No. 25-966

In The Supreme Court of the United States

DEPARTMENT OF LABOR, ET AL.

Petitioners,

v.

SUN VALLEY ORCHARDS, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1) Whether Article III of the Constitution precludes the Department of Labor from adjudicating proceedings to collect monetary remedies from employers who have allegedly violated the terms and conditions of employment of H-2A workers and domestic workers in corresponding employment.

2) Whether 8 U.S.C. § 1188(g)(2) authorizes the Department of Labor to adjudicate proceedings to collect monetary remedies from employers who have allegedly violated the terms and conditions of employment of H-2A workers and domestic workers in corresponding employment.

PARTIES TO THE PROCEEDING

Petitioners are the Department of Labor and Keith E. Sonderling, Acting Secretary of Labor. Respondent is Sun Valley Orchards, LLC.

CORPORATE DISCLOSURE STATEMENT

The statement required by Rule 29.6 appears in Sun Valley's brief in opposition to the petition for certiorari.

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INTRODUCTION

A Department of Labor ALJ held Sun Valley Orchards—a family farm in rural New Jersey—liable for over half a million dollars in penalties and back wages. Liability was based on alleged breaches of the farm's contractual obligations to both foreign and domestic workers, involving contract terms governing kitchen access, housing conditions, transportation, and dates of employment. At the trial, prosecuting attorneys, agency witnesses, and judge were all employed by DOL.

The Third Circuit correctly held that DOL's claims involved "private" rights that had to be adjudicated in Article III court. Private rights, at a minimum, include "the stuff of the traditional actions at common law." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (citation omitted). "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *SEC v. Jarkesy*, 603 U.S. 109, 128 (2024). That rule applies here because DOL sought common law remedies—penalties and back wages—on a breach-of-contract theory. The agency proceeded under regulations that "cover the enforcement of all contractual obligations," 29 C.F.R. § 501.0, and the ALJ explained that she found Sun Valley liable because it "breached … the contract that cemented the working relationship," Pet. App. 141a.

The government now attempts to shift focus from the claims and remedies at issue in the agency adjudication to DOL's antecedent decision to certify Sun Valley to employ H-2A workers. The government argues (at 30) that employing H-2A workers is a "government-granted privilege[]" and that executive officials can, as a condition of the privilege, adjudicate "matters related to the privilege."

The government's conclusion does not follow from its premise. It is true that this Court has identified a category of "public" rights that "from their nature do not require judicial determination." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (citation omitted). And it is true that whether to grant (or revoke) a privilege is typically a matter of public right. *Id.*[1] Sun Valley also does not dispute that participation in the H-2A program is a privilege. But it does not follow that executive officials can therefore adjudicate related monetary liability: For instance, while executive officials can decide whether to grant (or revoke) a patent, monetary liability related to patents is adjudicated in court. *Id.* at 344; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996). Likewise, although DOL can decide whether to certify employers to participate in the H-2A program, courts still must adjudicate claims for monetary liability.

This Court has recognized that cases involving monetary liability can sometimes fall in the "public rights" category, but the government bears a heavy burden to show this is such a case. "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Jarkesy*, 603 U.S. at 132 (citation omitted). To overcome that presumption, this

[1] Most executive-branch adjudication falls into this category. *See Office of Personnel Management, Federal ALJs By Agency*, https://perma.cc/2A7UY5S9.

Court looks for clear evidence of a venerable historical practice of executive-branch adjudication, giving "close attention to the basis for each asserted application of the doctrine." *Id.* at 131.

The government cites a history of immigration-related adjudication but does not give it close attention. That tradition was closely related to the determination of immigration status: For the most part, executive officials decided whether to admit, exclude, or deport. When executive officials adjudicated penalties, they did so at the border based on the prohibited movement of people at the border—for instance, when aliens were found ineligible for admission. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). Penalties imposed on domestic employers of foreign workers, on the other hand, were adjudicated in court. *Hepner v. United States*, 213 U.S. 103 (1909). Nothing in that tradition supports executive adjudication of breach-of-contract claims involving domestic and foreign workers at a domestic farm.

Perhaps because the government recognizes the immigration-related history does not suffice, the government broadens the lens to take in adjudications involving customs duties, government contractors, militia members, and more. If anything, the wide range of that historical discussion highlights the lack of on-point precedent for executive adjudication here.

As for the government's warning of a slippery slope, the gradient runs the opposite direction. Given the variety of activities that require some kind of license, registration, or other government-controlled privilege, the government's theory would transform agency adjudication of monetary liability from an "exception," *Jarkesy*, 603 U.S. at 131, into the default. Meanwhile, immigration-related penalties cited by the government more directly involve immigration status and present a different question.

Article III serves an important role in our constitutional structure. It ensures the "complete independence of the courts of justice" that is "peculiarly essential in a limited Constitution." THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* John Adams, *Thoughts on Government*, Papers 4:86-93, Apr. 1776 ("[T]he judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both[.]"). The Third Circuit properly enforced that guarantee.

At a minimum, these same constitutional considerations support a judgment in Sun Valley's favor on the second question presented. Agencies cannot adjudicate private rights, and they certainly cannot do so without clear statutory authorization. *Bank One Chi. NA v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 274-75 (1996). The government here relies on statutory authority to "impose" penalties and take "necessary" action, but it identifies no clear indication that Congress intended to authorize agency adjudication.

Putting all this together, Sun Valley was held liable by an administrative agency that created its own system of administrative adjudication without clear statutory authority; that wrote the applicable rules and regulations; and that employed both the enforcement staff and the judge. That is not how separation of powers is supposed to work.

PROVISIONS INVOLVED

Pertinent provisions are reprinted in the appendix to this brief.

STATEMENT

I. The H-2A Program

The H-2A program is divided into two parts. First, employers obtain a "certification" from DOL that "there are not sufficient [domestic] workers who are able, willing, and qualified" to do the job and that importation of foreign workers "will not adversely affect the wages and working conditions" of domestic workers. 8 U.S.C. § 1188(a)(1). Second, the employer files a "petition to import an alien as an H-2A worker" with the Department of Homeland Security, and the worker applies for a visa. *Id.*

DOL's part of the H-2A program piggybacks upon a preexisting system of employment offices that was created in 1933 by the Wagner-Peyser Act and that is jointly administered by DOL and the states. *See* 90 Fed. Reg. 28919, 28920 (2025) (explaining regulatory background).

Farm employers (H-2A or not) can use the Wagner-Peyser system to recruit domestic workers. To do so, the farm fills out a job order (sometimes called a "clearance order"), and the employment office "place[s] [the] job order … into intrastate or interstate clearance." 20 C.F.R. § 653.501(a). Job orders must include "all the material terms and conditions of the employment." *Id.* § 653.501(c)(1)(iv). It has long been understood that a "clearance order is essentially an offer for a contract of employment." *W. Colo. Fruit Growers*

Ass'n v. Marshall, 473 F. Supp. 693, 696 (D. Colo. 1979).

To participate in the H-2A program, an employer "must use" the Wagner-Peyser system "to recruit U.S. workers as a condition of receiving a temporary agricultural labor certification." 90 Fed. Reg. at 28920; 20 C.F.R. § 655.121. Farms applying to the H-2A program therefore fill out a job order, which is circulated intra- and interstate. *Id.* §§ 655.121(c), (f); 655.150(a).

DOL regulations specify terms that must be included in a job order:

- All job orders (H-2A or not) must state the dates of employment and specify any period "for which work is guaranteed." *Id.* § 653.501(c)(1)(iv)(H). H-2A employers must guarantee employment for at least three-fourths of the employment period. *Id.* § 655.122(i).
- All job orders must specify any "deductions to be made from wages." *Id.* § 653.501(c)(1)(iv)(F).
- All job orders must specify "any non-monetary benefits to be provided." *Id.* § 653.501(c)(1)(iv)(G). For H-2A employers:
    - The employer must "either" state that it will provide kitchen access or that it will provide a meal plan and "state the charge, if any, to the worker for such meals." *Id.* § 655.122(g).
    - The employer must commit to provide housing that complies with federal standards for migrant worker housing. *Id.* § 655.122(d).

- The employer must commit that transportation provided to workers will comply with local, state, and federal law. *Id.* § 655.122(h)(4).

If domestic circulation of the job order does not yield sufficient workers—and the employer takes other steps to recruit U.S. workers—then DOL certifies that there are insufficient domestic workers. *Id.* § 655.161. The employer separately petitions DHS for permission to import foreign workers, and workers separately apply for visas. 8 C.F.R. § 214.2(h)(5).

An H-2A employer must provide its foreign and domestic workers with "a copy of the work contract … in a language understood by the worker." 20 C.F.R. § 655.122(q). The contract "must contain all of the provisions required" for the job order, and, "[i]n the absence of a separate, written work contract … the work contract at a minimum will be the terms of the job order[.]" *Id.*

II. Enforcement Of Work Contracts

This "job order" architecture predates the H-2A program. *W. Colo. Fruit Growers*, 473 F. Supp. at 695. Even before Congress created the H-2A program, workers could bring state-law breach-of-contract actions to enforce their job orders. *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 639-40 (9th Cir. 1984).

When Congress created the H-2A program in 1986, it directed DOL to supplement these state law remedies. In a section titled "AUTHORIZATIONS OF APPROPRIATIONS," Congress authorized spending for enforcement of "terms and conditions under which" workers "are employed" and provided:

> The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment[.]

100 Stat. 3359, 3416 (1986) (codified at 8 U.S.C. § 1188(g)). While this provision contemplated DOL enforcement, it said nothing about where adjudication should occur. Other provisions in the same law expressly provided for agency adjudication in other contexts. *Infra* p.49.

Based on this appropriations provision, DOL promulgated regulations authorizing administrative adjudication. *Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act*, 52 Fed. Reg. 20524 (1987). The agency stated that it was adopting "procedures deemed necessary by DOL to carry out its statutory responsibilities regarding enforcement of an H-2A employer's contractual obligations." *Id.* at 20525.

Today, these provisions are codified at 29 C.F.R. Part 501, titled "Enforcement of Contractual Obligations…." The regulations "cover the enforcement of all contractual obligations … applicable to the employment of H-2A workers and workers in corresponding employment." 29 C.F.R. § 501.0.

Under the regulations, DOL's Wage and Hour Division ("WHD") investigates farms and can "[i]nstitute appropriate administrative proceedings" for "recovery of unpaid wages," "enforcement of provisions of the work contract," and "assessment of a civil money penalty." *Id.* § 501.16. First, WHD issues a notice of determination imposing a penalty. *Id.* § 501.31. To obtain "review of a determination," the employer must "make a written request for an administrative hearing." *Id.* § 501.33. The case is assigned to an ALJ, who hears evidence and issues a written decision. *Id.* § 501.41. At the hearing, a DOL ALJ presides, DOL lawyers prosecute the case, WHD enforcement staff typically testify as witnesses, and the "Federal Rules of Evidence … will not apply." *Id.* § 501.34.

The ALJ's decision is subject to review by DOL's Administrative Review Board—a panel of DOL agency officials. *Id.* § 501.42. Then, the decision is subject to discretionary review by the Secretary of Labor. 85 Fed. Reg. 13186, 13188 (2020).

When a penalty assessed by DOL becomes final, "the amount of the penalty must be received by the WHD Administrator within 30 days." 29 C.F.R. § 501.22. The agency warns employers that unpaid awards constitute a "debt owed to the Federal government" that is subject to "assessment of interest" and debt collection. Pet. App. 185a. Judicial review is available only under the Administrative Procedure Act's deferential standard. 5 U.S.C. § 706(2)(E).

In parallel to this administrative system, DOL regulations separately provide that WHD can "[p]etition any appropriate District Court … for temporary or permanent injunctive relief" or "specific performance of covered contractual obligations." 29 C.F.R. § 501.16(b)-(c). In addition to recovering back wages administratively, WHD sues for back wages in court. *E.g.*, Complaint, *Chavez-DeRemer v. Grimmway Enters., Inc.*, No. 25-cv-5030 (E.D. Wash. Mar. 14, 2025).

Courts also continue to recognize that workers can bring common law breach-of-contract actions to enforce their job orders. *E.g.*, *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1246-48 & n.27 (11th Cir. 2002). As one court put it, there are "federal cases too numerous to count which have held that H-2A workers may pursue state breach of contract claims against employers who fail to comply with clearance orders." *Lopez v. Fish*, No. 11-cv-113, 2012 WL 2126856, at *2 (E.D. Tenn. May 21, 2012).

III. Agency Proceedings

During the time relevant to this case, Sun Valley grew vegetables, including peppers, squash, cucumbers, and asparagus. Vegetable farming is labor intensive, as crops must be picked by hand, and the farm relied on seasonal workers. As it became increasingly difficult for the farm to find domestic workers, for the 2015 season the farm decided it had no choice but to participate in the H-2A program. The farm employed 96 foreign workers and 51 domestic seasonal workers.

In July 2015, a DOL investigator spent two days at the farm. Then, nearly a year later, the agency issued a letter imposing over half a million dollars in liability. Pet. App. 183a, 187a-199a. Breaking down the allegations, DOL imposed:

- $142,728.22 in back wages, plus $1,350 in penalties, because workers were allegedly fired before their employment end date—and thus were owed wages under a job order term guaranteeing employment for three-quarters of the job period.
- $198,450 in penalties and $128,285 in back wages because the farm allegedly did not provide the

type of kitchen access described in the job order, and the workers' field manager instead had his wife prepare cooked meals for a weekly fee.

- Over $70,000 in back wages because the field manager allegedly sold beverages to workers, resulting in undisclosed deductions.
- $7,500 in penalties related to transportation, primarily because the farm allegedly allowed workers to drive without U.S. licenses.
- Over $3,000 in penalties related to alleged housing conditions, such as torn window screens.
- $1,350 in penalties because Sun Valley allegedly had workers complete a form waiving rights under the three-fourths guarantee.

DOL assessed penalties and back wages for both foreign and domestic workers: For instance, for the kitchen access violation, DOL assessed per-worker penalties for 96 foreign and 51 domestic workers and included all those workers in its back wages calculation. Pet. App. 150a-151a & n.150, 155a. Notably, DOL did not seek to bar Sun Valley from participating in the H-2A program. Pet. App. 180a.

After a multi-day hearing, the ALJ affirmed the assessment of liability (with some minor adjustments in the amounts). The ALJ upheld liability for failure to provide kitchen access, reasoning that this failure "breached a material term of the job order; the contract that cemented the working relationship[.]" Pet. App. 141a. While Sun Valley argued that the workers were not harmed by this alleged violation (given that the price they paid for meals was not significantly more than they would have otherwise paid for groceries) the ALJ deemed that irrelevant, reasoning that "[a] material change to the terms of [the] contract necessarily provides 'harm' to both the workers' reliance on the H-2A program … as well as the overall integrity of the program itself." *Id.* at 150a.

The ALJ also found Sun Valley responsible for the actions of the field manager—both with respect to the meal plan and the beverage sales—because the field manager acted as the farm's agent. Pet. App. 142a (citing Restatement (Third) of Agency (2006)). The ALJ reasoned that "[a] less severe consequence would deny the farmworkers their contractual right" under the job order. *Id.* at 148a.

With respect to the alleged early termination of workers, the ALJ made factual findings and credibility determinations and concluded that the workers were fired—rather than leaving voluntarily. Pet. App. 159a (finding that farmer's testimony "lacks credibility"). As a result, workers were owed back wages for "the hours promised in their contracts." *Id.*

Finally, the ALJ upheld the smaller transportation and housing penalties. Pet. App. 172a, 176a.

The Administrative Review Board affirmed. Pet. App. 47a. For the kitchen access violation, the ARB affirmed that "Respondent failed to honor the terms of each worker's job contract." *Id.* at 65a. The ARB also affirmed the finding of liability for the alleged early termination, finding the workers entitled to payment as "specified in the work contract," *id.* at 71a, and upheld the transportation and housing penalties, *id.* at 74a.

IV. Proceedings Below

Sun Valley sought review under the Administrative Procedure Act, 5 U.S.C. §§ 704, 706, in the United States District Court for the District of New Jersey. Among other claims, Sun Valley alleged that DOL's adjudication violated Article III and was not sufficiently authorized by Congress.

The district court granted the government's motion to dismiss. With respect to Article III, the district court reasoned that the "public-rights doctrine applies" because "this matter is based on Sun Valley's violations of DOL's regulations, derives from a federal regulatory scheme under the federal government's immigration related powers, and is integrally related to a particular Federal Government action[.]" Pet. App. 32a-33a. The district court found agency adjudication "clear[ly]" authorized by Section 1188(g)(2) because DOL is "authorized" to "impos[e]" penalties and can choose the procedure to follow. *Id.* at 34a.

The Third Circuit reversed on Article III grounds. Tracking this Court's opinion in *Jarkesy*, the Third Circuit began by addressing whether the underlying action implicated Sun Valley's "private rights, asking if it 'is made of the stuff of the traditional actions at common law.'" Pet. App. 10a-11a (quoting 603 U.S. at 128). The Third Circuit pointed to the contractual nature of the underlying claims, explaining that DOL sought to enforce the job order, which "functions as a 'work contract.'" *Id.* at 11a (quoting 20 C.F.R. § 655.122(q)). The agency itself "framed its enforcement action against Sun Valley in contractual terms." *Id.* at 12a. Plus, "DOL sought common law remedies: civil penalties and back wages." *Id.* at 13a.

The Third Circuit acknowledged that "history does sanction non-Article III adjudication for certain immigration-related matters," but concluded that "this case falls well outside the heartland of that tradition." Pet. App. 13a-14a. In particular, the court canvassed the relevant history and concluded that it involved matters "closely related to the admission and exclusion of aliens." *Id.* at 15a. By contrast, "[r]ules about worker hours, housing, cooking, and transportation regard employment law." *Id.* at 16a.

The Third Circuit also drew a line based on remedy. The court acknowledged that an action "to bar Sun Valley from the program or to remove ineligible foreign workers" would likely involve public rights. Pet. App. 17a. But that reasoning did not apply to claims for penalties and back wages. To hold otherwise would "eviscerate *Jarkesy*'s instruction that we evaluate the legal basis for DOL's assertion of the public rights doctrine with care." *Id.* (cleaned up).

The Third Circuit did not reach Sun Valley's other claims, including its claim that agency adjudication was not authorized by statute.[2]

SUMMARY OF THE ARGUMENT

I. Following *Jarkesy*, 603 U.S. at 128, the nature of the claims and remedies in the underlying DOL adjudication establishes a strong presumption in favor of the Article III courts. There can be no real question that DOL sought liability on a breach-of-contract the-

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[2] Partly because of this looming liability, Sun Valley has shut down farming operations. BIO at 13 n.4. The entity remains incorporated, however, and this case presents a live dispute because DOL treats the award as a debt. *Infra* pp.21-22

ory, as DOL articulated the contractual nature of its claims both in its regulations and in the agency decisions under review. Workers could have sued to enforce these same job order terms at common law. In addition, DOL sought penalties, a fact that *Jarkesy* deemed "all but dispositive." *Id.* at 123. And DOL sought back wages—essentially contract damages. Putting that together, DOL sought common law remedies on a common law claim.

The government attempts to overcome the resulting presumption by invoking a tradition of immigration-related adjudication, but that tradition does not extend to these common law claims and remedies. Penalties against employers of foreign workers were historically adjudicated in Article III court. *Hepner*, 213 U.S. at 115. Most non-Article III adjudication involved the question whether to admit, exclude, or deport. Executive officials did adjudicate penalties at the border based on movement of people at the border—most notably, when immigrants were found ineligible for admission. *Oceanic Steam*, 214 U.S. at 331-32. The government, however, identifies no precedent for executive adjudication of common law claims related to domestic and foreign workers' conditions of employment at a domestic business.

Alternately, the government asserts (at 30) a broader theory under which agencies can adjudicate matters "related" to conditions on "government-granted privileges." However, while the executive can decide whether to grant or revoke a privilege, it does not follow that the executive can adjudicate "related" monetary liability. The government's cited history arises in distinct contexts and does not support such a sweeping rule: The customs tradition that it cites, for instance, involved valuations at the border, and this Court rejected an attempt to expand it beyond that context. *United States v. Sherman & Sons Co.*, 237 U.S. 146, 155 (1915). Nor can the government's argument be recast in terms of waiver or consent; regulated entities do not implicitly waive constitutional rights by participating in a regulatory program. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). Ultimately, the government's proposed rule resembles nothing more than the reading of *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), that this Court rejected in *Jarkesy*, and this Court should reject the argument here for the same reason. Nothing the government cites supports executive adjudication of common law remedies for common law claims.

Finally, the government's slippery-slope arguments are misplaced. Most immigration-related adjudication directly involves immigration status and is therefore unproblematic. Other immigration-related penalties might also be upheld under the Third Circuit's approach (though the Court need not decide that here), as they are related to immigration status and do not involve common law claims.

II. For largely the same reasons, this Court also should hold that Congress has not sufficiently authorized DOL's agency adjudication. DOL should not be allowed to adjudicate these issues at all, and it certainly should not be allowed to do so without clear statutory authorization. *Sherman & Sons*, 237 U.S. at 157; *Bank One Chi.*, 516 U.S. at 274-75.

There is no clear statutory authorization here. While the relevant statute says that DOL can "impos[e]" penalties, 8 U.S.C. § 1188(g)(2), this Court recognized just last Term that an agency can "impose" penalties but still adjudicate them in court. *FCC v. AT&T*, 146 S. Ct. 1418, 1429 (2026). As for the back wages portion of the award, the agency relies on a catch-all authorization to take "necessary" action, but that language says nothing about where liability should be adjudicated.

ARGUMENT

I. The Underlying Agency Adjudication Violated Article III.

A. DOL's Allegations Involved Private Rights.

Because Article III vests the "judicial power" in the federal courts, the Article III analysis begins by asking whether a case involves the types of claims and remedies that were traditionally adjudicated by courts—*i.e.*, "the stuff of the traditional actions at common law." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (citation omitted). This Court, in *Jarkesy*, therefore held that the nature of the claims and remedies "effectively decides [the] case." 603 U.S. at 134 (looking to the "substance of the action," including that agency sought "civil penalties" and "target[ed] the same basic conduct as common law fraud"). Matters that involve common law claims and remedies "presumptively" concern private rights. *Id.* at 128. Here, the nature of the claims and remedies gives rise to the same presumption.

i. DOL Pursued Common Law Claims.

Begin with the claims. DOL's claims are premised on Sun Valley's alleged failure to comply with the job order that set the terms of its relationship with both domestic and foreign workers and, thus, are essentially breach-of-contract claims. *Granfinanciera, SA v. Nordberg*, 492 U.S. 33, 56 (1989) (claims that "resemble state-law contract claims" are "quintessentially suits at common law").

Courts recognize that H-2A workers—like domestic workers—can enforce the terms of job orders through common law contract actions. *E.g.*, *Garcia-Celestino v. Ruiz Harvesting Inc.*, 843 F.3d 1276, 1285-86 (11th Cir. 2016) ("It is on the basis of the clearance order, which served as the workers' contracts, that the plaintiffs in this suit brought their breach of contract claims."); *see also Donaldson v. DOL*, 930 F.2d 339, 349 (4th Cir. 1991) (declining to imply federal cause of action for H-2A workers, as federal law would not be frustrated by "committing the workers to state common law remedies for breach of contract").

Such cases even involve the same contract terms at issue in this case. In *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 639-40 (9th Cir. 1984), foreign migrant workers brought an early-termination claim based on the three-quarters guarantee, and the Ninth Circuit held that the claim arose under state law (and thus did not even give rise to a federal question) because "the gravamen of appellants' action is breach of employment contract." *See also Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1353 (5th Cir. 1985) (holding, in action by foreign migrant workers, that three-quarters guarantee formed part of the "terms of plaintiffs' employment agreement").

DOL's regulations are clear that its system of agency adjudication is designed to enforce these contractual obligations. The relevant provision is titled "Enforcement of Contractual Obligations" and applies to "enforcement of all contractual obligations" related to H-2A and corresponding domestic workers. 29 C.F.R. § 501.0. When DOL's regulations authorize penalties, they authorize penalties for "each violation of the work contract[.]" *Id.* § 501.19. Even the statute under which DOL claims authority speaks in terms of assuring "compliance with terms and conditions of employment." 8 U.S.C. § 1188(g)(2).

The agency's characterization of its claims in this very case confirms the point. Testifying below, an agency enforcement official stated that the job order "lay[s] out terms and conditions of employment basically in the form of a contract." Pet. App. 168a. The ALJ likewise explained repeatedly that, in her view, Sun Valley "breached a material term of the job order; the contract that cemented the working relationship." *Id.* at 141a; *id.* at 143a ("promised"), 148a ("contractual right"), 150a ("contractual agreement"), 159a ("promised in their contract"). And the ARB affirmed on the ground that Sun Valley "failed to honor the terms of each worker's job contract." *Id.* at 65a; *id.* at 62a ("contractually promised"), 64a ("job contract"); 66a ("contractually promised"), 67a ("the wage promised").

Before this Court, the government asserts (at 37) that its claims are not actually contract claims because they involve "requirements that the government has imposed," rather than "terms to which the parties have agreed." As a factual matter, that is not right. Take the kitchen access claim: DOL's regulations allow employers to either provide kitchen access or a meal plan, 20 C.F.R. § 655.122(g), and DOL has never disputed that Sun Valley's meal plan would have been lawful if included in the job order.[3] As the ALJ put it, the problem was not that the meal plan was unlawful, but, rather, that it "changed a material term of the job order." Pet. App. 150a. Similarly, the three-quarters guarantee can only be applied with reference to start and end dates of employment that are set by agreement; thus, the ALJ found the workers were fired "before they worked the guaranteed three-fourths of the hours promised in their contracts." *Id.* at 159a. Even the housing- and transportation-related terms are incorporated into the job order, 20 C.F.R. § 655.122(c), and thus part of the contract that workers accept.

Legally mandated contract terms are common—including in insurance contracts, housing contracts, and more—and remain contract terms. *See, e.g.*, *Rosati v. Bos. Pipe Covering, Inc.*, 749 N.E.2d 143, 146 (Mass. 2001) ("[T]he fact that the contract price is governed and set by statute does not make the claim any less analogous to a contract claim."); *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126, 1133 (11th Cir. 2014) (regulations incorporated into contract "are enforceable terms"). Courts therefore recognize that H-2A workers can sue under state law to enforce the job order even where its terms are set by federal regulations. *See Donaldson*, 930 F.2d at 349 (in case involving H-2A workers, fact that "breach alleged here is of an obligation imposed by federal law … does not make

[3] The amount charged for meals was below what DOL regulations allowed. Pet. App. 132a (citing 80 Fed. Reg. 9482 (2015)).

the claim any less one traditionally the concern of state common law remedies”).

Finally, the government points out (at 37) that these claims are litigated by the government, not workers. However, the public rights analysis does not turn on the “identity of the parties,” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985), and this Court has made clear that a “close relationship” to a common law cause of action is sufficient to implicate private rights even if the claims do not perfectly overlap. *Jarkesy*, 603 U.S. at 126. Moreover, the government says (at 11-12) that it intends to pass on the back wages to the individual workers, and numerous cases confirm that the workers could (if they chose) have brought their own common law actions to enforce these same contractual terms. The government cannot eliminate the protection of Article III by substituting itself as a plaintiff. Rather, the text of Article III is clear that the presence of the government as a party is a reason to bring a case within the ambit of the federal courts. U.S. CONST. art. III, § 2; *see also Williams v. United States*, 289 U.S. 553, 577 (1933) (reading the text to refer to cases in which the government is a plaintiff).

ii. DOL Sought Common Law Remedies.

Moving from claims to remedies, DOL’s award purports to be a debt that is final and collectible unless appealed and, thus, effectively a judgment. *See Stern*, 564 U.S. at 486-87 (finding violation of Article III where bankruptcy court could “issue final judgments, which are binding and enforceable even in the absence of an appeal”). If the award is not appealed administratively, DOL regulations provide that it cannot be challenged at all. 29 C.F.R. § 501.33. And after agency adjudication is complete, the award is subject only to deferential appellate-type review. 5 U.S.C. § 706(2)(E). DOL regulations provide that the award must be paid 30 days after the agency's final order, 29 C.F.R. § 501.22, and DOL asserts that an unpaid award is subject to interest and collectible as a debt. Pet. App. 185a; *see also* 31 U.S.C. § 3701(b)(1) (defining "debt"), *id.* §§ 3711 *et seq.* (collection mechanisms). This is the type of monetary liability that *Jarkesy* held implicated private rights. 603 U.S. at 117; *FCC*, 146 S. Ct. at 1430; *compare id.* at 1428 (no Seventh Amendment violation where agency decision "did not create an obligation to pay").[4]

The nature of that judgment-like liability, moreover, involves remedies that traditionally would have been available only at common law.

Penalties. This Court has recently reaffirmed that "civil penalties are a type of remedy at common law that could only be enforced in courts of law." *Jarkesy*, 603 U.S. at 123 (marks omitted) (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). Even apart from the contractual nature of DOL's claims, the fact that DOL seeks penalties is itself sufficient to place this case within Article III.

Jarkesy also indicates that it is significant that the government's penalties serve to "punish or deter"

[4] At least one court has even held that DOL adjudication can preclude contract claims by H-2A workers. *Rowe v. Grapevine Corp.*, 527 S.E.2d 814, 828-29 (W. Va. 1999) (dismissing workers' claims for violation of three-quarters guarantee); *see also B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 150 (2015).

violations. 603 U.S. at 123. So too here. As in *Jarkesy*, DOL assesses penalties based in part on "culpability, deterrence, and recidivism." *Id.* at 123-24. Factors include "[p]revious history of violations," "gravity of the violations," "good faith," "[e]xplanation from the person charged," and "[c]ommitment to future compliance." 29 C.F.R. § 501.19(b). Applying these factors, the ALJ here cited "the seriousness of the violation and the 'large amount of workers affected.'" Pet. App. 155a; *see also id.* at 173a-174a & n.158; 177a-178a & n.159. There is no real question that DOL's penalties function to punish and deter.

The government argues (at 38) that the fact that it seeks penalties is "not dispositive." Technically true: In *Jarkesy*, it was "all but dispositive." 603 U.S. at 123. There is space between "dispositive" and "all but dispositive," but not much. The government bears a heavy burden to show it falls in that space here.

Back Wages. This Court has also held that "backpay" is a legal remedy, as "an action for money damages was 'the traditional form of relief offered in the courts of law.'" *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (citation omitted).

The government argues that the back wages here are really equitable, but that argument cannot be squared with the contractual nature of the agency's claims. It is black letter law that equitable relief is not available "if damages would be adequate." Restatement (Second) of Contracts § 359 (1981); *see also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002) ("[S]pecific performance of a past due monetary obligation[] was not typically available in equity[.]"). When a party sues for money due under a contract, that is a quintessential legal remedy.

The back wages cannot be recast as disgorgement, restitution, or other equitable relief, as they do not seek to recover excess profits (or any other particularly identifiable funds) in Sun Valley's possession. *Great-W.*, 534 U.S. at 213; *Sripetch v. SEC*, 146 S. Ct. 1403, 1410 (2026). On the contrary, the ARB stated that the "deductions were unlawful because they were not disclosed, not because they provided a profit." Pet. App. 66a.[5]

The back wages also go beyond compensation in a way that renders them partly punitive—a fact that places them within the scope of *Jarkesy*'s holding regarding penalties. *See Sripetch*, 146 S. Ct. at 1408, 1412-13. When Sun Valley argued that the amount of back wages exceeded any actual loss suffered by the workers—given, for instance, that workers would have had to purchase groceries even if they had kitchen access—the ALJ rejected that argument because a "less severe consequence … would provide a decreased deterrent effect to future employers." Pet. App. 148a; *id.* at 67a, 150a. While the compensatory part of the back wages is essentially an award of contract damages, the part that goes beyond compensation is tied "to the perceived need to punish the defendant rather than to restore the victim," 603 U.S. at 124, and triggers Article III as a penalty.

Regardless, even if the back wages were somehow equitable, they would still be a paradigmatic judicial

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[5] Nor are the back wages "an incident" to any order within the competence of the agency. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

remedy. Article III on its face encompasses "all Cases, in Law and Equity." U.S. CONST. art. III, § 2; *see also Intuit, Inc. v. FTC*, 170 F.4th 411, 420 (5th Cir. 2026) (holding that agency adjudication violated Article III where it awarded "traditional remedies that were available in courts of equity"). Here, the relevant statute directs DOL to "seek[]" equitable relief in court, 8 U.S.C. § 1188(g)(2), DOL's own regulations direct it to sue in court for specific performance of contractual obligations, 29 C.F.R. § 501.16(b)-(c), and DOL relies on that authority to sue for back wages. *See* Complaint, *Grimmway Enters., supra* p.9. Whether equitable or legal, back wages are a judicial remedy.

B. This Case Falls Outside The Historical Tradition Of Immigration-Related Adjudication.

The nature of the claims and remedies at issue establishes a presumption that adjudication must occur in Article III court. *Jarkesy*, 603 U.S. at 128. "Even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Id.* at 132 (marks and citation omitted). The government inverts the analysis when it begins with the public rights exception, rather than the private rights analysis.

In any event, the public rights exception does not apply here. The government's public rights argument invokes a tradition of immigration-related adjudication. However, at its core that tradition involves adjudication of status—*i.e.*, whether to admit, exclude, or deport. When executive officials have adjudicated monetary remedies, they have likewise been closely related to the question of immigration status. The government's key case, *Oceanic Steam*, 214 U.S. at 331-32, involved penalties on ships that brought immigrants to the border who were ineligible for admission. That tradition does not extend to common law remedies for a farm's breach of its contractual obligations to both foreign and domestic workers.

i. Article III Courts Adjudicated Cases Involving Domestic Employers.

The government offers an extensive tour of nineteenth-century immigration law, yet fails to mention penalties imposed on domestic employers of foreign workers. Even when penalties imposed on domestic employers involved a closer nexus to immigration than the penalties here, they were adjudicated in Article III court.

Early contract-labor laws called for Article III adjudication. Beginning in 1885, federal law prohibited employers from contracting to bring workers into the country. 23 Stat. 332 (1885).[6] Employers who nevertheless contracted with foreign workers faced fines that were "sued for and recovered … as debts of like amounts are now recovered in the circuit courts of the United States." *Id.* at 333, § 3. Similar provisions were included in later immigration laws that the government cites (at 30, 33, 35) in its brief. 32 Stat. 1213, 1214-15, § 5 (1903); 39 Stat. 874, 879, § 5 (1917).

The same Term that the Court decided *Oceanic Steam*—the government's key case—the Court decided a case involving Article III adjudication of con-

[6] Before that, an 1864 law provided that contracts to import foreign labor "may be enforced in the courts of the United States." 13 Stat. 385, 386, § 2 (1864).

tract-labor penalties. *Hepner v. United States*, 213 U.S. 103 (1909).[7] The two cases involved different sections of the same 1903 immigration law. *Id.* at 105 (section 5); *Oceanic Steam*, 214 U.S. at 331-32 (section 9). The question in *Hepner* was whether a directed verdict for the government in the absence of disputed facts violated the employer's jury right. 213 U.S. at 105. The Court upheld the directed verdict given the civil nature of the proceeding, distinguished criminal cases, and explained that a sum "prescribed in a statute as a penalty for the violation of a law, may be recovered by civil action." *Id.* at 108. At the same time, the Court acknowledged that the "defendant was, of course, entitled to have a jury summoned" to decide disputed facts. *Id.* at 115; *see also United States v. Regan*, 232 U.S. 37, 47 (1914).

If anything, the penalties in *Hepner* bore a much closer nexus to immigration than the liability here, as the penalties were based on importation under a contract to perform labor—rather than a subsequent breach of such a contract. If penalties against employers who unlawfully contracted with foreign workers were historically adjudicated in Article III court, it is hard to see why Article III courts would not also adjudicate cases involving penalties and back wages for alleged breaches of employers' contracts with their foreign and domestic workers.

Rather than mention these contract-labor penalties, the government highlights that executive offi-

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[7] *Hepner* occupies an important place in this Court's recent jurisprudence. *See Tull*, 481 U.S. at 416-17 (explaining that the Court granted certiorari to address *Hepner*); *Jarkesy*, 603 U.S. at 122 (relying extensively on *Tull*).

cials decided whether to admit aliens under certain exceptions to the ban on contract labor. *See* Op. Br. 6, 30 (citing section 3 of 1917 immigration law). That, however, merely confirms the remedy-based line that the Third Circuit drew below: Executive officials decided whether to admit contract labor into the country, but penalties against domestic employers were adjudicated in Article III court.

ii. Executive Adjudication Historically Was Closely Related To The Determination Of Immigration Status.

The government ignores this history of contract-labor penalties and relies instead on other immigration-related adjudications. None, however, involve liability based on the contractual relationship between a domestic employer and its foreign and domestic employees; and all involve claims and remedies with a close relationship to the admission or exclusion of aliens at the border.

Status Adjudications. To begin, the government cites numerous precedents establishing that executive officials can decide whether to admit, exclude, or deport aliens. *See, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (exclusion); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895) (exclusion); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation).[8] Those adjudications lie at the historical core of the immigration-related exception: The

[8] *See also Kleindienst v. Mandel*, 408 U.S. 753 (1972) (exclusion); *United States v. Ju Toy*, 198 U.S. 253 (1905) (exclusion); *Turner v. Williams*, 194 U.S. 279 (1904) (deportation); *Yamataya v. Fisher*, 189 U.S. 86 (1903) (deportation).

claims directly involved immigration status, and the remedy at issue was adjustment of status.

This Court has declined to extend that line of cases to other remedies. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court held that, while executive officials could decide to deport aliens, "when congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, *or by confiscating their property*, we think such legislation, to be valid, must provide for a judicial trial." *Id.* at 237 (emphasis added). While *Wong Wing* involved criminal liability, it indicates that cases about adjustment of status cannot be uncritically extended to other remedies.

Founding-era history also points to the importance of remedy as a distinguishing factor. While the Alien Friends Act gave the President broad authority to deport aliens, 1 Stat. 570, 571-72, §§ 1-2 (1798), it provided that deportation would not deprive the alien of any property right, *id.* 572, § 5, and that the "circuit and district courts" would "have cognizance of all crimes and offences against this act," *id.* § 4. The government notably does not cite the Alien Friends Act, although it is a foundational precedent for immigration adjudication.

Health Inspections. When it comes to adjudication of monetary remedies, the government relies on penalties adjudicated at the border by customs officials charged with conducting health inspections of incoming aliens. *Oceanic Steam*, 214 U.S. at 331-32; *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932).[9] However, both the claims and remedies at issue in those cases fell a great distance from the claims and remedies here.

First, the claims related directly to immigration status. Both cases involved laws that made aliens ineligible for admission if they were afflicted with certain diseases and that authorized customs officials to adjudicate fines on ships that nonetheless brought such aliens to the border. *Oceanic Steam*, 214 U.S. at 332; *Lloyd Sabaudo*, 287 U.S. at 331. Liability was therefore based on prohibited status. *See Jarkesy*, 603 U.S. at 129 (explaining that Congress "prohibit[ed] immigration by certain classes of persons and enforce[d] those prohibitions with administrative penalties"); *Oceanic Steam*, 214 U.S. at 340 (Congress can "impose particular restrictions on the coming in of aliens, and [ ] sanction such prohibitions by penalties").

The claims also turned on factual determinations at the border by executive officials deciding whether to grant or deny admission. To enforce the prohibition on entry by diseased aliens, Congress could "provide for the examination of the alien by medical officers, and [ ] attach conclusive effect to the result of that examination for the purposes of exclusion or deportation." *Oceanic Steam*, 214 U.S. at 342. Border officials were therefore deciding factual issues necessary to their administrative function of admitting or excluding aliens, not, as here, adjudicating common law

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[9] The government also cites (at 34) *United States v. New York & Cuba Mail Steamship*, 269 U.S. 304 (1925), but in that case the defendant "refused to pay" the penalty and the government "brought suit … in the Federal District Court." *Id.* at 309.

claims about events far from the border that involve both domestic and foreign workers.

Second, the remedy: While these cases involved penalties, the penalties were not collectible as debts and—instead—were exactions that customs officials collected by withholding permission for the steamship to disembark. *Oceanic Steam*, 214 U.S. at 329; *Lloyd Sabaudo*, 287 U.S. at 333 n.1; *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 604 n.189 (2007). The Court in *Oceanic Steam* thus stressed that customs officials had "complete administrative control over the granting or refusal of a clearance" and thus had "discretion to refuse to perform the administrative act of granting a clearance" until a penalty was paid. 214 U.S. at 343. And the Court specifically left open "questions which would arise for decision if the case presented an attempt to endow administrative officers to enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority." *Id.*; *see also id.* at 338 (distinguishing *Hepner* on this basis). The liability here implicates the "questions" that *Oceanic Steam* carved out of its holding.

These cases also provide no support whatsoever for back wages. The fact that customs officials could adjudicate penalties at the border—based on movement at the border—does not support agency adjudication of breach-of-contract damages, much less breach-of-contract damages allegedly owed to domestic workers.

Other Provisions. Finally, the government cites other provisions of twentieth-century immigration law that (unlike the penalties in *Oceanic Steam*) were never passed on by this Court. Those recent developments are a far cry from the kind of "centuries-old" history that the Court described as relevant in *Jarkesy*, 603 U.S. at 131, and they should not factor into the analysis. *See Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 482 (2020) (practice that "arose in the second half of the 19th century … cannot by itself establish an early American tradition").

Regardless, these examples also involve a close nexus to the movement of people across the border. For instance, the government cites (at 35) penalties on steamships that transported passengers ineligible for admission for reasons other than disease, that failed to provide a manifest listing passengers and crew, or that "allowed crew members to leave vessels before U.S. officials had inspected them"; and the government notes that steamships were required to refund the cost of passage to aliens denied admission. The point remains that liability was assessed at the border, was closely connected to movement across the border, and was collected as a condition of leaving the port.[10] These twentieth-century statutes are thus distinguishable for the same reasons as *Oceanic Steam*.[11]

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[10] A 1917 law allowed border officials to adjudicate fines on ships that transported contract laborers, collected as a condition of "clearance," but continued to provide that fines against employers would be adjudicated in court. 39 Stat. 874, 879, §§ 5, 7 (1917).

[11] The government briefly mentions (at 6) the mid-twentieth century Bracero program. That program involved a web of contracts under which farms agreed to indemnify the U.S. government for payments that it made to foreign workers—with that contractual undertaking enforced in Article III court. *United*

iii. DOL's Claims And Remedies Fall Outside The Tradition Of Immigration Adjudication.

Comparison to the historical practice discussed above yields multiple points of difference:

- DOL seeks to hold Sun Valley liable on a breach-of-contract theory.
- DOL seeks the common law remedy of back wages (including back wages allegedly owed to domestic workers).
- DOL seeks judgment-like penalties that are collectible as a debt.
- DOL seeks monetary liability that is based on conditions of employment (applicable to both domestic and foreign workers), rather than immigration status.
- DOL seeks monetary liability that is based on events that happened at the farm after aliens entered the country (and that involved both domestic and foreign workers), rather than events at the border.

Each of these distinctions should independently suffice to place this case outside the historical tradition of immigration adjudication. The government's contrary argument does not reflect the "close attention" that *Jarkesy* requires. 603 U.S. at 131.

States v. Ward, 309 F.2d 640 (5th Cir. 1962). By contrast, the government is not a party to the H-2A work contract. 20 C.F.R. § 653.501(c)(1)(i).

C. The Government's "Conditions Of Privileges" Theory Proves Too Much And Lacks Support.

The government also broadens its lens beyond immigration to encompass other "conditions of privileges." While the relevant "privilege" here is permission to employ alien labor, the government draws on history and case law from a variety of contexts and asserts (at 31) that "[p]atents, registrations, and licenses are likewise privileges subject to similar rules." Whatever the privilege, the government argues (at 32) it can require "executive adjudication of [ ] compliance with the privilege's terms and conditions" and (at 27) that "executive officers may assess civil penalties to enforce the terms and conditions." On this theory, agencies could adjudicate penalties related to a broad variety of permits, licenses, registrations, and more. This sweeping argument is unjustified by history or precedent.

i. Power To Revoke A Privilege Does Not Include Power To Adjudicate Monetary Remedies.

The government's argument rests on a fundamental confusion: While the executive can grant and revoke privileges, it does not follow that the executive can adjudicate "related" monetary liability.

The government's lead case for its theory, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325 (2018), illustrates the difference. The Court held that a patent is a "franchise," and that the executive can both grant patents and "qualify the grant by reserving its authority to revoke or amend the franchise." 584 U.S. at 337; *see also id.* at 340-41 (relying on patent-specific history). But the Court distinguished monetary liability. *Id.* at 344. Patent liability is adjudicated in court, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996), as are damages claims against patent holders based on "enforcement of a patent obtained by fraud on the Patent Office." *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173-74 (1965); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). The government would vastly expand the theory of *Oil States* from revocation of a privilege to adjudication of monetary liability.

The potential mischief of the government's theory is not limited to the patent sphere. Under the government's theory, agencies could treat penalty adjudication as a "condition" on environmental permits, sales of broadcast spectrum, drug approvals, copyrights, and more. The executive could seemingly take over adjudicating False Claims Act cases, as false claims involve conditions on receiving government funds. And nothing would stop the executive from taking over products liability litigation by conditioning permission to import foreign goods on assurances that goods are not defective (and doing the same for "corresponding" domestic goods).

Far from endorsing that approach, this Court rejected an analogous theory in *Stern*. There, the dissent argued that bankruptcy courts could adjudicate private rights belonging to individuals who had filed bankruptcy claims. 564 U.S. at 516, 519 (Breyer, J., dissenting). The majority held otherwise: The fact that a party was seeking a portion of the estate—which can fairly be described as a "benefit" controlled by the bankruptcy court—did not allow the bankruptcy court to adjudicate common law claims. *Id.* at 495 (majority op.). Individual litigants can consent to bankruptcy court jurisdiction (an issue discussed in Part I.C.iii below) but the government cannot systematically enlarge that jurisdiction by making it a "condition" of filing a claim.

If the government's contrary theory were correct, *Jarkesy* would seemingly have come out differently. The litigants there were participants in the highly-regulated securities market, and, in addition to seeking penalties, the SEC was seeking to bar Jarkesy from securities activities. *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022). The SEC could have recast that adjudication as a condition on participation in the securities market.[12]

Or take this Court's decision last Term, in *FCC*, 146 S. Ct. at 1431. On the government's theory, the forfeiture proceeding there could have been upheld as a "condition" on the carriers' licenses. *See* Br. for Carriers, *FCC*, No. 25-406, at 10 (explaining that carriers "appear regularly before the Commission—including to obtain and transfer the licenses they require to do business"). Instead, the Court upheld the forfeiture on the ground that it was subject to *de novo* adjudication with a jury. 146 S. Ct. at 1427-29. Far from treating the agency's control over the carriers' licenses as a reason to uphold the forfeiture, the Court expressed concern that the agency might use that control to co-

[12] Although the parties were not registered with the SEC, the opinion nowhere relied on that fact. And it would be a strange result if the SEC could adjudicate penalties against registered entities, but not against unregistered entities that it has authority to bar from the market.

erce the carriers into giving up their right to *de novo* adjudication—and upheld the forfeiture because federal law barred such coercion. *Id.* at 1431. That opinion cannot be squared with the government's theory.

ii. The Government's Grab-Bag Of History Does Not Support Its Theory.

To support its "conditions of privileges" theory, the government draws on historical precedent from a range of contexts. That grab-bag approach is contrary to *Jarkesy*'s warning that the public rights exception should be applied with "close attention." 603 U.S. at 131. On close examination, each of the government's precedents stands on distinct historical grounds.

Immigration. To support its "conditions" theory, the government takes language out of context from the immigration-related tradition discussed above in Part I.B. For instance, the government quotes (at 18) *Oceanic Steam*'s reference to "terms and conditions on which [aliens] may come in," 214 U.S. at 335, although the Court there used that phrase merely to refer to standards for admission.

To the extent that the government's cases involve "conditions" regulating conduct occurring after admission, executive officials adjudicated compliance when the remedy at issue was deportation. *See, e.g.*, *Zakonaite v. Wolf*, 226 U.S. 272 (1912). Executive officials could adjudicate "conditions" on continued presence in the country when the consequence of a violation was expulsion from the country. That does not support adjudication of monetary liability, much less common law remedies for common law claims.

Customs. The government also invokes the customs tradition, but, in fact, customs-related penalties were adjudicated in Article III court. *See* Collection Act, 1 Stat. 627, 695, § 89 (1799) ("all penalties … shall be sued for … in any court competent to try the same"); *Stockwell v. United States*, 80 U.S. 531 (1871).

The government relies on a tradition under which customs officials valued property and collected duties, and it highlights an 1818 statute under which customs officials collected extra duties if the assessed value exceeded the declared value. It is true those extra duties for under-valued merchandise could be characterized as punitive. *Passavant v. United States*, 148 U.S. 214, 221 (1893); *Tappan v. United States*, 23 F. Cas. 690, 693 (C.C.D. Mass. 1822) (Story, J.). But customs officials nonetheless collected those duties as part of their traditional role valuing property at the border, and, thus, were executing the "ordinary duties of the executive" with respect to "collection of the revenue." *Bartlett v. Kane*, 57 U.S. 263, 272 (1854). There is a vast gulf between valuing property and adjudicating contract liability.

This Court, in *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915), rejected an attempt to expand this narrow tradition of punitive duties. There, years after goods were imported, customs officials determined that the goods had been under-valued because of fraud, made a new valuation, and imposed punitive duties. *Id.* at 147. As a matter of constitutional avoidance, this Court rejected the argument that the officials' valuation had to be treated as conclusive, explaining that a contrary rule would otherwise transform a "limited administrative power to make a quasi judgment *in rem*, against goods in possession" into a more sweeping "jurisdiction authorizing the collector to declare that there had been fraud."

Id. at 155-56. The "determination of … whether there was fraud involved an exercise of the judicial rather than the executive function." *Id.* at 157.

If anything, that customs tradition places *Oceanic Steam* in context—and highlights its limitations. Much like customs officials valuing goods, customs officials conducting health inspections of immigrants made a limited factual inquiry into the present state of people or goods passing through the customs portal.[13] As this Court explained in *Sherman & Sons*, that "limited administrative power" to inspect items at the border does not imply a power to adjudicate liability under a common law theory (there, fraud; here, breach of contract). 237 U.S. at 155.

Government Contracts. The government relies on a tradition under which executive officials could sometimes decide whether to withhold payment of money due on a contract. *Allman v. United States*, 131 U.S. 31, 33 (1889). That tradition rests on the rationale that, because the government has sovereign immunity, executive officials enjoy some latitude to decide whether to pay out funds. *Williams*, 289 U.S. at 573. That tradition is irrelevant, as the government here is imposing liability, not withholding funds.[14]

The Court of Claims. The government also relies on the holding of *McElrath v. United States*, 102 U.S. 426, 440 (1880), that when a party sued the gov-

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[13] Indeed, that is what the government argued in *Oceanic Steam*. *See* Govt. Br. 27, No. 509 (1908).

[14] *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), likewise falls in this tradition, as the suit there "could only be brought if the Federal Government chose to allow it by waiving sovereign immunity." *Stern*, 564 U.S. at 489.

ernment for money in the Court of Claims, the court could adjudicate the government's counterclaim. That decision's relevance is unclear given that Congress and this Court subsequently clarified that the Court of Claims was an Article III court. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962) (plurality op.).[15] But, at most, *McElrath* stands for the proposition that a litigant who seeks out a non-Article III forum can sometimes be required to adjudicate counterclaims. *But see Stern*, 564 U.S. at 495-96 (bankruptcy claimant could not be forced to litigate counterclaim in bankruptcy court). A few lines of broad language from a case about counterclaims cannot support the government's sweeping theory.

Others. Fines on militia members are part of a long tradition of military discipline. *Ortiz v. United States*, 585 U.S. 427, 439 (2018). Similarly, tax adjudication is a recognized exception with its own logic and limitations. *Phillips v. Comm'r*, 283 U.S. 589, 611 (1931). Ultimately, the scattered nature of such historical references confirms the lack of on-point precedent for executive adjudication of common law remedies on a breach-of-contract theory.

iii. Participation In A Program Does Not Imply Consent To Waive Constitutional Rights.

At this point, it is necessary to distinguish an adjacent argument the government does not make: The words "consent" and "waiver" appear nowhere in the government's brief, and the government seems to be

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[15] The old Court of Claims is distinct from the current Court of Federal Claims, an Article I court created in 1982.

arguing that Article III does not apply—not that it was waived. Still, several *amici* frame their argument in those terms, and the government at times gestures at intuitions about consent. None of that raises the issue, but, regardless, Sun Valley did not consent to agency adjudication.

In the Article III context, this Court has indicated that parties can consent by seeking out a forum when they instead have the option to litigate in another forum. *CFTC v. Schor*, 478 U.S. 833, 849 (1986); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 673, 686 (2015); *compare Stern*, 564 U.S. at 493 (no consent where litigant "had nowhere else to go"). Because Sun Valley was required to defend itself in the agency, *see* 29 C.F.R. § 501.33, the Third Circuit correctly found that Sun Valley did not consent, Pet. App. 18a, and the government declined to seek review of that aspect of the decision, Pet. 31.

The government now insinuates that Sun Valley impliedly consented to agency adjudication by participating in the H-2A program.[16] However, this Court has said that it is "unheard of" to imply consent from participation in a regulated activity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). That case involved an alleged waiver of sovereign immunity, but, as an analogy, the

[16] *Amicus* AFL-CIO attempts to find express consent and, in doing so, demonstrates its absence. It agrees (at 5) that the "2015 application form did not generally call for express consent." So, it cites a contract between Sun Valley and another private company—not enforceable by the government—that merely cites federal regulations. *See Fla. Dept. of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (agreement to "obey federal law" not an express waiver).

Court stated that a party would not impliedly waive its jury right by participating in a regulated activity even if Congress "provide[d] with unmistakable clarity" that there would be no jury trials. *Id.*

This Court should be particularly reluctant to imply consent given the separation of powers issues at play. A litigant cannot consent to non-Article III adjudication if consent would undermine "the constitutionally assigned role of the federal judiciary." *Wellness*, 575 U.S. at 678 (quoting *Schor*, 478 U.S. at 851); *see also id.* at 698 (Roberts, C.J., dissenting). That rule applies here, as allowing the executive to extract consent as a condition of participating in regulatory programs would allow the executive to transfer whole areas of litigation out of the courts. *See id.* at 704 (raising this concern).

Consent extracted under threat of exclusion from a regulatory program also would not meet the requirement that consent be voluntary. *Id.* at 685 (majority op.); *see also id.* at 718 (Thomas, J., dissenting). On the contrary, it would violate the unconstitutional conditions doctrine. *See FCC*, 146 S. Ct. at 1431-32 (explaining that the "Government may not effectively deny constitutional rights by making it too costly to exercise them"). One of the foundational unconstitutional conditions cases, *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 607 (2013), cites with approval this Court's decision in *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207-08 (1892), which held that a state could not condition the right to do business within the state on consent to enlarge a court's jurisdiction. Likewise, DOL cannot use participation in a regulatory scheme to enlarge the bounds of agency adjudication.

iv. *Atlas Roofing* Does Not Apply And Should Be Overruled.

To the extent the government's "conditions of privileges" theory resembles anything from this Court's cases, it resembles the expansive reading of *Atlas Roofing* that the government advanced in *Jarkesy*. There, the government argued *Atlas Roofing* meant it could create regulatory schemes and adjudicate related penalties administratively. *See* Govt. Br., *SEC v. Jarkesy*, No. 22-859, at 21-22 (2023). Here, it argues it can require regulated entities to apply for permission to participate in regulatory schemes and *then* adjudicate related penalties administratively. The argument is essentially *Atlas Roofing* with a preliminary step.

Far from helping the government, this similarity shows why its theory fails. In *Jarkesy*, this Court held that *Atlas Roofing* is limited to cases where "the claims were unknown to the common law" and "does not control … where the statutory claim is in the nature of a common law suit." 603 U.S. at 138 (marks and citation omitted). The same reasoning applies here: Even though DOL's regulatory scheme involves privileges and benefits, DOL's adjudication involved common law claims and remedies and therefore triggers Article III.

To the extent that *Atlas Roofing* might nevertheless support the government, it should be overruled. This Court has already termed *Atlas Roofing* a "departure from our legal traditions." *Jarkesy*, 603 U.S. at 138 n.4. The Constitution creates an independent judiciary to stand between individuals and the executive; agency adjudication of penalties and other monetary liability replaces that bulwark with a system where prosecutor and judge work for the same employer. *See id.* at 142 (Gorsuch, J., concurring). Because *Atlas Roofing* authorizes wholesale disregard for the constitutional structure, it is "egregiously wrong." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022).[17] And while the government might cite its reliance interests, "[n]o branch may rely on adverse possession to claim power that the Constitution vests elsewhere." *Trump v. Slaughter*, No. 25-332, slip op. at 24 (June 29, 2026).

D. The Government's Slippery Slope Arguments Are Misplaced.

One final observation about the first question presented. The government is wrong to argue (at 44) that a decision for Sun Valley would lead to a slippery slope.

For the most part, immigration adjudication can easily be upheld. Most immigration-related adjudication by executive officials directly involves admission or exclusion and, therefore, is amply justified by historical tradition. *DHS v. Thuraissigiam*, 591 U.S. 103, 138-40 (2020).

As for various immigration-related penalties highlighted by the government, there is no reason to think those penalties are any more or less vulnerable under the government's theory than Sun Valley's. For instance, the government (at 44) highlights that executive officials adjudicate penalties imposed on domes-

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[17] *Atlas Roofing* has also failed to yield administrable lines. *Janus v. AFSCME*, 585 U.S. 878, 921 (2018); *see, e.g.*, *Thomas*, 473 U.S. at 583-84 (noting the doctrine's opacity).

tic employers for hiring illegal aliens or for hiring workers without verifying immigration status. 8 U.S.C. §§ 1324a(a)(1), (e)(3), (4). It is not clear that the government's theory even applies to those penalties, however, as they can be imposed on employers who have not applied for any visa program and are not related to any "condition" on any governmental privilege. On the other hand, under Sun Valley's claims-and-remedies approach, those penalties are potentially distinguishable because they are closely related to immigration status (imposed either directly based on prohibited status or based on failure to screen for prohibited status) and are not based on a common law breach-of-contract theory.[18]

To be sure, other visa programs allow DOL to adjudicate employment-related claims, and a ruling for Sun Valley would likely also implicate those programs. *See*, *e.g.*, *C.S. Lawn & Landscaping, Inc. v. DOL*, No. 26-5114 (D.C. Cir.) (challenge to H-2B adjudication). That, however, is not a slippery slope. That is just a consequence of Article III.

II. DOL Adjudicated Without Statutory Authority.

The constitutional issues discussed above also shed light on this Court's second question presented. This Court can resolve this case on the alternate

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[18] Likewise, penalties for forging immigration documents relate to proof of immigration status, 8 U.S.C. § 1324c, not to alleged breaches of employment contracts.

ground that DOL's adjudication was not sufficiently authorized by law.[19]

A. Congress Must Speak Clearly To Authorize Agency Adjudication Of Monetary Liability.

Given the constitutional concerns that arise when non-Article III courts adjudicate monetary liability, at a minimum Congress must speak clearly to authorize such agency adjudication.

This Court's opinion in *Sherman & Sons*, discussed above at pages 38-39, is illustrative. There, the Court rejected an argument seeking to extend customs officials' narrow administrative authority to assess duties at the border. The Court highlighted the constitutional issues that such an extension would raise, but, ultimately, did not need to reach those constitutional questions because it held that the "silence of Congress … cannot be construed as the expression of an intent to enlarge the administrative function." 237 U.S. at 157. So too here.

More recently, this Court required clear language in *Bank One Chicago*, 516 U.S. at 274-75. The question in that case was whether a statute authorized the Federal Reserve to adjudicate civil liability between financial institutions. *Id.* at 266, 270. The Court held that it did not, as "[o]ur cases have not been quick to infer agency authority to adjudicate private claims."

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[19] Avoiding the constitutional issue would, however, lead to continued uncertainty as statutes governing other visa programs might be interpreted to more clearly authorize agency adjudication. *See, e.g.*, 8 U.S.C. § 1184(c)(14) (H-2B penalties require "notice and an opportunity for a hearing").

Id. at 274. Absent a "secure signal" in the statutory text, the Court would not allow the executive to claim authority that had not been conferred by Congress. *Id.*; *see also Gomez v. United States*, 490 U.S. 858, 874-75 (1989) (interpreting scope of magistrates' authority narrowly given constitutional concerns).

Conversely, this Court's cases upholding administrative adjudication have invariably invoked Congress's authority. *Atlas Roofing*, for instance, invoked "Congress" in its first sentence and repeatedly mentioned "Congress" throughout. 430 U.S. at 444; *see also Thomas*, 473 U.S. at 571. As the Fifth Circuit put it in *Jarkesy*, in a portion of its opinion that this Court ultimately did not address, the decision "to assign certain actions to agency adjudication" is "a power that Congress uniquely possesses." 34 F.4th at 462; *see also Oil States*, 584 U.S. at 334 ("Congress" can "assign adjudication of public rights to entities other than Article III courts"). Vague or equivocal statutory language is not sufficient to show that Congress exercised its constitutional role.

More broadly, this clear-statement requirement arises from the principle that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168-77 (2010). In other contexts, this Court has required a clear statement when agencies address "major questions" of economic significance. *E.g.*, *Biden v. Nebraska*, 600 U.S. 477, 502-03 (2023). Constitutional protections, no less than economic interests, present "major" questions that require clear statutory text.

B. Congress Has Not Authorized DOL Adjudication Of H-2A Penalties.

DOL here does not identify any clearly articulated authority to adjudicate penalties.

The government points to 8 U.S.C. § 1188(g)(2), an appropriations provision that authorizes the agency to "impose appropriate penalties" without specifying the forum. The government reads "impose" to mean "adjudicate," but an agency can "impose" penalties by issuing citations that are adjudicated in court. This Court held as much last Term in *FCC*, where the relevant statute provided that the FCC could "impose" penalties on carriers; this Court explained, "these words tell us little about whether [an agency] order truly settles the carriers' rights and duties." 146 S. Ct. at 1429. Rather, the agency "imposed" the penalty by making its "own determination" to seek penalties that were adjudicated in court. *Id.*

DOL's statements in the agency record confirm that "impose" does not necessarily mean "adjudicate." When DOL sent Sun Valley its initial determination letter, the letter stated that "sanctions/remedies are being imposed," even though those sanctions had not yet been adjudicated. Pet. App. 184a. The ALJ likewise repeatedly referred to penalties having been "imposed" by enforcement officials. *Id.* at 120a, 150a, 176a, 177a. An agency can "impose" penalties without necessarily adjudicating them.

The government also argues (at 21) that Congress used "impose" to mean "adjudicate" in the statute at issue in *Jarkesy*. However, the law there provided that the agency could impose a penalty after making findings "on the record, after notice and an opportunity for a hearing." 15 U.S.C. § 77h-1(g)(1); *see also id.* §§ 78u-2(a)(1), 80b-3(i)(1)(A). "On the record" is a term of art for a hearing before an ALJ under the Administrative Procedure Act. 5 U.S.C. § 554(a) (setting procedures for "adjudication required by statute to be determined on the record after opportunity for an agency hearing").[20] The statute in *Jarkesy* is an example of the type of clear statutory authorization that is missing here.

Other provisions confirm that when Congress wants to authorize agency adjudication it knows how to speak clearly:

- In the same 1986 statute at issue here, Congress provided for an "administrative hearing respecting the denial or revocation" of an H-2A labor certification. 100 Stat. 3359, 3415 (1986) (codified at 8 U.S.C. § 1188(e)(1)); *see also id.* at 3412 (codified at 8 U.S.C. § 1188(b)(2)) (debarment from H-2A program requires "notice and opportunity for a hearing").
- Elsewhere in that law, Congress provided for administrative hearings for penalties imposed on domestic employers who employ illegal aliens or fail to adequately verify immigration status. *Id.* at 3366 (codified at 8 U.S.C. § 1324a(e)(3)(B)) ("before an administrative law judge").

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[20] Given this language in the APA, the government is simply wrong to assert (at 22) that "Congress … had no need to expressly provide for administrative adjudication because the APA already does so."

- Congress also provided for administrative hearings for penalties imposed on agricultural employers outside the H-2A program. 29 U.S.C. § 1853(b)(1) ("agency hearing").

In comparison, Section 1188(g)(2) is unmistakably silent. *See Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 574 (1989). The government (at 20) would instead "juxtapose" the word "impose" against Section 1188(g)(2)'s statement that the agency should "seek" equitable remedies. However, Congress naturally used different words when discussing different remedies. The more meaningful comparison is to other penalty provisions.

The statute's silence is particularly notable because 28 U.S.C. § 2461(a), a background provision of federal law, expressly provides that, "[w]henever a civil fine, penalty, or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action." Congress legislated against that background provision when it enacted Section 1188(g)(2). *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1439 & n.23 (1979) (citing section 2461(a) for the proposition that civil penalties are "by implication … subject to ultimate collection in a civil action"). Against that backdrop, Congress's silence should be read to mean that penalties may be "imposed" by an agency but adjudicated in court.

The government points out (at 21) that DOL promulgated regulations providing for agency adjudication "months after the statute's 1986 enactment."

However, an agency's "contemporaneous construction" is "only one input in the interpretational equation." *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024). In this case, the agency's interpretation went unchallenged for years in part because the H-2A program was far smaller than it is today. As recently as 2009, total H-2A related penalties added up to a combined total of just $326,838 (spread across 55 employers).[21] It is unsurprising that this regulatory scheme has received more scrutiny as the stakes have grown.

Ultimately, even the government does not really argue that Section 1188(g)(2) requires agency adjudication. Rather, the government (at 22) reads the statute as conferring "the power to choose the procedures." To the extent that there is any choice in this area, however, the choice rests with Congress. *See Jarkesy*, 34 F.4th at 462. Saying the statute conveys a choice is just another way of saying it does not answer the question. That alone should suffice to reject the government's position.

C. Congress Has Not Authorized DOL Adjudication Of H-2A Back Wages.

Finally, when it comes to the award of back wages, the government has even less to say.

The government (at 17) concedes that when Section 1188(g)(2) directs the agency to "seek[ ] appropriate injunctive relief and specific performance of contractual obligations," it directs the agency to seek such relief "from a court." Elsewhere, meanwhile, the

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[21] U.S. Gov't Accountability Office, GAO-15-154, *H-2A and H-2B Visa Programs* 77 (2015).

government (at 40) characterizes back wages as an equitable remedy. Putting that together, it is difficult to see why the agency would not be required to "seek" back wages in Article III court.[22]

Of course, as explained above (pages 23-24), back wages are legal and not equitable. But that does not change the analysis, as it remains true that nothing in Section 1188(g)(2) plainly authorizes agency adjudication of back wages. The agency hangs its hat on the statute's catch-all provision authorizing it to "take such actions … necessary to assure employer compliance with terms and conditions of employment." However, even assuming that language is sufficient to authorize back wages, it does not clearly indicate that Congress authorized the agency to adjudicate. Agencies cannot constitutionally adjudicate this type of liability at all, and they certainly cannot construct an entire system of administrative adjudication based on a catch-all appropriations provision authorizing "necessary" action.

CONCLUSION

The judgment below should be affirmed.

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[22] DOL, in fact, does exactly that. *See* Complaint, *Grimmway Enters.*, *supra* p.9.

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APPENDIX

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APPENDIX

U.S. Const. art. III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects….

8 U.S.C. 1188

(a) Conditions for approval of H-2A petitions

(1) A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

…

(b) Conditions for denial of labor certification

The Secretary of Labor may not issue a certification under subsection (a) with respect to an employer if the conditions described in that subsection are not met or if any of the following conditions are met:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not

covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment under this paragraph shall terminate on the date the H-2A workers depart for the employer's place of employment.

…

(e) Expedited administrative appeals of certain determinations

(1) Regulations shall provide for an expedited procedure for the review of a denial of certification under subsection (a)(1) or a revocation of such a certification or, at the applicant's request, for a de novo administrative hearing respecting the denial or revocation.

…

(g) Authorization of appropriations

(1) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, $10,000,000 for the purposes--

(A) of recruiting domestic workers for temporary labor and services which might otherwise be performed by nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, and

(B) of monitoring terms and conditions under which such nonimmigrants (and domestic workers employed by the same employers) are employed in the United States.

(2) The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

(3) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, such sums as may be necessary for the purpose of enabling the Secretary of Labor to make determinations and certifications under this section and under section 1182(a)(5)(A)(i) of this title.

(4) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, such sums as may be necessary for the purposes of enabling the Secretary of Agriculture to carry out the Secretary's duties and responsibilities under this section.

…

20 C.F.R. § 655.122 Contents of Job Offers

(a) Prohibition against preferential treatment of H–2A workers. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions that must be offered to U.S. workers consistent with this section.

(b) Job qualifications and requirements. Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) Minimum benefits, wages, and working conditions. Every job order accompanying an Application for Temporary Employment Certification must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) Housing—

(1) Obligation to provide housing. The employer must provide housing at no cost to the H–2A workers and those workers in corresponding employment who are not reasonably able to return to

their residence within the same day. Housing must be provided through one of the following means:

(i) Employer-provided housing. Employer-provided housing must meet the full set of the DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) Rental and/or public accommodations. Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the DOL OSHA standards at 29 CFR 1910.142(b)(2) (minimum square footage); (b)(3) (beds, cots, or bunks, and suitable storage facilities); (b)(9) (minimum square footage in a room where workers cook, live, and sleep); (b)(10) (where the employer chooses to meet its meal obligations under paragraph (g) of this section by furnishing free and convenient cooking and kitchen facilities to the workers, the provision of stoves, sanitary kitchen facilities); (b)(11) (heating, cooking, and water heating equipment installed properly); (c) (water supply); (d)(1) (adequate toilet facilities); (d)(9) (adequate toilet paper); (d)(10) (toilets kept in sanitary condition);

(f) (laundry, handwashing, and bathing facilities); (g) (lighting); (h)(2) (garbage containers kept clean); (h)(3) (garbage containers emptied when full, but at least twice a week); and (j) (insect and rodent control), State standards addressing such concerns will apply. In the absence of applicable local or State standards addressing such concerns, the relevant DOL OSHA standards at 29 CFR 1910.142(b)(2), (3), (9), (10), and (11), (c), (d)(1), (9), and (10), (f), (g), (h)(2) and (3), and (j) will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

…

(g) Meals. The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

(h) Transportation; daily subsistence—

…

(4) Employer-provided transportation.

(i) All employer-provided transportation must comply with all applicable local, State, or Federal laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver's licensure, and vehicle insurance required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128.

…

(i) Three-fourths guarantee—

(1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph (i)(1), a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract.

…

(3) Failure to work. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section,

and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

…

(n) Termination for cause or abandonment of employment.

(1) If a worker is terminated for cause or voluntarily abandons employment before the end of the contract period, and the employer notifies the NPC, and DHS in the case of an H–2A worker, in writing or by any other method specified by the Department in a notice published in the Federal Register or specified by DHS not later than 2 working days after such termination for cause or abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section, and, in the case of a U.S. worker, the employer will not be obligated to contact that worker under § 655.153.

(2) A worker is terminated for cause when the employer terminates the worker for failure to comply with employer policies or rules or to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer.

…

(p) Deductions.

(1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable….

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(q) Disclosure of work contract. The employer must provide to an H–2A worker not later than the time at which the worker applies for the visa, or to a worker in corresponding employment not later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H–2A worker going from an H–2A employer to a subsequent H–2A employer, the copy must be provided not later than the time an offer of employment is made by the subsequent H–2A employer. For an H–2A worker that does not require a visa for entry, the copy must be provided not later than the time of an offer of employment. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

29 C.F.R. Part 501—Enforcement of Contractual Obligations for Temporary Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act

§ 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B, applicable to the employment of H–2A workers and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, subpart B.

§ 501.22 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the WHD Administrator, by an ALJ, or by the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 days of the date of the final order. The person assessed such penalty shall remit the amount thereof, as finally determined, to the Secretary. Payment shall be made by certified check or money order made payable and delivered or mailed according to the instructions provided by the Department; through the electronic pay portal located at www.pay.gov or any successor system; or by any additional payment method deemed acceptable by the Department.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request (any issues not raised in the request may be deemed waived);

(3) State the specific reason or reasons the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

§ 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 calendar days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, WHD, or any other party wishing review, including judicial review, of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision within 30 calendar days after receipt of a timely filing of the petition, or within 30 calendar days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.