ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 2009
No. 09-1053

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)

Reply 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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Glossary of Abbreviations

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Chamber	Chamber of Commerce of the U.S., petitioner.
CF&I Steel	*Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991).
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 catch-call provision that generally applies when a standard does not.
Ho	*Chao v. OSHRC (Erik K. Ho)*, 401 F.3d 355, 373 (5th Cir. 2005).
Leg. Hist.	SUBCOMM. ON LABOR, SENATE COMM. ON LABOR & PUBLIC WELFARE, THE LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (Comm. Print 1971)
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. STATUTES AND REGULATIONS

Additional materials are set out at Addendum pages A-1 to A-4.

II. STATEMENT OF THE FACTS

OSHA argues (Br. 7-8) that per-condition penalties are assessed because the act required by a standard "protects all employees equally." Neither cited case states or stands for that proposition. *See Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275 (OSHRC 1978) (different scaffolds); and *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2212 (OSHRC 1993) (different floors). Similarly, the statement at 8-9 that per-employee penalties are imposed because a respirator protects only the employee using it neither appears in nor accurately reflects the rationale of the four cases cited there. The statement also erroneously implies that, under case law regarding respirator and similar violations, the unit of violation is necessarily each employee. Under case law not cited there, that may depend on several factors not mentioned in OSHA's statement of the case. See *Chao v. OSHRC (Erik K. Ho)*, 401 F.3d 355, 373 (5th Cir. 2005) (no per-employee penalties without "employee-specific unique circumstances," such as a need for "unique individual training sessions").

III. SUMMARY OF ARGUMENT

Petitioners' brief laid down a gauntlet, challenging OSHA to identify the words in the statute by which Congress delegated it authority to "prescribe" (OSHA Br. 36) units of violation. OSHA points to none. It does not claim that a unit of violation is even impliedly a "condition" or "practice" under OSH Act

§ 3(8), 29 U.S.C. § 652(8) – the statute's core rulemaking provision. See OSHA Br. 40-41. It fails to explain away the Fifth Circuit's holding in *Arcadian* that OSHA "*cannot* set a unit of prosecution …." It ignores its previous statement 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."

Instead, OSHA resorts to analogy: Prescribing units of violation is a "legislative" function; OSHA has a "legislative" function; ergo, it may prescribe units of violation. The argument is fallacious. That Congress has "legislative" authority to set units of violation does not mean that OSHA does. OSHA's powers are not "legislative" but quasi-legislative – a distinction drawn by Congress and by courts to emphasize that agencies have only the powers granted. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and at 223 (Scalia, J., concurring) (agency does not have retroactive rulemaking power merely because Congress does). Any such delegation must be found in the statute – where OSHA is unable to locate it.

Nor does it follow that, because courts look to the wording of a duty in a statute to determine units of violation, establishing such units must be a "component" of OSHA's rulemaking powers. Courts look to a statute's wording not because the power to prescribe units of violation inheres in the power to prescribe a duty but because Congress presumably had the unit of violation in mind while drafting the duty. That does not mean that a delegation to an agency to prescribe duties conveys the power to prescribe units of violations. Indeed, the Act

provides an example of standards made binding without considering units of violations – private "national consensus standards" adopted verbatim without rulemaking under OSH Act 6(a), 29 U.S.C. § 655(a). Moreover, determining duties and determining the number of punishments for their violation *are* different. Determining a unit of violation requires the legislature to determine the "singularity of blameworthiness" should the duty be violated. That requires the weighing of policy and moral factors, none of which figure in OSH Act rulemaking and which were excluded here.

OSHA also failed to refute Petitioners' showing that the only statutory provisions that bear on units of violation "unambiguously commit their resolution to" the courts and the Commission, which Congress intended would decide statutory questions "without regard to" OSHA. Instead, OSHA principally argues that, inasmuch as OSHA may "propose" penalties, and most penalties are not contested, "in most instances it is the Secretary who is establishing the penalty." But this shows only practical influence, much as police officers have over speeding fines. That does not imply a delegation of authority to adopt regulations addressing the unit of violation.

Finally, there is nothing "bizarre" about Petitioners' position. Under it, adjudicators would do much as courts do when a statute is silent: They would determine the number of employer "conditions" or "practices," or failures to "comply" within the meaning of section 5(a)(2); in cases of doubt, they might give its benefit to the employer, in effect applying a civil version of the rule of lenity to protect due process, which applies to civil penalty assessment.

This approach is rational, consistent with the statute and with the way that units of violation are traditionally ascertained. It ensures that the number of penalties is decided not by prosecution-minded rulemakers but by impartial adjudicators.

IV. ARGUMENT

A. Standard of Review.

1. Whether OSHA Has A Delegation of Authority To Prescribe Units of Violation Must Be Resolved *De Novo*.

Petitioners argued that whether OSHA has been delegated authority to make rules on the unit of violation must be examined *de novo* rather than under *Chevron*. Br. 29-30, citing *inter alia*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *Kelley v. EPA*, 15 F.3d 1100, 1107, 1108 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088, 1091 (1994). OSHA offers no response to Petitioners' argument.

If *Chevron* were applicable, Petitioners argued in their opening brief that, on statutory issues, OSHA is not the agency that should receive *Chevron* deference – an issue reserved in *Auto Workers v. OSHA*, 938 F.2d 1310, 1319 n.9 (D.C. Cir. 1991). Petitioners explained that, inasmuch as Congress intended that the Commission decide statutory questions "without regard to" OSHA's view, OSHA may not bind the Commission by adopting regulations on such issues. Petitioners explained (Br. 30-31 & n. 45) that all expressions by this Court on whether the

Commission has such independent authority have been *dicta* and, with respect to the unit of violation, not previously briefed.[1]

OSHA nevertheless cites this Court's previous expressions, saying that they are holding, but not addressing our argument that they are *dicta*. OSHA additionally cites *Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 734 (D.C. Cir. 2005), but its statement was again *dictum*, for there the Commission and OSHA were in agreement, the Court never applied the statement, and the employer did not brief the point.[2]

OSHA then cites caselaw under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, ignoring the OSH Act's very different legislative history, which Petitioners presented to this Court for the first time.

2. The OSH Act's Legislative History Shows That OSHA Is Not Entitled To Deference on Issues of Statutory Construction.

With respect to Senator Javits's assurance to the Senate, OSHA relies on the statement in *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), that "[t]he remarks of a single legislator, even the sponsor, are not controlling …." In *Chrysler*, however, the Court *relied* on a sponsor's assurance to the House of certain language's effect, finding it consistent with the legislative language and history. *See also Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238,

[1] OSHA states (Br. 32-33) that the Commission reviews OSHA's interpretations of "statutory" provisions for reasonableness, citing *CF&I Steel*, 499 U.S. at 154-56. This is wrong; the Commission does not defer to OSHA's statutory views because *CF&I Steel* said nothing about Commission review of OSHA's view of statutes. Opening Br. 10.

[2] Brief of Wal-Mart Stores, 2004 WL 3190497, at p. 11 (filed Oct. 6, 2004).

243 (D.C. Cir. 1981) (relying on supporter's statement uncontroverted by statute or legislative history); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976) (relying on floor manager's statement consistent with statutory language). Yet, OSHA never claims that Senator Javits's assurance is inconsistent with the OSH Act's text or legislative history.

Senator's Javits's remark was also not a "snippet" nor one by a mere sponsor. The remark was the key assurance to the Senate in a highly influential, crucially-timed speech. As Petitioners explained without dispute, passage of the OSH Act was threatened by a dispute over whether the Labor Department would perform rulemaking, enforcement and adjudication. Whether to establish an independent adjudicator was perceived "as the most important issue in this legislation."[3] Senator Javits, seeking to avoid a presidential veto and to end a filibuster,[4] proposed a compromise under which adjudication would be performed by an independent Commission, which he presented in a speech to the Senate. As to *how* independent the Commission would be, Senator Javits offered an assurance that led conservative[5] Senator Holland to support the Javits Compromise:

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[3] SUBCOMM. ON LABOR, SENATE COMM. ON LABOR & PUBLIC WELFARE, THE LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 442 (Comm. Print 1971) ("Leg. Hist."); *id*. at 462 ("big issue," "key issue"), 464 ("the nut in the coconut"); see BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY LAW OF 1970: TEXT, ANALYSIS 56 (1971)("BNA HISTORY") ("one of the most contested sections").

[4] BNA HISTORY at 20 (noting filibuster).

[5] MICHAEL GRUNWALD, THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE, p. 211 (2007) (available at this link) ; John R. Nemmers,

(continued…)

> Mr. JAVITS. It would not be a Labor Department instrument. … This is an autonomous, independent commission which, ***without regard to the Secretary***, can find for or against him on the basis of individual complaints.
>
> Mr. HOLLAND. I thank the Senator. I shall support his amendment, because I believe that that kind of independent enforcement is required under the circumstances.[6]

Immediately after this speech, the Senate adopted the Javits Compromise, which largely "enabled the Williams bill to come to a final vote and win Senate approval."[7] The importance of that speech is indicated by, *inter alia*, the fact that two histories of the OSH Act – including one written by OSHA's first chief attorney[8] – set it out at length or in full.[9]

OSHA then argues (Br. 29)) that, "Nothing in [Senator Javits's] statement … suggests that [he] intended to depart from the normal rule that the policymaking agency (here, the Secretary) is to receive deference for its interpretations of ambiguous statutory terms." Aside from the logical inconsistency that one cannot both decide cases "without regard to" an agency and defer to it, the argument stumbles badly over a mistake of fact: In 1970, when the OSH Act was passed, there was no "normal rule" of deference.

"Biographical/Historical Note" in "A Guide to the Spessard L. Holland Papers," Univ. of Fla. Smathers Libraries, web.uflib.ufl.edu/spec/pkyonge/Holland.htm.

[6] Leg. Hist. 463; 116 CONG. REC. 37607 col. 2 (1970) (emphasis added).

[7] BNA HISTORY at 20.

[8] BENJAMIN MINTZ, OSHA: HISTORY, LAW AND POLICY at 24-25 (1984) ("Mintz").

[9] BNA HISTORY at 300-302 (Appendix I-4, in "Significant Parts of Senate and House Debate").

As Professor Davis and others have observed, before *Chevron* there were two inconsistent lines of cases.[10] One line – echoed by Senator Javits's remark – held that courts construed statutes *de novo* after giving "weight" to agency views.[11] The other line – akin to *Chevron* – required courts to accept agency interpretations with "a reasonable basis in law."[12] In 1970, that conflict was unresolved, but Senator Javits's phrase "without regard to" shows Congress expected the Commission to generally adhere to the no-deference *Skidmore*-like rule.

This clear evidence of undisputed congressional intent can be given effect consistent with *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991). OSHA does not dispute Petitioners' argument that the Supreme Court "likely thought [Senator Javits's statement] distinguishable because the issue there was the weight due OSHA's view of the compliance duty imposed by its own standard." Br. 45-46. Similarly, OSHA never disputes Petitioners' observation (Br. 45-46) that that this Court in *Auto Workers*, 938 F.2d at 1319 n.9, reserved decision on whether *CF&I Steel*) is distinguishable as involving only OSHA's standards.

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[10] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (2d ed. 1984); R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.1, p. 137-138 (4th ed. 2002); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("two lines of Supreme Court decisions … are analytically in conflict"), *aff'd,* 432 U.S. 249 (1977); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking In Reviewing Agency Interpretations of Statutes,* 73 TEX. L. REV. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

[11] *E.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[12] *E.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944).

B. Congress Did Not Delegate to OSHA Authority 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.

Although OSHA claims rulemaking authority to "establish" the unit of prosecution (Br. 36), it implies it need not carry the burden of showing such authority: While Petitioners discussed whether the OSH Act "authorizes" OSHA to set a unit of violation (Br. 33-35), OSHA discusses whether it "forbids" OSHA from doing so. In a challenge to a rulemaking under section 6(f), 29 U.S.C. § 655(f), OSHA has the burden of showing its authority. *See Industrial Union Dept. v. American Petrol. Inst.,* 448 U.S. 607, 642-43, 662 (1980) (plurality); *Steelworkers v. Marshall,* 647 F.2d 1189, 1272 (D.C. Cir. 1980); *Synthetic Organic Chemical Mfrs Ass'n v. Brennan,* 503 F.2d 1155 (3d Cir. 1974).

1. The Language of the OSH Act Does Not Authorize OSHA to Consider the Unit of Violation When Wording A Standard.

a. OSH Act § 6(b)'s Language Does Not Authorize OSHA to Consider the Unit of Violation.

Petitioners' opening brief laid down a gauntlet: After noting that OSH Act § 6(b), 29 U.S.C. § 655(b), was the only provision upon which OSHA's preamble relied, it stated: "[T]here 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."

Despite this challenge, with one inconsequential exception discussed below, OSHA quotes nothing from section 6(b). See OSHA Br. at 4, 30, 36 and 39. Instead, OSHA resorts to implication and to *ipse dixit* (OSHA Br. at 30),

proclaiming that that the provision confers authority for "establishing" a unit of violation but never pointing to the words that supposedly do so.

OSHA does remark (Br. 30) that it would, under section 6(b)'s notice-and-comment rulemaking procedures, fix units of violation after receiving "input" from persons affected. It nowhere disputes our argument (Br. at 33), however, that, as this Court held in *American Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000), adherence to such procedure is not a substitute for a lack of rulemaking authority. OSHA also cites section 6(b) to support various truisms – that the provision authorizes OSHA to issue "rules carrying the force of law" and to "govern employer conduct with regard to employee health and safety" (e.g., OSHA Br. 29, 36) – none of which show authority to set units of violation.

The one place where OSHA quotes section 6(b) is on page 38, where it quotes subparagraph 6(b)(5) as authorizing it to consider "experience gained" under health and safety laws when adopting standards. But nothing there implies that that experience is to be used for setting units of violation. On the contrary, the only purpose mentioned in section 6(b)(5) for considering such "experience" is to draft health (not safety) standards to avoid "material impairment of health."

b. OSH Act § 3(8)'s Language Does Not Authorize OSHA to Consider the Unit of Violation.

Similarly, Petitioners' Br. 34-35 argued that section 3(8), the OSH Act's core rulemaking provision (which was not invoked by OSHA's preamble) "does not authorize OSHA to consider the unit of violation when choosing the wording of a standard."

Although OSHA's counsel now relies on the provision (Br. 38), it is never explained how the *words* of section 3(8) authorize OSHA to determine the unit of violation. OSHA nowhere denies Petitioners' assertion that a unit of violation is not a "condition" or "practice" under section 3(8). See OSHA Br. 40-41. OSHA nowhere disavows its previous statement 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."[13] Nor does OSHA explain any change of position.[14]

OSHA also fails to explain away the only judicial holding on whether the words of section 3(8) authorize OSHA to set units of violation – that of the Fifth Circuit in *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997). That court, citing section 3(8), held that "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." *Arcadian*, 110 F.3d at 1198-1199 (emphasis by the court). In a footnote, OSHA responds that the statement was "unnecessary" because the case involved the General Duty Clause (OSH Act § 5(a)(1), 29 U.S.C. § 654(a)(1). Br. 42 n. 14.

That is wrong; the statement directly supported the court's holding. In response to a party's argument, the Fifth Circuit inquired whether per-employee

[13] OSHA Reply Br. 4 (5th Cir., filed Aug. 20, 1996) (1996 WL 33450603) in *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997).

[14] *See generally FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009) (agency may not depart from prior policy *sub silentio*).

penalties for General Duty violations are "consistent with other provisions of the OSH Act." 110 F.3d at 1198. The court concluded that, because OSHA's position "runs counter to § 652(8) of the OSH Act," "[i]t would therefore be anomalous for us to hold that per-employee penalties, generally unavailable for violations of OSHA standards, are always available for violations of the General Duty Clause." 110 F.3d at 1199. Inasmuch as this conclusion directly supports the result, it is not *dictum*. *Parker v. District of Columbia*, 478 F.3d 370, 396 n.16 (D.C. Cir. 2007), *aff'd*, 128 S.Ct. 2783 (2008).

In that same footnote, OSHA cites the Fifth Circuit's further suggestion that a "failure to train … a worker" is "unique to the employee." The court did not say, however, that *all* failures to train are unique to the employee, and it later resolved the issue against OSHA in *Ho*, requiring a showing of a need for "unique individual training sessions."[15]

c. OSH Act § 8(g)(2)'s Language Does Not Authorize OSHA to Consider the Unit of Violation.

OSH Act § 8(g)(2), 29 U.S.C. § 657(g)(2), authorizes the Secretary to "prescribe such rules and regulations as [she] may deem necessary to carry out *[her] responsibilities* under this Act …." (Emphasis added.) Petitioners demonstrated (Br. 35-38) that this provision is of no aid to OSHA.

[15] OSHA suggests (Br. 43 n. 15) that the Final Standard is valid because Petitioners have not claimed that the amended standards fail to meet section 3(8). That is wrong. Petitioners claim that the amendments made by the Final Standard are not authorized by section 3(8) and thus unlawful.

OSHA responds that *Steelworkers v. Marshall*, 647 F.2d 1189, 1230 (D.C. Cir. 1980), "treated Section 8(g)(2) … as a relevant source of authority for standards." Br. 38-39 n. 12. The cited passage consists of a quotation of section 8(g)(2) in a paragraph discussing OSHA's authority – based on section 3(8) and another rulemaking provision – to impose a duty. But that is consistent with the terms of section 8(g)(2) itself, which states that the Secretary may prescribe rules and regulations to "carry out *[her] responsibilities* under this Act …." (Emphasis added.) Inasmuch as *Steelworkers* looked to provisions other than section 8(g)(2) to specify those responsibilities, it does not hold that section 8(g)(2) can alone authorize OSHA's actions here; one must still find OSHA's authority in the rulemaking provisions of the Act.

2. Authority to "Establish" A Unit of Violation Cannot Be Implied From Section 3(8), Section 6(b) or Other Provisions of the Act.

a. OSHA's Analogy to Congressional Authority Is Fallacious. That Congress Has "Legislative" Authority To State A Unit Of Violation Does Not Mean That OSHA Does.

OSHA's first principal argument for implied authority to "establish" the unit of violation consists of this attempted syllogism:

1. "Establishing the appropriate unit of prosecution is a legislative function." Br. 33.

2. "The Secretary … serves as the legislator in the OSH Act's scheme," for Congress "delegate[ed] to the Secretary the authority to promulgate legislative rules." Br. 30.

3. Therefore, "[e]stablishing the unit of prosecution is a component of the Secretary's delegated lawmaking powers." Br. 36.

The argument trades falsely on the word "legislative." Although Congress exercises "legislative" authority under Article I of the Constitution when it prescribes units of violation, OSHA's powers are not "legislative" but quasi-legislative – a distinction purposefully drawn by Congress,[16] courts[17] and commentators[18] to emphasize that agencies have only the powers granted by Congress. "The *legislative* power … is vested in the Congress, and the exercise of *quasi-legislative* authority by governmental departments and agencies must be rooted in a grant of such power by the Congress …." *Chrysler v. Brown*, 441 U.S. 281, 302 (1979) (emphases added).[19] For this reason, a delegation of quasi-legislative authority on one subject does not implicitly delegate every

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[16] Leg. Hist. 193, 202, 471, 475 (rulemaking "quasi-legislative"; adjudication "quasi-judicial"); LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 79th Cong. at 267 (1944-46) ("APA Leg. Hist."), *setting out* H. REP. NO. 1980, 79th CONG., 2D SESS. (1946) (to accompany S.7) (diagram listing "quasi-legislative functions" of agencies).

[17] *E.g.*, *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001) ("EPA acted in a quasi-legislative fashion.").

[18] *E.g.*, STEIN, MITCHELL, MEZINES, ADMINISTRATIVE LAW § 14.01 (2009) ("Rulemaking, the quasi-legislative power ….").

[19] *See also Qwest Communications International Inc. v. FCC*, 229 F.3d 1172, 1177 (D.C. Cir. 2000); *Fed. Mar. Comm'n v. Carolina State Ports Auth.*, 535 U.S. 743, 774 (2002) (Breyer, J., dissenting):

> This constitutional understanding explains why both commentators and courts have often attached the prefix "quasi" to descriptions of an agency's rulemaking or adjudicative functions. … The terms " *quasi* legislative" and " *quasi* adjudicative" indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court**….**

congressional power, nor power over any other subject. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and at 223 (Scalia, J., concurring):

> This case cannot be disposed of … by simply noting that retroactive rulemaking is similar to retroactive legislation, and that the latter has long been upheld against constitutional attack where reasonable. … [I]t does not at all follow that, since Congress itself possesses the power retroactively to change its laws, it must have meant agencies to possess the power retroactively to change their regulations.

And with regard to sanctions, OSHA's powers are presumed not to be co-extensive with Congress's.[20] Any such delegation must be found in the statute, not in analogy.

b. Authority to Establish A Duty Does Not Imply Authority to Establish A Unit of Violation.

OSHA also principally argues that it may establish units of prosecution because they "are a function of the employer's duties …, and the duties flow from the conditions or practices that the language of the standard prescribes." OSHA Br. 37*; see also id.* at 43 and AFL-CIO Br. 9 ("two sides of the same coin"). It cites *Sanabria v. United States*, 437 U.S. 54, 69 (1978), which looked to the words of a duty to determine the unit of violation.

The argument is unusual: It does not turn on the wording or structure of, or features special to, the OSH Act; it could be made by any rulemaker under any statute.

[20] 5 U.S.C. § 558(b), APA § 9(a).

The argument is wrong. First, it again relies on false analogy. Courts look to a statute's wording to determine intended units of violation not because the power to prescribe them inheres in the power to prescribe a duty but because Congress (which has Article I authority to prescribe both) presumably has one in mind while prescribing the other. That does not mean that the power to prescribe units of violations is conveyed to an agency with the power to prescribe duties. Indeed, the OSH Act itself provides an example of standards drafted and made binding without considering units of violations. Many OSHA standards were adopted verbatim without rulemaking under OSH Act 6(a), 29 U.S.C. § 655(a), from private standards, which lacked intended units of violations. At least one such standard was amended here – § 1910.134(a)(2) (A-4), originally paragraph 3.3 of ANSI Z88.2-1969, PRACTICES FOR RESPIRATORY PROTECTION (A-3).[21] One must find authority to prescribe units of violation in the statute.

Second, OSHA has shown nothing in the OSH Act to imply any such delegation. OSHA does not argue that a unit of violation is, even impliedly, a "condition" or "practice" within section 3(8) (see OSHA Br. at 40-41), which is ground enough to reject OSHA's claim. (In *Chevron* terms, there is no statutory ambiguity here.) Although OSHA argues (Br. 31-32, 36) that the power to set units of prosecution is an implied "component" of its rulemaking powers (citing *CF&I*, 499 U.S. at 152), that case held only that OSHA's authority to interpret

[21] 29 C.F.R. § 1910.139 (1971) (A-1); 63 Fed. Reg. 1152, 1180 (1998) ("unchanged"); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1267-68 (11th Cir. 1999).

duties in standards reflects its authority to adopt them. That does not mean that OSHA may make substantive regulations on subjects other than those duties.

Moreover, determining duties and determining the number of punishments for their violation *are* different, as OSHA's preamble indicates at JA 182-83 (75581-82) (distinguishing between compliance and penalty costs). When a legislature determines a unit of violation (such as each day,[22] act or victim), it is determining not a duty but the "singularity of blameworthiness" should the duty be violated. GEORGE THOMAS, DOUBLE JEOPARDY: THE HISTORY, THE LAW 134-35, 177 (1998) (discussing units of violation). In doing so, it weighs policy and moral factors, such as blameworthiness, the likelihood of deterrence at a particular violation unit, and the ability of regulated persons to shoulder the resulting penalty burden – none of which figure in OSH Act rulemaking. See JA 183 (75582) (penalty costs not "relevant" in OSHA rulemaking) and Part IV.B.2.c on page 19 below. Unsurprisingly, OSHA points to no evidence that Congress has ever expressly entrusted such decisions to a rulemaker, let alone one with prosecutorial functions.

Third, an OSH Act unit of violation is in part (and only in part) a consequence of the duty stated in a standard. As Petitioners argued (Br. 42-43) without rebuttal, an OSH Act unit of violation turns on whether there was one or more failures to "comply" within the meaning of section 5(a)(2), or one or more violative "conditions" or "practices" – issues committed to adjudicators for

[22] OSH Act § 17(d), 29 U.S.C. § 666(d).

resolution. See Part IV.C on page 21 below. If several employees are equally untrained because of employer ignorance of the presence of a certain chemical, it would be consistent with the words of the OSH Act to hold that only one respirator "practice" was involved unless, as the Fifth Circuit held in *Ho*, "employee-specific unique circumstances" were present. In such cases, the unit of violation would be consistent with the statute *and* with the duty imposed by the standard, and yet might not be as small a unit as a prosecutor would prefer. No OSH Act *rulemaking* criteria guide a choice of one over the other.

Indeed, there is another OSH Act feature that the Commission administers in which the required "condition" or "practice" yields a consequence that must be considered (along with other factors) but which OSHA could not credibly claim a right to regulate. In considering "the gravity of the violation" when assessing penalties,[23] the Commission looks to factors that necessarily reflect the terms of the standard, such as the probability that the cited condition would cause injury.[24] Yet, OSHA could not therefore adopt rules dictating what gravity a certain violation poses in certain circumstances. Like the unit of violation, Congress committed that matter to adjudicators even though its resolution requires consideration of, among other things, the duties imposed by a standard.

[23] OSH Act § 17(j), 29 U.S.C. § 666(j).

[24] OCCUPATIONAL SAFETY AND HEALTH LAW 250-54 (Randy Rabinowitz ed., 2d ed. 2002).

c. OSHA Has Failed to Show Rulemaking Criteria For Prescribing Units of Violation.

Petitioners argued that the OSH Act "prescribes no [rulemaking] criteria by which OSHA might draft" units of violation and that their absence was strong evidence that Congress had not delegated to OSHA such authority. Br. 32, 33, 42. Petitioners also argued that their absence made the Act unconstitutional as construed by OSHA. *Id.* at 32-33 & n.7.

OSHA attempts to show that there are such rulemaking criteria. Br. 47. It says the definition in section 3(8) of an "occupational safety and health standard" "constrain[s]" OSHA's supposed authority. But OSHA nowhere states *what* rulemaking criteria for selecting a unit of violation are established by the language of section 3(8), nor does it quote the language in section 3(8) that supposedly provides them. And OSHA fails to mention both the Fifth Circuit's view and its own view that section 3(8) provides no such criteria.

OSHA then cites the "each violation" language of OSH Act § 17, 29 U.S.C. § 666 – a section that textually commits the unit-of-violation issue to the Commission. Even then, OSHA points to no rulemaking criteria there.

OSHA then cites (Br. 47) this Court's statement in *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001), that "availability of [per-instance] penalties is consistent with the general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty." But *Kaspar* held only that, if there *are* "multiple violations," multiple penalties need not be grouped as a matter of law. 268 F.3d at 1131-32. That says nothing about

when multiple violations occur or, more to the point, whether there are *rulemaking* criteria for determining the issue. And *Kaspar* could not have said anything about rulemaking criteria for per-employee penalties because it involved per-condition penalties and did not concern rulemaking.

OSHA then claims at 48-49 that the criteria that would guide rulemaking on units of violation are "firmly grounded in the OSH Act." Instead of then quoting firm statutory language, it gauzily states that enforcement of standards is a "primary means of advancing the Act's goals," and then resorts to circularity: It states that OSHA's PPE and training standards impose an "individualized duty." That a standard requires an employer to train every employee does not mean that OSHA has statutory authority to decide that as many violations occur as there are untrained employees. As the *Ho* court held, that a training duty covers more than one employee does not mean that a breach is individual; its violation might involve only a single "practice."

OSHA then complains that the Commission's view in *Erik K. Ho,* 20 BNA OSHC 1361 (OSHRC 2003), *aff'd,* 401 F.3d 355 (5th Cir. 2005), threatened to frustrate OSHA's ability to "enforce that duty effectively and equitably." But, if the statutory maximum penalty were high enough, the Commission's decades-long practice of considering the number of employees as a factor in gravity would enforce that duty effectively and equitably, for the amount of any single penalty would reflect the number of employees affected. OSHA's real complaint is about the statutory ceiling on a single penalty ($70,000), which it should direct to Congress. *Arcadian,* 110 F.3d at 1198.

As to unconstitutionality, OSHA has completely failed to show that *the OSH Act* prescribes an "intelligible principle" for rulemaking on the unit of violation. *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008).

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

Petitioners argued, citing OSH Act provisions administered by only the Commission (principally, sections 10(c) and 17), that "the Final Standard usurps the authority of the Commission and the courts to decide the unit of violation" and that "[t]he only provisions of the Act that bear on units of violation unambiguously commit their resolution to" those bodies. Br. 40-41.

OSHA does not clearly dispute Petitioners' argument. It does not deny that the Act textually commits the resolution of the unit of violation to adjudicators. It does not deny that, under the statute, they would find whether there was one or more failures to "comply" under section 5(a)(2), or one or more "conditions" or "practices," and thus one or more "violations" under section 17. Nor does it deny that the Final Rule would prevent – and was adopted to prevent – them from doing so. Opening Br. 42. The section of OSHA's brief (Part D.2, pages 43-46) that purports to address Petitioners' argument mentions neither these points nor the statutory language cited. OSHA presents nothing to suggest that its claim of implied authority can trump an express delegation of authority.

OSHA first replies (Br. 44) with a cryptic statement that units of violations "bear upon the Secretary's informed judgment on how to achieve employer compliance with the OSH Act's provisions." Petitioners are unsure of what this

means. It appears to mean that, before proposing penalties, OSHA officials use their prosecutorial discretion to decide how many penalties to propose. But the relation of prosecutorial discretion to rulemaking authority is not apparent, and there is none.

OSHA then claims (Br. 44) that when it "decides to cite on a per-instance basis, the Commission may not override that prosecutorial choice through her authority to assess penalties," citing *Chao v. OSHRC (Saw Pipes USA, Inc.)*, 480 F.3d 320, 325 (5th Cir. 2007). This portrait of *Saw Pipes* is wrong. The only issue there was whether the Commission may assess a single penalty below the statutory minimum for what were *concededly* separate violations. See 480 F.3d at 324 (argument that Commission may "group" "multiple willful violations"). The court held that doing so would be inconsistent with the minimum $5,000 penalty in section 17(a). It referred to prosecutorial discretion to say that, if OSHA *does* propose multiple penalties for what *are* multiple violations, then multiple penalties must be assessed. See 480 F.3d at 325 n.4.

OSHA's second rejoinder is a denial that units of violation affect only penalty assessment. OSHA claims that the level of proof changes. This assertion is not even arguably correct. No authority is cited for it, and there is no reason why it could be so; the level of proof is always the same. Suppose that a single citation item covering five untrained employees were issued but only a single

penalty were sought.[25] If OSHA proved that only one employee was untrained, the allegations as to the other employees would be vacated, there would be no abatement order as to them and, because of lowered gravity, the amount of the resulting single penalty might be commensurately lower. *E.g., Adams Steel Erection, Inc.*, 11 BNA OSHC 2073, 2080, 2087 n.13 (OSHRC 1985) (disagreement whether to vacate item "with respect to" four or five employees), *rev'd on other grounds*, 766 F.2d 804, 810 (3rd Cir. 1985); *see Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1327, 1329 (OSHRC 2003) (vacating some per-condition instances, affirming others); *Arcon Inc.*, 20 BNA OSHC 1760, 1769-70 (OSHRC 2003) (same, adjusting penalty to reflect). If separate penalties were sought, only the penalty would change. OSHA then, also without citation to authority and with equal inaccuracy, implies that an employer would lack a "specific duty to abate each separate violation" if only a single penalty were sought. This is contrary to OSHA's own Field Operations Manual[26] and it could

[25] The issue can be visualized with these tables:

Table A: Per-Training-Practice Penalty Citation	
Citation (with abatement requirement)	Proposed Penalty
Item 1:	$5,000
Instance a: Employee No. 1	
Instance b: Employee No. 2	
Instance c: Employee No. 3	
Instance d: Employee No. 4	
Instance e: Employee No. 5	

Table B: Per-Employee Penalty Citation	
Citation (with abatement requirement)	Proposed Penalty
Item 1, Instance a: Employee No. 1	$5,000
Item 2, Instance a: Employee No. 2	$5,000
Item 3, Instance a: Employee No. 3	$5,000
Item 4, Instance a: Employee No. 4	$5,000
Item 5, Instance a: Employee No. 5	$5,000

[26] OSHA FIELD OPERATIONS MANUAL, Ch. 6, § VII.C.2, pp. 6-20 to 6-21 (2009) ("FOM") (similar) (www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf):

(continued…)

not possibly be so. An employer must abate as to each employee encompassed by a citation item that has become a final order, without regard to whether OSHA proposed one penalty or per-employee penalties. *See Allway Tools, Inc.*, 5 BNA OSHC 1094, 1095 (OSHRC 1977) (citation item with single penalty for two obstructed doors; failure to abate subsequently found as to only one door and failure-to-abate penalty assessed for the one door); FOM at Ch. 6, § VII.C.2, pp. 6-20 to 6-21 (similar).

OSHA then addresses Petitioners' argument that the Commission is solely responsible for penalty assessment. OSHA does not actually argue that the Commission is not solely responsible for penalty assessment, or that OSHA has a statutory role in penalty assessment. Instead, it argues that, inasmuch as OSHA may "propose" penalties, and most penalties are not contested, "in most instances it is the Secretary who is establishing the penalty."

> C. Partial Abatement.
>
> * * *
>
> 2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.
>
> **EXAMPLE 6-3:** Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

OSHA considers "each employee" to be separate citable "instance." JA 18 (48337 col. 2).

OSHA's argument shows only practical influence, much as a police officer has practical influence over the fines paid for rarely-contested speeding tickets. It does not show that Congress gave OSHA any role – let alone a "significant role" – in the "assessment" of penalties. The argument certainly does not suggest an implied delegation of authority to adopt regulations on the unit of violation. It does not even come close to showing that Congress departed from the universal practice of having impartial adjudicators resolve unit-of-violation questions and gave it to prosecution-minded rulemakers.

Elsewhere (Br. 33), OSHA resorts to legerdemain, stating that the Commission has the "primary" responsibility for penalty assessment. The word "primary" is misleading. The Commission's assessment authority is exclusive, not "primary." OSHA has *no* responsibility for assessing penalties – just proposing them.

Other mischaracterizations of OSHA's authority run throughout its brief. At 30-31, it states that it "serves as *the* agency-level lawmaker by issuing substantive rules …." The use of the definite article is wrong, for with respect to *statutory* issues, "the" OSH Act lawmaker is the Commission. The following is a short list of the fundamental statutory questions that the Commission has resolved and that exemplifies how it has fulfilled its congressionally-intended role of fashioning the common law of this statute: The elements of violations of OSH Act § 5(a), 29 U.S.C. § 654(a)[27]; the prescription of employer duties and affirmative defenses

[27] *E.g., Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126 (OSHRC 1979) (§ 5(a)(2) elements)), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

on multi-employer construction worksites[28]; the prescription of affirmative defenses, such as infeasibility and greater hazard[29]; the test for "repeated" violations under OSH Act § 17(a), 29 U.S.C. § 666(a)).[30]

D. Petitioners' Argument Is Neither Inconsistent With Commission Holdings Nor Unreasonable.

OSHA claims (Br. 50) that Petitioners' argument is inconsistent with Commission holdings. That is not so. Whether OSHA has rulemaking authority over units of violation has never been presented to or decided by the Commission. Although the Commission advised OSHA in *dictum* in *Ho*, 20 BNA OSHC at 1376, that it should conduct a rulemaking, it has never ruled that OSHA has authority to do so, nor considered whether OSHA could issue only interpretive rules on the subject.

OSHA argues that Petitioners' view is "bizarre" because adjudicators could not determine the unit of violation by trying to ascertain "the Secretary's intent, since she is not allowed to have one …." There is nothing bizarre here. Under Petitioners' view, adjudicators would do much as courts do when a statute is silent, or as they must do when applying section 6(a) standards: Determine on the facts the number of individual "conditions" or "practices," or failures to "comply"

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[28] *Grossman Steel & Aluminum Corp*., 4 BNA OSHC 1185 (OSHRC 1976); *Anning-Johnson Co.*, 4 BNA OSHC 1193 (OSHRC 1976).

[29] *E.g.*, *Dun-Par Engd. Form Co*., 12 BNA OSHC 1949, 1959 (OSHRC 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988) (infeasibility); *Industrial Steel Erectors*, 1 BNA OSHC 1497 (OSHRC 1974) (greater hazard).

[30] *Potlatch Corp.*, 7 BNA OSHC 1061 (OSHRC 1979).

within the meaning of section 5(a)(2); in cases of doubt, they might give its benefit to the employer, in effect applying a civil version of the rule of lenity. Such an approach would avoid treading on Congress's authority (as OSHA noted) and would protect due process,[31] which applies to civil penalties. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

This approach is rational, consistent with the statute, with OSHA's limited role, and with the way that units of violation are traditionally ascertained. It ensures that the number of penalties is decided not by prosecution-minded rulemakers but by impartial adjudicators.

V. CONCLUSION

The Final Standard should be vacated.

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[31] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995).

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

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(ii) because this brief contains fewer than 7,000 words (specifically 6970), excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). The undersigned relied on his word processor to obtain that count.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in Time Roman 14.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2009, two copies of the foregoing brief were served by depositing them in the first class mail addressed to:

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ADDENDUM: PERTINENT STATUTES AND REGULATIONS

29 C.F.R. § 1910.139 (1971)

quirements established in the American National Standards Institute Standards as specified in the following list:

Item	*Standard*
Rubber insulating gloves.	J6.6–1967.
Rubber matting for use around electric apparatus.	J6.7–1935 (R1962).
Rubber insulating blankets.	J6.4–1970.
Rubber insulating hoods.	J6.2–1950 (R1962).
Rubber insulating line hose.	J6.1–1950 (R1965).
Rubber insulating sleeves.	J6.5–1962.

§ 1910.138 Effective dates.

(a) The provisions of this Subpart I shall become effective on August 27, 1971, except that:

(1) Any provision in any other section of this subpart which contains in itself a specific effective date or time limitation shall become effective on such date or shall apply in accordance with such limitation; and

(2) If any standard in 41 CFR Part 50–204, other than a national consensus standard incorporated by reference in § 50–204.2(a)(1), is or becomes applicable at any time to any employment and place of employment, by virtue of the Walsh-Healey Public Contracts Act, or the Service Contract Act of 1965, or the National Foundation on Arts and Humanities Act of 1965, any corresponding established Federal standard in this Subpart I which is derived from 41 CFR Part 50–204 shall also become effective, and shall be applicable to such employment and place of employment, on the same date.

[36 F.R. 15105, Aug. 13, 1971]

§ 1910.139 Sources of standards.

Sec.	*Source*
1910.132	41 CFR 50–204.7.
1910.133(a)	ANSI Z87.1–1968, Eye and Face Protection.
1910.134	ANSI Z88.2–1969, Standard Practice for Respiratory Protection.
1910.134 Table I–I.	ANSI K13.1–1967, Identification of Gas Mask Canister.
1910.135	ASNI Z89.1–1969, Safety Requirements for Industrial Head Protection.
1910.136	ANSI Z41.1–1967, Men's Safety-Toe Footwear.
1910.137	ANSI Z9.4–1968, Ventilation and Safe Practices of Abrasive Blasting Operations.

§ 1910.140 Standards organizations.

Specific standards of the following organization have been referenced in this part. Copies of the referenced materials may be obtained from the issuing organization.

American National Standards Institute, 1430 Broadway, New York, NY 10018.

Subpart J—General Environmental Controls

§ 1910.141 Sanitation.

(a) *General requirements*—(1) *Housekeeping.* (i) All places of employment, passageways, storerooms, and servicerooms shall be kept clean and orderly and in a sanitary condition.

(ii) The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained and false floors, platforms, mats, or other dry standing places should be provided where practicable.

(iii) Cleaning and sweeping shall be done in such a manner as to minimize the contamination of the air with dust and, so far as is practicable, shall be done outside of working hours.

(iv) To facilitate cleaning, every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards.

(2) *Expectorating.* (i) Expectorating upon the walls, floors, work places, or stairs of any establishment shall not be permitted.

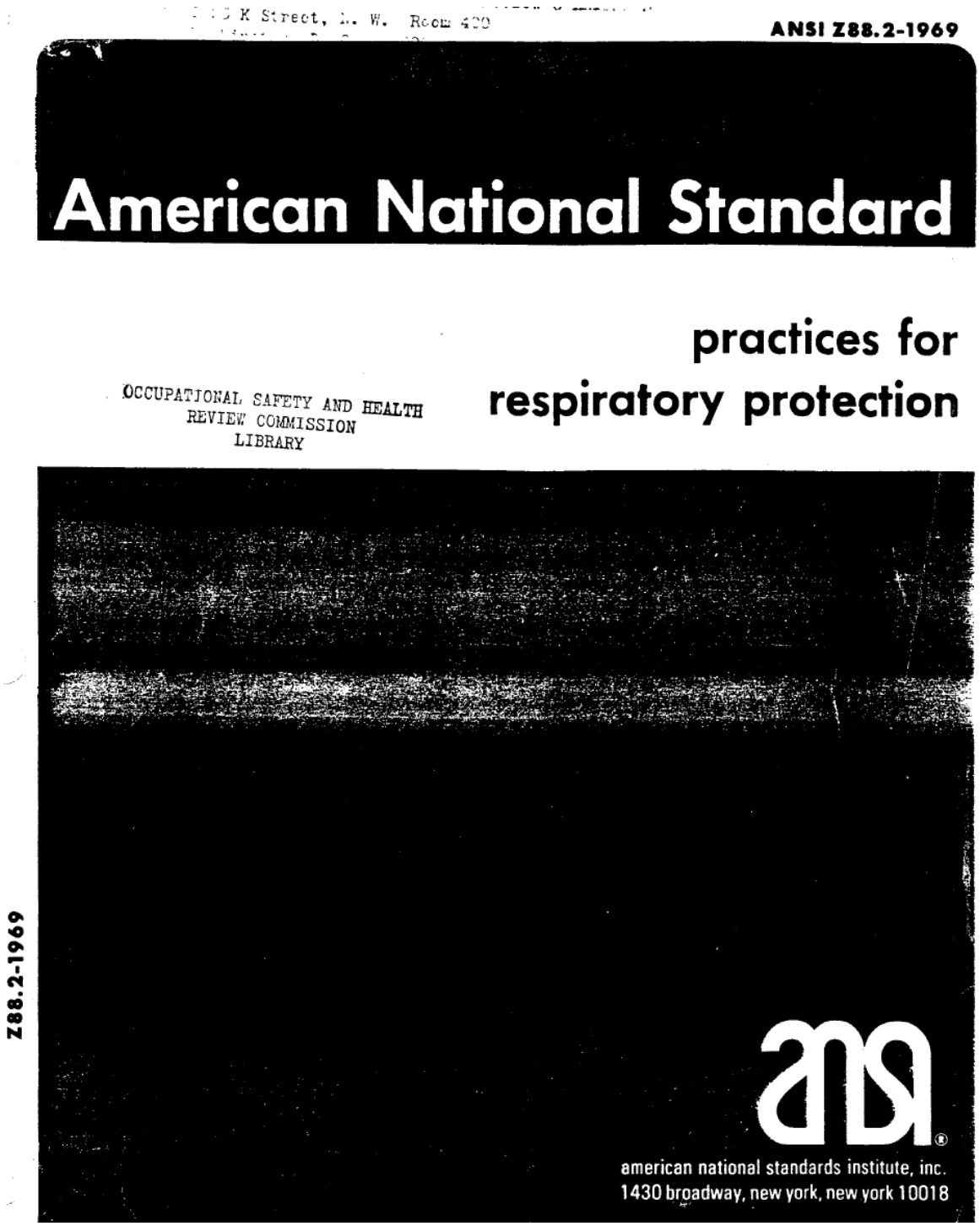
(ii) Cuspidors are considered undesirable, but, if used, they shall be of such construction that they are cleanable. They shall be cleaned at least daily when in use.

(3) *Waste disposal.* (i) Any receptacle used for putrescible solid or liquid waste or refuse shall be so constructed that it does not leak and may be conveniently and thoroughly cleaned, and it shall be maintained in a sanitary condition. Such a receptacle shall be equipped with a tight-fitting cover.

(ii) All sweepings, solid or liquid wastes, refuse, and garbage shall be removed in such a manner as to avoid creating a nuisance or menace to health and as often as necessary to maintain the place of employment in a sanitary condition.

(4) *Rodent, insect, and vermin control.* Every enclosed work place and personal service room shall be constructed, equipped, and maintained, so far as

ANSI Z88.2-1969, PRACTICES FOR RESPIRATORY PROTECTION, Paragraph 3.3



3. Recommended Requirements for Codes

3.1 Purpose. This section includes recommended requirements for authorities considering establishment of respirator regulations or codes. The following recommended requirements are supplemented by recommended practices in subsequent sections of this standard.

3.2 Permissible Practice. In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, *the primary objective shall be to prevent atmospheric contamination.* This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirements.

3.3 Employer Responsibility

3.3.1 Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee.

3.3.2 The employer shall provide the respirators which are applicable and suitable for the purpose intended.

3.3.3 The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the general requirements outlined in 3.5.

§ 1910.134(a)(2) Before and After The Amendments Made By the Final Standard

§ 1910.134(a)(2) Before the Final Standard	§ 1910.134(a)(2) After the Final Standard
§ 1910.134 Respiratory protection. * * * (a) … (2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of *the employee*. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in paragraph (c) of this section.	§ 1910.134 Respiratory protection. * * * (a) … (2) A respirator shall be provided to *each employee* when such equipment is necessary to protect the health of *such employee*. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover *each employee* required by this section to use a respirator.