ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 2009

No. 09-1053

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS, THE CHAMBERS OF COMMERCE and NATIONAL ASSOCIATION OF MANFACTURERS

Petitioners,

v.

OCUUPATIONAL SAFETY & HEALTH ADMINISTRATION and U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of a Final Rule of The
Occupational Safety and Health Administration

BRIEF FOR OSHA AND THE U.S. DEPARTMENT OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici.

Except for the United States Department of Labor, a Respondent, all parties, intervenors, and amici appearing in this court are listed in the Brief for National Association of Home Builders; Chamber of Commerce of the United States; and the National Association of Manufacturers, Petitioners.

B. Rulings Under Review.

The agency action for which review is sought and referred to in Petitioners' Certificate as to Parties, Rulings, and Related Cases is reproduced at pages 169 through 190 of the Joint Appendix.

C. Related Cases

This case has not previously been before this court or any other court. Counsel for OSHA and the United States Department of Labor is not aware of any related cases currently pending in this court or in any other court.

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MISCELLANEOUS

GLOSSARY

CF&I	Short form for the case *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991)
Chamber	Chamber of Commerce of the United States
Commission	Occupational Safety and Health Review Commission
NAHB	National Association of Home Builders
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.
OSHRC	Occupational Safety and Health Review Commission. This acronym is used only in case citations.
PPE	personal protective equipment
Secretary	Secretary of Labor

STATEMENT OF JURISDICTION

This is a pre-enforcement challenge to a final rule entitled *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee*, issued by the Occupational Safety and Health Administration pursuant to section 6(b) of the Occupational Safety and Health Act, 29 U.S.C. § 655(b). The final rule was promulgated on December 12, 2008. *See* 73 Fed. Reg. 75568. The Petitioners, National Association of Home Builders, United States Chamber of Commerce, and National Association of Manufacturers, filed a timely petition for review with this Court on February 6, 2009, invoking the Court's jurisdiction under section 6(f) of the OSH Act, 29 U.S.C. § 655(f).

STATEMENT OF THE ISSUE

The Secretary of Labor has authority to cite violations of an OSHA standard on a per-employee basis, provided that the standard's language imposes a specific duty on the employer to protect individual employees. The Occupational Safety and Health Review Commission held in 2003 that certain training and personal protective equipment (PPE) standards did not permit per-employee citations, and invited the Secretary to amend those standards if she wanted to cite on a per-employee basis. In response, the Secretary modified various standards through notice-and-comment rulemaking to clarify that an employer's duty to provide training and PPE runs to each employee who engages in covered work. She also clarified that violations of the amended standards may be cited on a per-employee basis.

The issue is whether the Secretary had authority under the OSH Act to modify her standards for the purpose of clarifying the unit of prosecution.

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief of Petitioners, National Association of Home Builders; Chamber of Commerce of the United States of America; and The National Association of Manufacturers.

29 U.S.C. § 651(b)(1), (10);

29 C.F.R. § 1926.1101(h)(2)-(4) (1997);

29 C.F.R. § 1926.1101(k)(9)(i), (viii) (1997).

These provisions are reproduced in the Addendum attached to this Brief.

STATEMENT OF FACTS

A. *Statutory and regulatory background*

To effectuate Congress' goal of protecting the health and safety of workers, the OSH Act authorizes the Secretary of Labor to promulgate, amend, and enforce occupational safety and health standards. 29 U.S.C. §§ 651(b)(3), 655, 658.[1] A

[1] The Secretary has delegated most of her authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration ("OSHA"). Secretary's Order 5-2002, 67 Fed.

standard "requires conditions, or the adoption or use of one or more practices . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Employers must "comply with occupational safety and health standards promulgated under" the Act. 29 U.S.C. § 654(a)(2). Section 6(f) of the Act authorizes pre-enforcement judicial review of a standard issued under section 6(b). 29 U.S.C. § 655(f).

The Secretary enforces her standards by inspecting workplaces and, when she discovers a violation, issuing a citation. 29 U.S.C. §§ 657-58. Citations describe the nature of the violation, require abatement of the violation, and, where appropriate, propose a civil penalty. 29 U.S.C. §§ 658, 659(a).

The Act creates four categories of citations -- willful, repeat, serious, and other-than-serious. *See* 29 U.S.C. § 666(a)-(c). A penalty "shall be" assessed for "each" willful and serious violation, and "may be" assessed for "each" repeat and other-than-serious violation. *Ibid.* The maximum penalty for

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Reg. 65008 (Oct. 22, 2002). Accordingly, this Brief uses the terms "the Secretary" and "OSHA" interchangeably.

a serious or other-than-serious violation is $7,000. 29 U.S.C. § 666(b), (c). The maximum penalty for a willful or repeat violation is $70,000. 29 U.S.C. § 666(a). A penalty of at least $5,000 must be assessed for willful violations. *Ibid.* Criminal sanctions are also available for willful violations, if the willful violation caused the death of an employee. 29 U.S.C. § 666(e).

The vast majority of the Secretary's citations are uncontested. *See Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 152 (1991). As a result, they evolve into final and unreviewable agency orders after the time period for contesting them expires. 29 U.S.C. § 659(a).

If an employer contests a citation, an independent adjudicatory agency, the Occupational Safety and Health Review Commission, resolves the contest. 29 U.S.C. §§ 659, 661. The Commission is a "neutral arbiter," and in contested cases has the responsibility to assess penalties if it determines that a violation occurred. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); 29 U.S.C. § 666(j). An aggrieved employer or the Secretary can seek review of the

Commission's final order in an appropriate court of appeals. 29 U.S.C. § 660.

Generally speaking, employers need not abate a violation during the pendency of Commission proceedings. 29 U.S.C. § 659(b). But if an employer fails to correct a violation after the citation has been affirmed or evolved into a final order, the Secretary can issue a notification of failure to abate proposing daily penalties of up to $7,000 per day. 29 U.S.C. §§ 659(b), 666(d). In addition, once a final order is obtained, the Act authorizes an appropriate court of appeals to issue a decree enforcing the employer's abatement obligations under the final order. 29 U.S.C. § 660(b).

B. *Per instance citations, the Ho decision, and post-Ho Commission decisions*

If during an inspection the Secretary discovers multiple violations of the same requirement of a standard, she usually issues a citation alleging a single violation and penalty. *See* JA 62-63.[2] To increase the effectiveness of her enforcement efforts, however, the Secretary has developed policies for citing

[2] "JA" refers to the Joint Appendix filed in this proceeding.

employers on a per-instance basis. *Ibid.* In these cases, the Secretary issues citations alleging as separate violations, with separate penalties, each instance in which a standard has been violated. JA 61-63.

The current policy, established in 1990, contains criteria and screening procedures that limit the issuance of these "per-instance" or "egregious" citations to employers who have exhibited bad faith in meeting their obligations under the OSH Act. JA 62-63; CPL 2.80 (CPL 02-00-080), Handling of Cases to be Proposed for Violation-by-Violation Basis (1990, amended 1999), *reprinted in* 1 BNA OSHR Reference File 21:9649. As a result, the Secretary has issued these citations in only a small percentage of cases. JA 62-63 (130 instance-by-instance citations and hundreds of thousands of regular citations over 18 years).

The unit of violation reflected in the Secretary's per-instance citations depends on the substance of the standard the employer has violated.[3] For example, a standard requiring

[3] The Secretary uses synonymously the phrases "unit of prosecution" and "unit of violation."

employers to install guardrails to protect employees from falls off of an elevated surface is violated at each location that lacks guardrails. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2212 (No. 87-2059, 1993). Similarly, a standard requiring machines to be guarded at the point of operation is violated at each machine that lacks the required guard. JA 171 (citing *Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275 (No. 4182 1978)). In these types of cases, the act required by the standard -- the installation of a guard -- protects all employees equally; therefore, the unit of violation is the condition of the location or equipment.

On the other hand, the Secretary's PPE and training standards require employers to protect employees on an individualized basis. The employer's action in properly providing and ensuring that one employee uses a respirator, for example, does not protect any other employee. *See Sanders Lead Co.*, 17 BNA OSHC 1197, 1203 (No. 87-260, 1995). Similarly, training one employee does not ensure that any other employee receives the training. *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 (5th Cir. 1997); *General*

Motors Corp., 22 BNA OSHC 1019, 1047 (Nos. 91-2834E & 91-2950, 2007); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1581 (No. 94-1979, 2009). In these cases, the unit of violation is the unprotected employee, and the Secretary's per-instance citations under these standards are known as per-employee citations.

In 2003, the Commission vacated per-employee citations under respirator and training provisions of an asbestos standard, 29 C.F.R. §§ 1926.1101(h)(1)(i), .1101(k)(9) (1997), even though the Secretary proved at trial that each of the employer's 11 employees had not received the required respirator or training. *Ho*, 20 BNA OSHC 1361, 1369-77 (Nos. 98-1645 & 98-1646, 2003), *aff'd*, 401 F.3d 355 (5th Cir. 2005). Rejecting the Secretary's interpretation of the respirator standard, the majority concluded that the "plain language of the standard addresses employees in the aggregate, not individually." 20 BNA OSHC at 1372.[4] The

[4] The citation alleging a violation of the respirator standard cited the general paragraph which required that the employer "shall provide respirators, and ensure that they are used" during specified jobs. 29 C.F.R. § 1926.1101(h)(1)(i) (1997).

standard, the majority continued, "refer[s] to a single course of conduct rather than an individualized duty, and therefore does not provide fair notice to an employer that it may be penalized on a per-employee basis for violations of the standard." *Id.* at 1373. Similarly, the Commission majority held that the cited training provisions "refer to employees collectively rather than individually, and therefore do not provide fair notice to an employer that it may be penalized on a per-employee basis for violations of the standard." *Id.* at 1375.[5]

In so ruling, the Commission stated that clarifying the unit of prosecution was the Secretary's responsibility: "The Secretary has it within her authority to draft standards in such a fashion so as to prescribe individual units of

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Subsequent paragraphs of the standard contained requirements for selecting and using appropriate respirators on an individualized basis. *See id.* § 1926.1101(h)(2)-(4).

[5] The citation alleging violations of the training standard referred to two related provisions. The first provision provided that the employer had to "institute a training program for all employees . . . and ensure their participation in the program." 29 C.F.R. § 1926.1101(k)(9)(i) (1997). The second provision provided that the training had to "be conducted in a manner that the employee is able to understand . . . [and] the employer shall ensure that each such employee is informed of [specified hazard information]." *Id.* § 1926.1101(k)(9)(viii).

prosecution or penalty units, placing the regulated community on notice that violations can be cited on an individualized basis. * * * '[A]n occupational safety and health standard . . . must provide a reasonably clear standard of culpability. . . . When a regulation fails [to do this] . . ., the Secretary should remedy the situation by promulgating a clearer regulation [rather] than forcing the judiciary to press the limits of judicial construction.'" *Id.* at 1376 (quoting *Diamond Roofing v. OSHRC*, 528 F.2d 645 (5th Cir. 1976) and *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999, 1005-06 (11th Cir. 1994)).

On review, a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the Commission's decision. *Chao v. OSHRC (Ho)*, 401 F.3d 355 (5th Cir. 2005). The majority agreed with the Commission that the respirator standard's plain language precluded per-employee citations. *Id.* at 376. However, the majority disagreed with the Commission that the training provisions could not be interpreted as supporting per-employee citations. 401 F.3d at 372. Nevertheless, the majority determined that the Secretary's decision to cite the employer for each untrained

employee was unreasonable absent circumstances showing that different training was required because of employee-specific traits. *Id.* at 373.

Judge Garza dissented on both points and would have upheld the Secretary's decision to cite on a per-employee basis. 401 F.3d at 377-80. He also noted that the majority's reading of the respirator standard "could be read to mean that when an employer provides most but not all of its employees with respirators, it is still not in violation" of the standard. 401 F.3d at 378 n.1.

In three cases decided after *Ho*, the Commission upheld the Secretary's decision to cite employers for each employee who was not trained or provided with a respirator, and assessed an individual penalty for each employee not protected as required by the cited standard. In the first two cases, the Commission referred to differences in the language of the standards at issue to distinguish *Ho*. *General Motors*, 22 BNA OSHC at 1047; *Manganas Painting Co.*, 21 BNA OSHC 1964, 1998-99 (No. 94-0588, 2007). In a third case, decided after the rulemaking at issue here, the Commission overruled

Ho's holding that the training provision of the asbestos standard could not be construed to support per-employee citations. *E. Smalis Painting Co.*, 22 BNA OSHC 1553 (No. 94-1979, 2009).

In overruling *Ho*, the Commission first noted that it was "troubled by the appearance of inconsistency and the possibility that the approach taken by the Commission majority in *Ho* has proved unworkable in subsequent cases with respect to training." 22 BNA OSHC at 1579. The Commission then determined that the *Ho* decision "elevates form over substance by emphasizing the coincidental placement of particular wording, and ignores the basic principle of statutory construction that regulations should be read as a consistent whole. * * * A unit of violation must reflect the substantive duty that a standard imposes, and therefore 'any failure to train would be a separate abrogation

of the employer's duty to each untrained employee.'" *Id.* at 1580, 1581.[6]

C. *The rulemaking proceedings*

OSHA responded to the *Ho* decisions by publishing a notice of proposed rulemaking to amend various PPE and training standards. JA 16-30.[7] OSHA explained that the proposed amendments did not impose any new compliance obligations or alter existing ones. JA 16, 24. Instead, they provided "additional clarity and consistency as to the individualized nature of the employer's duty to provide personal protective equipment, including respirators, and training under" OSHA's standards. JA 22.

OSHA invited comment on the proposal. JA 25. Several parties supported the proposal while several others urged

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[6] The *Smalis* decision was issued after the rulemaking at issue here but did not mention it. *See* 22 BNA OSHC at 1578-81.

[7] The full notice of proposed rulemaking and the preamble and final rule as published in the Federal Register are reproduced in tabs 2 and 12 of the Joint Appendix (JA). For simplicity, citations to these documents will be to the Joint Appendix.

OSHA not to adopt it. JA 177. The Chamber of Commerce (Chamber) and the National Association of Home Builders (NAHB) were among the parties that objected to the proposed rule. *E.g.*, JA 32-37, 45-53.[8]

In its comments, the Chamber agreed with OSHA that "employers, such as the employer in the *Ho* case, who have committed multiple violations should be penalized accordingly," and that the Commission had incorrectly seized on "insubstantial differences in the wording of standards" in determining when multiple violations had occurred. JA 32 (footnote omitted); *see also id.* at 34 (blaming Commission for problem addressed by proposal). The Chamber also agreed that the "substance of the employer's duty" under the standard, rather than "semantic peculiarities in its wording," is the key to determining the appropriate unit of prosecution. JA 33.[9]

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[8] Petitioner National Association of Manufacturers did not participate in the rulemaking.

[9] The NAHB also agreed that per-employee penalties were sometimes appropriate; in fact, it argued that the modified standards should codify in some form the Secretary's

Nevertheless, the Chamber contended that OSHA lacked authority under the OSH Act to adopt the proposal. JA 32-35. Determining the unit of prosecution, the Chamber contended, was the Commission's responsibility. *Ibid.* Thus, although the Commission's decisions had created a problem that the Secretary should redress, she should do so by litigating the issue in future cases, explaining "the legal and practical difficulties caused by . . . the Commission's opinions and seek a harmonizing adjustment of doctrine." *Id.* at 34-35.

In the preamble to the final rule, OSHA explained the purpose of the amendments: to clarify that under its PPE and training standards, the employer's duty was to provide training and the appropriate piece of PPE, such as a respirator, to each employee covered by the standard. JA 169, 171, 177. OSHA also explained its views that all PPE and training standards supported per-employee citations and that *Ho* had been wrongly decided. JA 169-77. All of its PPE and training standards, OSHA reasoned, "impose the same basic

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egregious policy. JA 50-51. Petitioners do not renew in this Court that or any other argument raised by NAHB.

duty on the employer to protect employees individually -- by providing personal protective equipment, such as a respirator, or by communicating hazard information through training." JA 173. Thus, in contrast to standards requiring a single action that necessarily protects all employees, such as protecting the edge of a roof, the "actions necessary to comply with PPE and training requirements for one employee do not constitute compliance for any other employee." JA 174; *see also* JA 177 ("The hazardous 'condition' or 'practice' addressed by the PPE and training standards is the failure to protect each individual employee -- through personal protective equipment or training -- from the hazards of his or her work environment") (quoting 29 U.S.C. § 652(8)).

The Commission's *Ho* decision, OSHA explained, was erroneous for three basic reasons. First, it was "inconsistent with the proper analytical framework" for determining the employer's duties under the PPE and training standards. JA 174. Second, it was inconsistent with the Commission's own precedent, both before and after the *Ho* decision. JA 174. And third, it "amounts to a 'magic words' test for determining

the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary's intention and does not make practical sense." *Ibid.* As a result, the decision may have created some uncertainty among employers about their liability for violating some of OSHA's standards, and was possibly "a significant impediment to the consistent and effective enforcement of" standards containing language similar to the language of the standards at issue in that case. JA 174, 175.

Thus, OSHA reasoned, the Commission had established a regulatory scheme under which similarly situated employers were exposed to different penalty amounts. The substantive requirements of the standards at issue in *Ho* and *Manganas* were the same -- to provide respirators for certain work. JA 174. The only difference was that the requirement that the respirators provided meet the criteria of the following provisions of the standard was stated explicitly in the provision at issue in *Manganas*, while the duty was left implicit in the cited provision at issue in *Ho* (and was made explicit in subsequent paragraphs of the standard). JA 174.

Similarly, in *General Motors*, "the 'each employee' language was in the first enumerated subsection of the training standard, while in *Ho* it was in a later subsection." *Ibid.* In both cases, one employer was subject to per-employee penalties and the other was not.

OSHA did not intend the minor linguistic differences the Commission had seized upon to alter the employer's duty or its potential liability under its PPE and training standards, however, because they all "impose the same basic duty -- provision of appropriate respirators and training to each employee covered by the requirements." *Ibid.*

OSHA also specifically rejected the Chamber's objections. JA 175-77. The OSH Act expressly authorized the Secretary to "modify" her standards, and therefore the proposed amendments fell squarely within the Secretary's statutory authority. JA 176. Only the Secretary had the authority to amend her standards to clarify the substantive duty the standards imposed and thereby provide the additional notice the Commission believed was necessary to support per-employee penalties. JA 176.

Similarly, OSHA explained that the amendments did not usurp the Commission's authority: "The Secretary's exercise of her express authority to amend her standards to add language the Commission has indicated is necessary is hardly a usurpation of the Commission's authority." JA 176. To the contrary, the amendments "recognize and respect the Commission's adjudicative role under" the Act. *Ibid.* In a contested case, the Commission would still exercise its role to determine whether the Secretary had reasonably interpreted her standard as permitting per-instance violations. *Ibid.* If so, the Commission would then determine whether the facts supported the multiple violations charged, and if so, apply the statutory criteria to assess the appropriate penalty for each proven violation. *Ibid.*

OSHA also determined that case-by-case adjudication was not an appropriate remedy for the problems created by the Commission's *Ho* decision. JA 177. The Chamber's recommendation that the Secretary use her litigating authority to address those problems was also inconsistent with her views of her standard-setting authority. *Ibid.*

Thus, OSHA promulgated the proposed amendments. The amendments added in various standards language explicitly stating that "each employee" had to be provided with a respirator and training. JA 179-180, 185-90. And the amendments also added introductory sections in the various parts of the Code of Federal Regulations containing OSHA's PPE and training standards. JA 177-78, 184-90.[10] These provisions stated that PPE and training provisions "impose a separate compliance duty with respect to each employee covered by the requirement[,]" that the employer "must" train and provide PPE to "each" covered employee, and that "each failure to train" or "to provide PPE to an employee may be considered a separate violation." *E.g.,* JA 184-85.

[10] The Secretary's occupational safety and health standards are contained in 29 C.F.R. parts 1910, 1915, 1917, 1918, and 1926. Part 1910 covers employers generally; parts 1915, 1917, 1918, and 1926 cover, respectively, shipyard employment, marine terminal employment, longshoring operations and related employment aboard vessels, and construction work.

SUMMARY OF ARGUMENT

The Secretary acted within her statutory authority when she modified the standards under review here. By delegating to the Secretary the authority to promulgate legislative standards under the OSH Act, Congress implicitly delegated to her the authority to establish the appropriate unit of prosecution for violations of those standards. And because the Secretary is permitted to establish the unit of prosecution when issuing standards in the first instance, she is likewise authorized to modify her standards for the purpose of clarifying (or even changing) the unit of prosecution. Therefore, the petition for review should be denied.

The Petitioners' challenge rests on the erroneous view that establishing the unit of prosecution is an adjudicative function to be performed by the Commission. That is wrong: establishing the unit of prosecution is a legislative function to be performed by the Secretary. Thus, the Secretary does not usurp the Commission's adjudicatory role when she phrases a standard in a way that clarifies the appropriate unit of prosecution. Indeed, the Commission recognized this in *Ho*,

when it suggested that the Secretary undertake this very rulemaking. 20 BNA OSHC at 1376.

Finally, any doubt on this score must be resolved in favor of the Secretary's reasonable interpretation of the OSH Act, which commands *Chevron* deference. Several provisions of the Act support the Secretary's interpretation, none undermine it, and the policies of the OSH Act are well-served when the Secretary clarifies the unit of prosecution through informal rulemaking. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873 (D.C. Cir. 2002) ("regulations promulgated to clarify disputed interpretations of a regulation are to be encouraged"). By engaging in this rulemaking, the Secretary has clarified for employers (1) what the standards require of them, and (2) what penalties they may incur if they fail to comply. Petitioners' claim that only the Commission could redress the problems created by its decisions is unreasonable. It is inconsistent with basic principles governing the roles of legislative and adjudicative actors and results in a scheme where unit of prosecution decisions would be reached in a thoughtless and virtually incoherent manner.

ARGUMENT

A. *Introduction*

The challenged rulemaking was a measured response to Commission decisions that, in the Secretary's view, had misinterpreted the unit of prosecution for violations of certain PPE and training standards. Prior to the decision in *Ho*, 20 BNA OSHC 1361, 1369-77 (Nos. 98-1645 & 98-1646, 2003), *aff'd*, 401 F.3d 355 (5th Cir. 2005), the Secretary had taken the position with respect to all of her PPE and training standards that "a separate violation occurs for each employee who is not provided required PPE or training." JA 170. In *Ho*, however, the Commission rejected that interpretation with respect to standards addressing exposure to asbestos. If the Secretary wanted to cite violations of those standards on a per-employee basis, the Commission declared, she would have to amend her standards to make that intention clear. *Ho*, 20 BNA OSHC at 1376.

By the Commission's own account, its decision in *Ho* "elevate[d] form over substance by emphasizing the coincidental placement of particular wording" in PPE and

training standards. *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009). And like the Commission, the Secretary was "troubled by the appearance of inconsistency and the possibility that the approach taken by the Commission majority in *Ho* has proved unworkable[.]" *Id.* at 1579. Thus, the Secretary undertook the present rulemaking for the modest purpose of clarifying prospectively what she had intended all along: that an employer's duty with respect to all PPE and training standards runs to each affected employee, and that violations of those standards may be cited on a per-employee basis.

As explained below, the Secretary did not through this rulemaking arrogate to herself any powers that belong to the Commission alone. To the contrary, the rulemaking served a number of salutary goals: (1) it cleared up any confusion caused by imprecise language in PPE and training standards; (2) it promoted the equitable enforcement of PPE and training standards by eliminating illogical distinctions across those standards, thereby helping to ensure that *all* affected employees would be provided the PPE and training necessary

to perform their jobs in a safe and healthful manner and that similar violations would result in similar citations and penalties; and (3) it ensured that employers have fair notice of their duties and liabilities under those standards. Those goals are consistent with the OSH Act's underlying purposes, and the rulemaking at issue was therefore lawful. The petition for review should be denied.

B. *This Court reviews the Secretary's statutory rulemaking authority through the Chevron framework.*

Petitioners' challenge to the Secretary's authority under the OSH Act to modify the standards under review raises an issue of statutory interpretation. For issues of statutory interpretation, the court determines whether Congress has answered the precise question at issue. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). If the usual tools of statutory construction do not reveal Congress' intent on the disputed question, the court defers to the Secretary's reasonable construction of the statute. *Id.* at 843; *see Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-54 (1991).

The Petitioners suggest that the Secretary is owed controlling deference to her interpretations of OSHA standards but not to her interpretations of the OSH Act itself. Br. 29-31, 43-46. This Court has held, however, that controlling deference is owed to the Secretary's interpretations of ambiguous statutory terms as well. *See Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 734 (D.C. Cir. 2005); *A.E. Staley Mfg. v. Sec'y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002); *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1302 (D.C. Cir. 1995). It has also held that the Secretary is entitled to *Chevron* deference for her interpretations of the analogous Mine Safety and Health Act. *See Sec'y of Labor v. National Cement Co.*, ___ F.3d ___, 2009 WL 2152373 (D.C. Cir. July 21, 2009); *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 & n.4 (D.C. Cir. 2003).

Notwithstanding this precedent, the Petitioners contend that the Commission is to determine questions regarding the proper interpretation of the OSH Act *de novo*, without deferring to the Secretary. Br. 43-46. In support, the

Petitioners cite a snippet of legislative history where Senator Javits stated that the Commission was to perform its functions "without regard to the Secretary." *Ibid.* In *CF&I*, however, the Supreme Court inferred from the OSH Act's split enforcement scheme and the statute's legislative history that the Secretary's "litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the promulgation of a workplace health and safety standard." *CF&I*, 499 U.S. at 157. That inference supports not only the conclusion that the Secretary is entitled to deference for her interpretation of OSHA standards, but also the conclusion that the Secretary is entitled to deference for her interpretations of the OSH Act itself. *See Twentymile Coal Co.*, 411 F.3d at 261.

The legislative history that Petitioners rely upon, which was before the Supreme Court in *CF&I*, is not enough to alter that conclusion. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). Senator Javits's statement that the Commission is to decide cases "without regard to the Secretary" fully supports the

Supreme Court's view that the Commission is to serve as a "neutral arbiter" of OSHA contests. *CF&I*, 499 U.S. at 155-56. Nothing in that statement, however, suggests that Senator Javits intended to depart from the normal rule that the policy-making agency (here, the Secretary) is to receive deference for its interpretations of ambiguous statutory terms.

The *Chevron* framework thus applies and, as shown below, this case is resolved at *Chevron*'s first step: the language and structure of the OSH Act refute the Petitioners' contention that the rulemaking exceeded the Secretary's bounds of authority. Even if an ambiguity exists, moreover, the Secretary's interpretation of the Act as permitting this rulemaking is eminently reasonable, and the Petitioners' contrary argument is patently unreasonable. Therefore, the petition for review should be denied.

C. *By delegating to the Secretary the authority to promulgate legislative rules, Congress implicitly delegated to her the authority to set the unit of prosecution.*

The Petitioners contend that the unit of prosecution is not a legitimate factor for the Secretary to consider when

drafting or modifying standards under the OSH Act. That is not so: establishing and clarifying the unit of prosecution through the standard-setting process is a necessary component of the Secretary's lawmaking authority. *See* 29 U.S.C. § 655(b). That is because the appropriate unit of prosecution is a legislative choice to be made by the Secretary, who serves as the legislator in the OSH Act's scheme. Thus, when the Secretary believes that the Commission and the courts have misinterpreted a standard as creating a different unit of prosecution from the one she intended, she is permitted to re-write the standard -- after receiving input from the regulated community, as she did here -- to prospectively clarify what the unit of prosecution should be.

1. *Congress delegated lawmaking powers under the OSH Act to the Secretary.*

Because the Petitioners' challenge implicates the division of duties under the OSH Act, it is useful to review the scheme that Congress created. Under that scheme, the Secretary serves as the agency-level lawmaker by issuing substantive rules carrying the force of law. *See* 29 U.S.C. § 655(b);

National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) ("When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law."). In performing that function, the Secretary does not have unbridled authority to enact any rule imaginable; instead, the OSH Act places various constraints on her rulemaking authority: her standards must, for example, be based upon substantial evidence in the rulemaking record, *see* 29 U.S.C. § 655(f), and must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," 29 U.S.C. § 652(8). *See generally UAW v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994); *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988). And the standards themselves must meet the definition of a "standard" contained in section 3(8), 29 U.S.C. § 652(8).

This delegation of lawmaking authority to the Secretary also includes certain powers that are "components" of the lawmaking function. The most prominent example is the Secretary's power to render authoritative interpretations of her

regulations. *See CF&I*, 499 U.S. at 152. The OSH Act does not grant this authority in express terms, but the Court found that it was to be derived implicitly from Congress's delegation of lawmaking authority to the Secretary. *Ibid.*

Congress wanted a single politically accountable agency to be responsible for the overall implementation of the OSH Act, so it also conferred upon the Secretary the authority to enforce her standards. *CF&I*, 499 U.S. at 153. She does this primarily by issuing citations and proposed penalties. *See* 29 U.S.C. §§ 658, 659; *CF&I*, 499 U.S. 144, 147-48 (1991); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); *United Steelworkers, Local No. 185 v. Herman*, 216 F.3d 1095, 1097-98 (D.C. Cir. 2000). In this role, the Secretary has a degree of prosecutorial discretion that may not be reviewed by the Commission or the courts. *See, e.g.*, *Cuyahoga Valley*, 474 U.S. at 6-7 (holding that Commission may not review Secretary's decision to withdraw a citation).

The Commission's role in the OSH Act scheme is to serve as a "neutral arbiter" of OSHA contests. To perform this limited role, the Commission possesses "the type of

nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *CF&I*, 499 U.S. at 154 (emphasis in original). The Commission, for example, is the arbiter of factual disputes in OSHA contests, and reviews the Secretary's interpretations of regulatory and statutory provisions to ensure that they are reasonable. *See CF&I*, 499 U.S. at 154-56. The Commission also has the primary responsibility for assessing penalties in contested cases. *See* 29 U.S.C. § 666(j).

2. *Establishing the appropriate unit of prosecution is a legislative function.*

As the foregoing discussion shows, the agencies' respective roles under the OSH Act are clearly defined: the Secretary serves as legislator and prosecutor; the Commission serves as adjudicator. Thus, to determine whether the Secretary may consider the unit of prosecution when drafting or modifying standards, it is necessary to determine whether establishing the unit of prosecution is a legislative role or a judicial one.

The concept of a unit of prosecution in the OSH Act context is taken from the criminal law. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172 (No. 87-0922, 1993) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)); Pet. Br. 11-12 (citing criminal cases). In the criminal context, the unit of prosecution is established by Congress, not the courts. *See, e.g., Sanabria v. United States*, 437 U.S. 54, 69 (1978); *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir 1974).[11] Indeed, the courts have eschewed any lawmaking role in this area by applying the "rule of lenity," whereby doubts as to the unit of prosecution are resolved favorably to the defendant. *Bell*, 349 U.S. at 83-84. That rule is premised in part on the notion that "legislatures and not courts should define criminal

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[11] Although the concept of a unit of prosecution in the OSHA context is derived from the criminal law, cases involving the imposition of civil money penalties also show that the unit of prosecution is a matter of legislative intent. *See Missouri, Kansas, & Texas Ry. Co. v. United States*, 231 U.S. 112, 119 (1913); *Used Equip. Sales, Inc. v. Dep't of Transp.*, 54 F.3d 862, 865 (D.C. Cir. 1995).

activity." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995) (internal quotation marks and citations omitted). Thus, the caselaw plainly establishes that setting the unit of prosecution is an aspect of legislation, not adjudication, and that adjudicative tribunals must take care not to usurp that task.

That is not to say, of course, that courts and agency adjudicators have no role to play in determining the appropriate unit of prosecution. Their role is an interpretive one: to ascertain what the lawmaker meant in drafting the statute or rule under consideration. But an adjudicative tribunal may not override a legislature's *clearly expressed* determination regarding the unit of prosecution, and the legislature is always free to amend its laws if it believes they have been misinterpreted by the courts. *See Braxton v. United States*, 500 U.S. 344, 347-48 (1991) ("Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations.").

3. *Establishing the unit of prosecution is a component of the Secretary's delegated lawmaking powers.*

Given that (1) Congress delegated legislative responsibilities to the Secretary; and (2) setting the unit of prosecution is a legislative task, it follows that setting the unit of prosecution is a necessary component of the Secretary's lawmaking authority. *Cf. CF&I*, 499 U.S. at 152 (holding that "the power to render authoritative interpretations of OSH Act regulations is a 'necessary adjunct' of the Secretary's powers to promulgate and to enforce national health and safety standards"). Therefore, the Secretary is permitted to consider the unit of prosecution when deciding how to draft her standards; and she is permitted to modify her standards for the purpose of clarifying the unit of prosecution, when she believes that the Commission or the courts have misinterpreted them.

The OSH Act is replete with provisions that confirm this grant of authority. The Act gives the Secretary the authority to create and modify standards to govern employer conduct with regard to employee health and safety, *see* 29 U.S.C. § 655(b);

places an affirmative duty on employers to comply with those standards, *see* 29 U.S.C. § 654(a)(2); and attaches civil and criminal penalties to "each violation" of those standards, 29 U.S.C. § 666. The authority to create binding rules, the violation of which exposes an employer to civil and criminal penalties, necessarily includes the power to consider the unit of prosecution when drafting and modifying standards. The units of prosecution, after all, are a function of the employer's duties under a standard, and the duties flow from the conditions or practices that the language of the standard prescribes. It is the Secretary who establishes the duties and determines the language that prescribes them through rulemaking. *See Sanabria*, 437 U.S. at 69 (Congress defines offenses "by its prescription of the allowable unit of prosecution")(internal quotation marks and citation omitted); *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001) (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").

Other OSH Act provisions likewise establish the Secretary's authority in this area. Congress expressly stated that the Act was intended to assure "so far as possible" employee safety and health by, among other things, encouraging employers to reduce hazards and by providing an effective enforcement program. 29 U.S.C. §§ 651(b)(1), (10). In addition, the OSH Act defines a standard as a requirement that is "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8). And, in drafting standards, the Secretary is authorized to consider her "experience gained under this and other health and safety laws," 29 U.S.C. § 655(b)(5), as she did here in reviewing her experience of attempting to enforce per-employee violations under standards that contained minor variations in wording. Finally, the Secretary is expressly allowed to "prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities" under the OSH Act, 29 U.S.C. § 657(g)(2), including her responsibility to enforce the Act, *see* 29 U.S.C. § 658.[12]

[12] Petitioners suggest (Br. 36-38) that Section 8(g)(2) is

The foregoing provisions remove any doubt that the Secretary has authority to consider the unit of prosecution when drafting standards. This case is thus resolved at *Chevron*'s "step one," *see Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 550 (D.C. Cir. 2009), and the Petitioners' challenge to the Secretary's rulemaking must be rejected.

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irrelevant because it refers to rules and regulations, not standards. The suggestion is contrary to authority and logic. This Court has treated Section 8(g)(2), 29 U.S.C. § 657(g)(2), as a relevant source of authority for standards. *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1230 (D.C. 1980). Standards are one type of rule and thus fit within Section 8's terms. Section 8(g) is broadly worded and thus includes rules that do not meet the definition of a standard, *e.g.*, *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467-69 (D.C. Cir. 1995), but that in no way suggests that the Section is limited to such rules. The substantive duties embedded in a standard must meet the criteria established by Congress in Sections 3(8) and 6(b), and it is undisputed that the standards challenged here do so. JA 171, 182-83; *infra* p. 43 n.15. Section 8(g) provides an additional basis for the Secretary's authority to draft standards meeting such criteria in a way that provides clear notice of employer duties and potential sanctions and promotes consistent and equitable enforcement of the standards.

D. *The Petitioners have not established that the Secretary usurps the Commission's role when considering the unit of prosecution during rulemaking proceedings.*

Despite the clear statutory and historical evidence against their position, the Petitioners claim that the Secretary acted outside the bounds of her authority in the challenged rulemaking. None of the Petitioners' arguments has merit.

1. *Section 3(8) of the OSH Act does not prohibit the Secretary from considering the unit of prosecution when drafting standards.*

The Petitioners contend that section 3(8) of the OSH Act forbids the Secretary from taking into account the unit of prosecution when drafting standards. Br. 33-35. That provision defines a standard as a rule 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." 29 U.S.C. § 652(8). Because a unit of prosecution cannot be said to be a "condition" or "practice" or the like, the Petitioners conclude

that any consideration of the unit of prosecution is outside the Secretary's standard-setting authority.

The Petitioners' reliance on section 3(8) is misplaced for two reasons. First, as stated above, the units of prosecution are a function of the employer's duties under the standard, and the duties flow from the condition or practice that the standard prescribes.[13] Thus, the unit of prosecution cannot be divorced from the conditions or practices that a standard prescribes. *Cf. Sanabria*, 437 U.S. at 69 (Congress defines criminal offenses "by its prescription of the allowable unit of prosecution") (internal quotation marks and citation omitted)). By giving the Secretary the authority to prescribe conditions and practices, Congress implicitly gave her the authority to

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[13] As the Secretary explained in her preamble, "[w]hat constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue." JA 171. *See also Kaspar Wire Works*, 268 F.3d at 1130 (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").

affect the unit of prosecution as well. Section 3(8), therefore, *supports* the Secretary's authority in this area.[14]

Petitioners' reliance on section 3(8) is also misplaced because of the rule that Congress is presumed to legislate against the backdrop of settled precedent. *Edelman v. Lynchburg College*, 535 U.S. 106, 117 n.13 (2002). It has been settled since at least 1887 that establishing the unit of prosecution is a legislative function. *See Whalen v. United States*, 445 U.S. 684, 704 (1980) (Rehnquist, J., dissenting) (tracing unit of prosecution jurisprudence to *In re Snow*, 120 U.S. 274 (1887), where Court held that unit of prosecution is

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[14] In *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1198 (5th Cir. 1997), the court stated, in light of section 3(8), 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." As the foregoing discussion shows, however, the unit of prosecution is directly related to the duty imposed by a standard. In any event, the *Arcadian* court went on to state that an employee could be the unit of prosecution under a training standard and other standards that regulated a condition that was unique to the employee. *Id.* at 1198-99. And the case involved an enforcement action under the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), which applies to hazards not covered by a standard, and therefore any discussion of the Secretary's standard-setting authority was unnecessary for the decision. *See* 110 F.3d at 1195-99.

dependent on legislative intent). Thus, when Congress delegated to the Secretary the lawmaking authority to create standards, it presumably included within that grant the authority to draft standards in such a way as to affect the unit of prosecution. Nothing in section 3(8) or any other part of the statute suggests that Congress meant to deviate from settled law by giving the Commission -- a strictly adjudicative tribunal -- the legislative task of creating a unit of prosecution.[15]

2. *The Secretary does not usurp the Commission's role in assessing penalties when she drafts regulatory language to affect the unit of prosecution.*

The Petitioners also contend that "[u]nits of violation affect only penalty assessment" and that, because the assessment of penalties is strictly within the Commission's domain, the determination of the unit of prosecution must be

[15] The Petitioners do not contend that the standards under review, as modified, fail to meet the definition of a standard as set forth in section 3(8). Prior to this rulemaking, the relevant standards prescribed "conditions and practices" regarding the use of PPE and the provision of training. The rulemaking did not change employers' duties under the relevant standards, as the Petitioners agree (Br. 50-51); thus, the standards are as fully valid under section 3(8) now as they were prior to the rulemaking. JA 171, 182-83.

left entirely to the Commission. Br. 40-43. Neither premise is correct, so the conclusion is incorrect as well.

First, units of prosecution do not "affect only penalty assessment"; they also bear upon the Secretary's informed judgment on how to achieve employer compliance with the OSH Act's provisions. As this Court has held, the decision whether to cite violations on a per-instance basis "reflects use of an enforcement tool within [the Secretary's] authority." *Kaspar Wire Works*, 268 F.3d at 1131. And when the Secretary decides to cite on a per-instance basis, the Commission may not override that prosecutorial choice through her authority to assess penalties. *See Chao v. OSHRC (Saw Pipes USA, Inc.)*, 480 F.3d 320, 325 (5th Cir. 2007) (distinguishing between the unit of violation and the penalty).

Indeed, when the Secretary chooses to cite on a per-instance basis, consequences flow from that decision wholly unrelated to the penalty assessment. For example, the level of proof needed to establish her case changes: to prove per-instance violations, the Secretary must produce sufficient evidence to establish each individual violation. Once those

violations are established, moreover, the employer has a specific duty to abate each separate violation. Thus, units of prosecution are relevant to matters beyond mere penalty assessment.

The Petitioners' premise that the Commission is solely responsible for penalty assessment is also faulty. To be sure, the Commission is not bound by the Secretary's proposed penalties, and may independently assess penalties using the criteria set forth in section 17 of the OSH Act. 29 U.S.C. § 666(j); *see also Saw Pipes USA*, 480 F.3d at 325. But the Act contemplates that the Secretary *will* propose penalties in the first instance, and her proposals constitute a final Commission order if they are not contested. *See* 29 U.S.C. § 659(a). Most OSHA citations are not contested, *see CF&I*, 499 U.S. at 152, so in most instances it is the Secretary who is establishing the penalty.[16] Therefore, Congress intended the Secretary to have a significant role in the assessment of penalties, and drafting standards to affect the unit of

[16] Over the past several years, approximately 7% of OSHA inspections resulting in citations have resulted in contests.

prosecution in no way usurps the Commission's role in the penalty-setting process.[17]

3. *The challenged rulemaking does not raise problems of unconstitutional delegation of legislative authority.*

The Petitioners also argue (Br. 22, 32-33) that the OSH Act "prescribes no criteria by which OSHA might draft" standards that affect units of prosecution, thereby hinting that the Secretary's position here raises concerns about unconstitutional delegation of lawmaking authority. *See generally UAW v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994). To the contrary, the OSH Act contains an "intelligible principle" to which the Secretary must conform when drafting regulatory

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[17] Nor is it true, as the Petitioners claim, that the unit of prosecution is an issue "as to which OSHA speaks only as a prosecutor." Br. 40. Certainly OSHA acts in its prosecutorial role when it determines whether to cite on a per-instance basis in a particular case. *Kaspar Wire Works*, 268 F.3d at 1131. But the Secretary acts in her *legislative* role when she drafts standards in a way that determines both an employer's duty to its employees and the corresponding unit of prosecution. *Cf. Sanabria*, 437 U.S. at 69 ("It is Congress, and not the prosecution, which establishes and defines offenses."); *ibid.* (Congress defines offenses "by its prescription of the allowable unit of prosecution")(internal quotations marks and citation omitted)).

language that bears upon the unit of prosecution. *See Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008). Accordingly, this case raises no concerns about an unlawful delegation of legislative authority.

The Secretary's authority to establish a unit of prosecution for a given standard is constrained by section 3(8), which defines an "occupational safety and health standard," 29 U.S.C. § 652(8), and section 17, which authorizes a limited range of penalties for "each violation" of a standard. 29 U.S.C. § 666. As this Court has held, the "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." *Kaspar Wire Works*, 268 F.3d at 1130. Therefore, the unit of prosecution is necessarily circumscribed by the nature of the duty which a standard imposes. *See E. Smalis*, 22 BNA OSHC at 1581 ("[a] unit of violation must reflect the substantive duty that a standard imposes"). For example, if a training standard requires an employer to train each employee, the Secretary may reasonably determine that each failure to train an employee

constitutes a single unit of prosecution. She may not, however, arbitrarily declare that each failure to train an employee constitutes *three* violations, in an effort to increase penalties beyond what Congress intended. The unit of prosecution chosen by the Secretary must reflect the substantive duties created by the standard.[18]

In the rulemaking under review here, the Secretary carefully chose language that establishes a unit of prosecution consistent with the substantive duty the standards impose: because the duty to provide PPE and training extends to each employee who may be exposed to the relevant hazards, a separate violation exists with respect to each employee who is not provided necessary PPE or training. *E.g.*, JA 170, 172, 173-74, 177; *see E. Smalis*, 22 BNA OSHC at 1581. The

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[18] Thus, an employer may violate more than one duty with respect to training of any particular employee. For example, an employer may have the duty not only to train an employee initially, but to retrain the same employee under specified conditions. *See General Motors Corp.* 22 BNA OSHC at 1047-48 (training and retraining provisions subject to per-employee citations). The rulemaking did not change any duties, and therefore does not address the circumstances under which an employer may be cited for multiple training violations with respect to the same employee.

"criteria" guiding her decision to clarify the duty and unit of prosecution are firmly grounded in the OSH Act: enforcement of standards is a primary means of advancing the Act's goals; PPE and training standards impose an admittedly valid individualized duty to protect employees; and a Commission decision threatened to frustrate the Secretary's ability to enforce that duty effectively and equitably. The delegation to the Secretary of legislative and enforcement responsibility includes the authority to clarify standards, as she did here, to state more precisely the duties they impose, JA 170, 174-75, 176, to provide clearer notice of the sanctions for violations, JA 170, 174-75, 176, and to harmonize the language of standards so that similar violations result in similar penalties, JA 174-75. Surely, the Secretary's attempt to clarify the meaning of valid standards to better achieve their intended purposes cannot be thought of as an exercise of unbridled lawmaking authority.

E. *The Petitioners' argument conflicts with the Commission's understanding of its own powers and is unreasonable.*

As the foregoing discussion shows, the Secretary has reasonably construed the OSH Act as conferring upon her the authority to clarify OSHA standards with respect to the appropriate unit of prosecution. Thus, even if the Act does not unambiguously grant that authority, deference to the Secretary's position is appropriate. *See CF&I*, 499 U.S. at 150-52. It is worth pointing out, moreover, that the Petitioners' argument -- under which unit of prosecution decisions are left entirely to the Commission -- is inconsistent with the Commission's own caselaw and is patently unreasonable.

From its earliest decisions to the present, the Commission has consistently taken the position that the unit of prosecution is to be derived from the language of the standard at issue. *See, e.g., E. Smalis*, 22 BNA OSHC at 1579-81; *Caterpillar*, 15 BNA OSHC at 2172. The whole point of construing a statute or regulation, of course, is to determine what the drafter meant; so if the unit of prosecution is to be

determined from an OSHA standard's language, then the intent of the drafter (the Secretary) is the paramount consideration. If the Commission believed that its role was to determine a unit of prosecution "without regard" to the Secretary, Br. 43, it would not care what the language of a standard said on the matter. On the contrary, then, the Commission agrees with the Secretary that she has the responsibility to establish the unit of prosecution through the standard-setting process. *See, e.g., Ho*, 20 BNA OSHC at 1376.

Notably, the Petitioners do not take issue with the proposition that the unit of prosecution depends on interpreting the relevant standard. Thus, according to the Petitioners' argument, the unit of prosecution is to be ascertained through the following bizarre scheme: the Secretary is to draft standards without considering in any way the appropriate unit of prosecution, and then the Commission is to ascertain the unit of prosecution by interpreting the relevant standard, which of course cannot reflect the

Secretary's intent, since she is not allowed to have one to begin with.

Needless to say, such a scheme is entirely foreign to American jurisprudence. And it is difficult to see how the Petitioners' constituent employers benefit from such a scheme, which is hardly designed to provide fair notice of an employer's duties and responsibilities. *Cf. Pharaon v. Bd of Govs. of Fed. Reserve Sys.*, 135 F.3d 148, 157 (D.C. Cir. 1998) (fair notice of severity of penalty that can be imposed an essential component of due process). Because the Secretary's interpretation of her authority under the OSH Act is far more reasonable than the interpretation advanced by the Petitioners, the petition for review should be denied.

CONCLUSION

The petition for review should be denied.

Respectfully submitted.

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