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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

KENRIC STEEL, LLC, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*, Defendants.	**CIVIL ACTION NO. 1:24-cv-09221-KMW-SAK** **NOTICE OF MOTION FOR SUMMARY JUDGMENT** **Motion Day: September 2, 2025** **Oral Argument Requested** **(Document Electronically Filed)**

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PLEASE TAKE NOTICE that, on September 2, 2025 at 10 a.m. or as soon thereafter as counsel may be heard, the undersigned attorneys for Plaintiff Kenric Steel, LLC will move before the Honorable Karen M. Williams, U.S. District Court, District of New Jersey, Mitchell

H. Cohen U.S. Courthouse, Courtroom 4A, 4th & Cooper Streets, Camden, New Jersey for an Order in the attached form that grants summary judgment in its favor pursuant to Federal Rule of Civil Procedure 56 (the "Motion"); and

PLEASE TAKE FURTHER NOTICE that, in support of the Motion, Plaintiff Kenric Steel, LLC shall rely on the accompanying Statement of Undisputed Facts, Brief in Support of the Motion, supporting Affidavits and Exhibits, as well as any other documents filed in this matter; and

PLEASE TAKE FURTHER NOTICE that Plaintiff Kenric Steel, LLC hereby requests oral argument if timely opposition to the motion is filed.

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Dated: June 2, 2025

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I. INTRODUCTION

The U.S. Secretary of Labor (the "Secretary"), acting through the Acting U.S. Solicitor of Labor (the "Solicitor"), is pursuing an unconstitutional and illegal administrative proceeding (the "OSHRC Proceeding") before the Occupational Safety and Health Review Commission ("OSHRC" or the "Review Commission"). As a result, Plaintiff Kenric Steel, LLC ("Kenric Steel") respectfully moves for Summary Judgment and seeks an Order that provides the relief requested in the attached Proposed Order (the "Requested Relief").

As an initial matter, the OSHRC Proceeding violates the Constitution in three different ways. ***First***, because OSHRC is purportedly an executive agency, Members of the Review Commission are unconstitutionally insulated from removal. To provide context, Review Commissioners serve six-year terms and "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(b). However, under the Supreme Court's interpretation of Article II of the U.S. Constitution, the President possesses nearly unrestricted removal power over principal officers, like Review Commissioners. Single-layer removal restrictions like those imposed on Review Commissioners are constitutional ***only if*** they insulate principal officers on multimember expert boards that do not wield substantial executive power. *See Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935). Defendants concede, however, that Review Commissioners ***do*** wield substantial executive power. Thus, by Defendants' own admission the exception in *Humphrey's Executor* is inapplicable here. Given the exception is inapplicable, the Constitution commands that the President must have unrestricted removal power over Review Commissioners. Therefore, the Court should sever the OSH Act's removal restrictions to align that law with the Constitution.

Second, the Review Commission's Administrative Law Judges ("ALJs") are unconstitutionally appointed and, once appointed, unconstitutionally insulated from removal.

Indeed, Review Commission ALJs are "Officers of the United States" within meaning of the Appointments Clause, i.e., Article II, Section 2, Clause 2 of the U.S. Constitution. As such, "the President alone," "the Courts of Law," or one of the "the Heads of Departments" must appoint OSHRC ALJs. U.S. Const. art. 2, § 2. Yet the OSH Act confers power solely on the Chairperson of the Commission to "appoint such administrative law judges and other employees as he deems necessary . . . ." 29 U.S.C. § 661(e). Under U.S. Supreme Court precedent though, the OSHRC Chairperson does not qualify as the President, a Court of Law, or the Head of a Department. Thus, the plain text of the OSH Act establishes the Review Commission's appointment process violates the Constitution.

Similarly, OSHRC ALJs are unconstitutionally insulated from presidential control in violation of Article II of the Constitution. In fact, three different layers of removal protections impede the President's ability to remove Review Commission ALJs: (1) while the Review Commission may take steps to remove an ALJ, it may do so "only for good cause established and determined by the Merit Systems Protection Board [('MSPB')]," 5 U.S.C. § 7521(a); (2) the President may remove members of the MSPB only for "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d); and (3) the President may remove Review Commissioners only for "inefficiency, neglect of duty, or malfeasance in office," 29 U.S.C. § 661(b). Courts have held that matching sets of removal restrictions pertaining to ALJs of other agencies, including the Securities Exchange Commission ("SEC"), the National Labor Relations Board ("NLRB"), and others are unconstitutional. The same conclusion follows here.

Third, Kenric Steel is being deprived of its right to a jury trial regarding purely legal remedies sought by the Secretary. In other words, the OSHRC Proceeding violates Plaintiffs' Seventh Amendment jury-trial right by adjudicating private rights outside the confines of an

Article III court. Plaintiff recognizes that the U.S. Supreme Court held in *Atlas Roofing Company v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), that the Seventh Amendment did not prevent Congress from assigning to the Review Commission the task of adjudicating alleged violations of the OSH Act and its attendant standards. Nevertheless, the Supreme Court's later opinions effectively overruled *Atlas Roofing*. Indeed, the Supreme Court's current reasoning regarding whether the Seventh Amendment requires a jury trial in administrative proceedings is incompatible with *Atlas Roofing*'s holding. That being said, Kenric Steel recognizes that this Court is bound to follow *Atlas Roofing*. The Supreme Court has clearly pronounced that its decisions are "binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). Accordingly, Plaintiff raises this argument solely to preserve it.

In addition to these constitutional deficiencies, the Secretary and the Solicitor are prosecuting the OSHRC Proceeding in violation of the express terms of the OSH Act. Specifically, even though the OSH Act requires that any civil litigation brought under it "be subject to the direction and control of the Attorney General," 29 U.S.C. § 663, the Attorney General does not oversee litigation conducted before the Commission. In other words, neither the Attorney General nor any subordinate within the Department of Justice supervises or directs OSHRC proceedings that seek civil fines, including the OSHRC Proceeding at issue. This wholesale abdication of the Attorney General's congressionally mandated duty to supervise and direct OSH Act litigation renders the Solicitor's prosecution of Kenric Steel unlawful.

Ultimately, Kenric Steel brings this action because the Secretary's prosecution of it, through the Solicitor, violates both the OSH Act and the U.S. Constitution. Accordingly, this

Court should enjoin the Secretary and those presiding over the OSHRC Proceeding to prevent Kenric Steel from being compelled to continue to submit to an unlawful process brought by an unlawful prosecutor.

II. UNDISPUTED FACTUAL BACKGROUND

The following undisputed facts establish Kenric Steel is entitled to summary judgment and the Requested Relief. Kenric Steel is a family-owned and -operated steel fabrication business specializing in the furnishing and installation of high-quality structural and miscellaneous steel, as well as custom fabrication and installation of manufactured safety and fall protection product. *See* Statement of Undisputed Facts ("SOF") ¶ 2. On or about July 26, 2023, OSHA opened an inspection regarding Kenric Steel's facility in New Jersey. *Id.* ¶ 9. On or about January 22, 2024, OSHA concluded its inspection, and the Secretary issued a Citation and Notification of Penalty (the "Citation"), which contained seven alleged "Serious" and four alleged "Willful" violations of the OSH Act's attendant standards. *Id.* ¶ 10. The Citation proposed a total penalty of $348,683.00. *Id.* To preserve its rights, Kenric Steel filed a timely Notice of Contest to the Citation on February 7, 2024, a necessary procedural step to ensure that the Citation does not become a final order. *Id.* ¶ 11. Defendant Judge Patrick Augustine is an administrative law judge within the Review Commission who presides over the OSHRC Proceeding against Kenric Steel. *Id.* ¶ 8. The Secretary filed a Complaint with the Review Commission on July 21, 2024, which Kenric Steel answered on July 31, 2024. *Id.* ¶ 13. The OSHRC Proceeding is now stayed pending the results of this matter. *Id.* ¶ 14.

III. ARGUMENT

Kenric Steel seeks an injunction enjoining the Secretary and those presiding over the OSHRC Proceeding from compelling to continue to submit to the unlawful OSHRC Proceeding process brought by an unlawful prosecutor. When determining whether to issue a permanent

injunction, a court should 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). For the reasons set forth above and below, Kenric Steel has proven its claims and shown that it will be irreparably injured if relief is not granted. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (holding those two elements most important). Kenric Steel also has proven that the balancing of equities and the public's interests weigh in its favor. *Id.* Thus, Kenric Steel requests that the Court issue a permanent injunction with the Requested Relief.

A. Kenric Steel Has Proven Its Claims

1. Kenric Steel Has Proven Members Of The Review Commission Are Unconstitutionally Insulated From Removal

Article II vests all executive power in the President, "who must 'take Care that the Laws be faithfully executed.'" *Seila L. LLC v. CFPB*, 591 U.S. 197, 203 (2020). Although "[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws," it has always been clear that the President could not execute the laws "alone and unaided." *Myers v. United States*, 272 U.S. 52, 117 (1926). Instead, "[h]e must execute them by the assistance of subordinates." *Id.* However, those officers can have no power that the President does not give, nor any that he cannot take away. The officers of every administrative agency—including the "independent" ones—are subject to presidential oversight. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513–14 (2010).

To discharge his duties under Article II, the President must have the power to appoint and remove subordinate officers who assist in carrying out the President's duties. *Id.* For "[a]s Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature

Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Id*. at 492 (quoting 1 Annals of Cong. 463 (1789)); *see also id.* (stating that the prevailing view at the Founding was that "the executive power included a power to oversee executive officers through removal" and that interpretation "soon became the settled and well understood construction of the Constitution" (quoting *Ex parte Hennen*, 38 U.S. 230, 13 Pet. 230, 259 (1839))). In fact, "unrestricted removal power" is the "general rule" of Article II. *Seila Law LLC*, 591 U.S. at 215. Ultimately:

> The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.

Collins v. Yellen, 594 U.S. 220, 256 (2021) (cleaned up).

Yet the OSH Act imposes restrictions on the President's ability to remove Review Commissioners. Specifically, Review Commissioners serve six-year terms and "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(b). Review Commissioners' terms are also staggered in two-year increments. *Id.* As a result, assuming Review Commissioners serve their full terms, a President may only appoint two Review Commissioners during that President's first term. Similarly, again assuming Review Commissioners serve their full terms, the Review Commission may be composed of two individuals appointed by the President's predecessor for two years or more. During that time, the President's predecessor would, in essence, have set the policy and direction of the Review Commission because the Review Commission cannot take official action without the vote of at least two Review Commissioners. 29 U.S.C. § 661(f).

The existence of unconstitutional removal protections and staggered term limits inflicts twofold harm. It limits the President's constitutional authority, of course. But it also produces an administrative bureaucracy that operates on regulated parties without the constitutionally required "degree of electoral accountability." *Collins*, 594 U.S. at 252. Because such removal protections affect not just the President, but also ordinary Americans who must interact with the administrative state, it makes no legal difference whether the President objects to a given statutory limit on his removal powers: "the separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 561 U.S. at 497 (citations omitted).

The Supreme Court has recognized only one narrow exception to the President's unrestricted removal power: single-layer removal restrictions may insulate principal officers who act as part of certain multimember expert boards. *See Seila L.*, 591 U.S. at 204-5 (citing, but declining to extend, *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935)). At most, *Humphrey's Executor* applies to certain quasi-judicial and quasi-legislative agency officials who do not exercise "executive power in the constitutional sense." *Humphrey's Executor*, 295 U.S. at 628; *see also Seila L.*, 591 U.S. at 205-6. Yet Review Commissioners ***do*** exercise substantial executive power under the Constitution. In fact, the President stated that Review Commissioners "wield vast executive power" and, consequentially, required the Review Commission to "submit for review all proposed and final significant regulatory actions to the Office of Information and Regulatory Affairs . . . ." *See* Exec. Order No. 14215, *Ensuring Accountability for All Agencies*, 90 Fed. Reg. 10,447 (Feb. 18, 2025). Because Review Commissioners do wield executive power, *Humphrey's Executor* does not apply and the removal protections on Review Commissioners violate the Constitution.

Ultimately, when a party is regulated by administrative officials who are shielded by unconstitutional removal protections, Supreme Court precedent teaches that the party is "entitled to declaratory relief sufficient to ensure that the [administrative] standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *Free Enter. Fund*, 561 U.S. at 513. Thus, at minimum, Kenric Steel is entitled to declaratory relief sufficient to ensure that the Review Commission is accountable to the Executive.

2. Kenric Steel Has Proven Review Commission ALJs Are Unconstitutionally Appointed And Then Unconstitutionally Insulated From Removal

Kenric Steel has also proven that the Review Commission's ALJs are unconstitutionally appointed and, once appointed, unconstitutionally insulated from removal.

a. Review Commission ALJs Are Officers of the United States

The Framers considered "the power of appointment to offices" to be "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted). To prevent the "manipulation of official appointments," *id.*, the Framers "carefully husband[ed] the appointment power" to "limit its diffusion," *id.*, and to ensure that "all . . . officers of the Union, will … be the choice, though a remote choice, of the people themselves." The Federalist No. 39, at 271 (James Madison) (Cynthia B. Johnson ed., 2006).

Principal Officers—such as ambassadors, judges, and department heads—must be appointed by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "vest the Appointment of such inferior Officers … in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* "Unless their selection is elsewhere provided for" in the Constitution—as with the President himself—every federal official whose position is "established by Law" and who exercises "significant authority"

must be appointed under the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 118, 126, 132 (1976) (*per curiam*) (citation omitted).

Supreme Court precedents make clear that the category of constitutional "Officers" includes adjudicators, like OSHRC ALJs, who decide the rights of citizens under federal law. First in *Freytag*, 501 U.S. at 882, the Court held that "special trial judges" ("STJs") of the United States Tax Court who presided over adversarial hearings, which are very similar to OSHRC proceedings, were inferior Officers. Then in *Lucia v. Securities Exchange Commission*, 585 U.S. 237, 248-50 (2018), the Court applied the reasoning of *Freytag* and held that SEC ALJs were also inferior Officers. While *Freytag* addressed only STJs and *Lucia* concerned only SEC ALJs, courts have extended their holdings to numerous agencies' ALJs. *See, e.g.*, *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019) (FDIC ALJs); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) (Department of Labor, Mine Safety and Health Review Commission ALJs); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018) (Department of Labor, Benefits Review Board ALJs).

OSHRC ALJs are near carbon copies of STJs and SEC ALJs. They "hold a continuing office established by law." *Lucia*, 585 U.S. at 246; 29 U.S.C. § 661. They can "both hear and definitively resolve a case for" the Review Commission. *Lucia*, 585 U.S. at 246; 29 U.S.C. § 661(j) (noting OSHRC ALJs "shall hear, and make a determination upon, any proceeding instituted before the Commission"). "Still more, the Commission's ALJs exercise the same significant discretion when carrying out the same important functions as STJs do." *Lucia*, 585 U.S. at 246 (citation omitted). Among other similarities, "the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries." *Id.*; *see also* 29 U.S.C. § 661. Thus, OSHRC ALJs are Officers within the meaning of the Appointments Clause.

b. Review Commission ALJs Are Unconstitutionally Appointed

The Constitution creates a single "safeguard" to protect litigants' "right to have claims decided by judges who are free from potential domination by other branches of government." *CFTC v. Schor*, 478 U.S. 833, 848 (1986) (citation omitted). That safeguard is Article III, which provides judges with life tenure and permanent salary to protect their independence from, and ensure their ability to check, the political branches. *See* U.S. Const. art. III, § 1; *see also Schor*, 478 U.S. at 848. But the Constitution provides "no such guaranties" with respect to other adjudicators, *McAllister v. United States*, 141 U.S. 174, 187 (1891)—including those in territorial courts, *ibid.*; Article I courts, *Palmore v. United States*, 411 U.S. 389, 390 (1973); and administrative agencies, *Schor*, 478 U.S. at 848, 853-55, 858. This is true whether they are called "administrative law judges" or anything else.

The Appointments Clause, however, establishes the "exclusive method by which those charged with executing the laws of the United States may be chosen." *Buckley*, 424 U.S. at 118, 125. The Clause is a critical safeguard to ensure that members in the Executive Branch follow the will of the people. The OSH Act, however, violates the Appointments Clause by allowing individuals not accountable to the people, or the President, to become and remain OSHRC ALJs. At bottom, "the President alone," "the Courts of Law," or one of "the Heads of Departments" must have appointed OSHRC ALJs. U.S. Const. art. 2, § 2. Contrary to that command, the OSH Act confers power solely on the OSHRC Chairperson to "appoint such administrative law judges and other employees as he deems necessary . . . ." 29 U.S.C. § 661(e). And the OSHRC Chairperson does not fall within any of the categories identified in the Appointments Clause.[1]

[1] Of course, the OSHRC Chairperson is not "the President," so Kenric Steel focuses on the two other possible entities that can appoint inferior officers.

First, neither the OSHRC Chairperson, nor even OSHRC itself, is a "Court of Law." To the contrary, OSHRC identifies itself as an independent federal agency, *see* www.oshrc.gov (last visited June 2, 2025), and the Administrative Procedures Act makes clear that an "agency," like OSHRC, cannot be a court of the United States, *see* 5 U.S.C. § 551(1). Further, the Supreme Court has *repeatedly* held that the Review Commission is an "administrative agency" and *not* a court of law. *See Atlas Roofing*, 430 U.S. at 449 (identifying question presented as "whether the Seventh Amendment prevents Congress from assigning to an administrative agency" the task of adjudicating alleged violations of the OSH Act); *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 147, 151 (1991) (identifying the Review Commission as an "administrative actor").

Just as the OSHRC Chairperson is not a "Court of Law," the Supreme Court's reasoning in both *Freytag* and *Free Enterprise Fund* conclusively establishes that she is also not the "Head of a Department." In *Freytag*, the Supreme Court held that the Chief Judge of the Tax Court—who had power to appoint STJs—was not the Head of a Department. It explained that "for more than a century [it] has held that the term Department refers only to 'a part or division of the executive government, as the Department of State, or of the Treasury,' expressly 'created and given the name of a department' by Congress." *Freytag*, 501 U.S. at 886 (cleaned up and citing *United States v. Germaine*, 99 U.S. 508, 511 (1878)); *see also Burnap v. United States*, 252 U.S. 512, 515 (1920) ("The term 'head of a department' means . . . the Secretary in charge of a great division of the executive branch of the government, like the State, Treasury, and War, who is a member of the Cabinet."). Because the Tax Court did not fall within this definition, in part because it only performed adjudicatory functions, the Supreme Court held that the Chief Judge of the Tax Court could be the Head of a Department. *Freytag*, 501 U.S. at 886.

A similar conclusion is warranted here. OSHRC was neither "expressly 'created and given the name of a department' by Congress" nor is the OSHRC Chairperson "in charge of a great division of the executive branch of the government, like the State, Treasury, [] War," Labor, Education, and so on. Instead, she is but one member of a multimember adjudicatory agency and, unlike the Secretary of any "great division" of the Executive Branch, her powers are limited to overseeing "the administrative operations of the Commission" and appointing "such administrative law judges and other employees as [s]he deems necessary to assist in the performance of the Commission's functions." 29 U.S.C. § 661(e). In fact, the OSHRC Chairperson cannot take any "official" Review Commission action without the vote of at least one other Review Commissioner.[2] 29 U.S.C. § 661(f). *Freytag*'s definition of the Head of a Department simply cannot be squared with the OSHRC Chairperson's duties and powers.

The Supreme Court further cemented that the OSHRC Chairperson cannot be a Head of a Department in *Free Enterprise Fund*. There, the Supreme Court held that a "principal agency," such as the SEC, is a Department under the Appointments Clause. *Free Enter. Fund*, 561 U.S. at 510. Nevertheless, it also concluded that the SEC Chairman was ***not*** the "Head" of the SEC for purposes of the Appointment Clause. *Id.* Instead, the Court held that only the "full Commission" could exercise that "Department's" Appointments Clause power.[3] *Id.* The

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[2] The OSH Act creates a dichotomy between "administrative" and "official" Commission actions. 29 U.S.C. § 661. The Chairperson is empowered only to take "administrative" actions, which purportedly include appointment of ALJs.

[3] The Supreme Court also rejected the argument that "appointments made directly by the Chairman" were invalid because those appointments were still "subject to the approval of the Commission." *Free Enter. Fund*, 561 U.S. at 512, n.13. In other words, the Head of the Department, i.e., the full Commission, still had to approve the Chairman's appointments, and the full Commission's approval satisfied the Appointments Clause. *Id.* The OSH Act, however, has no similar language requiring the Chairperson's appointments be "subject to the approval of the Commission."

Supreme Court based its ruling that the full SEC was the "Head of the Department" on two facts identical to those here: (1) the SEC's powers are "generally vested in the Commissioners jointly, not the Chairman alone," *id.*, just like OSHRC's powers are, *see* 29 U.S.C. § 661(f); and (2) the SEC's "Chairman is also appointed from among the Commissioners by the President alone," 561 U.S. at 510, just like OSHRC's Chairperson is, *see* 29 U.S.C. § 661(a). Thus, even assuming arguendo that OSHRC could qualify as a "principal agency" like the SEC (which it cannot as explained below), only the "full Commission" could exercise its Appointments Clause power. The OSH Act, however, vests that power solely in the Chairperson. 29 U.S.C. § 661(e). That cannot be so under the Constitution.

To be clear, Kenric Steel's position is that the Review Commission is not a principal agency given its solely adjudicatory function. Indeed, the Supreme Court's analysis under *Freytag* compels that result. The Supreme Court has repeatedly outlined how the Review Commission differs from "principal agencies" like the SEC. For example, in *Martin*, the Court noted the "unusual regulatory structure established by" the OSH Act. 499 U.S. at 151. It explained:

> Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority. *See*, *e.g.*, 15 U.S.C. § 41 *et seq*. (Federal Trade Commission); 15 U.S.C. §§ 77s–77u (Securities and Exchange Commission); 47 U.S.C. § 151 *et seq*. (Federal Communications Commission). Under the OSH Act, however, Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two different administrative authorities.

Id. Thus, the Review Commission does not even qualify as a "principal agency" since it lacks rulemaking and enforcement powers.

Ultimately, OSHRC ALJs are federal Officers and need to be appointed in accordance with the Appointments Clause. The plain language of the OSH Act prevents that occurring.

The Review Commission apparently recognized in 2019 that its ALJs could be subject to "constitutional challenges" due to the Chairperson being solely responsible for the appointment of the Review Commission's ALJs. Brigham Decl., Ex. 2. Thus, to preempt such a challenge like the one Kenric Steel has now brought, the full Review Commission ratified the appointments of the ALJs who served at the time, including Defendant Judge Augustine. *Id.*

Nevertheless, the full Review Commission's ratification of Defendant Judge Augustine's Appointment does not alter the fact that the plain language of the OSH Act prevents ALJs from being appointed in accordance with the Appointments Clause. Thus, Kenric Steel is entitled to a declaration finding the OSH Act's appointment process is unconstitutional.

c. Review Commission ALJs Are Unconstitutionally Insulated From Removal

Once appointed, Review Commission ALJs are also unconstitutionally insulated from removal.

OSHRC ALJs' removal protections are indistinguishable from the protections of other inferior officers that courts, including the Supreme Court, have held unconstitutional. In fact, three different layers of removal protections impede the President's ability to remove Review Commission ALJs: (1) while the Review Commission may take steps to remove an ALJ, it may do so "only for good cause established and determined by the [MSPB]," 5 U.S.C. § 7521(a); (2) the President may remove members of the MSPB only for "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d); and (3) the President may remove Review Commissioners only for "inefficiency, neglect of duty, or malfeasance in office," 29 U.S.C. § 661(b). Courts have held that matching sets of removal restrictions pertaining to ALJs of other agencies, including the SEC, NLRB, and others are unconstitutional. The same conclusion follows here.

Indeed, Supreme Court precedent establishes that multilayer removal protection violates Article II because it "not only protects [the inferior officers] from removal except for good cause, but withdraws from the President any decision on whether that good cause exists." *Free Enter. Fund*, 561 U.S. at 495. The Supreme Court reasoned:

> A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove [Inferior Officers] at will. The President therefore cannot hold the Commission fully accountable for the [Inferior Officers'] conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the [Inferior Officers'] actions.

Id. The Supreme Court concluded that this rendered the President "powerless to intervene" if he disagreed with those Inferior Officers' actions, even with "the Commission" being able to overturn those Inferior Officers' actions. The Supreme Court further reasoned that, due to this multilevel tenure protection, "the Commission" could only be responsible for its own actions, not its inferior officers. *Id.* "And even if the President disagrees" with "the Commission's" actions, "he is powerless to intervene—unless that determination is so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'" *Id*. (quoting *Humphrey's Executor*, 295 U.S. at 620). As a result, the Supreme Court held that these dual-layer statutory removal restrictions were unconstitutional. *Id.*

Courts have applied the Supreme Court's reasoning in *Free Enterprise Fund* to federal agencies' ALJs and found that their removal protection violates the Constitution. For example, in *Jarkesy v. SEC*, the Fifth Circuit Court of Appeals held that "statutory removal restrictions" for SEC ALJs "are unconstitutional." 34 F.4th 446, 465 (2015). Under 5 U.S.C. § 7521(a), "SEC ALJs may be removed by the Commission 'only for good cause established and determined by the [MSPB] on the record after opportunity for hearing.'" *Id.* at 464. Similarly, SEC Commissioners and MSPB Members "can only be removed by the President for cause." *Id.*

The Fifth Circuit determined that these multiple "layers of for-cause protection"—for the SEC Commissioners and MSPB members—unconstitutionally stood "in the President's way" of exercising his authority "over their functions." *Id.* at 464-65.

There is no relevant difference between SEC ALJs and OSHRC ALJs. Both are "inferior officers" who "have substantial authority" in agency investigations and enforcement actions. *Jarkesy*, 34 F.4th at 464; *see supra* 4-6. And like SEC ALJs, OSHRC ALJs are covered by "at least two layers of for-cause protection" that "stand in the President's way." *Jarkesy*, 34 F.4th at 465. Indeed, 5 U.S.C. § 7521(a), which allows an employing agency to remove its ALJs only when the MSPB finds good cause, applies equally to SEC and OSHRC ALJs; and 5 U.S.C. § 1202(d) applies equally to the MSPB members in both instances as well. The OSH Act also explicitly creates removal protection for Commissioners: they are removable only for "inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(b). So, like the SEC ALJs, OSHRC ALJs are unconstitutionally insulated from the President's oversight. *See Jarkesy*, 34 F.4th at 464; *see also Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1113 (D.C. Cir. 2021) (Rao, J., concurring and dissenting in part) ("Under the text, structure, and original meaning of the Constitution, as well as Supreme Court precedent, it is unconstitutional to insulate Agriculture ALJs with two layers of removal protection."); *Energy Transfer, LP v. NLRB*, No. 3:24-CV-198, 2024 WL 3571494, at *2 (S.D. Tex. July 29, 2024) (holding party "will likely show that the removal protections afforded to NLRB ALJs are unconstitutional").

At bottom, because Review Commission ALJs have the same—if not greater—protections on their removal that other courts have found unconstitutional, this Court should hold those removal protections unconstitutional here.

3. The ALJ'S Adjudication Of The Citation Without A Jury Trial Violates The Seventh Amendment And Article III

The OSHRC proceeding against Kenric Steel also violates the Seventh Amendment, which preserves the right to trial by jury "[i]n Suits at common law." U.S. Const. amend. VII. Kenric Steel recognizes that the U.S. Supreme Court held in *Atlas Roofing* that the Seventh Amendment did not prevent Congress from assigning to the Review Commission the task of adjudicating alleged violations of the OSH Act and its attendant standards. That decision binds this Court. Accordingly, Kenric Steel briefly sets forth its argument on this point solely to preserve it for appeal.

a. The Secretary Seeks Traditional Legal Remedies

By its text, the Seventh Amendment guarantees that in "suits at common law, . . . the right of trial by jury shall be preserved." When interpreting this language, the Supreme Court has noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons v. Bedford*, 3 Pet. 433, 436, 28 U.S. 433 (1830). The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.* at 447.

The Supreme Court recently reaffirmed that the "Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *S.E.C. v. Jarkesy*, 144 S. Ct. 2117, 2128–29 (2024) (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 courts to "courts to consider the cause of action and the remedy it provides," with the remedy being "more important." *Id.*

As it was in *Jarkesy*, here "the remedy is all but dispositive." *Id.* at 2129. The Secretary of Labor:

> seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Austin v. United States*, 509 U.S. 602, 610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (internal quotation marks omitted). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." *Ibid.* The same is true here.

Id.

To start, the OSH Act conditions the size of the civil penalty on (1) the size of the business of the employer being charged; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the history of previous violations. 29 U.S.C. § 666. "Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable." *Jarkesy*, 144 S. Ct. at 2129. The criteria that separate the tiers of civil penalties under the OSH Act likewise are legal in nature. Congress set one maximum for "Serious" and "Other-Than-Serious" penalties but multiplied that maximum by ten for "Willful or Repeated" violations. 29 U.S.C. § 666(a)-(c). These two tiers:

> condition[] the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. Since

> nothing in this analysis turns on "restor[ing] the status quo," *Tull*, 481 U.S. at 422, 107 S.Ct. 1831, these factors show that these civil penalties are designed to be punitive.

Jarkesy, 144 S. Ct. at 2129-30.

"The final proof that this remedy is punitive is that [OSHA] is not obligated to return any money to victims." *Id.* at 2130. "Such a penalty, by definition, does not 'restore the status quo and can make no pretense of being equitable." *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

Thus, because "the civil penalties in this case are designed to punish and deter, not to compensate," they are "'a type of remedy at common law that could only be enforced in courts of law.'" *Id.*

b. The Public Rights Exception Is Inapplicable to OSHA Civil Penalties

In *Atlas Roofing*, the Supreme Court concluded the "public rights" doctrine allowed Congress to assign OSH Act adjudications to an agency because the claims were "unknown to the common law." 430 U.S. at 461. The Court erred when reaching that conclusion. In fact, "civil penalties" existed in the common law when this nation was founded. Indeed, "[p]rior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418. "Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury." *Id.* at 418-19. OSHA civil penalties are no different than the civil penalties in *Tull* or *Jarkesy*. In both matters, the court determined that remedy required an Article III court and a jury. Thus, despite *Atlas Roofing*'s contrary holding, OSHA civil penalties were known to the common law and, thus, are "within the jurisdiction of the courts of law." Congress, therefore,

violated the Constitution by assigning adjudication of alleged violations of the OSH Act to OSHRC.

4. Kenric Steel Has Proven The Solicitor Of Labor's Unsupervised Prosecution Of Kenric Steel Violates The OSH Act

In addition to the constitutional deficiencies described above, the Secretary and the Solicitor are prosecuting this matter against Kenric Steel in violation of the OSH Act. Specifically, the OSH Act requires that any civil litigation brought under it "be subject to the direction and control of the Attorney General." 29 U.S.C. § 663; *see also Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1184 (3d Cir. 1980) ("Section 14 of the Act authorizes only the Secretary to conduct OSHA civil litigation, subject to the direction and control of the Attorney General. 29 U.S.C. s 663."). Yet neither the Attorney General nor any subordinate within the Department of Justice supervises or directs OSHRC proceedings that seek civil fines, including this OSHRC Proceeding. SOF ¶ 15. This wholesale abdication of the Attorney General's congressionally mandated duty to supervise and direct OSH Act litigation renders the Solicitor's prosecution of Kenric Steel unlawful.

The Attorney General of the United States is "the Nation's chief law enforcement officer." *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). Indeed, under Section 519 of Title 28 of the United States Code, and "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party[.]" 28 U.S.C. § 519.

No law authorizes the Secretary or the Solicitor of Labor to prosecute Kenric Steel and seek civil penalties ***without*** the supervision and direction of the Attorney General. The contrary is true. The OSH Act ***requires*** that the Attorney General supervise and direct OSH Act litigation.

Yet because of how the Department of Labor and Department of Justice are currently constructed, the Attorney General does not supervise or direct OSH Act litigation that occurs before the Review Commission and has not done so in the OSHRC proceeding. By way of background, the Office of the Solicitor was established by the Organic Act of March 4, 1913 ("Organic Act"), with the creation of the Department of Labor as an entity distinct and separate from the Department of Commerce and Labor. The Organic Act provided, however, that the Solicitor sat within the Department of Justice. As a result, the Organic Act's original provisions that created the Solicitor of Labor position established that the Solicitor would be a subordinate to the Attorney General. Then, on June 10, 1933, President Franklin D. Roosevelt issued Executive Order 6166 which transferred the Solicitor from the Department of Justice to the Department of Labor. As a result, and as noted by the official House of Representatives' website, Section 555 of Title 29 of the United States Code now reads as published "[t]here shall be a solicitor for the Department of Labor." That being said, "[t]he words 'of the Department of Justice' were omitted from text on authority of section 7 of Ex. Ord. No. 6166, which transferred the Solicitor for the Department of Labor from the Department of Justice to the Department of Labor." *See* https://uscode.house.gov/view.xhtml? req=granuleid:USC-prelim-title29-section555&num=0&edition=prelim (last visited June 2, 2025). In other words, but for Executive Order 6166, Section 555 of Title 29 of the United States Code would contain the phrase "of the Department of Justice."

"Of course, an executive order cannot supersede a statute." *Marks v. Cent. Intel. Agency*, 590 F.2d 997, 1003 (D.C. Cir. 1978). But that is exactly what appears to have occurred regarding to whom the Solicitor reports.

At bottom, Kenric Steel has standing to ensure that the Solicitor follows the procedures outlined in the OSH Act. *Dep't of Educ. v. Brown*, 600 U.S. 551, 561–62 (2023). To date, Defendants have refused. As a result, Kenric Steel requires the Court to order them to adhere their statutory obligations.

B. Kenric Steel Will Be Irreparably Harmed By The OSHRC Proceeding

Being subject to unconstitutional agency authority—including proceedings before unconstitutionally insulated agency officials—qualifies as a "here-and-now injury" under well-settled precedent. *See, e.g.*, *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 190–96 (2023) (citation omitted). Merely being subject to a hearing and decision in proceedings before an unconstitutionally appointed and unconstitutionally insulated ALJ causes Kenric Steel ongoing harm. This harm exists even if a President does not actively desire to remove a particular ALJ, because the mere potential for removal influences how rational ALJs carry out their duties. After all, Congress sought to make Review Commission ALJs politically independent for a reason: it wanted to insulate them from political pressures. *See, e.g.*, *Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part and dissenting in part). In addition, a showing of particularized cause and effect between the appointment process and removal restrictions and ALJ actions is unnecessary to declare that the appointment process and removal restrictions are unconstitutional. Kenric Steel is "entitled to declaratory relief sufficient to ensure that the [administrative] standards to which [Kenric Steel is] subject will be enforced only by a constitutional agency accountable to the Executive." *Free Enter. Fund*, 561 U.S. at 513. Without injunctive relief from this Court, Kenric Steel will be required to undergo an unconstitutional proceeding before an unconstitutionally appointed and insufficiently accountable agency official. That is the epitome of irreparable harm.

C. The Balance Of Equities Favors Kenric Steel

The balance of equities also favors granting Kenric Steel the Requested Relief; that is, the potential injury to Kenric Steel without this injunction versus the potential injury to Defendants with it in place heavily favors granting the Requested Relief. *Novartis Cons. Health, Inc. v. Johnson & Johnson–Merck Cons. Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002). Kenric Steel already detailed above the irreparable harm that it will suffer absent this injunction, and Defendants have no interest in continuing practices that violate the Constitution, the OSH Act, or the APA. *See Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017).

D. The Public Interest Favors This Preliminary Injunction

If a plaintiff proves "both" a likelihood of success on the merits and irreparable injury, it "almost always will be the case" that the public interest favors preliminary relief. *Id.* So too here. The public certainly would prefer that agencies not violate the Constitution. And it is not in the public's interest for the Executive Branch to "slip from the Executive's control, and thus from that of the people." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Permanent injunctive relief is in the public interest here.

IV. CONCLUSION

For the above reasons, Kenric Steel respectfully requests that the Court enter judgment in its favor and grant the Requested Relief.

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Dated: June 2, 2025

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing documents to be electronically filed and served on the parties via the Court's ECF system.

Dated: June 2, 2025 /s/ Brandon J. Brigham