No. 16-950

In the Supreme Court of the United States

JACOBS FIELD SERVICES NORTH AMERICA, INC.,
PETITIONER

v.

R. ALEXANDER ACOSTA, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner forfeited its right to judicial review on one issue by failing to present it to the Occupational Safety and Health Review Commission.

2. Whether the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, regulations that govern processes involving hazardous chemicals apply to contract employers.

3. Whether the administrative law judge correctly determined that the regulations governing processes involving hazardous chemicals apply to the equipment at issue here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter* but is reprinted at 659 Fed. Appx. 181. The decision of the administrative law judge (Pet. App. 18a-67a) is published at 2015 O.S.H. Dec. (CCH) ¶ 33,445 and is available at 2015 WL 1906701.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2016. A rehearing petition was denied on October 27, 2016 (Pet. App. 70a). The petition for a writ of certiorari was filed on January 25, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2013, the Secretary of Labor (Secretary) issued a citation to petitioner for violating two provisions of a regulation promulgated pursuant to the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.* Pet. App. 19a, 21a. After a multi-day hearing, an administrative law judge (ALJ) with the Occupational Safety and Health Review Commission (Commission or OSHRC) upheld the citation and penalties totaling $14,000. *Id.* at 67a. The court of appeals denied petitioner's petition for review. *Id.* at 1a-15a.

1. The OSH Act requires employers to comply with occupational safety and health standards promulgated under the Act. 29 U.S.C. 654(a)(2); see 29 U.S.C. 655 (Secretary's authority to promulgate standards). Those standards include the requirements in 29 C.F.R. 1910.119—titled "Process safety management of highly hazardous chemicals" and referred to herein as the PSM standards—which are designed to "prevent[] or minimiz[e] the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals." *Ibid.* (purpose section).

This case involves a citation for violating two requirements of the PSM standard governing the mechanical integrity of chemical-processing equipment. 29 C.F.R. 1910.119(j) (mechanical integrity provisions). Section 1910.119(j)(2) requires employers to "implement written procedures to maintain the on-going integrity of process equipment." 29 C.F.R. 1910.119(j)(2). Section 1910.119(j)(3) requires employers to train each employee "involved in maintaining the on-going integrity of process equipment * * * in the procedures applicable to the employee's job tasks to assure that

the employee can perform the job tasks in a safe manner." 29 C.F.R. 1910.119(j)(3). The relevant PSM standard defines "process equipment" to include "[p]iping systems (including piping components such as valves)." 29 C.F.R. 1910.119(j)(1)(ii).

Paragraph (h) of the PSM standards sets forth certain requirements applicable to host employers and to contract employers. 29 C.F.R. 1910.119(h). In promulgating the PSM standards, the agency further specified that other aspects of the PSM standards also apply to contract employers and their employees, explaining that "employees of an independent contractor are still employees in the broadest sense of the word and they and their employers must not only follow the process safety management rule, but they must also take care that they do nothing to endanger the safety of those working nearby who work for another employer." Pet. App. 93a (reproducing rule preamble, 57 Fed. Reg. 6356 (Feb. 24, 1992)); see *ibid.* (noting that paragraph (h) is not "the only section of the process safety rule that applies to contractors" and that "the fact that this rule has a separate section that specifically lays out the duty of contractors on the job site does not mean that other [Occupational Safety and Health Administration] standards, lacking a similar section, do not apply to contract employers").

2. The Secretary, through the Occupational Safety and Health Administration (OSHA), enforces the OSH Act by issuing citations to employers who violate OSH Act standards. 29 U.S.C. 659(a); see 77 Fed. Reg. 3912 (Jan. 25, 2012) (delegating authority to the Assistant Secretary for Occupational Safety and Health). In appropriate cases, the OSH Act authorizes the assessment of civil penalties against a cited employer.

29 U.S.C. 659(a), 666. If the employer timely contests a citation or penalty, the Commission is required to "afford an opportunity for a hearing" before an ALJ and to "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c); see 29 U.S.C. 659(a), 661(j).

To establish a violation of an OSH Act standard, the Secretary has the burden of demonstrating that: (1) the relevant standard applied to the cited conditions; (2) the requirements of the standard were not met; (3) employees were exposed to or had access to the hazardous condition created by the violation; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the condition caused by the violation. Pet. App. 15a, 26a; see *AJP Constr., Inc.* v. *Secretary of Labor*, 357 F.3d 70, 71 (D.C. Cir. 2004). When two or more employers are working at the same jobsite, OSHA may hold more than one employer liable for one violation in certain circumstances. *OSHA Instruction on Multi-Employer Citation Policy*, CPL 02-00-124 (Dec. 10, 1999)[1] (*Multi-Employer Citation Policy*); see *Grossman Steel & Aluminum Corp.*, 4 O.S.H. Cas. (BNA) 1185, 1188-1189 (1976). Under OSHA's multi-employer citation policy, an employer is liable for failing to comply with an OSH Act standard if the employer created or controlled the hazardous condition, or if the employer's employees are exposed to the hazardous condition and the employer knew or should have known about the condition and failed to take reasonable measures to protect its employees. *Multi-Employer Citation Pol-*

[1] https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024.

icy ¶¶ X.B, X.C, X.E; *Grossman Steel & Aluminum Corp.*, 4 O.S.H. Cas. (BNA) at 1188-1189. The preamble to the PSM standards specifies that OSHA's multi-employer citation policy applies to chemical-processing facilities. Pet. App. 93a-94a.

A party that is dissatisfied with an ALJ's decision may petition the Commission for discretionary review. 29 U.S.C. 661(j); 29 C.F.R. 2200.91. If the Commission denies a petition for review, the ALJ's "ruling becomes the order of the Commission." *Martin* v. *OSHRC*, 499 U.S. 144, 148 (1991). Any person adversely affected or aggrieved by a final decision of the Commission may seek review in the appropriate federal court of appeals—but the court of appeals' review is limited to "objection[s]" that were "urged before the Commission," unless the court excuses "the failure or neglect to urge such objection * * * because of extraordinary circumstances." 29 U.S.C. 660(a). In considering a petition for review, the court of appeals "must treat as 'conclusive' Commission findings of fact that are 'supported by substantial evidence.'" *Martin*, 499 U.S. at 148 (quoting 29 U.S.C. 660(a) and (b)). The Commission's legal conclusions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

3. This case arises from an incident at a chemical plant in La Porte, Texas. Pet. App. 2a. Akzo Nobel Polymer Chemicals (Akzo) owned and operated the plant and contracted with petitioner to provide maintenance services at the plant. *Ibid.* Akzo processed chemicals at the plant in vertical settler tanks that separated heavier compounds from lighter ones. *Ibid.* Each settler tank had six decant valves. *Ibid.* To

open and close the valves, Akzo used automated devices known as actuators, which were mounted to brackets on top of each valve. *Ibid.* Akzo mounted the actuators to the valves using one of two methods: the "old style" or the "new style." *Ibid.* Both methods used four bolts to attach the actuator to the top of a bracket, and four additional bolts to attach the bottom of the bracket to the valve. *Id.* at 2a-3a. Under the old style of mounting the actuator to the valve, the four bolts connecting the bracket to the valve also held the valve bonnet and valve body together. *Id.* at 2a. Under the new style of mounting, the four bolts connecting the bracket to the valve also connected to the flange (a rim that projects from the valve body). *Id.* at 2a-3a. All eight bolts of a bracket mounted in the new style could be removed without causing a loss of containment, but removing the four bottom bolts of a bracket mounted in the old style would cause a loss of containment. *Id.* at 3a.

On March 4, 2013, petitioner assigned maintenance employee Toyo Gonzalez to troubleshoot four malfunctioning decant valves on a settler tank containing a butylethlymagnesium-heptane mixture (BEM), a highly hazardous chemical that ignites when exposed to air. Pet. App. 3a. Gonzalez successfully resolved the airflow problem with three of the four valves by replacing the fittings and air lines. *Ibid.* When that approach did not resolve the problem with the fourth valve, Gonzalez attempted to remove the actuator, which was mounted in the old style, from the bracket mounting it to the valve. *Ibid.* After removing several of the bolts that attached the actuator to the top part of the bracket, Gonzalez began loosening the four bottom bolts that attached the bracket to the valve.

Ibid. His actions caused a loss of containment: BEM was released from the valve and splashed onto Gonzalez, causing first- and second-degree burns to his face, wrists, and neck. *Ibid.*

4. After conducting an inspection, OSHA issued a citation to petitioner, identifying serious violations of, *inter alia*, 29 C.F.R. 1910.119(j)(2) and (3) for failing to establish and implement written procedures for "separating the valve and actuator to repair the valves in the piping of the BEM Settlers," and for failing to train maintenance employees like Gonzalez on "procedures required to safely troubleshoot and repair the decant valves in the BEM Settler area" of the plant.[2] Pet. App. 49a; see *id.* at 4a, 20a-21a.

Petitioner contested the citation, and the case was assigned to an ALJ. See Pet. App. 5a. After holding a hearing, the ALJ upheld both relevant aspects of the citation and assessed a penalty of $7000 for each violation. *Id.* at 18a-67a (ALJ Decision and Order). The ALJ first rejected petitioner's argument that the relevant PSM standard did not apply to petitioner because petitioner is a contract employer, not a host employer. *Id.* at 28a-35a. The ALJ explained that the Secretary was required to "establish that the cited standard applies to the cited *conditions*, not to the cited *employer*." *Id.* at 34a (citing *Southern Pan Servs.*, 25 O.S.H. Cas. (BNA) 1081, 2014 WL 7338403 (2014)). Under that standard, the ALJ determined that petitioner, "[a]s the exposing employer, * * * was responsible for all violative conditions to which its em-

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[2] Akzo was also cited for violating those provisions. See Pet. App. 20a. The citation issued to petitioner alleged additional violations, but those violations were vacated and are no longer at issue. *Id.* at 4a-5a, 16a, 66a-67a.

ployee had access" and had a duty to "ma[k]e reasonable efforts to protect Gonzalez." *Ibid.* The ALJ further determined that petitioner failed to satisfy its duty. *Id.* at 49a-61a. The ALJ concluded that Section 1910.119(j)(2) and (3) applied to the condition at issue here because Gonzalez's troubleshooting work on the actuator's bracket and bolts was in service of maintaining the integrity of the plant's chemical-processing equipment, which was covered by the relevant PSM standard. *Id.* at 50a-56a. The ALJ further concluded that petitioner's failure to implement written procedures and provide adequate training exposed Gonzalez to the hazard that caused his injuries. *Id.* at 34a, 50a-61a.

Petitioner filed a petition for discretionary review with the Commission. Pet. App. 72a-84a. The petition noted "exception to" two aspects of the ALJ's decision: (1) the ALJ's "find[ing] as a fact that '[t]he same bolts that hold the [valve] bonnet and valve together also connect the actuator to the valve'"; and (2) the ALJ's "conclu[sion] that the actuator is 'process equipment.'" *Id.* at 73a, 75a (citation omitted; second and third sets of brackets in original). Petitioner did not directly challenge the ALJ's determination that the relevant provisions of the PSM standards apply to a contract employer such as petitioner. But in arguing that the actuator did not constitute process equipment, petitioner noted:

> The ALJ rejected [petitioner's] argument that under the circumstances, the requirements of paragraph (j) were intended to apply to Akzo Nobel as the host employer, and not to [petitioner], a contractor employer. Even assuming the ALJ is correct and the requirements of paragraph (j) are applicable to [petitioner] under the circumstances,

> then [petitioner's] determination that the actuator was not critical process equipment controls.

Id. at 77a. When the Commission did not direct the case for review, the ALJ's decision became a final order of the Commission. *Id.* at 68a.

5. Petitioner filed a petition for review of the Commission's final order in the court of appeals. Pet. App. 2a. The court of appeals denied the petition in an unpublished opinion. *Id.* at 1a-15a. The court first held that it lacked jurisdiction to consider petitioner's argument that the relevant provisions of the PSM standards did not apply to it as a contract employer because petitioner failed to raise that argument to the Commission. *Id.* at 8a-10a.

The court of appeals also rejected petitioner's argument that Gonzalez's work did not involve maintaining the integrity of process equipment and was therefore not subject to the relevant PSM standard. The court explained that the "regulatory definition of piping systems * * * is expressly open-ended: 'piping systems (including piping components *such as* valves.')" Pet. App. 12a (quoting 29 C.F.R. 1910.119(j)(1)(ii)). The court therefore concluded that, although the definition of "piping systems" did not specifically list the bracket and bolts used to mount the actuator to the valve bonnet, the ALJ's "conclusion that [those pieces of equipment] are process equipment within the meaning of § 1910.119(j)(1) was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 12a-13a.

ARGUMENT

Petitioner reiterates (Pet. 9-37) its arguments that the regulations governing the process-safety management of highly hazardous chemicals do not apply to

contract employers and that, even if they do, they did not apply to work involving the equipment that caused the chemical leak in this case. Review is unwarranted because the court of appeals correctly determined that petitioner forfeited the first argument and correctly rejected the second argument, and because the court's decision does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner first contends (Pet. 15-24) that the court of appeals erred in holding that petitioner forfeited its argument that the relevant provisions of the PSM standards do not apply to contract employers on a multi-employer worksite. The court of appeals' holding is correct and does not conflict with the regulations governing discretionary review before the Commission.

a. Although the OSH Act provides for judicial review of a final decision of the Commission, it limits that review to objections that were actually raised before the Commission. 29 U.S.C. 660(a) ("No objection that has not been urged before the Commission shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). This Court has held that virtually identical language in other federal labor statutes "mean[s] that a Court of Appeals is 'without jurisdiction to consider' an issue not raised before the" relevant agency. *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 23 (1986) (per curiam) (quoting *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982)). Courts of appeals have similarly held that 29 U.S.C. 660(a) precludes judicial review of an issue not presented for the Commission's consideration. *National Eng'g & Con-*

tracting Co. v. *Herman*, 181 F.3d 715, 720 (6th Cir.) ("Review by the Commission is a necessary prerequisite to review by this Court."), cert. denied, 528 U.S. 1045 (1999); see, *e.g.*, *Globe Contractors, Inc.* v. *Herman*, 132 F.3d 367, 370 (7th Cir. 1997); *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 694-695 (2d Cir. 1997); *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 104-107 (1st Cir. 1997); *Bethlehem Steel Corp.* v. *OSHRC*, 607 F.2d 871, 876 (3d Cir. 1979).

Petitioner does not contest that Section 660(a) precludes judicial review of an objection to a final order of the Commission unless the objection was first presented to the Commission. It argues instead (Pet. 16-22) that Section 660(a) does not apply here because petitioner did object that the relevant PSM standards did not apply to it because it is a contract employer. That factbound contention is erroneous and does not warrant further review.

The court of appeals correctly held that it lacked jurisdiction to consider petitioner's argument that 29 C.F.R. 1910.119(j)(2) and (3) do not apply to a contract employer like petitioner because petitioner "did not urge" that objection to the ALJ's decision in its petition for discretionary review by the Commission. Pet. App. 8a-9a. In its petition for discretionary review, petitioner urged the following objections to the ALJ's decision:

> [Petitioner] contends that the findings of fact and conclusions of law cited by the ALJ in affirming [citation] Items 3 and 4 are erroneous because [petitioner] was not tasked by Akzo Nobel with performing mechanical integrity work, and [petitioner] did not otherwise task its employee to perform me-

> chanical integrity work. Therefore [petitioner] should not have been cited for those items.

Id. at 73a. In that summary of its objection, petitioner did contend that Section 19100.119(j)(2) and (3) were inapplicable to the work it did at Akzo's chemical plant; but its argument was based on the type of work petitioner's employees performed, not on petitioner's status as a contract employer. Lest there be any doubt, petitioner went on to explain its objection with "[m]ore specific[ity]," *ibid.*, explaining that it disagreed with the ALJ's factual findings about which bolts held which pieces of equipment together, *id.* at 73a-75a, and about whether an actuator qualifies as "process equipment" under the applicable regulations, *id.* at 75a-84a. Neither of those arguments (the only two arguments developed in the petition for discretionary review) depended on petitioner's status as a contract employer.

As the court of appeals correctly noted, petitioner's "only mention of the ALJ's finding that the standard is applicable to it as a contract employer occurred in the context of the second objection," about the status of the actuator as process equipment. Pet. App. 9a. In that objection, while contending that an actuator does not qualify as process equipment in part because petitioner did not consider it to be so, petitioner stated:

> The ALJ rejected [petitioner's] argument that under the circumstances, the requirements of paragraph (j) were intended to apply to Akzo Nobel as the host employer, and not to [petitioner], a contract employer. Even assuming the ALJ is correct and the requirements of paragraph (j) are applicable to [petitioner] under the circumstances, then

> [petitioner's] determination that the actuator was not critical process equipment controls.

Id. at 77a. Petitioner's brief reference to an argument it unsuccessfully presented to the ALJ fell far short of urging that argument anew to the Commission. Although petitioner did not embrace the ALJ's contract-employer determination in its petition for discretionary review, neither did it contest that determination or suggest any basis for overturning it. The court of appeals thus correctly concluded that, "plainly read," petitioner's "abbreviated mention" of an argument it raised with the ALJ "fail[ed] to contest the ALJ's determination" on that issue. *Id.* at 9a. Because petitioner does not identify any "extraordinary circumstances" justifying its failure to raise the argument before the Commission, the court of appeals correctly held that Section 660(a) bars judicial review of the applicability of the relevant regulations to a contract employer such as petitioner.

b. Petitioner further errs in contending (Pet. 15) that the Commission's regulation governing the form of a petition for discretionary review conflicts with Section 660(a), as interpreted by courts of appeals. Petitioner relies on 29 C.F.R. 2200.91(d), which instructs, *inter alia*, that a petition for discretionary review "should concisely state the portions of the decision for which review is sought and should refer to the" items of the citation against the employer "for which review is sought." That regulation further provides that a petition may not "incorporate by reference a brief or legal memorandum" and advises that "[b]revity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition." *Ibid.* That provision, petitioner

contends (Pet. 15), "conflicts with the requirement by various circuit courts of appeal that the party be required to develop its argument." *Ibid.* No such conflict exists.

The regulation's admonishment that a petition "should concisely state the portions of the decision for which review is sought," 29 C.F.R. 2200.91(d), does not excuse a party's failure to perform its statutory duty to "urge[] before the Commission" any objection it wishes to preserve for judicial review, 29 U.S.C. 660(a)—and it certainly does not *preclude* a party from complying with the statute, as petitioner suggests. On the contrary, the regulation reinforces the statute's requirement that a party raise before the Commission any objection it wishes to preserve by requiring a focused articulation of any such objection. The regulation's further advice that a party filing a petition for discretionary review may obtain a more "prompt" review of its petition through "[b]revity and the inclusion of precise references to the record and legal authorities," 29 C.F.R. 2200.91(d), also does not conflict with the mandate of Section 660(a). This Court's own rules urge parties to be "concise" in a petition for a writ of certiorari when, *inter alia*, formulating the questions presented and setting forth argument in support of the petition. Sup. Ct. R. 14.1(a) and (h); see Sup. Ct. R. 14.3 ("A petition for a writ of certiorari should be stated briefly and in plain terms."). Those requirements do not excuse a party from its obligation to identify with specificity its objections to a lower court's decision in a petition for a writ of certiorari and to limit itself to those objections if its petition is granted. See *Visa Inc.* v. *Osborn*, 137 S. Ct. 289 (2017). The same is true of the regulation governing petitions

for discretionary review before the Commission.[3] Petitioner's contention that the Commission's regulation conflicts with Section 660(a) is therefore misplaced and does not warrant consideration by this Court.

2. Even if petitioner had not forfeited its argument that the relevant provisions of the PSM standards do not apply to contract employers, the ALJ correctly determined that that argument lacks merit. Pet. App. 28a-35a.

a. The applicable provisions of the PSM standards require "[t]he employer" both to implement written procedures for maintaining the integrity of process equipment and to train employees who maintain the integrity of process equipment so they can perform their tasks safely. 29 C.F.R. 1910.119(j)(2) and (3). Petitioner does not dispute that it was Gonzalez's employer, see Pet. App. 3a, but contends (Pet. 24-30) that those provisions did not apply to it because it was a contract employer, not the host employer.

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[3] Petitioner failed, moreover, to preserve its arguments (Pet. 15-24) that 29 C.F.R. 2200.91(d) conflicts with Section 660(a) and that a party's compliance with Section 660(a) should be judged from the perspective of the Commission. Petitioner had the opportunity to address the forfeiture issue in its reply brief in the court of appeals, but failed to assert either argument. See Pet. C.A. Reply Br. 3, 5-8; see also Pet. App. 9a-10a (describing and rejecting petitioner's argument that it had preserved the argument for appeal). Those arguments are therefore not properly presented to this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below"); see also, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("[T]his Court * * * is one of final review, not of first view.") (citation and internal quotation marks omitted).

Petitioner acknowledges (Pet. 25) that OSHA has promulgated a multi-employer policy "to determine employer responsibilities on a multi-employer worksite." As the ALJ correctly determined, under that policy, an employer is liable for failing to comply with an OSH Act standard if the employer created or controlled the hazardous condition, or if the employer's employees were exposed to the hazardous condition and the employer knew or should have known about the condition and failed to take reasonable measures to protect its employees. *Multi-Employer Citation Policy* ¶¶ X.B, X.C, X.E; *Grossman Steel & Aluminum Corp.*, 4 O.S.H. Cas. (BNA) 1185, 1188-1189 (1976). As Gonzalez's direct employer, petitioner was "the exposing employer" and was therefore "responsible for all violative conditions to which its employee had access," meaning that petitioner was required to "ma[k]e reasonable efforts to protect Gonzalez" even if it was not required to promulgate written safety policies in the first instance. Pet. App. 34a.

Petitioner does not challenge the validity of the multi-employer policy generally, contending instead that the policy does not apply to circumstances covered by the PSM standards because, petitioner contends, 29 C.F.R. 1910.119(h) "specifically delineates the responsibilities between the host employer and various contractor employers." Pet. 24-25. Petitioner is incorrect. The preamble to the PSM standards specifies that OSHA's multi-employer citation policy applies to chemical-processing facilities. Pet. App. 93a ("As a general matter each employer is responsible for the health and safety of his/her own employees."); see *id.* at 93a-94a. And even the provision petitioner relies on specifies that a contract employer is responsi-

ble for ensuring, *inter alia*, that each of its employees "is trained in the work practices necessary to safely perform his/her job," that each of its employees "is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process," and that each of its employees "follows the safety rules of the facility." 29 C.F.R. 1910.119(h)(3)(i), (ii), and (iv). Petitioner's assertion of a conflict between the PSM standards and OSHA's multi-employer policy is therefore illusory because both sets of rules dictate the same result: petitioner was required to take reasonable steps to ensure Gonzalez's safety while he performed the work of troubleshooting the actuator's valves.[4]

b. Petitioner further errs in asserting (Pet. 25, 27) that courts of appeals are divided on "the propriety of the multi-employer workplace doctrine." Petitioner has not identified any court of appeals decision holding that the requirements of 29 C.F.R. 1910.119(j)(2) and (3) do not apply to contract employers, and the

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[4] Petitioner errs in suggesting (Pet. 26, 28-29) that applying OSHA's multi-employer policy to petitioner had the effect of transferring responsibility from Akzo to petitioner. Akzo was responsible both for ensuring that written procedures were "establish[ed] and implement[ed]" "to maintain the on-going integrity of process equipment," and for ensuring that employees were trained on maintaining process equipment and the hazards of doing so to "assure that [each] employee can perform the job tasks in a safe manner." 29 C.F.R. 1910.119(j)(2) and (3). Indeed, Akzo was cited for violating those regulatory provisions. Pet. App. 20a But petitioner remained directly responsible for ensuring the safety of its employee Gonzalez by implementing written policies, ensuring that Gonzalez received the requisite training, and otherwise taking reasonable steps to ensure his safety. *Multi-Employer Citation Policy* ¶ X.C.2; see 29 C.F.R. 1910.119(h)(3).

government is not aware of any such case. On the contrary, courts of appeals to consider the issue have universally agreed that an employer whose employees are exposed to a violative condition may be cited for the violation in appropriate circumstances. See, *e.g.*, *Southern Pan Servs.* v. *United States Dep't of Labor*, No. 16-13417, 2017 WL 1325681, at *2-*3 (11th Cir. Apr. 11, 2017); *Bratton Corp.* v. *OSHRC*, 590 F.2d 273, 275-278 (8th Cir. 1979); *Central of Ga. R.R.* v. *OSHRC*, 576 F.2d 620, 623-624 (5th Cir. 1978); see also Mark A. Rothstein, *Occupational Safety and Health Law* § 168, at 227 & n.10 (4th ed. 1998) (noting "widespread support in the courts of appeals" for this aspect of the multi-employer policy and citing cases). The absence of a circuit conflict is an additional reason to deny the petition for a writ of certiorari.[5]

3. Finally, petitioner renews (Pet. 31-37) its fact-bound attack on the ALJ's determination that the bracket and bolts used to mount the actuator to the valve bonnet qualified as "process equipment" as that term is defined in 29 C.F.R. 1910.119(j)(1)(ii). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. Review of that case-specific argument is unwarranted.

The applicable regulation defines "process equipment" to include "[p]iping systems (including piping

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[5] Petitioner errs in suggesting (Pet. 27) that the Commission deviated in 2007 from its view that exposing employers may be held liable for a violation. The decision petitioner relies on addressed a controlling employer's liability for a violation to which its employees were not exposed and therefore has no relevance here. See *Summit Contractors, Inc.*, 21 O.S.H. Cas. (BNA) 2020 (2007), vacated and remanded, 558 F.3d 815 (8th Cir. 2009).

components such as valves)." 29 C.F.R. 1910.119(j)(1)(ii). Petitioner contends (Pet. 35-36) that Gonzalez was not performing work covered by the requirements of the PSM standards when he was troubleshooting the malfunctioning actuator because, although petitioner concedes that the actuator bracket (the removal of which caused the loss of containment) is process equipment, the actuator itself is not. The court of appeals correctly rejected that argument, affirming the ALJ's determination that petitioner's focus on the actuator itself, to the exclusion of the actuator's mounting system, was too narrow. Pet. App. 12a. The court explained that "[b]ecause one set of bolts connects the actuator bracket, the valve, and the valve bonnet, and because removing the bracket would 'break the line,' the ALJ's conclusion that the bracket and bolts used to mount the actuator to the valve bonnet are process equipment [covered by the relevant PSM standard] was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 14a-15a.

The court of appeals correctly concluded that the equipment Gonzalez worked on was part of the piping system. The relevant portion of the regulatory definition focuses on piping *systems*, which necessarily contain multiple parts that contribute to the overall functioning of process equipment. See *Webster's Third New International Dictionary* 2322 (1993) (defining "system" as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose"). Petitioner concedes (Pet. 31) that the role of the actuator was to operate the valve (which is expressly included in the regulatory definition). Under the plain meaning of the definition, the

actuator was part of the piping system, as demonstrated by the fact that its removal caused a loss of containment in the system. By the same token, the actuator's mounting system was also integral to the functioning of the valve and was an interdependent component of the larger piping system.

Petitioner's suggestion (Pet. 31-37) that the court of appeals' decision vastly and improperly expanded the types of process equipment potentially covered by the PSM standards is incorrect. The court of appeals explained that the definition of piping systems "is expressly open-ended" because the use of the phrase "such as" indicates that its enumerated example is not intended to be exhaustive. Pet. App. 12a. But petitioner is wrong in contending (Pet. 31) that the court held that any "piece of equipment" that merely "touches or is near equipment specifically enumerated by the standard" would be covered. The court specifically limited its holding in this case to equipment that, if removed, "would break the line" because "it has to be there for that valve to work." Pet. App. 13a-14a.

Petitioner further errs in contending (Pet. 31-37) that the court of appeals' decision conflicts with the Eighth Circuit's decision in *Perez* v. *Loren Cook Co.*, 803 F.3d 935 (2015) (en banc). That decision interpreted an entirely different OSHA standard that has no application in this case. The only similarity between the standard at issue in that case (29 C.F.R. 1910.212(a)(1), which governs machine-guarding requirements) and the regulatory definition in this case is that both use the phrase "such as" followed by a list of one or more examples—examples of hazards in *Loren Cook* and of piping components in this case. Like the court of appeals here, see Pet. App. 12a, 14a,

the Eighth Circuit found that the definition at issue in *Loren Cook* was open-ended in the sense that the list of examples following the phrase "such as" was "illustrative rather than exhaustive." 803 F.3d at 940. In *Loren Cook*, as in this case, the court of appeals inquired whether the relevant hazard or equipment (respectively) was sufficiently similar to the enumerated examples in the relevant non-exhaustive list. *Id.* at 940-941 (holding that particular hazard at issue was not covered by regulation because it was not related or similar to the types of hazards described in non-exhaustive list); Pet. App. 12a-13a (holding that actuator's mounting system qualifies as a piping component because it is required in order for an enumerated item (valves) to function). Nothing in the Eighth Circuit's analysis or conclusion conflicts with the decision below. Review is therefore unwarranted.[6]

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[6] Petitioner's assertions (*e.g.*, Pet. 3) that the mechanical-integrity PSM standard did not apply because "Gonzalez went beyond his assigned task" when he removed the bottom four bolts also provides no basis for further review. The court of appeals correctly rejected petitioner's fact-specific argument that Gonzalez's removal of the bolts did not qualify as maintenance of process equipment based in part on petitioner's concession that Gonzalez's task "may have required [him] to remove the actuator from the top of the bracket." Pet. App. 14a (brackets in original). The court explained that Gonzalez's "assignment therefore required him to work on the actuator's mounting system." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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