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

# REPLY BRIEF FOR APPELLANT

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## INTRODUCTION

The Secretary's Response fails to address the central issue raised by Appellant: the constitutionality of the OSHA inspectors' actions *before* inspecting Appellant's worksite. Appellant does not contend the inspection itself is a poisonous tree. Appellant's position is that the inspection is fruit of a poisonous tree. Because the inspectors exceeded the authority granted the Secretary under the Act, the authority granted to the inspectors by the Secretary, and the constitutional rights of Appellant *before* initiating the inspection, the issue of consent to the inspection is irrelevant. The critical fact here, *which is undisputed*, is that, unlike a police officer, a CSHO is *not permitted* to "patrol" the streets looking for a violation. Therefore, unlike a traffic stop, the relevant inquiry here does not begin with the "stop" or inspection, but rather the events prior to the inspection.

Here, the Secretary concedes only three inspections occurred in Nebraska on February 24, 2011. This fact proves the OSHA inspectors were on "patrol" and acting outside of their authority when they observed the violation leading to the inspection. Therefore, this court should vacate Appellant's citations and enjoin this impermissible conduct.

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## DISCUSSION

Appellant will address each section of the Secretary's Response in turn.

## I. STANDARD OF REVIEW

The only significant issue concerning the applicable standard of review concerns the Secretary's jurisdictional arguments. That being said, it is unnecessary to consider the level of deference due the district court's findings of fact and conclusions of law because it is unnecessary to review the Secretary's arguments. The district court[1] decided all of the Secretary's arguments regarding jurisdiction which are now, therefore, governed by the law-of-the-case doctrine.

## II. THE SECRETARY'S JURISDICTIONAL ARGUMENTS FAIL

It is hornbook law that a court "may (and, indeed, it must) *sua sponte* examine the issue" of subject matter jurisdiction if there is any question about the court's jurisdiction. Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 459 n.2 (8th Cir. 2000). The Secretary's argument that this court lacks subject matter jurisdiction is flawed because the Secretary fails to consider prior proceedings before the district court and this court. Specifically, the Secretary fails to consider (A) the Secretary's prior position and the waiver of arguments not raised before the

[1] The Honorable Laurie Smith Camp, Chief Judge United States District Court for the District of Nebraska.

district court, (B) the law-of-the-case doctrine as applied to the district court's transfer order and this court's order denying the Secretary's motion to dismiss, and (C) the facts found by the district court, which the Secretary did not timely appeal.

**A. Waiver**

"'Absent exceptional circumstances,' not present here, '[an appellate court] cannot consider issues not raised in the district court.'" Bell v. Pfizer, Inc., 716 F.3d 1087, 1093 & n.1 (8th Cir. 2013) (quoting Shanklin v. Fitzgerald, 397 F.3d 596, 601 (8th Cir. 2005)); Alexander v. Jensen-Carter, 711 F.3d 905, 908-09 (8th Cir. 2013) ("Because Andrew has not challenged the district court's determination that he lacked standing to appeal the bankruptcy court's decision, we deem the issue waived.") Arguments concerning subject matter jurisdiction are subject to waiver just as any other argument when not urged in prior proceedings. See United States v. 24.30 Acres of Land, 105 Fed. Appx. 134, 135 (8th Cir. 2004) (unpublished per curiam) (challenging subject matter jurisdiction does not affect an appellate court's discretion to decline to consider waived arguments (citing United States v. Century Healthcare Corp., 90 F.3d 1514, 1518 n.2 (10th Cir. 1996))).

Here, the Secretary did not object to the timeliness of Appellant's petition for review in the district court. (See Appellant's Appendix ("App.") at Tab 1). To

the contrary, in the Secretary's motion to transfer, the Secretary argued "[t]he Commission issued its Final Order on May 7, 2012," and "it [wa]s appropriate to transfer this matter." Id. at p. 4. The district court agreed, found the OSHRC "issued a final order on May 7, 2012[,]" and transferred the matter "in the interest of justice." (Appellant's Addendum to its Opening Brief ("Add.") at Tab 3). "[T]o the extent the Secretary now seeks to argue the district court committed some legal error in its analysis by relying on certain facts," White v. Smith, 696 F.3d 740, 753 (8th Cir. 2012)—such as the date of the final order being May 7, 2012—this argument was not made before the district court and is therefore waived. See, e.g., Jenkins v. Winter, 540 F.3d 742, 751 (8th Cir. 2008). As such, the Secretary "waived any challenge to the district court's finding" of jurisdiction. See XO Mo., Inc. v. City of Maryland Heights, 362 F.3d 1023, 1025 (8th Cir. 2004) (failing to appeal contested issue, party waived challenge to district court's determination on issue).[2]

[2] Cf. United States v. 24.30 Acres of Land, 105 Fed. Appx. 134, 135 ("The district court also noted that the Longs did not respond to the government when it raised the issue below. In these circumstances, we conclude the Longs waived any challenge to the district court's finding of no jurisdiction.")

### B. Law of the Case

The Secretary points to McCuen v. Am. Cas. Co. of Reading, Pa., 946 F.2d 1401 (8th Cir. 1991) to support its position the court should not adhere to the law-of-the-case doctrine. Response at p. 18. The Secretary claims the court should now reconsider the decision of the district court and the screening panel. However, the McCuen court considered this argument and rejected it:

> The major difficulty with FDIC's position on this point is that we have already decided in favor of our jurisdiction. Several months ago, the insureds made a motion to dismiss for want of jurisdiction, based essentially on the same arguments. On February 20, 1991, we denied the insureds' motion. That we have power to re-examine this decision, especially since it is a jurisdictional one, is not to be doubted. But the decision is the law of the case, ordinarily to be adhered to in the absence of clear error or manifest injustice. We see no such compelling circumstance here.

McCuen, 946 F.2d at 1403. As such, McCuen is of no help to the Secretary.

Here, like in McCuen, the court "already decided in favor of [its] jurisdiction." Id. Like in McCuen, "[s]everal months ago, the [Secretary] made a motion to dismiss for want of jurisdiction, based essentially on the same arguments." Id. Like in McCuen, the court "denied the [Secretary's] motion." Appellant concedes the court may examine jurisdictional questions at any time. Id.

However, "the decision [that this court has jurisdiction to hear this appeal] is law of the case, ordinarily to be adhered to in the absence of clear error or manifest injustice." Id. There is no such compelling circumstance here.

The Secretary filed an unopposed motion and urged the district court to transfer this matter. App. at Tab 1. The court need not and should not labor extensively to consider this second iteration of the Secretary's attempt to raise an argument directly contrary to facts it set forth before the district court. Moreover, the Secretary's flip-flop position has already been considered and rejected by this court's screening panel. See Arizona v. California, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); see also Alexander v. Jensen-Carter, 711 F.3d 905, 909 (8th Cir. 2013) ("Ms. Stephens offers several arguments to support her contention that the bankruptcy court lacked jurisdiction to evict her. We summarily reject most of her jurisdictional arguments because of the law-of-the-case doctrine.").

**C. Findings of Fact**

Whether Appellant's petition for review was timely filed is a question of fact. See, e.g., Grady v. United States, 269 F.3d 913, 919 (8th Cir. 2001)

("Whether Grady's motion was timely filed presents a question of fact."). See also Latsko v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1733 at *17 (U.S. App. Vet. Cl. Aug. 15, 2011) ("Whether a Notice of Disagreement was timely filed in a particular case is clearly a factual inquiry."); Wells v. FedEx Ground Package Sys., 2013 U.S. Dist. LEXIS 139145 (E.D. Mo. Sept. 27, 2013) ("[A]ny question as to whether their fraud claims were timely filed . . . is an issue of fact.");

The Secretary now attempts to challenge the factual finding made by the district court that Appellant's petition for review was timely. Notably, the Secretary did not appeal the district court's transfer order. Without an appeal of that order, this court is without jurisdiction to re-visit the factual findings of the district court. See Grady v. United States, 269 F.3d 913, 919 (8th Cir. 2001) ("[W]e are without authority to find the facts ourselves."). As such, this court must adopt the factual findings of the district court, and hold that Appellant timely filed its petition for review, albeit in the wrong court.

## III. APPELLANT'S ARGUMENTS HAVE BEEN PRESERVED

The Secretary next argues Appellant did not properly preserve the issues raised in its opening brief. The Secretary's argument in this regard fails for two reasons: (A) while proceeding *pro se* Appellant raised constitutional challenges to

the "fairness," the "targeting," and the unfettered discretion of inspectors; and (B) courts "[do] not require parties to exhaust administrative remedies when to do so would be pointless." In re Establishment Inspection of Kohler Co., 935 F.2d 810, 814 (7th Cir. 1991).

### A. Appellant Raised Its Arguments Before the Commission

While proceeding *pro se* before the Commission, Appellant raised the arguments in its opening brief. Admittedly, the vernacular used was less precise from a legal standpoint. This, however, does not mean Appellant waived any of the arguments. Federal courts must "liberally construe" *pro se* filings. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); In re Cook, 928 F.2d 262, 263 (8th Cir. 1991) (per curiam).

Liberally construed, Appellant raised each argument below. Appellant raised constitutional objections, which the ALJ acknowledged in its Order. App. at Tab 1. In its Petition for Discretionary Review, Appellant again raised constitutional issues of fairness and improper targeting by inspectors, which included driving around looking for violations. App. at Tab 3. At each step of the administrative process, Appellant argued OSHA's means to initiate the worksite inspection were unreasonable, unfair, and unconstitutional, which clearly embody basic Fourth and

Fifth Amendments principles. Moreover, Appellant consistently maintained that inspectors violated the purpose and spirit of the OSH Act on February 24, 2011, by driving around and looking for violations. Although Appellant did not articulate its position with the same detail during the administrative process, Appellant raised and, therefore, properly preserved each argument for this appeal.

**B. Appellant Need Not have Raised the Issues Before the ALJ**

Appellant was not required to raise its challenges before the Commission. Each of Appellant's arguments presents this court with a question of first impression.[3] This court has not opined on the issue of exhaustion of administrative remedies with regard to novel constitutional arguments. More specifically, it is unnecessary to advance a constitutional argument before an agency when the agency's jurisdiction and/or policies prohibit the tribunal from considering the merits of the argument.[4] The United States Court of Appeals for the Seventh

[3] Notably, after characterizing this case as "straightforward," the Secretary took fifty-four (54) pages to brief the issues presented.

[4] In an analogous context, the doctrine of primary jurisdiction would support this court's jurisdiction to resolve constitutional issues and challenges that the OSH Act and corresponding regulations have been violated. See, generally , Access Telecomms. v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (explaining application of doctrine (citing Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 131-32 (1915) (concluding the reasonableness of a tariff

Circuit addressed this issue and set forth apposite, persuasive reasoning. See In re Kohler Co., 935 F.2d 810, 813 (7th Cir. 1991) ([T]his Court has previously declined to apply the doctrine of exhaustion of administrative remedies in the context of challenges to OSHA inspections.").

The Seventh Circuit first examined whether exhaustion of constitutional arguments should be required in administrative proceedings in 1979. See Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979). In Weyerhaeuser, the court held an employer need not raise a Fourth Amendment challenge to a warrant authorizing an OSHA inspection before the OSHRC to preserve the issue for judicial review. Id. at 376. The court reasoned such a requirement would not serve the rationale for the rule because the factual record developed during the administrative proceedings would provide little assistance for judicial review of the issue, and there was no possibility the administrative proceedings would decide the merits of the constitutional challenge. Id. at 375-77.

Twelve years later, the court revisited and modified the holding of Weyerhaeuser. See In re Kohler Co., 935 F.2d at 813. The court noted that since Weyerhaeuser the Supreme Court articulated the relevant standards for Fourth

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is properly brought before an administrative agency, whereas a challenge alleging a tariff has been violated is properly brought before a court))).

Amendment review of OSHA warrants and the OSHRC applied these standards. Id. The court concluded: "We are thus not faced here with a case like *Weyerhaeuser* in which requiring an employer to exhaust administrative remedies would prove futile."[5] Id. at 814.

This case, however, is like Weyerhaeuser. Like the constitutional challenge considered in that decision, Appellant's constitutional challenge is novel and previously undecided. Also like Weyerhaeuser, here the OSHRC would not consider the merits of the argument. (See App. at Tab 1, ALJ Order at p. 10 (noting the ALJ does not have "the authority or the jurisdiction" to decide the constitutional challenges urged by Appellant)). As such, the Weyerhaeuser rule should be applied to Appellant's constitutional challenges.

Similarly, the Weyerhaeuser rule should be applied to Appellant's argument regarding the legitimacy of the referral inspection at issue and the general process of unreviewed referral inspections. (See Id. (noting the ALJ does not have "the authority or the jurisdiction" to decide questions concerning the authorizing statures, which would include application of the regulations authorizing referral

[5] The Secretary citation to the sentence immediately following the critical distinction is thus taken out of context. Response at 22 (citing In re Kohler Co., 935 F.2d at 813-14). Read properly, In re Kohler Co. does not support the position that courts require all constitutional challenges be raised before an agency.

inspections)). Moreover, after the ALJ made it clear he did not have "the authority or the jurisdiction" to consider the constitutional arguments and challenges to the inspectors authority to conduct unreviewed inspections raised by Appellant, continuing to urge the argument would have been pointless and contemptuous. Therefore, Appellant was not required to raise these issues before the Commission.

## IV. THE SEARCH WAS FRUIT OF A POISONOUS TREE

In the response, the Secretary attempts to reframe Appellant's argument to focus on the "search" of the worksite.[6] This is an incorrect interpretation of Appellant's position. Appellant has not raised the issue of whether a "search" violated Appellant's Fourth Amendment rights. Even if Appellant lacks standing to challenge the "search," like the passenger in an automobile Appellant has standing to challenge whether the seizure violates the Fourth Amendment.

[6] The Secretary correctly assumes Appellant's challenge is an "as applied" challenge to the referral inspection that occurred. Make no mistake, Appellant expresses grave reservations that the authorization of referral inspections is an end run around formal rule making and invalid under the Administrative Procedure Act insofar as the Secretary, through the F.O.M., has authorized a type of inspection not authorized by the relevant C.F.R. provisions. Nevertheless, the court can leave the question for another day. For, even if the referral inspection provision of the F.O.M. is permissible, which is doubtful, the way the inspectors in the Omaha office conducted such inspections clearly violates the reasonableness requirements of the OSH Act and the Fourth Amendment and general fairness required for due process.

Appellant was seized during the initial inspection and Appellant continues to be subject to periodic seizures as a result of the citations issued, *i.e.*, Appellant's mandated appearances throughout administrative proceedings to prove it is not liable. In sum, Appellant argues the holding of Brendlin v. California, 551 U.S. 249 (2007) applies here.

### A. The Plain View Doctrine Does Not Apply Here

The Secretary's first argument with regard to observations made from a public roadway is unpersuasive. The argument is flawed because it assumes the inspectors were permitted to be on the public roadway, which the Secretary cannot establish. As noted previously, CSHO's Jordan and Jacobson were impermissibly driving around looking for violations. They conducted only two inspections that day. They called CSHO Thurlby because he was out "doing referrals," which apparently in Omaha means impermissibly driving around looking for violations. Thurlby, however, only conducted one inspection that day[7]. As such, the record is insufficient to establish that Jordan, Jacobson, or Thurlby were justified in being present on the public roadway to observe the violation. Unlike a police officer, an

[7] Thurlby's only inspection was of Appellant's worksite.

OSHA inspector is not permitted to "patrol" on public roadways. (See TR 62:13-24; 68:17-20) (admitting CSHOs cannot drive around patrolling).

The proper analogy is a police officer impermissibly entering a person's home without permission and without a warrant, observing a crime, and arresting the individual. Although the crime may have been committed in "plain sight," the officer was not permitted to be standing in the place where he observed the crime. If the officer contacts a fellow officer to come and observe the crime, even if the second officer does so from a public sidewalk, his presence at the scene is fruit of the poisonous tree and cannot be used to legitimize the arrest.

Here, Appellant's challenge is to the actions of the inspectors leading up to the moment Jordan and Jacobson observed the violations at Appellant's worksite. The Secretary concedes only three inspections took place that day. Response at 48 (referring repeatedly to "the three inspections conducted by OSHA in Omaha, Nebraska, on February 24, 2011"). The first inspection Jordan and Jacobson completed (Inspection #1) took place at 6410 173rd Street. They then traveled 8.1 miles while "leaving the area," and observed a possible violation at 1206 N. 199th Street (Inspection #2). (TR 49:17-25; 50:3; 60:16-22; 69:3-6). After initiating Inspection #2, Jordan and Jacobson observed a possible violation at Appellant's

worksite and called Thurlby to conduct a referral inspection (Inspection #3). (TR 50:23-51:16; 57:17-22). Therefore, the relevant inquiry is whether Jordan and Jacobson were entitled to be present on N. 199th Street.

When the inspectors' testimony and the undisputed facts regarding the inspections actually conducted in Nebraska that day are put together, it becomes clear the inspectors were out impermissibly "patrolling" when they observed the possible violation that led to Inspection #2. Because the Secretary cannot establish Jacobson and Jordan had a permissible reason for being on the public roadway when observing the violation at Inspection #2, which led directly to observing Appellant's worksite and Inspection #3, the plain view doctrine does not apply.

**B. Acquiescence is Not Consent**

Not surprisingly, the Secretary seeks to purge the taint of the inspectors' conduct by arguing Appellant consented to the search. This argument is unpersuasive, however, because Appellant's challenge is to the seizure. While it is true there can be no seizure if a citizen voluntarily interacts with a government official, acquiescence to a show of authority does not amount to a consensual encounter. See United States v. Escobar, 389 F.3d 781, 785 (8th Cir.2004) ("The government bears the burden of showing consent was freely and voluntary

given . . . and the burden cannot be discharged by showing mere acquiescence to a claim of lawful authority."). Just as a police officer could seize an entire room (or bus) of individuals by flashing a badge and identifying him or herself as a police officer (see, e.g., Florida v. Bostick, 501 U.S. 429, 434 (1991)) an OSHA inspector can seize an entire worksite by entering the worksite, flashing credentials, and identifying him or herself as an OSHA inspector.

Like any Fourth Amendment analysis, the inquiry into whether a company was seized by virtue of an inspection must be individualized and focus on the circumstances. See United States v. Griffith, 533 F.3d 979, 983 (8th Cir. 2008) ("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."). Relevant factors to consider include the physical setting, the sophistication of the entity, and prior experience with inspections. For example, because of the sheer scope of its operations, it would take multiple simultaneous inspections and an army of inspectors to seize Tishman Construction

Corporation.[8] In the context of an OSHA inspection, the potential for criminal charges and penalties for impermissible refusals must also be considered.

Here, Appellant, through its employees, acquiesced to the show of authority by the inspectors; however, this was not a consensual encounter. Appellant's employees are not sophisticated and had no prior experience with OSHA inspections. The record does not indicate that the inspectors ever advised the employees they could refuse entry to the worksite, or that their participation and cooperation were voluntary. The threat of penalties is particularly significant here because of the "guilty until proven innocent" structure of the enforcement provisions and the availability of criminal charges for obstruction or non-compliance. As such, any reasonable person would have believed participation and cooperation was required.

### C. ALL Inspections under the OSH Act Must Be Reasonable

*ALL* OSHA inspections are subject to the reasonableness requirements of the Fourth Amendment. See Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978). The Supreme Court clearly indicated that the OSH Act does not contain the reasonableness protections of other safety legislation, such as the Mining Safety

[8] Tishman Construction served as general contractor for One World Trade Center. See http://en.wikipedia.org/wiki/Tishman_Realty_%26_Construction.

and Health Act. Therefore, all inspections conducted pursuant to the OSH Act implicate the full reach of Fourth Amendment concerns. The OSH Act also requires inspections be conducted in a "reasonable manner." See 28 U.S.C. § 657(a)(2). As discussed in Appellant's Opening Brief, courts have formulated a variety of tests to evaluate the reasonableness of inspections. Without repeating these tests, Appellant draws attention to the fact *all* OSHA inspections must be scrutinized for reasonableness. The Secretary's incorrect application of the reasonableness standard will be addressed in Section V below.

**D. Appellant's Employees and Property were Seized**

As discussed at length in Appellant's Opening Brief, whether a seizure occurs must consider the totality of the circumstances. Opening Br. at 40-42. Here, Appellant's size and the nature of its business lead to the conclusion the OSHA inspectors seized the Appellant when they initiated the inspection. Two inspectors, Thurlby and Scott, conducted the inspection. Appellant is a small business with only five employees, all of whom were present. Appellant's materials and tools were also present. The worksite, a single lot, was Appellant's only worksite at the time. Appellant had no prior experience with OSHA

inspections. Appellant's employees are not highly educated or sophisticated. The inspection paralyzed Appellant's business.

The number of inspectors is significant. It would certainly not be reasonable for OSHA to send twenty inspectors to inspect a fifty person worksite. Nor would be it be reasonable for OSHA to send two hundred inspectors to a five hundred person worksite. Nevertheless, OSHA sent two inspectors to a five-person worksite. The Secretary will argue, and Appellant will concede, a minimum of one inspector is needed to conduct an inspection. This means, however, OSHA used twice as many inspectors as it should have to conduct the inspection and unreasonably doubled the burden on Appellant.

## V. THE INSPECTION WAS NOT REASONABLE

The inspection here was not reasonable because it did not further the purpose of the OSH Act. See, generally, Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1259 (4th Cir. 1974) (discussing OSHRC vacating citation because it was "unfair" and did not "further the purposes of the Act"). Having rogue inspectors driving around "patrolling" does not further the purpose of the OSH Act. As then President Bill Clinton pointed out with ad hoc inspections driven by

inspectors, not policy, "you could get more citations, more fines, more hassle and no more safety." H.R. Rep. No. 105-445, 105th Cong., 2d Sess. At n. 2 (1998).

This point is underscored by the events here. If Jordan had called in the alleged violation he observed while traveling from one inspection to the next, a supervisor could have determined whether the observed violation was a priority, and, if so, assigned another inspector to conduct one of the two inspections. Without prior review of *each and every* inspection, OSHA cannot prioritize resources amongst possible inspections. If inspectors are free to roam and conduct ad hoc inspections, which the Secretary apparently advocates, (Response at 45), programmed inspections that could actually improve safety may never be completed. Moreover, the inspection at issue was not conducted in a reasonable manner because it was authorized and conducted pursuant to the individual preferences of inspectors without any input from supervisors or programmed initiatives.

### A. An Inspector Has NO AUTHORITY to Initiate an Inspection

The OSH Act only grants the Secretary authority to enter and inspect businesses—not an inspector. 29 U.S.C. § 657(f)(1). The Act limits the authority of the Secretary and thereby limits the authority of those working under the

Secretary, such as inspectors. Of course, the Secretary has delegated authority under the Act, which is permissible. That being said, the Secretary has not vested inspectors with the full authority granted to the Secretary. For example, an inspector cannot sign and issue a warrant or subpoena. See, e.g., F.O.M. Chp. II(A)(2)(c)(3) ("[T]he Regional Administrator, or authorized Area Director, may issue an administrative subpoena. (citing OSHA Instruction ADM 4.4)). This is logical as without a hierarchy of authority the entire agency would be ad hoc individuals pursuing individual goals rather than furthering the purpose of the Act. It follows an inspection conducted pursuant to the scope defined by an inspector or other individual lacking the authority is conducted in an unreasonable manner.

Two inspectors authorized and conducted the inspection at issue here. This is a significant fact when considering whether the inspection was (1) reasonable; (2) conducted in a reasonable manner; and (3) authorized under the OSH Act. To be permissible, the inspection must satisfy all three requirements. Appellant concedes that if the Secretary, or any individual the Secretary has vested with his full authority, authorized and conducted the inspection, it would be permissible under the Act. In this case, however, only inspectors were involved in the decision to enter and inspect. Only inspectors determined the scope of the inspection. Only

inspectors determined the manner of the inspection. Because neither Jordan, Jacobson, Thurlby, or Scott was vested with the authority of the Secretary, the inspection was not authorized under the Act and was not conducted in a reasonable manner. Therefore, the inspection also was not reasonable.

### B. The F.O.M. Defines What is Reasonable

The F.O.M. does not create rights, but it does provide evidence of what the Secretary considers reasonable. The F.O.M. decision trees are persuasive evidence of what constitutes a reasonable process for processing a referral and initiating an inspection.[9] The Secretary's position that referrals should be processed in the same manner as a non-formal or phone/fax complaint is further supported by the 2011 Federal Annual Monitoring and Evaluation (FAME) Report on the Washington Safety and Health Program. See U.S. DOL, 2011 Wash. FAME Report, available at https://www.osha.gov/dcsp/osp/efame/2011/wa_report.pdf ("FAME Report).

In the FAME Report, which was conducted by OSHA, the results of a "study focused on the state's handling of referral inspections to determine if they were being evaluated for processing under the phone and fax procedures contained in the DOSH Compliance Manual." FAME Report at 9. "The study was conducted

[9] Appellant again notes that here the inspectors did not follow the decision tree set forth in the F.O.M.

to evaluate if the state could have more expeditiously handled the referral inspections by phone/fax rather than conducting an on-site inspection." Id. In the results, OSHA seems to openly criticize the Washington Department of Safety and Health for conducting "DOSH inspections of referrals that OSHA would normally process as a phone or fax complaint." Id. The study ultimately concluded that "DOSH effectively screens referrals for alleged serious hazards to determine if they qualify for investigation under its phone and fax policy." Id. Nevertheless, it was recommended "adequate information is provided in referral case files to document the origination and determination that a referral exists." Id.

Here, Appellant's position is articulated rather well by the study results contained in the FAME Report. Referrals should be processed like a phone or fax complaint. The referral should be evaluated to determine whether an inspection should occur. The source of the referral should be documented. Here, none of this occurred. Indeed, the Secretary's response advocates for even more authority to be given to OSHA inspectors – the ability to "patrol" and drive around looking for hazards. OSHA inspectors are not police, and do not have corresponding authority. They are only able to act within the authority vested, and the record shows the inspectors agree their authority does not include the ability to "patrol." (See TR

62:13-24; 68:17-20) (admitting CSHOs cannot drive around patrolling). The inspectors here exceeded their authority and did not follow the prescribed F.O.M. referral procedures, which is further evidence of unreasonableness.

## VI. THE INSPECTION HERE WAS FUNDAMENTALLY UNFAIR

The Secretary first claims there is no invidious purpose here. The Secretary also claims Appellant has failed to adduce sufficient evidence for this court to find otherwise. The Secretary argues the fact all three inspections conducted on February 24, 2011, targeted small residential construction builders is insufficient to establish any violation of the Fifth Amendment. Somewhat surprisingly, the Secretary again tries to justify the targeting of "low hanging fruit." Response at 46-53. As Appellant noted in its Opening Brief, general dictates of fairness, which have been codified in Small Business Regulatory Enforcement Act ("SBREFA"), prohibit these actions.

The federal courts have long been willing to look past manufactured explanations to identify clearly discriminatory policies. Most recently, in Romer v. Evans, 517 U.S. 620 (1996), the Supreme Court struck down a state constitutional amendment in Colorado preventing protected status based upon sexual orientation, which purportedly was intended to ensure all persons were treated equally. On its

face, the amendment ensured equal treatment by prohibiting protected status based on sexual orientation. Id. By striking down the law, the justices, in essence, applied the well-known duck test and held the law had a discriminatory intent.[10]

Here, there is no coincidence when every inspection conducted on February 24, 2011, targeted the same type of business. OSHA saw small construction businesses as "low hanging fruit." They knew these businesses lacked the resources to "lawyer up" and contest citations. They knew the proprietors of these businesses may be unsophisticated and unfamiliar with the OSH Act, including the right to demand a warrant before an inspection. They used that knowledge to vindictively target businesses like Appellant's. Such actions go to the very heart of due process. A government should never selectively target its citizens. Perhaps this principle is best illustrated by Lady Justice, blindfolded and weighing only the merits of the case.

[10] See Dole v. Williams Enterprises, Inc., 876 F.2d 186, 191 n. 1 (D.C. Cir. 1989) ("For purposes of this case, we wholeheartedly embrace the now-infamous 'duck test,' dressed up in appropriate judicial garb: 'WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.").

## CONCLUSION

The inspectors here decided they wanted to be police officers. The Secretary advocates in favor of inspectors "patrolling." Unfortunately for them, but luckily for business owners, neither Congress nor the Secretary vested inspectors with police powers. For the reasons set forth above and in its Opening Brief, 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, and award Appellant attorney fees and costs.

Dated: December 23, 2013.

Respectfully submitted,

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**CERTIFICATES OF SERVICE**
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/s/Kenneth M. Wentz III

**CERTIFICATE OF COMPLIANCE**
**AND VIRUS FREE ELECTRONIC VERSION OF BRIEF**

I, Kenneth M. Wentz III, 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 Reply Brief contains 5,373 words, which complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B)(ii) in that it is no more than half the length of Petitioner's Opening Brief, which contained 11,009 words.

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

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

Dated: December 23, 2013.

JACKSON LEWIS P.C.

/s/Kenneth M. Wentz III

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