No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

v.

L.R. WILLSON AND SONS, INC.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(2), provides that covered employers "shall comply with occupational safety and health standards promulgated under" the Act. Section 17(k) of the Act, 29 U.S.C. 666(k), classifies a violation of the Act as "serious" if it creates a substantial risk of death or serious physical harm, "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." The questions presented are:

1. Whether the Secretary must establish, as part of her affirmative case charging even a non-"serious" violation of Section 5(a)(2), that an employer knew or should have known of the existence of a violation.

2. Whether an employer's claim that violation of an applicable standard resulted from "unpreventable employee misconduct" is an affirmative defense, as to which the employer must bear the burden of persuasion.

3. Whether an employer's claim that it did not know, and could not with the exercise of reasonable diligence have known, of the existence of a violation is likewise an affirmative defense to classification of a violation as "serious" under Section 17(k).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Occupational Safety and Health Review Commission was named as a respondent in the court of appeals. See App., *infra*, 1a; see also *id*. at 14a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 134 F.3d 1235. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 15a-40a) is reported at 17 O.S.H. Cas. (BNA) 2059 and 1995-1997 O.S.H. Dec. (CCH) ¶ 31,262. The decision of the administrative law judge (ALJ) (App., *infra*, 41a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. A petition for rehearing was denied on March 27, 1998. App., *infra*, 66a-67a. On June 17, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 5 and 17 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654 and 666, and the Secretary of Labor's safety standard concerning fall protection for steel erection, 29 C.F.R. 1926.750(b)(1)(ii), are reproduced at App., *infra*, 68a-72a.

STATEMENT

1. Respondent L.R. Willson and Sons was engaged to perform steel erection work related to the renovation of the Orange County Civic Center in Orlando, Florida. App., *infra*, 46a. An Occupational Safety and Health Administration (OSHA) inspector observed and videotaped two workers, later identified as respondent's employees, working about 80 feet above the ground without fall protection. *Id.* at 47a-48a. One of the workers, Randall Manley, was a foreman who was responsible for instructing members of his work crew on their assignments and for ensuring that the crew obeyed respondent's safety policies. *Id.* at 48a, 55a-57a.

The Secretary, through an OSHA inspector, cited respondent for violating 29 C.F.R. 1926.750(b)(1)(ii), a safety standard promulgated by the Secretary under the Occupational Safety and Health Act of 1970 (the

Act), 29 U.S.C. 651 *et seq.* That standard requires the use of safety nets during work on certain types of structures if the potential fall distance exceeds two stories or 25 feet. App., *infra*, 53a; see *id.* at 72a.[1] Having recently cited respondent for a number of alleged violations of the Act, including one involving fall protection (see *id.* at 46a-47a, 61a-62a), the Secretary characterized this violation as "willful" within the meaning of 29 U.S.C. 666(a), and notified respondent that she proposed to assess a civil penalty of $56,000. *Id.* at 58a; C.A. App. 9; see 29 U.S.C. 659(a). Respondent contested both the citation and the proposed penalty.

2. An administrative law judge (ALJ), acting for the Occupational Safety and Health Review Commission (OSHRC) (see 29 U.S.C. 659(c), 661(j)) and following Commission precedent, found that the Secretary had established a violation of the fall-protection standard by proving (1) the applicability of the fall protection standard, (2) failure to comply with the standard, (3) employee exposure to a hazard caused by the noncompliance, and (4) respondent's "actual or constructive knowledge of the violation (i.e., [that respondent] either knew or with the exercise of reasonable diligence could have known, of the violative conditions)."

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[1] As a matter of enforcement policy, OSHA does not cite employers for failing to provide nets so long as they use some system that offers equivalent or better fall protection. In this case, respondent generally used a system of fall-protection cables, to which employees were required to "tie off" while working at elevations above ten feet. See App., *infra*, 48a, 55a. Although that system is acceptable in principle, in this instance Manley "directed [a subordinate] to accompany him to work in an area where the fall protection cable had not been strung." *Id.* at 55a.

App., *infra*, 52a; see *id.* at 52a-58a.[2] With respect to respondent's "actual or constructive knowledge," the ALJ reasoned that Manley was a supervisory employee whose knowledge of the violation was properly imputed to respondent. *Id.* at 55a-58a.

The ALJ next considered respondent's "affirmative defense that any violation it committed was the result of unpreventable employee misconduct." App., *infra*, 58a; see *id.* at 58a-60a. Again applying OSHRC precedent, the ALJ observed that to establish that defense respondent was required to prove (1) that it had established work rules designed to prevent the violation; (2) that those rules had been adequately communicated to its employees; and (3) that it had taken steps to discover violations, and had effectively enforced the rules when violations were discovered. *Id.* at 58a. Although the ALJ found that respondent could establish the first two elements of the defense (which the Secretary did not dispute), see *id.* at 58a-59a, she credited Manley's testimony that he expected to be disciplined by respondent for violating fall-protection rules "if [an] OSHA [inspector] was on the job," but that "[i]f OSHA wasn't on the job, it's a completely different story" (*id.* at 59a). Concluding that Manley's admission "provide[d] insight into [respondent's] attitude towards enforcement, especially coming from

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[2] Respondent objected to the admission of videotape evidence of the violation at issue on the ground that it was obtained in violation of the Fourth Amendment and of Section 8 of the Act, 29 U.S.C. 657. See App., *infra*, 48a-51a. That argument was rejected by the ALJ (*ibid.*), the OSHRC (*id.* at 17a-26a; but see *id.* at 33a-40a (Comm'r Montoya, concurring in disposition but dissenting on this point)), and the court of appeals (*id.* at 4a-10a). We therefore do not address that evidentiary issue here.

a supervisory employee," the ALJ agreed with the Secretary that respondent had "failed to establish that its work rules were effectively enforced," and that its "unpreventable employee misconduct" defense must therefore fail. *Id.* at 60a.

The ALJ disagreed, however, with the Secretary's characterization of respondent's violation as "willful." App., *infra*, 60a-63a. Although the ALJ recognized that Manley, who participated in the violation at issue, was a supervisory employee, and that respondent had notice of previous fall-protection violations involving its workers, she concluded that "[t]he record [did] not demonstrate that [respondent] exhibited either intentional disregard for the Act, or plain indifference to its employees' safety," and that the Secretary had therefore "failed to establish that [respondent's] violation * * * was willful." *Id.* at 61a-63a. Noting that in this case two workers were exposed for 45 minutes to "a fall hazard of at least 75 feet, which would have resulted almost certainly in death had they fallen," the ALJ imposed a penalty of $7,000—the maximum authorized for a "serious" violation. *Id.* at 63a-64a.

3. The OSHRC exercised its discretion to review specified aspects of the ALJ's decision, and affirmed her disposition of the case. App., *infra*, 41a-42a (orders directing review), 15a-40a (Commission opinion). Although the bulk of the Commission's opinion addressed a different issue (see note 2, *supra*), in part it rejected the Secretary's argument that the ALJ had improperly characterized the violation as "serious" rather than "willful." App., *infra*, 16a, 26a. The Commission agreed that the Secretary had made out "a *prima facie* case of willfulness" by "establish[ing] that a supervisory employee knowingly violated the

fall protection standards." *Id.* at 27a-28a. It concluded, however, that although respondent "should have supervised its employees more closely," the company's "good faith efforts in enforcing its safety rules were sufficient to support a finding that the violation was not willful." *Id.* at 31a. Although it recognized that reservations about respondent's enforcement of its policies had led the ALJ to reject the company's "unpreventable employee misconduct" defense, the Commssion held that "[t]he failure to prove th[at] defense to the violation * * * does not preclude the employer from establishing the good faith defense to a willful characterization of the violation." *Id.* at 29a n.14.

4. With respect to the issues pertinent here, the court of appeals reversed. App., *infra*, 1a-13a; see note 2, *supra*. Relying on its previous decision in *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), the court held that, "despite a finding of knowledge of [a] violation on the part of a supervisory employee, the [Secretary bears] the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable." App., *infra*, 10a. Conflating the issues of employer "knowledge" as part of the Secretary's case in chief and "unpreventable employee misconduct" as an affirmative defense, the court concluded that the Commission in this case had "incorrectly placed on [respondent] the burden of showing that the conduct of [its employees] was unforeseeable or unpreventable." *Id.* at 10a-12a.

The court acknowleged the position of several other circuits "that unpreventable employee misconduct 'is an affirmative defense that an employer must plead and prove'" (App., *infra*, 11a & n.29), but it concluded that its own precedent and

cases from the Third and Tenth Circuits "clearly agree[d] that such must be disproved by the Secretary in [her] case-in-chief" (*id.* at 11a & n.30). Finding *Ocean Electric*'s reasoning "consistent with the clear intent of the Act," which "did not intend [the] employer to be [an] insurer of employee safety," the court "reaffirm[ed] its application" in the Fourth Circuit. *Id.* at 12a & n.31.[3] Because the Commission had "placed the burden of showing 'good faith efforts to comply with the fall protection standards' squarely on" respondent (*id.* at 10a-11a, quoting *id.* at 28a (OSHRC opinion)), the court reversed the Commission's order and remanded for further proceedings. *Id.* at 11a, 13a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision reflects and perpetuates the "confusing patchwork of conflicting approaches" that prevails in the lower courts on fundamental questions concerning the burden of persuasion in proceedings to enforce compliance with federal workplace health and safety standards. See *L.E. Myers Co.* v. *Secretary of Labor*, 484 U.S. 989, 990 (1987) (White & O'Connor, JJ., dissenting from denial of certiorari). This case would provide an appropriate vehicle for this Court's review and resolution of those important questions.

1. Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, "to assure so

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[3] Judge Campbell of the First Circuit, sitting by designation, concurred separately on the ground that *Ocean Electric* was "controlling precedent in [the Fourth] Circuit." App., *infra*, 1a, 13a. "As a visitor," he saw "no occasion to decide, and [did] not decide," whether *Ocean Electric's* reasoning was correct or should be "reaffirm[ed]." *Id.* at 13a.

far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). The Act requires covered employers to "comply with occupational safety and health standards promulgated" by the Secretary under the Act, and more generally to furnish every employee "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a); see also 29 U.S.C. 655 (providing for Secretary's promulgation of standards). Employees are also required to comply with promulgated standards, but only employers may be cited for violating the Act. 29 U.S.C. 654(b), 658-659, 666; *Atlantic & Gulf Stevedores, Inc.* v. *OSHRC*, 534 F.2d 541, 552-555 (3d Cir. 1976).

When the Secretary cites an employer, she requires abatement of the violation and generally proposes the assessment of a penalty. 29 U.S.C. 658(a), 659(a). The Act provides that for each violation that is "specifically determined not to be of a serious nature," a penalty of up to $7,000 "may" be assessed, while for each "serious" violation such a penalty "shall" be assessed. 29 U.S.C. 666(b)-(c). A violation is "serious," under the Act,

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in [the] place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. 666(k). For each "willful[]" or "repeated[]" violation, the Act provides for a penalty of up to $70,000. 29 U.S.C. 666(a).

An employer may contest the Secretary's citation or the penalty she proposes to assess, or both, and obtain a hearing before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory body created by the Act and independent of the Secretary. 29 U.S.C. 659(c), 661; see generally *Martin* v. *OSHRC*, 499 U.S. 144, 147-148 (1991). The ALJ's "report" becomes a final order of the Commission unless the Commission, on petition by the employer or the Secretary or on the motion of any Commissioner, directs further review of any or all issues. 29 U.S.C. 661(j); see 29 C.F.R. 2200.90(d), 2200.91-2200.92. The Commission's final decision is subject to review in the court of appeals for the circuit in which the violation occurred or in which the employer has its principal office (or, on the employer's petition, in the District of Columbia Circuit). 29 U.S.C. 660(a) and (b).

2. a. Under these statutory provisions, the proper course of proceedings in a case like this one is, in the Scretary's view, relatively straightforward. An employer who contests the Secretary's citation is entitled to an administrative hearing, and there is no question that at that hearing the Secretary bears the burden of proving the existence of a prima facie violation of the Act. See 29 U.S.C. 659(c) (hearings to be conducted in accordance with 5 U.S.C. 554); 5 U.S.C. 556(d); *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 276 (1994). Under the Act, that initial burden is discharged if the Secretary demonstrates noncompliance, in work carried out by or on behalf of the employer, with an applicable health or

safety standard promulgated in accordance with the Act. 29 U.S.C. 654(a), 658, 666.

Once the Secretary has made out her prima facie case of liability under the Act, the Secretary and the OSHRC agree that a cited employer should be able to avoid liability by establishing that a particular violation resulted from "unpreventable employee misconduct." See, *e.g.*, 59 Fed. Reg. 4320, 4349 (1994) (preamble to final rule governing electric power generation, transmission, and distribution facilities) ("[OSHA] recognizes unpreventable employee misconduct as an affirmative defense to a citation, and OSHA's policy is not to issue a citation where the employer has fulfilled his or her responsibilities to inform the employee of an adequate work rule and to enforce that rule uniformly," citing OSHA Field Operations Manual, Ch. 5, § E); App., *infra*, 58a (ALJ's decision). As articulated in OSHRC precedent, that defense requires an employer to prove (1) that it has established work rules designed to prevent the violation; (2) that those rules have been adequately communicated to its employees; and (3) that it has taken steps to discover violations, and has effectively enforced its rules when violations were discovered. App., *infra*, 58a. If an employer can establish the existence of those background circumstances, it is not held liable under the Act for an aberrant employee action in violation of company rules and OSHA safety standards. Compare *Faragher* v. *City of Boca Raton*, No. 97-282 (June 26, 1998), slip op. 28-30. Because such "unpreventable employee misconduct" is an affirmative defense, however, the employer properly bears the burden of raising it, introducing supporting evidence, and persuading the trier of fact that it applies. Compare *NLRB* v. *Transportation Management*

Corp., 462 U.S. 393, 401-403 (1983); see *Greenwich Collieries*, 512 U.S. at 278.

If the Secretary establishes the existence of a violation and the employer fails to establish that it resulted from unpreventable misconduct, there remains the further question whether the established violation is properly classified as willful, repeated, serious, or non-serious. See 29 U.S.C. 666. There is no dispute that the Secretary bears the initial burden of establishing that a violation is "willful[]" or "repeated[]" within the meaning of 29 U.S.C. 666(a), or "serious" within the meaning of Section 666(k). The "unless" language of Section 666(k) indicates, however, that it is the employer's responsibility to allege and prove that it "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation," if it wishes to avoid, on that basis, a determination that a potentially life-threatening violation was "serious."[4] Moreover, that statutory language, which appears only in the provision defining what constitutes a "serious" violation, makes clear that the issue of employer knowledge is *not* relevant at the antecedent stage of determining

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[4] As this case demonstrates, the OSHRC has adopted a similar structure for assessing claims that a violation involving a supervisor should be treated as "willful." Although "willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer," the employer's overall "good faith effort to comply with a standard or eliminate a hazard * * * may constitute a defense to willfulness." App., *infra*, 27a. The Secretary does not challenge here the OSHRC's ultimate determination that respondent's violation, although "serious," was not "willful." *Id.* at 31a.

whether the Secretary has established her prima facie case of violation *vel non*.[5]

b. The court of appeals accordingly erred in holding (App., *infra*, 10a-12a) that the Secretary bears the burden of proving, as part of her case-in-chief, that employee acts in violation of the Act were "not unforeseeable or unpreventable."

Most importantly, the court failed to recognize that the Secretary and the OSHRC have permissibly recognized "unpreventable employee misconduct" only as an affirmative defense to liability under the Act. As various courts of appeals have noted, the Act's declared goal of ensuring safe workplace conditions "so far as possible" (29 U.S.C. 651(b)) suggests that Congress did not intend the Act to be administered as a strict liability scheme. See, *e.g.*, *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997); *Ocean Elec. Corp.* v. *Secretary of Labor*, 594 F.2d 396, 399 (4th Cir. 1979); see also 59 Fed. Reg. at 4349. Moreover, in the Secretary's view, allowing an employer to defend against a citation by establishing that it took all reasonable steps to prevent the violation encourages employers to develop and enforce effective safety programs, which is consistent with the Act's overall goal of preventing accidents before they happen. See 54 Fed. Reg. 3904, 3910 (1989)

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[5] The Secretary disagrees, to that extent, with the ALJ's statement of the elements of the prima facie case. App., *infra*, 52a; see also *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 106-108 (2d Cir. 1996) (discussing this issue). Although that statement follows OSHRC precedent, it conflicts with the plain terms of the Act, which specifically address the relevance of employer knowledge or negligence, but only in the context of distinguishing "serious" from non-"serious" violations.

(OSHA's Safety and Health Program Management Guidelines); *Secretary of Labor* v. *Ocean Elec. Corp.*, 3 O.S.H. Cas. (BNA) 1705, 1706-1707 (OSHRC 1975) ("A rule which encourages diligence rather than renders it irrelevant is to be preferred."), rev'd as to burden of proof, 594 F.2d 396 (4th Cir. 1979); see also *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 12 (1980) ("the [Act's] remedial orientation is prophylactic in nature"); compare *Faragher*, slip op. 28 (Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").[6]

The Secretary and the OSHRC have therefore agreed that an employer should be able to avoid liability under the Act if it can demonstrate the conditions specified by the OSHRC in articulating the "unpreventable employee misconduct" defense. See 54 Fed. Reg. at 3910. Because, however, that formulation of the basis for avoiding liability rests on what are essentially policy-based judgments concerning the appropriate interpretation and administration of the Act (see, *e.g.*, *Ocean Elec.*, 3 O.S.H. Cas. (BNA) at 1706-1707), the Secretary and the OSHRC have reasonably treated it as an affirmative defense that must be pleaded and proved by the employer. Compare

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[6] See also 29 U.S.C. 651(b) and (b)(1) (declaring the purpose and policy of Congress to assure "so far as possible every working man and woman * * * safe and healthful working conditions * * * by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions").

Transportation Management, 462 U.S. at 401-403; cf. *Faragher*, slip op. 28-30.[7]

Apart from this central error, the court of appeals' opinion illustrates the fundamental confusion that has too often prevailed in interpreting the enforcement provisions of the Act. The court's brief discussion conflates the "unpreventable employee misconduct" issue with the separate, though related, issue of employer "knowledge" of a violation. See App., *infra*, 10a. As we have explained, the "knowledge" issue properly arises, under the text of the Act, only in determining whether a particular violation is to be characterized as "serious" under 29 U.S.C. 666(k). Compare 29 U.S.C. 654(a)(2) (imposing on employers a facially absolute duty to comply with health and safety standards promulgated under the Act). Moreover, in that context, the statutory language, which specifies that a violation is "serious" under certain circumstances "unless" the employer did not know of its existence, makes clear that excusable *lack* of

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[7] Treating "employee misconduct" as an affirmative defense is also consistent with traditional criteria for assigning the risk of nonpersuasion. The employer will, for example, inevitably have better access than the Secretary to relevant information concerning the nature and adequacy of its workplace safety program. See *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993). Moreover, it makes sense to assign the burden of persuasion to the party whose position is less consistent with ordinary expectations; and because it is reasonable to assume that employees normally follow rules that are adequately communicated and enforced, a violation of a health or safety standard is more likely to have resulted from an employer's failure to meet its duty to "assure compliance by [its] own employees," S. Rep. No. 1282, 91st Cong., 2d Sess. 10 (1970), than from "unpreventable misconduct."

knowledge is a defense that an employer may raise in order to *avoid* a determination that a particular violation was "serious." See *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (use of term "unless" ordinarily means that the party claiming the benefit of the exception has the burden of proving it); 2A N. Singer, *Sutherland Statutory Construction* § 47.11 (5th ed. 1992).

Thus, under the language of the Act, it is never the Secretary's burden to show that an employer knew or should have known that its employees were violating an OSHA standard. At a minimum, proof of knowledge cannot plausibly be viewed as part of the Secretary's "case-in-chief" on liability (App., *infra*, 11a), because the Act explicitly makes knowledge relevant only to the subsidiary issue of whether an established violation is or is not to be characterized as "serious." The court of appeals erred both in failing to distinguish those issues, and in nonetheless implicitly resolving them against the Secretary.

3. The decision in this case reflects and perpetuates longstanding conflicts among the courts of appeals concerning the proper allocation of burdens of persuasion in enforcement proceedings under the Act.

Most courts of appeals have agreed with the Secretary and the OSHRC that "unpreventable employee misconduct" is an affirmative defense on which the employer bears the burden of proof. See *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *P. Gioioso & Sons* v. *OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997); *Brock* v. *L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.), cert. denied, 484 U.S. 989 (1987); *Daniel Int'l Corp.* v. *OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812,

818 (5th Cir. 1981); see also *Danco Constr. Co.* v. *OSHRC*, 586 F.2d 1243, 1246-1247 & n.6 (8th Cir. 1978). The Third and Ninth Circuits have required employers to bear a burden of production if the Secretary makes a prima facie showing that a violation was foreseeable, but they impose the ultimate burden of persuasion on the Secretary. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 357-358 (3d Cir. 1984); *Brennan* v. *OSHRC (Alsea Lumber)*, 511 F.2d 1139, 1142-1143 & n.5 (9th Cir. 1975). The Tenth Circuit has required the Secretary to prove the absence of employee misconduct. See *Capital Elec. Line Builders of Kansas, Inc.* v. *Marshall*, 678 F.2d 128, 129-130 (1982); but see *Austin Bldg. Co.* v. *OSHRC*, 647 F.2d 1063, 1068 (1981) ("[t]he employer may defend by showing that the violation was an unforeseeable occurrence."). And the Fourth Circuit, although it had previously characterized unpreventable misconduct as a "defense" (*Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1450 (1985) (en banc)), has now "reaffirm[ed]" its position that the Secretary bears the burden of proving that an employee's acts were "not unforeseeable or unpreventable." App., *infra*, 10a, 12a; see *id.* at 66a-67a (denying suggestion of rehearing en banc).

The lower courts have also adopted varying approaches to the question whether an employer knew or should have known of the existence of a violation, either as part of the Secretary's initial prima facie case or in determining whether a particular violation is properly classified as "serious" under 29 U.S.C. 666(k). The Second Circuit requires that the Secretary prove employer knowledge, but it allows the knowledge of a supervisor who commits a violation to be imputed to the employer. *New York State Elec. &*

Gas Corp. v. *Secretary of Labor*, 88 F.3d 98, 105, 109-110 (2d Cir. 1996). The Third, Fourth, and Tenth Circuits require the Secretary to prove knowledge, but do not allow her to make that showing by demonstrating a supervisor's involvement in the violation. See *Ocean Elec.*, 594 F.2d at 398-399, 403; *Pennsylvania Power*, 737 F.2d at 357-358; *Capital Elec.*, 678 F.2d at 129-130. The Sixth and Eighth Circuits require the Secretary to prove employer knowledge, and may or may not allow imputation of the knowledge of a supervisor responsible for a violation. See *Carlisle Equip. Co.* v. *United States Sec'y of Labor*, 24 F.3d 790, 792-793 (6th Cir. 1994); *L.E. Myers*, 818 F.2d at 1276-1277; *Danco*, 586 F.2d at 1246-1247. The Sixth and Ninth Circuits, like the OSHRC, have expressly required the Secretary to establish employer knowledge in order to make out a prima facie case of either a serious or a non-serious violation. See *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1289-1292 (6th Cir. 1976) (but see *id.* at 1295-1296 (Edwards, J., dissenting)); *Brennan*, 511 F.2d at 1142-1145; *Secretary of Labor* v. *Prestressed Systems, Inc.*, 9 O.S.H. Cas. (BNA) 1864, 1868-1871 (OSHRC 1981). The courts, however, generally have not distinguished clearly among the requirements of the Secretary's initial prima facie case, the "unpreventable employee misconduct" defense, and the "knowledge" issue under Section 666(k); and no court has convincingly reconciled a requirement that the Secretary prove employer knowledge with the plain language of the Act.

Ten years ago, the cases in the courts of appeals already revealed a "confusing patchwork of conflicting approaches" to the related issues of employee "misconduct" and employer "knowledge" in cases under

the Act. *L.E. Myers Co.*, 484 U.S. at 990 (White & O'Connor, JJ., dissenting from denial of certiorari). Although we opposed review in *L.E. Myers* for reasons specific to that case, we agreed then that the "significant and continuing conflict" in the lower courts "[might] well require resolution by this Court." 87-246 Br. in Opp. at 7; see *id.* at 7-13 (discussing conflicting decisions, but noting that the burden-of-proof issue appeared not to have affected the court of appeals' disposition of the case).[8] Since that time, the relevant conflicts have deepened and solidified. See App., *infra*, 11a-12a; *D.A. Collins*, 117 F.3d at 695; *P. Gioioso & Sons*, 115 F.3d at 109. In our judgment, this case provides an appropriate opportunity for this Court to consider the fundamental burden-of-proof issues that arise in OSHA enforcement proceedings.

Those issues are important ones, arising in one form or another in virtually every enforcement proceeding under the Act. See *L.E. Myers Co.*, 484 U.S. at 990 (White & O'Connor, JJ., dissenting from denial of certiorari) ("the issue is central to OSHA's enforcement efforts"); *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive"). The usual confusion engendered by conflict among the circuits is, moreover, heightened in this instance because an aggrieved employer may generally seek review of an OSHRC decision in any of three circuits—where the violation occurred, where the employer is headquartered, or in the District of Columbia. 29 U.S.C.

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[8] We have provided respondent with a copy of our brief in opposition in *L.E. Myers*.

660(a); see also *id.* § 660(b) (Secretary may seek review in circuit of violation or of employer's headquarters).[9] The present state of the law in many circuits creates unjustifiable obstacles to the Secretary's enforcement of requirements designed to protect workplace safety and health; and uncertainty in the law disserves, in any event, the powerful interest in certainty and uniformity with respect to the interpretation of an Act intended to protect "every working man and woman in the Nation" (29 U.S.C. 651(b)). The questions presented here therefore warrant review and resolution by this Court.

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[9] This case, for example, involves a violation in Florida by a company headquartered in Maryland. App., *infra*, 46a-47a. The employer therefore had the option of seeking review in the Eleventh Circuit, where case law favors the Secretary; the Fourth Circuit, where case law favors the employer; or the District of Columbia Circuit, which has not clearly addressed the relevant issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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