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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

KENRIC STEEL, LLC,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR, *et al.*,

Defendants.

Case No. 1:24-cv-09221-KMW-SAK

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

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INTRODUCTION

In January 2024, the Occupational Safety and Health Administration (“OSHA”), a component of the Department of Labor (“Labor”), issued two citations to Plaintiff Kenric Steel that identified a series of workplace safety violations under the Occupational Safety and Health Act (the “OSH Act” or “Act”), 29 U.S.C. § 651 *et seq.* Those citations, and Plaintiff’s contestation of those violations, initiated an administrative proceeding before an administrative law judge (“ALJ”) of the Occupational Safety and Health Review Commission (“OSHRC” or the “Commission”) that is now currently stayed. Put simply, with the filing of this suit, Plaintiff attempts to short-circuit OSHRC’s administrative process before it even begins by raising a series of constitutional and statutory claims against OSHA, the Secretary of Labor (the “Secretary”), the Solicitor of Labor (the “Solicitor”), OSHRC, the Chair of OSHRC, and the OSHRC ALJ overseeing the administrative proceeding (collectively, “Defendants”)—none of which has merit.

First, as to its for-cause removal claims against OSHRC commissioners and ALJs (Counts I and II), Plaintiff has failed to state a plausible claim for relief. It offers no allegations that the statutory removal protections actually caused any compensable harm to Plaintiff, as required under *Collins v. Yellen*, 594 U.S. 220 (2021). And in any event, any constitutional remedy would necessarily be limited to severance of the offending provision, not permanent injunctive or declaratory relief. Plaintiff likewise attempts to bolster its ALJ removal claim by arguing, in tandem, that ALJ Patrick B. Augustine—who has been assigned to oversee the administrative proceeding against Plaintiff—was unconstitutionally appointed by the Chair of OSHRC (Count II). But that claim runs headlong into well-settled Supreme Court precedents, which hold that agencies like OSHRC may lawfully appoint inferior officers such as ALJ Augustine so long as

such appointments are ratified by the entire Commission. That the Commission did so here before the administrative proceeding had commenced belies any claim for relief.

Second, Plaintiff asserts that the administrative proceeding before the OSHRC ALJ violates its Seventh Amendment right to a jury trial before an Article III court (Count III). But as Plaintiff itself concedes, such a claim suffers from a litany of defects. Not only does this Court lack jurisdiction to review such a claim, but the Supreme Court, in both *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977) and *SEC v. Jarkesy*, 603 U.S. 109 (2024), has now twice recognized that the OSH Act created a new cause of action and attendant remedies—unknown to the common law—that do not implicate any Seventh Amendment right to a jury trial before an Article III court.

Finally, Plaintiff asserts that the Labor Solicitor’s prosecution of the administrative proceeding against it violates the OSH Act because the Attorney General of the Department of Justice did not supervise that prosecution (Count IV). But the OSH Act does not create a private right of action for Plaintiff to assert such a claim. Nor has Plaintiff demonstrated any procedural right, let alone any concrete interest in such “supervision” by the Attorney General, to satisfy Article III standing. Even on the merits, Plaintiff fails to establish judgment in its favor as a matter of law. Both the text and legislative history make clear that the Attorney General’s “direction and control” over such prosecutions is limited to that of civil litigation, not administrative proceedings before an expert agency tribunal.

At bottom, Plaintiff seeks unwarranted declaratory and injunctive relief on each of its claims. And while Plaintiff seemingly vacillates between seeking preliminary and permanent injunctive relief, one thing remains clear: Plaintiff fails to establish success on the merits on any of its claims, let alone any irreparable harm stemming from the purported constitutional defects it

raises with respect to OSHRC’s structure, or the alleged lack of supervision by the Attorney General. Accordingly, for the reasons set forth below, the Court should deny Plaintiff’s request for summary judgment and/or injunctive relief and dismiss the First Amended Complaint in its entirety.

BACKGROUND

I. Statutory and Regulatory Scheme

In 1970, Congress enacted the OSH Act, which established a comprehensive regulatory scheme designed “to assure so far as possible . . . safe and healthful working conditions” for “every working man and woman in the Nation.” 29 U.S.C. § 651(b). *See generally Atlas Roofing*, 430 U.S. at 444–45. To achieve this objective, the Act assigns distinct tasks to two different entities: the Secretary of Labor and OSHRC, an independent federal agency with a three-member appeals board appointed by the President with the advice and consent of the Senate. 29 U.S.C. §§ 651(b)(3), 661.

The Act charges the Secretary with setting and enforcing workplace health and safety standards, which are established through the exercise of rulemaking powers. *See Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 147 (1991); 29 U.S.C. § 655. If the Secretary, or the Secretary’s designee—here, OSHA¹—determines upon inspection or investigation that an employer is failing to comply with standards promulgated under the Act, the Secretary is authorized to issue a citation and assess the employer a proposed monetary penalty. *Martin*, 499 U.S. at 147; 29 U.S.C. §§ 657–659, 666. By contrast, OSHRC is assigned to “carry[] out adjudicatory functions” under the Act. 29 U.S.C. § 651(b)(3). Meaning, if an employer

¹ The Secretary has delegated this authority to OSHA. *See* U.S. Dep’t of Lab., *Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health*, 90 Fed. Reg. 27878 (June 30, 2025), available at <https://perma.cc/7JJK-TZFC>.

contests a citation issued by the Secretary (or her designee), that employer is entitled to an evidentiary hearing before an OSHRC ALJ, who will “thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation or proposed penalty.” *Id.* § 659(c). The OSHRC ALJ’s ruling following that administrative hearing becomes a final order unless a member of the Commission directs review. *Id.* § 661(j). Both the employer and the Secretary have the right to seek review of an adverse OSHRC order in an appropriate United States court of appeals, which must treat as “conclusive” any findings of fact that are “supported by substantial evidence.” *Id.* § 660(a)–(b).

II. Factual Background and Procedural History

On or about July 26, 2023, OSHA began investigating Plaintiff’s safety and health conditions and protocols in response to a complaint. First Am. Compl. (“FAC”) ¶ 107, ECF No. 21. Upon completion of that investigation, which included an on-site inspection, the Secretary issued two citations that notified Plaintiff of certain OSHA violations, including but not limited to, a failure to: conduct annual inspections of overhead cranes; ensure proper use of welding screens; train new hires on chemical safety; ensure grounding and bonding of a spray finishing process; label containers and maintain safety data sheets for chemicals; and install the correct circuit breakers to operate lights. *See* Citations 1 & 2 attached to Compl. (“Citations 1 & 2”), *Kenric Steel, LLC*, (OSHRC No. 24-0192 July 11, 2024), ECF No. 27-1, Ex. 3. Those two citations, issued on January 22, 2024, further ordered Plaintiff to abate certain identified OSHA violations. *See, e.g., id.*, Citation 1, Item 2a; Citation 1, Item 2b; Citation 1, Item 3; Citation 1, Item 5a; Citation 1, Item 5b; Citation 2, Item 1.

On February 7, 2024, Plaintiff filed a Notice of Contest, and the Secretary filed a complaint before OSHRC on July 11, 2024. *See* FAC ¶ 120.² As of this filing, ALJ Augustine—whose appointment was ratified by the full Commission—has been assigned to preside over the administrative proceeding. That proceeding has been temporarily stayed until September 24, 2025, in light of the instant case.

On September 17, 2024, Plaintiff filed its complaint for declaratory and injunctive relief before this Court, challenging (1) the for-cause removal protections afforded to OSHRC commissioners and ALJs, (2) ALJ Augustine’s appointment by the Chair of OSHRC, (3) the absence of a jury trial before an Article III court, and (4) the lack of “direction and control” of the Attorney General of the Department of Justice over the Solicitor’s prosecution of Plaintiff. *See generally* Compl., ECF No. 1. On April 7, 2025, Plaintiff filed its First Amended Complaint, asserting nearly identical claims, even after Defendants provided evidence that ALJ Augustine’s appointment was ratified by the full Commission. *See generally* FAC; Pl.’s Stmt. of Undisputed Facts in Supp. of Pl.’s Mot. for Summ. J (“Pl.’s SUF”) ¶ 9, ECF No. 27-3.

LEGAL STANDARDS

Rule 12(b)(1). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a court’s jurisdiction over the subject matter of the suit. The motion may either attack the Court’s subject matter jurisdiction by asserting that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based, or may assert that as a factual matter, the plaintiff cannot meet her burden of establishing jurisdiction. *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 268 (3d Cir. 2016). Under the latter approach, the Court may consider

² The parties dispute the date on which the administrative complaint was filed before OSHRC, but that slight difference in dates is immaterial for purposes of this case.

“competing facts” to determine whether subject matter jurisdiction exists. *Id.* (citing *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)). Moreover, “[i]t is to be presumed that a cause lies outside” a federal court’s limited jurisdiction, and the “burden of establishing the contrary rests upon” the plaintiff. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Rule 12(b)(6). A complaint is subject to dismissal if it fails to allege facts that state a plausible claim for relief rising “above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Legal conclusions, “naked assertions devoid of further factual enhancement,” and “a formulaic recitation of the elements of a cause of action” are insufficient to state a plausible claim. *Id.* (cleaned up); *Twombly*, 550 U.S. at 555.

Rule 56(a). “In deciding a motion for summary judgment, the court must construe the facts and inferences in a light most favorable to the nonmoving party.” *Stepan Co. v. Callahan Co.*, 568 F. Supp. 2d 546, 549 (D.N.J. 2008) (citing *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986)). “The summary judgment standard is not affected when the parties file cross-motions for summary judgment.” *Id.* And, “[i]f after review of cross-motions for summary judgment the record reveals no genuine issues of material fact, then judgment will be entered in favor of the deserving party in light of the law and undisputed facts.” *Id.* (citing *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 302 (3d Cir. 1998)); Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

Injunctive Relief. To obtain a permanent injunction, courts must consider whether “(1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest.” *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001). *Accord eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (plaintiff must demonstrate that she has suffered an irreparable injury, that remedies at law are unavailable to compensate for that injury, and that the balance of equities and the public interest warrant a permanent injunction). Unlike a preliminary injunction, a permanent injunction also requires a plaintiff to demonstrate “actual[] succe[ss] on the merits,” rather than likelihood of success. *CIBA–GEIGY Corp. v. Bolar Pharm. Co., Inc.*, 747 F.2d 844, 850 (3d Cir. 1984). *See also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

ARGUMENT

Whether framed as a request for preliminary or permanent injunctive relief, Plaintiff has failed to meet its burden of establishing that such an “extraordinary remedy” is warranted. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32 (2008). That is, Plaintiff fails to demonstrate, as a matter of law, any plausible constitutional or statutory claim, let alone any irreparable harm stemming from those meritless claims. Because of those threshold defects, and the balance of equities and the Government’s interest in enforcing safety and health conditions in workplaces throughout the Nation, the Court should deny Plaintiff’s request for declaratory and injunctive relief and dismiss the First Amended Complaint altogether.

I. Plaintiff’s Claims Fail As a Matter of Law

Because Plaintiff seeks to permanently enjoin the implementation of a duly enacted federal statute, it must demonstrate, at the threshold, that it will actually prevail on the merits. Plaintiff

does no such thing. To the contrary, Plaintiff fails to even state any plausible claim—let alone establish actual success on the merits—as to its claims of unconstitutional removal or appointment (Counts I and II), right to trial by jury before an Article III court (Count III), or any procedural right to prosecutorial supervision by the Department of Justice in an administrative proceeding (Count IV). Accordingly, Plaintiff’s threshold failures require denial of Plaintiff’s claim for summary judgment and/or injunctive relief and dismissal of the First Amended Complaint.³

A. Plaintiff Fails to Establish a Plausible Article II Removal Claim

Plaintiff’s removal claims against the Commission and its ALJs (Counts I and II) fail at the outset because it cannot show any compensable harm attributable to those challenged removal restrictions, as required under the Supreme Court’s decision in *Collins*. 594 U.S. at 259–60. Thus, the Court need not reach the merits of Plaintiff’s removal claims. But even if it did, Plaintiff cannot show entitlement to permanent injunctive relief, because the proper remedy for an unconstitutional removal protection is severance of the offending statutory provision(s).

1. Plaintiff Fails to Establish Compensable Harm Attributable to the Challenged Removal Restrictions

Under the Supreme Court’s decision in *Collins*, a plaintiff challenging a federal official’s

³ It is unclear whether Plaintiff seeks preliminary or permanent injunctive relief. Compare Pl.’s Br. at 23 (stating that “The Public Interest Favors This Preliminary Injunction”), *with id.* at 4–5 (relying on the more demanding standard for permanent injunctions). That conflation, however, makes no difference, as Plaintiff fails to establish actual success on the merits under either standard. Moreover, with respect to Defendants’ cross motion to dismiss, the Court may consider “an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document.” *Miller Indus. Towing Equip. Inc. v. NRC Indus.*, 582 F. Supp. 3d 199, 203 (D.N.J. 2022) (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). However, to the extent the Court considers “any other matters outside the pleadings,” it may treat a Rule 12(b)(6) motion as a motion for summary judgment under Rule 56. *Id.*

statutory removal protections under Article II of the U.S. Constitution is entitled to relief only when it can show that the challenged protection “inflict[ed] compensable harm” on the plaintiff. 594 U.S. at 259. Here, Plaintiff seeks to enjoin the OSHRC proceeding against it, arguing that the for-cause removal protection for OSHRC commissioners, 29 U.S.C. § 661(b), and the multiple layers of removal protections for OSHRC ALJs and the Merit Systems Protection Board (“MSPB”), 5 U.S.C. §§ 1202(d), 7521, are unconstitutional, *see* Pl.’s Br. in Supp. of Mot. for Summ. J. (“Pl.’s Br.”) at 7, 14, ECF No. 27. But Plaintiff does not even attempt to demonstrate that those challenged removal protections “inflict[ed] compensable harm” upon it. *Collins*, 594 U.S. at 259. That fundamental failure ultimately dooms Plaintiff’s Article II removal claims as to both the OSHRC commissioners and ALJs.

In *Collins*, the Supreme Court provided two “clear-cut” examples of actual harm attributable to a challenged removal restriction: (1) where “the President had attempted to remove [the officer] but was prevented from doing so by a lower court decision holding that he did not have ‘cause’ for removal,” or (2) where “the President had made a public statement expressing displeasure with actions taken by [the officer] and had asserted that he would remove [the officer] if the statute did not stand in the way.” 594 U.S. at 259–60. Here, there is no suggestion that the President has attempted to remove any commissioner or ALJ, much less that he was frustrated from doing so by any statutory provision. Nor has Plaintiff even alleged that the President has expressed displeasure with any action taken by those officials, let alone the ALJ presiding over Plaintiff’s now-stayed administrative proceeding. *Cf.* Pl.’s Br. at 22 (suggesting, in the abstract, that “harm exists even if a President does not actively desire to remove a particular ALJ”). *See also Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

Instead, Plaintiff asserts that being subject to an “unconstitutional proceeding” constitutes “irreparable harm.” Pls.’ Br. at 22. But the Third Circuit, in line with the Supreme Court, squarely rejected similar assertions of “irreparable harm,” concluding that “[t]his presupposition of harm” “is foreclosed by *Collins* and its progeny because there must be an actual, compensable harm in order for there to be an injury from an impermissible insulation provision.” *CFPB v. Nat’l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 615 (3d Cir. 2024) (citing *Kaufmann v. Kijakazi*, 32 F.4th 843, 850 (9th Cir. 2022)), *cert. denied*, 145 S. Ct. 984 (2024). In other words, “an impermissible insulation provision does not, on its own, cause harm,” and Plaintiff’s “mere allegation that the unconstitutional provision inherently caused them harm is insufficient.” *Id.*⁴

Unable to point to any compensable harm against it, Plaintiff separately argues that the challenged removal restrictions inflict harm because (1) “the mere potential for removal influences how rational ALJs carry out their duties,” and (2) removal protections produce “administrative bureaucracy” on “regulated parties” and “ordinary Americans” without “electoral accountability.” Pl.’s Br. at 7, 22 (citation omitted). But these generalized allegations of harm do not cure the *Collins* defect in Plaintiff’s claims. To the contrary, as the Third Circuit recently held, such an

⁴ To the extent Plaintiff asserts that it does not need to show concrete harm because it seeks to enjoin the OSHRC before it can issue a decision, *see* Pl.’s Br. at 22, that argument is likewise foreclosed. “*Collins* did not rest on a distinction between prospective and retrospective relief,” *Cnty. Fin. Servs. Ass’n of Am. v. CFPB*, 51 F.4th 616, 631 (5th Cir. 2022), *rev’d on other grounds*, 601 U.S. 416 (2024), and the required showing of harm “remains the same whether the petitioner seeks retrospective or prospective relief,” *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *cert granted & rev’d on other grounds*, 598 U.S. 623 (2023) (per curiam). *See also Bhatti v. Fed. Hous. Fin. Agency*, 97 F.4th 556, 561 (8th Cir. 2024) (citing *Community Financial Services* and *Calcutt* with approval); *Leachco, Inc. v. Consumer Prod. Safety Comm’n*, 103 F.4th 748, 765 (10th Cir. 2024) (affirming the denial of a preliminary injunction because plaintiff failed to show “how the allegedly unconstitutional removal protections . . . actually affected, or will affect, the [agency’s] actions against it”), *cert denied*, 145 S. Ct. 1047 (2025); *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024) (denying injunction pending appeal).

assertion—“that the ALJ in this case ‘might have altered his behavior’ if there were closer presidential supervision”—“is simply speculation.” *Nat’l Lab. Rels. Bd. v. Starbucks Corp.*, 125 F.4th 78, 88 (3d Cir. 2024) (citations omitted). Likewise, Plaintiff’s secondary and hypothetical harms of “administrative bureaucracy” and lack of “electoral accountability”—applicable to any member of the public—only underscore that Plaintiff has not alleged, let alone established, any causal “link” “between the removal provision[s] and [Plaintiff’s] case.” *CFPB*, 96 F.4th at 615 (citation omitted). Plaintiff’s failure to “causally link[] a specific, tangible harm to the for-cause removal provision[s]” belies any notion of actual, compensable harm under *Collins. Bhatti*, 97 F.4th at 561 (citation omitted).

Because Plaintiff fails to demonstrate any compensable harm, the Court should reject Plaintiff’s removal challenges to the OSHRC commissioners and ALJs in line with every other court of appeals to have considered the issue. *See, e.g., CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023) (explaining that under *Collins*, a plaintiff must show “but-for causation” between the “unconstitutional removal protection [and] the complained-of agency action”), *cert. denied*, 144 S. Ct. 2579 (2024); *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *Cnty. Fin. Servs.*, 51 F.4th at 632–33; *Calcutt*, 37 F.4th at 317–20; *Kaufmann*, 32 F.4th at 849–50; *Leachco*, 103 F.4th at 763–64; *Rodriguez v. SSA*, 118 F.4th 1302, 1315 (11th Cir. 2024); *Bhatti*, 97 F.4th at 561.⁵ Accordingly, the Court should deny Plaintiff’s motion for summary judgment on Counts I and II and either dismiss those claims or enter judgment in the Government’s favor.

⁵ Although Plaintiff points to the commissioners’ term limits and staggered terms, *see* Pl.’s Br. at 6, those allegations relate to the President’s ability to appoint, not any imposition on his power to remove. A “prescribed term of office imposes only a ceiling on an appointee’s length of service, not a guaranteed tenure.” *Severino v. Biden*, 71 F.4th 1038, 1042 (D.C. Cir. 2023).

2. Plaintiff Is Not Entitled to Injunctive Relief Because the Removal Protections Are Severable

Even if Plaintiff had demonstrated compensable harm attributable to the challenged removal protections under *Collins* (it has not), the proper remedy would be to sever the unconstitutional removal protection, not enjoin the administrative proceeding. “[W]hen confronting a constitutional flaw in a statute,” courts generally “limit the solution to the problem,” severing the “problematic portions while leaving the remainder intact.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation omitted). The Supreme Court has taken this approach in every instance over the past fifteen years in which it has found a structural constitutional defect in the appointment or removal provisions of a statute. *See id.* at 508–09 (rejecting argument that unconstitutionally structured board should be precluded from exercise of authority and instead excising removal protections); *Seila Law, LLC v. CFPB*, 591 U.S. 197, 233–38 (2020) (plurality opinion) (severing removal protections).

Take the Supreme Court’s plurality decision in *United States v. Arthrex, Inc.*, for example. 594 U.S. 1, 23–25 (2021) (plurality opinion). There, instead of declaring “the entire regime of inter partes review unconstitutional,” the Court remedied the unconstitutional offense (*i.e.*, the administrative patent judges’ unreviewable authority over inter partes proceedings), by concluding that the Director of the Patent and Trademark Office—who is appointed by the President and confirmed by the Senate—“may review final [Patent Trial and Appeal Board] decisions and, upon review, may issue decisions himself on behalf of the Board.” *Id.* Similarly, here, the Court should fashion any relief “giv[ing] ‘full effect’ to the Constitution and to whatever portions of the statute are ‘not repugnant’ to the Constitution, [by] effectively severing the unconstitutional portion of the statute.” *Id.* at 24 (citation omitted). The Court can do so here by severing the for-cause removal restriction in 29 U.S.C. § 661(b), which provides that “[a] member of

the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 29 U.S.C. § 661(b). Doing so would cure the allegedly unconstitutional removal protections for OSHRC commissioners and ALJs in a narrowly tailored fashion, as instructed by the Supreme Court.⁶

B. Plaintiff Fails to Establish that the ALJ’s Appointment Violated Article II

Article II prescribes that Congress may “vest the Appointment” of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2. Here, Plaintiff argues that neither the Chair nor the full Commission satisfies the “Head of Department” requirement, and thus, ALJ Augustine was unconstitutionally appointed. Pl.’s Br. at 11. That argument, however, suffers from a variety of defects, all of which compel dismissal of this claim (Count II).

As an initial matter, Plaintiff fails to demonstrate any harm stemming from this particular appointment. That omission makes logical sense, as Plaintiff’s primary argument—that the OSH Act allows only the Chair to make appointments—has been obviated by subsequent events. That is, while ALJ Augustine was initially appointed by the Chair, that appointment was subsequently ratified by all OSHRC commissioners before any proceeding against Plaintiff commenced. Pl.’s SUF ¶ 9 (conceding that in 2019, “the full Review Commission ratified Defendant Judge Augustine’s appointment”); *see also Free Enter.*, 561 U.S. at 510 (recognizing that ratification of the appointment by the full Commission satisfied constitutional limits on appointment power); Pl.’s Br. at 13 (conceding, in part, that “only the ‘full Commission’ could exercise its Appointments Clause power”).

⁶ Plaintiff argues that OSHRC’s ALJs are subject to three layers of removal protections. *See* Pl.’s Br. at 14. To the extent the MSPB creates another layer of removal protections, that provision can be severed too.

Plaintiff nevertheless argues that OSHRC is not a “Department” under the Appointments Clause, because it was neither “expressly ‘created and given the name of a department’ by Congress,” nor considered “‘a great division of the executive branch of the government, like the State, Treasury, [] War,’ Labor, Education, and so on.” Pl.’s Br. at 12 (relying on *Freytag v. Comm’r*, 501 U.S. 868, 886 (1991)). But in concluding that an Article I tax court did not constitute a “Departmen[t],” the *Freytag* Court did not address “any question involving an appointment of an inferior officer by the head of one of the principal agencies.” 501 U.S. at 887 n.4 (alteration in original). Instead, the Supreme Court, nearly two decades later, answered *Freytag*’s open question in *Free Enterprise*, holding that “for the purposes of the Appointments Clause,” the SEC “constitutes a ‘Departmen[t]’” because it “is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component.” *Free Enter.*, 561 U.S. at 511 (alteration in original). So too here; OSHRC represents a freestanding component of the Executive Branch: it is a congressionally created principal agency, separate and apart from the Department of Labor and OSHA. *See* OSHRC, *Occupational Safety and Health Review Commission*, available at <https://perma.cc/44GZ-RH6M> (“OSHRC is a completely independent agency that is not part of the Department of Labor or OSHA. This ensures that OSHA’s enforcement actions are carried out in accordance with the law.”); Pl.’s Br. at 11 (recognizing that OSHRC is an “independent federal agency”).

Plaintiff does not dispute that fact but argues, instead, that OSHRC cannot be considered a principal agency, because OSHRC lacks “rulemaking and enforcement authority.” Pls.’ Br. at 13. Plaintiff provides no *legal* support for that proposition; nor could it. Neither *Freytag* nor *Martin* adopted Plaintiff’s definition. And in *Freytag*, the Court included the Central Intelligence Agency—an agency that lacks rulemaking and enforcement authorities—as an illustrative example

of a principal agency. *Freytag*, 501 U.S. at 887 n.4. Put differently, Plaintiff cannot escape *Free Enterprise*'s clear command: the term "Departmen[t]," at least under the Appointments Clause, cannot be limited to executive cabinet agencies but instead must be read to be consistent with the "common, near-contemporary definition of a 'department,'" *i.e.*, as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." 561 U.S. at 511 (alteration in original) (citations omitted). Thus, "Department[]," for purposes of the Appointments Clause, necessarily includes independent agencies like OSHRC, and ALJ Augustine's appointment, as ratified by the full Commission, satisfies Article II. *See Freytag*, 501 U.S. at 919 (Scalia, J., concurring in part & concurring in judgment) ("This evident meaning—that the term 'Departments' means all independent executive establishments—is also the only construction that makes sense of Article II, § 2's sharp distinction between principal officers and inferior officers.").

It is against this legal and factual backdrop that Plaintiff nevertheless asks this Court to declare "the OSH Act's appointment process" to be "unconstitutional." Pl.'s Br. at 14. But to the extent any constitutional remedy is warranted even after the now-properly ratified appointment, the Court need not enjoin any forthcoming administrative proceeding or provide declaratory relief. Rather, just as in the removal context, it may simply sever the "problematic portions" of the OSH Act that grants sole appointment authority of ALJs to the Chair alone. *See supra* § I.A.2; 29 U.S.C. § 661(e), (f).⁷

⁷ Indeed, even if the language allowing appointment of OSHRC ALJs by the Chair is severed, section 12(j) of the OSH Act contemplates such appointments by the Commission. *See* 29 U.S.C. § 661(j) ("A[] administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding . . .").

C. The Court Lacks Jurisdiction Over Plaintiff’s Meritless Seventh Amendment and Article III Claim

Plaintiff’s Seventh Amendment and Article III challenge to the stayed OSHRC proceeding is not properly before this Court. The Supreme Court has repeatedly held that district courts lack jurisdiction over claims like Plaintiff’s, which attempt to bypass an exclusive remedial scheme established by Congress. *See, e.g., Elgin v. U.S. Dep’t of Treasury*, 567 U.S. 1 (2012); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). That remains true, even in the wake of the Supreme Court’s decision in *Jarkesy*. *See, e.g., Yapp USA Auto. Sys., Inc. v. NLRB*, 748 F. Supp. 3d 497, 511–15 (E.D. Mich. 2024), *appeal filed*, No. 24-1754 (6th Cir. argued June 12, 2025), *stay pending appeal denied*, No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024), *application for writ of injunction denied*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024); *Blankenship v. Fin. Indus. Regul. Auth.*, No. 24-3003, 2024 WL 4043442, at *2–3 (E.D. Pa. Sept. 4, 2024).

Determining whether Congress has impliedly divested district court jurisdiction over agency action involves a two-step inquiry under *Thunder Basin*. *See Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 195 (3d Cir. 2018). First, courts ask “whether Congress’s intent to preclude district court jurisdiction is ‘fairly discernible in the statutory scheme.’” *Id.* (quoting *Thunder Basin*, 510 U.S. at 207). Here, Congress’s intent is clear: the OSH Act expressly and exclusively channels judicial review of “an order of the Commission” to “any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit.” 29 U.S.C. § 660(a).

Having established that Congress intended to preclude district court jurisdiction, courts next ask “whether [Plaintiff’s] claims are of the type Congress intended to be reviewed within this statutory structure.” *Thunder Basin*, 510 U.S. at 212. At this step, Plaintiff must establish that (1)

“a finding of preclusion could foreclose all meaningful judicial review;” (2) “the suit is ‘wholly collateral to [the] statute’s review provisions;” and (3) “the claims are ‘outside the agency’s expertise.”’ *Free Enter.*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212–13). Plaintiff fails to establish any of these required factors, let alone all three.

The first factor—whether preclusion of district court jurisdiction would foreclose all meaningful judicial review—is the “most important.” *Bennett v. SEC*, 844 F.3d 174, 183 n.7 (4th Cir. 2016). It is well established that “adequate judicial review does not usually demand a district court’s involvement. Review of agency action in a court of appeals can alone ‘meaningfully address’ a party’s claims.” *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 190 (2023) (brackets omitted) (quoting *Thunder Basin*, 510 U.S. at 215; citing *Elgin*, 567 U.S. at 21). Indeed, in line with *Axon*, the Third Circuit has similarly recognized that a statutory scheme provides “meaningful judicial review,” even if it requires litigants to begin in an administrative forum, so long as an appeal to an Article III court is available. *Adorers*, 897 F.3d at 195; see also *Massieu v. Reno*, 91 F.3d 416, 420 n.4 (3d Cir. 1996) (“[T]he [*Thunder Basin*] Court’s fundamental point, we think, was that both statutory and constitutional claims could be meaningfully addressed in the court of appeals.”). That is indisputably the case here. If Plaintiff obtains an adverse decision before the Commission, an appropriate court of appeals—where the alleged violation occurred, where the employer has its principal office, or the D.C. Circuit—will adjudicate Plaintiff’s claims upon timely petition for review. 29 U.S.C. § 660(a). Cf. *Thunder Basin*, 510 U.S. at 218 (finding that compliance with agency action until the review is complete is not so “onerous” or “coercive” as to deny meaningful judicial review); *YAPP*, 748 F. Supp. 3d at 513 (plaintiff raising Seventh Amendment challenge to ALJ proceeding “would not be deprived of . . . meaningful judicial review” because “[i]f the ALJ

awards the . . . remedy that [plaintiff] contests, [plaintiff] can raise the Seventh Amendment issue before the Board and then the Court of Appeals”); *Blankenship*, 2024 WL 4043442, at *2 (similar).

The second factor centers on the extent to which a plaintiff’s claims are “wholly collateral” to the statute’s review provisions. *Adorers*, 897 F.3d at 195 (citation omitted); *Bennett*, 844 F.3d at 186. Plaintiff has not alleged as much; nor can it. That is because the Seventh Amendment is “the vehicle by which [Plaintiff] seek[s] to” challenge a future decision by OSHRC regarding the specific remedies that may be imposed at the conclusion of the administrative proceeding. *Elgin*, 567 U.S. at 22; *id.* (“constitutional claims” not wholly collateral where they “are the vehicle by which [the plaintiff] seek[s] to” challenge the agency’s decisions). *See, e.g.*, FAC ¶ 170 (“Kenric Steel therefore has a right to have a jury decide whether it is liable to Complainants and the extent of any damages.”). *Cf. YAPP*, 748 F. Supp. 3d at 513 (*Thunder Basin* precludes Seventh Amendment challenge to ALJ proceeding because “determining what type of remedies are appropriate or permissible under the [statute] is not ‘wholly collateral’ to the functioning of the [agency]”); *Blankenship*, 2024 WL 4043442, at *3 (Seventh Amendment “claims are not wholly collateral because they do not challenge [the agency’s] existence, but instead depend on [the agency’s] proceedings and the interpretation of its rules”).

The third and final factor involves the Commission’s expertise on “the many threshold questions that . . . accompany [Plaintiff]’s constitutional claim.” *Elgin*, 567 U.S. at 22. In *Elgin*, the Supreme Court held that the underlying allegation—that an employee’s “resignation amounted to a constructive discharge”—fell “squarely within the [agency]’s expertise” and affirmed the preclusion of judicial review, because administrative resolution of the employee’s claim in the employer’s favor “would avoid the need to reach [the] constitutional claims.” 567 U.S. at 23. The same is true here: resolution of the underlying OSH Act claims in Plaintiff’s favor before the ALJ

would avoid the need to reach its Seventh Amendment claim altogether. By contrast, permitting Plaintiff to “bypass the administrative process” at this stage would require this Court to decide “constitutional issues . . . devoid of factual context.” *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 629 (7th Cir. 2007) (citation omitted). “*Thunder Basin* and *Free Enterprise* . . . militate against jurisdiction when a pre-enforcement constitutional claim relates to factual issues that are the subject of a pending administrative adjudication.” *Chau v. SEC*, 72 F. Supp. 3d 417, 426 (S.D.N.Y. 2014), *aff’d*, 665 F. App’x 67 (2d Cir. 2016). *See also id.* at 429 (“the entire question would be moot were [plaintiff] to prevail before the [agency]”); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (favoring review of such preliminary matters along with the agency’s final order).

But even if the Court were to conclude that OSHRC lacks the expertise to address Plaintiff’s underlying claim, that is of no moment because the claim can be adequately reviewed by the courts of appeals. Indeed, in *Thunder Basin*, the Court reasoned that regardless of the agency’s expertise in addressing the embedded constitutional claims, those claims “can be meaningfully addressed in the Court of Appeals.” *Thunder Basin*, 510 U.S. at 215; *see also Adorers*, 897 F.3d at 195 (“[A]lthough the constitutional claims may be outside of [the agency’s] expertise, this is tempered by the court of appeals’s review, which regularly resolves constitutional issues.”).

* * *

In sum, all three *Thunder Basin* factors demonstrate that the statutory review scheme applies and divests this Court of subject matter jurisdiction: a court of appeals may hear Plaintiff’s claims if it is aggrieved by the outcome of the pending administrative proceeding; Plaintiff’s Seventh Amendment claim is directly related to that administrative proceeding; and OSHRC has

expertise that is relevant to Plaintiff's claim. Accordingly, Count III should be dismissed for lack of jurisdiction.

D. Plaintiff's Seventh Amendment and Article III Claim Is Meritless

Because it lacks jurisdiction, the Court should refrain from addressing the merits of Plaintiff's Seventh Amendment and Article III claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But even on the merits, Plaintiff's claim is squarely foreclosed by binding Supreme Court precedent.

The Seventh Amendment preserves the "right of trial by jury" in "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. That right, however, only "extends to a particular statutory claim if the claim is 'legal in nature.'" *Jarkesy*, 603 U.S. at 122 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). To determine whether a claim is "legal in nature," the Supreme Court instructed lower courts to examine both "the remedy" and "the cause of action." *Id.* at 122–23. At the same time, the Court reaffirmed that, even if a claim is "legal in nature," "Congress may assign [a] matter for [an initial] decision to an agency without a jury" under the public-rights exception—consistent with the Seventh Amendment and Article III. *Id.* at 126–27 (citation omitted). Here, the public-rights exception clearly applies, and in any event, no Seventh Amendment right attaches, as OSHA's claim that Plaintiff violated OSHA standards is fundamentally equitable in nature.

Public-Rights Exception. In *Atlas Roofing*, the Supreme Court recognized that Congress "enacted the Occupational Safety and Health Act" because it found "existing state statutory remedies as well as state common-law actions for negligence and wrongful death to be inadequate to protect the employee population from death and injury due to unsafe working conditions." *Atlas*

Roofing, 430 U.S. at 444–45. It is against that backdrop that the Supreme Court rejected the same claim Plaintiff asserts here, concluding that under the OSH Act:

[Congress] created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.

Id. at 461.

Plaintiff does not dispute this holding but asserts (apparently for preservation purposes) that the Supreme Court erred in reaching this conclusion. Pl.’s Br. at 17, 19. In effect, Plaintiff argues that the public-rights exception in *Atlas Roofing* is in tension with *Jarkesy*, because the Court more recently “determined that [the civil penalty] remedy required an Article III court and a jury.” *Id.* at 19. That generalization mischaracterizes the OSH Act’s statutory scheme, *Jarkesy*, and the legislative history and precedents that undergird that decision.

To begin, the Constitution vests Article III courts with the judicial power of the United States. Throughout the Nation’s history, though, it has also been established that certain public-rights matters outside of that judicial power may be adjudicated by the Executive Branch. *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (“[S]ince the beginning of the Republic,” executive officials have “conduct[ed] adjudications,” which may take “‘judicial’ forms” but are ultimately “exercises of . . . the ‘executive Power.’” (citation omitted)). That is, while private rights—“the stuff of the traditional actions at common law tried by the courts at Westminster in 1789”—are generally reserved to Article III courts, *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (citation omitted), public rights, and “the mode of determining [such] matters . . . is completely within congressional control,” *Crowell v. Benson*, 285 U.S. 22, 50 (1932). In the context of public rights, Congress may decide the matter itself, “delegate that power to executive

officers, or may commit it to judicial tribunals.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

Jarkesy did not disturb that long-held principle, but clarified that two overarching types of claims fall within the public-rights exception: (1) matters that “historically could have been determined exclusively by [the executive and legislative] branches” such as immigration, foreign commerce, relations with Indian tribes, and matters involving public benefits, 603 U.S. at 112 (citation omitted; alteration in original); and (2) claims that were “unknown to common law,” *id.* at 137–38 (citing *Atlas Roofing*, 430 U.S. at 461). The Court then applied that standard to the Security and Exchange Commission’s (“SEC”) statutory scheme, concluding that when Congress “create[s] claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts,” that “target the same basic conduct as common law fraud, employ the same terms of art, . . . operate pursuant to similar legal principles,” and impose “a punitive remedy”—those matters remain private rights to be adjudicated in an Article III court. *Id.* at 134–36.

Plaintiff latches on to one aspect of this holding, arguing (in conclusory fashion) that the OSH Act’s “civil penalties” mirror those imposed by the SEC in *Jarkesy*, so that no public-rights exception applies. *See* Pl.’s Br. at 19 (citing *Tull v. United States*, 481 U.S. 412, 422 (1987) and *Jarkesy*, 603 U.S. at 124–25); *but see Jarkesy*, 603 U.S. at 136 (refusing to reach the conclusion that “*Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals”). But in so arguing, Plaintiff ignores that *Jarkesy* explicitly recognized that unlike the SEC’s statutory scheme—which sounded in common law fraud—the “OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that ‘[e]ach employer . . .

shall comply with occupational safety and health standards promulgated under this chapter.’ These standards bring no common law soil with them.” *Jarkesy*, 603 U.S. at 136–37 (alteration & omission in original) (citation omitted). That is, as the Supreme Court recognized just a year ago, “[t]he purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law.” *Id.* at 137. To the contrary, “Congress stated that it intended the agency to “develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems.” *Id.* (alteration in original) (quoting 29 U.S.C. § 651(b)(5)). Accordingly, “[i]n both concept and execution, the [OSH] Act was self-consciously novel.” *Id.*

Plaintiff cannot overcome the Supreme Court’s now twice determination that “Congress could assign the OSH Act adjudications to an agency because the claims were ‘unknown to the common law.’” *Id.* at 138 (citation omitted). *Accord Atlas Roofing*, 430 U.S. at 461 (“Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation’s working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.”). Thus, Plaintiff’s Seventh Amendment and Article III claim is doomed from the start.

Equitable Claim. The Court need not reach the question of whether the Seventh Amendment is implicated in this case, because the public-rights exception clearly applies. But even so, no Seventh Amendment right attaches, as the Secretary’s claim that Plaintiff violated OSHA standards is equitable in nature. *See Jarkesy*, 603 U.S. at 123 (To determine whether a claim is “legal in nature,” a court must examine both “the remedy” and “the cause of action.”).

Plaintiff argues that the proposed civil penalties issued by the Secretary are like those at issue in *Jarkesy*, and therefore “legal” in nature. Pl.’s Br. at 17–19. But in focusing on the *size* of the civil penalties that may be imposed under the OSH Act, Plaintiff ignores the uniquely *remedial* scheme that Congress enacted. When Congress created a “new” cause of action, with new remedies for OSHA violations, *Atlas Roofing*, 430 U.S. at 445; 29 U.S.C. § 659(c) (authorizing OSHRC to affirm[], modify[], or vacat[e] the Secretary’s citation or proposed penalty, or direct[] other appropriate relief”), it did so in service of the Act’s “*remedial* scheme,” *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (emphasis added). Thus, it comes as no surprise that principal among the available statutory remedies is the Secretary’s authority to require *abatement* of the violative conditions. *See* 29 U.S.C. § 658(a) (allowing the Secretary to issue a citation for violations and requiring the citation to “fix a reasonable time for the abatement of the violation”). So while monetary penalties may play an important secondary role in promoting compliance by employers prior to inspection, the *raison d’etre* of the OSH Act and claims brought pursuant to it (like the one here) is one of abatement. *See, e.g., J.E. Chilton Millwork & Lumber Co.*, 1 BNA OSHC 1034, 1035 (No. 123, 1972) (“The Commission is of the opinion that the principal purpose of this Act is to obtain compliance with its requirements in order to ensure a safe and healthful workplace.”); *Gen. Elec. Co.*, No. 13732, 1981 WL 19531, *10, *14 (OSHRC Apr. 27, 1981) (Cottine, Comm’r, concurring in part and dissenting in part) (for “hazardous conditions that have actually been cited by the Secretary,” the OSH Act’s primary purpose, *i.e.*, “the prevention of work related injury and illness,” is “effectuated through the entry of abatement orders,” while the “[t]he function of [civil penalties] is exclusively to deter violative conduct”); H.R. Rep. No. 91-1291, at 21 (1970), *reprinted in* S. Comm. on Labor & Public Welfare, 92d Cong., *Legislative History of the Occupational Safety and Health Act of 1970*, at 853 (1971) (“The philosophy underlying [this

reported bill] is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties, because even large ones can become mere license fees. . . . Death and disability prevention is the primary intent of this bill. Although possible penalties for violations may be an important deterrent, they are only a partial solution.”). Compare 29 U.S.C. § 658(a) (“citation shall fix a reasonable time for the abatement of the violation”) with *id.* § 666(c) (permitting, but not requiring, the assessment of a penalty where the “violation is specifically determined not to be of a serious nature”); see also OSHA, U.S. Dep’t of Lab., OSHA Field Operations Manual, Ch. 6.II.C., <https://perma.cc/78SV-SVMH> (permitting no penalty to be proposed for an “other-than-serious” violation).

Put simply, when viewed in their proper context, the penalties proposed in OSHA’s citation, along with its orders of abatement, are distinguishable from and broader than the traditional, common-law penalties in *Jarkesy* that were sought solely to punish and deter fraudulent actors.

E. Plaintiff Fails to Establish that the Solicitor of Labor’s Prosecution Violates the OSH Act

As a last resort, Plaintiff asserts (in Count IV) that the Solicitor’s “[u]nsupervised” prosecution against it violates the OSH Act, because that prosecution is not “subject to the direction and control of the Attorney General.” Pl.’s Br. at 20 (quoting 29 U.S.C. § 663) (emphasis omitted). That statutory claim fails as a matter of law, for several distinct and independent reasons.

1. No Cause of Action Exists Under the OSH Act

To begin, Plaintiff cannot make out a claim for a statutory violation under the OSH Act because the statute does not create a private right of action. See *McGovern v. City of Philadelphia*, 554 F.3d 114, 116 (3d Cir. 2009) (“private rights of action to enforce federal law must be created by Congress”). Nowhere in the statute is there any implication that “Congress intended to create

a personal right.” *Id.* Nor is there any indication that “Congress intended to create a personal remedy.” *Id.* The relevant provision of the OSH Act merely provides that:

Except as provided in section 518(a) of [t]itle 28 relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this chapter but all such litigations shall be subject to the direction and control of the Attorney General.

29 U.S.C. § 663. Accordingly, Count IV must be dismissed, as no private cause of action under the OSH Act exists. *See Naderi v. Concentra Health Servs., Inc.*, No. CV 21-18958 (JXN) (AME), 2024 WL 2954181, at *5 (D.N.J. June 12, 2024) (holding, in the context of alleged substantive violations, that “[i]t is well-settled that OSHA does not create a private right of action”).⁸

2. Plaintiff Lacks Article III Standing

Plaintiff’s OSH Act claim likewise suffers from another fatal defect: it fails to establish any injury in fact under Article III. In *Department of Education v. Brown* (which Plaintiff principally relies on), the Supreme Court recognized the quintessential elements for Article III standing that a plaintiff must prove: injury in fact, traceability, and redressability. 600 U.S. 551, 561 (2023). At the same time, the Court relaxed the “usual ‘standards for redressability and immediacy’” where a “statute affords a litigant ‘a procedural right to protect his concrete interests.’” *Id.* at 561 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992)). That “procedural righ[t],” as *Lujan* explained, must implicate a “separate concrete interest,” such as, “a

⁸ To the extent Plaintiff argues in reply that its statutory supervision claim sounds in *ultra vires*, or alternatively, is impliedly brought under the Administrative Procedure Act (“APA”), that too fails. Plaintiff has waived such arguments, as it does not establish, as a matter of law, either cause of action. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 225 (3d Cir. 2007) (“Waiver is ‘the intentional relinquishment or abandonment of a known right.’” (citation omitted)); *Nuclear Reg. Comm’n v. Texas*, No. 23-1300, slip op. at 15 (U.S. June 18, 2025) (an *ultra vires* claim “applies only when an agency has taken action entirely in excess of its delegated powers and contrary to a *specific prohibition* in a statute” (quotation and citation omitted)).

hearing prior to denial of [plaintiff's] license application,” or “an environmental impact statement before a federal facility is constructed next door to [plaintiff].” 504 U.S. at 572 (alternation in original). Plaintiff does not explain how the Attorney General’s supervision of the ongoing prosecution affords it a procedural right. Indeed, it is hard to understand how Plaintiff could make out such a claim. Congress’s instruction over the machinations of intra-agency decision making with respect to civil prosecutions is not a form of “process” afforded to the potential violator of that statute.

But even if Plaintiff could plausibly contort this instruction into a “procedural right,” Plaintiff fails to demonstrate how such “process” implicates its “concrete interest.” *Dep’t of Educ.*, 600 U.S. at 562 (“Regardless of the redressability showing we have tolerated in the procedural-rights context, we have never held a litigant who asserts such a right is excused from demonstrating that it has a ‘concrete interest that is affected by the deprivation’ of the claimed right.” (citation omitted)); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (“Article III standing requires a concrete injury even in the context of a statutory violation.”). That is, “[Plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation” where the violation “may result in no harm.” *Spokeo*, 578 U.S. at 342. Yet that is all Plaintiff can muster. It asserts a generic interest in ensuring the Solicitor’s compliance with the OSH Act that is neither particularized nor concrete, and effectively concedes that “the Attorney General and Solicitor of Labor might well come to the same decision after abiding by the contested procedural requirement.” FAC ¶ 179 (citation and quotation marks omitted). In other words, Plaintiff offers no evidence as to how the supervision it seeks would change how the prosecution was carried out. And thus, its failure to demonstrate that “[it] has sustained or is immediately in danger of sustaining some direct injury as the result” “and not merely that [it] suffers in some indefinite way in common with people

generally” dooms any showing of injury in fact. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *Lujan*, 504 U.S. at 573–74 (“raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy”).

3. “Civil Litigation” Does Not Encompass Administrative Proceedings Before OSHRC

Even apart from these threshold defects, Plaintiff’s OSH Act claim fails on the merits too. Relevant here, the text of the OSH Act provides that the Solicitor of Labor may “represent the Secretary in any *civil* litigation” but that “all such litigations shall be subject to the direction and control of the Attorney General.” Pub. L. No. 91-596, § 14, 84 Stat. 1590, 1606 (1970) (codified at 29 U.S.C. § 663) (emphasis added). In providing that limitation, section 14 of the Act makes no mention of *administrative* proceedings, like those before OSHRC. See *DiGiacomo v. Teamsters Pension Tr. Fund of Phila. & Vicinity*, 420 F.3d 220, 227 (3d Cir. 2005) (“[A] court must begin with the language of the statute.”). That omission cannot be overlooked, because, as courts have frequently recognized, “civil litigation” does not necessarily encompass “administrative” proceedings. See, e.g., *Chavarria-Reyes v. Lunch*, 845 F.3d 275, 277 (7th Cir. 2016) (“mailbox rule” in “civil litigation” would be sufficient for jurisdictional requirements in “administrative litigation”); *Tommy A. D. v. Kijakazi*, No. 18-CV-00536-SH, 2022 WL 17986818, at *4 (N.D. Okla. Dec. 29, 2022) (“Commissioner’s ‘position’ includes the stance taken in the underlying administrative proceedings and during any subsequent civil litigation.” (citation omitted)); *Wilhite v. District of Columbia*, 110 F. Supp. 3d 77, 84 n.3 (D.D.C. 2015) (“An action or proceeding under the IDEA includes both civil litigation in federal court and administrative litigation before hearing officers.” (citation omitted)); *COMPTEL v. FCC*, 910 F. Supp. 2d 100,

120 (D.D.C. 2012) (attorney work product privilege “is not limited to civil litigation but includes administrative proceedings as well”).

Indeed, the legislative history suggests that Congress was aware of this distinction too. In the House Conference Committee Report reconciling the House and Senate versions of the OSH Act, the Conference Committee, with respect to section 14, explained:

The Senate bill and the House amendment contained comparable provisions for the Solicitor of Labor to appear for and represent the Secretary in any *civil litigation* brought under the Act, but the House amendment unlike the Senate bill made specific reference to the Attorney General’s authority to represent the United States in the Court of Claims. The Senate receded. *The conferees expect that the Solicitor of Labor will represent the Department of Labor in proceedings before the Review Commission.*

H.R. Rep. No. 91-1765, 40 (1970) (Conf. Rep.) (emphases added), *reprinted in* S. Comm. on Labor & Public Welfare, 92d Cong, *Legislative History of the Occupational Safety and Health Act of 1970*, at 1193 (1971). Put simply, in prescribing the proceedings in which the Solicitor of Labor (as opposed to the Attorney General) may appear, Congress understood there to be a distinction between “civil litigation” and “proceedings before the Review Commission.” *Id.* And its decision to limit the Attorney General’s review to that of “civil litigation”—when it could have used a broader term, such as “civil action or proceeding” to encompass both civil litigation and administrative proceedings—militates against reading the text as requiring Attorney General supervision here. *See Menchu v. U.S. Dep’t of Health & Hum. Servs.*, No. 3:12-CV-01366-AC, 2014 WL 1217128, at *4 (D. Or. Mar. 21, 2014) (“[t]he term ‘civil action or proceeding’ includes both traditional civil litigation as well as ‘quasi-judicial’ administrative proceedings.” (citation omitted)); *DiGiacomo*, 420 F.3d at 227 (“[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” (alteration in original) (citation omitted)).

But even if OSHRC proceedings are considered “civil litigation,” the First Circuit decades ago held, in the context of a nearly identical provision under the Fair Labor Standards Act, 29 U.S.C. § 204(b), that “participation by the Attorney General in litigation in which the Administrator [of the Labor Department’s Wage and Hour Division] is involved [is] not mandatory but permissive.” *Lowell Sun Co. v. Fleming*, 120 F.2d 213, 214–15 (1st Cir. 1941). More specifically, the First Circuit concluded that 29 U.S.C. § 204(b)—which provides that “all such litigation shall be subject to the direction and control of the Attorney General”—does “not require that the Attorney General must exercise his power of direction and control in every litigated case but only that he may exercise those powers in any particular case if he deems that course advisable,” *Lowell*, 120 F.2d at 215. This reasoning likewise precludes Plaintiff’s claim, and removes any doubt that dismissal is warranted here. *Compare* 29 U.S.C. § 204(b) (“Attorneys appointed under this section may appear for and represent the Administrator [of the Labor Department’s Wage and Hour Division] in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General.”), *with id.* § 663 (“Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this chapter but all such litigations shall be subject to the direction and control of the Attorney General.”).

4. Executive Order 6166 Did Not Impermissibly Amend the Organic Act

It is against this textual and legislative background that Plaintiff argues that Executive Order 6166 impermissibly amended the Organic Act, 29 U.S.C. § 555, to transfer the Solicitor of Labor from the Department of Justice to the Department of Labor, Pl.’s Br. at 21. But here too, Plaintiff misses the mark. In the wake of the Great Depression, Congress ordered President Roosevelt to “investigate the present organization of all executive and administrative agencies of the Government and . . . determine what changes therein are necessary.” Act of Mar. 3, 1933, Pub.

L. No. 72-428, 47 Stat. 1489, 1517. Specifically, Congress passed Title IV—Reorganization of Executive Departments, which provides, in relevant part, that:

Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by *Executive order*—

(a) *Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;*

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof.

47 Stat. at 1518 (emphases added). It is under that congressional mandate that President Roosevelt lawfully “determined,” by executive order, “that certain regroupings, consolidations, transfers, and abolitions of executive agencies and functions thereof [were] necessary”—including the transfer of solicitors from the Department of Justice to the Departments of Commerce and Labor, respectively. Exec. Order 6166, Preamble & § 7. In other words, Plaintiff errs in presuming any statutory intent that requires Attorney General supervision: § 555 of Title 29 of the United States Code was lawfully amended by executive order because Congress ordered it so.

* * *

In sum, Plaintiff’s statutory claim—that the Solicitor’s “unsupervised” prosecution against it violates the OSH Act—suffers from a series of threshold and merits defects, which independently warrant dismissal of Count IV.

II. Plaintiff Fails to Establish Irreparable Harm

Because Plaintiff’s motion for summary judgment seeks permanent injunctive relief, it must establish, as a matter of law, that it will be “irreparably injured by the denial of injunctive

relief.” *Shields*, 254 F.3d at 482. To satisfy that incredibly high burden, Plaintiff must make a “clear showing of immediate irreparable injury” that is “not merely serious or substantial” and “must be of a peculiar nature, so that compensation in money cannot atone for it.” *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (quoting *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) and *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)).

Here, Plaintiff’s core asserted harm boils down to a familiar refrain: it faces adjudication by “an unconstitutionally appointed and insufficiently accountable agency official.” Pl.’s Br. at 22. But any harm caused by that administrative proceeding would be reparable. “[I]f found to be constitutionally warranted, vacatur, even at the appeal-from-final-judgment stage, would fully vindicate the separation-of-powers rights of” Plaintiff. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (cleaned up). That is because, absent “immediate or ongoing harm stemming from the [Commission’s] alleged constitutional defects, the violation of separation of powers by itself is not invariably an irreparable injury.” *Id.* (quotations omitted); *see also Leachco*, 103 F.4th at 755 (“[A] mere generalized separation of powers violation . . . does not establish irreparable harm.”); *YAPP*, 748 F. Supp. 3d. at 516–17.

Plaintiff likewise errs in relying on *Axon*, 598 U.S. at 191, for the proposition that “subjection to an illegitimate proceeding” itself constitutes irreparable harm, *see* Pl.’s Br. at 22. *Axon* merely held that federal district courts have jurisdiction to hear certain structural constitutional challenges to the conduct of an ongoing administrative proceeding. *See* 598 U.S. at 180. It did not hold, as Plaintiff contends, that a structural challenge inherently entails irreparable harm warranting preliminary relief. As the Tenth Circuit explained, “*Axon* did not address the issue of irreparable harm, or any other issue regarding entitlement to injunctive relief.” *Leachco*,

103 F.4th at 758. It thus “does not help [Plaintiff] establish irreparable harm” here. *Id.*; *see also id.* at 759 (*Axon* did not “create[] an entitlement on the merits to a preliminary injunction in every case where such constitutional challenges are raised”); *see also, e.g., YAPP*, 2024 WL 4489598, at *3 (*Axon* “did not address issues of relief or injury” (citation omitted)).

In sum, Plaintiff’s failure to demonstrate any irreparable harm, let alone any compensable harm attributable to the challenged removal restrictions, warrants denial of Plaintiff’s request for injunctive relief.

III. The Balance of the Equities and Public Interest Factors Weigh Against an Injunction

The balance of equities and public interest factors “merge” when the Government is the party opposing relief. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These combined factors counsel heavily against injunctive relief here. To begin, the public has a strong interest in enforcement of the OSH Act, which seeks to ensure safe and healthy conditions for working men and women in the United States and its territories. *See* 29 U.S.C. § 651(a) (“The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”); *Martin*, 499 U.S. at 147 (the OSH Act “establishes a comprehensive regulatory scheme designed ‘to assure so far as possible . . . safe and healthful working conditions’ for ‘every working man and woman in the Nation.’” (omission in original) (quoting 29 U.S.C. § 651(b)). Indeed, “the very backbone of an administrative agency’s effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction.” *Fed. Mar. Comm’n v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975). The proceeding Plaintiff challenges here—as shown by the Secretary’s citations—is one to determine, *inter alia*, whether

Plaintiff failed to ensure safe and healthful working conditions, including whether Plaintiff failed to ensure the use of welding screens to protect employees from welding rays, conduct annual inspections of overhead cranes, and train new hires on chemical safety. *See generally* Citations 1 & 2. Put differently, Plaintiff’s requested injunction of the administrative proceedings would undermine the governmental and public interest in enforcing duly enacted laws and protecting workers from being exposed to safety and health hazards in the workplace. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (A sovereign enjoined “from effectuating statutes enacted by representatives of its people . . . suffers a form of irreparable injury.” (citation omitted)).

On the other side of the ledger, Plaintiff asserts that neither the public nor Defendants should have an interest in “continuing practices that violate the Constitution, the OSH Act, or the APA.” Pl.’s Br. at 23. But here too, Plaintiff misses the mark. The Supreme Court has not endorsed injunctive relief for any structural constitutional defect stemming from the appointment or removal provisions of a statute. The fact that any proceeding—if found to be unconstitutionally warranted—can be made reparable by vacatur limits the purported public interest that Plaintiff asserts. *See supra* §§ I.A; II. As such, the balance of the equities and public interest weigh against granting Plaintiffs’ motion for extraordinary injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiff’s motion should be denied, and the Court should dismiss the First Amended Complaint in its entirety.

Dated: July 14, 2025

Respectfully submitted,

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