

**IN THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

Case No. 22-1845

**UHS OF WESTWOOD PEMBROKE, INC.,  
and UHS OF DELAWARE, INC.,**

*Petitioners,*

v.

**OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION,  
and SECRETARY OF LABOR,**

*Respondents.*

**BRIEF OF PETITIONERS UHS OF PEMBROKE WESTWOOD, INC.  
AND UHS OF DELAWARE, INC.**

Judicial Review of the March 3, 2022 Decision of the  
Occupational Safety and Health Review Commission in  
OSHRC No. 17-0737

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**United States Court of Appeals for the Third Circuit**

**Corporate Disclosure Statement and  
Statement of Financial Interest**

No. 22-1845

UHS of Westwood Pembroke, Inc.,  
UHS of Delaware, Inc.

v.

Occupational Health and Safety Review Commission,  
Secretary of Labor

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, UHS of Westwood Pembroke, Inc.  
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Petitioner UHS of Westwood Pembroke, Inc. is a wholly-owned subsidiary of UHSD, LLC, which is a wholly-owned subsidiary of Universal Health Services, Inc., a publicly traded company.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:  
No publicly held company owns 10% or more of the stock of Universal Health Services, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:  
N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Gary A. Orseck  
(Signature of Counsel or Party)

Dated: 8/22/2022  
\_\_\_\_\_

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, UHS of Delaware, Inc.  
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Petitioner UHS of Delaware, Inc. is a wholly-owned subsidiary of Universal Health Services, Inc., a publicly traded company.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:  
No publicly held company holds more than 10% of the stock of Universal Health Services, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:  
N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.  
N/A

/s/ Gary A. Orseck  
(Signature of Counsel or Party)

Dated: 8/22/2022

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Six years ago, inspectors from the Occupational Safety and Health Administration (“OSHA” or the “Secretary”) began an inspection of Pembroke Hospital, an inpatient psychiatric hospital in Massachusetts operated by Petitioner UHS of Westwood Pembroke, Inc. (“Pembroke”). The inspection came in response to complaints of patient violence against clinical staff employed by Pembroke. Following that inspection, the Secretary issued a citation directing Pembroke to abate the risk of patient violence. Not surprisingly, the OSHA regulators could not settle on a single process to pacify mentally ill patients whom they never met. Instead, the Secretary proposed a hodgepodge of alternatives that Pembroke might try, such as purchasing additional MP3 devices for the patients to listen to music.

Pembroke contested the citation before the Occupational Safety and Health Review Commission (the “Commission”). In response, the Secretary supersized its allegations to recharacterize the alleged violation as a “repeat” offense, based on patient violence at a different facility in 2015, and added Pembroke’s administrative services provider, Petitioner UHS of Delaware, Inc. (“UHS-Delaware”), to the case. Although UHS-Delaware has no role providing clinical care to patients at Pembroke—and the Secretary has not alleged that its employees are exposed to *any* risk of patient violence—the Secretary urged that Pembroke and UHS-Delaware nevertheless operated as a “single employer,” such that UHS-Delaware should be liable for the citation as well.

Following an evidentiary hearing, the administrative law judge (“ALJ”) affirmed the citation against Pembroke on the inexplicable basis that Pembroke had failed to implement all of OSHA’s proposed abatements—even though the abatements were presented as *alternatives*, not a series of requirements, and Pembroke had implemented many of them. The ALJ correctly dismissed the citation as to UHS-Delaware, however, finding that UHS-Delaware employees were not exposed to a risk of patient violence at Pembroke—and thus, pursuant to longstanding Commission precedent, the two companies were not a “single employer.” Likewise, and also consistent with Commission precedent, the ALJ correctly rejected the Secretary’s contention that the citation was a “repeat” offense, finding that the citation was not “substantially similar” to the 2015 citation at a different facility.

On cross-petitions for review, the Commission ruled against Petitioners on every issue. For starters, the Commission affirmed the ALJ’s erroneous holding that Pembroke was required to (and did not) implement *all* of the proposed abatements, on the ground that the abatements collectively constituted a unified “process”—despite Commission precedent squarely holding otherwise. The Commission also reversed the ALJ on the “single employer” issue, holding that Pembroke and UHS-Delaware shared a “common worksite” and had “integrated and interrelated” operations—here, again, in violent tension with the Commission’s own precedents.

The Commission likewise reversed the ALJ’s finding that the citation was not a “repeat” offense—without regard to the Commission’s precedents requiring a showing of “substantial similarity” to sustain such a finding.

Agencies have deference, of course, to interpret and apply the laws within their purview. And they likewise have flexibility to establish their own rules of decision in adjudicatory proceedings. Once an agency *establishes* precedents, however, it must apply them consistently to the cases before it. If the agency deviates from that precedent, or intends to alter it, it must state a reasoned basis for doing so.

The Commission, at the Secretary’s urging, has abused its discretion in just that manner here. On each of the three issues presented in the petition, the Commission contravened its own precedents. It did so without so much as acknowledging it was doing so, much less offering a reasoned justification for reversing itself.

Petitioners take extremely seriously the risk of patient-on-staff violence, a problem that is endemic to the psychiatric-care industry. And Pembroke has taken numerous proactive steps, including some suggested by OSHA, to address it. But these are highly clinical judgments, which frequently turn on circumstances unique to each patient. It is difficult enough to make such clinical judgments in a way that promotes the safety of hospital staff without compromising patient care. It is nearly

impossible, however, when OSHA cannot settle on consistent standards or rules of decision.

### **STATEMENT OF JURISDICTION**

The Occupational Safety and Health Review Commission issued a final decision affirming the Occupational Safety and Health Administration’s citation and penalty against Pembroke and UHS-Delaware on March 3, 2022. Pembroke and UHS-Delaware timely petitioned for judicial review in this Court on May 2, 2022. *See* 29 U.S.C. § 660(a) (allowing 60 days to file a petition for judicial review). Because UHS-Delaware’s principal office is located in the Third Circuit, this Court has jurisdiction. *See id.* § 660(a) (allowing judicial review in the circuit “where the employer has its principal office”).

### **STATEMENT OF ISSUES**

1. In concluding that Pembroke and UHS-Delaware were a “single employer,” the Commission reversed the ALJ and concluded, contrary to its precedents, that it needn’t find the companies’ respective employees were exposed to a common hazard, nor that they had substantially overlapping operations and ownership. Op. 4-10; JA775-784 (UHS-Delaware Response to Pet. for Discretionary Review, at 9-18).<sup>1</sup> The Commission did not acknowledge its

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<sup>1</sup> “Op.” refers to the decision issued by the Commission, which is located at JA3-25. “ALJ Op.” refers to the decision issued by the ALJ, which is located at JA26-105.

departure from precedent or provide a reasoned justification for it. Was that an abuse of discretion?

2. In concluding that the Secretary’s proposed abatements amounted to a holistic “process,” rather than a set of alternatives, the Commission failed to announce a principled reason for its departure from materially indistinguishable Commission precedent. Op. 11-13; JA749 (Pembroke Br. in Supp. of Discretionary Review, at 19 n.20); JA672-673 (Pembroke Pet. for Discretionary Review, at 11-12). Was that ruling arbitrary and capricious or otherwise contrary to law?

3. In reversing the ALJ’s finding that a prior citation was not “substantially similar” to the instant one, the Commission defined the bounds of “similarity” with far more breadth than permitted by precedent and statute. In so doing, the Commission deemed irrelevant the differing abatements that were proposed in connection with each citation (also contrary to the statute and Commission precedent). Op. 18-20; JA756-760 (Pembroke Br. in Supp. of Discretionary Review, at 26-30). Was the Commission’s resulting characterization of the violation as “repeat” arbitrary and capricious or otherwise contrary to law?

### **STATEMENT OF RELATED CASES**

Petitioners are unaware of related cases. This case has not come before this Court previously.

## STATEMENT OF THE CASE

### A. Petitioners' Separate Businesses

Pembroke operates Pembroke Hospital, a 120-bed inpatient psychiatric hospital in Massachusetts. Op. 2. Pembroke is an indirect, wholly owned subsidiary of Universal Health Services, Inc. Op. 2; JA512 (JX1, at 2). Pembroke staff are solely responsible for providing clinical care to inpatients at the Pembroke facility.

UHS-Delaware is a management and administrative services company that operates out of Pennsylvania and provides its services to healthcare facilities across the country. Op. 2; ALJ Op. 73. Like Pembroke, UHS-Delaware is a wholly owned subsidiary of Universal Health Services, Inc. JA512 (JX1, at 2).

UHS-Delaware provides “management services and budget oversight” to Pembroke under an administrative services contract. Op. 2. Pembroke’s CEO and CFO are employed and supervised by UHS-Delaware. Op. 2, 5. Pembroke’s CEO, who works on site in Massachusetts, has a role in budgeting and authority to hire and fire hospital staff. Op. 6-7. He also manages regulatory affairs, directs training, and has supervisory responsibility for matters such as admissions capacity. *Id.*

UHS-Delaware also provides input into Pembroke’s workplace safety programs. That input comes in the form of “recommendations” and “benchmarks.” Op. 8; JA179 (Tr. 515-17). So, for example, a UHS-Delaware manager visits the Pembroke site periodically to meet with employees about strategies to reduce

incidents of patient aggression. Op. 2. In the end, however, Pembroke staff ultimately decides whether to adopt such policies and in what form. JA176 (Tr. 503-504); JA184 (Tr. 534-37).

Importantly, *UHS-Delaware employees have no role providing clinical care to patients at the Pembroke facility.* ALJ Op. 73. Instead, Pembroke’s medical director—who is not a UHS-Delaware employee—is responsible for “manag[ing] patient care and has authority over clinical and staffing decisions.” Op. 7; JA173 (Tr. 493 (Pembroke Director of Nursing)). Thus, it is undisputed that UHS-Delaware employees are not exposed to the risk of workplace violence at the Pembroke facility. *See* ALJ Op. 73 (“The Secretary does not allege that any UHS-DE employees were exposed to the cited hazard” of patient aggression.); *see also* Op. 4-5.

#### **B. OSHA’s Inspections, Proposed Abatements, And Citation**

In March 2016, OSHA received a complaint about patient-on-staff violence at Pembroke. JA541-550 (RX-38). After inspecting Pembroke’s facilities, OSHA acknowledged that “no OSHA standard applies” to the risk in question; OSHA has never invoked its rulemaking power to promulgate workplace-violence standards. JA538 (RX-37, at 1). OSHA further stated that “it is not considered appropriate at this time to invoke [the General Duty Clause],” a vaguely worded provision that says

nothing about how to control outbursts by mentally ill patients. *See id.*<sup>2</sup> Thus, rather than issuing a citation, OSHA sent a letter suggesting a grab-bag of potential abatement measures that Pembroke might try—above and beyond the host of abatement measures that Pembroke already had in place. JA539 (RX-37, at 2).

Between October 11, 2016 and April 7, 2017, OSHA again inspected the Pembroke facility. *See* ALJ Op. 2, 7-8. Following that inspection, OSHA—in an abrupt reversal of course—decided to issue a citation under the residual General Duty Clause, after all. JA554-563 (Complaint and Citation). That citation, as subsequently amended by the Secretary, proposed a smattering of *new* ideas for abating the risk of patient violence, with an emphasis on “adequate staffing.” So, for example, the Secretary suggested: (i) “[e]stablish[ing] a team of nurses and mental health associates (MHAs)” to focus on new-patient admission and assessment; (ii) “[e]nsur[ing] that staffing is sufficient to allow the issuance and implementation of medical orders that specify staffing arrangements”; (iii) providing security staff on all shifts; (iv) “[m]aintain[ing] staffing that is adequate to safely address changes in patient acuity and new patient admissions,” including not

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<sup>2</sup> Far from a lodestar, the General Duty Clause does not specify how *any* employer (let alone an inpatient psychiatric facility) should mitigate workplace violence. It provides simply, and in the most general of terms, that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).

decreasing “staffing levels mid-shift regardless of the timing of patient discharges”; and (v) “[m]aintaining adequate staffing to support therapeutic activity groups and recreation periods, thereby engaging patients in activities that reduce patient agitation and incidents of workplace violence.” *See* JA570-571 (Unopposed Motion to Amend Abatement in Citation and Complaint, at 2-3).

For good measure, the Secretary also recommended that all staff carry personal panic alarms at all times, and that Pembroke purchase additional MP3 players for patients to play music with. JA571 (Unopposed Motion to Amend Abatement in Citation and Complaint, at 3).

### **C. OSHA’s Amended Complaint And Shifting Theories**

Pembroke contested the citation before the Commission in April 2017. ALJ Op. 2. In the course of that proceeding, the Secretary’s legal theories vacillated wildly. Six months in, the Secretary amended its complaint to add UHS-Delaware, Pembroke’s administrative services provider, on the novel theory that UHS-Delaware and Pembroke somehow functioned as a “single employer.” ALJ Op. 2, 72-74.

The Secretary’s amended complaint also contended, for the very first time, that the violation was a “repeat” offense and thus subject to harsher penalty. ALJ Op. 2, 74-75; Op. 18-20. That newfangled theory was premised on a 2015 violation at a *different* Pembroke facility, the Lowell Treatment Center (“LTC”). There, like

here, the Secretary had charged LTC with a violation of the amorphous General Duty Clause. Op. 18; JA333-347 (GX-14). Specifically, the Secretary charged that LTC had failed to provide a workplace free of the “recognized hazards” of “verbal threats of assault, physical assaults, choking, punches, kicks, human bites, scratches, and/or pulling of hair by patients.” JA339 (GX-14, at 6). The LTC citation was resolved by settlement and became a final order. Op. 18.

**D. The ALJ’s Decision**

Following a lengthy evidentiary hearing, the ALJ issued a 77-page opinion on three issues that are the subject of this petition.

*First*, consistent with longstanding Commission precedent, the ALJ rejected the Secretary’s claim that Pembroke and UHS-Delaware were a single employer. For one thing, the ALJ found, as fact, that the two entities do not share a “common worksite”: Not only do UHS-Delaware and Pembroke operate out of different locations (in different states), but, crucially, the Secretary does not contend that UHS-Delaware employees are exposed to the hazard of workplace violence at the Pembroke facility, as the Commission and courts have long required to sustain a “common worksite” finding. ALJ Op. 73. The ALJ further found, as fact, that Pembroke and UHS-Delaware did not have “interrelated and integrated” operations because they are in distinct businesses with separate offices, UHS-Delaware

employees do not provide daily oversight at Pembroke, and the two companies have separate executive leadership. ALJ Op. 72-74.

*Second*, the ALJ agreed with the Secretary that, although the Secretary’s “multiple abatement methods,” were “not a process *per se*,” ALJ Op. 46, “the Secretary had proposed the citation’s listed measures as a process,” Op. 11. As such, the ALJ found that Pembroke was required to implement *all* of the proposed abatements—and, thus, its failure to install panic alarms and stockpile MP3 players was enough to sustain the citation, notwithstanding the host of abatement measures that Pembroke *had* implemented. *See* Op. 10-18

*Third*, the ALJ rejected the Secretary’s contention that the violation at Pembroke was “repeat.” “When relying on a previous general duty citation,” the ALJ explained, “the Secretary must show substantial similarity based on the circumstances surrounding the hazard.” ALJ Op. 74-75 (citing *Gem Indus., Inc.*, OSHRC No. 93-1122, 1996 WL 710982, at \*5-6 (Dec. 6, 1996)). And here, the ALJ found, “the record does not establish that the two violations are sufficiently similar to support a repeat characterization.” ALJ Op. 75; *see also id.* (finding that certain of the proposed abatements for each violation were “notably different”).

#### **E. The Commission’s Decision**

The Commission granted Pembroke’s petition for discretionary review on the issue of abatement, and the Secretary’s cross-petition on the issues of “single

employer” and “repeat” violation. The Commission ruled against Petitioners on all three issues.

*First*, the Commission reversed the ALJ’s finding that Pembroke and UHS-Delaware were not a “single employer.” Among other things, the Commission rejected the ALJ’s conclusion that, consistent with longstanding Commission precedent, a “common worksite” finding requires evidence that the relevant employees be exposed to a common workplace hazard. Op. 4-5. The Commission did not so much as acknowledge that it was flouting its own precedent; rather, the Commission quizzically insisted that its decision was *consistent* with that precedent. The Commission likewise set aside the ALJ’s finding that Pembroke and UHS-Delaware did not have “interrelated and integrated” operations, notwithstanding the vast gulf between this case and the other cases where the Commission precedents did find this factor satisfied. Op. 6-10.

*Second*, the Commission, affirming the ALJ, held that “the Secretary proposed, and the parties tried, the [abatement] measures listed in the citation as a process-based approach to abate the cited hazard.” Thus, the Secretary could prevail by showing simply that “at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the alleged hazard.” Op. 12; *see A.H. Sturgill Roofing, Inc.*, OSHRC No. 13-0224, 2019 WL 1099857, at \*9 (Feb. 28, 2019). Like the ALJ, the Commission sustained

liability based on Petitioners’ failure to implement only two of the proposed abatements: panic alarms and additional MP3 players. Op. 13-18. Neither the ALJ nor the Commission considered whether the potpourri of *additional* abatements suggested by OSHA were effective and feasible, nor did they evaluate the numerous abatement measures that Pembroke had already implemented.

*Third*, the Commission—again reversing the ALJ’s factual finding to the contrary—held that the 2015 LTC violation was “substantially similar” to the citation here, rendering the instant violation “repeat.” Op. 18-20. In so holding, the Commission defined the hazard in question so broadly as to ensure that *any* violation could be deemed recidivism: “the hazard of physical assault by patients at a psychiatric care facility.” Op. 19. Adding insult to injury, the Commission refused even to *consider* Pembroke’s rebuttal evidence demonstrating—as the ALJ found—that the abatements proposed for each violation were markedly different from one another. *Id.* Despite its own precedents saying the opposite, the Commission declared those probative facts “not relevant.” Op. 19 n.19.

### **SUMMARY OF ARGUMENT**

On all three issue, the Commission jettisoned its own precedent without reasoned justification, rendering its decision arbitrary and capricious.

*First*, the Commission disregarded its precedents applying the “single employer” test. For one thing, the Commission declared it irrelevant that UHS-

Delaware’s employees were concededly not exposed to the hazard of patient violence—even though its own precedents (and those of appellate courts) hold otherwise. The Commission also held that UHS-Delaware and Pembroke had “integrated and interrelated operations,” despite coming to the opposite conclusion in prior cases with materially indistinguishable facts. Under the Commission’s novel and untenable single-employer standard, virtually *any* management or advisory relationship between two companies would suffice.

*Second*, the Commission abused its discretion in concluding that the proposed abatement measures constituted a “process,” such that Pembroke could be sanctioned for failing to implement even *one* of those measures. (The Commission picked two.) But the abatements were not proposed as a process, nor did the Secretary litigate them as such. Thus, under the Commission’s own precedents, Pembroke was not required to implement every one of the Secretary’s proposed abatements.

*Third*, the Commission abused its discretion by deeming the violation a “repeat” one. The Commission held that the 2015 violation at a different facility and the instant citation at Pembroke were sufficiently “similar” because they both concerned, at the highest level of generality, the risk of “patient violence.” At the same time, the Commission disregarded as “not relevant” the fact that the two

citations entailed materially different abatement measures. All of this is irreconcilable with the Commission’s own precedents.

On each issue, the Commission cut a new path departing from its own precedents—all while professing that it was *following* those precedents and never justifying its reversal of course. Such unacknowledged and unexplained deviations in agency rules of decision are unfair to parties and constitute an abuse of discretion. The Commission’s decision should be vacated and remanded.

### **STANDARD OF REVIEW**

“[T]his Court may set aside the legal conclusions of an agency body if they are ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.’” *Secretary of Labor v. ConocoPhillips Bayway Refinery*, 654 F.3d 472, 477 (3d Cir. 2011).

“Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without ‘announcing a principled reason’ for the departure.” *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002) (quoting *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir.1998)). “[I]f it departs from an announced rule without explanation or an ‘avowed alteration,’ such action could be viewed as ‘arbitrary, capricious, [or] an abuse of discretion.’” *Id.* (quoting *INS v. Yang*, 519 U.S. 26, 32 (1996)).

Decisions by the Commission on questions of fact are reviewed for “substantial evidence.” 29 U.S.C. § 660(a). “[W]hen [an agency review board] overrules an ALJ’s finding on a relevant factual issue, this Court’s inquiry is slightly more nuanced than when the [agency’s review board] has agreed with the ALJ—even though the ultimate standard of review remains the same. In such a case, as part of the overall analysis we must consider whether the Agency’s rejection of the ALJ’s finding was itself reasonable.” *Mathew Enter., Inc. v. NLRB*, 498 F. App’x 45, 46 (D.C. Cir. 2012).

## ARGUMENT

### **I. THE COMMISSION’S APPLICATION OF THE SINGLE-EMPLOYER TEST IS ARBITRARY AND CAPRICIOUS BECAUSE IT FLOUTS THE COMMISSION’S OWN PRECEDENTS**

The Commission held that Pembroke, which provides clinical care, and UHS-Delaware, which provides back-office services, are a single employer for purposes of workplace safety. That proposition makes no sense, for the reasons set out at length by the ALJ, who cited Commission and appellate court precedent. What is more, the Commission’s remarkable ruling on this point is directly at odds with its conclusion in another case on indistinguishable facts. Indeed, the Commission departed from its own precedent—and overruled the ALJ’s decision *relying* on that precedent—without so much as acknowledging it was doing so. By “depart[ing]

from its established precedent[] . . . without announcing a principled reason,” the Commission’s decision was arbitrary and capricious. *Johnson*, 286 F.3d at 700.

The Commission here purported to apply its standard three-part test to determine if two employers “handled safety matters as one company” and thus were a “single employer.” *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 76 (2d Cir. 2012) (internal quotation marks omitted); *Advance Specialty Co.*, OSHRC No. 2279, 1976 WL 22254, at \*3 (Mar. 5, 1976). The Commission deems two separate companies to be a single employer only when they: (1) “share a common worksite such that the employees of both have access to the same hazardous conditions,” (2) “have interrelated and integrated operations,” and (3) “share a common president, management, supervision or ownership.” *Advance Specialty Co.*, 1976 WL 22254, at \*3-4. The three factors are considered together. *Loretto-Oswego*, 692 F.3d at 76.

In its ruling below, the Commission abrogated its precedents about how to apply this test, *sub silentio*. In doing so, it radically expanded the single employer standard to a near-boundless degree. As rewritten by the Commission, the single employer test no longer requires that employees of both companies “have access to the same hazardous conditions,” *Advance Specialty Co., Inc.*, 1976 WL 22254, at \*4, nor does it require “strong evidence of close identity between the two companies,” *Loretto-Oswego Residential Health Care Facility*, OSHRC No. 02-

1164 & 02-1174, 2011 WL 95330, at \*2 (Jan. 7, 2011). Instead, the mere act of supervision or management by a corporate affiliate—or a third-party consultant, for that matter—could well suffice. Though the ramifications of the Commission’s rewritten standard will be far-reaching, the Commission failed to acknowledge (much less justify) its abrupt volte-face. Reversal is warranted.

**A. The Commission Scuttled The *Sine Qua Non* Of The Single Employer Test: That The Companies’ Employees Be Exposed To A Common Workplace Hazard**

1. For decades, the Commission has emphasized that whether two entities share a “common worksite” turns on whether “employees of both [entities] have access to the same hazardous conditions.” *Advance Specialty Co.*, 1976 WL 22254, at \*4; *C.T. Taylor Co.*, OSHRC No. 94-3241 & 94-3327, 2003 WL 1961272, at \*3 (Apr. 26, 2003) (“two companies share a common worksite” when “employees of both have access to the same hazardous conditions” (internal quotation marks omitted)). Appellate courts have agreed that “[g]iven the . . . focus on worker safety,” the single-employer analysis is rightly focused on “the location at which the employees worked and were exposed to workplace hazards, *i.e.*, the ‘worksite,’ not just the ‘business address.’” *A.C. Castle Constr. Co. v. Acosta*, 882 F.3d 34, 42 (1st Cir. 2018). This is consistent with OSHA regulations in other contexts. *See, e.g.*, 29 C.F.R. § 1960.2(h) (“Where distinctly separate activities are performed at a single physical location, each activity shall be treated as a separate establishment.”).

Following those well-worn precedents, the ALJ correctly evaluated whether UHS-Delaware “employees work and are exposed to the hazard” alongside the Pembroke employees. ALJ Op. 73 (citing *A.C. Castle*, 882 F.3d at 42). The ALJ noted that the “Secretary does not allege that any UHS DE employees were exposed to the cited hazard. Nor does he allege that employees were exposed to the hazard of workplace violence at locations other than Pembroke Hospital.” *Id.* Thus, on these undisputed facts, the ALJ concluded that UHS-Delaware and Pembroke do not share a “common worksite.” *Id.*

2. The Commission reversed. In doing so, it announced a brand new rule for what qualifies as a “common worksite”: “[M]utual employee access to a hazard is not a precondition to establishing the common worksite factor.” Op. 5.

The Commission made this pronouncement without acknowledging its precedents that say just the opposite. Nor did it offer a reasoned basis for fundamentally altering the single employer test. Instead, the Commission simply declared that its new rule was in line with “Commission and relevant circuit court precedent.” *Id.* But the Commission identified only three such “precedents,” none of which remotely supports the Commission’s decree.

*First*, the Commission pointed to the First Circuit’s decision in *A.C. Castle* as supposedly “reject[ing]” a requirement “that workers from each entity must be at the site at the time the violation occurred, or directly exposed to the risk.” *Id.* (quoting

*A.C. Castle*, 882 F.3d at 42). But the First Circuit did no such thing. Rather, in *A.C. Castle*, the court rejected the companies’ argument that there could be no common worksite where the employee in question “was not at the site when *the accident occurred*.” 882 F.3d at 42 (emphasis added). That is unremarkable. Your worksite does not change locations whenever you step out to lunch, and workplace hazards rarely injure every employee simultaneously. To say that one needn’t be physically present when an *accident* occurs is a far cry from saying—as the Commission held here—that one needn’t even be exposed to the *underlying hazard*. Indeed, the First Circuit separately acknowledged that the “worksite” is defined by reference to “the location at which the employees worked *and were exposed to workplace hazards*.” *Id.* (emphasis added). The court likewise emphasized that the employee in question “was himself physically present at the site shortly before the accident,” and “supervised the roofing crew that set up the faulty scaffolding apparatus at the worksite.” *Id.* Thus, in *A.C. Castle*, there plainly *was* “mutual employee access to a hazard.” Op. 5.

*Second*, the Commission passingly referred to its prior decisions in *C.T. Taylor* and *Loretto-Oswego*. Op. 5 (citing *C.T. Taylor*, 2003 WL 1961272, at \*3-4, and *Loretto-Oswego*, 2011 WL 95330, at \*4). Neither stands for the proposition that common employee access to a hazard is not required—in neither case was the issue even raised. In *C.T. Taylor*, the Commission did not discuss the common worksite

factor except to note that it requires “access to the same hazardous conditions.” *See* 2003 WL 1961272, at \*3-4.<sup>3</sup> And, in *Loretto-Oswego*, the Commission had no occasion to address this factor because there was no contention that the management company’s employees shared a physical space with the relevant nursing home. 2011 WL 95330, at \*4.

In short, the Commission disregarded its own precedents (and misread the First Circuit’s decision) in declaring, for the first time ever, that both companies’ exposure to a common hazard is irrelevant to whether they share a “common worksite.” That ruling severs altogether the single employer test from its animating purpose: to identify situations where two sets of employees are exposed to common risks, and thus can fairly be regulated as one.

**B. The Commission Arbitrarily Watered Down Its “Interrelated And Integrated” Requirement**

1. Commission precedent also requires a showing that the employers in question are “interrelated and integrated with respect to operations and safety and health matters.” *S. Scrap Materials Co.*, OSHRC No. 94-3393, 2011 WL 4634275, at \*34 (Sept. 28, 2011). There needs to be “strong evidence of close identity between the two companies.” *Loretto-Oswego*, 2011 WL 95330, at \*2. As this Court has

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<sup>3</sup> Further, *C.T. Taylor* was an unusual case in that it was the *employers*, not the Secretary, arguing that they were a single employer, in order to avoid duplicate liability. 2003 WL 1961272, at \*1; *see also id.* at \*9 (Rogers, Commissioner, concurring in part, dissenting in part).

recognized in analogous contexts, the mere fact of some interrelation and integration of operations between a parent and subsidiary—or, as here, two sister-subsidiaries—is not enough. Were it otherwise, virtually all corporate entities would qualify. Instead, the companies must be “so interrelated and integrated” as to justify piercing the corporate veil, which requires an assessment of whether the parent “so dominate[s] the subsidiary’s operations that the parent and the subsidiary are one entity and thus one employer.” *Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 513 (3d Cir. 1996) (quoting *Ratcliffe v. Ins. Co. of N. Am.*, 482 F. Supp. 759, 764 (E.D.Pa.1980), and *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 981 (4th Cir. 1987)).

Consistent with that understanding, the Commission has found this factor satisfied where one employer exercises near total control over another with respect to safety, or where the two companies’ safety operations are fully integrated. For example, in *C.T. Taylor*, the general manager of a construction site “controlled and directed the work activities” of the subcontractor’s employees, “provided [their] equipment,” “dictated the days of work,” and “directly intervened regarding the safety of [the subcontractor’s] employees” by “order[ing]” safety measures. 2003 WL 1961272, at \*4. Likewise, in *Absolute Roofing & Construction*, the two companies “ha[d] the same owners and managers,” “d[id] the same work,” and “share[d] employees.” OSHRC No. 11-2919, 2013 WL 5505275, at \*8 (Aug. 20,

2013). And in *Vergona Crane Co.*, the two companies were “owned by the same family, had the same president, and operated out of the same office, and the leases for the crane at issue in that case appeared to use the names of those companies interchangeably.” *Loretto-Oswego*, 2011 WL 95330, at \*2 (citing *Vergona Crane Co.*, OSHRC No. 88-1745, 1992 WL 184539 (July 22, 1992)).

Short of such extensive integration, however, the Commission has found this factor not satisfied. In *Loretto-Oswego*, for instance, the Commission found the nursing home was a separate employer from the management company, even though the management company had initiated a safety control plan at the nursing home, had hiring and firing authority, provided training to nursing home employees, participated in negotiations with OSHA inspectors, prepared and monitored budgets and finances, and provided executive leadership to boot. *Id.* at \*2-4. The Commission explained that, notwithstanding the management company’s degree of control and authority over the nursing home, the nursing home employees retained ultimate control over staffing and safety policy. *Id.*

Similarly, in *Southern Scrap Materials Co.*, the Commission noted that the parent company’s corporate safety director “was involved with safety at all of the scrap yards” affiliated with the parent—including by “draft[ing] [their] safety program[s]” and “maintain[ing] records on work-related injuries and illnesses.” Nevertheless, the Commission found the parent not “interrelated [and] integrated”

with those affiliates because there was no evidence the safety director had “authority . . . to implement that program or to control other operational decisions affecting safety and health.” 2011 WL 4634275, at \*35.

2. This case bears no resemblance to those in which the Commission has found the “interrelated and integrated” factor satisfied, and thus the ALJ found this factor does not support a single employer finding. To the contrary, and as the ALJ correctly found, the facts here are materially indistinguishable from those in *Loretto-Oswego*: Here, just as in *Loretto-Oswego*, “UHS DE and Pembroke [are] related, but distinct businesses” in that “Pembroke provides direct patient care, while UHS DE is a management and consulting business.” ALJ Op. 73. And, just like the management company in *Loretto-Oswego*, UHS-Delaware employees had authority with respect to budgets and hiring, “ma[d]e[] recommendations in that regard to the hospital,” “analyze[d] data,” and “advise[d] Pembroke on safety training” and other corrective actions. Op. 7-8. But, in the end—like in *Loretto-Oswego*—it was Pembroke’s medical director, *not* a UHS-Delaware employee, who “manage[d] patient care and ha[d] authority over clinical and staffing decisions.” Op. 6-8.

The Commission attempted to distinguish *Loretto-Oswego* on the basis that UHS-Delaware’s supervision of Pembroke is more extensive than the management company’s in *Loretto-Oswego*. Op. 8. Even if that were so, the advice and supervision provided by UHS-Delaware is a far cry from the wholly integrated

operations and common ownership that existed in *C.T. Taylor*. And, in the end, Pembroke (not UHS-Delaware) retained ultimate authority over matters of clinical judgments and safety through Pembroke’s medical director, director of nursing, risk manager, and clinicians. Op. 6-7; JA163-164, 174-176, 181, 228 (Tr. 453-55, 497-505, 524-25, 742). That ultimate authority was the touchstone of the Commission’s holding in *Loretto-Oswego*—and, until now, was ostensibly the relevant benchmark for employers.

But no longer. The Commission’s decision announces a new rule that lowers the bar to establish interrelated and integrated operations far below the requirements set forth in *C.T. Taylor*. Henceforth, all that is required is “advice” and “supervision” to a degree that the Commission regards (using an unspoken standard) as enough. The implications of this change are extreme, as just about any corporate parent, management company, or even third-party consulting or advisory firm could readily qualify. The Commission’s failure to offer anything approaching a rationale for this remarkable new standard merits reversal.

**C. The Mere Fact That Pembroke And UHS-Delaware Share A Common Corporate Parent Is Not Sufficient**

The third factor in the single employer test requires a “common president, management, supervision, or ownership.” *Loretto-Oswego*, 2011 WL 95330, at \*2. In other agencies’ single employer tests, this factor has been found to be relatively unimportant compared to the other factors that relate to the need for agency

regulation. That is because “[c]ommon ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single employer relationship will be found only if one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other.” *The Dow Chem. Co.*, 326 N.L.R.B. 288, 288 (1998). Commission precedents are consistent with this, as they have found this element satisfied most often where there is “strong evidence of close identities between the two companies,” such as where “two companies were owned and controlled by the same individual and operated out of the same office” or “had the same president.” *Loretto-Oswego*, 2011 WL 95330, at \*2.

As the ALJ recognized, while it is true that Pembroke and UHS-Delaware share an ultimate parent company (Universal Health Services, Inc.), there is no dispute that Pembroke and UHS-Delaware have different executives; operate out of different offices; and that Pembroke’s medical director, director of nursing, risk manager, and clinicians (not UHS-Delaware) have ultimate and autonomous control over the hospital’s clinical and safety operations. Thus, the ALJ concluded this factor does not support a finding that the companies were a single employer. Indeed, if a common corporate parent were enough to establish single-employer liability, as suggested by the Commission’s newly announced rule, then the doctrine would be boundless. In the end, this “relatively unimportant” factor cannot itself sustain the Commission’s single employer conclusion.

**II. THE COMMISSION’S RULING THAT THE SECRETARY’S SEVEN PROPOSED ABATEMENTS WERE ALL COMPONENTS OF A SINGLE, INTEGRATED “PROCESS” WAS ARBITRARY AND CAPRICIOUS**

a. The Commission erroneously concluded that the Secretary’s proffered abatements constituted a unified, holistic “process,” rather than “alternative” measures that Pembroke could implement as appropriate. Op. 10-13. This ruling allowed the Secretary to prevail merely by demonstrating that, at the time of the hearing before the ALJ, any *one* of the Secretary’s preferred abatements had not been implemented by Pembroke. This was outcome determinative: Pembroke advanced evidence that its staffing was adequate, JA749 (Pembroke Br. in Support of Discretionary Review, at 19 n.20), but because of the Commission’s “process” holding, and its “conclu[sion] that the Secretary had proven two of his proposed abatement measures”—MP3 players and panic alarms—the Commission held that it “need not reach these other proposed abatement measures.” Op. 13 n.11. In reaching this conclusion, the Commission arbitrarily “depart[ed] from its established precedent[ ] . . . without announcing a principled reason.” *Johnson*, 286 F.3d at 700 (internal quotation marks omitted). In particular, the Commission’s decision is irreconcilable with its prior decision in *A.H. Sturgill Roofing, Inc.*, OSHRC No. 13-0224, 2019 WL 1099857 (Feb. 18, 2019).

In *Sturgill*, OSHA’s citation was “internally inconsistent” as to whether the proposed abatements were intended as a process or a set of alternatives. 2019 WL

1099857, at \*9. The citation led off by describing the violation in terms of “fail[ure] to implement a ‘prevention program,’” and went on to list five specific, numbered abatement measures and one unnumbered measure: “develop[ing] an acclimatization program.” *Id.* at \*9 n.17. All of that “suggest[ed] an intent to allege that the proposed abatement is a program.” *Id.* Nevertheless, the abatement portion of the citation referred to the abatements as multiple “[f]easible and acceptable methods,” not a unified program. *Id.* And, in the course of briefing and adjudication, “the Secretary litigated his proposed measures as alternative means of abatement.” *Id.* at \*9. Consequently, the Commission held that the abatements were best understood as alternatives, and the respondent was not required to implement all of them. *Id.*

b. Applying *Sturgill*'s reasoning, this case is not a close call. Here, the citation was not “inconsistent”; it *plainly* contemplated alternatives. The citation contained a veritable grab-bag of potential abatement measures, not a cohesive series of interrelated steps. And, unlike in *Sturgill*, it did not describe the alleged violation as a failure to implement a “program.” Each proposed abatement was a separately numbered and self-contained prescription—not a requirement to “develop” a “program.” Compare JA570-571 (Unopposed Motion to Amend Abatement in Citation and Complaint, at 2-3) with *Sturgill*, 2019 WL 1099857, at \*9 n.17

(describing five specific, numbered abatement measures and unnumbered requirement to “develop an acclimatization program”).

Likewise, as in *Sturgill*, the Secretary litigated its proposed abatements as alternatives. In its post-trial briefing before the ALJ, the Secretary argued that “*each* of his proposed abatement measures would have *independently provided a material reduction* in the hazard of workplace violence,” although “[m]aximal reduction of workplace violence *may* require implementation of multiple abatement measures.” JA638 (SOL Post-Trial Br., at 54 n.7) (emphasis added); *see also* Op. 12. *Compare Sturgill*, 2019 WL 1099857 \*9 (reasoning that “could also have” language introducing abatements suggested alternatives) *with* JA638-648 (SOL Post-Trial Br., at 54-64) (various seriatim abatements “could have” been implemented). Then, in its principal brief before the Commission, the Secretary described its proposal as reflecting numerous “abatement *methods*.” JA728 (SOL’s Comm’n Br., at 35) (emphasis added); *see* JA727-728 (SOL’s Comm’n Br., at 34-35).

Further paralleling *Sturgill*,<sup>4</sup> the Secretary’s reply brief before the Commission was the very first time the Secretary argued in earnest that the proposed abatements were a “process”—supposedly because “each proposed abatement method would help avoid different and separate acts of patient-on-staff violence.”

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<sup>4</sup> *Cf. Sturgill*, 2019 WL 1099857, at \*9 n.17 (“Only after being asked a fourth time, at which point the ramifications of his prior answers were evidently now clear, did counsel assert that they are not alternatives.”).

*See* JA798 (SOL’s Reply Br., at 9 (citing dissent in *Sturgill*, 2019 WL 1099857, at \*22-23)). Thus, according to the Secretary, “maintaining sufficient staff to implement 1:1 orders would reduce the hazard of patient-on-staff assaults committed by the patients placed on the 1:1 orders,” whereas “providing panic alarms would reduce the hazard by enabling employees to summon help more quickly when assaults do occur.” But the Secretary’s position is self-defeating. It defined the hazard so generally that these abatements cannot but address the same hazard. (It’s also unclear why a panic alarm would not help abate an assault in almost *any* context.) It is unclear, too, how greater staffing for “acuity”—*i.e.*, a function of danger accounting for staffing levels, patient numbers, and patient condition, *see* ALJ Op. 32—somehow addresses a *different* hazard than greater staffing for a “1:1” assignment to monitor an agitated or violent patient. *See* SOL Post-Trial Br. at 21-22.

Yet the Commission reasoned that each of the abatement measures was designed to address a different form of workplace hazard owing to “different contexts and conditions at Pembroke.” Op. 12. *Compare with Sturgill*, 2019 WL 1099857, at \*22 (Atwood, Comm’r, dissenting) (“the measures are, by their very terms, cumulative measures *that each address distinct aspects of the excessive heat hazard* and together form a complete prevention program.” (emphasis added)). The Commission never explains *how* the Secretary’s abatements map on to a protean

hazard of violence described as occurring in an unspecified variety of “contexts and conditions” Op. 12.<sup>5</sup> (Compounding the Commission’s arbitrary reasoning, just before describing the Secretary’s abatements as a multifaceted process tracking a multifarious hazard, Op. 12 the Commission zooms out and characterizes the violation as “repeat” by adverting to the monolithic “hazard of physical assault.” Op 19.)

In short, under *Sturgill*—which is not materially distinguishable from this case—there can be no meaningful dispute that the abatements proposed by OSHA are correctly understood as alternatives, not an exhaustive process. The Commission’s unreasoned conclusion to the contrary violates the “fundamental

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<sup>5</sup> The Commission’s (and the ALJ’s) citations to *Pepperidge Farm*, *Integra*, and *BHC* fail to distinguish *Sturgill*. In *Pepperidge Farm*, the Commission approved of a process approach, found that the employer had in fact employed such an approach, and held for the employer that it had already taken adequate measures. *Pepperidge Farm, Inc.*, OSHRC No. 89-265, 1997 WL 212599, at \*51 (Apr. 26, 1997). The process versus alternatives analysis is thus *dicta*, and in any event bears no resemblance to this case; there, the Secretary had proposed a process-by-experimentation in which the employer would “discover—through the *adoption and evaluation of the many suggested means of abatement*—precisely what particular mix of [measures] most efficiently reduces the [hazard].” *Id.* at \*44 (emphasis added). As for *Integra*, “[t]he only abatement argument *Integra* made to the judge, and the only one the company [made] on review, is that the Secretary failed to establish that the proposed abatement measures would materially reduce the incidence of the workplace violence hazard.” *Integra Health Mgmt., Inc.*, OSHRC No. 13-1124, 2019 WL 1142920, at \*13 (Mar. 4, 2019). And the *BHC* Court, which does not bind this one, did not address *how* to determine whether multiple abatements are a process or alternatives. See *BHC Nw. Psychiatric Hosp., LLC v. Sec’y of Lab.*, 951 F.3d 558, 565 (D.C. Cir. 2020).

norm of administrative procedure [that] requires an agency to treat like cases alike.” *Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

And the Commission’s error was prejudicial: As Pembroke argued before the Commission, Pembroke “put forth evidence that it had adequate staffing, and at a minimum the record is equivocal regarding this abatement measure.” JA749 (Pembroke Br. in Supp. of Discretionary Review, at 19 n.20). Yet the Commission did not pass on the question whether Pembroke had implemented at least *some* abatement measures, which is all that was required. Op. 13 n.11; *see* Op. 13-17. *Sturgill*, 2019 WL 1099857, at \*9 (“Therefore, if the record shows that Sturgill implemented any one of the Secretary’s proposed measures, or is equivocal in that regard, the abatement element of the Secretary’s burden of proof has not been established.”).

### **III. THE COMMISSION’S CHARACTERIZATION OF THE VIOLATION AS “REPEAT” WAS ARBITRARY AND CAPRICIOUS**

The Commission reversed the ALJ’s determination that the violation was properly characterized as “repeat”—and so subject to higher penalties—based on a 2015 violation at LTC, a completely different Pembroke treatment facility. The ALJ had it right the first time: The Secretary needed to show that the circumstances surrounding the violations were “substantially similar,” but it offered virtually no evidence to support such a finding. Instead, the Commission defined the relevant

“hazard” at such a level of generality—*viz.*, the “hazard of physical assault by patients”<sup>6</sup>—that virtually *any* two General-Duty-Clause violations would qualify. Compounding the error, the Commission erred as a matter of law by ignoring altogether Pembroke’s rebuttal evidence showing that, in point of fact, the differing abatements proposed for each violation betrayed the markedly *dissimilar* circumstances surrounding each. Op. 19 & n.19 (dismissing evidence of dissimilar abatements as “not relevant”).

The Commission’s holding is inconsistent with the statute, flouts judicial and Commission precedent, and should be vacated.

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The OSH Act authorizes enhanced penalties for “repeat” violations. 29 U.S.C. § 666(a). These enhanced penalties are considered “appropriate” because “once an employer has been found to have violated” the “same or similar regulation,” “it is reasonable to expect that extra precautions will be taken.” *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996). But that expectation is reasonable *only* if the ostensibly “repeat” violations are sufficiently similar in nature. If the violations are too generally framed, “repeated violations will be unavoidable

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<sup>6</sup> In its post-trial brief’s defense of the proposed abatements, the Secretary framed appropriately narrower hazards relating to inpatient violence—*e.g.*, of “the heightened risk associated with the admissions process,” JA638 (SOL Post-Trial Br., at 54), or the “risks of interference with or inadequate staffing for 1:1 assignments,” JA641 (SOL Post-Trial Br., at 57).

and invite enhanced penalties without connoting any enhanced culpability,” *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998) (Posner, J.),<sup>7</sup> thereby “disadvantag[ing]” certain employers “merely for being large,” *Wal-Mart Stores, Inc. v. Sec’y of Lab.*, 406 F.3d 731, 737 (D.C. Cir. 2005).

The statute does not itself define “repeat.” Instead, the definition has been provided by Commission precedent approved by the Secretary and the courts: “A violation is ‘repeated’ if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *D.M. Sabia Co.*, 90 F.3d at 860 (quoting *Sec’y of Labor v. Potlatch Corp.*, OSHRC No. 16-183, 1979 WL 61360, at \*3 (Jan. 22, 1979) (cleaned up)).

The Secretary makes a *prima facie* case of substantial similarity merely by “showing that the prior and present violations are for failure to comply with the same standard.” *Gem Indus., Inc.*, 1996 WL 710982, at \*5. That makes sense—the two violations had to be “substantially similar in nature in order to be violations of the same standard” in the first place. *Potlatch Corp.*, 1979 WL 61360, at \*3.

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<sup>7</sup> The Secretary has expressed OSHA’s “full agreement with [*Caterpillar*’s] principle and believes that both its enforcement guidance and the caselaw of the Review Commission and the courts have been consistent with it. Application of this principle assures fairness even to very large employers.” OSHA Standard Interpretation Letter (July 13, 1999), <https://www.osha.gov/laws-regs/standardinterpretations/1999-07-13-1> (last visited Aug. 17, 2022).

But where, as here, a repeat characterization is based on the General Duty Clause, “the Secretary must show more”: the Secretary must show “substantial similarity based on the *circumstances surrounding* the hazard.” *Gem Indus., Inc.*, 1996 WL 710982, at \*5 (emphasis added). This, too, makes sense: the standards that the Secretary promulgates through rulemaking define a hazardous condition and set forth mandatory countermeasures after notice and comment. The General Duty Clause, however, does not establish the existence of any hazard at all, provides no notice of the rule to the public, and allows no opportunity to comment. It can be applied to a wide variety of workplace-safety risks, and the existence of a hazard and feasible abatements are both elements of a violation that the Secretary must prove. *See Harry C. Crooker & Sons, Inc. v. Occupational Safety & Health Rev. Comm’n*, 537 F.3d 79, 85 (1st Cir. 2008). Thus, where the General Duty Clause is at issue, the term “substantially similar” must be “defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation.” *Caterpillar*, 154 F.3d at 403.

**A. The Commission Defied Precedent By Comparing The Two Violations At An Impossibly High Level Of Generality**

The Secretary, and the Commission on review, defied Circuit and agency precedent in defining “substantial similarity” at such a high level of generality—in marked contrast to the telephoto lens used by the Commission when analyzing the process vs. alternative question (*see supra* pp. 30-31)—that virtually *any* General

Duty Clause violation could qualify as “repeat.” Specifically, the Commission determined the Secretary had shown “substantial similarity” because “both violations involve employees exposed to an almost identical hazard—the hazard of physical assault by patients at a psychiatric care facility.” Op. 19; *see also* JA617, 619 (SOL Comm’n Br., at 33, 35) (urging that “the hazard—patient-on-staff workplace violence—was exactly the same”).

True enough—framed at a level of generality akin to “the hazard to police officers of suspect-on-officer violence”—the hazards are similar. True, too, that the “circumstances” of the violations were similar, insofar as they involved basic acts of violence (punching, kicking, biting) and injuries (concussions, contusions, strains) typical of personal assaults in many contexts. *See* JA617-618 (SOL Comm’n Br., at 33-34). But precedent requires similarity more “substantial” than these superficialities. *Compare Gem Indus., Inc.*, 1996 WL 710982, at \*5 (generalized characterization of prior fall hazard, with evidence of similar fall-height, insufficient). The Secretary was obligated to come forward with “evidence regarding the *particular circumstances* of the first [General Duty Clause] citation.” *Id.* at \*6 (emphasis added); *see also Brennan v. Occupational Safety & Health Rev. Comm’n*, 502 F.2d 946, 952-53 (3d Cir. 1974) (“Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed.”). The Secretary did not. Instead, as the ALJ found, “[t]he limited

information in the record reveals only that the cited workplaces had significant differences related to the hazard.” ALJ Op. at 75; *see* JA333-347 (GX-14).

That will not do. If all that mattered were the similarity of vaguely defined hazards—even though the statute speaks of repeated “*violations*”<sup>8</sup>—OSHA would have the power to penalize the inpatient psychiatric care industry out of existence, without ever establishing a standard for that industry to follow. After all, “the hazard of physical assault by patients” (Op. 19) is an inevitable truth of running a psychiatric care facility. Recognizing the dubiously delegated power that the General Duty Clause *could* be read to confer, “[t]he courts and the Department of Labor have recognized that [its] broad terms . . . must be applied reasonably lest the Clause morph into a blunt instrument” for imposing strict liability. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218-19 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *see Brennan*, 502 F.2d at 952-53 (3d Cir. 1974). Exercising due restraint, “the Department has acknowledged that hazards posed by the normal activities intrinsic to an industry cannot be ‘feasibly’ eliminated and so may not form the basis of a General Duty Clause citation.” *SeaWorld*, 748 F.3d at 1219 (Kavanaugh, J., dissenting) (discussing *Pelron Corp.*, OSHRC No. 82-388, 1986 WL 53616 (June 2, 1986)).

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<sup>8</sup> As explained *supra* p. 35, the existence of a hazard is but one of four elements necessary to establish a General Duty Clause violation.

It follows that—even where a hazard intrinsic to an industry can be feasibly *mitigated*, and so (under current precedent) form the basis for a General Duty Clause violation—“substantial similarity” cannot be defined in terms so general as to threaten the very existence of that industry through enhanced penalties. Congress did not clearly empower the Secretary or the Commission to exercise such “unprecedented power over American industry.” *W. Va. v. EPA*, 142 S. Ct. 2587, 2612 (2022) (quoting *The Benzene Case*, 448 U.S. 607, 645 (1980) (plurality opinion)). See *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm’n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (“The duty was to be an achievable one”).

It would be passing strange if such power were buried in a provision that was “intended to serve only as a stopgap measure to protect employees until standards could be adopted.” *Sturgill*, 2019 WL 1099857, at \*5 n.9 (04 National/Federal Feb. 28, 2019) (internal quotation marks omitted); *Kastalon, Inc.*, OSHRC Nos. 79-5543 & 79-3561, 1986 WL 53514, at \*2 (July 23, 1986) (“Congress contemplated that the Secretary would place primary reliance on standards to achieve safe and healthful workplaces and envisioned that the general duty clause would be used sparingly.”).<sup>9</sup>

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<sup>9</sup> The “substantial similarity” analysis here would be vastly simpler (and fairer) had OSHA promulgated workplace-violence standards under its rulemaking powers, as the House of Representatives and multiple Commissioners have urged. See H.R. 1309, 116th Cong. § 101 (2019); *Integra.*, 2019 WL 1142920, at \*23 n.24 (MacDougall, Comm’r, Concurring); *id.* at \*15-16 & n.17 (Sullivan, Comm’r,

It would be stranger still where, as here, the hazard at issue implicates sensitive medical judgments that highly trained psychiatrists, nurses, medical administrators, and state authorities—not OSHA—have the training and expertise to address. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (“The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.”).

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concurring). Instead, that proposed rulemaking has languished on OSHA’s regulatory agenda for more than a decade while the Secretary relies on ad-hoc adjudication under a provision designed as a stopgap, not a catchall. *Integra*, 2019 WL 1142920, at \*21 n.22. O.S.H. Dec. (CCH) ¶ 33713 n.24 (04 National/Federal Mar. 4, 2019) (MacDougall, Comm’r., Concurring) (discussing Prevention of Workplace Violence in Healthcare and Social Assistance, 81 Fed. Reg. 88,147, 88,150 (Dec. 7, 2016); *see id.* at \*15 (Sullivan, Comm’r, concurring).

The problems posed by the Secretary’s approach are compounded by the unique structure of the OSH Act agencies. While courts generally must defer to agencies’ decisions to make policy through adjudication or rulemaking, *see N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974), the OSH Act provides reason to believe Congress intended that rulemaking predominate. The OSH Act rulemaking provisions are more stringent than those under the APA. *See* 29 U.S.C. § 655 (b)(3) (1994); *see also Industrial Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467, 472 (D.C. Cir 1974) (noting differences). And the Commission has no policymaking power, unlike most agencies exercising their adjudicative functions. The Secretary’s prolific use of the General Duty Clause takes the Commission “beyond the limited adjudicatory role” the statute assigns it. *Kastalon*, 1986 WL 53514, at \*13. *See also Brennan*, 502 F.2d at 950 (rejecting application of General Duty Clause to case before it but “distinguish[ing] at the outset the issue whether the Secretary . . . might impose by rule” requirements to address the cited hazard.).

**B. The Commission erred in holding the differences in proposed abatements irrelevant**

1. An obvious way to solve this generality problem is to consider, even if not exclusively, the *abatements* ordered in the putatively “similar” violations. The Commission has done just that in the past. *E.g.*, *Monitor Constr. Co.*, OSHRC No. 91-1807, 1994 WL 39006, at \*6 (Feb. 8, 1994) (“In this case, it is the disparity of the hazards *and the means of abatement required* that leads us to find that the present violation was not repeated.”) (emphasis added). In the proceedings below, even the Secretary seemingly acknowledged that “the similarity of the abatement can show the similarity of the circumstances surrounding the violation.” JA728 (SOL Comm’n. Br., at 35).

To be sure, the proposed abatements may not be the sole criterion in determining whether two violations were substantially similar. *Stone Container Corp.*, OSHRC No. 88-310, 1990 WL 139160, at \*6 (Aug. 29, 1990); *see Active Oil Serv., Inc.*, OSHRC No. 00-0553, 2005 WL 3934873, at \*6 (July 15, 2005). But the Commission has never before held that abatements are entirely immaterial. Nor could it: that would fly in the face of the statute, which speaks not of repeat “hazards,” but repeat “*violations*”—which includes the element of feasible abatement. 29 U.S.C. § 666(a). *See J.L. Foti Constr. Co. v. Occupational Safety & Health Rev. Comm’n*, 687 F.2d 853, 856–57 (6th Cir. 1982) (“Substantial similarity,

in turn, is determined with reference to the similarity of the violative elements of the infractions.” (cleaned up)).

Indeed, to tie “substantial similarity” *exclusively* to the nature of the hazard would, as the Seventh Circuit warned in *Caterpillar*, broaden the term so that the first citation would not give the employer “notice of the need to take steps to prevent the second violation,” *Caterpillar*, 154 F.3d at 403. *See Monitor Constr. Co.*, 1994 WL 39006, at \*6 (“unless the employer has previously been made aware that his safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the Act.” (quoting *George Hyman Constr. Co.*, 582 F.2d 834, 841 (4th Cir. 1978))). After all, “[d]isparate factual circumstances can result in the same hazard.” *Mondo Constr. Co., LLC Respondent.*, OSHRC-ALJ No. 13-1322, 2014 WL 768432, at \*9 (Dec. 1, 2014). *Cf. Mid S. Waffles, Inc.*, OSHRC No. 13-1022, 2019 WL 990226, at \*6 (Feb. 15, 2019) (“Absent such specificity [in proposed abatements], MSW lacked adequate notice as to what the Secretary was claiming was the extent of MSW's obligation under the general duty clause.”).

But that is just what the Commission did here.

2. The Secretary’s “repeat” characterization was premised entirely on a 2015 violation at LTC, a different Pembroke facility. As just discussed, the Secretary failed to produce a whisper of record evidence showing the requisite

“substantial similarity” between the two violations. In fact, the opposite is true: As the ALJ correctly found, what limited evidence *is* in the record—the abatements proposed for each violation—betrays “notabl[e] differen[ces]” between the two. ALJ Op. 75.

So, for example, the LTC citation recommended “[i]mplement[ing] and maintain[ing] a stand-alone Workplace Violence Prevention Program.” JA352-353 (GX-15, at 34). Not so for the Pembroke citation—Pembroke already *has* such a program. *See, e.g.*, ALJ Op. 22. Likewise, whereas the LTC citation suggested “[i]mplement[ing] and maintain[ing] training” regarding the facility’s violence-prevention protocols, the Pembroke citation says nothing about safety training;<sup>10</sup> it focuses almost exclusively on hiring staff that the LTC citation never mentioned. *Compare* JA352-353 (GX-15, at 3-4) *with* JA570-571 (Secretary’s Unopposed Motion to Amend Abatement in Citation and Complaint, at 2-3).

To put a finer point on it, certain of the proposed abatements are *irreconcilable* with one another. In the LTC citation, the Secretary suggested the use of “walkie-talkies,” “panic alarms,” or “*other similar devices*” to “rapidly summon assistance when needed.” JA353 (GX-15, at 4) (emphasis added). In the Pembroke citation, by contrast, the Secretary abruptly reversed course and deemed “walkie-talkies” and “similar devices” insufficient. Pembroke *has* walkie-talkies and “similar devices”

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<sup>10</sup> Save for training on the use of personal panic alarms, Op. 10 n.9.

(phones) for emergency use. ALJ Op. 41-42 & n.61 (Pembroke had “at least” four walkie-talkies per unit, and has since purchased more). But, by the Secretary’s lights, panic buttons—not walkie-talkies—are now the only useful form of electronics. JX571 (admonishing Pembroke to “[p]rovide personal panic alarms for all employees who may work in close proximity to patients”).

The Commission ignored all of this. It swept away the ALJ’s finding that the LTC and Pembroke abatements were “notably different”—as they plainly are—regarding that pesky detail “not relevant.” Indeed, the Commission disregarded *all* circumstances surrounding the two supposedly similar violations, instead training on the supposedly “shared” underlying hazard: “physical assault by patients at a psychiatric care facility.” Op. 19. Having defined the comparator hazard with a generality that stripped it of distinctive features, the Commission found that the two hazards were “almost identical.” Op. 18. With the Secretary’s *prima facie* burden carried by that feather-light showing, the Commission proceeded to dismiss as “not relevant” Pembroke’s rebuttal evidence demonstrating that the abatements proposed for each citation were dramatically different from one another. Op. 18-19 & n.19.

That was legal error. By relying *only* on the cited hazard, the Commission arbitrarily “depart[ed] from its established precedents without announcing a principled reason.” *Johnson*, 286 F.3d at 700 (internal quotation marks omitted). Nor only that, but the Commission defied the plain language of the

statute. *See supra* pp. 40-41. That alone own warrants vacatur, because an agency “literally has no power to act’—including under its regulations—unless and until Congress authorizes it to do so by statute.” *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

### CONCLUSION

The Commission has run roughshod over its own precedents, and in so doing, has created a moving target for Petitioners on each of the issues raised in this petition. This abuse of discretion requires vacatur and remand of the Commission’s decisions.

Respectfully submitted,

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