No. 13-1933

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NYFFELER CONSTRUCTION, INC.,

Petitioner-Appellant,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent-Appellee.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR RESPONDENT SECRETARY OF LABOR

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SUMMARY OF THE CASE

This Court lacks jurisdiction over this appeal because it was not timely filed. Moreover, even if the notice of appeal had been timely filed, the Court lacks jurisdiction over the issues raised by Nyffeler Construction, Inc. (Nyffeler) on appeal because it failed to raise the issues before the Occupational Safety and Health Review Commission (Commission), as required under 29 U.S.C. § 660(a). And, even assuming jurisdiction, Nyffeler's Fourth Amendment, statutory, and due process claims are without merit. While on a public street, Occupational Safety and Health Administration (OSHA) compliance officers observed Nyffeler employees working hazardously. Based on their observations, OSHA properly initiated, and Nyffeler consented to, an inspection of the worksite.

The Court should decide this case without oral argument, as the issues are straightforward and suitable for disposition on the briefs. If the Court determines that oral argument is appropriate, the Secretary requests equal time to that allotted to Nyffeler.

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STATEMENT OF LACK OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary before the Commission under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c). On April 4, 2012, an administrative law judge (ALJ) issued a decision and order affirming a citation issued by the Secretary of Labor to Nyffeler. Nyff. Add. at 2-13.[1] The Commission did not direct the case for discretionary review, and the ALJ's decision thus became the Commission's final order on May 4, 2012. Notice of Final Order, App. Tab 1; 29 U.S.C. § 661(j).[2] Nyffeler was required to file its petition for review with this Court within the sixty-day period proscribed by the OSH Act, which ended on July 3, 2012. *See* 29 U.S.C. § 660(a). Nyffeler filed its petition for review (erroneously with the district court, which subsequently transferred the petition to this Court pursuant to 28 U.S.C. § 1631) on July 5, 2012, and thus filed two days late. *See* Nyff. Add. at 14. This Court therefore lacks jurisdiction over this appeal because Nyffeler's appeal was not timely filed. This Court also lacks jurisdiction over Nyffeler's petition for review because Nyffeler failed to raise its Fourth Amendment, statutory, and Fifth Amendment arguments before the Commission. *See* 29 U.S.C.

[1] Citations to Nyff. Add. refer to the Appellant's Addendum to Opening Brief for Appellant.

[2] Citations to App. refer to Appellant's Appendix.

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§ 660(a) ("No objection that has not been urged before the Commission shall be considered by the Court, unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction over this appeal because Nyffeler's appeal was untimely filed where under the OSH Act the 60th day for filing was July 3, 2012, and Nyffeler filed on the 62nd day, July 5, 2012.

   Apposite Authority: *Bowles v. Russell*, 551 U.S. 205 (2007); 29 U.S.C. § 660(a); Fed. R. App. P. 26(b)(2).

2. Whether the Court lacks jurisdiction to review the issues raised in this appeal where Nyffeler failed to raise the issues in its petition for discretionary review to the Commission.

   Apposite Authority: *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564 (8th Cir. 2000); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100 (1st Cir. 1997); 29 U.S.C. § 660(a).

3. Whether, assuming the Court has jurisdiction to review Nyffeler's Fourth Amendment claim, work conducted on a worksite visible from a public street is protected by the Fourth Amendment, where OSHA's inspection was based upon compliance officers' observations of employees working hazardously from the vantage point of a public street, Nyffeler neither raised

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an objection at the outset of the inspection nor requested a warrant, and the inspection did not constitute a seizure.

Apposite Authority: *Oliver v. United States*, 466 U.S. 170 (1984); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Marshall v. W. Waterproofing Co.*, 560 F.2d 947 (8th Cir. 1977); 29 U.S.C. § 657.

4. Whether, assuming the Court has jurisdiction to review Nyffeler's statutory claim, section 8 of the OSH Act authorizes an OSHA compliance officer to initiate an inspection of a worksite where the compliance officer observes workers exposed to a hazard from the vantage point of a public street.

   Apposite Authority: *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980); 29 U.S.C. § 651(b); 29 U.S.C. §§ 651(b), 657(a); 29 C.F.R. § 1903.3.

5. Whether, assuming the Court has jurisdiction to review Nyffeler's Fifth Amendment claim, OSHA violated Nyffeler's right to due process where it selected Nyffeler for inspection based on direct observations of workers exposed to a hazard, and no pattern of discrimination has been established.

   Apposite Authority: *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717 (8th Cir. 1996); *Matthews v. Eldridge*, 424 U.S. 319 (1976).

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STATEMENT OF THE CASE

This appeal involves an enforcement action initiated by the Secretary[3] under the OSH Act against Nyffeler after two of its employees were observed installing roof sheathing more than ten feet above the ground with no form of fall protection. Nyff. Add. 4. Four OSHA compliance safety and health officers (compliance officers or CSHOs) observed Nyffeler's employees exposed to the fall hazard prior to initiating an inspection. *Id.* After an investigation, OSHA issued a citation alleging that Nyffeler violated the safety standard requiring fall protection in residential construction, 29 C.F.R. § 1926.501(b)(13), and the standard requiring training of workers exposed to fall hazards, § 1926.503(a)(1). *Id.* at 4-8.

Following a hearing, an ALJ affirmed OSHA's citations as serious violations of the OSH Act, finding that Nyffeler had knowingly exposed its employees to a fall hazard without fall protection, and the hazard could have resulted in serious injury or death. *Id.* at 7-9. Nyffeler filed a petition for discretionary review to the Commission. Sec. Add. 3-6.[4] The Commission declined review, and the ALJ's decision became a final order of the Commission on May 4, 2012. Notice of Final

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[3] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs the Occupational Safety and Health Administration (OSHA). In this brief, the terms "Secretary" and "OSHA" are used interchangeably.

[4] Citations to Sec. Add. refer to the Secretary's Addendum attached to this brief.

Order, App. Tab 1. On July 5, 2012, Nyffeler filed an untimely appeal in the United States District Court for the District of Nebraska (subsequently transferred to this Court from the district court pursuant to 28 U.S.C. § 1631). Nyff. Add. 14.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

Finding that occupational injuries and illnesses "impose a substantial burden" upon interstate commerce, Congress enacted the OSH Act to "assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(a), (b). The OSH Act's "purpose is neither punitive nor compensatory, but rather forward-looking; *i.e.*, to prevent the first accident." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir. 1987). To effectuate this purpose, Congress imposed dual obligations on employers to comply both with a "general duty clause" and OSHA's occupational safety and health standards. 29 U.S.C. §§ 654(a)(1)-(2), 665.

To enforce standards, Congress authorized OSHA to enter, inspect, and investigate places of employment without delay, and to issue citations to employers when OSHA believes a violation has occurred. 29 U.S.C. §§ 654(a)(2), 657(a), 659(a), (b). Section 8(a) of the OSH Act specifically authorizes OSHA to enter work places, including construction sites, having presented credentials, and to inspect and investigate at "reasonable times, and within reasonable limits and in a

reasonable manner" all relevant conditions. 29 U.S.C. § 657(a); *see also* 29 C.F.R. § 1903.3. OSHA also promulgated regulations providing that if an employer refuses to permit an OSHA compliance officer to conduct any portion of a reasonable workplace inspection, the compliance officer "shall terminate the inspection or confine the inspection" to areas and activities to which the employer has not objected. 29 C.F.R. § 1903.4(a). The OSHA Area Director then determines, in consultation with the Department of Labor's Office of the Solicitor, whether it is appropriate to make an "ex parte application for an inspection warrant or its equivalent," which is the preferred means of "compulsory process" to conduct a non-consensual inspection. *Id.* § 1903.4(d).

In appropriate cases, the Secretary issues citations requiring the employer to abate violations and, where applicable, proposes a civil penalty. 29 U.S.C. §§ 658-659, 666. If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission presides over a hearing, and issues an order affirming, modifying, or vacating the Secretary's citation or proposed penalty. *Id.* §§ 659(a), (c), 661(j). A party adversely affected by an ALJ's decision may file a petition for discretionary review of the decision by the full three-member Commission. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, an ALJ's decision becomes the final order of the Commission thirty days after the

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ALJ's decision was docketed with the Commission. 29 U.S.C. § 661(j). A party adversely affected or aggrieved by the Commission's final order may within sixty days seek review in the court of appeals where the violation occurred, where the employer has its principal place of business, or in the Court of Appeals for the District of Columbia Circuit. *Id.* § 660(a), (b).

II. Nyffeler's Citation for Violating OSHA's Fall Protection and Employee Training Standards

On the morning of February 24, 2011, OSHA compliance officers Steven Jordan and Scott Jacobson were conducting an inspection of a residential construction worksite in an Omaha neighborhood on S. 199th Street when they observed two workers on the roof of Nyffeler's nearby residential construction worksite. Tr. 49:4-50:12.[5] While standing in front of the first inspection site, compliance officers Jordan and Jacobson observed the portion of the roof at the Nyffeler worksite where two workers were installing roof sheathing on the unfinished roof. Tr. 50:10-51:23. From that vantage point, the compliance officers photographed the two Nyffeler employees working more than six feet above the ground without any fall protection. Tr. 52:5-57:5. After observing that the Nyffeler employees lacked fall protection, compliance officers Jordan and Jacobson immediately referred the Nyffeler worksite for an inspection by calling

[5] Citations to Tr. refer to the hearing transcript reproduced in the Appellant's Appendix, Tab 2.

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two compliance officers from the OSHA area office (Matthew Thurlby and Michael Connett) and then resumed their inspection of the first worksite. Tr. 50:23-51:4.

Approximately twenty minutes after the referral was made, compliance officers Thurlby and Connett arrived on S. 199th Street, where the Nyffeler worksite was located. Tr. 51:2-8. Prior to approaching the worksite, the compliance officers observed and photographed the worksite from the street and sidewalk in front of the site. Tr. 77:1-18. The compliance officers photographed two workers on the roof near the front of the house using a pneumatic nail gun to attach roof sheathing with no form of fall protection in place. Tr. 79:23-82:12. The compliance officers observed at least one of the workers standing within a foot of the edge of the roof, which was more than ten feet from the ground and had a slope of greater than four in twelve.[6] Tr. 83:25-84:21.

When the compliance officers approached the worksite and asked to speak with the person in charge, Greg Nyffeler was "quite cordial," and acknowledged that he was "in charge of the site." Tr. 93:17-22. Mr. Nyffeler cooperated with the inspection by making his employees available for interview, and by providing company information on the form handed to him by the compliance officers. Tr. 94:11-97:14. Shortly after the compliance officers' arrival on the worksite, the two

[6] This ratio refers to the slope (or pitch) of a roof that gains more than four units vertically per twelve units horizontally. *See* Nyff. Add. at 4.

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employees who had been working on the roof came down. Tr. 97:15-23. The compliance officers then requested that Mr. Nyffeler permit them to interview the two workers who had been on the roof, and Mr. Nyffeler made employees Troy Poledna and Ryan Coleman available. Tr. 98:13-25. The compliance officers proceeded to interview the two employees and Mr. Nyffeler, and to conduct a physical investigation of the fall hazard. Tr. 86-92, 98, 118-119.

Based upon the information gathered during the inspection, OSHA issued a citation for two serious violations of OSHA fall protection standards: 1) Nyffeler failed to protect its employees working at a height of more than six feet with any type of fall protection in violation of 29 C.F.R. § 1926.501(b)(13); and 2) Nyffeler failed to train its employees regarding fall hazards in violation of 29 C.F.R. § 1926.503(a). Nyff. Add. 4-8. Nyffeler contested the citation and proposed penalty of $8400, and a hearing was held before an ALJ on September 23, 2011. *Id.* at 2.

III. The ALJ's Decision

Following a hearing, the ALJ affirmed both items of OSHA's citation. ALJ's Decision and Order, Nyff. Add. 2, 12-13. Regarding Citation 1, Item 1, for failure to provide fall protection for employees engaged in residential construction working more than six feet above the ground, the ALJ found that Nyffeler did not use the fall protection required by 29 C.F.R. § 1926.501(b)(13), and that its employees were exposed to the unsafe condition. *Id.* at 5-6. Specifically, the ALJ

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found that Nyffeler knew or reasonably could have known of the violation, because Greg Nyffeler admitted that he observed the employees working on the roof on February 24, 2011, and that no fall protection, including roof kicks, were in place on the area of the roof where the two employees were working. *Id.* at 5-6. Because an employee could have been seriously injured or killed in a fall from the roof, the ALJ found the citation was properly classified as a "serious" violation of the OSH Act. *Id.* at 6.

Similarly, the ALJ found it was "undisputed" that Nyffeler did not train its employees regarding fall protection and hazards. *Id.* at 8. Greg Nyffeler admitted that the company had only trained its employees to use roof kicks, and that even so, Nyffeler had not trained its employees to properly install roof kicks. *Id.* at 8. The ALJ found that Citation 1, Item 2, for failure to provide training, was also properly classified as a "serious" violation. *Id.* at 9.

Nyffeler raised several additional arguments, each of which the ALJ considered in turn. First, the ALJ clarified that the fall protection requirements issued by OSHA on June 16, 2011, did not apply to the citations here, which resulted from activities on February 24, 2011. *Id.* at 9. Second, in response to Nyffeler's claim that OSHA provided inadequate outreach and training on fall protection, the ALJ explained that OSHA's regulatory and enforcement strategy, including its outreach and training program, are outside the judicial purview of the

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administrative court. *Id.* at 10. Third, Nyffeler argued that OSHA unfairly targeted enforcement actions and citations at residential construction employers in Omaha. *Id.* at 9. The ALJ found that the Secretary has discretion to decide who to prosecute, and Nyffeler did not present any facts that it was selectively or vindictively prosecuted because it did not show that the inspection or citation were conducted in response to Nyffeler's exercise of a protected right. *Id.* at 9-10. Fourth, in response to Nyffeler's assertion that the OSH Act is unconstitutional because it applies to private employers and not the federal government, the ALJ stated that the administrative court did not have jurisdiction to rule on questions of the constitutionality of its authorizing statute. *Id.* at 10. Finally, the ALJ explained that the American Recovery and Reinvestment Act of 2009, which Nyffeler argued was in conflict with the OSH Act, "does not relieve the employer of its duty to comply with the OSH Act." *Id*.

In reviewing OSHA's proposed penalty, the ALJ reconsidered de novo the relevant factors and found that a reduction was appropriate due to Nyffeler's lack of negative inspection history and the small size of its business (five employees at the time). *Id.* at 11. The ALJ assessed a total penalty for both violations of $3400. *Id*.

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IV. Nyffeler's Petition for Discretionary Review to the Commission

Nyffeler timely filed a petition for discretionary review with the Commission, raising seven issues. Petition for Discretionary Review, Sec. Add. 3-6. First, Nyffeler asserted that the jurisdiction of the OSH Act under the interstate commerce clause is overly inclusive. *Id.* at 3. Second, Nyffeler disagreed with the ALJ's citation to cases involving industrial hazards, because those environments are too different from residential construction, and furthermore, Nyffeler argued, it should not be cited for failing to know "excessive rules" applicable to the residential construction industry. *Id.* at 4. Third, Nyffeler argued that the ALJ erred in affirming the citation for failure to properly train its employees, because compliance with the training requirements under 29 C.F.R. § 1926.503(a) and (a)(1) is not feasible because OSHA does not provide sufficient materials. *Id.* at 4.

Fourth, Nyffeler asserted that "the DOL and the ALJ have failed to affirm my constitutional rights," and then quoted portions of the Fourteenth Amendment equal protection clause, and Section 8 of Article I of the Constitution, including, in part, the requirement that any imposts and excises collected by Congress must be uniform throughout the States.[7] *Id.* at 4. Nyffeler then asserted that the alleged constitutional violation resulted from the enforcement of the OSH Act on private

[7] The reference to Article I, Section 8, is referred to in the petition for discretionary review as both "preamble section 8, powers of congress," and as the Eighth Amendment. Sec. Add. 4.

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sector employers like Nyffeler, and not on the federal government. *Id.* Fifth, Nyffeler argued that the ALJ failed to properly consider his vindictive prosecution argument. *Id.* at 4-5. In particular, the ALJ found that Nyffeler did not show that OSHA's inspection was taken in response to Nyffeler's exercise of any protected right. *Id.* In response, Nyffeler asserted that OSHA's "regulatory and enforcement strategy is unethical and unconstitutional," because OSHA regularly fines the residential construction industry and has at times targeted the construction industry for inspections, and the Secretary's trial counsel noted that it was permissible for OSHA to cite employers for hazards that are readily visible ("low-hanging fruit."). *Id.* at 5.

Sixth, Nyffeler asserted that the ALJ failed to properly take into account the size of its business, the facts of the violations, the seriousness of the violations, and the relative implication of the penalties on it, as compared to the relative impact of penalties issued to British Petroleum following the Texas City refinery explosion. *Id.* Finally, Nyffeler concluded by asserting in general that the citations were "unfounded," that Nyffeler should be credited for making an effort to comply with the regulations, that the ALJ erred in declining to rule on the "constitutionality of its authorizing statute," and that "DOL unconstitutionally cites people." *Id.* at 5-6.

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SUMMARY OF THE ARGUMENT

The Court lacks jurisdiction to review this appeal because it was not timely filed. Additionally, because Nyffeler did not raise any of the arguments in its appeal to this Court in its petition for discretionary review to the Commission, those arguments have been waived under section 11(a) of the OSH Act, 29 U.S.C. § 660(a). Nyffeler's petition for review should therefore be dismissed for lack of jurisdiction.

Even assuming that the Court has jurisdiction to hear Nyffeler's appeal, each of its substantive arguments fails. From the vantage point of a public street, four OSHA compliance officers observed and photographed Nyffeler's employees working on a roof more than ten feet above the ground with no fall protection, where they were at risk of serious injury or death due to the fall hazard. Nyffeler's Fourth Amendment claim therefore lacks a foundation, because Nyffeler had no reasonable expectation of privacy in its publicly visible construction site, and also because it consented to OSHA's inspection and did not demand a warrant. Additionally, OSHA was authorized, under its broad mandate to prevent worker injuries, to inspect worksites and conduct a reasonable consent inspection based on its compliance officers' observations of a hazard, and OSHA has no statutory or regulatory obligation to review compliance officer referrals prior to initiating an investigation. And Nyffeler has presented no facts to support its argument that

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OSHA impermissibly singled out small residential construction businesses in Omaha, or that inspections based on compliance officer observations result in unequal application of the law in violation of the Fifth Amendment. Because none of Nyffeler's arguments is supported by fact or law, this appeal should be dismissed.

ARGUMENT

I. Standard of Review

Nyffeler does not seek review of any Commission factual findings. Nyff. Br. 4. The Court's review of whether OSHA acted in accord with Nyffeler's constitutional rights is de novo. *See Mocevic v. Mukasey*, 529 F.3d 814, 817 (8th Cir. 2008). The Commission's legal conclusions must be upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See United States v. Massey*, 380 F.3d 437, 440 (8th Cir. 2004).

II. The Court Lacks Jurisdiction over the Appeal Because Nyffeler's Appeal to the Court Was Untimely.

The OSH Act requires that an appeal from a final order of the Commission be filed with the appropriate federal court of appeals within sixty days of the date of the Commission's final order. 29 U.S.C. § 660(a). Where the Commission has not directed review, the ALJ's decision and order becomes the final order of the Commission thirty days after the ALJ's decision is docketed by the Commission. 29 U.S.C. § 661(j); 29 C.F.R. §§ 2200.90(b)(2). In this case, the ALJ's decision

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was docketed by the Commission on April 4, 2012. Notice of Docketing, Sec. Add. 1-2. Although Nyffeler filed a petition for discretionary review, the Commission did not direct the case for review. Notice of Final Order, App. Tab 1. The Commission's Notice of Final Order states that the ALJ's decision became a final order of the Commission on May 4, 2012.[8] *Id.* Accordingly, Nyffeler's sixty-day period to file its appeal ended on Tuesday, July 3, 2012. Nyffeler filed its appeal on Thursday, July 5, 2012—two days late.

The OSH Act's statutory time limit to file an appeal is a jurisdictional requirement, "[b]ecause Congress decides whether federal courts can hear cases at all, [so] it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007); *see also Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009) ("It is a verity that federal courts are courts of limited jurisdiction. Parties may not enlarge that jurisdiction by waiver or consent."). Thus, an appeal must be dismissed for lack of jurisdiction if it has not been filed within the time

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[8] In claiming that the final order date was May 7, 2012, Nyffeler quotes the Secretary's motion to transfer the appeal under 28 U.S.C. § 1631 from the District Court for the District of Nebraska to this Court. Nyff. Br. 1. The portion of the Secretary's motion that Nyffeler cites, which suggests that the date of the Commission's final order was May 7, 2012, was a mistaken reference to the date the Notice of Final Order was signed. Nyff. Br. 1; App. Tab 1. The Commission's Notice of Final Order and Notice of Docketing of the Administrative Law Judge's Decision are clear, however, that the ALJ's decision became a final order on May 4, 2012. App. Tab 1; Sec. Add. 1.

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limit set by Congress. *Bowles*, 551 U.S. at 213 (citing *United States v. Curry*, 47 U.S. 106, 113 (1848) ("[T]he same authority which gives the [Court] jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them.")).

Federal Rule of Appellate Procedure 26(b)(2) further prohibits the Court from extending the time for an appellant to file a notice of appeal from an order of the Commission. Fed. R. App. P. 26(b)(2) ("The court may not extend the time to file . . . a notice of appeal from . . . an order of an administrative agency, board, [or] commission . . . , unless specifically authorized by law."). Because the OSH Act sets the time limit for filing a petition for review with the court of appeals and does not specifically authorize extensions, the Court lacks authority to extend Nyffeler's time to file. *See* 29 U.S.C. § 660(a). Furthermore, under this Court's rules, the Court has a duty to dismiss an appeal that is not within its jurisdiction, and is permitted to do so on its own motion. *See* 8th Cir. R. 47A(a); *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 773 (8th Cir. 2009) ("We are obligated to consider *sua sponte* our jurisdiction to entertain a case . . .") (emphasis in original); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 459 n.2 (8th Cir. 2000) ("[I]f there is any question about this Court's jurisdiction, the Court may (and, indeed, it must) sua sponte examine the issue.").

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The Secretary previously filed a motion to dismiss based on Nyffeler's untimely petition for review that was denied by the Court without explanation on June 20, 2013. Nyffeler asserts that this merits panel is bound by the administrative panel's order denying the Secretary's motion to dismiss, and that the issue can only be revisited by the en banc court. Nyff. Br. 2. But neither of the cases cited by Nyffeler to support its assertion are apposite to the jurisdictional question here, because in those cases the Court was deciding whether to apply a previous panel's final decision on a similar legal issue in an entirely separate case.[9]

Instead, the merits panel has "the power to re-examine" the motions panel's jurisdictional decision. *See McCuen v. Am. Cas. Co. of Reading, Pa.*, 946 F.2d 1401, 1403 (8th Cir. 1991) (affirming a motions panel's denial of a motion to dismiss for lack of jurisdiction). Likewise the Court may correct a "clear error" in an earlier assertion of jurisdiction. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (stating in dicta that "the law-of-the-case doctrine merely expresses the practice of courts generally to refuse to reopen what has been

[9] Nyffeler also suggests that res judicata may prevent the review of this issue, but the doctrine of res judicata, also termed claim preclusion, does not apply to the present circumstance because the original suit is ongoing, no final judgment has been issued on any claim, and no subsequent suit is being or could be initiated at this stage. *See Montana v. U.S.*, 440 U.S. 147, 153 (1979) (explaining that under res judicata "a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a *subsequent suit* between the same parties'") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) (emphasis added)).

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decided, not a limit to their power") (internal quotation marks and citations omitted); *Arizona v. California,* 460 U.S. 605, 618 n.8 (1983) (reversal of an earlier decision is appropriate where the court finds it was "clearly erroneous and would work a manifest injustice"); *Ritchie Special Credit Investments, Ltd. v. U.S. Tr.*, 620 F.3d 847, 856 (8th Cir. 2010) (Colloton, Cir. J., concurring) (stating in dicta that an administrative panel's denial of a motion to dismiss for lack of jurisdiction constitutes the law of the case, but can be reversed upon finding "clear error or manifest injustice") (internal citations omitted).[10] Accordingly, the Court may review the earlier panel's decision for error, and the error here is clear: Nyffeler's petition for review was filed after the expiration of the sixty-day filing deadline, and therefore the Court lacks jurisdiction over this appeal. 29 U.S.C. § 660(a).

III. The Court Also Lacks Subject Matter Jurisdiction to Review Any of the Three Issues Raised by Nyffeler in Its Opening Brief Because Nyffeler Failed to Raise the Issues Before the Commission.

The Court also lacks jurisdiction over Nyffeler's appeal for another reason: Nyffeler failed to first raise the arguments in its petition to this Court before the

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[10] *See also Council Tree Commc'ns, Inc. v. F.C.C.*, 503 F.3d 284, 292 (3d Cir. 2007) (holding that "the law of the case doctrine does not bar a merits panel from revisiting a motions panel's assumption of subject matter jurisdiction."); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (holding that although the court's obligation to correctly interpret the law "may be tempered at times by concerns of finality and judicial economy, nowhere is it greater and more unflagging than in the context of subject matter jurisdiction issues, which call into question the very legitimacy of a court's adjudicatory authority.").

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Commission. The petition for review should therefore be dismissed.

Under section 11(a) of the OSH Act, "[n]o objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 660(a). Where the Commission declines to review an ALJ's decision, an issue is preserved for judicial review only if the issue was raised in the aggrieved party's petition for discretionary review. *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 567 (8th Cir. 2000) (holding that, where the Commission denied review, the employer waived its penalty argument because it failed to raise the issue in its petition for discretionary review); *accord A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 333 (D.C. Cir. 2002) ("In cases where the Commission declines to review the ALJ decision, we and our sister circuits have uniformly held that courts of appeals lack jurisdiction over objections not raised in the PDR."). And to sufficiently "urge" an issue, it must be raised "face up and squarely, in a manner reasonably calculated to alert the Commission to the crux of the perceived problem." *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997); *see also, e.g.*, *D.A. Collins Const. Co. v. Secretary of Labor*, 117 F.3d 691, 694-95 (2nd Cir. 1997) (holding that an employer could not challenge the ALJ's finding that the Secretary established a prima facie case of a violation where the employer's petition for discretionary

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review only sought review of the ALJ's rejection of the employer's affirmative defense).

Nyffeler's petition for discretionary review lacks any argument that would have alerted the Commission that Nyffeler sought to challenge the inspection under the Fourth or Fifth Amendments, or as a violation of section 8 of the OSH Act. The petition for discretionary review made several general references to the Constitution, but never hinted at either a Fourth Amendment or a due process challenge. Sec. Add. 4-6. And the petition made no reference to the compliance officer referral process generally, or specifically to the decision to initiate the inspection at issue; nor does it mention section 8 of the OSH Act or any regulations or agency interpretations authorizing inspections. *Id.* at 3-6.

In its opening brief to this Court, Nyffeler argues that OSHA's inspection of the Nyffeler worksite violated the Fourth Amendment guarantee against unreasonable searches and seizures. Nyff. Br. 2, 32. None of Nyffeler's arguments in the petition for discretionary review mention the Fourth Amendment, or even indirectly touch upon the company's or its owners' right to privacy at the worksite, the lack of a warrant for the inspection, or any assertion that the company or its property was improperly seized during the inspection. Sec. Add. 4-5. Even where Nyffeler raised the issues of vindictive prosecution or targeting, it never asserted that it withheld consent to the inspection, that the inspection required a

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warrant, that the compliance officers' exercise of discretion was improper, or that the company believed its operations were seized by the inspection. *Id.* By failing suggest any of these arguments at any time prior to its initial brief before this Court, Nyffeler has waived these arguments under section 11(a) of the OSH Act. *Cf. In re Establishment Inspection of Kohler Co.*, 935 F.2d 810, 813-14 (7th Cir. 1991) ("We will therefore now join the other circuits that require parties challenging completed OSHA inspections on fourth amendment grounds to address their arguments to the Review Commission before turning to the federal courts.").

Nyffeler's statutory interpretation argument raised in the brief to this Court asserts that section 8 of the OSH Act and related regulations do not permit OSHA to initiate an inspection based upon only a compliance officer's referral, particularly without pre-inspection supervisory review. Nyff. Br. 2, 17-32. The only argument in the petition for discretionary review even tangentially related to this issue is Nyffeler's assertion of selective and vindictive prosecution, which questions OSHA's methods of enforcement, but appears to argue that OSHA, and the Nebraska regional office generally, over-enforce in the residential construction industry. Sec. Add. 4-5. This argument, however, does not address the instant claim regarding OSHA's initiation of the inspection of Nyffeler's worksite based upon its compliance officers' observations. *See id.*

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Likewise, Nyffeler's Fifth Amendment due process argument, Nyff. Br. 42-48, has also been raised for the first time in the brief to this Court, and thus is waived. In its opening brief, Nyffeler asserts that the inspection of its worksite violated the due process clause of the Fifth Amendment, and more generally that OSHA's practice of permitting compliance officers to refer violations for inspection resulted in discrimination against small businesses engaged in residential construction. Nyff. Br. 3, 42-47. Nyffeler did not mention the Fifth Amendment or due process anywhere in its petition for discretionary review. Sec. Add. 3-6. Nyffeler's references to the equal protection clause of the Fourteenth Amendment and Article I, Section 8, of the Constitution, Sec. Add. 4, were tied to an argument that it is unfair that the private sector is covered under the OSH Act while the federal government is not, and perhaps impliedly to an assertion that the OSH Act is not uniformly enforced throughout the region or the country. *Id.* at 4-5.

Although in paragraph five of its petition for discretionary review, Nyffeler asserted that OSHA's method of enforcement is "unethical and unconstitutional," it tied that argument to the proposition that OSHA should recognize the difficulty of compliance in residential construction, and also that it did not enforce construction standards equally throughout the region. *Id.* at 5. None of these arguments is sufficiently specific or related to the arguments raised in the brief to this Court to

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satisfy the requirements to avoid waiver. Such broadly sweeping statements and implied legal arguments in a petition for discretionary review are insufficient to alert the Commission that an issue is on the table, much less to alert it to "the crux of the perceived problem." *P. Gioioso & Sons, Inc.*, 115 F.3d at 107.

Because Nyffeler did not sufficiently urge before the Commission any of the three issues argued in its opening brief, it waived its right to appeal those arguments, and this Court lacks jurisdiction to review the issues on appeal. 29 U.S.C. § 660(a); *Dakota Underground, Inc.*, 200 F.3d at 567. Accordingly, Nyffeler's petition for review to this Court should be dismissed.

IV. Even If the Court Had Jurisdiction over Nyffeler's Fourth Amendment Argument, Nyffeler Raises No Cognizable Fourth Amendment Claim Where It Held No Protected Privacy Interest In Work Conducted in Public View, It Consented to the Inspection, and Its Property Was Never Seized.

Even assuming jurisdiction, Nyffeler's Fourth Amendment claim lacks merit. Nyffeler argues that the inspection of its worksite violated its Fourth Amendment right to be protected from unreasonable searches and seizures.[11] Nyff. Br. 32-42. The argument fails, however, because Nyffeler neglected to establish

[11] Nyffeler's framing of its Fourth Amendment issue in terms of this particular inspection leads the Secretary to conclude that this challenge is "as applied," rather than a facial challenge to the OSH Act, even though Nyffeler makes sweeping arguments about the constitutionality of OSHA's referral inspections policy.

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foundationally that it holds a protected Fourth Amendment right in its publicly visible worksite or that it did not consent to OSHA's inspection.[12]

A. *Nyffeler Has No Protected Privacy Interest in a Construction Site in Open View from a Public Street.*

To succeed with a claim of an unreasonable search under the Fourth Amendment, the aggrieved party must show that it held a subjective expectation of privacy from government intrusion in the location at issue and that the expectation is objectively reasonable. *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("The [Fourth] Amendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as reasonable.'") (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (internal quotation marks omitted)). Under the Supreme Court's reasoning in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), a business owner may hold a reasonable expectation of privacy in commercial premises, sufficient to invoke the general rule that warrantless searches, including administrative searches, are unreasonable. 436 U.S. at 311-12. But the Court in *Barlow's* clearly stated that locations in

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[12] In addition, Nyffeler does not seek any remedy specific to its Fourth Amendment argument, aside from its general request that the citation be ordered dismissed and the practice of CSHO referral inspections in Omaha be enjoined. Nyff. Br. 48. Therefore, even if the exclusionary rule applies to evidence gathered during an unreasonable OSHA inspection, which the Secretary does not concede, no such remedy is applicable here because Nyffeler does not seek exclusion of any evidence, and moreover, the uncontested evidence supporting the citation was not gathered in violation of Nyffeler's Fourth Amendment rights.

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public view are not subject to Fourth Amendment protection, explaining that "what is observable by the public is observable, without a warrant, by the Government inspector as well." *Id.* at 315, n.9 (referencing the "open fields" exception to the Fourth Amendment limit on warrantless searches applied in *Air Pollution Variance Bd. of Colo. v. W. Alfalfa Corp.*, 416 U.S. 861 (1974)).

Thus, observations and photographs taken from a public vantage point or by entry onto an open field are not intrusions protected under the Fourth Amendment, because "an open field is neither a 'house' nor an 'effect,' and, therefore, 'the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.'" *United States v. Dunn*, 480 U.S. 294, 303-04 (1987) (quoting *Oliver*, 466 U.S. at 177). Nor does the Fourth Amendment "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* at 304 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (internal quotation marks omitted) (holding that police officers' search was reasonable where they entered an open field and then shined a flashlight into the open door of a barn); *see also United States v. Mathias*, 721 F.3d 952, 957-58 (8th Cir. 2013) (holding there was no reasonable expectation of privacy in a yard visible with the naked eye through slats in a fence).

Similarly, courts have consistently held that employers lack a reasonable expectation of privacy in publicly visible and accessible construction sites. *See,*

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e.g., *Marshall v. W. Waterproofing Co.*, 560 F.2d 947, 950-51 (8th Cir. 1977) (no Fourth Amendment violation where OSHA inspected a scaffold exposed to public view); *Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) (no reasonable expectation of privacy where OSHA observed and then inspected an open trench dug on a public roadway); *L.R. Willson & Sons, Inc. v. OSHRC,* 134 F.3d 1235, 1238-39 (4th Cir.1998) (no Fourth Amendment violation where OSHA took video of a construction site observable from an adjacent building and then conducted an inspection); *Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 902 (D.C. Cir. 1984) (holding that "open construction areas [were] devoid of any reasonable expectations of privacy").

Under this clear precedent, Nyffeler did not have a reasonable expectation of privacy in its construction site on S. 199th Street because it was publicly observable and accessible. Nyffeler's worksite at S. 199th Street was part of a home construction "showcase" located on a public street in an Omaha neighborhood. Tr. 27. Compliance officers Jordan and Jacobson were inspecting a different builder's construction site on the same street when they observed Nyffeler's employees installing roof sheathing without any form of fall protection. Tr. 50:5-51:23. The referring compliance officers observed and photographed the workers on the roof at the Nyffeler worksite from a public street and sidewalk where any member of the public could have made the same observation. Tr. 52-

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57:5. On their arrival on S. 199th Street, the compliance officers who ultimately inspected Nyffeler's worksite first observed and photographed the workers on the roof of the worksite from the public street and sidewalk in front of the construction. Tr. 77:1-10; 79:23-82:12; 83:25-84:13. The four compliance officers who observed and photographed Nyffeler's worksite saw its employees on the roof from a public street where the worksite was in public view. Tr. 50:5-51:4; 76-77. Nyffeler therefore lacked any reasonable expectation of privacy in its worksite, and furthermore it does not even argue that it held a subjective expectation of privacy. Because Nyffeler lacked a recognized Fourth Amendment right at its publicly viewable worksite, Nyffeler lacks the basis for a Fourth Amendment claim.

B. *Nyffeler Consented to the Inspection Because It Granted the Compliance Officers Access to the Worksite, and Did Not Demand a Warrant.*

Even if Nyffeler held a recognized Fourth Amendment interest in its worksite, Nyffeler was not subject to any "search or seizure" under the Fourth Amendment because it consented to the inspection. And Nyffeler never requested a warrant from the compliance officers, thereby waiving its assertion of the warrant requirement at this late stage. Indeed, Nyffeler concedes that valid consent to a search or seizure eliminates the need for a warrant, and that a search conducted

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with consent is not a "search or seizure" within the Fourth Amendment meaning of the terms. Nyff. Br. 34.

The Court in *Barlow's* recognized that a warrant is not required for an administrative search if "some recognized exception to the warrant requirement applies." 436 U.S. at 313. Consent is such an exception. *See, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (limiting its holding that a warrant is required for certain administrative searches of businesses by noting that "administrative entry, *without consent*," may require such procedure) (emphasis added); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting, in the criminal context, that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent"). In *Barlow's*, the Court recognized that businesses often consent to an administrative inspection, negating the requirement for a warrant. *See* 436 U.S. at 314-316 (noting that while warrantless "entry over Mr. Barlow's objection" is unreasonable, *id.* at 314, "the great majority of businessmen can be expected in normal course to consent to inspection without warrant," *id.* at 316).

Valid consent to a search is evaluated by determining if the consent was given voluntarily, "and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)). This Court in *Marshall*

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v. W. Waterproofing Co., 560 F.2d 947 (8th Cir. 1977), held that an employer lacked the basis for a Fourth Amendment claim because OSHA conducted the warrantless inspection based upon valid consent. 560 F.2d at 950-51 (finding third party consent was valid under the circumstances). Although *Western Waterproofing* was decided prior to *Barlow's*, the consent search holding remains valid because no consent was present in *Barlow's*, and the Eighth Circuit acknowledged the Fourth Amendment limits on administrative searches set out in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See*, 387 U.S. 541 (1967). *See W. Waterproofing*, 560 F.2d at 950.

In this case, owner Greg Nyffeler validly consented to the inspection when he immediately cooperated with the OSHA compliance officers and never refused entry or asked to see a warrant for the inspection. Tr. 93-96; s*ee Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) (holding OSHA's search was validly consented to even when by third party). Compliance officer Thurlby testified that upon approaching the worksite, he asked the employees on the roof who their employer was, and Greg Nyffeler came forward. Tr. 96:8-13. Compliance officer Thurlby further testified that Mr. Nyffeler was "quite cordial," and confirmed that he was "in charge of the site." Tr. 93:19-22. The compliance officer immediately explained that the scope of the inspection was the two workers on the roof without fall protection. Tr. 96:14-19. Mr. Nyffeler proceeded to

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cooperate with the inspection by asking his employees to come down from the roof, making the employees available for interview, and by providing company information on the form handed to him by the compliance officers. Tr. 94:11-97:22; 98:18-25.

Unlike the employer in *Barlow's* who refused entry to OSHA, 436 U.S. at 310, Nyffeler never asked if OSHA had a warrant, and did not deny the compliance officers entry to the worksite.[13] Mr. Nyffeler even voluntarily consented to provide a recorded interview. Tr. 118:20-119:1. Nothing in the transcript, nor any finding by the ALJ, suggests that Nyffeler's owners and employees were anything less than cooperative and consenting to the OSHA inspection. And, in its brief, Nyffeler offers no indication that it did not consent to the search. *See* Nyff. Br. 34. Considering all of the circumstances, including that the compliance officers spoke with an owner of the company who was authorized to consent, and he cooperated with the inspection without being coerced, it is plain that Nyffeler in fact consented to the inspection.

[13] The Seventh Circuit has considered such failure to request a warrant to constitute waiver of the employer's Fourth Amendment objection to the inspection. *Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) (citing *Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119, 122 (7th Cir.1981), for the proposition that an employer waives its objection to any portion of an inspection when it fails to raise them at the time of the inspection).

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C. *Because Nyffeler Consented to the Inspection, Additional Reasonableness Analysis Is Unnecessary, but Even so, OSHA's Inspection Was Reasonable.*

Nyffeler also argues that its Fourth Amendment argument remains valid even if no warrant was required—ostensibly even if it consented to the inspection and held no reasonable expectation of privacy in worksite—because "any search to gather evidence of regulatory violations must satisfy the standard [sic] reasonableness." *See* Nyff. Br. 34-35 (citing *Barlow's*, 436 U.S. at 320). The premise of this argument misconstrues the consent exception, because the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594 (1981), clearly recognized that the holding in *Barlow's* is meant to protect the "*nonconsenting* owner" from a presumptively unreasonable warrantless inspection. 452 U.S. at 601 (emphasis added) (discussing *Barlow's*, 436 U.S. at 323). The Secretary does not contend that OSHA is never required to obtain a warrant prior to an inspection. To the contrary, OSHA *does* seek an administrative warrant when an employer refuses to consent to an inspection. *See* 29 C.F.R. § 1903.4. But when, as here, the employer has no recognized privacy interest and consents by raising no objection to the inspection, the Fourth Amendment is no longer implicated.

The reasonableness tests cited by Nyffeler are inapplicable here because Nyffeler lacks a Fourth Amendment interest and consented to the inspection. *See* Nyff. Br. 35. The factors set forth by the Court in *Burger* apply to an analysis of a

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statutory provision granting authority to conduct warrantless searches even without the consent of the regulated business. *See New York v. Burger*, 482 U.S. 691, 708-16 (1987) (upholding a provision in state law permitting warrantless searches of automobile dismantling businesses after considering whether warrantless inspection was necessary to a substantial government interest, and whether the procedures incorporated constitutional protections). And, the balancing test from *O'Connor v. Ortega*, 480 U.S. 709 (1987) is inapposite here because Nyffeler has established no Fourth Amendment interest to weigh against the government's strong interest in protecting workers' safety. 480 U.S. at 719-20.

Nyffeler nonetheless asserts that this inspection was "arbitrary" and lacked a properly defined scope.[14] Nyff. Br. 36-39. Nyffeler's argument ignores the fact that the inspection was motivated by the observations of four different compliance officers who observed workers exposed to a clear fall hazard. Tr. 50-51, 76-77, 79-80. Such specific facts are not an arbitrary basis for an inspection, but rather are an objective and reasonable basis for further investigation. Furthermore, the scope of this inspection was clear when the referral was made and remained clear

[14] Nyffeler also argues that the scope of the inspection here was undefined in part because the referral was made without identifying the name of the employer. Nyff. Br. 37. While the CSHOs may not have known prior to speaking with the workers that they were employees covered by the OSH Act (and not exempt independent contractors), the inspectors were within their authority to seek that information in a reasonable manner by asking the workers who their employer was, and if they had not been covered employees, ending the potential inspection.

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when the inspecting compliance officers arrived and observed Nyffeler's employees working without fall protection. *Id.* Nyffeler has not suggested that the inspection went beyond the scope of what the compliance officers initially stated was the purpose: the lack of fall protection for two workers on a roof at its worksite on S. 199th Street. *See* Nyff. Br. 37-38; Tr. 96:14-19.

Citing to OSHA's Field Operations Manual (FOM), Nyffeler attempts to argue that OSHA's Omaha office permits "unlimited CSHO discretion" when it conducts inspections based upon a compliance officer's observations that may not have been reviewed by a supervisor. Nyff. Br. 38-39. As discussed in detail below, the FOM is merely internal guidance to assist area offices and encourage efficient use of agency resources. *See infra* at 42-43, n.18 (explaining that the FOM creates no rights or obligations); OSHA FOM Disclaimer, Sec. Add. 11. But even though the FOM is nonbinding and confers no rights, the compliance officers here complied with the guidance designed to ensure sufficient basis for initiating an inspection. The compliance officers' referral was based on "reasonable grounds to believe a violation or hazard exists," which was readily determined because the compliance officers directly observed the hazard, and so did not need to conduct further review to evaluate information from an outside source. *See* FOM at 9-9 to 9-10, App Tab 5.

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Nyffeler has pointed to no facts indicating that the compliance officers abused their position or otherwise acted unreasonably. Moreover, a compliance officer is not authorized to conduct a warrantless inspection if the employer denies consent (which is not the case here) meaning that the standards of reasonableness set forth by the Supreme Court in *Dewey*, *Burger*, and *Barlow's*—that a provision permitting warrantless searches must provide an adequate alternative to a warrant to comport with the Fourth Amendment—are inapplicable here.

D. *Neither Nyffeler's Employees nor Its Property Were Seized.*

Nyffeler also asserts that the compliance officers "seized" the company, its employees, and its business assets in violation of its Fourth Amendment rights. Nyff. Br. 40-42. This argument is wholly without merit. Nyffeler's own brief acknowledges that the seizure of an individual within the meaning of the Fourth Amendment requires a demonstration that a reasonable person would have believed he was not free to leave. *Id.* at 40-41 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). And Nyffeler also cites the factors considered by the Court in *Mendenhall*, which held that no seizure occurred where a woman suspected of drug trafficking was approached by two armed male police officers in an airport, asked to present her identification, and subsequently acquiesced to accompany the officers to an office for further questions. *Id.* at 41; 446 U.S. at 547-55.

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If the woman in *Mendenhall* was not seized, by no stretch of the imagination were Nyffeler's employees seized. The compliance officers were unarmed, did not use threatening or coercive language, did not take anyone's personal individual property, and did not physically limit anyone's freedom of movement. In fact, Greg Nyffeler stated at trial that: "I sent my guys to lunch early . . . and they came back because you wanted to interview them," and he asserted that the compliance officers also took a lunch break during which they left the worksite. Tr. 142:15-25. These statements show that the compliance officers did not attempt to restrict the movements of Nyffeler's employees, and certainly did not physically restrict their movements. Nyffeler relies on statements not in the record that the employees "reasonably believed they could not resume business operations," but it has provided no subjective or objective support for this assertion. Nyff. Br. 42. The unprotected employees come down from the roof voluntarily, but even if the compliance officers requested that the workers come down, they were merely seeking voluntary abatement of a violation of the OSH Act, and they did not restrict Nyffeler from conducting other non-violative activities. *See* Tr. 97.

Nyffeler also fails to show any facts indicating that its property was seized. Nyff. Br. 42. For property to be "seized," in the meaning of the Fourth Amendment, there must be "meaningful interference with an individual's possessory interests." *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1075 (8th

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Cir. 2009) (quoting *United States v. Jacobsen,* 466 U.S. 109, 113 (1984) (internal quotation marks omitted). The inspection here did not result in any interference with Nyffeler or its employees' possessory interests, because no property was taken or removed, and the company had access to its property at all times.

V. Even If the Court Had Jurisdiction over Nyffeler's Challenge to Its Selection for Inspection Under Section 8(a) of the OSH Act, the Argument Fails Because the Inspection Was Reasonable Under the OSH Act Where Nyffeler Consented to the Inspection and Neither the OSH Act nor Related Regulations Creates a Right to Pre-Inspection Review of a Compliance Officer Referral Based on Direct Observation of a Hazard.

Nyffeler appears to challenge its selection for inspection by OSHA as improper under section 8(a) of the OSH Act, 29 U.S.C. § 657(a), and related regulations and interpretations.[15] Nyff. Br. 12-32. Nyffeler asserts that OSHA's Omaha area office unreasonably interprets section 8(a) of the OSH Act when it permits a compliance officer to initiate an inspection based upon a referral from a colleague and the compliance officer's first-hand observation of a violation of a safety standard without first seeking approval from the Area Director. Nyff. Br. 31-32. As explained above, *supra* pp. 19-24, the Court lacks jurisdiction over this

[15] The Secretary relies on Nyffeler's statement that its challenge under section 8 of the OSH Act is "an as applied challenge, [so] the court need not reach the validity of the policy" of inspections based on CSHO referrals generally. Nyff. Br. 14 n.11. The remedy sought by Nyffeler, however, includes enjoining the practice of "unreviewed CSHO Referral Inspection," Nyff. Br. 32, which would be a more drastic remedy than necessary to make Nyffeler whole.

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argument. But even assuming jurisdiction, Nyffeler's argument fails to recognize that: (1) section 8(a) only restricts a consent inspection to the extent that it must be reasonable after it is initiated, and Nyffeler does not contest the conduct of the inspection itself; and (2) a compliance officer referral inspection is reasonable under section 8(a) because the OSH Act grants the Secretary authority to respond to safety violations and the FOM grants no rights to employers.

A. *Challenges Under Section 8(a) of the OSH Act Are Limited to the Reasonableness of the Inspection Itself, and Not the Selection of the Employer for Inspection.*

Section 8(a) and related regulations grant OSHA wide authority to enter a workplace and conduct an inspection, within reasonable times and limits, and in a reasonable manner. 29 U.S.C. § 657(a); 29 C.F.R. § 1903.3. The Supreme Court's holding in *Barlow's* only limits OSHA's authority to conduct warrantless inspections in circumstances where the employer refuses to consent to the inspection. *See* 436 U.S. at 314-15. The Secretary's authority is otherwise limited only by the reasonableness requirements under section 8(a), which address the manner in which an inspection is conducted once it has been initiated, but not the process of selecting a workplace for inspection. *See* 29 U.S.C. § 657(a). The reasonableness protections under section 8(a) of the OSH Act are therefore narrower than those under the Fourth Amendment, because the statute "requires an *actual entry* onto a site before its protections are invoked." *L.R. Willson & Sons,*

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Inc. v. OSHRC, 134 F.3d 1235, 1239 (4th Cir. 1998) (emphasis in original). But the reasonableness requirements under section 8(a) are also broader than the protections of the Fourth Amendment in that they require that even a consent inspection be conducted within the OSH Act's definition of reasonableness, whereas consent to a search waives any Fourth Amendment claim. *See id.*

As a threshold matter, Nyffeler's challenge to the manner in which it was selected for an inspection under section 8(a) of the OSH Act is precluded by its consent to the inspection because section 8(a) applies only to actions taken after the compliance officers entered the worksite.[16] *See id.*; *supra* pp. 30-31 (discussing Nyffeler's consent to the inspection). Moreover, Nyffeler raises no objections to the time, manner, scope, or general conduct of the inspection once it began. Nyff. Br. 12-32. Because Nyffeler does not challenge the manner in which the compliance officers conducted the inspection, its attempt to challenge—as a

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[16] While unpublished opinions issued prior to 2007 generally should not be cited, 8th Cir. R. 32.1A, the Secretary notes that the D.C. Circuit considered a nearly identical claim under section 8(a) of the OSH Act in *Cody-Zeigler, Inc. v. Sec'y of Labor*, No. 01-1236, 2002 WL 595167 (D.C. Cir. Mar. 15, 2002) (unpublished) (per curiam). 2002 WL 595167 at *1 ("Although consent would not have precluded Cody-Zeigler from objecting under § 8(a) to the manner in which the inspections were conducted, we find no fault in the Commission's conclusion that consent precluded Cody-Zeigler from challenging under § 8(a) the manner in which it was selected for inspections.") (citation omitted). No published opinion identified by the undersigned specifically addresses this issue. Although this opinion is available in an accessible electronic database, a courtesy copy is attached in the Secretary's Addendum. Sec. Add. 12-13.

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violation of section 8(a)—the manner in which it was selected for inspection, is barred by its consent to the inspection.

B. *OSHA's Broad Mandate to Enforce the OSH Act Authorizes Inspections Based upon a Compliance Officer's Observation of a Hazard or Violation of the OSH Act, and No Provision of the OSH Act or Related Regulations Prohibits Such an Inspection, Regardless of Whether It Is First Reviewed by a Supervisor.*

The OSH Act's expansive mandate is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b); *see also Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728 (8th Cir. 2003). Because the OSH Act is forward-looking, it "does not wait for an employee to die or become injured," before permitting enforcement action. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980). Instead, it authorizes the Secretary to carry out the "promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring." *Id; see also Brock v. Dun-Par Engineered Form Co*., 843 F.2d 1135, 1138 (8th Cir. 1988) ("the Act was not intended to be remedial so much as to 'prevent the first injury.'") (quoting *Arkansas-Best Freight System v. OSHRC,* 529 F.2d 649, 653 (8th Cir.1976)).

Nyffeler fails to point to any provision in the OSH Act or related regulations that prohibits an inspection based upon a compliance officer's observations of an ongoing current violation exposing workers to a hazard, irrespective of whether

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that information is first relayed to the area office.[17] *See* Nyff. Br. 31-32. Indeed, Nyffeler recognizes that "no regulation requires a compliance officer referring an inspection to him or herself or to a fellow CSHO" to seek authorization or rigidly follow the procedures in the FOM. Nyff. Br. 45. This is because a compliance officer who sees workers exposed to a hazard in violation of a safety standard is authorized under section 8(a) to carry out the OSH Act's mandate to strive to prevent that injury by conducting an inspection or making a referral.

Nyffeler rightly acknowledges that the OSH Act incorporates a check on the authority of the Secretary to enforce the OSH Act, namely, the Commission. Nyff. Br. 18-19; 29 U.S.C. § 661. Contrary to Nyffeler's assertion that a compliance officer making a referral inspection stands as "judge, jury, and executioner without any checks and balances," Nyff. Br. 31, a compliance officer's authority is limited to that of an inspector, whose findings are reviewed by the Area Director before a citation is issued, 29 C.F.R. 1903.14(a). A citation is subject to further review because an employer may challenge it and seek review by the Commission and a court of appeals. *See* 29 U.S.C. §§ 659-661. Nyffeler's assertion that a

[17] Nyffeler also points to no facts supporting its insinuation that the compliance officers who referred and inspected its worksite were motivated by a quota for inspections or citations (Nyff. Br. 22-24, 30-31) that would be unlawful under 29 U.S.C. § 657(h). This provision and the legislative history that led to it are irrelevant to Nyffeler's arguments, because they address a particular incentive system that Nyffeler does not even allege is in practice, and therefore is unrelated to the inspection at issue or the referral that initiated it.

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compliance officer referral inspection results in a lack of checks on the compliance officer's power overlooks the extensive protections for employers under the OSH Act, all of which serve to limit the authority of an individual compliance officer. *See id.* Not only may an employer refuse to permit the compliance officer to conduct an inspection without a warrant, but even if the employer consents to the inspection, the employer may seek at least three levels of review of any citation. *Id.*

In addition, Nyffeler discusses at length OSHA's internal enforcement guidelines, including the OSHA FOM. Nyff. Br. 24-30. Nyffeler appears to argue that OSHA's Omaha area office unreasonably interprets section 8 of the OSH Act when it permits compliance officers to initiate inspections based on their direct observations without pre-inspection supervisory review, as it alleges is required by the FOM. *Id.* In particular, Nyffeler attempts to show that Omaha did not follow the criteria and decision-making procedures in Chapter 9 of the FOM when determining whether an inspection is appropriate based upon a referral. *Id. at* 24-29.

As an initial matter, Nyffeler's attempt to create a right or obligation based on the procedures in the FOM is without merit, because the FOM is merely an informal "publication of agency enforcement guidelines." *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (discussing the lesser deference due to the FOM as compared

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to a substantive rulemaking). The contents of the FOM guide OSHA's internal operations and practices, and are "primarily directed toward improving the efficient and effective operations of [the] agency, not toward a determination of the rights of interests of affected parties." *See Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980) (describing the exemption from APA rulemaking for agency internal practice and procedure). As the Disclaimer at the front of the FOM states: "No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor . . . ." FOM Disclaimer, Sec. Add at 11. Thus, the FOM does not have the force and effect of law, bind OSHA, or confer important procedural or substantive rights or duties on regulated employers. *See Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995); *see Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (SSA "handbook for internal use" has "no legal force, and it does not bind the SSA"); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974) (ADEA conciliation officers' "handbook[] cannot have the force or effect of regulations that are binding upon the Secretary").[18]

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[18] *See also United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982) ("guideline, adopted solely for the internal administration of the IRS, rather than for the protection of the taxpayer, does not confer any rights upon the taxpayer"); *Caterpillar, Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2173, n.24 (OSHRC 1993); *H.B. Zachary Co.*, 7 O.S.H. Cas. (BNA) 2202 (OSHRC 1980) (OSHA FOM lacks the

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Even if the FOM created rights or obligations, OSHA did not violate the FOM when its compliance officers initiated an inspection based on direct observations. The FOM does not require that compliance officer referrals be reviewed by a supervisor prior to initiation of an inspection, and no provision requires rigid compliance with the decision-making guidelines or inspection criteria. *See* FOM Ch. 9, App. Tab 5. The FOM procedures for assessing incoming information generally guide OSHA area offices in evaluating and prioritizing incoming reports of alleged OSH Act violations, and ensure OSHA's compliance with the rights granted to employee and employee representative complainants under 29 U.S.C. § 657(f). *See id.* But neither of these purposes is implicated when the incoming information is a compliance officer's direct observation of an ongoing hazard. Even though "CSHO referral" is defined in the FOM in the same section as referrals and complaints from outside parties, the information is fundamentally different because it comes from within the OSHA office, rather than an unverified external source. *See* FOM at 9-2, App. Tab 5.

The FOM provides criteria that help an area office determine when an inspection is "normally warranted," under agency priorities and obligations, but meeting one of the criteria is not a rigid requirement to initiate an inspection. FOM at 9-3 to 9-4, App. Tab 5. The FOM further provides that the Area Director,

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force of law), *aff'd*, *H.B. Zachary Co. v. OSHRC*, 638 F.2d 812, 820 (5th Cir. 1981).

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"or his or her designee" evaluates whether reasonable grounds exist to believe a hazard or violation exists. FOM at 9-9, App. Tab 5. This procedure does not preclude an Area Director from authorizing compliance officers to conduct inspections based upon their direct observations of workers exposed to a hazard.

Similarly, Nyffeler's claim that compliance officers are "not allowed to just drive around and look for violations," Nyff. Br. 29, is unsubstantiated, because no written regulation or even FOM provision prohibits such activities. If an OSHA Area Director restricts compliance officers' driving activities, such an informal policy is not a legal requirement, but is merely a matter of internal personnel management. And, even if the compliance officers who referred Nyffeler's worksite for inspection intentionally drove past an area with multiple residential construction sites, Nyffeler demonstrates no prejudice as a result. As the ALJ found—and as Nyffeler admitted and does not now contest—Nyffeler's employees *were* exposed to falls from more than six feet above the ground, and had no form of fall protection in place when the compliance officers observed them. Nyff. Add. 5-9.

In short, nothing about the manner in which Nyffeler was selected for inspection constituted a violation of section 8(a), and Nyffeler demonstrates no prejudice as a result of the compliance officer referral inspection conducted at Nyffeler's worksite on February 24, 2011.

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VI. Even if the Court Finds Nyffeler Did Not Waive Its Fifth Amendment Argument, It Fails Because OSHA's Inspection Based on the Compliance Officers' Observations Does Not Violate Nyffeler's Fifth Amendment Due Process Rights.

Nyffeler argues that its Fifth Amendment due process rights were violated because OSHA did not require the compliance officers who observed Nyffeler's employees to seek additional approval before initiating an inspection. Nyff. Br. 42-47. And, Nyffeler asserts that OSHA violates the principles of equal protection by intentionally discriminating against small businesses in the residential construction industry. *Id.* at 44-46. These arguments, which were not raised in Nyffeler's petition for discretionary review, have been waived. *See supra* pp. 19-24. They are also without merit.

Nyffeler makes its equal protection argument under the Fifth Amendment's due process clause, which has been held to incorporate the general principles of equal protection under the Fourteenth Amendment, thereby applying them to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). To make a colorable equal protection claim under the Fifth Amendment due process clause, Nyffeler must either show that it is part of a group targeted because of a "suspect classification," such as race, or it must show that it was purposefully discriminated against, and that there was no rational basis for the difference in treatment. *See Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996).

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Nyffeler must show that OSHA treated small businesses in residential construction discriminatorily, and that the allegedly discriminatory application of the law was the result of "intentional or purposeful discrimination."[19] *Id.* at 721 (quoting *Snowden v. Hughes,* 321 U.S. 1, 8 (1944) ("The unlawful administration . . . [of a] statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.")). The unequal application of a facially neutral law is exemplified in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where a laundry permit law was applied in an intentionally discriminatory manner resulting in disparate treatment against one particular minority group (Chinese immigrants). *Yick Wo*, 118 U.S. 356, 6 S.Ct. 1064, 1066 (1886). The Court also considered an otherwise neutral test in *Washington v. Davis*, 426 U.S. 229 (1976), holding that even though more black job applicants failed a test requirement for employment, the police department did not violate the equal protection clause by relying on the test in hiring. 426 U.S. at 246. As discussed below, neither case cited by Nyffeler supports its argument, Nyff. Br. 43-44, because OSHA did not discriminate against any class of employers, and it

[19] Nyffeler does not argue its equal protection claim as a "class of one" claim asserting that it was individually vindictively selected, and although such an argument has been accepted in other contexts, it is not applicable here. *See Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing that an equal protection claim may be made based on a group classification, or based on a "class of one").

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did not select employers for inspection in a purposefully discriminatory manner or through the application of a subjective test.

Nyffeler attempts to argue that because the three inspections conducted by OSHA in Omaha, Nebraska, on February 24, 2011, were of small residential construction employers, OSHA purposefully singled out small businesses in residential construction for unlawfully discriminatory treatment. Nyff. Br. 44, 46. But three inspections conducted by OSHA cannot meaningfully be compared to the "invidious purpose" of the laundry permit scheme in *Yick Wo.* The aggrieved party in *Yick Wo* proved that the application of the law was intentionally discriminatory by showing that while all 200 of the Chinese immigrants' applications for permits were denied, all but one of the non-Chinese applicants' permits were granted. 118 U.S. 356, 6 S.Ct. at 1066. The "data" that Nyffeler suggests show OSHA's discriminatory treatment of small businesses in the residential construction industry amount to nothing more than three inspections on a single day, and provide no support for the assertion that OSHA targeted Nyffeler or any other worksite because of its status as a small business. Nyff. Br. 44.

That OSHA may have inspected three residential construction employers in a day, all of which may have been small businesses (which Nyffeler has not proved), demonstrates nothing more than that at least three residential construction employers appeared to be noncompliant with OSHA standards, particularly fall

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protection, in public view on that date. *See id.* Nyffeler seems to believe that OSHA may only observe residential construction sites visible to the public by happenstance. To the contrary, when OSHA's trial counsel referred to "low-hanging fruit," she was explaining that OSHA reasonably carries out its mandate to prevent harm to workers when it investigates worksites where workers are observed being exposed to a hazard, regardless of the size of the business. Tr. 246. Nyffeler's paltry evidence is grossly insufficient to support a claim of intentional discriminatory application the OSH Act, and therefore its equal protection claim fails.

Nyffeler also asserts that the practice of compliance officers conducting inspections based on observations of hazardous conditions from a public vantage point is arbitrary and subjective because those referrals are not always reviewed by a supervisor. Nyff. Br. 44-46. But "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Nyffeler does not demonstrate that it or other residential construction businesses were deliberately and arbitrarily discriminated against, because there is nothing subjective about OSHA conducting an investigation of an employer who has been observed placing its employees in hazardous conditions. Indeed, such specific information substantially supports a compliance officer's exercise of discretion to investigate further. Even if OSHA conducts an initial

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investigation to determine whether the workers are covered employees under the OSH Act, it may reasonably approach a worksite seeking voluntary information from workers or an employer, as it did in Nyffeler's case. Moreover, OSHA rationally carries out its prospective safety mandate by using compliance officer referrals to initiate consent inspections. The lack of review by a supervisor does not make this practice subjective, because the decision to initiate the inspection is based on objective and specific information that a violation of the OSH Act is likely occurring.

Nyffeler additionally claims that OSHA violates its right to procedural due process when it initiates inspections based on a compliance officer referral.[20] Nyffeler asserts that the practice of compliance officer referral inspections "contains no due process protections or procedural safeguards." Nyff. Br. 45. Although Nyffeler cites *Matthews v. Eldridge*, 424 U.S. 319 (1976), it does not conduct the due process analysis set forth in that case. Nyff. Br. 43. The *Matthews* balancing test asks the court to weigh: 1) the private interest at stake; 2) the risk of erroneous deprivation of that private right under existing procedures, and the probable value of additional procedures; and 3) the government's interest,

[20] Nyffeler also argues that the inspection conflicted with the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601, *et seq*. Nyff. Br. 47. But Nyffeler points to no specific provision of the statute that OSHA has violated, and moreover, Nyffeler has not demonstrated that it or any other small business was treated unfairly.

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including the costs of additional procedure. *Matthews*, 424 U.S. at 335.

Here, although Nyffeler has not articulated its interest, the private interest at stake may be assumed to be Nyffeler's property interest in not having its work temporarily disrupted by an OSHA inspection. Nyffeler seeks the additional procedure of requiring a compliance officer observing a hazardous condition to seek review by a supervisor prior to initiating an inspection. Nyff. Br. 45. Nyffeler has not shown that there is a real risk of error in the current process of permitting a compliance officer to conduct an inspection based on direct observation. While it argues that decisions to inspect are made arbitrarily because compliance officers do not inspect every worksite where they see workers on a roof, Nyffeler has not shown that compliance officers have erroneously inspected worksites where no violation was ultimately found, or where they had no reasonable basis to believe a violation was occurring when the inspection was initiated. *See id.* at 45-46. In Nyffeler's case, each of the facts relied upon by the compliance officers in making the referral and initiating the inspection were ultimately admitted by Greg Nyffeler. *See* Nyff. Add. 5-7. Additional review by a supervisor who had not made a direct observation would not have changed the outcome, because the inspection still had a reasonable basis.

The government has a strong interest in promptly enforcing the OSH Act's safety standards when it finds a hazard that places workers at risk of injury. While

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the burden of seeking additional review of a compliance officer's referral may not always be substantial, if the additional delay were to prevent a compliance officer from alerting a worker or employer to a hazard, and a worker were injured, then the government's interest in preventing harm to workers would be significantly hindered. Because the private interest in avoiding erroneous temporary disruption of productivity would only be very slightly affected by requiring review of a compliance officer referral, the strong government interest in prompt response to observed workplace hazards weighs heavily in favor of the current procedures.

Nyffeler's procedural due process argument also ignores all of the procedural protections for employers under the OSH Act, and the fact that the FOM does not confer any rights on employers. *See* Nyff Br. 45-46. Most importantly, as previously discussed, the OSH Act and related regulations contain significant due process for employers subject to inspections and citations, beginning with the right to refuse to permit an inspection absent a valid administrative warrant, and including the right to a hearing and review of OSHA's proposed citation. *See supra* pp. 41-42. Nyffeler has not demonstrated that those due process rights are in any way limited by a compliance officer referral inspection. Moreover, the FOM is intended to guide the agency's efficient use of resources, and does not confer any rights to employers or obligations to OSHA. *See supra* pp. 42-43, n.18. OSHA commits no constitutional violation when it

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exercises its investigative authority under section 8(a) of the OSH Act to permit a compliance officer to conduct a referral inspection, regardless of whether the specifics of OSHA's internal guidelines are followed.[21]

OSHA's inspection of Nyffeler's worksite did not violate Nyffeler's Fifth Amendment right to due process, and therefore this appeal should be dismissed.

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[21] By citing *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Rochin v. California*, 342 U.S. 165 (1952), Nyffeler seems to compare its plight of having been observed violating the OSH Act in public view to that of a criminal defendant being tried twice for the same crime (*Palko*, 302 U.S. at 321-22), or that of a criminal suspect forced to submit to a search of the contents of his stomach (*Rochin*, 342 U.S. at 166). *See* Nyff. Br. 42-43. These cases are wholly inapposite; nothing about OSHA's conduct in initiating an inspection of Nyffeler's worksite shocks the conscience or disturbs a right implicit to the concept of ordered liberty.

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CONCLUSION

For the foregoing reasons, the Court should dismiss Nyffeler's petition for review and affirm the Commission's decision.

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This brief and addendum have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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.

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