" for violations of the OSH Act, which are brought only by the government, in its discretion, to further the statute's "remedial and preventive" purpose. *Arcadian*, 1995 WL 17049978 at *5 (citation omitted); *see also Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6 (1985) ("enforcement of the Act is the sole responsibility of the Secretary").

Additionally, OSHA claims do not seek to "compensate individual employees, as does the common law." *Arcadian*, 1995 WL 17049978 at *5. Rather, Congress created "new" remedies for OSHA violations that may be ordered regardless of "whether or not an employee is actually injured or killed." *Atlas Roofing*, 430 U.S. at 445; *see* 29 U.S.C. § 659(c). As discussed *infra* pp. 26-27, the principal remedy is an abatement order, which ensures that all exposed employees are protected from the cited hazardous conditions in the future, even though civil penalties may also be assessed to deter future violations. Such remedies could not be obtained in a negligence suit seeking compensation for an individual's injury.

The OSH Act's general duty clause also targets a much narrower scope of conduct than does a negligence action. *See Jarkesy*, 603 U.S. at 125 (considering whether statute and common law comparator "target the same basic conduct"). While negligence claims generally concern a person's duty to exercise "reasonable care," the OSH Act imposed a new and unique obligation on employers to provide workplaces free of danger. *See* 29 U.S.C. § 654(a)(1). Rather than imposing a reasonableness standard, the OSH Act imposes an "'unqualified and absolute' textual imperative that the workplace be 'free' of the recognized hazard." *SeaWorld of Fla.*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Nat'l Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973)). Because this duty was intended "to be an achievable one," the general duty clause is understood to require that "[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace." *Id.* (quoting *Nat'l Realty*, 489 F.2d at 1266-67) (additional citations omitted).

Indeed, the D.C. Circuit explained in *National Realty* that the duty imposed by the OSH Act is intentionally more exacting than the reasonableness standard that generally applies under the common law. 489 F.2d at 1265 n.34 ("employers must take more than merely 'reasonable' precautions for the safety of employees" which "follows from the great control which employers exert over the conduct and working conditions of employees") (citations omitted). Consistent with this understanding, courts have long agreed that employers' duties under the OSH Act are "not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence." *Id.* at 1266 n.36; *accord REA Exp.*, 495 F.2d at 825. This reflects Congress placement of "[f]inal responsibility for compliance" with the OSH

Act on employers, "qualified by the simple requirement that it be achievable and not be a mere vehicle for strict liability." *Nat'l Realty*, 489 F.2d at 1266 n.36 (citations omitted).

In sum, even setting aside that modern negligence claims are not "made of the stuff of the traditional actions at common law tried by the courts at Westminster," *Jarkesy*, 603 U.S. at 128, OSHA claims alleging that an employer violated the general duty clause are starkly and intentionally dissimilar from negligence claims. And, unlike the securities fraud claims in *Jarkesy* (which were "derive[d] from, and are interpreted in light of, their common law counterparts," 603 U.S. at 138, and were therefore "common law suit[s] in all but name," *id.* at 136), there is no "enduring link" between an OSH Act general duty clause claim and a "common law ancestor." *Id.* at 125. Berglund thus fails to establish that general duty clause claims are "in the nature of a common law suit." *Id.* at 138 (cleaned up and citations omitted). The public rights exception therefore applies, and no jury trial is required.

2. Violations of the General Duty Clause Are Not Legal in Nature.

Even if the public-rights exception did not apply, the Seventh Amendment still would not provide an employer with a right to a jury trial in cases where OSHA has alleged a violation of the general duty clause. As previously noted, *supra* p. 15-16, the Seventh Amendment applies only to claims that are "legal in nature," *Jarkesy*, 603 U.S. at 122 (citation omitted); *i.e.*, claims that are "analogous to 'Suits at common law.'" *Tull*, 481 U.S. at 417. The Supreme Court has instructed lower courts to examine both "the cause of action" and "the remedy" to determine if a claim falls within that category. *Id.* at 122-23. In *Jarkesy*, the Court determined that the SEC's securities fraud claim was "legal in nature" because the cause of action had "an enduring link between federal securities fraud and [a] common law 'ancestor,'" *id.* at 126, and because the sought remedy—monetary civil penalties that were intended to punish the offender—were "the prototypical common law remedy." *Id.* at 123. Not so, here.

First, as discussed *supra* sec. II.C.1, the Supreme Court has already twice determined that the cause of action at issue here neither replicates, has a "close relationship" to, nor "an enduring link" with a "common law ancestor." *Jarkesy*, 603 U.S. at 125 (cleaned up); *id.* at 140 ("novel [OSHA] claims . . . had never been brought in an Article III court"); *Atlas Roofing,* 430 U.S. at 461 (the OSH Act "created a new cause of action, and remedies therefor, unknown to the common law"). The OSH Act intentionally imposed a unique duty on employers that was distinct from existing common law torts to address the persistent problem of employee injuries and deaths due to unsafe working conditions. "The purpose of th[e] [OSH Act] regime was *not* to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law," *Jarkesy*, 604 U.S. at 137 (emphasis added), and the claims are therefore not "legal in nature."

Moreover, when Congress created the "new" cause of action, it also created "new remedies" for OSHA violations. *Atlas Roofing*, 430 U.S. at 445; 29 U.S.C. § 659(c) (authorizing OSHRC to affirm[], modify[], or vacat[e] the Secretary's citation or proposed penalty, or direct[] other appropriate relief"). Unlike the penalties at issue in *Jarkesy*, which aimed solely to punish and deter fraudulent actors, the OSH Act's unique remedies serve the OSHA Act's "remedial and preventive" purpose. *Arcadian*, 1995 WL 17049978 at *5 (citation omitted); *see also Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (noting the OSH Act's "remedial scheme").

Perhaps unsurprisingly, then, the principal remedy for a violation of 29 U.S.C. § 654 is an equitable one: an order requiring the employer to abate the violative conditions. *See* 29 U.S.C. § 658(a) (allowing the Secretary to issue a citation for violations and requiring the citation to "fix a reasonable time for the abatement of the violation"); *Internat'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994) (J. Scalia, concurring) ("the relief . . . decreed [by a court of equity] would almost always be a directive to an individual to perform an act with regard to property at issue," and "usually required 'a single simple act'") (citations omitted). While monetary penalties play an important role in promoting compliance by employers prior to inspection, the *raison d'etre* of the OSH Act and claims brought under it (like the one here) is one of abatement.[15] *See, e.g.*, *J.E. Chilton Millwork & Lumber Co.*, 1 BNA

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[15] The primacy of the abatement remedy is reflected in the fact that all OSHA citations order the abatement of the cited hazardous conditions, but assessing a penalty is not required in all cases. *Compare* 29 U.S.C. § 658(a) ("citation shall fix a reasonable time for the abatement of the violation") *with id.* § 666(c) (permitting, but not requiring, the assessment of a penalty where the "violation is specifically determined not to be of a serious nature"); *see also* OSHA, U.S. Dep't of Lab., OSHA

OSHC 1034, 1035 (No. 123, 1972) ("The Commission is of the opinion that the principal purpose of this Act is to obtain compliance with its requirements in order to ensure a safe and healthful workplace."); *Gen. Elec. Co.*, No. 13732, 1981 WL 19531, at *14 (OSHRC April 27, 1981) (Cottine, Comm'r, concurring in part and dissenting in part) (for "hazardous conditions that have actually been cited by the Secretary," the OSH Act's primary purpose . . . is "effectuated through the entry of abatement orders").[16] Thus, when viewed in their proper context, the remedies sought in an OSHA claim are primarily equitable in nature and clearly distinguishable from, and broader than, the traditional, common-law penalties at issue in *Jarkesy*.

Accordingly, OSHA's claim is equitable, not legal. It involves a novel cause of action and novel remedies designed to further the OSH Act's remedial and preventative purpose. Accordingly, OSHA's claim does not implicate the Seventh Amendment.

CONCLUSION

For the reasons stated above Respondent's Motion to Dismiss should be denied.

Field Operations Manual, Ch. 6.II.C., https://perma.cc/78SV-SVMH (permitting no penalty to be proposed for an "other-than-serious" violation).

[16] *See also* H.R. Rep. No. 91-1291, at 21 (1970), *reprinted in* S. Comm. on Labor & Public Welfare, 92d Cong., *Legislative History of the Occupational Safety and Health Act of 1970*, at 853 (1971) ("The philosophy underlying [this reported bill] is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties, because even large ones can become mere license fees. . . . Death and disability prevention is the primary intent of this bill. Although possible penalties for violations may be an important deterrent, they are only a partial solution.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify one copy of the foregoing the Secretary's Opposition to Respondent's Motion to Dismiss Complaint has been served on the below-named individual this 12th day of September, 2025, by sending said copy electronically to:

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