No. _____

In The
Supreme Court of the United States

RIVERDALE MILLS CORPORATION,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal agencies, including the Occupational and Safety Health Administration ("OSHA"), exist and are limited by the authority delegated to them by Congress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (quoting *Stark v. Wickard*, 321 U.S. 288, 309–310 (1944)). When agencies engage in actions that overreach their Congressionally delegated powers and infringe on individual rights, Congress has empowered the courts to determine the lawfulness of the agency's actions. *Id*. "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951). Accordingly, this Court has established clear precedent delineating courts of appeals' review of an administrative law judge's factual finding as requiring meaningful review of the record evidence as a whole.

A fundamental requirement of Fifth Amendment due process rights is the opportunity to be heard in a meaningful manner. Furthermore, because the Federal Rules of Evidence apply to Occupational Safety and Health Review Commission hearings, an administrative law judge has the power to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

The questions presented are:

1. Whether the United States Court of Appeals correctly applied the substantial evidence standard as articulated by this Court's prior precedent.

QUESTIONS PRESENTED—Continued

2. Whether the United States Court of Appeals correctly applied *Auer* deference pursuant to the analysis set out by this Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

3. Whether the admission of a prior out-of-court statement of a non-managerial employee, which constituted the sole evidence in support of an Occupational Safety and Health Administration citation in an administrative adjudication, is a violation of an employer's due process rights or was reversible error under Federal Rule of Evidence 403.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Riverdale Mills Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Occupational Health and Safety Review Commission and the United States Court of Appeals for the District of Columbia:

- *Secretary of Labor v. Riverdale Mills Corporation*, Occupational Health and Safety Review Commission, Docket No.: 19-1566 & 19-2011, Notice of Final Order entered by the Commission on August 19, 2022.
- *Riverdale Mills Corporation v. Secretary of Labor*, United States Court of Appeals for the District of Columbia Circuit, Docket No.: 22-1226, judgment entered June 23, 2023.

There are no other proceedings in the state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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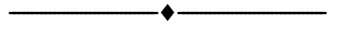
Petitioner Riverdale Mills Corporation ("RMC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals' review of the administrative decision failed to apply the substantial evidence standard required by this Court's precedent. The Court of Appeals also did not consider any aspect of the ALJ's erroneous decision to admit a prior, out-of-court written statement by an hourly employee as the sole support for OSHA's citation. The lack of meaningful review sanctioned the ALJ's clear departure from the accepted and usual course of judicial proceedings and conflicts with Supreme Court precedent.

OPINIONS BELOW

The decision by the United States Court of Appeals for the District of Columbia Circuit is unreported as *Riverdale Mills Corp. v. Sec'y of Lab.*, No. 22-1226, 2023 WL 4146272 (D.C. Cir. June 23, 2023) and is attached in the Appendix ("App.") at 1. The Administrative Law Judge's decision, which became the final decision of the Occupational Safety and Health Review Commission is attached at App. at 7.



STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on June 23, 2023. This Court has jurisdiction under 29 U.S.C. § 660(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following relevant constitutional, statutory, and regulatory provisions involved are set forth at App. at 84-91.

- Fifth Amendment to the United States Constitution
- 29 U.S.C. § 660(a)
- 29 C.F.R. § 1910.147
- 29 C.F.R. § 1910.1200(g)(11)
- 29 C.F.R. § 1910.1200(h)(1)
- 29 C.F.R. § 1910.1020(e)(1)(i)
- Federal Rule of Evidence 403

PRELIMINARY STATEMENT

Administrative agencies "are creatures of statute, bound to the confines of the statute that created them. . . ." *U.S. Fid. & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1135 (9th Cir. 2011) (quoting *Int'l Union of Elec., Radio & Mach. Workers, AFL–CIO v. NLRB*, 502

F.2d 349, 354 n. * (D.C. Cir. 1974)). Thus, "[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark*, 321 U.S. 288 at 309. When a federal agency like OSHA oversteps its statutorily granted authority and infringes on the rights of an individual, the Courts have the authority to determine whether such agency actions are a lawful exercise of their administrative power. *Lujan*, 504 U.S. at 578. Through enactment of the Administrative Procedure Act ("APA"), Congress has specifically delegated to the courts of appeals the responsibility of determining whether an agency's factual findings are supported by substantial evidence. *Universal*, 340 U.S. at 491. It is, therefore, imperative that the courts of appeals follow this Court's well-established precedent of conducting a meaningful review of the record evidence as a whole.

Here, the ALJ made factual findings that were not supported by substantial evidence. Instead, the ALJ's decision depended on evidence that was either not within the record or proven at trial. In determining whether substantial evidence existed to support the ALJ's decision, the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") failed to apply the requisite meaningful review. The Court of Appeals' affirmation of the ALJ's decision creates an unduly relaxed standard for federal agencies in prosecuting their cases.

Furthermore, the Court of Appeals erred when it granted the Secretary's interpretation of 29 C.F.R.

§ 1910.1200(g)(11), applying *Auer* deference without first conducting the appropriate analysis. The plain language of the regulation required that OSHA actually request, or demand, the SDSs it was seeking. Thus, the regulation is not genuinely ambiguous and the Secretary's interpretation of the regulation is unreasonable. *Auer* deference should not have been applied to the Secretary's interpretation of the regulation.

Additionally, the admission of a prior out-of-court statement by a non-managerial employee during OSHA's interview of the employee and written by OSHA's compliance officer violated RMC's due process rights under the Fifth Amendment. The written statement was inconsistent with documentary evidence and the employee was never called to testify at trial, depriving RMC of any ability to cross-examine the employee and to challenge the veracity of his statement. The written statement should also have been excluded pursuant to Federal Rule of Evidence 403 and the ALJ's failure to do so was an abuse of discretion.

STATEMENT OF THE CASE

I. Background

Petitioner Riverdale Mills Corporation manufactures welded wire mesh fabrics for use in various industries at its facility in Northbridge, Massachusetts. As part of the manufacturing process, the wire mesh is coated with PVC on a production line comprised of a series of machinery and is hundreds of feet in length

(the "coating line"). The machines on the coating line have varying functions and operations, including rolling the wire mesh, coating the wire mesh in product, and baking or curing the wire mesh. Each of these machines has specific and unique lockout/tagout ("LOTO") procedures to de-energize and lockout the power source(s).

Throughout RMC's existence, RMC has long engaged in free speech activities dedicated to protecting its interests against federal agency overreach. Throughout RMC's history, RMC's founder, James Knott, Senior, was a well-known critic of federal agencies including the United States Occupational Safety and Health Administration and United States Environmental Protection Agency. RMC and Mr. Knott's stance with respect to federal agencies' authoritative overreach were well-known at the time of the subject OSHA inspections and influenced OSHA's actions towards RMC. Throughout the trial and appeal of this case, the Secretary has sought to retroactively fill in the evidentiary gaps and justify OSHA overstepping its statutory and regulatory authority. Where the Administrative Law Judge ("ALJ") made unreasonable inferences from these evidentiary gaps, the DC Circuit Court of Appeals merely "rubber-stamped" the ALJ's factual findings.

A. Docket No. 19-1566 (the "Safety Case")

On April 3, 2019, Arthur Talmadge was working as a spindle operator for RMC. On that date, Talmadge

ignored his training by bypassing a clearly marked machine guard (a closed gate) while the machine was still operating. Talmadge had no reason to enter the area behind the closed, yellow gate, which bore a sign stating, "DANGER. DO NOT ENTER THIS AREA WHILE MACHINE IS RUNNING." No coating line operator ever opened the gate to perform work while the machine was running. After bypassing the gate, Talmadge reached his hand into the coating line to adjust the mesh moving through the line just upstream of the drive rollers. Upon doing so, Talmadge's hand and arm became caught in the drive roller, resulting in his injuries. OSHA opened an inspection as a result of the accident.

During the inspection, RMC produced a LOTO log. Two entries on that log indicated that RMC employees Tom Borden and Edgar Melendez performed LOTO on a "C-Spindle" on April 26, 2019. The LOTO log did not state what exactly had been done on that date. At the time of the entries, Borden was RMC's maintenance supervisor. Borden testified that the April 26, 2019 entries on the log indicated that LOTO was applied, and the C-Spindle was serviced. However, Borden could not remember the specific work that was performed on the C-Spindle on that date. Borden also testified that the term "C-Spindle" on the log meant "coating line spindle." Critically, however, there were not one, but three coating line spindles on the coating line.

No evidence was presented regarding which of the three, if any, was the "big spindle" identified in Citation 1, Item 2.

After the investigation, the Secretary issued Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1910.147(c)(6)(i), which provision provides that, "The employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed." The Secretary alleged that RMC violated this standard by failing to "conduct[] a periodic inspection of Energy Control Procedure RMC-022 for the Big Spindle" during the three years prior to April 26, 2019.

B. Docket No. 19-2011 (the "Health Case")

i. Citation 1, Item 3

The OSHA inspection giving rise to Docket No. 19-2011 relates to an inspection of the same worksite arising out of a complaint regarding alleged air-contaminant hazards (the "Health Case"). At some point in April 2019, OSHA received a complaint that alleged that RMC "does not provide access to medical supplies such as . . . a first aid kit . . . " and that employees "may be exposed to poor indoor air quality from powder coating and galvanizing chemicals due to inadequate ventilation on the factory floor."

Pursuant to the anonymous air quality complaint, on June 27, 2019, compliance officer Anne Hart conducted an opening conference in which she requested "any [Safety Data Sheets] not already provided." There was no specific request for safety data sheets ("SDSs") related to the coating or galvanizing line at the

opening conference. After the opening conference, Hart conducted a walkaround inspection of RMC's facility. Hart also later returned to RMC and collected air samples.

As part of her investigation, Hart interviewed a non-managerial employee, Louis Trinidad. According to Trinidad's written statement and Hart's testimony, admitted over objection, Trinidad said he had not received chemical training and had had a dermal exposure to a chemical while working. Trinidad's written statement was inconsistent in that, despite his allegation that he had not received training, he knew the industry name for the chemical, what personal protective equipment ("PPE") to wear to protect himself from related hazards, and what to do in event of exposure. Moreover, a document signed by Trinidad on "Right to Know/Hazard Communication" training when he onboarded, as well as another document Trinidad had received and reviewed, evidenced that Trinidad had been trained on the hazards associated with the chemical. Trinidad was not available to testify for trial; he was no longer an employee of RMC at that time and could not be located.

Based only on Trinidad's out-of-court statement, which was written by Compliance Officer Hart, OSHA issued Citation 1, Item 3 of the Health Case. The citation item alleged that RMC violated 29 C.F.R. § 1910.1200(h)(1) and that "hazardous chemicals were used in the coating line work area, such as 'soap', fluid bed chemicals, washer chemicals, and cooling chemicals" without training for its employees.

ii. Citation 2, Item 1

The timing of OSHA's "request" for SDSs is of crucial importance. On June 17, 2019, RMC provided OSHA with several SDSs. On that same date, OSHA responded that they "appreciate[d] that [RMC] provided all the Safety Data Sheets associated with the power coating and galvanizing operations at Riverdale Mills." Thereafter, on June 27, 2019, Compliance Officer Hart, gave RMC an "Employer Data & Information Request" that requested "SDSs"—specifically, "any not already provided." Hart's inspection was specifically opened as a result of a complaint about air-contaminant hazards. Thus, as of June 27, 2021, RMC had already fully complied with OSHA's requests for SDSs related to potential air contaminants. At the very least, RMC believed that it had fully complied with OSHA's requests for SDSs, as confirmed by OSHA's email.

OSHA's first explicit request for SDSs beyond the scope of the air contaminants complaint upon which the inspection was opened, occurred on August 26, 2019. On that date, and for the first time, Hart asked for SDSs for "all materials used on the galvanizing and coating lines" by email. However, Hart's email was sent to an email account of Mr. Knott, the deceased founder of RMC. At the time that Hart sent her email, no one was using or monitoring Mr. Knott's email. On the same date that Hart sent her email to Mr. Knott's unused email account, Hart received an email informing her that "no delivery notification was sent by the destination server[.]" Despite that alert, Hart did not

follow up with anyone at RMC regarding the SDSs or her August 26, 2019 email.

Thereafter, in September of 2019, during the closing conference of the Health Inspection, OSHA made counsel for RMC aware that it was seeking additional SDSs. The SDSs were then provided, more than two months before the end of the six-month inspection period and while Hart was still conducting investigation activities. OSHA did not request any additional SDSs during the inspection period.

Despite providing OSHA with all SDSs related to the coating and galvanizing lines once OSHA had requested them, OSHA issued Citation 2, Item 1 of the Health Case, which incorrectly alleged that RMC violated 29 C.F.R. § 1910.1200(g)(11) by not making all SDSs requested readily available to the compliance officer. Specifically, although OSHA had never actually requested the SDSs for the galvanizing and coating lines, Citation 2, Item 1, citing 29 C.F.R. § 1910.1200(g)(11), alleges that RMC did not make the SDSs for the hazardous materials used on the galvanizing and coating lines for Chemicals 4, 5, and 6 available on 6/27/19 or 8/26/19.[1]

[1] Chemicals 4, 5, and 6 are chemicals that were used in RMC's galvanizing and coating lines, the identities and SDSs were filed under seal in the lower courts.

II. Proceedings Below

Administrative Law Judge Sharon D. Calhoun entered her Decision and Order on the 1st day of July 2022. By Notice of Final Order entered by the Commission on August 22, 2022, the Decision and Order became a final order of the Commission on August 19, 2022.

Pursuant to 29 U.S.C. § 660(a), RMC appealed the Decision and Order with respect to Citation 1, Item 2 of the Citation and Notification of Penalty issued for Inspection No. 1391183, Docket No. 19-1566, and to Citation 1, Item 3 and Citation 2, Item 1 of the Citation and Notification of Penalty issued for Inspection No. 1411675, Docket No. 19-2011, to the United States Courts of Appeals for the District of Columbia.

The Court of Appeals denied the petition for review, holding that substantial evidence supported the ALJ's order. However, the Court of Appeals' decision did not conduct a meaningful review of the record evidence as a whole in abrogation of Supreme Court precedent. The decision also improperly applied *Auer* deference to the Secretary's interpretation of a regulation and failed to address any aspect of the ALJ's erroneous decision to admit a prior, out-of-court, written statement by an hourly employee as the sole support for the OSHA citation.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision Conflicts with Supreme Court Precedent's Substantial Evidence Standard Because No Meaningful Review was Conducted.

OSHA was created pursuant to The Occupational Safety and Health Act of 1970 (the "Act"). *Irving v. United States*, 909 F.2d 598, 603 (1st Cir. 1990) (citing 29 U.S.C. §§ 651 et seq.). OSHA's congressionally granted authority, therefore, is limited to the confines of the Act. *Stark*, 321 U.S. at 309. Congress has specifically delegated to the courts of appeals the responsibility of determining whether an agency's factual findings are supported by substantial evidence. *Universal*, 340 U.S. at 491. Thus, this Court has consistently reiterated the importance of the courts of appeals' meaningful review of an agency's factual findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

Judicial review of a federal administrative agency's findings of fact are governed by the Administrative Procedure Act. Pursuant to 29 U.S.C. § 660(a), to be conclusive, the Occupational Safety and Health Review Commission's ("OSHRC") findings of fact must be "supported by substantial evidence on the record considered as a whole."[2] "Substantial evidence" has been defined by this Court as requiring "more than a

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[2] "The OSH Act, *see* 29 U.S.C. § 660(a), incorporates the basic judicial review provisions of the Administrative Procedure Act." *P. Gioioso Sons v. Occupational Safety*, 115 F.3d 100, 107-08 (1st Cir. 1997).

mere scintilla[,]" such that "a reasonable mind might accept as adequate to support a conclusion." *Universal*, 340 U.S. at 477 (quoting *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

"The APA requires meaningful review[.]" *Dickinson*, 527 U.S. at 162. Accordingly, creation of suspicion as to the existence of the fact to be established is insufficient to constitute substantial evidence. *Id*. Instead, "it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id*. at 477 (quoting *N.L.R.B. v. Columbian Enameling & Stamping Co*., 306 U.S. 292, 300 (1939) (cleaned up)).

In *Universal*, this Court evaluated the effect of the APA on judicial review of administrative decisions. Review of the APA's legislative history demonstrated that Congress intended to "impose on courts a responsibility which has not always been recognized." *Id*. at 489. The courts of appeals must, therefore, evaluate whether substantial evidence exists to support the ALJ's findings of fact on the record as a whole. *Id*. at 490. In recognition of Congress's placement of this review within the purview of the courts of appeals, this Court held that it would intervene to review the correctness of applying the substantial evidence standard when it was "misapprehended or grossly misapplied." *Id*. at 491.

The substantial evidence standard was reiterated in *Dickinson*, where "the Court stressed the importance of not simply rubber-stamping agency

factfinding." *Dickinson*, 527 U.S. at 162. Instead, it requires a "stricter judicial review of agency factfinding[.]" *Id*. Judicial review of federal administrative decisions, therefore, "requires judges to apply logic and experience to an evidentiary record . . . " and there must be "judicial confidence in the fairness of the factfinding process." *Id*. at 163 (citing *Universal*, 340 U.S. at 489).

The Court of Appeals' review of the ALJ's decision in this case does not meet the substantial evidence standard established by this Court. Where this Court has emphasized the importance of meaningful review, the Court of Appeals' decision merely "rubber-stamped" the ALJ's decision despite glaring evidentiary gaps.

A. The Court of Appeals Erroneously Made Inferential Leaps to Hold that Substantial Evidence Existed to Support the ALJ's Finding that RMC Violated 29 C.F.R. § 1910.147(c)(6)(i).

In finding that a reasonable mind may have found that the Big Spindle is the same as the C-Spindle, the Court of Appeals relied on the following facts: (1) Borden testified that the C-Spindle refers to the coating line spindle; (2) "the coating line feeds mesh only to the biggest of the three spindles near it[;]" (3) Borden was "probably" referring to a certain spindle and referred to Big Spindle and C-Spindle "somewhat interchangeably[.]" (Op. at 3). Such a review and holding do not

evince the requisite "judicial confidence in the fairness of the factfinding process." *Dickinson*, 527 U.S. at 163.

At the hearing of this case, the Secretary failed to establish that the specific equipment referenced in the citation item (Big Spindle) was the same as the equipment referenced on the employer's lockout/tagout log (C-Spindle). Additionally, the Secretary did not establish what lockout/tagout procedure was used by Borden on the date at issue when multiple lockout/tagout procedures would have applied to different parts of the coating line. In fact, OSHA's compliance officer had testified that he didn't know if "the same procedure for the big spindle lockout can be used to lockout a different machine" because there were "multiple energy control procedures that were provided." (J.A., Vol. 2, p. 263).

Despite these obvious evidentiary gaps, the ALJ found that the Secretary had proven its case by a preponderance of the evidence by making inferential leaps from evidence that was not within the record. On appeal, the Court of Appeals simply accepted the ALJ's factual finding and made inferences such as finding that Borden was "probably" referring to a certain spindle and referred to Big Spindle and C-Spindle "somewhat interchangeably. Pursuant to this Court's precedent, such leaps in inferences do not constitute substantial evidence that the Big Spindle was the C-Spindle or that RMC in fact violated the standard as set out in OSHA's citation. *DeNucci Constructors, L.L.C. v. Occupational Safety & Health Rev. Comm'n*, No. 20-60710, 2021 WL 2843852, at *2 (5th Cir. July 7,

2021) ("Contentions based on speculation or derived from inferences upon inferences 'do not add support to a finding of substantial evidence.' ") (quoting *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 639, 641 (5th Cir. 2003)); *N. L. R. B. v. Walton Mfg. Co.*, 369 U.S. 404, 406, 82 S. Ct. 853, 854, 7 L. Ed. 2d 829 (1962) (stating that to constitute substantial evidence, "surmise or suspicion, even though reasonable, is not enough.").

By ignoring these evidentiary gaps, the Court of Appeals has sanctioned the ALJ's clear departure from the accepted and usual course of judicial proceedings. S. Ct. R. 10(a), (c). This is in clear conflict with the requirements for the substantial evidence standard set out by this Court.

B. The Court of Appeals Erroneously Made Inferential Leaps to Hold that Substantial Evidence Existed to Support the ALJ's Finding that RMC Violated 29 C.F.R. § 1910.1200(g)(11).

The Court of Appeals continued its lack of meaningful review when it held that RMC was required to produce safety data sheets for all chemicals used in the coating and galvanizing lines because the request for SDSs "not already provided" occurred during a tour that included the coating and galvanizing lines. (Op. at 3). This conclusion was in error. The evidence in the record was that OSHA's compliance officer's request for safety data sheets "not already provided" occurred at the opening conference for air contaminants, not

during the tour. (JA Vol. 2 at 276). If the Court of Appeals had conducted the requisite meaningful review of the record evidence as a whole, the court would not have made such an error.

Moreover, when applying the plain meaning of 29 C.F.R. § 1910.1020(e)(1)(i), Compliance Officer Hart was required to "request" the SDSs, which would have triggered RMC's obligation to produce them. However, the evidence as a whole demonstrated that Hart had failed to *request* them. The Court of Appeals did not consider the plain meaning of the term "request" as used in the regulation in light of the record evidence. Instead, the Court of Appeals merely accepted the ALJ's conclusion and then made an inaccurate factual finding that Hart had "requested" safety data sheets "not already provided" during the tour, rather than during the opening conference for the air contaminant complaint.

The term "request" is not defined within the standard. The term's regular meaning is defined as "the act or an instance of asking for something" and "the state of being sought after: DEMAND[.]" Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/request (Accessed 10 Aug. 2023). Meaningful review of the record evidence as a whole would have revealed to the Court of Appeals that there is no evidence that OSHA's compliance officer sufficiently requested SDSs unrelated to air contaminants. Without a request or demand for those specific SDSs, it belies common sense that RMC would have known to provide OSHA with SDSs unrelated to the complaint regarding air

contaminants and for which the Health Case inspection was opened, unless those SDSs were requested. The evidence at trial was clear that OSHA's compliance officer simply did not.

C. Allowing the Court of Appeals' Decision to Stand Would Gut the Substantial Evidence Standard and Federal Agencies' Burden of Proof at Trial.

The effect of allowing the Court of Appeals' decision to stand would be to permit the Secretary to forgo his burden of proving his citations in all future prosecutions. *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399, 1402 (D.C. Cir. 1989) ("The Secretary has the burden of proving all the elements of the OSHA violation with which an employer is charged.") (citing *Brock v. L.R. Willson Sons, Inc.*, 773 F.2d 1377, 1383 (D.C. Cir. 1985)). By failing to conduct a meaningful review of the record evidence as a whole, the Court of Appeals sanctioned the ALJ's clear departure from the accepted and usual course of judicial proceedings. The Court of Appeals accepted the ALJ's factual inferential leaps despite the ALJ's reliance on multiple facts that were never proven at trial, including but not limited to OSHA's failure to present adequate evidence that the cited "Big Spindle" is in fact the "C-Spindle" referenced in the lockout/tagout log and that OSHA's compliance officer requested SDSs unrelated to air contaminants. The Court of Appeals' application of the substantial evidence standard in this case is in direct contradiction to this Court's precedent which has stressed the

Congressional intent apparent in the APA: that courts of appeals must conduct meaningful review of the record evidence as a whole.

Permitting the continued application of the Court of Appeals' version of the substantial evidence standard allows courts of appeals to merely "rubber-stamp" ALJ factual findings, rendering any appeal to the courts meaningless. The decision's effect is to essentially give OSHA officials, and all other federal government agencies prosecuting cases, an incredibly relaxed legal standard by which they must prove their citations. This is in abrogation of the accepted and usual course of judicial proceedings. It would permit federal agencies to sloppily present its case and allow agency action and appellate judicial review to unearth any facts to make inferential leaps in support of a citation.

Inferences on inferences do not constitute substantial evidence and a meaningful review of the record evidence as a whole, as required by this Court's precedent, would have led the Court of Appeals to find that no reasonable person could have accepted the ALJ's holding.

II. The Court of Appeals Erred in Granting the Secretary's Unreasonable Interpretation of 29 C.F.R. § 1910.1200(g)(11), Applying *Auer* Deference Without Applying the Appropriate Analysis.

The ALJ and the Court of Appeals erroneously deferred to the Secretary's interpretation of 29 C.F.R.

§ 1910.1200(g)(11) to hold that Compliance Officer Hart had actually requested the SDSs unrelated to air contaminants. As discussed above, the plain meaning of the term "request" within 29 C.F.R. § 1910.1200(g)(11) required that OSHA's compliance officer actually ask for the specific SDSs unrelated to air contaminants. Even if this Court finds that the plain language of the term "request" is ambiguous, the ALJ and Court of Appeals' deference to the Secretary's interpretation of the term within the regulation is unwarranted because the regulation is not genuinely ambiguous, and the Secretary's interpretation is unreasonable.

Pursuant to *Auer* or *Seminole Rock*, this Court has held that courts should defer to an agency's reasonable interpretation of its own genuinely ambiguous regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). To determine whether *Auer* deference applies, a court is to determine whether the regulation is genuinely ambiguous based on the text, structure, history, and purpose of the regulation. *Kisor*, 139 S. Ct. at 2424. In addition, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id*. at 2416 (citing *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012)). If there is more than one reasonable meaning, the agency's interpretation is still required to be reasonable. *Id*. at 2415. Only after a court has gone through this analysis would *Auer* deference apply.

Without undergoing the analysis set out by this Court, the ALJ and Court of Appeals relied upon the Secretary's interpretation of the term "request" within the regulation to find that Hart's request for "any [Safety Data Sheets] not already provided" was sufficiently a request for SDSs related to the coating and galvanizing lines. (Op. at 3). In addition, the Court of Appeals failed to undertake the proper *Auer* analysis and relied upon an erroneous fact that was contrary to the evidence. *Id.* ("[B]ecause that statement was made during a tour that included the coating line and galvanizing line, Riverdale was required to produce safety data sheets for all chemicals used in the coating line and galvanizing line—not just possible air contaminants.").

The ALJ and Court of Appeals erred by applying *Auer* deference to the Secretary's interpretation of the term "request" within the regulation. The regulation is simply not genuinely ambiguous and "[t]he regulation . . . just means what it means . . . " *Kisor*, 139 S. Ct. at 2415. First, as discussed above, the plain meaning of the term "request" requires an individual to "demand" what they are asking for. The Secretary in his brief to the Court of Appeals contended that Hart's "broad" and "general" request for SDSs "not already provided" during the opening conference of an air contaminant complaint inspection was a sufficient "request" for those specific SDSs. (*See* Sec'y Br. at 47). The Court of Appeals improperly accepted the Secretary's interpretation of the regulation to find that Hart's request for "any [SDSs] not already provided" meant that Hart

had actually requested SDSs for the coating and galvanizing lines when, in fact, Hart requested SDSs "not already provided" during an opening conference for air contaminants.

Second, the structure, history, and purpose of the regulation demonstrates that the regulation is not genuinely ambiguous. The regulation requires "[a] list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the **workplace as a whole or for individual work areas**) . . . " 29 C.F.R. § 1910.1200(e)(1)(i) (emphasis added). The structure of the regulation itself allows for a differentiation between the availability of safety data sheets based on the workplace as a whole versus for individual work areas. Thus, when Hart asked for SDSs "not already provided," after conducting an opening conference for air contaminants, this did not constitute a request for SDSs that also included those for the coating and galvanizing lines. The term "upon request" appears within the regulation eight (8) times. When considering the use of that term within the regulation, it is apparent that "request" means "demand." For example, 29 C.F.R. § 1910.1200(g)(6)(iv) requires that, "[t]he chemical manufacturer or importer shall also provide distributors or employers with a safety data sheet upon request." Thus, a distributer or employer would have to request, or demand, the SDS for the specific chemical provided by the chemical manufacturer or importer in order to receive the SDS for that chemical. The distributor or employer cannot

request SDSs for chemicals "not already provided" within the broader array of the potentially multitude of different types of chemicals received. Such an interpretation would lead to confusion and be contrary to the entire purpose of the regulation: "to ensure that the hazards of all chemicals produced or imported are classified, and that information concerning the classified hazards is transmitted to employers and employees. . . ." 29 C.F.R. § 1910.1200(a)(1).

In promulgating the final rule on November 25, 1983, OSHA stated that, "Many of the decisions to be made were of a policy, rather than technical, nature." Hazard Communication, 48 FR 53280-01. Thus, the Secretary's interpretation of the term "request" within the regulation is not one that is within the agency's specialized or technical knowledge. This further undercuts any application of *Auer* deference to the Secretary's interpretation of the regulation. *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) ("The deference here is tempered by the Attorney General's lack of expertise in this area . . . ").

Moreover, the Secretary's interpretation and the ALJ and Court of Appeals' deference to the Secretary's interpretation of the regulation is unreasonable. Where the regulation allows differentiation between the chemicals used within an individual work area and the workplace as a whole, the Secretary's interpretation of the term "upon request" would allow OSHA inspectors and administrative agency investigators as a whole to vaguely and broadly ask for documents "not already provided" when they are actually seeking a

specific set of documents. The agency could then, despite the failure to adequately clarify what it is seeking, issue a citation against the employer for failing to understand what the inspector was seeking in the first place. The Secretary's "interpretation is 'plainly erroneous or inconsistent with the regulation[]'" and therefore, "[d]eference is undoubtedly inappropriate[.]" *SmithKline Beecham*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 461). Thus, the Court of Appeals and ALJ erred when it accepted the Secretary's interpretation of the regulation by applying *Auer* deference without conducting the appropriate *Auer* analysis. *Auer* deference did not apply in the first instance as the regulation is not genuinely ambiguous. *Kisor*, 139 S. Ct. at 2418 ("When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. . . . But that phrase 'when it applies' is important—because it often doesn't.").

This Court should grant this petition pursuant to its supervisory power. Allowing the Court of Appeals' decision to stand would permit administrative agencies to vaguely ask for a specific document it seeks, then punish the employer for the agency's failure to actually request or demand what it is seeking.

III. The Court's Decision Permits Administrative Agencies to Rely on a Prior Out-of-Court Statement of a Non-Managerial Employee as the Sole Evidence in Support of a Citation.

The Secretary relied on a single out-of-court statement made by a non-managerial employee to prosecute

the citation alleging that RMC violated 29 C.F.R. § 1910.1200(h)(1). Notably, the statement was not written by that employee. Instead, it was written by OSHA's compliance officer *during an OSHA inspection*. The employee was never called to testify at trial and RMC did not have the opportunity to cross-examine him. This written statement was admitted over RMC's objection. The ALJ's failure to exclude this written statement violated RMC's due process rights and was in violation of the Federal Rule of Evidence 403. The Court of Appeals' decision failed to even mention these issues.

A. Admission of the Written Statement Violated RMC's Due Process Rights.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law . . . " U.S. Const. amend. V. A fundamental requirement of due process is the opportunity to be heard in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Thus, this Court has recognized that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id*. at 269. As stated by the Court:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that **no safeguard for testing the value of human statements is comparable to that**

> **furnished by cross-examination**, and the conviction **that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test**, has found increasing strength in lengthening experience.

Greene v. McElroy, 360 U.S. 474, 497, 79 S. Ct. 1400, 1414, 3 L. Ed. 2d 1377 (1959) (quoting 5 Wigmore on Evidence (3d ed. 1940) § 1367) (emphasis added).

It is well-settled law that procedural due process applies to adjudicative administrative proceedings. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The procedural requirements that must be met in adjudicative administrative proceedings vary based on the circumstances and "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id*. at 389 (quoting *Goldberg*, 397 U.S. at 262-63); *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974). The Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), set out the following factors to determine whether due process requirements have been met prior to deprivation of a property interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Id. at 335.

The admission of a hearsay, prior out-of-court statement made by a non-managerial employee and written by OSHA's own employee, when used as the sole basis in support of a citation, should not be permitted. At the very least, such unreliable evidence should not be sufficient to constitute substantial evidence of the alleged violation. Should such procedure be allowed, employers like RMC would be deprived of its property interest and future business opportunities due to the impact upon its reputation. Furthermore, the impact of an OSHA citation far outreaches a simple monetary fine. It potentially opens employers to repeat citations with higher penalties, identification as a severe violator, inspections by other federal agencies, and creates potential for collateral litigation. Criminal penalties are also provided for by the Occupational Safety and Health Act. 29 U.S.C. § 666. Thus, circuit courts have acknowledged the severity of OSHA's penalties, describing OSHA administrative proceedings as "quasi-criminal." *See Savina Home Indus., Inc. v. Sec'y of Lab*., 594 F.2d 1358 (10th Cir. 1979); *Marshall v. Milwaukee Boiler Mfg. Co., Inc*., 626 F.2d 1339, 1342 (7th Cir. 1980) ("While the present proceedings are civil in nature, there are at least quasi-criminal aspects.").

The risk of an erroneous deprivation of RMC's property interest is substantial. Where the statement

itself was contradictory in nature, was not written by the employee but by an investigator who was looking to support her case, and was the sole evidence used to support the citation, the inability to cross-examine the employee creates a substantial risk of erroneous deprivation. Unlike in *Richardson*, the credibility and veracity of the statement were the heart of the issue in this case. Yet there was no opportunity to cross-examine the employee. Furthermore, RMC could not subpoena the employee as his whereabouts were unknown. The burden is on the Secretary to prove his case at trial and, where the Secretary seeks to impose penalties upon an employer, a meaningful and fair administrative hearing requires that such unreliable written statements be excluded. Otherwise, employers like RMC would lose their protected property rights under the Fifth Amendment.

There would be little to no administrative burden by requiring that federal agencies, like OSHA, produce the witness at trial under these circumstances. Where the Secretary seeks to prove its citation based on a single written statement, the Secretary would be required to subpoena one individual.

Furthermore, the APA provides that evidence received must be reliable. 5 U.S.C. § 556(d). The circumstances surrounding the admission of such a written statement all contribute to its obvious unreliability. Thus, employers should have the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id*. The Commission's failure to abide by due process requirements and the

protections afforded by the APA should not be allowed to stand. Without the ability or requirement that more is required of administrative prosecutions, the result of which may deprive an individual of its property interest, employers across the country like RMC are stripped of their due process rights.

B. Admission of the Written Statement Was Abuse of Discretion Federal Rule of Evidence 403.

The ALJ erred in admitting the written statement at issue and the Court of Appeals undertook no analysis or determination of this issue. The Federal Rules of Evidence apply to OSHRC hearings. 29 C.F.R. § 2220.71. Pursuant to Federal Rule of Evidence 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice . . . " Although "[a] district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules[,]" the lower court's Rule 403 ruling is improper if the court abused its discretion. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)).

The ALJ abused her discretion by admitting the written statement without any analysis or consideration of the statement's prejudicial effect. The ALJ solely relied upon the fact that RMC's counsel was present during OSHA's interview of the employee. However, the presence of RMC's counsel at the interview

should not have affected the ALJ's Rule 403 analysis. Instead, the ALJ and the Court of Appeals should have considered the surrounding circumstances bearing on whether admission of the written statement was unfairly prejudicial to RMC. Moreover, the employee's written statement was contradicted by other documentary evidence admitted during trial. The evidence showed that RMC had complied with the standard by providing training and information to that employee. However, because the employee was never called to testify at trial, RMC did not have any opportunity to cross-examine him. On appeal, the Court of Appeals simply accepted the statement's admissibility, also without any analysis, and found that the employee "said he had not received any training on hazardous chemicals." (Op. at 3).

Where the unfair prejudice clearly outweighed the probative value of the written statement, the Court of Appeals' failure to discuss the ALJ's abuse of discretion ignores the requisite application of 29 C.F.R. § 2220.71 and the Federal Rules of Evidence to OSHRC hearings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

This the 21st day of September, 2023.

Respectfully submitted,

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