No. 13-1933

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nyffeler Construction, Inc.,

Appellant

vs.

United States Secretary of Labor,

Appellee.

PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OPENING BRIEF FOR APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is a petition to review an order of the Occupational Safety and Health Review Commission ("OSHRC") affirming citations issued following the inspection of Nyffeler Construction, Inc.'s ("Appellant") worksite. The inspection at issue was the product of a "CSHO Referral," in which the information leading to the inspection came from one OSHA Compliance Safety and Health Officer ("CSHO") to another. Federal regulations governing OSHA inspections, 29 C.F.R. § 1903, make no reference to "referral" inspections—CSHO or otherwise. OSHA's Field Operations Manual ("F.O.M.") does include "referral" inspections. The F.O.M. also includes an internal review process used to evaluate information before initiating an inspection from a complaint/referral. With regard to CSHO Referrals, however, Omaha CSHOs followed no review process. Omaha CSHOs targeted small construction companies, "referring" themselves these inspections. The Secretary justified these procedurally unreviewed referral inspections as "good government" because they target "low hanging fruit," i.e. small businesses. Appellant now challenges the Secretary's interpretation of the Act as authorizing unreviewed, discretionary CSHO referral inspections. See See v. Seattle, 387 U.S. 541, 545 (1967) ("[T]he decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer.").

Due to complex issues, Appellant asks for twenty minutes for argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Nyffeler Construction, Inc., discloses the following corporate interest:

None—Nyffeler Construction is a privately held company.

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JURISDICTIONAL STATEMENT

Jurisdiction over this appeal is proper pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, ("the OSH Act" or "the Act"). The Administrative Law Judge ("ALJ") issued his decision on March 29, 2012. (Addendum ("Add.") at Tab 1). Appellant filed a petition for discretionary review, which was denied, and "[t]he Commission issued its Final Order on May 7, 2012." (Add. at Tab 3).[1] On July 5, 2012, Appellant timely filed its petition for review of the Commission's final order, albeit in the wrong court. (Add. at Tab 2). On November 14, 2012, the Secretary moved "the [district] court to transfer th[e] case to the Eighth Circuit pursuant to 28 U.S.C. § 1631." (Add. at Tab 3).

The Secretary explained: "The OSH Act permits a party to appeal to an appropriate court of appeals within 60 days of the Commission's order. The Commission issued its Final Order on May 7, 2012. . . . Accordingly, it is appropriate to transfer this matter to a court of appeals." (App'x at Tab 1) (internal citations omitted). On April 18, 2013, in the interests of justice, the district court ordered the case transferred to this court. (Add. at Tab 3).

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[1] See (Add. at Tab 3) ("The OSHRC . . . issued a final order on May 7, 2012.").

A panel of this court has already considered and rejected a claim by the Secretary that the court lacks jurisdiction to consider this appeal. (Add. at Tab 4) (denying Secretary's motion to dismiss for want of subject matter jurisdiction). This panel is bound by the prior determination of a panel, which can only be re-considered by the en banc court. See Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) ("'[A] cardinal rule in our circuit that one panel is bound by the decision of a prior panel.'") (quoting Owsley v. Luebbers, 281 F.3d 687, 690 (8th Cir. 2002)). Moreover, the law of the case doctrine and *res judicata* prevent the Secretary from re-litigating this issue.

STATEMENT OF ISSUES AND APPOSITE AUTHORITIES

I. Is it reasonable to conclude Section 8 of the Act, as interpreted by the Secretary's regulations, authorizes the decision to enter and inspect a worksite be left to the unreviewed discretion of a CSHO?

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)

See v. Seattle, 387 U.S. 541 (1967)

Advanta USA, Inc. v. Chao, 350 F.3d. 726 (8th Cir. 2003)

II. Does an inspection conducted pursuant to the OSH Act constitute an unreasonable seizure in violation of the Fourth Amendment when the

decision to enter and inspect was left to the unreviewed discretion of a CSHO and the scope of the inspection paralyzed all of the employer's operations for the duration of the inspection?

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)

New York v. Burger, 482 U.S. 691 (1987)

Brendlin v. California, 551 U.S. 249 (2007)

III. Does a CSHO worksite inspection violate the basic principle of fairness embodied in the Due Process Clause of the Fifth Amendment when the CSHO targeted the employer because it was a small business with limited resources—in the Secretary's words, "low hanging fruit."

Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Palko v. Connecticut, 302 U. S. 319 (1937)

STATEMENT OF THE CASE

On February 24, 2011, two CSHOs conducted an unplanned "referral" inspection of Appellant's worksite and issued two citations for alleged violations of OSHA standards. An administrative hearing was held on September 23, 2011. On March 29, 2012, the ALJ issued a decision and order affirming the citations while reducing the fines due to mitigating circumstances. Appellant then filed a

petition for review with the OSHRC, which was denied. On July 5, 2013, Appellant filed its petition for review of the OSHRC decision with the United States District Court for the District of Nebraska. On April 18, 2013, the district court transferred the case to this court.

Appellant now challenges the inspection underlying its citations. By authorizing a CSHO to request an inspection, the CSHO Referral Inspection Policy stands in tension with Section 8(f) of the Act. See 29 U.S.C. § 657(f) (authorizing only an employee or employee representative to request an inspection). The policy also stands in tension with the Secretary's regulations, 29 C.F.R. § 1903, which make no mention of referral inspections. These issues, however, can be left for another day. Assuming, without conceding, the CSHO Referral Inspection Policy is a permissible interpretation[2] of the Act, it is still unreasonable for the Omaha area office to interpret the policy as giving a CSHO *carte blanche* to initiate inspections. In the Omaha area office there was a total lack of any review process or compliance with the "decision tree" prior to the inspection.[3]

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[2] To the extent the F.O.M. is found to be a new interpretation, it is invalid under the Administrative Procedures Act ("APA"). See 5 U.S.C. § 553 (requiring notice and comment before a new interpretation of a regulation can be adopted).

[3] The F.O.M. provides a "decision tree" for determining whether the information justifies an inquiry (written) or an inspection (physical). (Add. at Tab 5).

FACTS[4]

I. The Street of Dreams and Appellant's Worksite

Appellant is a residential construction company with an impeccable safety record. (TR 25:1-14; 168:1) Appellant specializes in framing and remodeling custom homes. (TR 25:1-14; 168:1). Appellant is jointly owned by Greg Nyffeler, Josh Farris, and Derek Pierce. (TR 24:13-17). On February 24, 2011, Appellant had five employees, including the three owners. (TR 29:17-25).

In February 2011, Appellant was framing a home for the 2011 Street of Dreams, an annual home showcase by local Omaha builders. (TR 27:13-21). The 2011 Street of Dreams featured eight custom homes located on the same block of N. 199th Street. (TR 27:10-28:1).

II. CSHO Targeting of the Omaha Residential Construction Industry

In February 2011, Omaha CSHOs began targeting residential construction worksites in Omaha for inspection, despite no local or national emphasis program focusing on residential construction. (TR 67:14-18; 140:23-141:3) This residential construction targeting occurred only in Douglas County, Nebraska—not across the entire State. (TR 141:22-142:2). Counsel for the Secretary argued that

[4] Citations in this section are to the hearing transcript. (See App'x at Tab 2).

it was "good government" to target small businesses because "OSHA really should pick the low-hanging fruit." (TR 246:7-12).

The Omaha area office used the CSHO Referral Inspection Policy to implement this targeting. During February 2011, residential construction worksite inspections arose from one of two types of CSHO referrals. The first type was when a CSHO refers the inspection to him or herself. (TR 62:15-16). The second is when a CSHO refers the inspection to a fellow CSHO. (TR 61:14-15; 67:19-68:1). A CSHO can initiate a "referral" driving by a worksite and seeing what he or she perceives to be a "problem." (TR 62:15-16). Per direction from the Omaha area office, CSHOs inspect residential construction worksites "quite often" and virtually 100% of inspections result in citations. (TR 61:8-18).

When scouting residential construction worksites for a "referral," CSHOs commonly focus on fall protection. CSHOs often initiate inspections for improper use or lack of fall protection systems when viewed from the CSHO's car. (TR 148:7-14). While driving by a worksite, a CSHO may observe an individual using a fall protection system. (TR 147:17-148:6). From his vehicle, the CSHO might evaluate whether the system is being used correctly to determine whether to initiate a referral inspection—or not. (TR 147:17-148:6). For example, CSHO Mathew

Thurlby ("Thurlby") initiated an inspection when, from his vehicle, he perceived "a lot" of slack between an individual and the anchor point. (TR 148:7-14). Other times, a CSHO may drive past a residential construction worksite, and, if it appears some type of fall protection system is employed, the CSHO will not "stop and make contact," *i.e.*, initiate an inspection pursuant to a self-referral. (TR 115:1-9). Curiously, at the hearing, there was considerable testimony from CSHOs Jordan and Thurlby regarding violations observed from the road. (TR 62:13-24; 68:17-20). There is, however, no dispute that CSHOs are not allowed to drive around and search for violations. (TR 62:13-24; 68:17-20).

III. February 24, 2011

On February 24, 2011, CSHO Scot Jacobson ("Jacobson") and Steve Jordan ("Jordan") were driving around conducting "referrals" together.[5] (TR 49:4-14). A search of citations available at http://www.osha.gov[6] shows only three inspections conducted by the Omaha area OSHA office on February 24, 2011. All three were "referral" inspections. All three were inspections of residential construction builders. All three resulted in citations being issued. Each will be examined.

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[5] On February 24, 2011, no local emphasis program targeted the residential construction industry in Nebraska. (TR 67:14-18). CSHOs could not drive around and scout potential violations. (TR 62:13-24; 67:14-18; 68:17-20).

[6] **Note:** throughout link displays as www.osha.gov, but connects to precise page.

Inspection #1: ***Precision Framing Inc.***

On February 24, 2011, CSHOs Steve Jordan ("Jordan") and Jacobson inspected the worksite of Precision Framing Inc. ("PFI") at 6410 173rd Street.[7] Notably, the PFI worksite is located at a dead end—even today only open fields surround this location. As a result of the inspection, PFI received five citations—three for failure to comply with fall protection requirements. (App'x at Tab 3).

Inspection #2: ***Affordable Exteriors Inc.***

On February 24, 2011, Jordan and Jacobson inspected the worksite of Affordable Exteriors, Inc. ("AEI") located on the Street of Dreams at 1206 N. 199th Street.[8] AEI received two citations for failure to comply with fall protection requirements.

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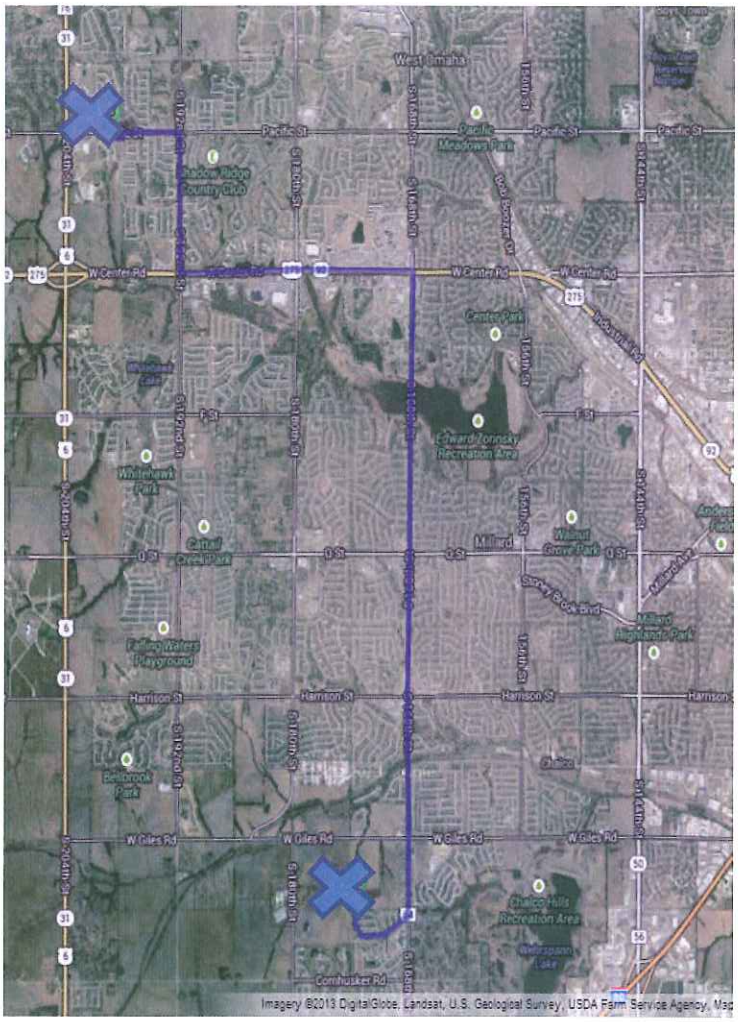
[7] See http://www.osha.gov: Activity No. 314059379; Referral ID 202943817.
[8] See http://www.osha.gov: Activity No. 314059379; Referral ID 202943809.

Jordan testified he had completed an inspection "in the general area" of AEI—likely PFI—and was driving out of the area "on one of the main streets," when he and Jacobson "saw individuals up on the roof," and stopped to conduct an un-programmed inspection at the worksite. (TR 49:17-25; 50:3; 60:16-22; 69:3-6). Jordan could not recall the name of any of the companies he inspected on February 24, 2011, but he only reported two inspections. (TR 50:3-4). The distance between the two worksites is approximately eight miles.[9]



[9] Neither worksite is near the Omaha area office, which is located at 444 Regency Pkwy Dr., Suite 303, Omaha, Nebraska 68114. (See App'x. at Tab 3).

Jordan also could not recall where he was going after Inspection 1 (PFI) when he observed the possible violations at the site of Inspection 2 (AEI)—but testified he was "driving on one of the main streets." (TR 49:17- 25; 60:16-22). The only non-secondary road near AEI's worksite is Pacific Street, which means Jordan made the initial decision to refer a second inspection.[10]

After initiating the inspection of AEI's worksite, Jacobson and Jordan observed two individuals on the roof at Appellant's worksite. (TR 50:1-51:16). Jacobson and Jordan did not warn or otherwise contact the individuals on the roof. (TR 60:23-61:7). Instead, they observed the individuals briefly and then called Thurlby and CSHO Connett to conduct a "referral" inspection. (TR 50:23-51:16; 57:17-22). Thurlby and Connett were also out "doing referrals" that day. But see

[10] On September 26, 2013, the speed limit on this stretch of road was 45 MPH.

http://www.osha.gov (showing only three inspections in Nebraska on February 24, 2011, which means Thurlby either did not record or did not conduct any inspections other than Appellant's worksite).

Inspection #3: *Nyffeler Construction Inc.*

The third and final inspection occurred at Appellant's worksite at 1210 N. 199th Street—adjacent to the worksite of AEI on the Street of Dreams.

IV. The Inspection of Appellant's Worksite

The CSHOs only inspected Appellant's worksite because of the telephone referral from fellow CSHOs. (TR 75:14-23).

The inspectors arrived twenty to twenty-five minutes after receiving the referral call. (TR 57:9-16). Thurlby observed two individuals on the roof when he arrived at Appellant's worksite. (TR 76:17-24). Thurlby and Connett entered the worksite approximately two minutes after arriving. (TR 77:13-18).

At the start of the inspection, Thurlby showed his credentials to Mr. Nyffeler, gave him a blank "contact sheet," and instructed Mr. Nyffeler to complete the sheet immediately. (TR 94:11-97:18). The individuals came down from the roof. (TR 97:19-22). During the inspection, Thurlby and Connett decided to take an hour and a half lunch break. (TR 142:15-20).

Thurlby testified it would have been feasible for the individuals on the roof to use "conventional" fall protection. (TR 99:1-8; 108:16-23; 109:5-9). Only an engineer could determine whether a structure is capable of holding a static load sufficient to satisfy standards regarding the feasibility of conventional fall protection use. (TR 144:1-145:15). Thurlby is not an engineer. (TR 144:1-145:15). Thurlby admitted he did not know whether there would have been a load-supporting tie-off point to satisfy the standard. (TR 144:1-145:15).

After inspecting Appellant's worksite, Thurlby returned to the Omaha office. (TR 95:1-7). Thurlby entered the information for the inspection, including the source of the "referral" as Jordan, into the OSHA computer system. (TR 95:8-17). The referral number—202943825—generated *after* the inspection. (TR 95:1-12).

V. The Administrative Hearing

On September 23, 2011, Appellant contested the citations. The ALJ affirmed the citations and reduced the related fines.

SUMMARY OF ARGUMENT

The OSH Act established a comprehensive regulatory scheme for workplace safety, including inspections. A primary concern when debating the Act was balancing the employer's right to be free from arbitrary harassment by government

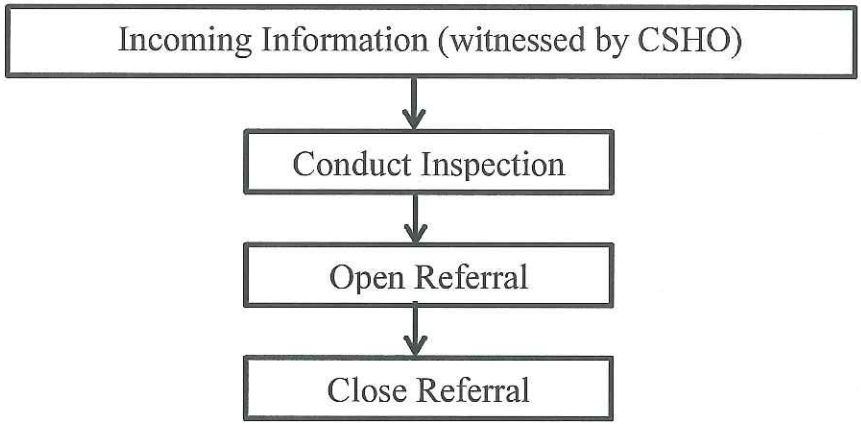
inspectors with the need for worksite inspections. To strike this balance, Congress granted the Secretary only limited authority under the Act. This case is about the Secretary's impermissible expansion of that authority.

Section 8 of the Act authorizes inspections. The regulations interpreting Section 8 are found at 29 C.F.R. § 1903. The Secretary's regulations interpret Section 8 as authorizing inspections in five categories: imminent danger, catastrophic and fatal accidents, employee complaints, programmed high hazard inspections, and follow-up—but not referrals. (App'x at Tab 4).

The F.O.M. promulgated by the Secretary added "referrals" to the Secretary's interpretation of Section 8. The F.O.M., which is subject only to informal rulemaking procedures, has defined six types of referrals. Appellant, however, takes issue with only one: "CSHO referral—information based on the direct observation of a CSHO." F.O.M. § 9-2.

Chapter 9 of the F.O.M. also expresses the Secretary's interpretation of procedural safeguards for review of referral inspections, including CSHO referrals. These procedures are embodied in Subparts (I)(B) and (I)(C) and two "decision trees." See F.O.M. §§ 9-2 to -3, 9-15 to -16 (authorizing inspection only if information received meets one of the criteria in Subpart (I)(C)); (Add. at Tab 5).

The interpretation of the CSHO Referral Inspection Policy by the Omaha area office is unreasonable when viewed in light of the Act, its regulations, and Congressional intent. The Omaha area office interpreted the policy as authorizing a CSHO to initiate an inspection without any review process.[11] The lack of procedural safeguards is readily apparent. Essentially, the interpretation of the policy by the Omaha area office adopted a "decision branch" instead of a "decision tree." The "decision branch" model used by the Omaha area office looks like this:



(TR 75:14-23; 95:1-12). Oddly, the inspection comes before the referral is opened.

The Secretary failed to explain the departure from the reasoned and relatively detailed review procedures articulated in Chapter 9. The decision trees

[11] Because this is an as applied challenge, the court need not reach the validity of the policy. Appellant's position, however, is that by adding "referrals" to the list of entities that can request an inspection under the Act, the F.O.M. impermissibly expands Section 8(f) of the Act.

explicitly apply to "referrals," without any statement indicating CSHO referrals are to be treated differently. The Secretary authorizes an inspection based on a "referral" if the information received meets the criteria listed in Subpart (I)(C)—if none of the criteria are met, an inquiry is authorized. (Add. at Tab 5). The Secretary clearly intended the decision trees to apply to referrals. (Add. at Tab) ("Describe the complaint/referral process and the difference between an inquiry and an inspection."); (Add. at Tab 5) (identifying step to close referral).

The interpretation of the CSHO Referral Inspection Policy by the Omaha area office is unreasonable because it authorizes a CSHO to "refer" a worksite for inspection without *any* review or documentation procedures. See See, 387 U.S. at 545 ("[T]he decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer.").

Appellant concedes some review process *prior* to initiating an inspection *may* render an inspection constitutionally sound. For example, an inspection may be constitutional if the CSHO identified the entity to be inspected (to ensure jurisdiction is proper), reported the perceived violation to his or her superior, requested authorization to initiate an inspection, and generated a referral number *prior* to the inspection, none of which occurred before Appellant's worksite

inspection. Alternatively, it might be permissible for the CSHO to follow OSHA's "decision tree" from the F.O.M. prior to an inspection, which also did not occur before the inspection of Appellant's worksite. Because there was a complete absence of review here, the question of how much review is required *prior* to an inspection can be left for another day.

Here, Appellant was unfairly targeted by inspectors because it is a small business in the Omaha residential construction industry. Targeting the weak, which the Secretary rationalized as picking "low hanging fruit," is contrary to the most basic concept of due process—fairness. The inspectors were out doing something thing they testified they cannot do—driving around looking for violations. Accordingly, Appellant asks this Court to vacate the OSHRC's final order and remand this case with directions to dismiss Appellant's citation and enjoin the practice of an unreviewed CSHO Referral Inspection.

STANDARD OF REVIEW

A review of constitutional claims is *de novo.* Cnty. of Charles Mix v. U.S. Dep't of Interior, 674 F.3d 898, 901 (8th Cir. 2012).

The F.O.M's "[i]nterpretive rules do not require notice and comment, . . . do not have the force . . . of law and are not accorded that weight." Shalala v.

Guernsey Mem'l Hosp., 514 U.S. 87, 89 (1995). "[A]n agency's interpretation not subjected 'to the rigors of notice and comment' is not entitled to substantial deference." Saint Mary's Hosp. v. Leavitt, 535 F.3d 802, 807 (8th Cir. 2008).

When considering whether the Omaha area office's interpretation of the CSHO Referral Inspection Policy is reasonable, the standard of review is *de novo*. See Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n. 4 (2009)("[When] Congress has directly spoken . . . any agency contradicting what Congress has said would be unreasonable."); Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1023; (8th Cir. 2010) (giving no deference to an informal interpretation).

DISCUSSION

I. The CSHO Referral Inspection Policy Is An Unreasonable Interpretation of the Act and the Secretary's Own Regulations.

The CSHO Referral Inspection Policy constitutes an unreasonable interpretation and extension of the Act by the Secretary. The policy is contrary to the structure of the Act, which creates internal checks and balances as discussed in the legislative history, and the Act as interpreted by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Moreover, the policy is in marked tension with the Secretary's own regulation, 29 C.F.R. § 1903, which allows for inspections in five circumstances: imminent danger, catastrophes and fatal

accidents, employee complaints, programmed high-hazard, and follow-up inspections—conspicuously the regulation does not include referral inspections.[12]

A. The OSH Act of 1970

The Act is one of the most expansive pieces of legislation in the United States, regulating businesses across various industries. See Robert D. Moran, The Legal Process for Enforcement of the Occupational Safety and Health Act of 1970, 9 Gonz. L.Rev. 349, 355-56 (1973). The Act's passage followed years of debate on how to balance a public interest in safety with employers' constitutional rights.

To strike this balance, Congress drafted several checks and balances into the Act.[13] The Act divides authority between the Secretary of Labor and the OSHRC. The Act vests the Secretary with authority "to set mandatory occupational safety and health standards." 29 U.S.C. §§ 651(b)(3), 655. If the Secretary finds an employer failed to comply with a standard, the Secretary may issue a citation and

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[12] Negative-implication—the expression of one thing excludes all others—is a basic cannon of interpreting any text. See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) (holding language granting a bankruptcy trustee the right to recover does not permit an administrative claimant to recover).

[13] Congressman Lloyd Meeds, A Legislative History of OSHA, 9 Gonz. L.Rev. 327 (1974). Congressman Meeds was member of the House Subcommittee on Labor that first considered the OSH Act, a conferee with the Senate concerning the OSH Act, and voted for the OSH Act. Id. at 327.

assess a monetary penalty.[14] 29 U.S.C. §§ 658-59, 666; Martin v. OSHRC, 499 U.S. 144, 147 (1991). In contrast, the OSHRC performs the adjudicatory functions of the Act. See 29 U.S.C. § 651(b)(3). This internal separation of powers balances a public interest in safety with judicial review to ensure employers remain free from arbitrary government intrusion. See 116 Cong. Rec. 42,200 (1970) (noting the final bill separated issuance of citations and the imposition of penalties).

Congress also limited the Secretary's enforcement activities by restricting the Secretary's power to inspect. One of Congress' primary concerns was that CSHOs would unfairly target and harass employers. See H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970) ("[This bill is] unacceptable because . . . the bill would create a monopoly of functions in the Secretary of Labor.").

To address this concern, Congress included "structural" protections in the Act. For example, Congress created the division of power between the Secretary and the OSHRC. See 116 Cong. Rec. 42,200 (1970). Section 8(a) of the Act requires inspectors to present credentials prior to an inspection.[15] The presentation

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[14] The employer may then contest the citation. 29 U.S.C. §§ 659(c), 661. Initial proceedings occur before an ALJ, who issues a decision. 29 U.S.C. § 661(j). On the petition of a party or initiative of a commissioner, the Commission may review and modify the decision of the ALJ. 29 U.S.C. § 661(j).

[15] See 29 U.S.C. § 657(a) (requiring presentation of appropriate credentials).

of credentials assures the employer that the person is a CSHO, and provides an opportunity to discuss the scope and details of the inspection. See Practical Guide to The Occupational Safety and Health Act § 3.04. The Act also provides: "[A] representative of the employer . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace." 29 U.S.C. § 657(e). This "walkaround rule" allows an employer to ensure a CSHO adheres to the inspection's stated scope. (See App'x at Tab 5).

The Act also vests the Secretary with authority to conduct programmed (regularly scheduled visits) and un-programmed (unscheduled) inspections. 29 U.S.C. § 657(f)(1). "A 'programmed' inspection is one 'scheduled based upon objective or neutral selection criteria.'" F.O.M. § 2-9. "The worksites are selected according to national scheduling plans for safety and for health under local, regional, and national special emphasis programs." F.O.M. § 2-9.

Other inspections are un-programmed, including inspections in response to fatalities and employee complaints. Id. "'Un-programmed' inspections are '[i]nspections in which alleged hazardous working conditions have been identified at a specific worksite . . . .'" In re Inspection of Buffalo Recycling Enters., LLC,

2011 U.S. Dist. LEXIS 31228, at *7 (W.D.N.Y. Mar. 1, 2011) (citing Indus. Steel Prods. Co. v. OSHA, 845 F.2d 1330, 1332 n.1 (5th Cir.1988)).

Each type of inspection, however, must be based on neutral criteria to be constitutionally legitimate. See Barlow's, 436 U.S. at 326-28.

B. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)

As originally enacted, Section 8(a) of the Act authorized the Secretary to conduct warrantless searches of businesses "to inspect for safety hazards and violations of OSHA regulations." Id. In Barlow's, the Supreme Court determined the Secretary's warrantless inspection policy violated Fourth Amendment protections against unreasonable searches and seizures. Barlow's, 436 U.S. at 309-10. The Court found OSHA inspections are subject to the general reasonableness requirements of the Fourth Amendment. Id. at 309. The Court also found the requirement of obtaining a search warrant was not overly burdensome. Id. at 316-20. The Court pointed to the common practice of issuing an administrative subpoena when a business refused inspectors entry.[16] Id. at 317-18. Ultimately, the Supreme Court required the Secretary to comply with Fourth Amendment

[16] The Court noted this nicety had not impeded OSHA's effectiveness. Id.

procedures when conducting inspections.[17] Similarly, because of the increased danger of abuse of discretion and harassment, un-programmed inspections must be limited in scope to the alleged violations of the Act. See Marshall v. Cent. Mine Equip. Co., 608 F.2d 719, 720-21 (8th Cir. 1979) (applying reasonableness requirement and concluding un-programmed inspection, still requires neutrality (citing Michigan v. Tyler, 436 U.S. 499, 507 (1978))).

C. The Amendment of Section 8 of the Act

In 1998, after more than three years of hearings, Congress amended the Act to prohibit the Secretary and OSHA from using enforcement activities, such as inspections conducted, citations issued, and penalties assessed, to evaluate CSHO performance. Pub. L. 105-198, Sec. 1, July 16, 1998, 112 Stat. 640. Congress added Section 8(h), which provides: "The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this Act or to impose quotas or goals with regard to the results of such activities." 29 U.S.C. § 657(h). The purpose of H.R. 2877, eventually codified as Section 8(h), was to prohibit OSHA from setting penalty quotas and using the results of enforcement

[17] See See, 387 U.S. at 545 ("[T]he decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer.").

activities to evaluate CSHO performance.[18] The 1998 Amendment acknowledged that "'if the government rewards inspectors for writing citations and levying fines more than ensuring safety, there's a chance you could get more citations, more fines, more hassle and no more safety.'"[19]

During the prolonged hearings and debate on the issue, the evidence before Congress highlighted that OSHA's focus on enforcement did not advance the Act's purpose. Likewise, small business owners also testified about the need for reform of enforcement policies, which had become quota driven shakedowns of small businesses. See H.R. Rep. No. 105-445, 105th Cong., 2d Sess. (1998) (quoting OSHA Area Director: "I have a goal to meet, a quota, if you will, but I have made my quota for this fiscal year." (citing Testimony before Subcommittee on Oversight and Investigations (Feb. 16, 1995))).

Acknowledging inherent problems exist when focusing on enforcement, especially with smaller businesses, the President and Congress called on OSHA to "reinvent" itself. After extensive hearings, Congress determined that evaluating CSHO performance based on enforcement numbers was a systemic issue. To

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[18] See H.R. Rep. No. 105-445, 105th Cong., 2d Sess. (1998).
[19] See H.R. Rep. No. 105-445, 105th Cong., 2d Sess. at n. 2 (1998) (quoting Remarks by the President on Reinventing Worker Safety Regulation, Stromberg Sheet Metal Works, Inc., Washington, D.C., May 16, 1995).

remedy this serious issue, Congress passed Section 8(h) of the Act prohibiting the use of enforcement activities, such as inspections conducted, citations issued, and penalties assessed, to evaluate CSHO performance. 29 U.S.C. § 657(h).

D. No Regulation Authorizes Unreviewed CSHO Referral Inspections

The Act vests the Secretary with authority to enact administrative regulations governing enforcement. Regulations regarding CSHO inspections are set forth in 29 C.F.R. § 1903. Generally, "Compliance Safety and Health Officers of the Department of Labor are authorized to enter . . . construction site[s] . . . to inspect and investigate during regular working hours . . . within reasonable limits and in a reasonable manner." 29 C.F.R. § 1903.3(a).

The Secretary publishes informal interpretive regulations, which identify six categories of inspections.[20] See, e.g., (App'x at Tab #, OSHA Inspections (OSHA 2098) (rev. 2002)). Five of the six categories listed are derived from regulations. Imminent Danger inspections are authorized pursuant to 29 C.F.R § 1903.13, Employee Complaint inspections are authorized pursuant to 29 C.F.R § 1903.11,

[20] (See App'x at Tab 6, OSHA Inspections (OSHA 2098) (rev. 2002) (identifying six types of inspections: Imminent Danger, Catastrophes and Fatal Accidents, Employee Complaints, Referrals, Programmed High-Hazard Inspections, and Follow-up Inspections)).

Follow-up Inspections are authorized pursuant to 29 C.F.R § 1903.19, Programmed High-Hazard Inspections are authorized pursuant to 29 C.F.R. § 1908.2; and Catastrophes and Fatal Accident inspections are authorized pursuant to 29 C.F.R § 1904.39 Referral inspections are the only inspection category not derived from the regulations.

The F.O.M. is an extensive set of informal interpretive rules and policies published by the Secretary as "a reference document for identifying the responsibilities associated with the majority of their inspection duties." (App'x at Tab 7).[21] Chapter 9 of the F.O.M. defines six types of referral inspections and provides an internal step-by-step procedure for evaluating incoming complaint/referral information to determine whether the information received requires an "inquiry," an "inspection," or no action at all.[22]

The F.O.M. lists the following possible sources for a referral:

OSHA Compliance Officer—including a CSHO referral to him or herself;

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[21] (See also App'x at Tab 8, Reflections on OSHA's History (OSHA 3360), p. 41 (January 2009) (stating the F.O.M. is intended "to give CSHO's the ability and confidence to rely on professional judgment in their decision making process.").

[22] The "decision tree" varies slightly depending on whether the information is received by phone or in writing

Safety and Health Agency—including NIOSH, state safety programs, and state or local health departments, as well as safety and/or health professionals in other Federal agencies;

11(c) Whistleblower Complaint—including when an employee was retaliated against for complaining about safety or health conditions in the workplace or refusing an allegedly dangerous task;

Other Government Agency—including employees of other Federal, State, and local agencies, local police, and fire departments;

Media Report—including information reported directly to OSHA by a media source and news items reported in the media; or

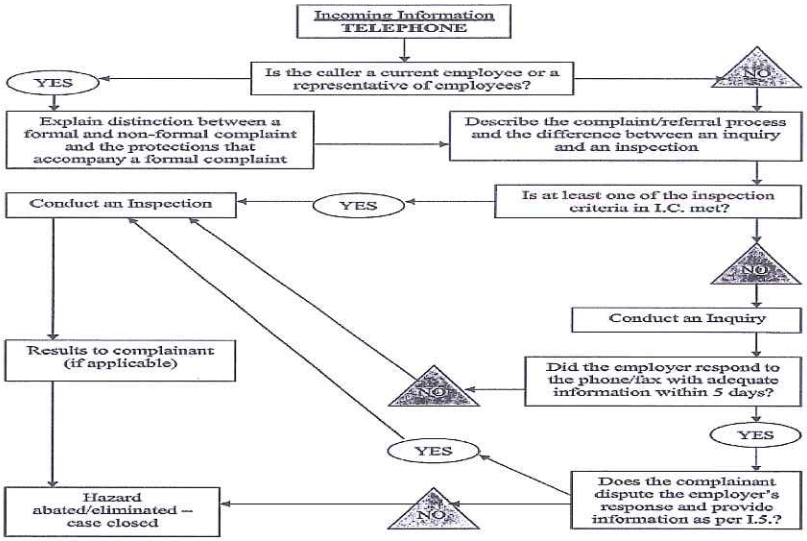
Employer Report—including reports other than fatalities and catastrophic accidents.

F.O.M. § 9-2 to -3; (App'x at Tab 9).

When a "referral" is received from one of the above listed sources, Chapter 9 details the criteria used to determine whether the information received requires an "inquiry," an "inspection," or no action at all. See F.O.M. § 9-15 to -16; (Add. at Tab 5). The F.O.M. prescribes a specific process (decision tree) to evaluate the information received and determine whether an inspection is authorized. See F.O.M. § 9-3 to -4 (listing criteria required for inspection to be authorized). The decision tree and analysis varies by the character of the incoming information.[23]

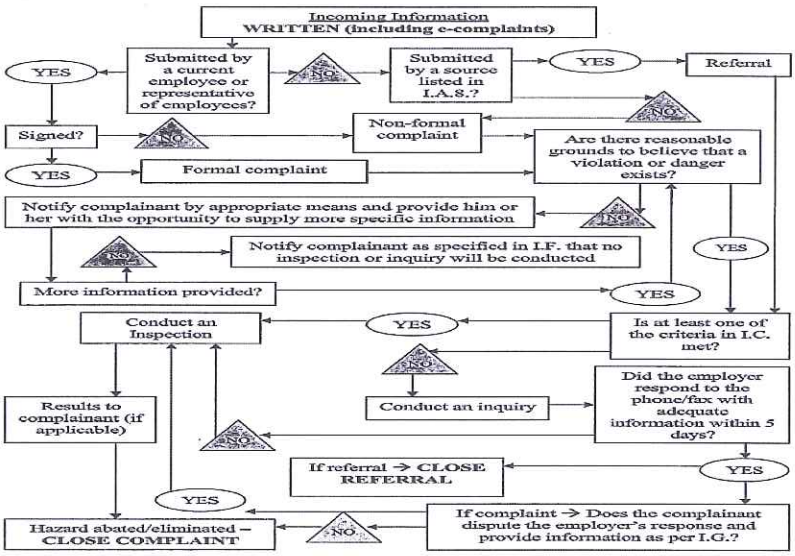
[23] Compare F.O.M. § 9-15 (publishing decision tree for written information), with F.O.M. § 9-16 (publishing decision tree for verbal information).

The decision tree for information received by phone:



F.O.M. § 9-16; See also (Add. at Tab 5).

The decision tree for written information is:



F.O.M. § 9-15; (Add. at Tab 5).

Turning to the first decision tree, if a complaint or referral is received by telephone, the decision tree published at § 9-16 controls. The first step is to identify the caller. If the caller is not a current employee or representative of employees, which a CSHO is not according to the Secretary, 29 C.F.R. § 1903, the next step is to describe the difference between an inquiry and inspection. Since a CSHO is aware of this difference, failure to follow this step is not prejudicial to an employer. The next step, is the critical part of the review process: the area office determines whether one (or more) of the ten inspection criteria listed in the F.O.M. are satisfied by the "referral" (*i.e.*, incoming information).[24] If none of the criteria are met, the CSHO conducts an inquiry—*not an inspection*. If one or more of the criteria is met, the CSHO conducts an inspection—*not an inquiry*.

Here, it is clear the Omaha area office did not follow any of the decision trees prescribed in the F.O.M. to evaluate incoming information. The "decision branch" model as applied by the Omaha area office leaves the decision to inspect entirely in the direction of the CSHO.

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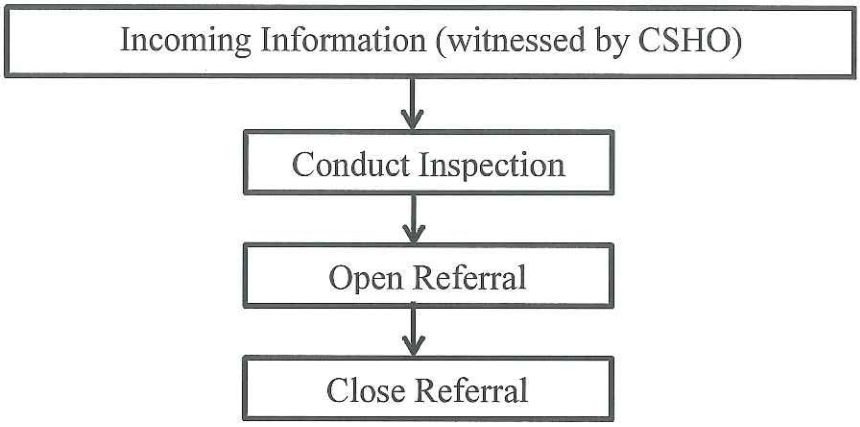
[24] Underscoring the critical nature of this step is the fact the inquiry is the same whether the information is received verbally or in writing. See F.O.M. § 9-3 to -5 (listing the ten conditions warranting an inspection).

On February 24, 2011, the CSHO Referral Inspections:



(TR 75:14-23; 95:1-12).

The "decision tree", or lack thereof, followed by Omaha CSHOs on February 24, 2011, to initiate CSHO referral inspections is fatally flawed because there is no pre-inspection review process. The Omaha CSHO "simplified" process permits a CSHO to unilaterally, and without any pre-inspection review, initiate an inspection as is evidenced by the facts here.

On February 24, 2011, the Omaha area office conducted three worksite inspections. No local or national emphasis program existed on that date, and CSHOs are not allowed to just drive around and look for violations. Nevertheless, "driving around" appears to be exactly how Omaha CSHOs targeted local residential contractors. The first inspection of the day occurred at PFI's worksite

on 173rd Street. The PFI inspection resulted from Jordan's self-referral pursuant to the F.O.M. policy. Jordan completed the PFI inspection and, instead of returning to the Omaha area office, Jordan drove eight miles *in the opposite direction* to the Street of Dreams, located on N. 199th Street. Since the Street of Dreams occurs annually, Jordan likely knew small, local, residential contractors would be onsite. Driving onto the Street of Dreams, Jordan immediately referred AEI's worksite to himself as allowed by the F.O.M. Notably, Jordan did not call the Area Office, Area Director, or any other OSHA employee prior to initiating the inspection. Jordan also did not follow any procedure set forth in the F.O.M.

From AEI's worksite, Jordan then referred Appellant's worksite to a fellow CSHO, who was also "out doing referrals." Unlike the complaint procedure or a referral from any other source authorized in the F.O.M., Jordan's referral did not identify the employer to be inspected, the alleged violation prompting his referral, or receive Area Director review or approval. In fact, the referral number for the inspection did not generate until the CSHOs returned to the office.

This failure to adhere to any review procedure is not an anomaly for Appellant's worksite; it is common for Omaha CSHOs targeting residential builders. CSHOs often initiate inspections for improper use or lack of fall

protection system when viewed from his or her car. (TR 148:7-14). A typical CSHO "referral" can be as simple as a CSHO driving by a worksite and seeing what he or she perceives to be a "problem." (TR 62:15-16). Sometimes a CSHO may observe an individual using a fall protection system while driving by a worksite, evaluate whether the system is being used correctly, and initiate a referral inspection. (TR 147:17-148:6). Other times, a CSHO may drive past a residential worksite, and, if it appears the individuals at the site are using some type of fall protection, a CSHO will not initiate an inspection pursuant to a self-referral. (TR 115:1-9). Thus, one CSHO may see a company using a fall protection system and decide not to make a referral, while another may evaluate whether the fall protection system is being used correctly without getting out of his or her vehicle and make a referral. (Compare TR 115:1-9 to 148:1-20).

As illustrated, the CSHO Referral Inspection Policy authorizes the very thing Congress sought to avoid—one man (a CSHO) standing as judge, jury, and executioner without any checks and balances. The CSHO Referral Policy in practice is a manner OSHA has seemingly devised to circumvent the very procedural flowchart it applies to evaluate a complaint or referral. A CSHO can drive to lunch, drive to work, or drive home, and decide to conduct an unplanned

referral inspection without going through an approval or evaluation process, or consulting any other OSHA official. Consequently, there may be no supervisory review whatsoever before the CSHO executes the inspection—not even an email or text message to the Area Office or Area Director regarding the targeted location. This process is an unreasonable interpretation of Section 8 of the Act. Appellant asks this Court to vacate the OSHRC's final order and remand this case with directions to dismiss Appellant's citation and enjoin the practice of an unreviewed CSHO Referral Inspection.

II. The Inspection of Appellant's Worksite Violated the Fourth Amendment Guarantee Against Unreasonable Searches and Seizures.

The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment applies to all searches and seizure made pursuant to the OSH Act. See Barlow's, 436 U.S. at 320. Under the Fourth Amendment, searches and seizures conducted without a warrant "are *per se* unreasonable—

subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted).[25] Because the Fourth Amendment applies to searches and seizures conducted pursuant to the OSH Act, Barlow's, 436 U.S. at 320, unless an exception applies, a warrantless search or seizure under the Act is *per se* unreasonable and violative of the Fourth Amendment. See id. Moreover, even if a warrant is not required, the Fourth Amendment still requires *all* searches and seizures must be reasonable. New York v. Burger, 482 U.S. 691, 702 (1987).

"[T]ranslation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task." Camara v. Mun. Court of San Francisco, 387 U.S. 523, 528 (1967). Accordingly, an appellate court must conduct an independent review and make the "ultimate determinations" regarding whether particular conduct was reasonable." Ornelas v. United States, 517 U.S. 690, 697 (1996).

In Camara v. Municipal Court of San Francisco, the Supreme Court reasoned that, unless a warrant was required, a property owner had "no way of

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[25] One such exception is the Colonnade-Biswell exception, which permits searches of businesses in heavily regulated industries. Nevertheless, the Supreme Court has already determined the Colonnade-Biswell exception does not apply to inspections under the Act. See Barlow's, 436 U.S. at 320.

knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." Camara, 387 U.S. at 532. In other words, because it defined the scope *before* the inspection, which could be enforced through suppression of improperly obtained evidence *after* the inspection, only a warrant can protect against arbitrary or overbroad searches. Id.

The Secretary will likely argue that consent by the target of a CSHO inspection is sufficient to avoid the warrant requirement. This position is a misapplication of the relevant analysis. Consent does not excuse an impermissible search or seizure. Rather, a consensual encounter is not a search or seizure. See Appellant concedes that in certain circumstances valid consent to a search or seizure may eliminate the need for a warrant. See, e.g., United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Griffith, 533 F.3d 979, 983 (8th Cir. 2008); United States v. Vera, 457 F.3d 831, 834–35 (8th Cir.2006). Moreover, consent cannot resurrect an unreasonable search or seizure.

With or without a warrant, any search to gather evidence of regulatory violations must satisfy the standard reasonableness. Barlow's, 436 U.S. at 320

(requiring reasonableness for regulatory searches); Griffin v. Wisconsin, 483 U.S. 868, 877 n. 4 (1987) (applying reasonableness test). The "standard of reasonableness applicable to a particular class of searches [or seizures] requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (quoting United States v. Place, 462 U.S. 696, 703 (1983).

In general, a warrantless inspection is only reasonable if, in addition to a "substantial" government interest: (1) the warrantless inspection is necessary to further the regulatory scheme; and (2) the inspection procedures provide adequate constitutional protections. Burger, 482 U.S. at 702-03. Neither the Act nor the policy at issue satisfy the reasonableness requirement of the Fourth Amendment.

A. Arbitrary Inspections Do Not Further the Purpose of the Act

Previous Secretaries and Congress agree that worksite inspections do not further the purpose of the OSH Act. H.R. Rep. No. 105-445, 105th Cong., 2d Sess. (1998); (App'x at Tab 10). In 1995, then President Bill Clinton explained: "[I]f the government rewards inspectors for writing citations and levying fines more than ensuring safety, there's a chance you could get more citations, more fines,

more hassle and no more safety." Id. In 1997, then Secretary Joe Dear told Congress: "OSHA's performance is now measured by its success in making safety and health improvements"—not inspections and enforcement. Id. The legislative history supporting the addition of Section 8(h) discussed above is filled with testimony from industry leaders, Secretaries of Labor, members of Congress, and the President against a focus on enforcement. Against that backdrop, Congress has already determined arbitrary inspections do not further the Act's purpose.

B. No Defined Procedures for CSHO Referral Inspections

A "statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." Dewey, 452 U.S., at 603. To be an adequate substitute, two basic functions of a warrant must be fulfilled: (a) the owner of the commercial premises must be advised the search is being conducted pursuant to the law and has a properly defined scope; and (b) the discretion of the inspecting officers must be limited. Barlow's, 436 U.S. at 323.

1. Properly Defined Scope

To fulfill the first element, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that

his property will be subject to periodic inspections undertaken for specific purposes." Dewey, 452 U.S. at 600. For an inspection originating from a CSHO referral, it is common to have a complete lack of information from the CSHO referral source, including identifying the inspection's target and scope. Here, for example, the inspectors did not know "who" they were going to inspect. It is difficult to imagine a warrant issuing without the inspector first identifying the employer being inspected. State and city workers, self-employed individuals with no employees, and many other categories of businesses are exempt from the Act. If a referring CSHO does not know the identity of the referral inspection target, there can be no particularized suspicion that OSHA applies and the inspector has jurisdiction or that some of the inspection criteria are met.

Additionally, there is no pre-defined scope for a referral inspection. The CSHO simply makes it up either before, and many times during, an inspection and nothing forces the CSHO to document the scope until *after* the investigation. Through this process, the CSHO will never exceed the scope of an investigation authorized to him or herself. For example, in Appellant's case, there is no evidence that any CSHO identified the name or corporate status of Appellant, or defined the scope of the search during the referral process.

The Secretary also failed to produce evidence that a CSHO is trained regarding Fourth Amendment concerns for warrantless inspections. Without training regarding Fourth Amendment reasonableness requirements, a CSHO could not have considered the relevant factors when determining the proper scope of an inspection, including the inspection of Appellant's worksite.

2. Unlimited CSHO Discretion

Another factor is the limitation placed on inspector discretion. The Supreme Court observed that discretion must be "carefully limited in time, place, and scope." Biswell, 406 U. S. at 315. Here, there is no limit to CSHO discretion when the CSHO refers an inspection to him or herself, or to a fellow CSHO.

As explained above, the F.O.M. contains a review procedure for complaints and referrals to determine if it requires an "inquiry," an "inspection," or no action at all. This review procedure limits CSHO discretion in two ways. First, it provides an established procedure ensuring all "referrals" are treated equal. Second, it ensures the person making the "referral" is not the same person evaluating the information to determine if an inspection is authorized. These safeguards represent the Secretary's interpretation of what the Act requires.

The Omaha area office, however, did not follow the Secretary's decision trees to evaluating CSHO Referral Inspections. The evidence shows that for the two inspections prior to Appellant's worksite, a CSHO simply referred the matter to himself without even contacting the area office. From the second inspection site, a CSHO called another CSHO for the "referral" of Appellant's worksite. Despite being a telephone referral, the CSHOs did not follow any review procedure. F.O.M. § 9-16; (Add. at Tab 5). The result of this lack of any review is unlimited CSHO discretion to refer any worksite to him or herself, or another CSHO without determining whether necessary criteria are satisfied.

Further, assuming the CSHO Referral Policy as applied in Omaha was done correctly, the policy does not contain any prerequisite level of "suspicion" or "cause" that must be observed before a CSHO can initiate an inspection. There are also no restrictions on time, place, and scope in the CSHO Referral Policy, nor any required review by a supervisor or area director. The policy's lack of direction results in complete CSHO autonomy. Thurlby testified to this standardless discretion and arbitrary enforcement when he described that he only "looks for fall protection," but then admitted he has inspected a worksite after evaluating a fall protection system from his car to determine whether it was used correctly. On

February 24, 2011, Jordan referred two inspections to himself. Based on the testimony of the investigators, if Thurlby had driven by the same worksites, he may have reached different conclusion about whether to inspect. Evidence from CSHOs shows the CSHO Referral Policy vests them with wide discretion.

Additionally, the CSHO Referral Policy contains no requirement that any referral information be in writing. With a warrant, the scope of the search and seizure may be reviewed after the fact. Without a written document outlining the scope of the investigation, it is impossible to determine the scope or basis for the referral before any inspection, giving the referring CSHO additional unchecked discretion. Indeed, in Appellant's case the referral number did not generate until well after the inspection. Unlimited autonomy of the CSHO Referral Policy also factors against reasonableness in warrantless CSHO searches.

When the CSHO Referral Policy is weighed using established Fourth Amendment reasonableness factors, none of the factors weigh in favor of reasonableness. The CSHO Referral Policy is unreasonable and unconstitutional.

C. The Inspection of Appellant's Worksite Constitutes an Unreasonable Seizure

There is no bright line rule to distinguish a consensual encounter from a seizure. Instead, the court must assess whether "in view of all of the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave." Griffith, 533 F.3d at 983 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). In the criminal context, courts consider the following factors when determining whether a seizure has occurred include:

> officers positioning themselves in a way to limit the person's freedom of movement, the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication the person is the focus of a particular investigation.

Id. (internal citations omitted). A seizure does not occur when an officer approaches an individual and questions him—unless the officer conveys a message that compliance with his request is required. Florida v. Bostick, 501 U.S. 429, 434 (1991); see also United States v. Drayton, 536 U.S. 194, 200–01 (2002). "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Griffith, 533 F.3d at 983.

Here, the CSHOs seized Appellant within the meaning of the Fourth Amendment the instant they entered the worksite. Immediately, Thurlby presented his credentials to Mr. Nyffeler and required Mr. Nyffeler to complete an

information sheet. Thurlby then ordered Appellant's employees off the roof, restricting their movement. In short, the inspectors dictated everything that occurred on that worksite for the duration of the inspection.

Because of Appellant's small workforce, the presence of two CSHOs constitutes an unreasonable seizure within the meaning of the Fourth Amendment. At the time of the inspection, Appellant had five employees. All five employees were present at the worksite and reasonably believed they could not resume business operations until the CSHOs released them to do so. Appellant is a service business. Thurlby and Connett's inspection actions effectively paralyzed Appellant and rendered it impossible for Appellant to do business, depriving Appellant of its business assets until the CSHOs departed. This constitutes an unlawful seizure violating Appellant's Fourth Amendment rights.

III. The Inspection of Appellant's Worksite Violated the Due Process Requirements of the Fifth Amendment.

The Due Process Clause of the Fifth Amendment provides, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. Due process has three primary concerns: substantive due process, procedural due process, and equal protection. "Substantive due process" prohibits government actors from engaging in conduct

that disturbs the rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U. S. 319, 325-326 (1937), or that "shocks the conscience," Rochin v. California, 342 U. S. 165, 172 (1952). Even if government action depriving a person of life, liberty, or property does not implicate substantive due process concerns, the taking must still be conducted in a fair manner. See Mathews v. Eldridge, 424 U. S. 319, 335 (1976). This is generally referred to as "procedural" due process. Due process guidelines are necessary to protect business owners from the "unbridled discretion [of] executive and administrative officers by assuring that reasonable legislative or administrative standards for conducting . . . inspection are satisfied with respect to a particular establishment." Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir. 1980) (citing Barlow's, 436 U.S. at 323, and Camara, 387 U.S. at 538).

Generally, equal protection[26] requires only a rational relationship between a classification scheme and a legitimate government objective. Plyler v. Doe, 457 U.S. 202, 216-18 (1982). It is not enough to show a discriminatory effect based on

[26] The equal protection clause of the Fourteenth Amendment has been "reverse incorporated" to be applicable to the federal government through the due process clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 497 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.")

a facially neutral law—one must show a discriminatory purpose. See, generally, Washington v. Davis, 426 U.S. 229 (1976).

Here, the data is compelling in showing a discriminatory effect. On February 24, 2011, three inspections occurred and all three employers were small businesses in the residential construction industry. This effect, when combined with the arbitrary nature of the policy at issue rises to the level of showing an "invidious purpose" such as the discrimination in Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In Washington v. Davis, the Court indicated an objective test is generally less suspicious and often will pass the discriminatory purpose requirement of equal protection analysis. Washington, 426 U.S. at 232-47. This position followed logically from the Court's prior holding in Yick Wo. In Yick Wo, the Court indicated a subjective test is suspicious in nature and will be examined more closely than an objective one—especially when applied by citizen enforcers. Yick Wo, 118 U.S. at 372-75. When a subjective test is at issue and a discriminatory effect can be shown, it is likely that a discriminatory purpose exits. Id.

To comply with these due process requirements, Chapter 9 of the F.O.M. sets out decision trees to determine whether an inspection or inquiry is authorized. (Add. at Tab 5). Chapter 9 also establishes the requirements for evaluating complaints and referrals prior to initiating an inspection. (Add. at Tab 5). If the evaluation of a complaint or referral does not establish cause to believe a violation exists, the Area Director may decide against an inspection. (App'x at Tab 9).

The CSHO Referral Policy, however, is suspect with regard to each Fifth Amendment concern.[27] The policy itself contains no due process protections or procedural safeguards. Critically, no regulation requires a CSHO referring an inspection to him or herself or to a fellow CSHO to follow the decision trees in Chapter 9 to determine whether an inspection is authorized. Instead, under the policy, a lone CSHO can initiate an inspection against any employer without ever talking to another person in the agency or following the written or verbal complaint or referral procedures outlined in the F.O.M. Even more troubling, the CSHO can

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[27] It is well settled law that a corporation holds and may exercise due process rights under the United States Constitution. See Pembina Consolidated Silver Mining Co. v. Pennsylvania, 125 U.S. 181 (1888) (holding that a private corporation is entitled to due process and equal protection because "[s]uch corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution.").

initiate the inspection without even identifying the target of the inspection. Under the current policy, the information received (referral) is not required to be in writing, and there is no vetting process when a CSHO makes the referral to him or herself or to a fellow CSHO. Because there are no procedural requirements, the decision of whether a CSHO initiates an inspection is arbitrary.

Moreover, the CSHO Referral Inspection Policy does not contain a single criterion that can be classified as objective. The policy, as applied by the Omaha area office, is entirely subjective in nature. The decision to inspect was left to the individual CSHO, which led to arbitrary enforcement. It would be a much more difficult decision if even one of the employers targeted on February 24, 2011, was not a small business in the resident construction industry. Instead, every inspection targeted the same class of employer—the Secretary's "low hanging fruit." Accordingly, the court should find the inspections unconstitutional.

Appellant was targeted by the CSHOs from the Omaha area office because of its size. Targeting citizens, including corporations and their agents, stands in direct conflict with the basic requirement of fairness that is the essence of "due process." Congress has made it clear the Secretary is not to target small businesses because they lack financial resources. See Pub. L. 104-121 (March 29, 1996)

("[S]mall businesses bear a disproportionate share of regulatory costs and burdens.").

In 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 et. seq. The stated purpose of the legislation was "to make Federal regulators *more accountable for their enforcement actions* by providing small entities with a meaningful opportunity for redress of excessive enforcement activities." Pub. L 104-121 § 203(7) (emphasis added). In addition, Congress wanted federal agencies "to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution oriented." Id. at § 203(6). In essence, Congress tried to codify the principle of "fairness" that is embodied in the Due Process Clause of the Fifth Amendment. The Omaha area office has not complied with this fundamental notion of fairness. These inspections targeted "low hanging fruit." Regardless of how the Secretary wants to define that term, the government should not target anyone. The application of the law should be fair, which is why the process applied must be fair and we cannot leave the "decision to enter and inspect" to "the unreviewed discretion of the enforcement officer." See See, 387 U.S. at 545. In sum, because the CSHO Referral Inspection Policy is procedurally deficient and

subject to arbitrary enforcement, it does not comply with the Fifth Amendment's due process requirements, and Appellant's citation should be dismissed.

CONCLUSION

For the reasons set forth above, Appellant asks this court to vacate the OSHRC's final order and remand this case with directions to dismiss Appellant's citation and enjoin the practice of unreviewed CSHO Referral Inspections used to target homebuilders in Omaha, Barlow's, 436 U.S. at 325, and award Appellant attorney fees pursuant to SBREFA, 5 U.S.C. § 601 et. seq..

Dated: October 4, 2013.

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CERTIFICATES OF SERVICE
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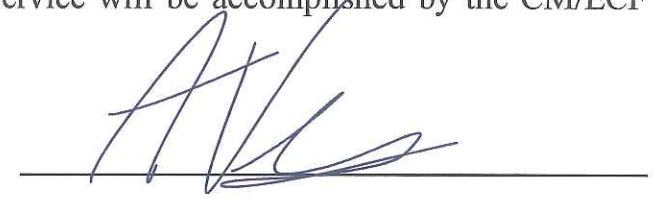
I hereby certify that on October 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



CERTIFICATE OF COMPLIANCE

AND VIRUS FREE ELECTRONIC VERSION OF BRIEF

I, Adam Jacob Vergne, certify the following pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Local Rule 28(h):

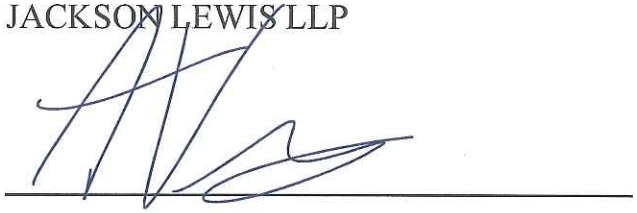
1. Petitioner's Opening Brief contains 11,009 words, which complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) in that it contains no more than 14,000 words.

2. Petitioner's Opening Brief was prepared in Microsoft Office Word 2010, Microsoft Windows 7.

3. In compliance with Local Rule 28(h), the electronic vesion of Petitioner's Opening Brief filed via Appellate CM/ECF, was scanned for viruses and was found to be virus free.

Dated: October 4, 2013.

JACKSON LEWIS LLP



4834-2280-3221, v. 25

Mettlen, Cindy (Omaha)

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Eighth Circuit Court of Appeals

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Case Name: Nyffeler Construction, Inc. v. Secretary of Labor, et al
Case Number: 13-1933
Document(s): Document(s)

Docket Text:
APPELLANT brief of Mr. Nyffeler Construction, Incorporated submitted for review. The time for filing the subsequent brief does not begin to run until the brief has been approved and filed. [4083140] [13-1933] (AJV)

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Mr. Kenneth Michael Wentz, III: wentzk@jacksonlewis.com, korthk@jacksonlewis.com, OmahaDocketing@jacksonlewis.com
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Mr. Ray H. Darling, Jr.
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