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The Administrative Procedure Act states: "Except as otherwise provided by statute, the proponent of a[n] . . . order has the burden of proof."[1] The Supreme Court in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries* thus held that "[e]xcept as otherwise provided by statute,"[2] agencies "cannot allocate the burden of persuasion in a manner that conflicts with the APA."[3]

Despite the clarity of the APA provision and the Court's holding, courts and adjudicative agencies continue to impose a burden of persuasion on defendants on the basis of something other than a statute—an agency's regulations. This article asserts that doing so violates the APA on its face and as construed in *Greenwich Collieries*. It discusses the circumstances in which the APA does and does not permit adjudicators to allocate a burden of persuasion to a defendant. It also discusses whether and how a regulation, as opposed to a statute, may impose on defendants a burden going forward.

I. APA § 556(D) AND THE *GREENWICH COLLIERIES* DECISION

The first sentence of APA § 556(d) states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[4] The legislative history of the provision is sparse but does state that

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1. 5 U.S.C. § 556(d). Inasmuch as the APA has been enacted into positive law, and for clarity, this article will refer to the APA's burden of proof provision as "APA § 556(d)."

2. 512 U.S. 267, 269 (1994).

3. *Id.* at 281.

4. 5 U.S.C. § 556(d).

the provision reflects the "customary"[5] or "standard"[6] rule, and that "no agency is entitled to presume that the conduct of any person . . . is unlawful or improper."[7]

In *Greenwich Collieries,* the Court considered claims under the Black Lung Benefits Act (BLBA)[8] and the Longshore and Harbor Workers' Compensation Act (LHWCA).[9] The U.S. Department of Labor's Benefits Review Board (BRB) had in both cases relied on a rule announced in a formal 1978 BRB adjudication,[10] called the "true doubt rule," that required monetary awards to claimants if the evidence was in equipoise.[11] The Supreme Court held that the rule "conflicts with" the APA's burden-of-proof provision: "Under the Department's true doubt rule, when the evidence is evenly balanced the claimant wins. Under [APA § 556(d)], however, when the evidence is evenly balanced, the benefits claimant must lose."[12] The Court noted that the APA was intended "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."[13] Yet, under the Labor Department's practice, "each agency would be free to decide who shall bear the burden of persuasion."[14] The Court concluded with the sentence central to this article: "Accordingly, the Department cannot allocate the burden of persuasion in a manner that conflicts with the APA."[15]

Along the way, the Court rejected an argument that an unusual provision of the BLBA permitted the Labor Department to displace APA

5. S. REP. NO. 79-752, *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944–46, S. DOC. NO. 248, at 185, 228 (1946) [hereinafter APA LEG. HIST.] ("Section 7(c): The first sentence states the customary rule that the proponent of a rule or order shall have the burden of proof. Statutory exceptions to the rule are preserved.").

6. SENATE JUDICIARY COMMITTEE PRINT, *reprinted in* APA LEG. HIST., *supra* note 5, at 11, 31.

7. S. REP. NO. 79-752, *reprinted in* APA LEG. HIST., *supra* note 5, at 185, 208; H.R. REP. NO. 79-1980 (1946), *reprinted in* APA LEG. HIST. *supra* note 5, at 233, 270.

8. 30 U.S.C. §§ 901-931 (1988).

9. 33 U.S.C. §§ 901-950 (1984).

10. Provance v. United States Steel Corp., 1 Black Lung Rep. 1-483 (1978).

11. Grizzle v. Pickands Mather & Co., 994 F.2d 1093, 1096 (4th Cir. 1993). The court summarized the rule as follows: "When there is conflicting, but equally probative, evidence for and against the existence of a particular fact in the benefits inquiry, or, ultimately, when the evidence for and against entitlement to black lung benefits is equiponderate, the true doubt rule requires that the benefit of the doubt be given to the claimant." *Id.*

12. Dir. v. Greenwich Collieries, 512 U.S. 267, 281 (1994).

13. *Id.* at 280–81 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950)).

14. *Id.* at 281.

15. *Id.*

§ 556(d) by regulation.[16] The BLBA incorporates the APA (by incorporating parts of the LHWCA) "except as otherwise provided . . . by regulations of the Secretary"[17] and the Labor Department argued that it had adopted an APA-displacing regulation.[18] The Court disagreed, stating:

> [W]e do not think this regulation can fairly be read as authorizing the true doubt rule and rejecting the APA's burden of proof provision. Not only does the regulation fail to mention the true doubt rule or § 7(c) [APA § 556(d)], it does not even mention the concept of burden shifting or burdens of proof. Accordingly—and assuming, *arguendo*, that the Department has the authority to displace § 7(c) [APA § 556(d)] through regulation—this ambiguous regulation does not overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision.[19]

Although it is striking that the Court hesitated to accept the idea that the APA could be displaced by a regulation authorized by a statute specifically allowing deviation from the APA, this article does not concern statutes that purport to authorize an agency to depart from APA § 556(d) by regulation. It concerns regulations that depart from APA § 556(d) without such authority.

Greenwich Collieries also held that the term "burden of proof" in the APA refers to the burden of persuasion, not the burden of production or going forward (which the Court described as "the obligation to come forward with evidence to support a claim").[20] The Court disavowed dictum to the contrary from a footnote in a previous case.[21]

II. POST-*GREENWICH COLLIERIES* DECISIONS

Since *Greenwich Collieries*, the Court has revisited APA § 556(d) a few times but without fundamental change in its approach. None of the cases concerned whether an agency may, by regulation, impose a burden of persuasion on a regulated person.

16. *Id.* at 271.

17. 30 U.S.C. § 932(a) (1988).

18. 20 C.F.R. § 718.3(c) (1993). The regulation stated in part: "In enacting [the BLBA], Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis." *Id.*

19. *Greenwich Collieries*, 512 U.S. at 271.

20. *Id.* at 268.

21. *Id.* at 276–78 (disapproving of NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 404 n.7 (1983)). The disapproved statement was, "Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof . . . . Section 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Transp. Mgmt. Corp.*, 462 U.S. at 404 n.7.

In *Schaffer ex rel. Schaffer v. Weast*, the Court held that APA § 556(d) reflected the "general rule" that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims."[22] The Court then observed: "The ordinary default rule, of course, admits of exceptions. For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions."[23] Although it also noted that "[u]nder some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant,"[24] "[a]bsent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief."[25] The Court then considered (and rejected) several reasons based on the wording of the Individuals with Disabilities Education Act[26] why the normal rule should not apply.[27]

In *NLRB v. Kentucky River Community Care, Inc.*, an employer challenged a bargaining unit and a consequent failure-to-bargain unfair-labor-practice (ULP) charge.[28] The Court held that the NLRB was reasonable in imposing the burden of persuasion on the employer concerning whether certain workers fell within the express exception for "supervisor[s]" in the definition of "employee" in the National Labor Relations Act (NLRA).[29] The Court principally held that "[t]he Board's rule is supported by 'the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'"[30]

The employer in *Kentucky River* claimed, however, with special respect to the ULP charge, that it did not bear the burden of persuasion on whether the members of the bargaining unit were excluded from the general category of "employee" by the statutory exception for supervisors. The Court disagreed, holding that "[s]upervisory status . . . is not an element of the Board's [ULP] claim . . . ."[31] It observed that, according to an

22. Schaffer v. Weast, 546 U.S. 49, 57 (2005).

23. *Id.* (citation omitted).

24. *Id.* (citing Alaska Dep't. of Envtl. Conservation v. EPA, 540 U.S. 461, 494 (2004)).

25. *Id.* at 57–58.

26. Individuals with Disabilities Education Act (IDEA) of 1975, 20 U.S.C. §§ 1400-1482 (2010) [hereinafter IDEA].

27. Schaffer, 546 U.S. at 58–61.

28. 532 U.S. 706, 712 (2001).

29. *Id.*; National Labor Relations Act, 29 U.S.C. §§ 151–169; 29 U.S.C. § 152(3) (defining "employee" to "include any employee . . . but shall not include . . . any individual employed as a supervisor . . . "

30. *Kentucky River*, 532 U.S. at 711 (quoting FTC v. Morton Salt Co., 334 U.S. 37, 44 (1948)).

31. *Id.* at 712.

NLRA provision,[32] the record must show only that the employer refused to bargain with the representative of a unit of "employees."[33] The Court concluded that if the employer wishes to show that the unit included workers excepted by statute, it bore the burden of persuasion pertaining to that exception.[34] In sum, *Kentucky River* looked to the wording of the agency's organic statute to determine whether the statute provided a departure from the general rule stated in APA § 556(d).

In *Metropolitan Stevedore Co. v. Rambo*, the Supreme Court first held that, under the LHWCA, a worker whose work-related injury has not yet diminished his present wage-earning capacity is entitled to nominal compensation if there is a significant potential that the injury will cause diminished capacity under future conditions.[35] If the employer should seek an order modifying a previous award, the employer is the proponent of that modifying order and thus must, under APA § 556(d), shoulder the burden of persuasion on whether changed conditions justified a modification.[36]

After stating how in certain cases the employer could satisfy that burden, the Court held that LHWCA § 8(h) gives rise to a presumption that the employee's earning capacity equals his current, higher wage.[37] The Court then stated that "in the face of this presumption, the burden shifts back" to the injured employee to establish yet a different proposition (that the likelihood of a future decline in capacity is sufficient for an award of nominal compensation).[38] The term "shifts back" suggests that the "burden" of which the Court spoke was a burden of production, with the burden of persuasion presumably on the employer, the party seeking an order of modification.

In sum, post-*Greenwich Collieries* cases have not altered its fundamental teachings.

32. 29 U.S.C. § 158(a)(5). The statute states in context: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his *employees* . . . ." *Id.* (emphasis added.)

33. *Kentucky River*, 532 U.S. at 712.

34. *Id.*

35. 521 U.S. 121 (1997).

36. *Id.*

37. *Id.*

38. *Id.* at 139.

III. DESPITE *GREENWICH COLLIERIES*, COURTS AND AGENCIES RELY ON REGULATIONS TO IMPOSE BURDENS OF PERSUASION ON PARTIES OPPOSING ORDERS

Despite *Greenwich Collieries* and APA § 556(d), courts and adjudicative agencies have, in reliance on agency regulations, imposed burdens of persuasion on private parties opposing orders. They have done so in two broad classes of cases. First, they have done so when regulations explicitly impose the burden of persuasion on parties opposing an order. Such a regulation might state that a defendant is relieved of a duty that the regulation would otherwise impose when the defendant "can demonstrate" a certain fact or can establish an "affirmative defense."[39] Second, they have done so by construction of a regulation, such as when an agency regulation uses a key word, such as "except," "unless," "but" or "however," to introduce a duty-relieving condition.[40] It is argued in Part IV.A. below that such impositions are unlawful in both settings and that, to be lawful, any such imposition must be explicitly or implicitly authorized by statute, not regulation.[41]

A. EPA Regulations as Examples of Agency Regulations Imposing a Burden of Persuasion on a Defendant, and Decisions so Holding

The Environmental Appeals Board (EAB) of the Environmental Protection Agency (EPA), which adjudicates environmental cases prosecuted by the EPA, has inferred from the wording of regulations that a defendant has a burden of persuasion.[42] The EPA has also adopted regulations expressly purporting to impose burdens of persuasion on defendants. Neither the EPA nor its EAB appears to have considered whether doing so comports with APA § 556(d).

39. *See infra* Parts III.A.2 and III.C.2.
40. *See infra* Parts III.A.1 and III.C.1.
41. *See infra* Part IV.A.
42. *See* 40 CFR § 22.1(a).

1. Decisions construing EPA regulations to impliedly impose a burden of persuasion on defendants

An underground storage tank regulation[43] adopted under the Resource Conservation and Recovery Act (RCRA)[44] requires that when a tank is temporarily closed, certain precautions such as release detectors and anti-corrosion measures must continue. "However," the regulation continues, those measures "are not required as long as the [tank] system is empty."[45] In *In re Norman C. Mayes*, the EAB, in apparent reliance on the word "however," held that the sentence it introduced provided an "exemption" and that the operator had to prove the tank was empty as an "affirmative defense" on which it bore the "burden of persuasion."[46] The EAB stated that "[a]n argument that release detection is not required because a tank is empty is avoiding in nature and as such is an affirmative defense."[47] Inasmuch as the operator presented "no evidence" that the tank was empty, the EAB held that it was "irrelevant" that the prosecuting agency "presented no evidence to demonstrate that [the tank] . . . was . . . not empty."[48]

In *In re Rogers Corp.*,[49] a PCB dumping case, a regulated party was alleged to have violated regulations that, according to a regulation's prefatory note,[50] imposed different burdens depending on when certain chemical disposals occurred. The EAB held that "the timing of an improper disposal of PCBs is *not* part of a complainant's *prima facie* case. Rather, timing is a component of the historic disposal site exemption, which must be raised as an affirmative defense."[51] The EAB seemed to partly ground its holding on the prefatory note's use of the word "however," partly on an analogous EPA regulation allocating "the burden of proving the date"

43. 40 C.F.R. § 280.70(a).

44. Although the statute is technically called the Solid Waste Disposal Act (SWDA) of 1965, it is commonly known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6912, 6991, 6991(a)–(f), 6991(i), 6991(k).

45. 40 C.F.R. § 280.70(a) ("Temporary closure. (a)When an UST [underground storage tank] system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection . . . and any release detection . . . . However, release detection and release detection operation and maintenance testing and inspections . . . are not required as long as the UST system is empty. The UST system is empty when all materials have been removed using commonly employed practices . . . .").

46. 12 E.A.D. 54, 89, n.28 (EAB 2005), *aff'd,* Mayes v. E.P.A., No. 3:05-CV-478, 2006 WL 2709237 (E.D. Tenn. Jan. 4, 2008).

47. *Id.* at 92.

48. *Id.*

49. 9 E.A.D. 534 (EAB 2000).

50. Prefatory note to former 40 C.F.R. § 761.60. The prefatory note was deleted in 1998. 63 Fed. Reg. 35384 (1998).

51. *Rogers Corp.*, 9 E.A.D. at 556 (emphasis in original).

of deposition of PCB-containing waste,[52] and partly in reliance on an earlier decision by a judicial officer, which relied on the practical observation that "the evidence concerning any placement of PCBs during that period lies particularly within [the operator's] knowledge."[53] A serious question might be raised whether, in light of APA § 556(d), this practical consideration permits an agency to place on a regulated party a burden of persuasion, as opposed to a burden of going forward.[54]

2. EPA regulations expressly imposing a burden of persuasion on defendants, and decisions so holding

To regulate air pollution, the EPA adopted under the Clean Air Act (CAA)[55] a scheme of "presumptive liability" and affirmative defenses with respect to the handling of gasoline with excessively volatile compounds.[56] A regulation states when various participants in the distribution chain are "deemed" in violation and what facts they may "demonstrate" to establish "defenses."[57] The EAB characterized the regulation as "provid[ing] EPA

52. 40 C.F.R. § 761.50(b)(3)(iii); *see also infra* text accompanying note 64.

53. *Rogers Corp.*, 9 E.A.D. at 556 (citing Standard Scrap Metal Co., 3 E.A.D. 267, 272–74 (CJO 1990), which states in part: "Neither the regulation nor the prefatory note expressly allocates the burden of proof on the applicability of the exemption. Generally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception. [Footnote omitted.] Placing the burdens of proof upon the respondent in this case is particularly appropriate, because Standard Scrap operated the facility before February 17, 1978, and the evidence concerning any placement of PCBs during that period lies particularly within its knowledge.") The EAB also relied in *Standard Scrap*, 3 E.A.D. at 273 & n.12, on a view of APA § 556(d) consistent with the dictum in *Transportation Management*—that it allocates only the burden of going forward. That view was later disapproved in *Greenwich Collieries*. *See* Dir. v. Greenwich Collieries, 512 U.S. 267, 268 (1994); *supra* text accompanying note 21.

54. *See infra* Part III.C.

55. Clean Air Act of 1990, 42 U.S.C. §§ 7401–7671q [hereinafter CAA].

56. 54 Fed. Reg. 11868, 11872 (discussion), 11885 (1989) (adopting *inter alia* 40 C.F.R. § 80.28 under CAA § 211(h), 42 U.S.C. § 7545(h), a provision that is silent about burdens of persuasion and affirmative defenses, and that does not mention APA § 556(d)).

57. Liability for Violations of Gasoline Volatility Controls and Prohibitions, 40 C.F.R. § 80.28. For example, paragraph (a), which deals with violations at refineries or importer facilities, states that "[w]here a violation of . . . § 80.27 is detected at a refinery that is not an ethanol blending plant or at an importer's facility, the refiner or importer shall be deemed in violation." *Id.* Paragraph (g) then sets out a series of affirmative defenses for various participants in the distribution chain; paragraphs (g)(2) and (g)(4) provide defenses for refiners. *Id.*

with a relaxed burden of proof": the EPA need only establish that noncomplying gasoline was found "in a carrier's tank."[58] The regulation was several times reviewed and nearly entirely upheld against validity challenges by the D.C. Circuit, but without mention of APA § 556(d).[59]

A RCRA storage tank regulation permits storage of restricted wastes for more than one year, but then states: "however, the owner/operator *bears the burden of proving* that such storage was solely for [a certain permitted] . . . purpose . . . ."[60] In *In re Rybond, Inc.*,[61] the EAB held that the regulation expressly "places the burden on [the operator] to demonstrate" the permitted purpose.[62] Earlier, it cited cases dealing with *statutory* exemptions to hold that "[i]t is [the operator's] burden to demonstrate that it is exempt from" a different regulatory requirement.[63]

A PCB spill regulation places on the owner or operator of a site containing so-called "PCB remediation waste" (waste resulting from an unauthorized PCB spill) "the burden of proving the date that the waste was placed in a land disposal facility."[64]

Clean Air Act regulations on chemical plant safety in 40 C.F.R. Part 68 also purport to expressly impose burdens of persuasion on chemical plant operators.[65] For example, paragraph (b)(1) of § 68.115 states a general rule that if the amount of a regulated substance in a mixture exceeds one percent, then that amount must be considered when determining whether enough of the substance is present to make Part 68 applicable.[66] "[B]ut" the amount of the regulated substance in the mixture need not be considered if the "operator *can demonstrate* that" its partial pressure in the mixture "is less than 10 millimeters of mercury (mm Hg)."[67] Similarly

58. Com. Cartage Co., 7 E.A.D. 784, 795 (EAB 1998) ("[A] carrier is presumptively liable when EPA finds noncomplying gasoline in the carrier's tank.") (quoting Nat'l Tank Truck Carriers, Inc. v. EPA, 907 F.2d 177, 179 (D.C. Cir. 1990)).

59. *Id.*; Amoco Oil Co. v. EPA, 543 F.2d 270 (D.C. Cir. 1976); Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974).

60. 40 C.F.R. 268.50(c) (emphasis added).

61. Rybond, Inc., 6 E.A.D. 614, 614 (EAB 1996).

62. *Id.*

63. *Id.*

64. 40 C.F.R. § 761.50(b)(3)(iii). The regulation states in context:

> 40 C.F.R. § 761.50 Applicability . . . . (b) *PCB waste* . . . . (3) *PCB remediation waste* . . . . (iii) The owner or operator of a site containing PCB remediation waste has the burden of proving the date that the waste was placed in a land disposal facility, spilled, or otherwise released into the environment, and the concentration of the original spill.

Id.

65. The regulations in Part 68 were adopted under CAA § 112(r), 42 U.S.C. § 7412(r).

66. 40 C.F.R. § 68.115(b)(1).

67. *Id.* (emphasis added).

worded rules include 42 C.F.R. § 68.115(b)(2)(i) (if one percent of mixture is flammable, mixture is covered "*unless the . . . operator can demonstrate* that mixture does not have" certain flammability rating); and 40 C.F.R. § 68.22(b) (analysis of worst-case chemical release must assume 1.5 m/sec wind speed unless operator "*can demonstrate* that local meteorological data . . . show a higher minimum wind speed").

B. Medicare/Medicaid Regulations as Examples of Agency Regulations Imposing a Burden of Persuasion on a Defendant, and Decisions So Holding

The Department of Health and Human Services (HHS) has adopted regulations regulating operators of skilled nursing homes.[68] Violations of the regulations can result in contract termination—that is, disqualification of an operator from receiving reimbursement for nursing home care[69]—and civil monetary penalties.[70] Violations are prosecuted by the Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), under the procedures in 42 C.F.R. Part 498, especially § 498.5, entitled "Appeal rights."

None of the statutes governing such proceedings address who has the burden of persuasion when an operator disputes contract termination or a penalty, nor do any purport to allocate the burden of persuasion differently from APA § 556(d).[71] Several regulations nevertheless purport to expressly impose burdens of persuasion on nursing home operators.

For example, one regulation requires that the operator "ensure" that certain residents of skilled nursing homes "not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, *unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable . . . .*"[72]

68. 42 C.F.R. § 483.

69. Social Security Act §§ 1819(h)(2)(A)(i), 1919(h)(3)(B)(i), 42 U.S.C. §§ 1395i–3(h)(2)(A)(i), 1396r(h)(3)(B)(i).

70. Social Security Act §§ 1819(h)(2)(B)(ii)(I), 1919(h)(3)(C)(ii)(I), 42 U.S.C. §§ 1395i–3(h)(2)(B)(ii)(I), 1396r(h)(3)(C)(ii)(I). The procedures for imposing penalties are in Social Security Act § 1128A, 42 U.S.C. § 1320a-7a.

71. *See* Social Security Act §§ 1156, 1866(b)(2), (h)(1), (j)(8), 42 U.S.C. §§ 1320c–5, 1395cc(b)(2), (h)(1), (j)(8). Additionally, Social Security § 205(b), 42 U.S.C. § 405(b), referenced in Social Security Act §§ 1156(b)(4), 1866(h), has no provision stating on whom the burden of persuasion lies.

72. 42 C.F.R. § 483.40(b)(2) (emphasis added). The regulation states in context:

> 42 C.F.R. § 483.40 Behavioral health services. . . . (b) Based on the comprehensive assessment of a resident, the facility must ensure that . . . . (2) A resident whose assessment did not reveal or who does not have a diagnosis of a mental or psychosocial adjustment diffi-

A regulation on bed sores not only requires that the operator "ensure" that "[a] resident receives care . . . to prevent pressure ulcers [bed sores]" but that the resident "does not develop pressure ulcers *unless the individual's clinical condition demonstrates that they were unavoidable* . . . ."[73] HHS's Departmental Appeals Board (Board or DAB), which adjudicates prosecutions for alleged violations of nursing home regulations, has held that the bed-sore regulation imposes an "affirmative defense" on which the operator must "bear[] the burden of persuasion" on whether bed sores were "unavoidable."[74] Several nursing home operators have been assessed monetary penalties because they failed to show the unavoidability of a particular bed sore.[75]

culty or a documented history of trauma and/or post-traumatic stress disorder does not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, *unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable* . . . . (emphasis added).

73. 42 C.F.R. § 483.25(b)(1)(i) (emphasis added). The regulation states in context:

42 C.F.R. § 483.25 Quality of care. . . . (b) *Skin integrity* . . . . (1) *Pressure ulcers*. Based on the comprehensive assessment of a resident, the facility must ensure that . . . . (i) A resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers *unless the individual's clinical condition demonstrates that they were unavoidable*. . . . (emphasis added).

74. Rae-Ann Geneva Nursing Home, DAB Dec. No. 2461, at 6 (2012), www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2012/dab2461.pdf. The Board stated there that "'[u]navoidability' is an affirmative defense," *id.* at 14; that once the presence of a bed sore is shown, "the burden then shifts to the facility to establish that the pressure sore was clinically unavoidable," *id.* at 6; and that the operator "bears the burden of persuasion to show by a preponderance of the evidence that it was in substantial compliance with participation requirement or any affirmative defense." *Id.* at 14. The Board there affirmed the judge's finding that the operator "did not carry its burden to rebut the finding of noncompliance by establishing that the pressure sores were unavoidable." *Id.* at 6. *See also* Koester Pavilion, DAB Dec. No. 1750, at 16 (2000), www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2000/dab1750.html ("Koester . . . had to show that the development of these sores was clinically unavoidable in order to sustain its burden of proof . . . ."); Clermont Nursing & Convalescence Ctr., DAB Dec. No. 1923, at 9 (2004), www.hhs .gov/sites/default/files/static/dab/decisions/board-decisions/2004/dab1923.htm (The facility "bear[s] the burden of showing that the development or deterioration of pressure sores was 'clinically unavoidable.'"), *aff'd without consideration of point*, 142 F. App'x 900 (6th Cir. 2005).

75. *E.g.,* The Harborage, DAB Dec. No. 2905, at 8 (2018), www.hhs.gov/sites/default/files/board-dab-2905.pdf ("[T]he record does not contain" sufficient evidence of unavoidability.); Barbourville Nursing Home, Dec. No. CR1135 (2004), www.hhs.gov/sites /default/files/static/dab/decisions/alj-decisions/2004/CR1135.htm (holding evidence adduced by operator "insufficient"; civil monetary penalty imposed), *aff'd without consideration of the point*, DAB Dec. No. 1962 (2005), www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2005/ dab1962.htm (noting that "the ALJ concluded that BNH violated section 483.25(c) because *it did not show* that a pressure sore Resident 2 developed in the facility was clinically unavoidable") (emphasis added); South Valley Health Care Center, DAB Dec. No. 1691 (1999), www.hhs.gov/sites/default/ files/static/dab/decisions/board-decisions/1999/dab1691.htm.

The DAB has apparently never considered whether allocating a burden of persuasion to the nursing home operator based on the wording of a regulation comports with APA § 556(d).[76]

C. OSHA Standards as Examples of Agency Regulations Imposing a Burden of Persuasion on a Defendant, and Decisions so Holding

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor has under the Occupational Safety and Health Act of 1970 (OSH Act)[77] adopted occupational safety and health standards.[78] An employer who violates a standard may receive a citation[79] and a notice of proposed penalties.[80] If the citation is affirmed, the employer must abate the cited conditions.[81] If an employer contests the citation or proposed penalty, the independent Occupational Safety and Health Review Commission[82] is to "afford an opportunity for a hearing (in accordance with [APA § 554])" and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief. . . ."[83]

Although the OSH Act is silent on burdens of proof in contests of citations and proposed penalties, the Supreme Court held in an OSH Act case[84] that "[a]t this hearing the burden is on the Secretary to establish the

76. The Board has more broadly held that the statute it administers allocates the burden of persuasion to nursing home operators. Inasmuch as the Board did not claim that the statute expressly allocates the burden of persuasion in this manner, its holding must be seen as one that the statute implicitly does so. The Board first so held as to operators opposing contract termination, Hillman Rehab. Ctr., DAB Dec. No. 1611 (1997), *aff'd*, 1999 WL 34813783, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999)), and later as to operators opposing the imposition of civil monetary penalties, Batavia Nursing & Convalescent Ctr., DAB No. 1904 (2004), hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2004/dab1904.html, *aff'd without reaching the point*, No. 04-3325 (6th Cir., Apr. 15, 2005). The correctness of these holdings is outside the scope of this article.

77. OSH Act §§ 2–34, 29 U.S.C. §§ 651–678.

78. Occupational safety and health standards are, according to OSH Act § 6(a)–(b), 29 U.S.C. §§ 655(a)–(b), required to be adopted by "rule." Another OSH Act provision, OSH Act § 8(g)(2), 29 U.S.C. § 657(g)(2), speaks of the adoption of "regulations," which has led courts to, for some purposes, distinguish OSHA "regulations" from "standards." *E.g.,* Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 209 (D.C. Cir. 1999); Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 1467 (D.C. Cir. 1995). Inasmuch as none of those purposes relates to this article, it uses "standards" and "regulations" interchangeably.

79. OSH Act § 9(a), 29 U.S.C. § 658(a).

80. OSH Act §§ 10(a)–(b), 17(a)–(c), (e), 29 U.S.C. §§ 659(a)–(b), 666(a)–(c), (e).

81. OSH Act §§ 10(b), 17(d), 29 U.S.C. §§ 659(b), 666(d).

82. The Commission is not a part of OSHA or the U.S. Department of Labor. It is an independent agency in the Executive Branch. *See* 29 U.S.C. § 661(a).

83. OSH Act § 10(c), 29 U.S.C. § 659(c).

84. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty . . . ."[85] By contrast, in certain unusual OSH Act proceedings—that in which an employer requests a variance from a standard[86] or in which a citation had already become a final order but the employer needs more time to abate—the statute expressly states that the burden is on the employer.[87] That Congress placed these express statements about the burden of persuasion in these OSH Act provisions but was silent about the matter in ordinary enforcement cases indicates that Congress expected that APA § 556(d) would allocate the burden of persuasion in an ordinary enforcement proceeding. Moreover, the APA's anti-supersession clause states that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly"[88] and no OSH Act provision arguably meets that exception.

1. OSHA standards implicitly imposing a burden of persuasion on a defendant by use of "except" or "unless"

Despite this, the Commission has treated OSHA standards as implicitly imposing a burden of persuasion on the employer. It did so without discussing whether that imposition is consistent with APA § 556(d).

In several early decisions, the Commission held that the use of the word "except" or "unless" in OSHA standards has the effect of placing the burden of persuasion on the employer. This line of cases began in a 1976 case, *Stephenson Enterprises,*[89] where a standard imposed a requirement but then introduced two clauses with the word "except."[90] The employer argued that OSHA had not proved that those clauses did not apply; the

85. *Id.* at 446.

86. OSH Act § 6(d), 29 U.S.C. § 655(d). This provision states in part that OSHA shall grant a variance if it determines "that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions [or] practices . . . proposed to be used . . . will provide employment . . . as safe and healthful as those which would prevail if he complied with the standard." *Id.*

87. OSH Act § 10(c), 29 U.S.C. § 659(c). This section states in part:

> Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary [*sic*, Commission], after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation.

Id.

88. 5 U.S.C. § 559. The APA's anti-supersession clause, states that a "[s]ubsequent statute may not be held to supersede or modify this subchapter [or] chapter 7 . . . of this title . . . except to the extent that it does so expressly." *Id.*

89. Stephenson Enters., Inc., 4 BNA OSHC 1702, 1705 (No. 5873, 1976), *aff'd without consideration of point,* 578 F.2d 1021 (5th Cir. 1978).

90. 29 C.F.R. § 1910.215(a)(2)(i)–(ii).

Commission rejected the argument, holding that "it is the burden of the party who is claiming an exemption to prove its applicability."[91] The Commission cited, however, cases construing a statute,[92] not a regulation. Other examples include *FMC Corp.*,[93] relying on the phrase "except that which is in use" in a former housekeeping standard for shipbuilding,[94] and *Wynnewood Refining Co.*,[95] relying on the phrase "except for" in the scope provision of a chemical process safety standard.[96] For an example of the Commission relying on the word "unless," *see Central Florida Equipment Rentals*[97] discussed at note 108 and accompanying text.[98] Importantly, all precedents cited by these decisions either immediately or ultimately relied on cases construing statutes. The Commission has never discussed the possible inapplicability of those cases to regulations.[99]

Two federal courts have agreed with the Commission's approach. In *Harry C. Crooker & Sons v. OSHRC*,[100] the First Circuit stated:

91. *Stephenson*, 4 BNA OSHC at 1705.

92. *Id.*; OSH Act § 4(b)(1), 29 U.S.C. § 653(b)(1). This statute states circumstances in which OSHA authority over a workplace is displaced by regulations adopted by another federal agency. The cases cited were S. Pac. Trans. Co., 2 BNA OSHC 1313 (No. 1348, 1974), *aff'd*, 539 F.2d 386 (5th Cir. 1976); and Idaho Travertine Corp., 3 BNA OSHC 1535 (No. 1134, 1975). The statute and cases construing it are discussed *infra* in Part VI.B.2 and at note 184 and accompanying text.

93. 5 BNA OSHC 1707 (No. 13155, 1977).

94. 29 C.F.R. § 1916.51(a) (1979).

95. 27 BNA OSHC 1971, 1977 n.9 (Nos. 13-0644 & 13-0791, 2019), *aff'd*, 978 F.3d 1175 (10th Cir. 2020).

96. 29 C.F.R. § 1910.119. The case concerned paragraph (a)(1)(ii), which states: "This section applies to . . . [a] process which involves a Category 1 flammable gas . . . *except for* [certain substances in certain circumstances]." *Id.* (emphasis added).

97. Cent. Fla. Equip. Rentals, Inc., 25 BNA OSHC 2147 (No. 08-1656, 2016).

98. Other cases giving effect to "except" clauses include Griffin & Brand of McAllen, Inc., 4 BNA OSHC 1900, 1904 (No. 4415, 1976) ("except" clause in standard); Stephenson Enters., Inc., 4 BNA OSHC 1702, 1705 (No. 5873, 1976), *aff'd without consideration of the point*, 578 F.2d 1021 (5th Cir. 1978). Agrico Chem. Co., 4 BNA OSHC 1727, 1728 (No. 8285, 1976), found an "exemption" based on other language. It relied on a provision addressing a special circumstance—"[r]unways used exclusively for special purposes (such as oiling, shafting, or filling tank cars)." *Id.* The provision went on to state that, unlike the general case, an employer "may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide." *Id.* at n.2.

99. Other examples of OSHA standards using the word "except" or "unless" and the like include 29 C.F.R. §§ 1910.269(l)(3)(iii) (requiring that employees must be kept a certain distance from energized parts "unless" certain safety measures are taken; *see also infra* text accompanying note 162); 1910.106(b)(5)(vi)(a) (specifying that flammable liquid storage tanks may not be located in certain place "unless" tank has certain structure); 1926.152(j)(1)(ii) (providing exceptions regarding pipes carrying flammable liquids); 1926.602(a)(3)(i) (requiring that construction equipment may not be moved on access roadway "unless" roadway constructed to safely accommodate it; *see also infra* text accompanying note 109).

100. Harry C. Crooker & Sons, Inc. v. OSHRC, 537 F.3d 79, 86 (1st Cir. 2008).

> A . . . misprision of the Secretary's burden undermines Crooker's assertion that the Secretary's prima facie case failed for lack of evidence that the power lines were uninsulated. The text of the applicable regulation identifies the existence of insulation as an exception to the standard. *See* 29 C.F.R. § 1926.550(a)(15) ("Except . . . where insulating barriers . . . have been erected to prevent physical contact with the lines . . . ."). As such, an unbroken line of Commission precedent correctly places the burden of both production and persuasion on the party seeking to find shelter under that exception. [Citations omitted]. This reasonable approach to interpretation is in harmony with the baseline rule for statutes. *See, e.g., Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 . . . (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.") (*quoting FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 . . . (1948) (internal quotation marks omitted)). We therefore conclude that the Commission permissibly placed on Crooker the burden of proving the presence of effective insulation.

As will be discussed further in Part IV.A. below, the First Circuit's heavy reliance on cases dealing with exceptions in statutes was misplaced, for the case involved a regulation, as to which *Greenwich Collieries* and APA § 556(d) forbids reliance. More recently, the Second Circuit in *Triumph Construction* applied, at least in the alternative, the same approach in a case involving an excavation standard.[101] Neither circuit considered whether their holdings comported with APA § 556(d).

2. OSHA standards expressly imposing a burden of persuasion on a defendant

Some OSHA standards expressly purport to impose a burden of persuasion on employers. For example, an electrical safety standard requires

101. Triumph Constr. Corp. v. Sec'y of Labor, 885 F.3d 95, 98 (2d Cir. 2018). The Court stated:

> Although the Secretary bears the burden of proving an OSHA violation by a preponderance of the evidence [citation omitted], the "party claiming the benefit of . . . an exception must demonstrate its applicability" [citation to case on statutory construction omitted]. The excavation standard at 29 C.F.R. § 1926.652(a)(1) "applies to *any* excavation, unless the employer shows that the excavation meets one of two exceptions." [Citation omitted]. One of the two exceptions is relevant here: the exception for excavations less than five feet deep. 29 C.F.R. § 1926.652(a)(1)(ii).
>
> We conclude that the ALJ did not impermissibly shift the burden of proof. First, the ALJ properly placed the burden of proof on Triumph to demonstrate that its site fell within the exception for excavations less than five feet deep under 29 C.F.R. § 1926.652(a)(1)(ii). . . . Second, the depth of the excavation was not an issue that turned on which party bore the burden of proof. The great weight of evidence established that the excavation was more than five feet deep . . . .

Id. See also Or. OSH Div. v. Mowat, 240 P.3d 748 (Or. Ct. App. 2010) (construing same excavation standard as applied under Oregon law).

employers installing or removing overhead electrical lines to determine "the approximate voltage to be induced in the new lines, or work shall proceed on the assumption that the induced voltage is hazardous."[102] The next sentence states:

> *Unless the employer can demonstrate* that the lines that employees are installing are not subject to the induction of a hazardous voltage . . . temporary protective grounds shall be placed at such locations and arranged in such a manner *that the employer can demonstrate* will prevent exposure of each employee to hazardous differences in electric potential.[103]

An OSHA standard governing electrical power generation, 29 C.F.R. § 1910.269(l)(2)(i), first creates a general rule that "*[e]xcept as* provided in paragraph (l)(2)(ii) . . . at least two employees shall be present while any employees perform" certain types of work.[104] Paragraph (l)(2)(ii) then states that the two-employee rule "does not apply to . . . [r]outine circuit switching, *when the employer can demonstrate that conditions at the site allow safe performance of this work . . . .*"[105]

OSHA's chemical hazard communication standard, 29 C.F.R. § 1910.1200, "does not apply to," among other things, a "consumer product" "where the employer *can show* that it is used . . . for the purpose intended . . . and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers . . . ."[106] An administrative law judge of the Commission has held that the "can show" clause creates an affirmative defense as to which the employer has the burden of persuasion.[107]

102. 29 C.F.R. § 1910.269(q)(2)(iv).

103. *Id.* (emphasis added).

104. 29 C.F.R. § 1910.269(l)(2)(i)–(ii) (emphasis added). In context, it states:

> § 1910.269 Electric Power Generation, Transmission, and Distribution. . . . (l) *Working on or near exposed energized parts*. This paragraph applies to work on exposed live parts, or near enough to them to expose the employee to any hazard they present. . . . (2) At least two employees. (i) Except as provided in paragraph (l)(2)(ii) of this section, at least two employees shall be present while any employees perform the following types of work: . . . . (ii) Paragraph (l)(2)(i) of this section does not apply to the following operation[]: . . . . (A) Routine circuit switching, when the employer can demonstrate that conditions at the site allow safe performance of this work . . . .

105. 29 C.F.R. § 1910.269(l)(2)(ii) (emphasis added).

106. 29 C.F.R. § 1910.1200(b)(6)(ix) (emphasis added).

107. Con Agra Flour Milling Co., 1991 CCH OSHD ¶ 29,267 (No. 88-1249, 1991) (ALJ) (applying 29 C.F.R. § 1910.1200(b)(6) (consumer products exemption)).

3. A troubling result: Shifting the burden of proving innocence to the employer

Even aside from their failure to follow APA § 556(d), some Commission and court decisions have endorsed results that should have been troubling—the shifting of practically the entire burden of proof to the employer, including the burden of proving that a condition is safe.

In *Central Florida Equipment Rentals*,[108] the employer allegedly violated 29 C.F.R. § 1926.602(a)(3)(i), which states that "[n]o employer shall move . . . vehicles upon any access roadway . . . *unless* the access roadway . . . is constructed and maintained to accommodate safely the movement of the . . . vehicles involved." [109] The Commission held that the standard's wording indicates that OSHA "need only show that the [off-highway truck] was used on an access roadway . . . ."[110] Inasmuch as the word "unless" signifies "an exception," the Commission held, "it is [the employer's] burden to prove that the berm was 'constructed and maintained to accommodate safely the movement of' the equipment."[111] Thus, OSHA had to prove no more than that a certain kind of truck was used on an access roadway. OSHA was not required to prove a lack of safety; instead, the employer was required to affirmatively prove safety.

The scheme of the standard did not rest on a finding made in rulemaking—either when the standard was proposed or adopted—that merely driving that certain kind of truck on an access road is unsafe, or is unsafe a majority of the time.[112] Common sense suggests that such a finding could never be made. The Commission's holding thus suggests that an agency could misuse its rulemaking power to impose on its enforcement officials a very light burden of persuasion—one that bears no or little relationship to safety—and then place a heavy burden of proving safety on a defendant. It suggests that OSHA could write a standard saying that no employee may be assigned labor unless the employer can demonstrate that it is safe.

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108. Cent. Fla. Equip. Rentals, Inc., 25 BNA OSHC 2147 (No. 08-1656, 2016).

109. 29 C.F.R. § 1926.602(a)(3)(i) (emphasis added). In context, it states:

> § 1926.602 Material handling equipment. (a) Earthmoving equipment; General. (1) These rules apply to the following types of earthmoving equipment: scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment. . . . (3) Access roadways and grades. (i) No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade unless the access roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and vehicles involved.

110. Cent. Fla., 25 BNA OSHC at 2150.

111. *Id.* The Commission cited United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967), which relied on *Morton Salt.*

112. The provision was proposed at 36 Fed. Reg. 20,772, 20,778 (Oct. 29, 1971) and adopted at 37 Fed. Reg. 6837, 6846 (1971).

a. The Bardav *and* Triumph Construction *cases.* Indeed, it seems that, as construed by the Commission, OSHA already has something very close to such a standard. *Bardav, Inc.*,[113] concerned the same excavation standard considered by the Second Circuit in *Triumph Construction*,[114] namely, 29 C.F.R. § 1926.652(a)(1). The standard states that employees in an "excavation" must be "protected from cave-ins by an adequate protective system" (sloping or shoring) "except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet . . . in depth and examination of the ground by a competent person provides no indication of a potential cave-in."[115] At trial, OSHA proved that employees were in an unshored, unsloped excavation. The employer did not argue that it met either of the two exceptions in paragraphs (i) and (ii). Instead, it argued that the excavation was so shallow (not more than four feet deep) and sloped "that no hazard existed."[116] The Commission rejected the argument, stating that "the provision applies to *any* excavation, unless the employer shows that the excavation meets one of the two exceptions," neither of which the employer met.[117] The problem is that "excavation" is defined without regard to height or stability—as a "man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal."[118] The lack of these criteria means that, if the Commission's holding were taken literally, it would be facially illegal for an employee to stand in a perfectly stable two-inch deep rut. During the rulemaking leading to the excavation standard, OSHA did not find that standing in an excavation of any height is more likely than not to be unsafe and thus requires a special design.[119] Yet, OSHA's burden is to show something that is not at all unsafe while the employer must entirely prove its innocence by proving one of the two safety-related exceptions.

Neither the Commission in *Bardav* or *Central Florida Equipment Rentals,* nor the Second Circuit in *Triumph Construction,* appeared to notice that, as construed, the standards cited there placed nearly the entire burden on the employer, with OSHA not required to prove a lack of safety or the presence of a condition found in a rulemaking to be unsafe. The

113. 24 BNA OSHC 2105, 2107–08 (No. 10-1055, 2014).

114. Triumph Constr. Corp. v. Sec'y of Labor, 885 F.3d 95 (2d Cir. 2018).

115. 29 C.F.R. § 1926.652(a)(1).

116. *Bardav*, 24 BNA OSHC at 2107.

117. *Id.* at 2107–08 (emphasis in original).

118. 29 C.F.R. § 1926.650(b).

119. *See* 52 Fed. Reg. 12,288 (1987) (proposed rule); 53 Fed. Reg. 5280 (1988) (re-opening for comment); 54 Fed. Reg. 45,959 (1989) (final rule).

cases thus suggest that administrative agencies might abuse their rulemaking power to impose only a slight burden of persuasion on the prosecuting agency and a heavy burden of persuasion on the defendant.

b. Solutions to the problem. As will be argued in Part IV.A. below, APA § 556(d) bars this result; it requires that the entire burden of persuasion must, unless a statute (not a regulation) provides otherwise, fall on the prosecuting agency. Such standards would also violate APA § 556(d)'s purpose as it was expressed in both the Senate and House committee reports—that "no agency is entitled to presume that the conduct of any person . . . is unlawful or improper."[120]

Other principles would also bar this result. Constitutional due process requires "some rational connection between the fact proved and the ultimate fact presumed."[121] For example, as construed by the Commission in *Bardav,* there is no rational connection between merely standing in a stable rut two inches high and the implicitly presumed fact that doing so is not only unsafe but so unsafe as to require sloping or shoring.

Another obstacle to such an irrational result might be rooted in an agency's organic statute, and specifically in the substantive rulemaking criteria that must be satisfied before a regulation can be adopted. The Occupational Safety and Health Act provides a good example. It defines an "occupational safety and health standard" as one that "requires conditions . . . or . . . practices . . . reasonably necessary or appropriate to provide safe or healthful employment."[122] The "reasonably necessary or appropriate" criterion has been construed to require a finding that a certain required measure addresses a "significant risk of harm."[123] Yet, in *Bardav*, *Triumph Construction*, and *Central Florida Equipment Rental*, OSHA's case-in-chief was not required to include proof of a condition (for example, standing in a rut two inches deep, or driving a certain truck on a certain roadway) that had been found in a rulemaking to pose a significant risk of

120. S. REP. NO. 79-752, at 22 (1945), *reprinted in* APA LEG. HIST., *supra* note 5, at 187, 208. The House report, H.R. REP. NO. 79-1980, at 36 (1946), *reprinted in* APA LEG. HIST., *supra* note 5, at 235, 270, contains identical language.

121. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976) (A presumption will be upheld if there is "some rational connection between the fact proved and the ultimate fact presumed, and [if] the inference of one fact from proof of another [would] not be so unreasonable as to be a purely arbitrary mandate.").

122. OSH Act § 3(8), 29 U.S.C. § 652(8) ("The term 'occupational safety and health standard' means 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.").

123. Indus. Union Dep't v. Am. Petrol. Inst., 448 U.S. 607, 642 (1980) (plurality opinion). Industrial Union has been followed by other cases. *See, e.g.,* Nat'l Maritime Safety Ass'n v. OSHA, 649 F.3d 743, 750 (D.C. Cir. 2011). OSHA has taken the position as well that it may not regulate in the absence of a significant risk. 55 Fed. Reg. 16612, 16614 (1993) (supplemental statement).

harm. Instead, OSHA was required to prove only facts that are nearly always innocuous. Applying a standard in that way threatens its validity. To avoid that result, a court might hold, consonant with APA § 556(d), that no part of the burden of persuasion falls on the defendant.[124] It does not appear that these considerations or APA § 556(d) were brought to either the attention of the Commission or the court in *Bardav*, *Triumph Construction*, or *Central Florida Equipment Rentals.* A different result might have been reached if different arguments had been made.[125]

4. A troubling result: Shifting the burden of persuasion when shifting the burden of going forward would suffice

The Commission has also, without any analysis of substance, construed a regulation (29 C.F.R. § 1910.5(c)) to impose a burden of persuasion where a shift of the burdens of pleading and going forward might instead be more sensible.

Because many OSHA standards come from varying sources, they often overlap, sometimes requiring different precautions against the same hazard. To solve this problem, OSHA adopted a regulation saying, essentially, that where two standards both apply, the more specifically applicable standard preempts the less applicable one.[126] To give the regulation force, and to apply the standards as they were intended, the Commission has vacated citations where the less applicable standard was not cited or

124. This article does not argue that OSHA's case-in-chief must necessarily in all cases include a showing that a hazard was present. The Commission and the courts have long held that, unless a standard uses the word "hazard" or the like, OSHA has no such burden. *E.g.*, Am. Steel Works, 9 BNA OSHC 1549, 1551 n.4 (No. 77-553, 1981); Pratt & Whitney Aircraft v. Donovan, 715 F.2d 57, 63–64 (2d Cir. 1983); Lee Way Motor Freight, Inc. v. Sec'y of Labor, 511 F.2d 864, 869 (10th Cir. 1975). *See generally* Cent. Fla. Equip. Rentals, Inc., 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016) (collecting cases). This article instead argues that OSHA must in a rulemaking (1) find that certain facts (such as airborne levels of a toxin or presence within a certain number of feet of a high-voltage line) pose a significant risk of harm, and (2) have memorialized those facts in the words of a standard as criteria that trigger a duty. In a citation contest, OSHA's case-in-chief must include proof of those duty-triggering facts, not necessarily that the facts pose a hazard.

125. In a future excavation case, in addition to arguing that APA § 556(d) and *Greenwich Collieries* bar the imposition of a burden of persuasion based on a regulation, the employer might argue in part for the same reasons that OSHA should be required to show that employees in an excavation were not "protected from" the "falling or sliding [of soil or rock], in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person." 29 C.F.R. § 1926.652(a)(1) (using the phrase "protected from cave-ins"); 29 C.F.R. § 1926.650(b) (defining "cave-ins" to include the "falling or sliding [of soil or rock], in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person"). Such an argument might, if adopted, obviate the need for the Commission to invalidate the standard's purported allocation of the burden of persuasion.

126. 29 C.F.R. § 1910.5(c)(1)–(2).

pled in the alternative.[127] The Commission has also held, without any analysis, that the employer must plead and prove greater applicability as an affirmative defense.[128] The holding not only places an excessive burden on the employer but was made without consideration of APA § 556(d).

There is a solution, however. The Commission need not hold that something is an affirmative defense before requiring that it be pled.[129] If the concern that animated its holding is that OSHA should have notice that the issue is being raised, the Commission's rules can require the employer to shoulder the burden of pleading in its answer and thereby give notice of the issue. Consistent with APA § 556(d), the employer could then be required to go forward with evidence that the other standard is not only applicable but more specifically applicable. If the employer carried that burden of going forward, and if OSHA successfully moved to amend its pleadings to plead a violation of that more specifically applicable standard,[130] APA § 556(d) would require OSHA to shoulder the burden of persuasion of showing that the employer violated it.

IV. ADJUDICATORS MAY NOT RELY ON THE WORDING OF REGULATIONS TO IMPOSE A BURDEN OF PERSUASION ON A PARTY OPPOSING AN ORDER

As shown above, courts and administrative adjudicators have relied on the wording of regulations to allocate the burden of persuasion to parties opposing agency orders. Sometimes such regulations expressly purport to allocate the burden of persuasion to a private party and sometimes adjudicators point to a regulation's use of words like "except," "unless" or

127. *E.g.,* Brand Energy Solutions LLC, 25 BNA OSHC 1386, 1389–90 & n. 6 (No. 09-1048, 2015).

128. Spirit Aerosystems, Inc., 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) ("[P]reemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer."). The Commission cited earlier cases but none considered the issue in any depth. *Id.*

129. Ronald J. Allen, *Burdens of Proof,* 13 LAW, PROBABILITY & RISK 195, 198 (2014) ("The burden of production often parallels the burden of pleading, but there is no analytical requirement that this be so. Sometimes it can be sensible to require one party to plead an issue and the other party to bear a burden of production (or a burden of persuasion for that matter) on the issue."); Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 59 (1961) ("The burden of proof does not follow the burden of pleading in all cases."). For examples, *see id*. at 59–60.

130. The employer would have no incentive to plead preemption unless it had complied with the more applicable standard; if it pleads preemption but had not been in compliance with the preempting standard, OSHA would likely move to amend the citation to instead or alternatively plead a violation of it. The Commission has encouraged this. McWilliams Forge Co., 11 BNA OSHC 2128, 2131 (No. 80-5868, 1984) ("[W]e suggest that the Secretary's attorneys follow [this] course . . . : When it is claimed or suggested that a standard preempts the general duty clause, (or is more specifically applicable), move to amend to allege in the alternative a violation of that standard.").

"however," often together with the idea expressed in *FTC v. Morton Salt Co.*[131] to hold that the standard implicitly allocates the burden of persuasion to a defendant.

A. The APA and Greenwich Collieries *Do Not Permit Regulations to Allocate Burdens of Persuasion*

APA § 556(d) and *Greenwich Collieries* do not, however, permit adjudicators to rely on a regulation to impose a burden of persuasion on a defendant, whether the imposition is based on a regulation's express text (such as "must demonstrate that") or is implied from its use of words such as "except," "unless" or "however." APA § 556(d) states the general rule that "the proponent of a[n] . . . order has the burden of proof." *Greenwich Collieries* holds that the term "burden of proof" means the burden of persuasion and that an agency in a formal adjudication "cannot allocate the burden of persuasion in a manner that conflicts with the APA."[132] The rule of *Morton Salt* cannot change that, for it states a canon of construction (and *statutory* construction at that), not a rule of law, while APA § 556(d) states a rule of law—that agency adjudicators may not depart from its general rule "[e]xcept as otherwise provided by statute." The allocation of the burden of persuasion to the defendant in the above cases was therefore erroneous, though in fairness to the courts and agencies involved, the issue was very likely not raised.

Greenwich Collieries involved, however, a burden of persuasion that was allocated in an adjudication, not in a rulemaking. Could it be distinguished on that basis? May agencies allocate by regulation a burden of persuasion they could not allocate by adjudication?

It appears not. Court decisions have stated or recognized that APA § 556(d) as construed in *Greenwich Collieries* forbids an agency from imposing by regulation the burden of persuasion on a defendant.[133] These decisions were undoubtedly correct. First, APA § 556(d) draws no distinction between burdens of persuasion allocated in an adjudication and those allocated in a rulemaking. Second, *Greenwich Collieries* and other cases

131. 334 U.S. 37, 44–45 (1948).

132. Dir. v. Greenwich Collieries, 512 U.S. 267, 269 (1994).

133. *E.g.,* Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 871–72 (D.C. Cir. 2002) ("*Greenwich Collieries* carefully distinguishes agency regulations that shift the burden of proof (prohibited by the APA 'except as otherwise provided by statute,' 5 U.S.C. § 556(d)) from regulations that shift the burden of production (which the APA does not prohibit . . . ."). For other cases, see *infra* note 150.

expressly hold that "the assignment of the burden of proof is a rule of *substantive* law" rather than procedural law[134] and APA § 558(b) states that an agency "may not" make a "*substantive* rule or order except within jurisdiction delegated to the agency and as authorized by law."[135] The term "rule or order" expressly indicates that APA § 558(b) applies equally to both functions. Third, APA § 558(b)'s prohibition against an agency acting except "as authorized by law" dovetails well with the phrase "[e]xcept as otherwise provided by statute" in APA § 556(d). Fourth, the APA's purpose was "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."[136] Distinguishing between adjudication and rulemaking would defeat that purpose, for it would mean that "each agency would be free to decide who shall bear the burden of persuasion."[137]

In sum, the APA and *Greenwich Collieries* prohibit agencies from shifting the burden of persuasion by regulation—either expressly in a regulation, or by construction of a regulation.

B. Implications of APA § 556(d) and Greenwich Collieries

1. The greater-access-to-evidence fallacy

Agencies might try to avoid APA § 556(d) and *Greenwich Collieries* by arguing that a defendant's greater access to evidence of his conduct or business can justify the imposition on the defendant a burden of persuasion. This would be wrong because the only exception to the rule stated in APA § 556(d) is that a statute provides otherwise.

As discussed in Part V below, however, this factor *is* properly considered when an agency decides whether to allocate to a defendant a burden of going forward. (As to the relevance of greater access to evidence when construing a *statute*, see Part VI.B.1 *infra*.)

134. *Greenwich Collieries,* 512 U.S. at 271 (citing Am. Dredging Co. v. Miller, 510 U.S. 443, 454 (1994)); *see also* Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191, 199 (2014) ("[W]e have held that 'the burden of proof' is a "'substantive' aspect of a claim." (quoting Raleigh v. Ill. Dep't. of Revenue*,* 530 U.S. 15, 20–21 (2000)).

135. 5 U.S.C. § 558(b) (emphasis added). In context, it states: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." *Id.*

136. *Greenwich Collieries,* 512 U.S. at 280–81 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950)).

137. *Id.* at 281.

2. The semantic fallacy—"prima facie case" and "affirmative defense"

As noted in Part II above and Part III.C.3. below, courts have allocated a burden of persuasion to a defendant by pointing to certain elements of a statute and declaring that they define the prosecuting agency's "*prima facie* case," while pointing to others and declaring that, because they define an "affirmative defense," they place a burden of persuasion on a defending party. The terms "*prima facie* case" and "affirmative defense" are just conclusory shorthand terms; they represent a conclusion, not a method for determining who should have the burden of persuasion. APA § 556(d) would state a shallow, even meaningless, principle if it could be defeated by a mere change of semantic label, from element of violation to affirmative defense.[138] A statutory analysis must go deeper than that. Part VI of this article discusses how such an analysis should be conducted.

3. The inappropriateness, uselessness, and misleading nature of procedural rules on burdens of proof and "affirmative defense"

APA § 556(d) and *Greenwich Collieries* have implications for the way that agencies write their rules of procedure, some of which set out rules on burdens of proof and affirmative defenses. For example, the Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation, has a rule stating that "[t]he burden of proof shall be on the Administration in enforcement cases."[139] The Occupational Safety and Health Review Commission once had a similar rule, stating in part that "the burden of proof shall rest with the Secretary."[140] The Department of Homeland Security has a rule stating that "[e]xcept in the case of an affirmative defense, the burden of proof is on the agency."[141] Most such rules are inappropriate or useless, and some are misleading.

Rules such as that of the FMCSA and such as the Review Commission's former rule, which state that the burden of "proof" is on the prosecuting agency, are misleading if the substantive law provides affirmative

138. *Cf.* John C. Jeffries *et al.*, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1333 (1979) (discussing the consistency of calling an element an affirmative defense with constitutional principle that crimes must be proven beyond a reasonable doubt: "it is a singularly shallow constitutional principle that is subject to defeat by a single stroke of the drafter's pen").

139. 49 C.F.R. § 386.58(a).

140. 29 C.F.R. § 2200.73 (1986) ("§ 2200.73 Burden of proof. (a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.").

141. 49 C.F.R. § 1503.639(a).

defenses as to which the defendant is expected to carry the burden of persuasion. When it revoked its former rule, the Review Commission stated the rule had misled defendants into believing that they never need bear a burden of persuasion.[142] If, however, there are no affirmative defenses, then the rule merely restates APA § 556(d).

Rules such as those of the EAB[143] and the Department of Homeland Security, the latter of which states that "[e]xcept in the case of an affirmative defense, the burden of proof is on the agency," state tautologies and are therefore useless.[144] They leave open the most important question: On which issues must the defendant bear the burden of persuasion? And if an agency has a rule (such as the Review Commission does[145]) that attempts

142. In 1986, the Review Commission stated in part:

> Paragraph (a) of the [former] rule stated that, in all notice of contest proceedings, "the burden of proof shall rest with the Secretary." The Secretary commented that paragraph (a) needed to be clarified. The Secretary correctly observed that paragraph (a) has never been applied literally because the Commission has recognized numerous affirmative defenses, such as the invalidity of a standard, to which the employer has the burden of proof. It has also been the Commission's experience that the unequivocal wording of the present rule has misled pro se employers and sometimes even attorneys into believing that they never bore a burden of proof. The Secretary proposed, therefore, that the rule be clarified to reflect that the Secretary bears the burden of proof with respect to those elements deemed to be a part of his prima facie case, and that the employer bears the burden of proof on affirmative defenses.
>
> The Commission agreed with the Secretary that the present rule is misleading but concluded that it could not be rewritten as he proposed without great difficulty. A simple statement that the Secretary bears the burden of proof on matters that are part of his prima facie case provides no guidance. To give the statement some meaning, the Commission would have to state what each element of the Secretary's prima facie case is. The same would be true of all affirmative defenses. To do so in greater detail than is suggested by the allocation of the burdens of pleading in [certain] revised [rules] would not only be impractical but would tend either to restrict the development of the law or render the rule misleading as case law developed. More fundamentally, the Commission determined that such a rule is not a rule of procedure at all but one of substantive occupational safety and health law, which has been and must be developed and stated in case law.

51 Fed. Reg. 32002, 32012-13 (1986).

143. The example is taken from the Environmental Appeals Board rule at 40 CFR § 22.24(a) (2019), which states in part:

> § 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard. (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

144. 49 U.S.C. § 1503.639(a) (2019).

145. *See* 29 C.F.R. § 2200.34(b)(3) (2019). This Review Commission rule states that an answer to a complaint "shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, 'infeasibility,' 'unpreventable employee misconduct,' and 'greater hazard.'" *Id.*

to set out such affirmative defenses, it would either be incomplete (as the Review Commission's rule is) or it runs the risks of freezing the development of case law or becoming obsolete as case law changes.

The existence of such rules may be questioned on a more fundamental ground. *Greenwich Collieries* held that the allocation of a burden of persuasion is a matter of substantive law, not procedure.[146] Given APA § 556(d)'s prohibition against a regulation placing a burden of persuasion on a defendant unless a statute provides otherwise, any such rule could only restate APA § 556(d) or restate any different statutory rule. It could only inform, not regulate. It was for essentially this reason that the Administrative Conference of the United States' Model Adjudication Rules has a rule on only the initial burden of going forward.[147]

V. MAY AN AGENCY BY REGULATION SHIFT THE BURDEN OF GOING FORWARD TO THE DEFENDANT?

May an agency by regulation shift to a defending party, not the burden of persuasion, but the burden of going forward? Stated differently, may it adopt a presumption, which under Federal Rule of Evidence 301 has the effect of casting the burden of producing evidence on a defending party?[148]

In the suggested scenario, a regulation (or adjudicative decision construing it) would place on the prosecuting agency an initial burden of going forward with evidence to establish a certain fact. Proof of this fact would trigger a presumption, thereby shifting the burden of going forward to the defendant to rebut either the triggering fact or the presumed fact. If the defendant succeeds in either, then the burden of going forward shifts back

146. Dir. v. Greenwich Collieries, 512 U.S. 267, 271 (1994). The cases on which it relies are cited *supra* note 134.

147. *Model Adjudication Rules: Rule 329 Burden of Going Forward with Evidence*, ADMIN. CONFERENCE OF THE U.S., https://www.acus.gov/sites/default/files/documents/Model Adjudication Rules 9.13.18 ACUS_0.pdf (last visited Mar. 21, 2021) ("The proponent of a factual proposition has the burden of introducing evidence to support that proposition."). The official comment to the provision states:

> The burden-of-proof provision of the APA is 5 U.S.C. § 556(d), which states: 'Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.' The ultimate burden of persuasion in any case depends on the substantive statute involved, and the burden of persuasion may be allocated among parties or shift from one party to another, depending on the issue. As a consequence, this rule only addresses the initial burden of going forward with the evidence.

Id.

148. FED. R. EVID. 301 states that "the party against whom a presumption is directed has the burden of producing evidence to rebut" it. It also states that "this rule does not shift the burden of persuasion, which remains on the party who had it originally."

to the prosecuting agency. If the prosecuting agency could not present sufficient additional evidence to make it more likely than not that the triggering fact or the presumed fact is true, then it would lose, for the ultimate burden of persuasion always rested on it. This scheme would be lawful if prescribed or authorized by statute, and such schemes have been adopted.[149] Would such a scheme be lawful under APA § 556(d) if prescribed by regulation or adopted in adjudication?

Inasmuch as *Greenwich Collieries* held that APA § 556(d) generally prohibits the shift of the burden of persuasion and not the burden of going forward, it can be argued that a regulation or holding shifting only the burden of going forward would be lawful, and courts have so held.[150]

A. Limiting the Capacity for Abuse

The question then arises whether the APA or any provision of law constrains an agency from shifting the burden of going forward to the accused. The agency has almost no burden of going forward and thus would not be required to show, at least initially, that the accused has done anything wrong. Shifting much of the burden of going forward would threaten, as a practical matter, the congressional policy that animated APA § 556(d). Both the Senate and House committee reports stated that "no agency is entitled to presume that the conduct of any person . . . is unlawful or improper."[151] "[A]t a certain point along an evidentiary continuum a shift in the burden of production can become de facto a shift in the burden of persuasion."[152] And constitutional due process requires "some rational connection between the fact proved and the ultimate fact presumed."[153]

149. *E.g.*, LHWCA § 20(d), 33 U.S.C. § 920(d) (2019) ("In any proceeding for the enforcement of a claim for compensation . . ., it shall be presumed, in the absence of substantial evidence to the contrary . . . (d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." The title of the section is "Presumptions." Paragraph (c) erects the presumption, "That the injury was not occasioned solely by the intoxication of the injured employee."). *See also* Consol. Coal Co. v. Dir., 864 F.3d 1142, 1149 (10th Cir. 2017) (construing 33 U.S.C. § 921(c)(4)).

150. *Greenwich Collieries*, 512 U.S. at 270–80. *See also*, *e.g.*, Nat'l Min. Ass'n v. Dep't of Labor, 292 F.3d 849, 871–72 (D.C. Cir. 2002); Garvey v. NTSB, 190 F.3d 571, 580 (D.C. Cir. 1999); Gulf & W. Indus. v. Ling, 176 F.3d 226, 234 (4th Cir. 1999); Glen Coal Co. v. Seals, 147 F.3d 502, 512–13 (6th Cir. 1998); Lovilia Coal Co. v. Harvey, 109 F.3d 445, 452 (8th Cir. 1997).

151. S. REP. NO. 79-752, at 22 (1945), *reprinted in* APA LEG. HIST., *supra* note 5, at 187, 208; H.R. REP. NO. 79-1980, at 36 (1946)), *reprinted in* APA LEG. HIST., *supra* note 5, at 235, 270.

152. Nat'l Mining Ass'n v. Babbitt, 172 F.3d 906, 910 (D.C. Cir. 1999).

153. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976) (A presumption will be upheld if there is "some rational connection between the fact proved and the ultimate fact presumed, and [if] the inference of one fact from proof of another [would] not be so unreasonable as to be a purely arbitrary mandate").

Take again the implications of the holding in the *Bardav* case mentioned above. There the Occupational Safety and Health Review Commission so interpreted an OSHA excavation safety standard that OSHA in its case-in-chief theoretically need show only that an employee stood in a rut two inches deep—a condition that is neither unsafe nor was found unsafe in any rulemaking finding. For the Commission to effectively require, on the basis of such a paltry showing, that the employer shoulder the entire burden of going forward with evidence that the condition was not unsafe would disrespect the congressional intent behind APA § 556(d). There are, however, neutral principles indicating how much of the burden of going forward may be shifted to the defendant.

B. Neutral Principles

General administrative law principles provide one solution to the problem—requiring the agency to justify with evidence that the facts triggering the presumption "make it more likely than not that the presumed fact exists."[154] As the D.C. Circuit stated, an evidentiary presumption is permissible only "if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it."[155]

In *Steelworkers v. Marshall*,[156] employers mounted a pre-enforcement challenge to OSHA's lead standard.[157] During the rulemaking, OSHA had found, as case law required, that compliance with the standard was generally feasible. The D.C. Circuit held that this finding gave rise to a "presumption of feasibility," which an employer in an enforcement proceeding could challenge.[158] Although the court characterized such a challenge as

154. Nat'l Mining Ass'n v. Babbitt, 172 F.3d at 910 ("For a factual presumption that causes a shift in the burden of production must be reasonable (as we explain below, this means essentially that the circumstances giving rise to the presumption must make it more likely than not that the presumed fact exists).").

155. *Id.* at 912 (emphasis in original). The court there dissected an agency's attempt to create a presumption and exposed it as unsupportable. *Id.*

156. United Steelworkers of Am. v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

157. 29 C.F.R. § 1910.1025.

158. United Steelworkers, 647 F.2d at 1270 ("[I]n an enforcement proceeding the employer could . . . expect the . . . court to entertain the affirmative defense that the standard had proved generally infeasible even if the court had earlier found otherwise on pre-enforcement review. In any of these proceedings, of course, the employer would bear the burden of proof."); *id.* at n.119 ("OSHA [would] bear the initial burden of proving the general feasibility of the standard for the industry as a whole at the rulemaking stage, shifting to the employer in later [enforcement] proceedings the task of overcoming OSHA's initial finding.").

an "affirmative defense" on which "the employer would bear the burden of proof,"[159] that court's later decision in *National Mining Association v. Babbitt* indicates that, because *Steelworkers* preceded *Greenwich Collieries*, the "presumption" it erected must be re-cast as one that shifts only the burden of persuasion.[160]

As discussed in Part III.C.3. above, a court could also hold that the lack of support for a presumption causes the regulation to violate a substantive statutory criterion governing adoption of the regulation. If, on the other hand, a presumption is not triggered until OSHA shows triggering facts that OSHA had earlier found in a rulemaking *do* reflect a condition or conduct that is more likely than not to satisfy statutory criteria for the adoption of the regulation, APA § 556(d) would not be violated.[161] An electrical safety standard might require that employees be kept a certain distance from energized parts "unless" certain safety measures are taken[162] A chemical process safety standard might impose requirements for handling certain flammable gases "except for" certain flammable gases in certain circumstances.[163] In such cases, OSHA could adopt a presumption and place on the employer the burden of going forward with proof of the exceptional circumstances, *if* it made rulemaking findings justifying the presumption as more likely than not to be true.

159. *Id.* at 1270.

160. *See* Nat'l Mining Ass'n v. Babbitt, 172 F.3d 906, (D.C. Cir. 1999).

161. In the case of the OSH Act, such criteria might be found in OSH Act § 3(8), the definition of an "occupational safety and health standard." *See supra* notes 122–24 and accompanying text.

162. 29 C.F.R. § 1910.269(l)(3)(iii) (2019).

> § 1910.269 Electric Power Generation, Transmission, and Distribution. . . . (l) *Working on or near exposed energized parts*. This paragraph applies to work on exposed live parts, or near enough to them to expose the employee to any hazard they present. . . . (3) *Minimum approach distances*. . . . (iii) The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance, unless: (A) The employee is insulated from the energized part (rubber insulating gloves or rubber insulating gloves and sleeves worn in accordance with paragraph (l)(4) of this section constitutes insulation of the employee from the energized part upon which the employee is working provided that the employee has control of the part in a manner sufficient to prevent exposure to uninsulated portions of the employee's body), or (B) The energized part is insulated from the employee and from any other conductive object at a different potential, or (C) The employee is insulated from any other exposed conductive object in accordance with the requirements for live-line barehand work in paragraph (q)(3) of this section.

Id.

163. 29 C.F.R. § 1910.119(a)(1)(ii).

VI. WHEN MAY A STATUTE BE HELD TO "OTHERWISE PROVIDE" AND PLACE A BURDEN OF PERSUASION ON A DEFENDANT?

As discussed below, many cases permit agencies to allocate to the party opposing an order a burden of persuasion on an issue, which means that the issue is an affirmative defense. APA § 556(d) permits this only if a statute can be said to so provide, for it states that, "*[e]xcept as otherwise provided by statute*, the proponent of a rule or order has the burden of proof."[164]

A provision of the Surface Mining Reclamation and Control Act[165] exemplifies language that expressly allocates a burden of persuasion differently than does APA § 556(d). It states that when an applicant for a strip-mining permit "is currently in violation" of state or federal rules, "the permit shall not be issued *until the applicant submits proof* that such violation has been corrected or is in the process of being corrected . . . ."[166] This was held to satisfy the exception in APA § 556(d).[167] For examples involving the OSH Act, see notes 86 and 87 and accompanying text.

A. When May a Different Allocation of the Burden of Persuasion Be Merely Implied from a Statute?

Unlike the anti-supersession clause in APA § 559, which requires that departures from the APA be stated "expressly,"[168] the burden-of-persuasion provision in APA § 556(d) does not use that word, so it would appear that a different allocation may be implied from a statute. Nevertheless, courts and agencies may not willy-nilly allocate burdens of persuasion to a defendant. As the Supreme Court taught in *Schaffer*, there must be "some reason to believe that Congress intended" something other than the usual rule "that the burden of persuasion lies . . . upon the party seeking relief."[169]

FTC v. Morton Salt Co. and its maxim that "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on

164. 5 U.S.C. § 556(d) (emphasis added).

165. 30 U.S.C. §§ 1201-1328 (2019).

166. 30 U.S.C. § 1260(c) (2019) (emphasis added).

167. National Mining Ass'n v. Dep't of Interior, 251 F.3d 1007, 1013 (D.C. Cir. 2001).

168. *See supra* text accompanying note 88.

169. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 57–58 (2005) ("Absent some reason to believe that Congress intended otherwise . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.").

one who claims its benefits"[170] teach us that tell-tale words such as "exception," "unless," "however," and "provided however" can go far to meet APA § 556(d)'s exception. Courts should, however, be leery of alone relying on the maxim, for *Morton Salt* itself did not do so. On the contrary, the Court additionally noted that the statute there "specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices" and that a Senate committee report states that the provision "throw[s] 'upon any who claims the benefit of those exceptions the burden of showing that their case falls within them.'"[171]

Another case teaching that more than just a tell-tale word such as "except" is required is *Meacham v. Knolls Atomic Power Laboratory*, where the Court pointed to both a suggestive phrase ("otherwise prohibited") and an explicit statutory structure to determine congressional intent.[172] The statute there had a general prohibition in one provision and in a different provision had exemptions for practices that were "otherwise prohibited."[173] The Court relied heavily on this wording and structure, characterizing it as "exempt[ing] otherwise illegal conduct by reference to a further item of proof."[174]

Another example is *Greenwich Collieries* itself. Although it rejected *Transportation Management*'s dictum that APA § 556(d) allocates only the burden of going forward, the Court stated that *Transportation Management*'s holding that the accused employer must prove that it would have terminated the complainant's employee anyway, even without the protected activity, "remains intact."[175] The Court stated that this "is consistent with [APA § 556(d)] because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision" and thus violated the statute's prohibition.[176] "Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense."[177]

170. FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948).

171. *Id.* at 45.

172. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008).

173. *Id.* at 91.

174. *Id.* at 93.

175. Dir. v. Greenwich Collieries, 512 U.S. 267, 278 (1994).

176. *Id.*

177. *Id. See also* Schaeff Inc. v. NLRB, 113 F.3d 264, 267 n.5 (D.C. Cir. 1997) ("*Greenwich Collieries* does hold that the ultimate burden of persuasion remains with the General Counsel. . . . But the Court added that, once the General Counsel establishes that anti-union animus was a motivating factor, the employer bears the burden of establishing any affirmative defense such as the inevitability of termination.").

B. Fallacies to Avoid

1. Over-reliance on access to evidence

Courts and agencies often rely on a regulated party's better access to evidence as a justification for placing a burden of persuasion on it. For example, in the PCB dumping case discussed at notes 50–53 above, the Environmental Protection Agency's Environmental Appeals Board (EAB) partly justified the imposition of a burden of persuasion on a defendant by pointing to its greater access to information about a fact critical to the regulation's applicability—when the dumping occurred.[178] In *Greenwich Collieries*, the Labor Department argued, citing Supreme Court precedent, "that where one party is more likely to have information relevant to the facts at issue, it is both traditional and sensible to assign to that party the risk of non-persuasion."[179]

Greenwich Collieries effectively held that, because APA § 556(d)'s exception requires that a "statute" place the burden of persuasion on the defendant, such policy considerations cannot alone suffice.[180] Even aside from APA § 556(d)'s wording, courts should be reluctant to rely heavily on such policy considerations, for they can easily prove too much. Defendants always know better the facts about their conduct or business than any prosecutor, and so that consideration would swallow up the principle that lies behind APA § 556(d)—that the prosecuted should not be required to prove their innocence.[181] To meet the requirement of APA § 556(d) that a

178. The EAB rejected an argument that this allocation violated APA § 556(d) by pointing to pre-*Greenwich Collieries* holdings that it allocated only the burden of going forward. Standard Scrap Metal Co., 3 E.A.D. 267, 272–74 (EAB 1990) (citing Environ. Def. Fund, Inc. v. EPA, 548 F.2d 998, 1003 (D.C. Cir. 1976)). The EAB anticipated the dictum of *Transportation Management* and held that the phrase "burden of proof" in APA § 556(d) "denotes the burden of production only, and not the burden of persuasion." *Id.* at 273.

179. Brief for the Petitioner, Dir. v. Greenwich Collieries, 512 U.S. 267 (1994) (No. 93-744), 1994 WL 183496, at *20 (citing Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602, 626 (1993)) ("It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law. W. Bailey, ONUS PROBANDI 1 (1886) (*citing* POWELL ON EVIDENCE 167–171) ('In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant')."). *See also* Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976) ("[S]pecial circumstances may lead a court to shift the burden of persuasion to the defendant on some part of the claim. One special circumstance commonly accepted is that the burden will be shifted where the material necessary to prove or disprove an element 'lies particularly within the knowledge' of the defendant.").

180. *Greenwich Collieries*, 512 U.S. at 280.

181. The sources marshalled to this point generally demonstrate this assertion. For another example, see the excellent discussion of this point in Yuval Sinai, *The Doctrine of Affirmative Defense*

"statute" provide a different allocation, and to ensure procedural fairness, there must be some strong indication in a statute or its legislative history supporting the imposition of such a burden on the defendant. Otherwise, such a policy consideration can support a shift of only the burden of going forward.

2. Courts should be wary of shifting the burden of persuasion if shifting only the burden of going forward might satisfy a statutory policy

In asking whether the words, structure, and legislative history of a statute are strong enough to fit within the APA § 556(d)'s "otherwise provided" exception, courts and adjudicative agencies should be wary of shifting too much of the burden to a defendant. They should ask themselves whether the indications in the statutory material are too vague or uncertain to justify shifting the burden of persuasion, and whether statutory policy indications justify only a shift of the burden of going forward.

An example of a statute that very much requires such an analysis is OSH Act § 4(b)(1).[182] That provision states that "[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[183] There has been disagreement over whether this provision places the burden of persuasion on OSHA or the employer—specifically, whether it creates an affirmative defense that must be pled in the answer, or is "jurisdictional" and thus may be raised at any time.[184] None of the cases take APA § 556(d) into account. That failure alone justifies re-examination.

Clearly the burden of pleading should be on the employer. That would address the problems of surprise and disorderly litigation raised by court

in Civil Cases—Between Common Law and Jewish Law, 34 N.C. J. INT'L L. & COM. REG. 111, 124–126 (2008) ("Increased accessibility to evidence may justify imposing the burden of proof, but certainly cannot justify shifting the burden of persuasion." *Id.* at 126).

182. 29 U.S.C. § 653(b)(1).

183. *Id.*

184. The Commission held in its early days that the provision creates an affirmative defense. Idaho Travertine Corp., 3 BNA OSHC 1535 (No. 1134, 1975); Pennsuco Cement & Aggregates, Inc., 8 BNA OSHC 1378, 1379 n.2 (No. 15462, 1980). Two courts have disagreed and held that the provision "is not a matter of affirmative defense but is jurisdictional." U.S. Air, Inc. v. OSHRC, 689 F.2d 1191, 1193 (4th Cir. 1982) ("[P]reemption [under OSH Act § 4(b)(1)] . . . is not a matter of affirmative defense but is jurisdictional, properly raisable . . . without regard to whether it was suggested at the administrative hearing on the citation."); Columbia Gas of Pa., Inc. v. Marshall, 636 F.2d 913, 918 (3d Cir. 1980) ("OSHA views section 4(b)(1) preemption as an affirmative defense that . . . must be raised initially if it is to be considered on appeal. We disagree. . . . [A] section 4(b)(1) claim can be raised initially on appeal or by the court sua sponte.").

holdings that, because the provision is "jurisdictional," it can be raised at any time.

The burden of going forward should also be placed on the employer. Not only is it rare and difficult for another federal agency to preempt OSHA, but the employer will know much better than OSHA what other federal agency has been regulating its business, what its allegedly applicable regulations are, and what facts about its business make those regulations applicable.

Should the employer also be allocated the burden of persuasion? Do the words and legislative history of OSH Act § 4(b)(1), together with the provision's purposes and the OSH Act's structure and general purposes, provide strong enough indications that a departure from APA § 556(d)'s default rule is "otherwise provided" by OSH Act § 4(b)(1)?

Nothing in OSH Act § 4(b)(1)'s words expressly indicates that Congress meant to allocate the burden of persuasion on this issue to the employer. Its legislative history does not address the issue. And reading the statute and its structure and purposes for implied indications of intent yields little. On the one hand, while the provision does not use words like "except" or "unless," it is worded as a carve-out ("Nothing in this Act shall apply to . . .") and thus could be said to be an exception or exemption, much as the carve-outs in *NLRB v. Kentucky River Community Care, Inc.,*[185] *Schaffer ex rel. Schaffer v. Weast*[186] and *Meacham v. Knolls Atomic Power Laboratory*[187] were held to create affirmative defenses. On the other hand, the provision carves out an exception to agency regulatory authority, not an exception to a principle of liability or employer conduct except indirectly. As one court put it, the provision appears to be a "limitation upon OSHA's authority to issue a citation."[188]

Judicial holdings that OSH Act § 4(b)(1) appears to be "jurisdictional" do not provide a strong enough indication of congressional intent to depart from APA § 556(d). The word "jurisdiction" is a conclusory label. Since those decisions were issued, the Supreme Court has repeatedly emphasized that courts should not be quick to so characterize a provision, stating that courts have been "less than meticulous" and "profligate" in their use

185. 532 U.S. 706, 712 (2001).
186. 546 U.S. 49, 57 (2005).
187. 554 U.S. 84, 91 (2008).
188. U.S. Air, Inc. v. OSHRC, 689 F.2d 1191, 1195 (4th Cir. 1982).

of the term.[189] The court decisions on whether OSH Act § 4(b)(1) are "jurisdictional" are thus subject to re-examination in light of the Supreme Court's recent admonitions.

In sum, it might be reasoned that (1) OSH Act § 4(b)(1)'s words and the OSH Act's structure do not together show that a departure from APA § 556(d)'s default rule is "otherwise provided" by the statute; and (2) that the OSH Act's words and structure are strong enough to place on the employer only the burden of pleading and going forward. Under APA § 556(d)'s default rule, the burden of persuasion would remain on OSHA—the proponent of the order that would impose abatement requirements and a penalty.

VII. CONCLUSION

APA § 556(d) and *Greenwich Collieries* have gone unheeded for too long. A decent respect for the rule of law requires that they be followed. Courts and agencies should not permit agencies to adopt or follow regulations allocating the burden of persuasion to a party opposing the imposition of an order. Such regulations should be declared invalid. Similarly, courts and agencies should no longer construe regulations to make or justify such an allocation. Any such allocation must be made by statute, not regulation.

Courts should also not be quick to construe statutes to prescribe a rule contrary to that of APA § 556(d). To overcome its general rule, it is not enough that a different rule might work better or be justified by policy considerations. The different rule must be "otherwise *provided* by statute," and that requires a grounding in the statute's words, legislative history, or structure. Such a grounding is not often easy to find.

Under special circumstances, courts and agencies may, and sometimes should, allocate the burden of pleading and a burden of going forward to a regulated party, as in the case of OSH Act § 4(b)(1). Such allocations do not violate APA § 556(d) so long as the burden of persuasion remains with the prosecuting agency.

189. Kontrick v. Ryan, 540 U.S. 443, 454 (2003) ("less than meticulous"); Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006) ("profligate"); Bowles v. Russell, 551 U.S. 205, 215 (2007) (Souter, J., dissenting) ("insidiously tempted"); Steel Co. v. Citizens for Better Environ., 523 U.S. 83, 90 (1998) ("'Jurisdiction' is a word of many, too many, meanings.") (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *see also* Myers v. IRS, 928 F.3d 1025, 1034 (D.C. Cir. 2019) (reviewing recent cases). The decisions seem to follow Justice Frankfurter's observation that "jurisdiction is a verbal coat of too many colors." United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 39 (1952) (dissenting opinion).