UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 15, 2025

UNITED STATES OF AMERICA, Complainant, v. ABS STAFFING SOLUTIONS, LLC, Respondent.	))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2025A00020

NOTICE OF CASE ASSIGNMENT FOR COMPLAINT
ALLEGING UNLAWFUL EMPLOYMENT

1. A complaint was filed on November 29, 2024, against ABS Staffing Solutions, LLC (Respondent) by the United States of America (Complainant). Attached to this Notice of Case Assignment (NOCA) is a copy of the complaint, the Notice of Intent to Fine (NIF) issued by the Department of Homeland Security (DHS), and the Respondent's request for a hearing pursuant to 8 U.S.C. § 1324a(e)(3).[1] This case is assigned to the Honorable John Henderson, Administrative Law Judge (ALJ).

2. Proceedings in this matter will be conducted according to the OCAHO rules appearing at 28 C.F.R. pt. 68 and the applicable case law.[2] It is imperative that you obtain a copy of the rules

[1] OCAHO does not typically publish a NOCA. *United States v. Liberty Constructors, LLC*, 18 OCAHO no. 1495, 1 n.1 (2023). "However, OCAHO will publish a NOCA when it contains an update to the standard information provided in order to enhance transparency and better inform stakeholders with an interest in OCAHO proceedings." *Id*. In the instant case, OCAHO is publishing this NOCA to clarify OCAHO's position on considering arguments sounding in constitutional law, which will be summarized and added to its standard NOCA language going forward. *See infra* ¶¶ 10-18.

[2] Published OCAHO decisions may be accessed on the Executive Office for Immigration Review's (EOIR) website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions, or in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO." Hard copy volumes of OCAHO decisions up to and including volume 8 may be located at federal depository libraries nationwide, which may be located at http://catalog.gpo.gov/fdlpdir/FDLPdir.jsp. All volumes after 8 are only available online.

immediately and comply with their requirements in this case. A Portable Document Format (PDF) copy (32 pages) is available on the OCAHO webpage at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations. If you are unable to access the webpage or print a copy, you may call our office at 703-305-0864 and request that a copy be mailed to you at no charge.

Attorneys and unrepresented parties are advised to read the relevant rules in their entirety prior to filing documents. Attorneys are advised that the OCAHO rules sometimes differ from the Federal Rules of Civil Procedure.

Additionally, attorneys and unrepresented parties are encouraged to review and consult OCAHO's Practice Manual. OCAHO's Practice Manual is available at the following link, and provides an outline of the procedures and rules applicable to OCAHO cases: https://www.justice.gov/eoir/reference-materials/ocaho.

All representatives and parties are also required to maintain a current address with OCAHO and to timely file a notice of a change of address with the presiding ALJ (or with the Chief Administrative Hearing Officer (CAHO) if the case either has not yet been assigned to an ALJ or is under administrative review by the CAHO) and must also serve such notice on the opposing party. *See United States v. Cordin Co.*, 10 OCAHO no. 1162, 4 (2012) ("It is the Respondent's responsibility (indeed, the responsibility of all parties before OCAHO) to file a notice of change

of address or other contact information directly with the ALJ, as well as serving that notice on the opposing party."); *cf.* 28 C.F.R. § 68.6(a) ("Except as required by § 68.54(c) and [§ 68.6(c)], service of any document upon any party may be made . . . by mailing a copy to the last known address.").

Parties wishing to appear anonymously (or pseudonymously) or to use their initials in the case caption rather than their name should be aware of applicable law on that issue when making any such request to the presiding OCAHO adjudicator. *See generally United States v. Wallcon, LLC*, 21 OCAHO no. 1630, 3-5 (2025) (discussing OCAHO's consideration of such requests).

3. OCAHO does not have authority to appoint counsel. 28 C.F.R. § 68.34. Unrepresented parties are encouraged to seek and obtain representation and, if appropriate, to avail themselves of available pro bono resources. Private parties may be represented by an attorney who is a member in good standing of the bar of the highest court of any state, the District of Columbia, or any territory or commonwealth of the United States. 28 C.F.R. § 68.33(c)(1). Attorneys must file a Notice of Appearance as required by 28 C.F.R. § 68.33(f). In limited circumstances subject to the requirements of 28 C.F.R. § 68.33(c)(2), private parties may be represented by law students. Private parties may also be represented by certain non-attorney representatives in appropriate circumstances, in accordance with the requirements in 28 C.F.R. § 68.33(c)(3). Non-attorney representatives who wish to appear before the ALJ on behalf of a party must seek approval from the ALJ pursuant to 28 C.F.R. § 68.33(c)(3). Private parties may also represent themselves and should file a Notice of Appearance in accordance with 28 C.F.R. § 68.33(f) if they do so.

4. The Respondent has the right to file an answer to the complaint. The answer (and two copies) must be filed within thirty (30) days after receipt of the attached complaint by either Respondent or its attorney (or representative) of record. 28 C.F.R. §§ 68.3(b), 68.9. The answer is considered filed on the date when OCAHO receives the filing. 28 C.F.R. § 68.8(b). If the Respondent fails to file an answer within the time provided, the Respondent may be deemed to have waived its right to appear and contest the allegations of the complaint, and the ALJ may enter a judgment by default along with any and all appropriate relief. 28 C.F.R. § 68.9(b).

5. All documents filed by either party, including letters, must be filed and served as follows: (i) File one original signed document and two copies, **including** attachments, with the ALJ, and serve one copy on each person on the attached Service List. 28 C.F.R. § 68.6(a);

(ii) Effort should be made to avoid filing by facsimile. Filing by facsimile is permitted only to toll a deadline. 28 C.F.R. § 68.6(c). Exhibits and attachments are never to be filed by facsimile; and

(iii) Include a certificate of service indicating the recipient(s), manner and date of service with every filing. 28 C.F.R. § 68.6(a). A document that does not have a certificate of service will be returned to the party filing it.

6. OCAHO operates an electronic filing pilot program.[3] For cases enrolled in the program, the parties can file and serve case documents by email and will receive decisions and orders issued

[3] "The pilot program was originally in effect until November 26, 2014, and was subsequently extended until May 29, 2015. Due to the overall success of the electronic filing pilot program, the pilot program has now been extended indefinitely while OCAHO

by OCAHO by email. More information about the electronic filing program can be found on OCAHO's website at the following location: https://www.justice.gov/eoir/ocaho-filing. Participation in the program is strongly encouraged in order to minimize the delays inherent in filing and service of hard copy documents by mail or other delivery service. Although participation is voluntary and typically allowed only when both parties in a case elect to participate and complete the necessary certification, OCAHO adjudicators may, in certain circumstances, require the parties in a particular case to electronically file documents even if the case is not enrolled in the pilot program. *See, e.g.*, *A&D Maint. Leasing & Repairs, Inc.*, 19 OCAHO no. 1568a, 9 (2024) (decision by the CAHO noting that pursuant to an ALJ's authority to "[t]ake other appropriate measures necessary to enable him or her to discharge the duties of the office," 28 C.F.R. § 68.28(a)(8), an ALJ may, "in certain circumstances," require parties to file documents electronically even if their case is not enrolled in OCAHO's electronic filing program); *Zajradhara v. Kang Corp.*, 19 OCAHO no. 1555 (2024) (converting a case to electronic filing absent objection from the parties due to "significant delays inherent with mail filing" between the parties' location and OCAHO's offices).

7. Procedures for conducting discovery are governed by OCAHO rules and applicable case law. *See generally* 28 C.F.R. §§ 68.6(b), 68.18–68.23. The parties should not initiate discovery

works toward implementation of a permanent e-filing system." *OCAHO Filing*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/ocaho-filing (last updated June 4, 2021). After nearly two years of delay, in November 2022, EOIR's Office of Information Technology indicated that work on implementation of a permanent OCAHO electronic filing system would begin that fiscal year. However, no work was apparently ever initiated, and implementation has been further delayed since then without an official explanation. A current expected completion date—or even a current expected initiation date—is unknown.

until the presiding ALJ has set a discovery schedule or otherwise authorized the start of discovery. *See Ferrero v. Databricks*, 18 OCAHO no. 1505, 4-8 (2023). Should either party believe it is necessary to begin discovery prior to that time, it may seek leave from the presiding ALJ to do so through the filing of a motion. *See id.*

8. OCAHO operates a Settlement Officer Program, which is a voluntary program through which the parties can use a settlement officer to mediate settlement negotiations as a means of alternative dispute resolution. The settlement officer may convene and oversee settlement conferences and negotiations, may confer with the parties jointly and/or individually, and will seek voluntary resolution of issues. The parties may request that the presiding ALJ refer the case to a settlement officer at any time while proceedings are pending, up to thirty days before the date scheduled for a hearing in the matter. More information about the Settlement Officer Program can be found in the OCAHO Practice Manual: https://www.justice.gov/eoir/reference-materials/ocaho/chapter-4/7.

9. Should the ALJ determine that a hearing is required, the Respondent would have the right to appear in person and give testimony at the place and time fixed for the hearing. 28 C.F.R. § 68.39. The hearing shall be held at the nearest practicable place to the place where the Respondent resides or the place where the alleged violation occurred. *See* 8 U.S.C. § 1324a(e)(3)(B); 28 C.F.R. § 68.5(b). Due regard shall also be given to the convenience and necessity of the parties or their representatives in selecting a time and place for the hearing. *See* 5 U.S.C. § 554(b).

10. Over the past decade, a number of challenges to federal administrative adjudicatory authority based on constitutional law have arisen in both federal court and administrative agency proceedings, including in cases before OCAHO. *See*, *e.g.*, *United States v. Terrapower, Inc*., 19 OCAHO no. 1548a, 7 (2024) ("At the heart of Respondent's contentions is a request to this administrative court to invalidate (on constitutional grounds) various provisions of different statutes."). For example, perhaps the most salient challenge in recent years addresses the constitutionality of the dual-layer, for-cause civil service removal protections which are attached to most federal administrative adjudicators, including the adjudicators in OCAHO, and the potential remedy if such protections are unconstitutional. The argument, in its condensed version, goes that because many—if not most or all—non-temporary federal administrative adjudicators are inferior officers [4] under the Constitution, because non-term and non-probationary

[4] For purposes of the Constitution, officers are individuals who both occupy a continuing and permanent position established by law and "exercise significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (cleaned up). The Constitution further distinguishes between inferior and principal officers. U.S. CONST. art. II, § 2, cl. 2. Inferior officers are those directed by a principal officer, *i.e*., "'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *United States v. Arthrex, Inc*., 594 U.S. 1, 13 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). All federal ALJs, including OCAHO ALJs, occupy permanent positions established by law, 5 U.S.C. § 3105, and all federal ALJs exercise similar, significant authority pursuant to law, 5 U.S.C. § 556(c); accordingly, all federal ALJs, including those at OCAHO, are inferior officers. *See Guidance on Administrative Law Judges After* Lucia v. SEC *(S.Ct.), July 2018,* 132 Harv. L. Rev. 1120 (2019) (discussing guidance from the Department of Justice's Office of the Solicitor General that after the decision in *Lucia*, "all ALJs" should be appointed as inferior officers); *see also A.S. v. Amazon Web Servs., Inc*., 14 OCAHO no. 1381h, 2 n.4 (2021). However, there are also over 10,000 non-ALJ adjudicators working for the federal government, many—if not most—of whom occupy permanent positions and exercise significant authority. *See* Admin. Conf. of the U.S., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 18-21 (Sept. 24, 2018), https://www.acus.gov/sites/default/files/documents/Administrative%20Judges%20Final%20Report%20Corrected%20-%20%289.24.18%29.pdf. Thus, many federal non-ALJ adjudicators are also inferior officers. *See*, *e.g.*, *Arthrex*, 594 U.S. at 13 (noting that Administrative Patent Judges on the Patent Trial and Appeal Board within the Department of Commerce are inferior officers); *Duenas v. Garland*, 78 F.4th 1069, 1073 (9th Cir. 2023) (determining that immigration judges and appellate immigration judges within EOIR are inferior officers). Indeed, many federal non-adjudicators may also be inferior officers based on the nature of their positions. *See, e.g.*,

administrative adjudicators are generally protected by civil service laws enforced by the Merit Systems Protection Board ("MSPB")[5] which allow for removal of those adjudicators only for cause, *see* 5 U.S.C. §§ 7511, 7513(a), 7521, 7541, 7543(a),[6] and because the MSPB members themselves are also removable only for cause, *see* 5 U.S.C. § 1202(d), this dual layer of for-cause protection inappropriately insulates the adjudicators from removal by the President, compromising his ability to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and violating Article II of the Constitution. *See generally Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022), *aff'd on different grounds and remanded*, 144 S.Ct. 2117 (2024); *cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495-98 (2010) (holding that two layers of removal protections

Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 546-558 (2018) (suggesting that numerous federal non-adjudicatory officials qualify as "officers" under the Constitution, ranging from certain employees of the Federal Emergency Management Agency to certain employees of the Internal Revenue Service). In short, although many constitutional challenges to the removal protections for federal adjudicators have focused on ALJs, the universe of federal employees subject to such challenges is actually much wider.

[5] The MSPB generally lacks jurisdiction to review a removal action which consists, in substance, of the termination of an employee with a term appointment whose term expires based on an "expiration date specified as a basic condition of employment at the time the appointment was made." 5 C.F.R. § 752.401(b)(11). Except in narrow circumstances, it also generally lacks jurisdiction to review removal actions of employees serving a probationary or trial period *See*, *e.g.*, 5 C.F.R. §§ 752.401(c)(1), (2), and (d)(10). It also lacks jurisdiction over non-preference-eligible, excepted-service employees who have not "completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less." 5 U.S.C. § 7511(a)(1)(C)(ii); *see also Roy v. MSPB,* 672 F.3d 1378, 1380-82 (Fed. Cir. 2012) (affirming the MSPB's dismissal of a termination appeal due to 5 U.S.C. § 7511(a)(1)(C)(ii)). It also lacks jurisdiction over removal actions against other discrete categories of employees, such as employees at certain federal intelligence agencies. *See generally* 5 C.F.R. § 752.401(d). Thus, this argument may not apply in the same way to federal administrative adjudicators who are not subject to MSPB protections.

[6] The for-cause standard for removal for most non-ALJ federal administrative adjudicators subject to MSPB protections is found in 5 U.S.C. § 7513(a). The for-cause standard for removal for federal ALJs is found in 5 U.S.C. § 7521. The for-cause standard for removal for federal administrative adjudicators who are also members of the Senior Executive Service (SES) is found in 5 U.S.C. § 7543(a). Although the particular formulations differ slightly, it is undisputed that almost all federal administrative adjudicators, including both ALJs and non-ALJs and both SES and non-SES adjudicators, are subject to a for-cause standard for removal. At OCAHO specifically, its four ALJs, the CAHO, and the Deputy Chief Administrative Hearing Officer, who performs the duties of the CAHO when the CAHO is absent or when the position is vacant, are inferior officers subject to for-cause removal restrictions enforced by the MSPB.

for constitutional officers violates the Constitution because such a structure "subverts the President's ability to ensure that the laws are faithfully executed"); *but see Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133-36 (9th Cir. 2021) (rejecting the argument that the dual-layer for-cause protections for ALJs are unconstitutional).[7]

11. Whether an administrative agency can—or should—address arguments like this one sounding in constitutional law in the first instance is a question upon which the Supreme Court has sent mixed messages that defy easy reconciliation. *Compare*, *e.g.*, *Carr v. Saul*, 593 U.S. 83, 92 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise."), *and Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . ."), *with*

[7] In its typical formulation, the scope of this argument has massive potential effects on the whole of the federal government well beyond OCAHO—but only if both the argument *and* its most common proposed relief (*i.e.* invalidation of the underlying proceeding) are accepted. *See infra* ¶ 17 (discussing the significant distinction between the argument regarding removal protections and the proposed remedy if those protections are unconstitutional). In other words, if both the argument *and* the remedy were accepted, it would invalidate most patent, immigration, veteran benefits, and social security disability adjudicatory proceedings, nearly all of which are presided over by inferior officers who are subject to dual-layer, for-cause removal protections. Although there may be relevant granular distinctions among each of those classes of adjudicators whose salience is not yet recognized, OCAHO is nevertheless cognizant of the impact that accepting such arguments *and* their proposed relief could have on large and important swaths of the federal administrative state. *See Decker Coal*, 8 F.4th at 1137 ("As a practical matter, we note that were we to accept Decker's argument [*i.e.*, that dual-layer, for-cause removal protections are unconstitutional and the underlying proceeding should be invalidated] . . . it would have potentially catastrophic effects on numerous past and ongoing claim adjudications under various benefits programs administered throughout the federal government."). However, as discussed in more detail below, *see infra* ¶ 17, it is not established that the proposed remedy (*i.e.* invalidation of the underlying proceedings) necessarily follows from the finding of a constitutional violation based on an adjudicator's removal restrictions. Consequently, concerns about the effects of a finding that an adjudicator's removal restrictions are unconstitutional may be overstated.

Elgin v. Dep't of Treasury, 567 U.S. 1, 23 (2012) (acknowledging that there may be "constitutional claims that [an agency] routinely considers, in addition to a constitutional challenge to a federal statute"), *and Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (observing that the rule that agency consideration of constitutional questions is generally beyond the agency's jurisdiction is not "mandatory").

12. The federal circuit courts of appeals, too, have sent mixed messages regarding agency consideration of constitutional arguments. *Compare*, *e.g.*, *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1042 (D.C. Cir. 1997) (finding that administrative agencies have "an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress"), *and Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) (noting both that "we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward" and that the failure of an agency to consider a constitutional argument raised by a respondent in an enforcement action "seems to us the very paradigm of arbitrary and capricious administrative action"), *with Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 544 (D.C. Cir. 1988) (holding that "[i]t was entirely correct for the [administrative agency] to decline to decide the [constitutional] issue . . . on the ground that the federal courts provide more appropriate forums for constitutional claims" and observing that "[a]dministrative agencies are entitled to pass on constitutional claims but they are not required to do so"). Further, some courts have also attempted to differentiate between constitutional challenges that are

"correctable" by an agency—and, thus, can be addressed by an agency—and those that are not. *See*, *e.g.*, *Sola v. Holder*, 720 F.3d 1134, 1135-36 (9th Cir. 2013) ("The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the [agency's] ken." (quoting *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir.1995))). [8] However, distinguishing constitutional claims that an agency can address from those it cannot is rarely straightforward, and the line between them is often nebulous and only clarified *post hoc* through litigation in federal court.

13. Indeed, most questions regarding the ability or appropriateness of a federal administrative agency to address constitutional claims have arisen indirectly in federal court in the context of either a challenge to whether a respondent met an administrative exhaustion requirement regarding the claim, *see, e.g., Sola*, 720 F.3d at 1135, or a challenge to whether a special statutory review scheme, which typically funnels claims to an administrative agency first followed by

[8] As noted in *Carr*, *Sola*, and other cases, the most frequent reason cited for restricting agency adjudication of constitutional issues is that such issues are beyond an agency's typical expertise. However, that observation appears more and more empirically questionable—at least for certain categories of constitutional arguments—as constitutional claims regarding agency adjudications have arisen more frequently in recent years, and agencies have become quite knowledgeable about such issues, particularly ones going to the heart of agency adjudications such as arguments based on the Appointments Clause or the Take Care Clause. Further, as a practical matter—because challenges to agency adjudication have become so common—agencies must be aware of both the statutory and constitutional underpinnings of their own existence in order to ensure their decisions may be affirmed upon judicial review. Moreover, not all agencies lack constitutional expertise in the first instance. To the contrary, the Department of Justice not infrequently opines on constitutional law issues, including the constitutionality of statutes. *See, e.g.*, *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. 279 (1996) (concluding that 19 U.S.C. § 2171(b)(3) [now 19 U.S.C. § 2171(b)(4)] is unconstitutional). In fact, by statute, it is anticipated that "the Attorney General or any officer of the Department of Justice" may establish a policy to refrain from "enforcing, applying, or administering any [federal law] whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D(a)(1)(A)(i) (requiring the Attorney General to report to Congress any such policy). As OCAHO decisions are reviewable by the Attorney General, *see* 28 C.F.R. § 68.55, and as the Attorney General can unquestionably opine on constitutional issues, it is not clear that constitutional law issues are truly beyond the Department of Justice's expertise.

review by a federal court of appeals, displaces a district court's general federal-question jurisdiction over constitutional claims, *see, e.g.*, *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185-88 (2023). Thus, perhaps unsurprisingly, there is little federal caselaw directly evaluating an agency's authority to consider constitutional claims.[9]

14. Moreover, attempts by some agencies to draw a line between constitutional claims they can hear (*e.g.*, those related to procedures or the application of statutes or those alleging n agency acted in an unconstitutional manner) and those they cannot (*e.g.*, challenges to the constitutionality of a statute itself) have been described as "dubious" by the Supreme Court. *See Elgin*, 567 U.S. at 16, n.5 ("Agencies are created by and act pursuant to statutes. Thus, unless an action is beyond the scope of the agency's statutory authority, an [individual's] claim that the agency 'acted in an unconstitutional manner' will generally be a claim that the statute authorizing the agency action was unconstitutionally applied to him."). Although a few types of constitutional arguments have clearly been placed beyond an administrative agency's purview—*e.g.*, a constitutional challenge

[9] In most cases, it is a respondent who raises a constitutional claim as a defense to an agency enforcement action, and such a respondent logically would not also argue that the agency adjudicating its constitutional defense lacks authority to accept that defense. Moreover, even if the agency rejected a constitutional defense as beyond its authority, a respondent could simply raise the defense anew before an Article III court, which can consider the issue without having to decide whether the agency's view of its authority was correct. *See, e.g., Plaquemines*, 838 F.2d at 544 (noting that a federal court may reach a constitutional issue that an agency has declined to address). Further, if an adjudicating agency decides a constitutional issue adverse to the enforcement agency, the enforcement agency generally has no recourse to federal court—though it may have recourse within the Executive Branch—as one executive branch agency generally cannot bring suit against another. *See, e.g., Constitutionality of Nuclear Regul. Comm'n's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138 (1989) ("The Office of Legal Counsel has long held the view that lawsuits between two federal agencies are not generally justiciable. . . . We relied on the principle that the federal courts may only adjudicate actual cases and controversies. A lawsuit involving the same person as plaintiff and defendant does not constitute an actual controversy. This principle applies to lawsuits between members of the executive branch." (citations omitted)). Consequently, review by a federal court of a direct challenge to an agency's ability to decide constitutional questions would involve an unusual set of facts or procedures that is unlikely to occur.

to an ALJ's appointment which an ALJ cannot remedy and which an agency head could not directly remedy in the course of an adjudication, *see Carr*, 593 U.S. at 94—the overall question of an agency's ability to address constitutional questions remains unsettled. *Cf. Elgin*, 567 U.S. at 17 ("We need not, and do not, decide whether the [agency's] view of its power [*i.e.*, that it cannot decide constitutional issues] is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction.").

15. Historically, OCAHO's general view has been that, except for arguments regarding the constitutionality of a statute itself, OCAHO adjudicators can and should decide constitutional questions that come before them, including questions related to the constitutional application of statutory provisions.[10] *See*, *e.g.*, *United States v. Nev. Lifestyles, Inc*. 3 OCAHO no. 463, 677, 679 (1992) ("Constitutional issues implicating statutory applicability are appropriate for consideration in administrative adjudications, *i.e.*, by administrative law judges (ALJs), where those issues pertain to the constitutionality of the statutory application, as distinct from the constitutionality of the statute itself. . . . *Agency adjudicators are not only competent to consider certain constitutional issues, but are obliged to consider them*." (emphasis added)). To that end, OCAHO has regularly and unremarkably—and without any noted controversy—addressed constitutional arguments raised in its proceedings throughout its history. *See, e.g., Hossain v. Job Serv. N.D.*, 14 OCAHO no. 1352 (2020) (dismissing a complaint brought under 8 U.S.C. § 1324b based on the respondent's

[10] As discussed above, *see supra* ¶ 14, the Supreme Court has characterized this distinction between deciding the constitutionality of a statute and deciding other constitutional questions as "dubious," *Elgin*, 567 U.S. at 16, n.5, and OCAHO has not had an occasion to revisit it or to re-assess its correctness in light of more recent jurisprudence.

sovereign immunity under the Eleventh Amendment); *Nev. Lifestyles*, 3 OCAHO no. 463, at 682-88 (denying a challenge to the constitutionality of 8 U.S.C. § 1324a based on the Commerce Clause).

16. Furthermore, regardless of whether it is appropriate for OCAHO to consider constitutional issues on a blank slate as a matter of first impression, once a constitutional issue has been decided in a precedential decision by an appropriate circuit court of appeals or the Supreme Court, OCAHO is obligated to faithfully apply that precedent. *See* 28 C.F.R. §§ 68.56, 68.57; *see also United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 11 n.9 (2023) (noting that OCAHO applies precedential authority from the circuit in which a particular case arises). In such cases, OCAHO is no longer adjudicating a constitutional law question in the first instance; rather, it is simply applying established precedent—just as it applies any relevant precedent—even though that precedent involves an issue of constitutional law. In short, although there may be lingering, unresolved questions regarding to what extent, or under what types of circumstances, OCAHO is authorized to consider a constitutional law question in the first instance, once a constitutional issue has been addressed by an appropriate federal court in a relevant, precedential opinion, OCAHO is bound to apply that precedent.[11]

[11] To illustrate this point, multiple circuit courts of appeals have already considered, to one degree or another, the constitutional argument related to the for-cause removal protections for ALJs. *See*, *e.g.*, *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 148 (4th Cir. 2023) (collecting cases). Therefore, OCAHO is bound to follow those precedents for cases arising in the respective circuits and will apply those precedents as appropriate. Moreover, although the Supreme Court has noted in passing that a claim that an administrative adjudicator's civil service protections violate Article II is generally outside an agency's expertise, *see Axon*, 598 U.S. at 194-95; *but see supra* note 8, that passing observation does not relieve an agency of any obligation to apply binding circuit court precedent when a relevant circuit court has already decided that constitutional question. Thus, for example, OCAHO could not simply decline to

17. One additional wrinkle also arises in OCAHO's consideration of constitutional arguments in its proceedings. Like most courts and other adjudicatory bodies, even if OCAHO can decide constitutional issues, it should avoid doing so if there is another basis on which to resolve a case. *Cf., e.g., Bond v. United States*, 572 U.S. 844, 855 (2014) (noting that "it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case" (cleaned up)). For instance, some constitutional claims (*e.g.*, the dual-layer, for-cause removal protections afforded to OCAHO adjudicators violates Article II of the Constitution) are distinct from the relief sought based on those claims (*e.g,* the invalidation of the OCAHO proceeding altogether and the dismissal of a complaint). Thus, in some situations, OCAHO would not need to decide the constitutional claim related to the removal protections of its adjudicators if the relief sought based on that claim would not be available because the party raising the claim could not demonstrate harm. *See, e.g., Collins v. Yellen*, 141 S. Ct. 1761, 1787-89 (2021) (holding that actions taken by properly-appointed constitutional officers are not void absent a showing of harm, even if those officers are subject to unconstitutional removal restrictions); *Decker Coal*, 8 F.4th at 1136-37 (following *Collins* and noting that even if the ALJ removal protections were unconstitutional, that flaw would not invalidate the underlying proceedings); *K & R Contractors*, 86 F.4th at 148-49 (declining to decide the constitutionality of an ALJ's removal restrictions

apply the holding of *Decker Coal* in cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit or decline to apply the holding of *Jarkesy* to cases arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit (Fifth Circuit).

because, following *Collins*, the petitioner had not alleged any harm and, thus, could not obtain relief even if the restrictions were unconstitutional); *cf. Jarkesy*, 34 F.4th at 465-66 (declining to decide whether the underlying administrative proceedings were subject to vacatur solely because the ALJ's removal restrictions were unconstitutional).[12]

18. In sum, based on its own precedent, as well as on the admittedly sometimes-inconsistent federal caselaw on the point, OCAHO may generally consider and adjudicate arguments based on constitutional law, though it need not—and should not—do so if there is another basis on which to resolve the case. Further, in considering such arguments, OCAHO will apply Supreme Court precedent and applicable circuit court precedent to questions of constitutional law, just as it applies applicable precedent to any other legal questions. Additionally, as with most actions sought by a party in OCAHO proceedings, the party moving OCAHO to make a ruling on a constitutional-law issue bears the burden of establishing both that OCAHO has authority to make such a decision and that the applicable law supports such a decision. Thus, OCAHO may also decline to reach a constitutional-law question if the relevant party fails to meet those burdens. *See*, *e.g.*, *Terrapower*, *Inc*., 19 OCAHO no. 1548a at 8-10. Finally, as OCAHO proceedings are adversarial and each

[12] This principle also informs OCAHO's application of certain circuit-court precedents addressing constitutional issues. For example, in cases arising within the jurisdiction of the Fifth Circuit, OCAHO is bound to apply the holding in *Jarkesy* that the dual-layer for-cause removal protections for ALJs are unconstitutional. However, that decision pointedly declined to address a remedy for that holding, relying instead on the remedies ordered for its other holdings. *See Jarkesy*, 34 F.4th at 465-66. In other words, although the Fifth Circuit found an ALJ's for-cause removal protections to be unconstitutional, it did not prescribe a remedy for that violation. Thus, for cases arising in the Fifth Circuit, OCAHO is *not* required to necessarily dismiss a complaint based on the dual-layer-for-cause-removal-protection holding in *Jarkesy*. *Cf. Collins*, 141 S. Ct. at 1787-89 (holding that actions taken by properly-appointed constitutional officers are not void absent a showing of harm, even if those officers are subject to unconstitutional removal restrictions), 1793 ("The mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated.") (Thomas, J., concurring)).

party is expected to develop the issues fully and present its positions, *see A&D Maint. Leasing & Repairs, Inc.*, 19 OCAHO no. 1568, 4 (2024) (noting that "OCAHO generally follows the principle of party presentation which is common to nearly all adversarial legal or adjudicatory proceedings in the United States"), constitutional law issues not presented before OCAHO may be forfeited or waived due to a failure to exhaust potential remedies, *see Carr*, 593 U.S. at 89 n.3 (discussing the "general rule" in adversarial administrative proceedings that parties to such proceedings should fully develop all arguments or risk forfeiting them). Accordingly, parties should be particularly cognizant of all applicable caselaw from both OCAHO and federal courts when an OCAHO case may potentially raise a constitutional-law issue.

19. Finally, all parties in OCAHO proceedings are expected to act with integrity and in an ethical manner and shall conform their conduct to the Standards of Conduct. 28 C.F.R. § 68.35. Consistent with this expectation, parties and attorneys appearing before OCAHO who elect to use technological tools such as generative artificial intelligence in preparing their filings should be mindful of the ethical and professional responsibility implications of using such tools. *See generally Wallcon,* 21 OCAHO no. 1630, at 9-14 (discussing ethical and professional considerations regarding the use of generative artificial intelligence in OCAHO proceedings). The presiding ALJ may also provide further direction regarding the use of generative artificial intelligence in individual cases. *See id*. at 14, n.10.

Notice Given By:

James McHenry
Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041