Nos. 15-1326 and 15-1340

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

AGRICULTURAL RETAILERS ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR and
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Respondents.

On Petitions for Review of a Memorandum of the
Occupational Safety and Health Administration

RESPONDENTS' PETITION FOR REHEARING AND REHEARING EN BANC

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November 7, 2016

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STATUTES AND REGULATIONS:

MISCELLANEOUS:

GLOSSARY

APA:	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
OSHA:	Occupational Safety and Health Administration
OSH Act (or Act):	Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
PSM:	OSHA's process safety management standard, 29 C.F.R. § 1910.119
RFI	Request for Information, 78 Fed. Reg. 73756 (Dec. 9, 2013)
Secretary	The United States Secretary of Labor

INTRODUCTION AND RULE 35(b)(1) STATEMENT

The governmental respondents petition for rehearing and rehearing en banc of the panel's decision vacating a memorandum of the Occupational Safety and Health Administration (OSHA) that articulated OSHA's current understanding of the term "retail facilities" in an exception to its Process Safety Management (PSM) standard, 29 C.F.R. § 1910.119(a)(2)(i). The panel held that OSHA's revision to its earlier interpretation of that term modified the PSM standard itself and was procedurally defective because OSHA issued its memorandum without notice-and-comment rulemaking. Although special notice-and-comment procedures must be followed before an OSHA standard is "promulgate[d], modif[ied], or revoke[d]," 29 U.S.C. § 655(b), the panel significantly erred in holding that OSHA *modified* the PSM standard by expressing the agency's own *interpretation* of that standard. Rehearing is warranted for three key reasons.

First, the panel assumed arguendo that the interpretive memorandum "would constitute an interpretive rule under the [Administrative Procedure Act (APA)]," but nevertheless held that the memorandum was an OSHA standard. Op. 10. The panel's rationale conflicts with the Supreme Court's specification in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), of the legal effect of interpretive rules. Interpretive rules—unlike legislative rules like OSHA

standards—do not have the force and effect of law, and OSHA's *interpretation* of its standard could not have modified the standard itself.

Second, the panel viewed Congress's failure to address expressly "interpretive rules" in the Occupational Safety and Health (OSH) Act as suggesting that the APA's provisions for interpretive rules would not govern in this statutory context. Op. 9. That conclusion fundamentally misapprehends what is needed to displace the APA's application, wholly ignoring the inquiry that Congress required in Section 12 of the APA. Because "[C]ongress[] specifi[ed] in the APA that '[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly,'" the Supreme Court has made clear that any "legislative departure from the norm [established by the APA] must be clear." *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (quoting APA § 12, 60 Stat. 244). The statutory silence here provides no such clarity. Indeed, the panel's decision conflicts with the Supreme Court's conclusion in *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 156-157 (1991), that OSHA *may* issue "interpretive rules" announcing its own interpretation of its standards as a means of interpreting those standards even "less formal" than issuing citations for violations.

Finally, the panel's invalidation of established administrative practice and deviation from the Supreme Court's relevant decisions threaten a significant

disruption of longstanding practices benefiting the public and the regulated community. Employers, trade associations, unions, and workers frequently request OSHA's interpretation of the regulatory "standards" it enforces; OSHA has issued hundreds of interpretations over many decades in response;[1] and the regulated community relies heavily on those interpretations. The panel's decision prevents OSHA from issuing such critical guidance. The decision accordingly presents a question of exceptional importance warranting rehearing by this Court.

BACKGROUND

1. The OSH Act. Under the OSH Act, the Secretary of Labor (Secretary), through OSHA, is responsible for "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To that end, the Act broadly authorizes OSHA to issue, without limitation, "rules and regulations as he may deem necessary to carry out [his] responsibilities under th[e] Act." 29 U.S.C. § 657(g)(2).

In addition, Congress addressed a particular type of legislative regulation—an "occupational safety or health standard"—and specified special rulemaking procedures for such rules. *See* 29 U.S.C. § 655(b). An "occupational safety and health standard" is a regulation that "requires conditions, or the adoption or use of

[1] *See, e.g.*, the more than 200 interpretations of the PSM standard alone, found at PSM Interpretations (https://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=INTERPRETATIONS&p_toc_level=1&p_keyvalue=Standard_Number) (last visited Nov 7, 2016).

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). OSHA may "promulgate, modify, or revoke" such standards by following special notice-and-comment procedures set forth in Section 6(b). 29 U.S.C. § 655(b). Section 6(f) of the Act makes OSHA standards subject to pre-enforcement review in the courts of appeals. 29 U.S.C. § 655(f).

The OSH Act does not otherwise address the promulgation of OSHA's other rules and regulations. The APA's rulemaking provisions accordingly apply to such agency rules. *See* 5 U.S.C. § 553(a); *see also* 5 U.S.C. § 551(1), (4). The requisite rulemaking procedures vary depending on the nature of the rule or regulation at issue. When a rule (other than a standard) is "designed to . . . prescribe law," 5 U.S.C. § 551(4), it must be promulgated using notice-and-comment rulemaking unless some exception applies. 5 U.S.C. § 553(b). Such "[r]ules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Mortgage Bankers*, 135 S. Ct. at 1203 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979)).

Interpretive rules—*i.e.*, "agency statement[s] . . . designed to . . . interpret . . . law," 5 U.S.C. § 551(4)—have a fundamentally different function and effect. Such rules "advise the public of the agency's construction of the statutes and rules which it administers;" may be adopted without notice-and-comment rulemaking;

and *unlike* legislative rules, "do *not* have the force and effect of law and are not accorded that weight in the adjudicatory process." *Mortgage Bankers*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)) (emphasis added).

2. OSHA's Interpretations Of The Process Safety Management Standard. In 1992, OSHA promulgated the PSM standard (29 C.F.R. § 1910.119) to protect "employees in industries with processes involving highly hazardous chemicals." 57 Fed. Reg. 6356, 6359 (Feb. 24, 1992) (Joint Appendix (J.A.) 70). The standard states that its requirements do not apply to "[r]etail facilities." 29 C.F.R. § 1910.119(a)(2)(i). The standard does not define "retail facilities," but the preamble published with it explained that OSHA intended the exemption to apply to facilities, such as gas stations, that sell highly hazardous chemicals in "small volume packages, containers and allotments." 57 Fed. Reg. at 6369 (J.A. 74).

Later in 1992, OSHA issued a letter in response to a request by industry for "interpretations and clarifications" of the PSM standard. J.A. 78-81. The 1992 letter stated that OSHA interpreted "retail facility" in the PSM standard as an establishment "which would otherwise be subject to the PSM standard, at which more than half of the income is obtained from direct sales to end users." J.A. 81.

This case concerns a 2015 memorandum that OSHA issued to announce its revised interpretation of "retail facility." After seeking public input,[2] OSHA issued its memorandum, which states that it "revises [OSHA's] interpretation of the exemption of retail facilities" in the PSM standard. J.A. 45. The memorandum adopts the revised interpretation that the agency suggested in requesting public comment. J.A. 45-47. As relevant here, the memorandum explains that the exemption for retail facilities should not be interpreted to extend to "facilities engaged in distinctly wholesale activities" even if more than 50 percent of their sales are made to end users. J.A. 46. The memorandum accordingly rescinds "all prior policy documents, letters of interpretation, and memoranda related to the retail exemption and the 50 percent test" articulated in OSHA's 1992 letter. *Ibid*.

3. The Panel's Decision. Petitioners filed petitions for pre-enforcement review of the 2015 memorandum. OSHA moved to dismiss the challenges for lack of subject-matter jurisdiction on the ground that this Court's jurisdiction to review a "standard issued under [29 U.S.C. § 655]," did not extend to OSHA's

[2] In 2013, OSHA issued a Request for Information (RFI) seeking, *inter alia*, comments on its interpretation of the scope of the retail exemption. 78 Fed. Reg. 73756 (Dec. 9, 2013) (J.A. 1-7). That RFI was issued in response to Executive Order 13650 (*Improving Chemical Facility Safety and Security*), which, following a catastrophic explosion at a fertilizer plant in West, Texas, directed the Secretary to "identify any changes that need to be made in the retail . . . exemption[] in the PSM Standard," and to "issue a[n RFI] designed to identify issues related to modernization of the PSM Standard . . . necessary to meet the goal of preventing major chemical accidents." 78 Fed. Reg. 48029, 48032 (Aug. 1, 2013) (J.A. 98).

memorandum, which was an "interpretive rule" that merely expressed OSHA's own interpretation of the PSM standard. After the parties declined to request oral argument, the panel issued its decision without argument.

The panel vacated the memorandum based on its holding that OSHA's issuance of the memorandum "qualified as issuance of a 'standard'" that required notice-and-comment rulemaking under 29 U.S.C. § 655(b), because it "narrow[ed] the substantive scope of the exemption for retail facilities" in the PSM standard. Op. 3. Although the panel recognized that the memorandum did not, on its own, "require new preventative measures" to address the risks associated with storing large quantities of highly hazardous chemicals, it concluded that the memorandum nonetheless modified the PSM Standard because: (1) its "essential effect and object . . . [was] to expand the substantive reach of the PSM Standard by narrowing [the retail] exemption"; and (2) "[b]y redefining retail facilities, the memorandum, in purpose and effect, subject[ed] a substantial number of businesses previously classified as exempt retail facilities to additional safety standards." Op. 9.

In so holding, the panel assumed "the rule at issue here would constitute an interpretive rule for purposes of the APA." Op. 10 (declining to decide the question). But the panel nevertheless concluded that Congress in the OSH Act required notice-and-comment procedures to promulgate such an interpretive rule: "The OSH Act does not adopt the 'interpretive rule' terminology, but instead uses

vocabulary distinct from the APA's," and "nothing in the OSH Act or APA establishes that the standard/non-standard distinction under the OSH Act must directly track the legislative/interpretive rule distinction under the APA." Op. 9.

REASONS FOR GRANTING REHEARING

THE PANEL'S HOLDING THAT OSHA CREATED A NEW STANDARD BY INTERPRETING A STANDARD'S TEXT IS CONTRARY TO RELEVANT STATUTORY AUTHORITY AND SETTLED PRECEDENT

The panel accepted *arguendo* that "the rule at issue here would constitute an interpretive rule for purposes of the APA," Op. 10, but held that the OSH Act required notice-and-comment procedures to promulgate OSHA's interpretive rule expressing the agency's own understanding of the meaning of "retail facilities" in its regulatory PSM standard. The panel's decision fundamentally misapprehends the role of the APA and "interpretive rules" in this context, and its decision conflicts with the reasoning of decisions by the Supreme Court and this Court. The panel's decision, moreover, effectively eliminates an administrative practice spanning many decades that significantly benefits the regulated community. Rehearing and oral argument is warranted before this Court imposes such a significant novation in the law.

1. First, although the panel assumed *arguendo* that the memorandum would "constitute an interpretive rule for purposes of the APA," Op. 10, the panel fundamentally erred in concluding that OSHA's interpretive rule "amounted to

[the] issuance (or modification) of an '[OSHA] standard,'" Op. 7, that "expand[ed] the substantive reach of the PSM standard" by "redefining retail facilities," Op. 9. An interpretive rule can have no such effect. The Supreme Court has made clear that an interpretive rule does not "amend" or "effectively amend[]" the regulation being interpreted any more than "a court 'amends' a statute when it interprets its text." *Mortgage Bankers*, 135 S. Ct. at 1207-08. Indeed, the Supreme Court's "longstanding recognition that interpretive rules"—unlike the legislative regulations they construe—"do not have the force and effect of law" demonstrates that an "interpretive rule" does not "change[] the regulation it interprets." *Id*. at 1208.

Even when an agency interpretation in an interpretive rule is accorded deference in litigation, "it is the court that ultimately decides whether a given regulation means what the agency says" in its interpretive rule. *Mortgage Bankers*, 135 S. Ct. at 1208 n.4. This Court itself has rejected OSHA's own interpretation of its standards. *See, e.g.*, *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1085-88 (D.C. Cir. 2007) (rejecting OSHA's interpretation of a safety standard). That outcome underscores that OSHA's interpretive rules do not, in fact, modify the standards they interpret, much less constitute a legislative-rule "standard" that the Court would be obligated to apply.

This case illustrates the point. The text of the PSM standard's exemption for "retail facilities" has not changed since the standard's promulgation in 1992.

Although OSHA previously interpreted the exemption to apply more broadly than the agency's current understanding, both the 1992 letter and the 2015 memorandum simply reflect the agency's own interpretation of what the standard requires. The agency's view that its current interpretation better conforms to the original language and intent of the standard by ensuring that only true "retail" facilities are exempt from PSM requirements, J.A. 45-46, therefore reflects a change from OSHA's prior interpretive guidance but—like any interpretive rule—it does not in any way alter the PSM standard itself. *See Edison Electric Inst. v. OSHA*, 411 F.3d 272, 282 (D.C. Cir. 2005) (concluding that OSHA directive interpreting an electrical standard was not itself a standard because it did not render any significant change to the underlying rule); *cf. Nat'l Ass'n of Manufacturers. v. OSHA*, 485 F.3d 1201 (D.C. Cir. 2007) (OSHA standard imposing duties based on the "latest edition" of a list of chemicals published by a private group is not amended every time the private group adds new chemicals to the list); *Steel Erectors Ass'n v. OSHA*, 636 F.3d 107, 116 (4th Cir. 2011) (explaining in analogous OSHA context that "a person who opened Volume 29 of the Code of Federal Regulations in 2001 would find the exact same requirements . . . that are on the books today").[3]

[3] Nor does the fact that the agency's interpretation advanced the goal of protecting workers from a specific hazard (Op. 8) suggest that the interpretation is itself a standard. An agency interpretation of a standard obviously will frequently

2. The panel concluded that the OSH Act could require an OSHA "interpretive rule" to be promulgated with the notice-and-comment procedures for "standards" in Section 6(b) because the Act refers to "standards" and, unlike the APA, does not refer to "interpretive rules." Op. 9. That reliance on statutory silence is precisely backwards, and it is inconsistent with the Supreme Court's decision in *Martin*, which concluded that OSHA may issue "interpretive rules" construing its own regulatory "standards" as a "less formal" means of expressing the agency's reading of those standards.

a. The OSH Act authorizes the Secretary, through OSHA, to issue "rules and regulations as he may deem necessary to carry out [his] responsibilities under th[e] Act." 29 U.S.C. § 657(g)(2). The APA, in turn, specifies the procedures for issuing such agency rules—including both legislative and interpretive rules. 5 U.S.C. § 553(a); *see* 5 U.S.C. § 551(1) and (4). This Court itself has long understood the APA's provisions to apply in this context. *See, e.g.*, *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1466 (D.C. Cir. 1995) (OSHA "has authority under the OSH Act to issue . . . regulations" through rulemaking pursuant to the Administrative Procedure Act.). Indeed, this Court has specifically recognized that OSHA may issue interpretive rules. *See, e.g.*, *Chamber of*

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advance the general purposes of the standard, but it does so without modifying the standard itself. *Cf. Steel Erectors*, 636 F.3d at 116 (change in enforcement policy was not an OSHA standard just because it sought "to decrease the risk of falls").

Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980) (29 U.S.C. § 657(g)(2) "allows the Secretary to promulgate legislative as well as interpretive rules"); *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1178 (D.C. Cir. 2014) (OSHA provided an adequate definition of a regulatory term by "point[ing] regulated entities to an 'operative definition' . . . in [an enforcement document]."

The fact that Congress failed to refer explicitly to "interpretive rules" in 29 U.S.C. § 655 or § 657 cannot warrant the panel's conclusion that such interpretive rules are "standards" under the OSH Act. Because "[C]ongress[] specifi[ed] in the APA that '[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly,'" any "legislative departure from the norm [established by the APA] must be clear." *Zurko*, 527 U.S. at 155 (quoting APA § 12, 60 Stat. 244). Congress's failure to refer to "interpretive rules" is therefore properly understood as accepting that OSHA may issue such rules interpreting OSHA's regulatory "standards." Silence is not a rejection of such authority.[4]

[4] The panel erred by considering the memorandum analogous to the OSHA directive at issue in *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999). *See* Op. at 7-8. That case did not involve an interpretive rule, or address the distinction between standards and interpretive rules. It involved an OSHA directive under which some employers would be inspected unless they adopted a safety and health program that exceeded the requirements of the OSH Act and OSHA standards. The Court held that the directive was an OSHA standard because the directive *itself* imposed new requirements more demanding than those required by the Act or any pre-existing regulation. *See* 174 F.3d at 210.

b. The panel's decision not only ignores the teachings of Section 12 of the APA, it also conflicts with the Supreme Court's conclusion in *Martin* that OSHA *may* issue "interpretive rules" announcing its own interpretation of its standards as a means of interpreting those standards that is "less formal" than issuing citations for violations. *Martin* held that the Secretary, rather than the Occupational Safety and Health Review Commission, should receive judicial deference for his interpretation of an OSH Act standard in 29 C.F.R. § 1910.1029 "establishe[d] . . . through the exercise of rulemaking powers" under 29 U.S.C. § 655. *See Martin*, 499 U.S. at 146-149, 158. In so holding, the Court rejected the argument that "the Secretary's interpretations of [such OSHA standards] will necessarily appear in forms undeserving of judicial deference." *Id*. at 156-157. The Court concluded that the Secretary should receive deference for such an interpretation embodied in a citation issued for a violation of a standard. *Id*. at 157.

Significantly, *Martin* further concluded that the Secretary's "promulgation of interpretive rules" was one of the other "*less formal* means of interpreting regulations prior to issuing a citation" that "the Secretary regularly employs" in this context. *Martin*, 499 U.S. at 157 (emphasis added). The Court added that such "interpretive rules" reflect "informal interpretations" of standards that might not be entitled to the "same [degree of] deference" as interpretations reflected in

the Secretary's issuance of OSH Act citations, but the Court made clear that they are entitled to at least "some weight in judicial review." *Ibid.*

Although one may debate the degree of judicial deference owed to the 2015 interpretive rule in this case, the case involves only the procedure required to issue it. And the panel's procedural decision cannot be squared with *Martin*: If, as the panel holds, such an "interpretive rule" must be issued through notice-and-comment rulemaking, it would not be a "less formal" means of interpreting the standard, it would itself be a standard that—unlike an interpretive rule—has the force and effect of law.

3. The panel's decision, if not modified on rehearing, threatens a significant and adverse alteration of the legal landscape that will prevent OSHA from issuing interpretive rules that merely "advise the public of the agency's construction of" its regulation. See *Mortgage Bankers*, 135 S. Ct. at 1203. To the extent that the interpretive rule here is a "standard" that must be promulgated using notice-and-comment rulemaking, other OSHA interpretations are also procedurally invalid for the same reason. The OSH Act does not distinguish between rules that increase and those that decrease the requirements set forth in standards. Whether OSHA increases those requirements by "promulgat[ing]" or "modify[ing]" a standard or diminishes them by "modify[ing]" or "revok[ing]" an existing standard, it must use special notice-and-comment requirements. 29 U.S.C. §

655(b). And interpretive rules construing OSH standards by their very nature necessarily reject both narrower and broader readings of the underlying standards.

The agency's 1992 letter, for instance, which OSHA issued in response to an industry request for an interpretation, expresses the agency's prior interpretation of the PSM standard that, like the 2015 memorandum, rejects other possible interpretations, whether they be deemed broader or narrower. If the panel's decision is not altered, therefore, OSHA will rescind the 1992 letter and will be precluded from publicly announcing its own views on the scope of the exemption.

That outcome significantly and erroneously undermines the policy of encouraging agencies to issue interpretive rules to "advise the public of the agency's construction of the statutes and rules which [they] administer[]." *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (quoted in *Mortgage Bankers*, 135 S.Ct. at 1203). Although it is "no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities," *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.), *see also American Mining Cong. v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993) (similar), the panel has reached precisely that result.

For the foregoing reasons, the Court should grant panel or en banc rehearing.

Respectfully submitted.

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ADDENDUM

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The parties in Case No. 15-1326 are:

Petitioners:
Agricultural Retailers Association
The Fertilizer Institute

Respondents:
U.S. Department of Labor
Occupational Safety & Health Administration

The parties in Case No. 15-1340 are:

Petitioners:
Allied Cooperative of Adams, WI
Basin Fertilizer & Chemical Co., LLC of Merrill, OR
Bern Seed, Inc. of Bern, KA
Brandt Consolidated, Inc. of Springfield, IL
Centennial Ag Supply Co. of Greeley, CO
Consumers Oil & Supply Company of Braymer, MO
Farmers Feed & Grain Company, LLC of Riceville, IA
Harvest Land Co-Op of Richmond, IN
O'Toole, Inc. of Letts, IA
Pinnacle Ag Holdings, LLC of Memphis, TN
Premier Ag Co-op Association of Columbus, IN
Sinclair Elevator, Inc. of Parkersburg, IA
South Dakota Wheat Growers of Aberdeen, SD
Stratton Seed Co. of Stuttgart, AK
The Andersons, Inc. of Maumee, OH
The Equity of Effingham, IL
The McGregor Company of Colfax, WA
Van Horn, Inc. of Mt. Zion, IL

Respondents:
U.S. Department of Labor
Occupational Safety & Health Administration

The Court granted the United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC amicus curiae status in both cases.

(B) Rulings Under Review

At issue is an OSHA memorandum, dated July 22, 2015, entitled "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(i))."

(C) Related Cases

These matters have not previously been before this Court or any other court. The undersigned counsel are not aware of any other related cases currently pending in this Court or any other court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted May 16, 2016 Decided September 23, 2016

No. 15-1326

AGRICULTURAL RETAILERS ASSOCIATION AND THE FERTILIZER INSTITUTE,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR AND OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,
RESPONDENTS

Consolidated with 15-1340

On Petitions for Review of a Memorandum
of the Occupational Safety & Health Administration

Gary H. Baise, *Stewart D. Fried*, *Chris S. Leason*, *Mark C. Dangerfield*, and *Andrew E. Dudley* were on the joint briefs for petitioners. *Anson M. Keller Sr.* entered an appearance.

Ann S. Rosenthal, Associate Solicitor, Occupational Safety & Health Administration, *Charles F. James*, Counsel, U.S. Department of Labor, and *Lauren S. Goodman*, Senior

Attorney, U.S. Department of Labor, were on the brief for respondents.

Randy S. Rabinowitz was on the brief for movant-intervenor for respondents.

Before: ROGERS, SRINIVASAN and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: The Occupational Safety and Health Administration, part of the Department of Labor, aims to secure "safe and healthful working conditions" for the Nation's workers. 29 U.S.C. § 651(b). To that end, OSHA in 1992 issued the so-called Process Safety Management Standard to protect the safety of those who work with or near highly hazardous chemicals. From its inception, the standard has exempted retail facilities from its requirements. The exemption rests on an assumption that the retail setting involves diminished risks of a substantial release of toxic chemicals. Recently, after a catastrophic chemical explosion at a Texas fertilizer company that qualified as an exempt retail facility, OSHA narrowed the scope of the retail-facility exemption so that the safety standard's requirements would now apply to formerly exempt facilities like the Texas plant.

The question we confront is whether, when OSHA narrowed the scope of the exemption for retail facilities, the agency issued a safety "standard" within the meaning of the Occupational Safety and Health Act (OSH Act). If so, we have jurisdiction to review OSHA's action, and the OSH Act would have required the agency to adhere to procedural notice-and-comment requirements, which it concededly did not do. If, however, OSHA's action did not amount to

issuance of a "standard," we would lack jurisdiction to review it and the OSH Act would have imposed no obligation to follow notice-and-comment procedures.

Under our decisions, when an action by OSHA corrects a particular hazard, as opposed to adjusting procedures for detection or enforcement, it amounts to a "standard." Applying that understanding, we conclude that the agency's narrowing of the substantive scope of the exemption for retail facilities qualified as issuance of a "standard." We therefore have jurisdiction, and OSHA was required to adhere to notice-and-comment procedures. Consequently, we grant the petitions for review and vacate OSHA's action.

I.

In 1992, OSHA promulgated the Process Safety Management (PSM) Standard in an effort to "provide safe and healthful employment and places of employment for employees in industries which have processes involving highly hazardous chemicals." Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6359 (Feb. 24, 1992), *codified at* 29 C.F.R. § 1910.119 (2016). The PSM Standard "contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals." 29 C.F.R. § 1910.119.

From the outset, OSHA exempted "[r]etail facilities" from the requirements of the PSM Standard. *Id.* § 1910.119(a)(2)(i). The exemption, OSHA explained in the preamble of the final standard, was rooted in an understanding that "chemicals in retail facilities are in small volume packages, containers and allotments, making a large release [of toxic chemicals] unlikely." 57 Fed. Reg. at 6369. OSHA

identified "gasoline stations" as prototypical examples of retail facilities. *Id.* Shortly after promulgating the PSM Standard, OSHA issued a letter defining an exempt retail facility as "an establishment . . . at which more than half of the income is obtained from direct sales to end users." *See* Letter from Patricia K. Clark, Dir. of Enf't Programs, OSHA, to Gary Myers, President, The Fertilizer Inst. (June 19, 1992). The "50 percent test" remained the rule for more than two decades.

In April 2013, a catastrophic chemical explosion at a fertilizer company in West, Texas, resulted in the deaths of 15 persons and injured many others. Although the company stored large quantities of a highly hazardous chemical (anhydrous ammonia) for bulk distribution as fertilizer to farmers, it had been exempt from the PSM Standard under the 50 percent test for retail facilities. That test had enabled establishments to claim the exemption even if they stored large amounts of hazardous chemicals for distribution in wholesale quantities to commercial end users (including farmers), as long as the distributions went directly to the end users.

After the explosion at the West, Texas, fertilizer facility, President Obama issued an executive order that, among other things, directed the Secretary of Labor to "identify any changes that need to be made in the retail . . . exemption[] in the PSM Standard" so as to "meet the goal of preventing major chemical accidents." Improving Chemical Facility Safety and Security, 78 Fed. Reg. 48029, 48032 (Aug. 1, 2013). OSHA responded in 2015 by issuing the Memorandum at issue in this case. OSHA, Memorandum on Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 C.F.R. § 1910.119(a)(2)(i)), July 22, 2015.

The Memorandum "rescind[ed] all prior policy documents, letters of interpretation, and memoranda related to the retail exemption and the 50 percent test." *Id.* OSHA explained that the "50 percent test allows employers who sell or distribute large, bulk quantities of highly hazardous chemicals directly to end consumers to claim the exemption, even if the end users are themselves commercial establishments." *Id.* That result was "directly contrary to OSHA's original intent," i.e., "to exclude retail facilities from PSM coverage because the small container, package, or allotment sizes of the chemicals typically found at these facilities do not present the same safety hazards as establishments that handle large, bulk quantities of materials." *Id.* Concluding that the retail exemption "should never have been interpreted to cover facilities engaged in distinctly wholesale activities," OSHA announced that retail facilities would instead be defined by a Department of Commerce manual classifying types of businesses. *Id.* Under that definition, retail facilities must be "organized to sell merchandise in small quantities to the general public." *Id.* Because farm supply establishments like the West, Texas, facility sell chemical fertilizers in bulk to farmers, they fall outside the revised definition of retail facilities. *Id.* Under the new definition, those facilities thus would become subject to the PSM Standard's requirements for managing highly hazardous chemicals.

II.

The Agricultural Retailers Association, the Fertilizer Institute, and a number of individual businesses brought petitions for review in this court to challenge OSHA's narrowed definition of retail facilities. According to petitioners, the OSH Act required the agency to adhere to

notice-and-comment procedures in promulgating its new definition. We agree with petitioners.

The OSH Act authorizes the Secretary of Labor, through OSHA, to promulgate "occupational safety [and] health standard[s]." 29 U.S.C. § 655(b). The Act provides for pre-enforcement review in the courts of appeals of any such "standard" issued by OSHA. *Id.* § 655(f). The Act also authorizes the promulgation of "regulation[s]" (and other rules falling short of "standards"), which are governed by a different means of judicial review: challenges to regulations are brought under the Administrative Procedure Act (APA), which calls for initial review in federal district court rather than in a court of appeals. *Id.* § 657(c)(1); *see also Edison Elec. Inst. v. OSHA*, 411 F.3d 272, 277 (D.C. Cir. 2005); *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467 (D.C. Cir. 1995).

The OSH Act provides for distinct treatment of "standards" in another pertinent respect as well. When promulgating or modifying a "standard," OSHA must adhere to notice-and-comment procedures set forth in the OSH Act. 29 U.S.C. § 655(b). OSHA concedes that, when it promulgated its Memorandum redefining "retail facility," it did not satisfy the procedural requirements for standards. The agency instead argues that the Memorandum did not issue or modify a standard. In the agency's view, the Memorandum only interpreted an existing standard, and it therefore was subject neither to the procedural requirements set out in the OSH Act, *id.*, nor to direct review in this court under that Act, *id.* § 655(f).

The existence of jurisdiction in this court, as well as the applicability of the OSH Act's notice-and-comment procedures, both turn on the same question: whether OSHA's

Memorandum amounted to issuance (or modification) of an "occupational safety and health standard." The OSH Act defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.* § 652(8).

Our decisions construing that definition have established a framework for differentiating between OSHA standards and regulations. A standard within the meaning of that definition is "a remedial measure addressed to a specific and already identified hazard, not a purely administrative effort designed to uncover violations of the Act and discover unknown dangers." *Workplace Health & Safety Council*, 56 F.3d at 1468 (quoting *La. Chem. Ass'n v. Bingham*, 657 F.2d 777, 782 (5th Cir. 1981)). Standards, that is, are designed for "correction rather than mere inquiry into possible hazards." *Id.* They focus on "correct[ing] a particular significant risk," not on "general enforcement." *Id.* (quotation and internal quotation marks omitted).

In *Workplace Health & Safety Council*, we applied that understanding to find that a rule requiring employers to report workplace deaths and hospitalizations was a regulation rather than a standard. 56 F.3d at 1468. The "basic function of the rule [was] administrative," in that it principally served to enable "collect[ing] information about unknown hazards." *Id.* We distinguished "information-gathering" measures of that kind from the "correction of a particular significant risk." *Id.* (quotation and internal quotation marks omitted).

When we later applied the same framework in *Chamber of Commerce of the United States v. U.S. Department of*

Labor, 174 F.3d 206 (D.C. Cir. 1999), we reached the opposite outcome with regard to the OSHA rule at issue in that case. We determined that a compliance program subjecting businesses to extra inspections if they did not engage in specified safety measures amounted to a standard rather than a regulation. That program aimed at "correcting, rather than merely uncovering," workplace safety hazards. *Id.* at 210. It therefore could not "be described as merely an enforcement or detection procedure." *Id.* (quotation and internal quotation marks omitted). Whereas the rule held to be a regulation in *Workplace Health & Safety Council* was "procedural," the "basic function of the rule" in *Chamber of Commerce* was "substantive," in that it "impose[d] upon employers new," and "more demanding," "safety standards" than those in existence beforehand. *Id.* at 210-11.

Under the principles set forth in those decisions, we conclude that OSHA's new definition of a retail facility, like the compliance program in *Chamber of Commerce*, amounts to a standard. The "basic function" of OSHA's new definition is to address a "particular significant risk," *id.* at 209: the risk associated with storing large quantities of highly hazardous chemicals for distribution to end users in bulk quantities, as had been the case at the West, Texas, fertilizer company. OSHA's Memorandum aims not just to gather data about that risk or otherwise serve a general detection or enforcement function, but instead to correct the risk by subjecting facilities such as farm supply companies to the preventative measures in the PSM Standard. OSHA estimates that its revised definition would subject up to 4,800 facilities to "new," and necessarily "more demanding," substantive standards for the management of highly hazardous chemicals. *Id.* at 211.

Of course, the Memorandum itself does not require new preventative measures of its own accord; it does so in conjunction with the PSM Standard. But we do not look at the Memorandum in strict isolation. We consider the Memorandum's "practical effect," not "its formal characteristics." *Id.* at 209. And the essential effect and object of the Memorandum is to expand the substantive reach of the PSM Standard by narrowing an exemption from that standard. As OSHA describes the measure, it aims to eliminate "policy and regulatory gaps" so as to help "prevent incidents like the West Fertilizer explosion." OSHA, Questions and Answers—PSM Retail Exemption Policy, July 22, 2015. By redefining retail facilities, the Memorandum, in purpose and effect, subjects a substantial number of businesses previously classified as exempt retail facilities to additional safety standards in order to address a "particular significant risk." Given those specific circumstances, the measure, under our decisions, qualifies as a standard within the meaning of the OSH Act.

OSHA argues that the Memorandum cannot be a standard because it would constitute an interpretive rule under the APA. But nothing in the OSH Act or APA establishes that the standard/non-standard distinction under the OSH Act must directly track the legislative/interpretive rule distinction under the APA. The OSH Act and the APA prescribe different procedural requirements, and those requirements do not necessarily apply to the same subset of rules. Unlike some other statutes, the OSH Act does not adopt the "interpretive rule" terminology, but instead uses a vocabulary distinct from the APA's. *Compare* 29 U.S.C. § 655, *with* 42 U.S.C. § 1395hh(c) (using the term "interpretive rules" in the Medicare Act). And petitioners' principal submission is that they are entitled to relief under the OSH Act's governing

standards, a result that, in their view, renders the APA irrelevant. Petitioners' Reply Br. at 1-3.

We thus need not decide whether the rule at issue here would constitute an interpretive rule for purposes of the APA. Because the Memorandum amounts to a standard within the meaning of the OSH Act, we have jurisdiction to review it and to vacate it for failure to comply with the procedural requirements established by that Act. Of course, nothing in our decision necessarily calls into question the substance of OSHA's decision to narrow the exemption for retail facilities and correspondingly to expand the scope of the PSM Standard. We hold only that, insofar as OSHA does so, it must follow the notice-and-comment procedures for standards set forth in the OSH Act.

Finally, we consider the motion of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) to intervene in support of OSHA. Mot. to Intervene Out of Time Filed on Behalf of [the Union], Nov. 5, 2015. We deny the motion because the Union has failed to establish its standing to intervene. The Union submitted a declaration saying that certain Union members "may" be affected by OSHA's action insofar as there are members whose employers previously fit within the retail facility exemption under the 50 percent rule but would no longer do so under the Memorandum's revised definition. Decl. of Michael J. Wright ¶¶ 4-5 (attachment to Br. of Union). But because nothing in the Union's declaration establishes that the Union *does* have such members, the Union has failed to demonstrate standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Although we deny the Union's motion to intervene for that reason, we grant the Union's alternative request to accord it amicus curiae status, and we thus have

given full consideration to the Union's arguments. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999).

* * * * *

For the foregoing reasons, we grant the petitions for review and vacate OSHA's Memorandum for failure to abide by the OSH Act's procedural requirements. We also deny the Union's motion to intervene but grant it amicus status.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2016, I caused the foregoing document, Respondents' Petition for Panel Rehearing and Rehearing En Banc, to be electronically filed, and served on the following counsel of record, via the Court's CM/ECF system:

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