No. 09-1053 **ORAL ARGUMENT NOT YET SCHEDULED**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Association of Home Builders; Chamber of Commerce of the United States of America; and The National Association of Manufacturers,
Petitioners,

v.

Occupational Safety and Health Administration, U.S. Department of Labor,
Respondent.

On Petition for Judicial Review of Final Standard of the Occupational Safety and Health Administration (Docket No. OSHA–2008–0031)

Brief of Petitioners, National Association of Home Builders; Chamber of Commerce of the United States of America; and The National Association of Manufacturers

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Certificate As To Parties, Rulings, And Related Cases

A. Parties and *Amici*

The parties are: National Association of Home Builders; Chamber of Commerce of the United States of America; and The National Association of Manufacturers (Petitioners); and Occupational Safety and Health Administration, U.S. Department of Labor (Respondent).

The *amici curiae* are: American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and its Building Construction Trades Department.

B. Rulings Under Review

This is an original action; there was no district court decision. The agency action for which review is sought is: "Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee," 73 Fed. Reg. 75568 (Dec. 12, 2008).

C. Related Cases

This case has not previously been before this Court or any other court.

Counsel is not aware of any related cases currently pending in this court or in any other court.

Corporate Disclosure Statement

In accordance with Fed.R.App.P. 26.1 and Circuit Rule 26.1, National Association of Home Builders; Chamber of Commerce of the United States of America; and The National Association of Manufacturers (all trade associations within the meaning of Circuit Rule 26.1(b)) hereby submit these Corporate Disclosure Statements.

1. The National Association of Home Builders (NAHB) is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB represents the interests of home builders and home remodelers, and other companies working in closely related fields within the housing industry. NAHB has member companies in all 50 states, the District of Columbia, and Puerto Rico, and over 800 affiliated local and state associations throughout the Nation. NAHB does not have a parent company or publicly-traded stocks.

2. The Chamber of Commerce of the United States of America (the Chamber) is a non-profit corporation organized and existing under the laws of, and with a principal place of business in, the District of Columbia. The Chamber is the largest federation of business, trade and professional organizations in the United States. It represents an underlying membership of more than 3 million businesses and organizations of every size, sector, and region of the country, including the

District of Columbia. A central function of the Chamber is to advocate the interests of its members in important matters before courts, Congress and the Executive Branch. The Chamber has no parent company and does not issue stock.

3. The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector. It has employer-members in all 50 states and the District of Columbia. The NAM is a non-profit organization with its principal place of business in Washington, D.C., and has 10 additional offices across the country. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM does not have a parent company or publicly-traded stocks.

/s/

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Statement Respecting Oral Argument

Petitioners respectfully request oral argument in this matter. This case raises a question of first impression in this Court – whether a federal regulatory agency may amend and adopt substantive rules for the purpose of changing or affecting a unit of violation, and thus increasing the number of penalties assessed by adjudicative agencies and federal courts. The answer to that question will likely be of considerable importance under not only the particular statutory scheme before the Court (the Occupational Safety and Health Act) but other federal regulatory schemes.

Accordingly, oral argument is respectfully requested.

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Glossary of Abbreviations

§ 1910.9	A provision added by the Final Standard. Also, a reference to its sister provisions – §§ 1915.9 (maritime employment), 1917.5 (marine terminals), 1918.5 (longshoring), and § 1926.20(f) (construction).
ACCSH or Advisory Committee	Advisory Committee on Construction Safety and Health
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Chamber	Chamber of Commerce of the U.S., petitioner.
Final Standard	"Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee," 73 Fed. Reg. 75568 (Dec. 12, 2008).
General Duty Clause	OSH Act 5(a)(1), 29 U.S.C. § 654(a)(1) (A-2). A catch-call provision that generally applies when a standard does not.
IBMA or Interior Board	Interior Board of Mine Operation Appeals
MESA	Mining Enforcement Safety Administration
NAHB	National Association of Home Builders, petitioner.
NAM	National Association of Manufacturers, petitioner.
OSH Act	Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.
OSHA	Occupational Safety and Health Administration of the U.S. Department of Labor. (The terms "OSHA," "Labor Department" and "the Secretary" are used synonymously.)
OSHRC or Commission	Occupational Safety and Health Review Commission. (Its preferred acronym is "OSHRC"; see 29 C.F.R. § 2200.12(a)(1) & (b)(1).)
PPE	Personal protective equipment (such as hardhats, gloves, steel-toed shoes, ear plugs, etc.)
Proposed Standard	"Clarification of Remedy For Violation of Requirements To Provide Personal Protective Equipment and Train

	Employees," 73 Fed. Reg. 48335 (proposed Aug. 19, 2008).
Secretary	The Secretary of Labor, respondent.
Standard	Occupational safety and health standard.

I. JURISDICTIONAL STATEMENT

This Court has original jurisdiction under 29 U.S.C. § 655(f) (A-5). A petition for judicial review was filed on February 6, 2009, within 60 days after the promulgation on December 12, 2008, by the U.S. Occupational Safety and Health Administration ("OSHA") of a "Final Standard" entitled "Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee," 73 Fed. Reg. 75568 (Dec. 12, 2008). The Final Standard, which purports to have been issued under 29 U.S.C. § 655, amends and adopts occupational safety and health standards ("standards") in 29 C.F.R. Parts 1910, 1915, 1917, 1918 and 1926. Petitioners either are or represent persons adversely affected by the Final Standard, and each have, and represent members who reside in or have, their principal places of business in the District of Columbia.

II. STATEMENT OF ISSUES

Did Congress delegate to OSHA statutory authority to promulgate the Final Standard entitled "Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee," 73 Fed. Reg. 75568 (Dec. 12, 2008)?

Specifically, did OSHA exceed its delegated authority when it considered whether to word, and did word, certain new and amended workplace safety standards so as to change or affect the unit of violation – *i.e.,* the criterion by which courts and the independent Occupational Safety and Health Review Commission determine the number of "violations" within the meaning of 29 U.S.C. § 666 (A-9)

(and thus the number of penalties to be assessed), an issue committed by statute to the courts and the Commission to determine?

III. STATUTES AND REGULATIONS

Pertinent statutes, a sample of standards affected by the Final Standard, and pertinent regulations, are set forth in the Addendum beginning on page A-1. All affected standards are in the Joint Appendix beginning at JA 184 or are set out below.

IV. STATEMENT OF THE CASE

Petitioners, three national trade associations of employer-members subject to the OSH Act, seek judicial review of OSHA's amendment and adoption of a large number of occupational safety and health standards ("standards").

On December 12, 2008, OSHA published its "Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee," 73 Fed. Reg. 75568 (Dec. 12, 2008) ("the Final Standard"). The Final Standard amended 65 paragraphs in 29 standards, added four new standards, and added two paragraphs to a pre-existing standard. The purpose of the Final Standard was to "address[] the [Occupational Safety and Health Review] Commission's interpretation that the language of some respirator and training provisions does not allow separate per-employee citations and penalties." JA 171 (73 Fed. Reg. 75570

col. 2[1]). It did this by, *inter alia*, changing the phrase "all employees" to "each employee" in many standards, and adding several new provisions.

On February 6, 2009, Petitioners filed a petition asking that the Court vacate the Final Standard as invalid. Petitioners argue that Congress has not delegated to OSHA authority to adopt or amend standards to change or affect a unit of violation.

V. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background.

1. Basic Structure of the Occupational Safety and Health Act.

Unlike other statutes extant in 1970, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the OSH Act"), has a separation of functions: Adjudication is performed by the independent Occupational Safety and Health Review Commission, while rulemaking, inspections and prosecutions are performed by the Secretary of Labor, who has delegated her responsibilities to the Occupational Safety and Health Administration (OSHA).[2] *See generally Martin v. OSHRC (CF&I Steel Corp.),* 499 U.S. 144, 147-48 (1991) ("*CF&I Steel*").

Specifically, Congress authorized the U.S. Department of Labor to adopt "occupational safety and health standards"[3]; to inspect workplaces[4]; to issue

[1] All references to the Final Standard's preamble are to volume 73 of the Federal Register.

[2] In this brief, the terms "OSHA," "Labor Department," and "Secretary of Labor" are used synonymously.

[3] OSH Act §§ 6(a) and (b), 29 U.S.C. § 655(a) and (b) (A-3).

[4] OSH Act §§ 8(a), (b), (d)-(h), 29 U.S.C. § 657(a), (b), (d)-(h) (A-5).

citations alleging violations[5]; and to notify the employer of "the penalty … proposed to be assessed."[6]

To "carry out adjudicatory functions under the Act,"[7] Congress created the wholly independent Commission. The Commission is composed of three members appointed by the President, by and with the advice and consent of the Senate,[8] who serve staggered six-year terms.[9] If an employer contests a citation or proposed penalty, the Commission must afford an opportunity for a hearing in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), and "issue an order … affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief …."[10]

2. Employer Duties Under the OSH Act.

Employers have two principal duties under the OSH Act. They must "comply" with standards[11] and, generally in the absence of a standard,[12] they must comply with the catch-all General Duty Clause, *i.e.,* "furnish to each of [their]

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[5] OSH Act §§ 9, 10 and 17(a)-(d), 29 U.S.C. §§ 658, 659 and 666(a)-(d) (A-7, A-9).

[6] OSH Act § 10(a), 29 U.S.C. § 659(a) (A-7).

[7] OSH Act § 2(b)(3), 29 U.S.C. § 651(b)(3) (A-1).

[8] OSH Act § 12(a), 29 U.S.C. § 661(a) (A-8).

[9] OSH Act § 12(b), 29 U.S.C. § 661(b).

[10] OSH Act § 10(c), 29 U.S.C. § 659(c) (A-7).

[11] OSH Act § 5(a)(2), 29 U.S.C. § 654(a)(2) (A-2).

[12] *See generally* 29 C.F.R. § 1910.5(f); and *UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987).

employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm ….”[13]

3. The Adoption of “Standards” Under the OSH Act.

OSH Act § 6(b), 29 U.S.C. § 655(b) (A-3), states: “The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner ….” The principal criteria for adopting standards are in OSH Act § 3(8), 29 U.S.C. § 652(8) (A-1), which defines “occupational safety and health standard” as “a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”

4. Civil Penalty Assessment Under the OSH Act.

The Act’s penalty section (section 17, 29 U.S.C. § 666) (A-9) states in part: “The Commission shall have authority to assess all civil penalties provided in this section….”[14] The Commission assesses penalties *de novo.*[15]

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[13] OSH Act § 5(a)(1), 29 U.S.C. § 654(a)(1) (A-2).

[14] OSH Act § 17(j), 29 U.S.C. § 666(j) (A-10).

[15] *E.g., Hern Iron Works,* 16 BNA OSHC 1619, 1622 (OSHRC 1994) (penalty assessment *de novo*). *See Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 873 (D.C. Cir. 2002) (“*de novo*”); *Dan J. Sheehan Co. v. OSHRC,* 520 F.2d 1036, 1041 (5th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (“in the nature of a *de novo* review”); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975) (“OSHRC thus determines the penalty *de novo,* considering the proposed penalty as, in fact, only a proposal”); *Secretary of Labor v. OSHRC (Interstate Glass Co.)*, 487 F.2d 438, 442 (8th Cir. 1973) (“Congressional intent … plainly manifested that the Commission shall be the final arbiter of penalties”; OSHA’s proposals

(continued…)

Different penalty ranges applies to different types of violations. A penalty of at least $5,000 must be assessed, and up to $70,000 may be assessed, for "each [willful] violation."[16] Inasmuch as $5,000 must be assessed for "each willful violation," it has been held that a separate penalty is mandatory for each "willful" violation.[17] A penalty of up to $70,000 may be assessed for "each [repeated] violation."[18] A penalty of up to $7,000 "shall" be assessed for "each [serious] violation."[19] A penalty of up to $7,000 may be assessed "for each violation" that is non-serious.[20] A failure to correct a "violation" that is the subject of a final order may be assessed up to $7,000 for "each day" during which the "failure or violation" continues.[21]

Provisions of the OSH Act speak of violations in terms of a "condition" or "practice" and like terms. OSH Act § 3(8), 29 U.S.C. § 652(8) ("conditions", "practices" etc.) (A-1); §§ 6(b)(6)(A) and (d), 29 U.S.C. §§ 655(b)(6)(A) & 655(d) (variance provisions; "conditions, practices, etc.") (A-4); § 13(a), (c), 29 U.S.C.

"merely … advisory"); *cf. Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994) (Federal Mine Safety and Health Review Commission to assess penalties *de novo*).

In citing Commission cases, this brief generally follows the citation form prescribed in the Commission's rule of procedure at 29 C.F.R. § 2200.12.

[16] OSH Act § 17(a), 29 U.S.C. § 666(a) (A-9).

[17] *Chao v. OSHRC (Saw Pipes USA, Inc.*), 480 F.3d 320 (5th Cir. 2007).

[18] OSH Act § 17(a), 29 U.S.C. § 666(a) (A-9).

[19] OSH Act § 17(b), 29 U.S.C. § 666(b) (A-9).

[20] OSH Act § 17(c), 29 U.S.C. § 666(c) (A-9).

[21] OSH Act § 17(d), 29 U.S.C. § 666(d) (A-9).

§ 662(a), (c) (injunction against "conditions or practices") (A-8); and § 17(k), 29 U.S.C. § 666(k) (serious "violation" a "condition," "practice," etc.) (A-10).

Section 17(j), 29 U.S.C. § 666(j) (A-10) requires that the Commission consider four factors when assessing penalties – the size of the employer's business, the "gravity" of the violation, the employer's good faith, and the history of previous violations. The Commission considers the number of employees exposed to a violation as a factor in determining gravity.[22]

5. Penalties and Fines Imposed by Federal Courts Under the OSH Act.

OSH Act § 11(b), 29 U.S.C. § 660(b) (A-8), permits a court of appeals to impose the civil penalties described above to punish contempt of an order enforcing a final order of the Commission.[23] *E.g.*, *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413 (7th Cir.1995) (assessing such penalties).

OSH Act § 17(e), 29 U.S.C. § 666(e) (A-9), makes criminal a willful "violation" of a standard that causes death to an employee. A district court may order imprisonment of up to six months for a first offense and a year for a second offense; fines may also be imposed. *E.g.*, *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999).

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[22] *E.g., Kus-Tum Builders, Inc.,* 10 BNA OSHC 1128, 1132 (OSHRC 1981); *see Getty Oil Co. v. OSHRC,* 530 F.2d 1143, 1145 n.2 (5th Cir. 1976) (exposure of eight employees a penalty factor).

[23] OSH Act 11(b) (A-8) states in part: "In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17…."

6. Units of Violation Under the OSH Act.

a. OSHA's Prosecution Policy.

Until 1986, OSHA's policy was to propose one penalty if several conditions violated a single standard or the General Duty Clause.[24] If ten machines lacked guards, or if an employer mis-recorded ten workplace injuries, OSHA proposed one penalty, not ten. OSHA also proposed one penalty even if more than one employee was exposed to a violative condition.[25]

In 1986, OSHA began applying an "additional penalty factor" if violations were not merely "willful" but "egregious" (a word not used in the statute).[26] The new policy became widely known as the "egregious policy."[27] Its current version[28] takes the position that a penalty may be separately proposed in "egregious" cases (1) on a per-condition basis (*e.g.,* a penalty for each unguarded machine or for each erroneous recordkeeping entry); and (2) on a per-exposed-employee basis. The policy states that "the standard['s] language must support citation of separate violations."[29] (The Final Standard is not tied to application of OSHA's egregious policy. JA 179 (75578 col. 3).)

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[24] *See generally Caterpillar Inc.*, 15 BNA OSHC 2153, 2170 (OSHRC 1993) (tracing history).

[25] OSHA, FIELD OPERATIONS MANUAL ¶¶ X.C.1.a & XI.C.3.c(3)(a) & (c) (1979).

[26] Memorandum, John Miles, "Cases Proposed for Citation Using Additional Penalty Factor" (Nov. 20, 1986).

[27] *See, e.g.,* JA 178 (75577 col. 3).

[28] OSHA Instruction CPL 2.80, *Handling Of Cases To Be Proposed By Violation-By-Violation Penalties* at ¶ A, p. 1 (Oct. 1, 1990).

[29] *Id.* at ¶ H.3.d(1).

b. OSH Act Case Law on Units of Violation Leading to the Rulemaking Here.

Per-violative-condition, as opposed to per-exposed-employee, penalties were upheld by this Court in *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123 (D.C. Cir. 2001) (upholding separate penalty for each recordkeeping violation), and before that by the Commission in *Caterpillar Inc.*, 15 BNA OSHC 2153, 2172–73 (OSHRC 1993).

With respect to per-employee penalties, the Commission held that per-employee penalties may not be assessed as to each employee exposed to a single condition violative of the General Duty Clause. *Arcadian Corp.*, 17 BNA OSHC 1345 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). In so doing, the Commission held that it owed no deference to OSHA's view because the case involved the General Duty Clause, "the adjudication of which Congress expressly left to the Commission, not a regulation that [OSHA it]self drafted and promulgated." 17 BNA OSHC at 1352, distinguishing *Martin v. OSHRC (CF&I Steel Corp.),* 499 U.S. 144, 152 (1991) ("*CF&I Steel*"). The Commission further stated that it especially owed no deference to OSHA regarding the unit of violation, which "touches directly upon the appropriateness of the penalty, which is solely within the Commission's statutory authority." *Id.*

The Commission rejected per-employee penalties for a single condition violative of a standard (an unguarded roof edge) in *Hartford Roofing Co.,* 17 BNA OSHC 1361 (OSHRC 1995). It also stated:

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the

> protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

Id. at 1365. The Commission stated that it might impose a per-employee penalty for "the individual and discrete failure to provide an employee … with a proper respirator." *Id.* at 1367. The Commission rejected OSHA's demand for deference in determining the unit of violation because, while it is required by *CF&I Steel* to defer to OSHA's interpretation of a standard, "such deference is not owed … where at issue is not a standard, but a provision of the Act." 17 BNA OSHC at 1366 (speaking of OSH Act §§ 3(8) and 5(a)(2), 29 U.S.C. §§ 652(8) and 654(a)(2))). *See also Kerns Bros. Tree Service,* 18 BNA OSHC 2064, 2067-68 n. 7 (OSHRC 2000) (no deference regarding statute; *CF&I Steel* applies only to standards).

In *Erik K. Ho,* 20 BNA OSHC 1361 (OSHRC 2003), *aff'd,* 401 F.3d 355 (5th Cir. 2005), the Commission determined that per-employee penalties under certain standards were not appropriate. It found that an asbestos standard's requirement to "provide respirators" "addresses employees in the aggregate, not individually" (*id.* at 1372, construing former 29 C.F.R. § 1926.1101(h)(1)(i) (1997) ((A-14), and that a requirement for an asbestos "training program" imposes a single duty to have a training program (*id.* at 1374, construing former 29 C.F.R. § 1926.1101(k)(9)(i) (1997) (A-14)).

The Fifth Circuit affirmed. *Chao v. OSHRC (Erik K. Ho)*, 401 F.3d 355 (5th Cir. 2005). As to the asbestos respirator standard, the court found "no language" in

that provision "that suggests the unit of prosecution could be based on each individual employee not receiving a respirator versus the employer's course of action in failing to provide respirators to his employees as a whole for the … asbestos job." *Id.* at 374. It held that the language provided for only a single penalty based on an employer's "course of conduct." *Id.* at 376. As to the asbestos training program provision, it disagreed with the Commission's reasoning. It held that the provision's language did permit per-employee penalties but that they were unreasonable without a showing of "employee-specific unique circumstances," such as a need for "unique individual training sessions" rather than group training. *Id.* at 373.

In *Manganas Painting Co.*, 21 BNA OSHC 1964, 1998–99 (OSHRC 2007), the Commission analyzed the language of certain respirator requirements, stated that they permitted per-employee penalties, and distinguished *Ho* because "that standard was worded differently." In *General Motors Corp.*, 22 BNA OSHC 1019, 1047-48 (OSHRC 2007), the Commission held that, "regardless whether an employer chooses to provide required training to employees individually or collectively," a failure to train was individual because the training standard stated that "*Each* authorized employee shall receive training …." (Emphasis added.)

7. Units of Violation Under Other Federal Legislation.

In criminal law cases, units of violation are determined *de novo* by the courts, often using the rule of lenity. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), the Court held that because a failure to pay the minimum wage to several employees stemmed from a single managerial decision

or "single course of conduct," it "cannot be turned into a multiplicity of offenses." *See also Ladner v. United States*, 358 U.S. 169, 173-77 (1958) (one shot wounds two officers; one offense); *Bell v. United States,* 349 U.S. 81 (1955) (transportation of two persons; one offense); *Blockburger v. United States*, 284 U.S. 299 (1932) (separate unlawful sales, two crimes); *United States v. Alexander*, 471 F.2d 923, 930-34 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1044 (1972) (gun brandished before multiple victims; one assault); *United States v. Rivera Ramos*, 856 F.2d 420, 422 (1st Cir. 1988), *cert. denied*, 493 U.S. 837 (1989) (act, not officers, is unit of prosecution in 18 U.S.C. § 111 (assault on "any [federal officer]")).

Under at least two other federal regulatory schemes, administrative adjudicators determine units of violation *de novo*. *See Nicholas P. Howard*, SEC No. 3-8873 (March 24, 1999) (ALJ) (www.sec.gov/litigation/aljdec/id138cff.txt) ("course of action" concerned "one corporation … and will be considered as one violation")[30]; *Microban Products Co*., 9 E.A.D. 674 (EAB 2001) (Environmental Appeals Board) (www.epa.gov/eab/disk11/microban.pdf) (unit of violation depends on whether certain acts were done "as a part of" certain shipments or sales).

[30] *See also Leslie A. Arouh*, No. 3-10884 (Oct. 21, 2003) (ALJ) (www.sec.gov/litigation/aljdec/id238cff.pdf) ("[t]he requested total penalty amount is excessive"), *aff'd*, 57 S.E.C. 1099 (2004); *Orlando J. Jett,* No. 3-8919 (July 21, 1998) (ALJ) (www.sec.gov/litigation/aljdec/id127cff.htm) (possible penalty "astronomical"; proposed penalty "excessive").

B. The Challenged Rulemaking.

1. Presentation to the Construction Advisory Committee.

On May 15, 2008, an attorney for OSHA presented to the Advisory Committee on Construction Safety and Health (Advisory Committee or ACCSH) a draft proposed standard in a presentation entitled, "Clarification of Remedy for Violation of Requirements to Provide Personal Protective Equipment and Train Employees." (Such consultation is required for proposed standards applicable to construction work.[31]) The attorney stated:

> This proposed rule is intended to address a problem created by [Commission] case law … that deals with the Secretary's ability to assess penalties for each employee in egregious cases … [who] is not provided a respirator or trained in accordance with OSHA requirements.
> … [The Commission's *Ho* decision] only allowed for a single violation and a single penalty regardless of how many employees were not provided respirators and regardless of the dangerousness of the conditions to which they were exposed.

JA 5.[32] OSHA's attorney stated that, under the proposal, OSHA "could assess a penalty for each employee not trained in accordance with the requirements of the standard." JA 10. OSHA's acting Director of Construction stated:

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[31] "[U]nder the Construction Safety Act [Contract Work Hours and Safety Standards Act of 1969, 40 U.S.C. §§ 327-333] and 29 C.F.R. § 1911.10, OSHA is required to consult with the Advisory Committee for Construction Safety and Health before issuing proposed rules affecting construction, to assure that the unique aspects of construction work are taken into consideration by the Agency." 55 Fed. Reg. 31984, 31986 (1990). Violation of these requirements invalidates a standard. *National Constructors Ass'n v. Marshall*, 581 F.2d 960 (D.C. Cir. 1978).

[32] Counsel for OSHA has authorized Petitioners to represent that this transcript was inadvertently omitted from the certified record; pertinent parts will be included in the Joint Appendix.

> the review commission has looked at the phrasing of [the standard] to make an assessment as to … whether the employer's obligation is to meet the standard with respect to each individual employee or to employees as a group. So for example, you might have a provision that says an employer must have a training program. … [T]he ruling has been ... [that] my obligation as an employer is to have one program, so if I don't do that, that's one violation. Of course, we say well, the program is to train each and every employee. But the standard wasn't phrased that way. So this regulatory change is going to effectively change the wording of these kinds of provisions so that it says instead of have one program, train each employee or provide a respirator to each employee. And that will make it clear that, technically, the employer has this obligation to provide this respirator, each employee, so each one that they don't provide a respirator, that could be viewed as a separate and distinct violation.

JA 13-15.

2. The Proposed Standard.

On August 19, 2008, OSHA published a "Proposed Standard" to "clarify the remedy" if certain requirements for employee safety training or personal protective equipment (PPE) were violated. "Clarification of Remedy For Violation of Requirements To Provide Personal Protective Equipment and Train Employees," 73 Fed. Reg. 48335, 48345 col. 1 (Aug. 19, 2008) (JA 16).[33] OSHA proposed to amend a large number of already-existing standards, and to add several new ones (29 C.F.R. § 1910.9 and its sister provisions), in various parts of title 29 of the

[33] All references to the Proposed Standard's preamble are to volume 73 of the Federal Register.

Code of Federal Regulations.[34] (A more precise statement of the changes made by the Final Standard, which is nearly identical to the Proposed Standard, begins on page 18.)

The Proposed Standard would, in general, have changed phrases such as "all employees" to "each employee," or added the phrase "each employee." Their stated purpose was to "clarify[] that noncompliance with" the amended or new standards "may expose the employer to liability on a per-employee basis." JA 16 (48335 col. 2). OSHA stated that "the revisions may change the frequency or number of violations and amount of fines assessed[.]" JA 24 (48343 col. 2).

OSHA explained that the Proposed Standard was "in response to recent decisions of the … Commission indicating that differences in wording among" the standards affect whether one or more penalties could be assessed if multiple employees had not been trained or provided personal protective equipment. JA 16 (48335 col. 2). The Proposed Standard reflected OSHA's "interpretation," including its view that "a separate violation occurs for each employee who is not provided required PPE or training …." JA 18 (48337 col. 1). OSHA stated that the Proposed Standard would "add no new compliance obligations." JA 16 (48335 col. 1) The notice invited public comment.

3. Public Comment.

Petitioner Chamber of Commerce, joined by NAHB and others, objected to the proposal, arguing that nothing in the Act suggests that OSHA may

[34] All references to OSHA standards are to volume 29 of the Code of Federal Regulations and, unless otherwise indicated, to the current volume.

"manipulate[e] the wording of standards in ways that do not affect their substance" to increase the number and amount of penalties. The Chamber stated in part:

> The basic difficulty is that OSHA's statutory authority is to prescribe standards, not state "remedies" for their violation; it thus may not so draft a standard as to state a unit of violation and thereby cause a "change [in] the frequency or number of violations and amount of fines assessed …." 73 Fed. Reg. at 48343 col. 2. …
>
> * * *
>
> … Inasmuch as [the proposed rules] state no new duties of employers to provide "practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" [quoting OSH Act § 3(8)], but nevertheless attempt to prescribe a unit of violation, such sanction rules are forbidden by the Administrative Procedure Act and are not authorized by the OSH Act. The Secretary has no authority to draft standards in a way the only purpose of which is to cause employers to be penalized in a particular way. The standards already state all that OSHA is entitled to state – the substantive duty of the employer.
>
> * * *
>
> [W]hether one or more penalties may or must be assessed depends as a matter of law on whether one or more "violations" occurred within the meaning of section 17 of the OSH Act, and that determination is committed by the Act to the Review Commission in adjudication. That determination requires a finding of fact by the Commission whether the employer failed to adopt one or more "conditions" or "adopt" or "use" one or more "practices" etc. that the Secretary prescribed "to provide safe or healthful employment and places of employment." On such a question, OSHA has no role and it would usurp the Commission's authority if it attempted to assert one.

JA 34. The Chamber also criticized OSHA's attempt to embody in the Proposed Standard its interpretation that "a separate violation occurs for each employee who

is not provided required PPE or training …." JA 18 (48337 col. 1). "[T]his is not necessarily true[;]… the error in this statement undermines much of the reasoning behind the proposal." JA 35. The Chamber continued:

> Suppose, for example (and such examples have arisen) that an entire identically-situated class of employees is not provided required PPE or training because the employer overlooked a paragraph or phrase in an OSHA standard and failed to cover a certain point in group training or failed to provide the right cartridge for a respirator. On such facts, the Commission might find that there was only one violative "practice" or violative "condition" that affected several employees, and not as many violative practices or conditions as there are affected employees. The existence of a duty to protect more than one person does not always mean that multiple violations occur when more than one protected person is affected. [Citing OSHA and non-OSHA cases.[35]] Under the OSH Act, it all depends on whether there are different violative "conditions" or "practices," and these are questions of fact.

Id.

4. The Final Standard.

On December 12, 2008, OSHA adopted the Final Standard (JA 169), which, except for a few minor changes, is identical to the Proposed Standard. OSHA changed the name of the rulemaking from "Clarification of *Remedy For Violation of Requirements* To Provide …" to "Clarification of *Employer Duty* To Provide …." (Emphasis added.)

[35] The Chamber cited the cases cited on p.11 above (*Universal C.I.T.*; *Ladner*; *Bell*; as well as *Reich v. Arcadian Corp.,* 110 F.3d 1192, 1199 (5th Cir. 1997) (one General Duty violation).

The Final Standard amended 65 paragraphs in 29 standards, added four new standards, and added two paragraphs to a pre-existing standard (JA 184-190 (73 Fed. Reg. at 75583-89)). A standard held by the Fifth Circuit and the Commission in *Ho* to not permit per-employee penalties (*e.g.,* § 1926.1101(k)(9)(i) (1997) (A-14)) were among those amended. The Final Standard changed phrases such as "all employees" to "each employee," added the phrase "each employee" to other standards, and made other changes. For example, § 1926.761(b) (A-13), entitled "Fall hazard training," was changed from, "The employer shall provide a training program for *all employees* exposed to fall hazards" to, "The employer shall train *each employee* exposed to a fall hazard …" (emphases added); a sentence was also added: "The employer shall institute a training program and ensure employee participation in the program." Table A in Addendum A (A-12) illustrates additional typical changes.

The Final Standard also added § 1910.9 and nearly identical sister rules for certain industries (§§ 1915.9 (maritime employment), 1917.5 (marine terminals), 1918.5 (longshoring), § 1926.20(f) (construction)) (collectively, "§ 1910.9"). Section 1910.9 states:

> **§ 1910.9 Compliance duties owed to each employee.**
>
> (a) *Personal protective equipment*. Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

> (b) *Training*. Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

OSHA stated: "The final rule … addresses the Commission's interpretation that the language of some respirator and training provisions does not allow separate per-employee citations and penalties." JA 171 (75570 col. 2). OSHA discussed at length court and Commission decisions on the unit of violation. JA 171-177 (75570 col. 3 to 75576 col. 2). OSHA stated its agreement with some decisions and disagreement with others, and stated that it was acting because court and Commission decisions had interpreted language in certain standards to "allow separate per-employee citations and penalties." JA 171 (75570 col. 2). For example, OSHA stated: "Although the Secretary does not acquiesce in the *Ho* majority's interpretation of the asbestos respirator and training requirements at issue, the agency is modifying the language of most of the initial respirator provisions … to expressly state that the employer must provide each employee an appropriate respirator." JA 174 (75573 col. 3).

Because OSHA stated that the Final Standard "add[s] no additional requirements,"[36] it made no findings required by the definition of "occupational safety and health standard" in section 3(8) (A-1) – that the Final Standard "requires

[36] JA 171 (75570 col. 3).

conditions, or … practices … reasonably necessary or appropriate to provide safe or healthful employment and places of employment," and was feasible and addressed a significant risk of harm.[37] It did, however, acknowledge that the Final Standard ''may change the frequency or number of violations and amount of fines assessed …." JA 182 (75581 col. 3).

OSHA responded to the comments by the Chamber of Commerce. JA 175-177 (75574 col. 3 to 75576 col. 2). Despite the Chamber's comment that OSHA lacked statutory authority for the Proposed Standard, OSHA did not quote, or claim that the Final Standard met, the criteria in the definition of "occupational safety and health standard" in section 3(8) (A-1). As to section 6(b) (A-3), OSHA stated only: "Section 6(b) of the Act authorizes the Secretary to 'promulgate, modify or revoke any occupational safety or health standard' by following certain procedures, and the Secretary is exercising this express authority here." JA 176 (75575 col. 1).

OSHA also disagreed with the Chamber's comment that the Proposed Standard was built on the erroneous supposition that multiple violations occur even if a single employer misstep caused multiple employees to be untrained or unequipped. OSHA declared that the employee is "always" the relevant "condition" or "practice" (JA 177 (75576 col. 1)), that it "rejects [the Chamber's]

[37] *Id.* at cols. 2-3, citing *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (feasibility); *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980) (significant risk). *See also* JA 169 (75568 col. 3); JA 182-184 (75581-83) (economic and other analyses).

reasoning for the same reasons she rejects the Commission majority's analysis in *Ho"* (*id*.), and stated: "It does not matter that a single action or decision by the employer results in several employees being exposed to hazardous working conditions without PPE or training — the unit of violation remains the individual unprotected employee." *Id.* OSHA also relied on Judge Garza's dissenting view in *Ho*, 401 F.3d at 379. JA 174 (75573 col. 1).

OSHA then asserted that whether multiple violations occurred "turns entirely on the proper interpretation of the standard's text."[38] It declared: "The Commission's role is limited to determining whether the Secretary's interpretation that the standard permits per-instance violations is reasonable."[39]

This petition followed.

VI. SUMMARY OF ARGUMENT

The Final Standard is invalid because it was adopted on the basis of an unauthorized factor, the unit of violation – a subject that Congress did not delegate to OSHA authority to regulate. An agency rule is invalid "if the agency has relied on factors which Congress has not intended it to consider …." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Res. Def. Council v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("improper factors").

Congress delegated to OSHA authority to consider and state in standards only the compliance duties of employers. *No* language in the OSH Act authorizes OSHA

[38] JA 176 (75575 col. 2).

[39] *Id.* .

to adopt, or provides criteria by which OSHA might draft, standards so as to change or affect the unit of violation, which affects only penalty assessment. Congress instead delegated authority over that subject only to the independent Occupational Safety and Health Review Commission and the federal courts. Whether authority over a subject has been delegated to a body – and especially one body rather than another – is reviewed *de novo*, without *Chevron* deference. *E.g., Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (1994).

That Congress delegated to OSHA authority to consider and state in standards only the compliance duties of employers is clear from the principal rulemaking provisions of the OSH Act (§§ 3(8) and 6(b); 29 U.S.C. §§ 652(8) and 655(b) (A-1), (A-3). Neither authorizes OSHA to adopt, or provides criteria by which OSHA might draft, standards so as to change or affect the unit of violation, and OSHA did not purport to apply any.

Thus, Section 3(8), the OSH Act's core rulemaking provision, authorizes OSHA to "compel employer practices" and state "conditions required" of employers. *Edison Elec. Inst. v. OSHA*, 411 F.3d 272, 277 (D.C. Cir. 2005); *Nat'l Ass'n of Mfrs. v. OSHA*, 485 F.3d 1201, 1204-1205 (D.C. Cir. 2007). OSHA "*cannot* set a unit of prosecution because, in most cases, a unit of prosecution has nothing to do with employment or workplace practices or conditions." *Reich v. Arcadian Corp.,* 110 F.3d 1192, 1198-1199 (5th Cir. 1997) (emphasis by the court.) There, OSHA itself stated that section 3(8) "serves a purpose that is entirely unrelated to the appropriate unit of violation" and that "there is no reason

to believe that Congress was speaking to that subject when it drafted the definition." Note 48 and accompanying text on p. 34.

Although OSHA's preamble claimed that section 6(b) of the Act (29 U.S.C. § 655(b)) authorized the Final Standard because OSHA had followed notice-and-rulemaking procedures, no substantive rulemaking criteria there authorize the Final Standard, and none were cited or applied. Merely following rulemaking procedures is not a substitute for a lack of delegated authority. *American Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000).

These "specific respects" in which OSHA was granted rulemaking authority "instruct [courts] that [the agency] is not authorized to make a rule" on other subjects. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Inasmuch as the effect of a standard's language on the unit of violation is not an authorized rulemaking factor, OSHA may not manipulate the wording of a standard to affect it and thereby "change the frequency or number of violations and amount of fines assessed."[40]

OSHA also exceeded its delegated authority by usurping the authority of the Commission and the courts to decide the unit of violation – an issue to which OSHA speaks only as a prosecutor. The only provisions of the Act that bear on units of violation unambiguously commit their resolution to the Commission and the courts. "The *Commission* shall have authority to assess all civil penalties provided in this section…."[41] OSHA only proposes penalties while the

[40] JA 182 (75581 col. 3).

[41] OSH Act § 17(j), 29 U.S.C. § 666(j) (A-10) (emphasis added).

Commission decides them: "[T]he *Commission* shall … issue an order …. affirming, modifying, or vacating the Secretary's … *proposed* penalty."[42] In determining the unit of violation, it is the Commission and the courts that apply the phrase "each violation" in the Act's penalty provisions, apply the word "comply" in the provision requiring compliance with standards, and apply the words "condition" and "practice" in various provisions to find whether, on the facts, there was one or more failures to "comply," or one or more violative "conditions" or "practices" – and thus one or more "violations." Thus, if several employees went untrained because a standard was erroneously thought inapplicable or if a required training point was overlooked during a group training session, the Commission might find only a single failure to "comply" or a single "condition" or "practice," and thus a single "violation."

Yet, OSHA sought to wrest that issue from the Commission and the courts. It not only changed the wording of its standards to make each employee the unit of violation, but sought to gain primary interpretive authority over the issue by embedding in the standards its rulemaking "interpretation" that *every* case involving training or PPE involves only violations unique to each employee. Thus, OSHA stated it "reject[ed]" the proposition that only a single violation occurs in the above cases, agreed with Judge Garza's dissent in *Ho*, stated that the issue "turns entirely on the proper interpretation of the standard's text," and declared that

[42] OSH Act § 10(c), 29 U.S.C. § 659(c) (A-7) (emphasis added).

the Commission's role is "limited to determining whether [OSHA's] interpretation that the standard permits per-[employee] violations is reasonable."

OSHA's broad articulation not only made plain that the rulemaking was infected with an unauthorized factor but rests on a profound error: A unit of violation cannot logically turn "entirely" on the standard's text because, as OSHA admitted in *Arcadian*, section 3(8) contains no criteria by which OSHA can determine a unit of violation. Looking solely to a standard to resolve a unit-of-violation issue would ascribe to its wording a power that OSHA lacks. That OSHA determines the employer's *compliance duty* does not mean that OSHA may, by embedding in standards its view on the unit of violation, channel a determination on whether, on the facts, one or multiple "violations" under OSH Act § 17 (A-9) occurred. The OSH Act gives authority to decide that issue to only the courts and to the Commission, which – the legislative history expressly states (p. 45 below) – was established to decide such questions "without regard" to OSHA's view.

That OSHA's action is unauthorized and infected by an improper factor is also indicated by the APA's sanctions provision, 5 U.S.C. §558(b), APA § 9(a) (A-11), which states: "A sanction may not be imposed or a substantive rule … issued except within jurisdiction delegated to the agency and as authorized by law." Inasmuch as the Final Standard seeks to permit a previously-unavailable unit of violation and thereby "change the frequency or number of violations and amount of fines assessed," it is covered by the broad definition of "sanction" in APA § 2(f), 29 U.S.C. § 551(10) (A-10). That definition includes not only the

imposition of a penalty but any "requirement, limitation, or other condition affecting the freedom of a person" and "other compulsory or restrictive action." The APA's legislative history shows that Congress intended that this definition be construed broadly: "The purpose of the [definition of "sanction"] is to define *exhaustively every possible form* of legitimate administrative power or authority"; its "terms are meant to be all embracing." (Emphasis added.) Similarly, Congress intended that the APA's sanction provision itself (APA §9(a), 5 U.S.C. § 558(b)) be broadly construed. Its legislative history states that it "applies to *any* power or authority that an agency may assume to exercise" and makes clear that "agencies may not undertake *anything* which statutes … do not authorize them to do." (Emphasis added.) And this Court has indicated that APA §9(a) require agencies to have an affirmative grant of statutory authority to adopt substantive rules that seek to state or channel the imposition of a sanction. *Slater*, 231 F.3d at 6 n. 1 (requiring agency to show authority to channel courts' imposition of sanction).

Vacatur is the correct remedy here. Inasmuch as the Final Standard did not change employers' compliance obligations, vacatur would not impair employee safety and health; employers would still be required to properly train and equip "all" their employees exactly as they were before the Final Standard was adopted. It is highly unlikely that OSHA could on remand cure the defect in the Final Standard with reasons and evidence that do not pertain to the unit of violation – such as evidence that employers believe that phrases such as "all employees" mean that fewer than all employees must be trained or receive protective equipment. Alternatively, Petitioners most respectfully suggest that this Court might upon *en*

banc consideration adhere to the view that remand without vacatur would contravene APA §10(e)(B), 5 U.S.C. § 706(2) ("reviewing court *shall* … hold unlawful and set aside [unlawful] agency action") (emphasis added). See *In re Core Communications*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (noting conflicting views). If a remand is ordered, OSHA should be required to support the Final Standard with reasons and evidence that do not pertain to the unit of violation.

VII. STANDING

The Petitioners and their members lie within the zone of interests of those protected by OSH Act § 6(f), 29 U.S.C. § 655(f), because the Petitioners either are themselves or represent a "person who may be adversely affected by" the Final Standard. Each Petitioner is an "employer" within the meaning of OSH Act § 3(5), 29 U.S.C. § 652(5) and subject to the Final Standard and, as a consequence, subject to the increase in the number and total amount of penalties that can be imposed if they should violate standards amended by the Final Standard. Declarations of R. Matuga (NAHB) at B–2-3; of K. Smith (NAM) at B–16-17; and of S. Dibrari (Chamber) at B–23-24.

Furthermore, each Petitioner is a membership organization that represents members who are "employers" likewise subject to and affected by the Final Standard and who have standing to sue in their own right. Declarations of R. Matuga at B–2-3, of K. Smith at B–18-19; and of S. DiBari (Chamber) at B–23-24. The declarations further show that "the interests [Petitioners] seek[] to protect

are germane to the organization's purpose"; and, inasmuch as the issue here is purely legal, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Declarations of R. Matuga at B–3-8, of K. Smith at B–17-20; and of M. Freedman (Chamber) at B–26-29. In addition, at least two of the Petitioners suffers harm from having to devote organizational resources to advising its members on and avoiding the adverse effects of the Final Standard. Declarations of R. Matuga at B–7-14, of K. Smith at 20-21. *E.g., Spann v. Colonial Vill.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (challenged action increases resources plaintiff must devote to programs).

VIII. ARGUMENT

A. Standard of Review.

The scope of review provision of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C) ("APA"), states that a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right." OSH Act § 6(f), 29 U.S.C. § 655(f) (A-5), states: "The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."

With respect to questions involving the APA, this Court's review is *de novo*. *Professional Reactor Operator Society v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir.

1991). APA questions are raised particularly in Part VIII.B.3 beginning on p.46 and Part VIII.D, beginning on p.50 below.

Inasmuch as the Petitioners challenge the legality of agency action, it would ordinarily appear that the scope of review of non-APA issues would be the familiar *Chevron*[43] analysis – "If Congress has directly spoken to the precise question at issue, [courts] must give effect to Congress's unambiguously expressed intent. …. If the statute is silent or ambiguous with respect to the specific issue, we ask whether the agency's position rests on a permissible construction of the statute." *E.g., National Multi Housing Council v. EPA*, 292 F.3d 232, 234 (D.C. Cir. 2002) (citations and interior quotation marks omitted).

Chevron deference is not afforded to a rulemaking agency, however, unless the agency has been granted delegated statutory authority to administer the relevant part of a statute. *Kelley v. EPA*, 15 F.3d 1100, 1107, 1108 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088, 1091 (1994) (no EPA rulemaking authority over lender liability; "each section of the statute [must] be analyzed separately to determine whether EPA can assert authority to interpret, with *Chevron* deference, substantive terms"), *cert. denied*, 513 U.S. 1110 (1995); *Gonzales v. Oregon*, 546 U.S. 243, 258, 264 (2006) ("To begin with," *Chevron* inapplicable unless rule "promulgated pursuant to authority Congress had delegated"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (interpretation of enforcement provisions not entitled to *Chevron* deference because "[n]o such delegation regarding [those] provisions is

[43] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

evident in the statute").[44] Neither rulemaking authority over some issues nor being a prosecutor is enough; the agency must have rulemaking authority over the particular matter at issue. *See*, *e.g., Kelley*, 25 F.3d at 1091-92 (no deference where "Congress treats an agency only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted"); *Gonzales*, 546 U.S. at 264 (role as prosecutor insufficient). That threshold delegation inquiry is apparently to be conducted *de novo*. *See*, *e.g., Kelley*, 15 F.3d at 1109 ("as we read the statute"). *Kelley* further indicates that *de novo* consideration is particularly appropriate where, as here, the issue at least partly turns on whether a power has been delegated to one governmental actor (OSHA) or another (the Commission and the courts). Petitioners argue in Part VIII.B.2 beginning on p.40 that Congress delegated authority over the unit of violation issue to the independent Commission and the federal courts, not OSHA.

If *Chevron* were to apply, Petitioners note that a previous panel of this Court indicated in *dictum* that it would defer to OSHA on unit-of-violation questions. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1131 (D.C. Cir. 2001). The statement is not binding because OSHA and the Commission in *Kaspar* had agreed on the unit of violation.[45] The point had also not been briefed

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[44] *Motion Picture Ass'n of Am., Inc. v. FCC*, 353 U.S. App. D.C. 405, 309 F.3d 796, 801 (D.C. Cir. 2002) ("agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue") (emphasis by the Court), *quoted in Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005).

[45] *Gersman v. Group Health Ass'n,* 975 F.2d 886, 897 (D.C. Cir. 1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta."). *See*

(continued…)

by the employer.[46] Petitioners here present argument that Congress has not delegated OSHA any authority over the unit of violation, that it was delegated to the Commission and the courts, and hence that it should receive no deference on that point. Petitioners also present argument that Congress intended the Commission, not OSHA, to have authority over penalty assessment issues and further present, beginning on p.43 below, authoritative legislative history, not presented in *Kaspar*, showing that Congress specifically intended that, as a general rule, the Commission decide cases "without regard" to OSHA's view.

B. Congress Did Not Delegate Authority to OSHA To Word A Standard To Change or Affect A Unit of Violation; The Final Standard Thus Reflects An Unauthorized Factor And Is Not Authorized By Law.

The Final Standard is invalid because it was adopted on the basis of an unauthorized factor, the unit of violation – a subject that Congress did not delegate to OSHA authority to regulate. "[A]n administrative agency's power to promulgate legislative regulations is limited to the authority delegated by

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Brecht v. Abrahamson, 507 U.S. 619, 630-31 (1993). In other cases, there also is *dicta* regarding deference to OSHA's statutory construction but not involving units of violation. In *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1345 (D.C. Cir. 2002), the Commission and the Secretary agreed; see *id*. at 1351. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1302 (D.C. Cir. 1995), which *Staley* cited, involved only interpretation of a standard, as did *S.G. Loewendick & Sons v. Reich,* 70 F.3d 1291 (D.C. Cir. 1995). *Auto Workers v. OSHA*, 938 F.2d 1310, 1319 n.9 (D.C. Cir. 1991), noted in *dictum* that, because *CF&I Steel* was limited to regulations, it only "may" have impaired deference to the Commission as to the "statute."

[46] See Kaspar's Final and Reply Briefs, 2001 WL 36039623 and 2001 WL 36039626 (July 11, 2001). *See also District of Columbia v. Heller*, 128 S.Ct. 2783, 2814, 2816 n.25 (2008) (regarding absence of briefing).

Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). An agency rule is invalid "if the agency has relied on factors which Congress has not intended it to consider …." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Res. Def. Council v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("improper factors").

Congress delegated to OSHA authority to consider and state in standards only the compliance duties of employers. *No* language in the OSH Act authorizes OSHA to adopt, or provides criteria by which OSHA might draft, standards so as to change or affect the unit of violation, which affects only penalty assessment. Indeed, OSHA cited no substantive criteria in the OSH Act that the rulemaking had to meet. Inasmuch as the effect of a standard's language on the unit of violation is not an authorized rulemaking factor, OSHA may not manipulate the wording of a standard to affect it.

1. No OSH Act Provision Permits OSHA to Consider the Unit of Violation When Wording a Standard.

a. OSH Act § 6(b) Does Not Permit OSHA to Consider the Unit of Violation When Wording a Standard.

Petitioner Chamber of Commerce commented that OSHA lacks statutory authority for this rulemaking (JA 32). In response, OSHA stated that, "Section 6(b) of the Act [29 U.S.C. § 655(b) (A-3)] authorizes the Secretary to 'promulgate, modify or revoke any occupational safety or health standard' by following certain procedures, and the Secretary is exercising this express authority here." JA 176

(75575 col. 1). OSHA did not point to or apply language, and there is no language, in section 6(b) authorizing OSHA to adopt, or providing criteria by which to draft, standards so as to change or affect the unit of violation. Merely following notice-and-comment rulemaking procedures is not a substitute for a lack of delegated authority over an issue. *American Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) ("The agency has exceeded the scope of the authority delegated to it by Congress, and it matters not that they adhered to the APA's procedural requirements in doing so.").

b. OSH Act § 3(8) Does Not Permit OSHA to Consider the Unit of Violation When Wording a Standard.

OSHA also neither cited as authority nor discussed section 3(8) (A-1), the definition of "occupational safety and health standard," which has been called the "core provision" of OSH Act rulemaking.[47] Section 3(8) defines "occupational safety and health standards" as those that "require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably

[47] Cass Sunstein, *Is OSHA Unconstitutional?*, 94 VA.L.REV. 1407 & n. 5 (2008). This definition provides a substantive limit on OSHA's rulemaking authority. *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607, 614, 642 (1980) (plurality opinion); *Auto Workers v. OSHA*, 938 F.2d 1310, 1315, 1316, 291 U.S.App.D.C. 51 (D.C. Cir. 1991) ("substantive constraints"; "substantive criteria"); *see also* 57 Fed. Reg. 6356, 6398-6400 (1992) (delegation not unconstitutionally broad because § 3(8) "constrain[s]" OSHA's rulemaking power". This Court noted in *Auto Workers v. OSHA*, 938 F.2d at 1316, that section 3(8) provides the "only evident source of constraints" for OSHA rulemaking. The Fifth Circuit has stated, "If a standard does not fit in this definition, it is not one that OSHA is authorized to enact." *American Petroleum Institute v. OSHA*, 581 F.2d 493, 502 (5th Cir. 1978), *aff'd sub nom. Industrial Union Dep't v. Am. Petroleum Inst.,* 448 U.S. 607 (1980).

necessary or appropriate to provide safe or healthful employment and places of employment." This language refers to the "compel[ling of] employer practices" and "conditions required" of employers. *Edison Elec. Inst. v. OSHA*, 411 F.3d 272, 277 (D.C. Cir. 2005); *Nat'l Ass'n of Mfrs. v. OSHA*, 485 F.3d 1201, 1204-1205 (D.C. Cir. 2007). As the Fifth Circuit stated in *Reich v. Arcadian Corp.,* 110 F.3d 1192, 1198-1199 (5th Cir. 1997): "[Section 3(8)] permits the Secretary to promulgate standards governing 'conditions' and 'practices' of employment.… As such, the Secretary *cannot* set a unit of prosecution because, in most cases, a unit of prosecution has nothing to do with employment or workplace practices or conditions." (Emphasis by the court.) Indeed, OSHA told the *Arcadian* court that section 3(8) "serves a purpose that is entirely unrelated to the appropriate unit of violation" and that "there is no reason to believe that Congress was speaking to that subject when it drafted the definition."[48] Accordingly, section 3(8) does not

[48] In *Arcadian*, the employer argued that the unit of violation under the General Duty Clause could not be each employee because the unit of violation under standards (the preferred source of employer duties) is a "condition" or "practice" rather than each employee, citing section 3(8). Arcadian Br. 16, 43 (5th Cir., filed July 11, 1996) (1996 WL 33450601). OSHA replied:

> Arcadian's reliance on the definition of "occupational safety and health standard" is misplaced. The purpose of an OSH Act standard is to tell employers what they must do to avoid hazardous conditions. [Citation omitted.] It was therefore natural for Congress to define a "standard" in terms that notify employers of the workplace "conditions" and "practices" they must establish and maintain. *Since the definition of "standard" serves a purpose that is entirely unrelated to the appropriate unit of violation, there is no reason to believe that Congress was speaking to that subject when it drafted the definition.*

(continued…)

authorize OSHA to consider the unit of violation when choosing the wording of a standard.

That the Act's principal rulemaking provisions (OSH Act §§ 3(8) and 6(b)) authorize OSHA to address only employers' compliance duty rather than units of violation indicates that Congress did not delegate to OSHA authority to word standards to change or affect units of violation. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("specific respects" in which agency granted rulemaking authority "instruct us that [it] is not authorized to make a rule" on other subjects).[49] *Cf. Ethyl Corp. v. EPA,* 51 F.3d 1053, 1058 (D.C. Cir. 1995) (if "plain language … makes it clear that ... decisions are to be based on one criterion, the EPA cannot base its decision on other criteria"). This is particularly true here, for as we show beginning on page 40 below, the provisions of the OSH Act that bear on units of violation authorize only the Commission and the courts to rule on that issue, and give no role to OSHA except that of prosecutor.

c. OSH Act §§ 4 and 8 Do Not Permit OSHA to Consider the Unit of Violation When Wording a Standard.

The "Authority and Signature" section of the preamble included a *pro forma* recitation that the Final Standard was adopted under sections 4 and 8 of the OSH

OSHA Reply Br. 4 (5th Cir., filed Aug. 20, 1996) (1996 WL 33450603) (emphasis added).

[49] The Court stated: "The Attorney General has rulemaking power to fulfill his duties under the [statute]. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."

Act, 29 U.S.C. §§ 653 and 657. JA 184 (75583 col. 2). Section 4 (29 U.S.C. § 653) (A-1) has no relevant provisions. Various paragraphs in section 8 (29 U.S.C. § 657) (A-5) (entitled "Inspections, Investigations, and Recordkeeping") authorize OSHA to adopt regulations on such things as required records, employer inspections, postings and information for employees.[50] None of them authorize amendment of standards (as opposed to regulations), let alone units of violation.

For example, section 8(g)(2) (29 U.S.C. § 657(g)(2)) (A-6) authorizes the Secretaries of Labor and Health and Human Service to "prescribe such rules and regulations as [they] may deem necessary to carry out *their* responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment." (Emphasis added.) Not only does this provision not apply to "standards,"[51] but nothing in the Act makes rulemaking on units of violation a "responsibilit[y]" of OSHA; the Act leaves adjudication of whether one or more "violations" occurred within OSH Act § 17 (A-9) to the Commission and the courts (see discussion beginning on p.40). As the Supreme Court held in *Gonzales*, such general provisions cannot authorize an agency to adopt substantive

[50] See § 8(c)(1) (accident and illness cases; periodic inspections; posting) (A-5); § 8(c)(2) (injury, illness records, reports) (A-5); § 8(c)(3) (exposure records, monitoring); § 8(e) (inspection accompaniment) (A-6); § 8(f)(2) (review of refusal to issue citation) (A-6), 29 U.S.C. §§ 657(c)(1)-(3), (f)(2).

[51] For differences under the OSH Act between "standards" and "regulations," *see Steelworkers v. Auchter*, 763 F.2d 728, 753 (3d Cir. 1985); *La. Chemical Ass'n v. Bingham*, 657 F.2d 777, 783 (5th Cir. 1981).

rules addressing an issue committed to other bodies for decision.[52] Inasmuch as OSHA's "responsibilities" do not include the remedy for a violation, it may not seek to "channel" decisions on that subject by the Commission and the courts. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6 n. 1 (D.C. Cir. 2000).[53]

Moreover, section 8(g)(2) could not be construed so broadly as to permit OSHA to adopt or amend standards, for section 6(b) states that *it* governs the adoption and amendment of standards. A contrary view would violate not only the rule of construction that the specific controls over the general, but it would render sections 3(8) and 6(b) superfluous and smother the legislative decisions and

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[52] *Gonzales* construed 21 U.S.C. § 871(b), a provision of the Controlled Substances Act, 21 U.S.C. § 801 *et seq*., which authorized the Attorney General to promulgate "rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter." The Court stated (546 U.S. at 264-65):

> …This section allows the Attorney General to best determine how to execute "his functions." … To find a delegation of this extent [to define medical practice] in §871 would put that part of the statute in considerable tension with the narrowly defined delegation concerning control and registration. It would go, moreover, against the plain language of the text to treat a delegation for the "execution" of his functions as a further delegation to define other functions well beyond the statute's specific grants of authority. When Congress chooses to delegate a power of this extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret.

[53] "If the Secretary [of Transportation] intends to assert that by means of his rule he can channel the choices of the Attorney General and the courts within the [Americans with Disabilities Act] remedy structure, he points to nothing suggesting such authority."

compromises they embody. In sum, section 8(g)(2) did not authorize OSHA to consider the unit of violation when wording a standard.

d. OSHA's Other Rationales Are Unauthorized by the Act.

OSHA suggested that the Final Standard was authorized because it embodied OSHA's "interpretation" of its standards[54] and "provides clearer notice of the nature of the employer's duty under existing PPE and training provisions."[55] But OSHA must have statutory authority to embody a particular position in its standards. *See Kelley*, 15 F.3d at 1107, 1108. As we have shown, the only subject OSHA has authority to prescribe in standards is employers' compliance duties, and not the unit of "violation" under OSH Act § 17, 29 U.S.C. § 666 (A-9), to which OSHA has no authority to speak except as a prosecutor. *See Kelley*, 25 F.3d at 1092 (authority to interpret coverage provision insufficient to adopt liability regulation). Inasmuch as the Final Standard's preamble makes clear that the "interpretation" that OSHA embedded in the Final Standard pertains to the unit of violation, the Final Standard is infected with an unauthorized rulemaking factor and is invalid.

OSHA also did far more in the Final Standard than merely provide notice that per-employee penalties were possible. It *made* them possible by changing the text of the standards. (Indeed, if it had not done so, its "interpretation" would have

[54] JA 174 (75573 col. 2) ("final rule confirms the Secretary's interpretation of standards of this kind."); JA 176 (75575 col. 2) ("final rule … concerns only the Secretary's interpretation that the … standards are susceptible to per-employee citations.").

[55] JA 171 (75570 col. 2); *see also* JA 176 (75575 col. 1).

no anchor for the deference it also claims. See p. 42 below.) In any event, OSHA neither claimed nor found that the Final Standard would relieve employer uncertainty about compliance duties – the only subject on which it is authorized to prescribe standards. OSHA neither claimed nor found that phrases such as "all employees" left employers uncertain whether they are required to train all employees or equip all employees with PPE. On the contrary, OSHA acknowledged that, "Neither the Commission nor any court has ever suggested that an employer can comply with the PPE and training provisions … by providing PPE to some employees covered by the requirement but not others, or that the employer can train some [covered] employees … but not others."[56] See also JA 178 (75577 cols. 2-3) ("there is not widespread confusion on this matter"); JA 40 (AFL-CIO comment: "It would be absurd for an employer to assert … that an employer is in compliance with the requirements in circumstances where they do not provide PPE and respirators to all affected employees.").[57] Hence, had OSHA made a finding of employer uncertainty over compliance obligations, it would have been unsupported by the rulemaking record.[58]

[56] JA 170 (75569 col. 3).

[57] *See also* JA 166 (AFL-CIO comment that "no employer participating in the informal rulemaking hearing suggested that their approach to providing PPE or training was" other than that they "must provide PPE or training to each affected employee … to be in compliance ….").

[58] OSH Act § 6(f), 29 U.S.C. § 655(f) (A-5), requires rulemaking findings to be "supported by substantial evidence in the record considered as a whole."

If OSHA had merely been sought to give notice of the penalty consequences of violations and of its interpretations, it had lawful means to do so. It could have added an interpretive rule to its "Proposed penalties" regulation in § 1903.15 (A-15), a provision that "prescribe[s] rules and … set[s] forth general policies for enforcement of the … proposed penalty provisions of the Act." § 1903.1 (A-14). Or it could have published a Federal Register notice announcing its view. *E.g.,* "Interpretation of OSHA's Standard for Process Safety Management of Highly Hazardous Chemicals," 72 Fed. Reg. 31453 (2007), responding to *Motiva Enterprises*, 21 BNA OSHC 1696 (OSHRC 2006). Neither of these means (and there are others) would have infected OSHA's standards with an unauthorized rulemaking factor.

2. The Final Standard Addresses a Matter That Congress Committed to Resolution by the Commission and the Courts.

OSHA also exceeded its delegated authority because the Final Standard usurps the authority of the Commission and the courts to decide the unit of violation – an issue as to which OSHA speaks only as a prosecutor. The only provisions of the Act that bear on units of violation unambiguously commit their resolution to the Commission and the courts.

Units of violation affect only penalty assessment. The Act's penalty provision states that, "The Commission shall have authority to assess all civil penalties provided in this section…."[59] The Act's administrative hearing provision further states that OSHA only proposes penalties while the Commission decides

[59] OSH Act § 17(j), 29 U.S.C. § 666(j) (A-10).

them: "[T]he *Commission* shall … issue an order …. affirming, modifying, or vacating the Secretary's … *proposed* penalty."[60] In determining the unit of violation, it is the Commission and the courts that apply the phrase "each violation" in the Act's penalty provisions,[61] apply the word "comply" in the provision requiring compliance with standards,[62] and apply the words "condition" and "practice" in various provisions[63] to find whether, on the facts, there was one or more failures to "comply," or one or more violative "conditions" or "practices," and thus one or more "violations."

For example, it is the Commission that determines whether one or more violations occurred if, for example, several employees went untrained because an employer erroneously thought that a standard does not apply, believed that a certain chemical is not present, or overlooked a required training point during permissible[64] group training sessions. The Commission might well hold that any of these situations involved a single failure to "comply" with a standard or a single "condition" or "practice." *See Chao v. OSHRC (Erik K. Ho)*, 401 F.3d 355, 373 (5th Cir. 2005) (requiring "employee-specific unique circumstances," such as need

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[60] OSH Act § 10(c), 29 U.S.C. § 659(c) (A-7) (emphasis added).

[61] Specifically, sections 17(a) (penalty for "each violation"), (b) ("each such violation"), (c) ("each violation"), (d) ("each failure or violation"), and (i) ("each violation"). 29 U.S.C. § 666(a)-(d), (i) (A-9 – A-10).

[62] OSH Act § 5(a)(2), 29 U.S.C. § 654(a)(2) (A-2).

[63] See page 6 above, quoting OSH Act §§ 3(8) (A-1); 6(b)(6)(A) and (d) (A-4); 13(a), (c) (A-8); and 17(k) (A-10).

[64] See JA 180-81 (75579-80) ("individual customized training" not required; group training permitted).

for "unique individual training sessions"); *cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (failure to pay minimum wage to several employees; one FLSA violation despite "each of his employees" language; single managerial decision or "single course of conduct" "cannot be turned into a multiplicity of offenses").

OSHA sought, however, to wrest that issue from the Commission and the courts. It not only changed the wording of its standards to make each employee the unit of violation, but sought to embed in them its rulemaking "interpretation" that *every* case involving training or PPE involves only violations unique to each employee. OSHA "reject[ed]" the proposition that the above facts might result in a finding of only a single violation, stated that the unit-of-violation issue "turns entirely on the proper interpretation of the standard's text," and asserted that the Commission's role is "limited to determining whether [OSHA's] interpretation that the standard permits per-[employee] violations is reasonable." JA 177 (75576). By including its broadly-articulated "interpretation" in the preamble, OSHA apparently sought to gain primary interpretive authority over the unit of violation. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (*Chevron* deference for interpretation made in notice-and-comment rulemaking).

OSHA's broad articulation not only made plain that the rulemaking was infected with an unauthorized factor but rests on a profound error: A unit of violation cannot logically turn "entirely" on the standard's text because, as OSHA admitted in *Arcadian*, section 3(8) contains no criteria by which OSHA can determine a unit of violation. Looking solely to a standard to resolve a unit-of-

violation issue would ascribe to its wording a power that OSHA lacks. That OSHA may prescribe (and receive deference regarding) the employer's *compliance duty* does not mean that OSHA may, by embedding in the Final Standard a view that every case involving training or PPE necessarily involves only violations unique to each employee, channel a determination on whether, on the facts, one or multiple "violations" under OSH Act § 17 (A-9) occurred. The statute gives authority to decide *that* issue to only the courts and to the impartial Commission, which, as we now show, was established to decide just such questions "without regard" to OSHA's view.

a. Congress Specifically Intended as a General Rule That the Commission Decide Cases "Without Regard to the Secretary."

Although the Supreme Court has held that courts must defer to OSHA on the compliance duties of employers under OSHA standards (*Martin v. OSHRC (CF&I Steel Corp.),* 499 U.S. 144, 147-48 (1991) (*CF&I Steel*)), the legislative history of the OSH Act clearly shows that the Commission is to decide all other issues "without regard to the Secretary." That general rule is especially apt on unit-of-violation questions, on which OSHA speaks only as a prosecutor.

In 1970, when Congress was considering passage of the Act, a central dispute was who would decide enforcement cases.[65] One proposal was to commit

[65] BOKAT & THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW at 41-42 (1st ed. 1988); and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, MONTHLY LAB. REV. 22-23 (March 1981), *available at* www.dol.gov/oasam/programs/history/osha.htm.

adjudication to the Labor Department but rely on the APA's separation of function requirement to assure impartiality.[66] Congress was aware that under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976), the Interior Department (under which all administrative functions had been placed) had established separate enforcement and adjudication arms – the Mining Enforcement Safety Administration (MESA) and the Interior Board of Mine Operation Appeals (Interior Board or IBMA).[67] The Interior Board reviewed questions of law *de novo,* without deference to MESA,[68] and courts deferred to the views of the Interior Board, for *it* – not the enforcement arm – spoke for the cabinet department.[69]

But in 1970, dissatisfaction and suspicion of the independence and objectivity of such departmental boards ran so deep as to endanger the OSH Act's passage.[70] The President threatened to veto any bill that placed all administrative

[66] S. REP. NO. 1282, 91st Cong., 2d Sess. 15 (1970), *reprinted in* SUBCOMM. ON LABOR, SENATE COMM. ON LABOR & PUBLIC WELFARE, THE LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 at 155 (Comm. Print 1971) ("Leg. Hist.").

[67] The IBMA was mentioned at, *e.g.,* S. Rep. at 56; Leg. Hist. at 195 (sep. views of Sen. Javits) and at 477 (remarks of Sen. Javits).

[68] *See, e.g., Eastern Associated Coal Corp*., 7 IBMA 133, 1976-77 CCH OSHD ¶ 21,373 (1976) *(en banc);* 1 COAL LAW & REGULATION, ¶ 1.04[9][b][iii], p. 1-49 (T. Biddle ed. 1990) ("Of course, the Board could independently decide questions of law.").

[69] *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight").

[70] S. REP. at 55, Leg. Hist. at 194 (debate "so bitter as to jeopardize seriously the prospects for enactment...."). *See also* the remarks by Senators Dominick and Smith appended to S. REP. at 61-64, Leg. Hist. at 200-03.

powers in one agency.[71] To save the Act, Senator Javits proposed an "important"[72] compromise – the establishment of the Commission. During a colloquy with Senator Holland, he assured the Senate that his compromise would establish "an autonomous, independent commission which, *without regard to the Secretary,* can find for or against him on the basis of individual complaints."[73]

On the strength of that assurance Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required …."[74] A sharply-divided Senate then voted for the Javits Compromise[75] and, "[w]ith this basic compromise inserted,"[76] the bill then passed.[77]

This assurance to the Senate by Senator Javits, the architect of the compromise that established the Commission, that the Commission may act "without regard to the Secretary" is the only piece of legislative history that directly addresses the interpretive freedom of the Commission. No court has discussed it. It was not discussed in *CF&I Steel* or mentioned by any party. It was mentioned by an *amicus* brief[78] but likely thought distinguishable because the issue

[71] BOKAT & THOMPSON at 42 .

[72] MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 1.3, p. 7 (2009 ed.) (Act passed only after Senate "passed a series of compromise amendments, including an important amendment by Senator Jacob Javits ….").

[73] Leg. Hist. at 463 (emphasis added).

[74] *Id*. *See also id.* at 193-94, 200-03, 380-94, 479.

[75] Leg. Hist. at 479 (43 to 38 vote).

[76] JOSEPH A. PAGE AND MARY-WIN O'BRIEN, BITTER WAGES 175 (1973).

[77] Leg. Hist. at 528.

[78] Brief of Am. Iron and Steel Institute at 4, 1989 U.S. Briefs Lexis 1541.

there was the weight due OSHA's view of the compliance duty imposed by its own standard.

The Javits-Holland colloquy supports the Commission's consistent refusal to defer to OSHA on matters other than the meaning of the compliance duties imposed by OSHA's standards. The Commission cannot decide the unit of violation "without regard to" OSHA's position and simultaneously defer to it. If the Commission cannot interpret the OSH Act without deference to OSHA's view, it would have even less authority than the pre-Act departmental appeals boards that Congress rejected.

3. The Administrative Procedure Act Requires Agencies to Have an Affirmative Grant of Authority to Adopt Substantive Rules on the Unit of Violation or Do Anything With Regard to Sanctions.

That the Final Standard is unauthorized and infected by an improper factor is also indicated by 5 U.S.C. § 558(b), APA § 9(a) (A-11), which states: "A sanction may not be imposed or a substantive rule … issued except within jurisdiction delegated to the agency and as authorized by law." *See generally American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). Nothing in the Act authorizes OSHA to issue substantive rules on the unit of violation, which affects only sanctions and not employers' compliance duties.

The Final Standard is covered by APA § 9(a) because it is a "substantive rule." It amends and adopts OSHA standards enforceable by citation and penalty. *See generally Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1108-13 (D.C. Cir. 1993) ("amendment to a legislative rule must itself be legislative") (interior

quotation marks omitted). It "work[ed] substantive changes in prior regulations" and "change[d] the rules of the game,"[79] because, before its adoption, per-employee penalties were not available in certain cases (*e.g., Ho,* 20 OSHC at 1372, 1374 (asbestos standard addressed employees in "aggregate, not individually"; single duty to have training program)).[80] OSHA "explicitly invoked its general legislative authority" (here, OSH Act § 6) in adopting the Final Standard, and it uses the "the language of command."[81] The Final Standard is also to be codified in the Code of Federal Regulations. *See Am. Mining Congress*, 995 F.2d at 1112.

The Final Standard also provides a "sanction" under the definition in APA § 2(f), 29 U.S.C. § 551(10) (A-10) because it permits a previously-unavailable unit of violation to be applied during penalty assessment and thereby "change[s] the frequency or number of violations and amount of fines assessed" (JA 182 (75581 col. 3). A "sanction" includes not only the imposition of a penalty[82] but any "requirement, limitation, or other condition affecting the freedom of a person" and "other compulsory or restrictive action."[83] Congress intended that this definition be construed broadly. "The purpose of the [definition of "sanction"] is to define

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[79] *Sprint Corp. v. Fed. Communication Comm'n,* 315 F.3d 369, 374 (D.C. Cir. 2003).

[80] *See also US Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir 1994) (penalty policy, substantive rule); *Am. Mining Congress*, 995 F.2d at 1109 ("legislative basis for agency enforcement would be inadequate").

[81] *Am. Bus Ass'n v. United States*, 627 F.2d 525, 531 (D.C. Cir. 1980) (quoting *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942)).

[82] APA § 2(f), 5 U.S.C. § 551(10)(C) (A-10).

[83] *Id.* at (10)(A) and (G) (A-10).

exhaustively every possible form of legitimate administrative power or authority."[84] Its "terms are meant to be all embracing."[85]

Congress also intended that the APA's sanction provision itself (APA § 9(a), 5 U.S.C. § 558(b)) be broadly construed, and that agencies have an affirmative grant of statutory authority to adopt substantive rules that seek to state or channel the imposition of a sanction; silence or ambiguity is not enough. Thus, APA § 9(a) "applies to *any* power or authority that an agency may assume to exercise."[86] "[A]gencies may not undertake *anything* which statutes … do not authorize them to do. Where these sources are specific in the authority granted, no additional authority may be assumed."[87] A "detailed specification" of sanction power is required: "This provision is framed on the necessary assumption that the detailed specification of powers must be left to other legislation relating to specific agencies. Its effect is to confine agencies to the jurisdiction and powers so conferred."[88]

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[84] LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 79TH CONG. at 197 (1944-46) ("APA LEG. HIST."), setting out SEN. JUD. COMM. PRINT (June 1945) (to accompany S.7) (emphasis added).

[85] *Id.* at 356 (floor remarks of Rep. Walter, a chief APA architect). The introduction to the ATTORNEY GENERAL'S MANUAL ON THE APA at 5 (1947) refers to the "[t]he members of the Seventy-Ninth Congress who worked so assiduously on the McCarran-Sumners-Walter bill."

[86] APA LEG. HIST. at 211 (emphasis added); *see also id.* at 233, 274, setting out H.REP. NO. 1980, 79th Cong., 2d Sess. (1946) (to accompany S.7) (same).

[87] APA LEG. HIST. at 211 (emphasis added).

[88] *Id.* at 367-68.

In the Final Standard's preamble, OSHA briefly claimed that the Final Standard falls "within jurisdiction delegated to the agency" (quoting APA § 9(a)) because OSHA may issue a citation for a violation of a standard's "requirement"[89] and because a penalty may be assessed "for a violation."[90] But the OSH Act's citation-issuance provision[91] authorizes OSHA to be only a prosecutor, *i.e.,* to "allege[]" violations. The OSH Act's penalty-assessment provision expressly commits to "the Commission" both the "authority to assess all civil penalties"[92] and the determination of what a "violation" is for penalty assessment purposes.[93] It does not once mention OSHA, whose role is only to "propose" penalties.[94]

C. If *Chevron* Were Applied, the Plain Language of the Act Shows That OSHA Had No Authority to Issue the Final Standard, and That Its View of Its Authority Is Unreasonable.

As stated in Part VIII.A on p.28 above, Petitioners respectfully submit that *Chevron* deference does not apply here because Congress has not delegated to OSHA authority to change or affect units of violations.

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[89] OSH Act § 9(a), 29 U.S.C. § 658(a) (A-7) .

[90] OSH Act § 17, 29 U.S.C. § 666 (A-9). OSHA stated (JA 176 (75575 col. 3)): "[S]ection 9(a) of the OSH Act expressly authorizes the Secretary to issue a citation for violation of 'a requirement … of any standard,' and section 17 states that a penalty may be assessed 'for each violation.' Thus, the final rule clearly falls 'within jurisdiction delegated to the agency' and does not violate section 558 of the APA."

[91] OSH Act § 9(a), 29 U.S.C. § 658(a) (A-7).

[92] OSH Act § 17(j), 29 U.S.C. § 666(j) (A-10).

[93] *E.g.,* OSH Act § 17(a), 29 U.S.C. § 666(a) (A-7).

[94] OSH Act § 10(a)-(c), 29 U.S.C. § 659(a)-(c) (A-7).

If *Chevron* were applied, the Final Standard should be vacated. We have shown above that the language of the OSH Act is plain that it confers authority on OSHA to legislate only with respect to compliance duties of employers, not units of violation. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("specific respects" in which agency granted rulemaking authority "instruct us that [it] is not authorized to make a rule" on other subjects). The only provisions of the Act that bear on units of violation unambiguously commit their resolution only to the Commission and the courts.

The Act's language, especially together with the APA's sanction provision, which limits deference on sanctions issue,[95] and the commitment by Congress of authority to the Commission and the courts to decide the unit of violation, also show that OSHA's contrary interpretation is unreasonable. "The 'reasonableness' of an agency's construction depends" in part "on the construction's 'fit' with the statutory language …." *Abbott Labs. v. Young*, 920 F.2d 984, 988 (D.C. Cir. 1990); *see also California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004). For the reasons stated in detail above, OSHA's claim of authority is such a poor fit with the statute that it must be rejected.

D. Vacatur is the Correct Remedy.

Vacatur is the correct remedy here. Inasmuch as the Final Standard did not change employers' compliance obligations, vacatur would not impair employee

[95] *Cf. Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (canon of liberal construction favoring Native Americans restricts *Chevron* deference).

safety or health; employers would still be required to properly train and equip "all" their employees exactly as they were before the Final Standard was adopted. It is highly unlikely that OSHA could cure the defect in the Final Standard on remand with reasons and evidence that do not pertain to the unit of violation. The record does not contain, and there is no realistic prospect that OSHA will be able to adduce, evidence that employers believe that phrases such as "all employees" mean that fewer than all employees must be trained or receive protective equipment. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001); *see generally Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007).

Alternatively, although this Court remanded without vacatur in, *e.g., Allied–Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), Petitioners most respectfully suggest that this Court upon *en banc* consideration might adhere to a contrary view. See *In re Core Communications*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (noting conflicting views). APA § 10(e)(B), 5 U.S.C. § 706(2), states that "[t]he reviewing court *shall* … (2) hold unlawful and set aside [unlawful] agency action …." (Emphasis added.) The term "shall" "normally creates an obligation impervious to judicial discretion." *Miller v. French*, 530 U.S. 327, 337 (2000), *quoting Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Certainly, no abnormal circumstances warrant a departure from vacatur here.

If a remand is ordered, OSHA should be required to support the Final Standard with reasons and evidence that do not pertain to the unit of violation.

IX. CONCLUSION

The Final Standard should be vacated.

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