No. 07-128

In the Supreme Court of the United States

JINDAL UNITED STEEL CORP., ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

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

BRIEF FOR THE SECRETARY OF LABOR

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QUESTION PRESENTED

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, authorizes the Occupational Safety and Health Review Commission to assess civil penalties and provides that any employer who willfully or repeatedly violates safety and health requirements "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. 666(a) and (j). In these cases, the Secretary of Labor charged and the Commission affirmed numerous individual, willful violations of a record-keeping regulation.

The question presented is whether the Commission erred by grouping those individual, willful violations and imposing one penalty that amounted to less than the $5000 statutory minimum for each violation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 480 F.3d 320. The decisions of the Occupational Safety and Health Review Commission vacating the directions for review (Pet. App. 10-19, 20-40) are reported at 21 O.S.H. Dec. (BNA) 1298 and 21 O.S.H. Dec. (BNA) 1306. The decisions of the administrative law judge (Pet. App. 41-78, 79-138) are reported at 22 O.S.H. Dec. (CCH) ¶ 32,528 and 23 O.S.H. Dec. (CCH) ¶ 32,580.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2007. A petition for rehearing was denied on April 30, 2007 (Pet. App. 139-140). The petition for a

writ of certiorari was filed on July 30, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, was enacted to "assure so far as possible * * * safe and healthful working conditions" for the Nation's workers. 29 U.S.C. 651(b). To achieve that objective, Congress assigned "distinct regulatory tasks" to the United States Secretary of Labor (Secretary) and the Occupational Safety and Health Review Commission (OSHRC or Commission). *Martin* v. *OSHRC*, 499 U.S. 144, 147 (1991). The Secretary exercises prosecutorial and policymaking authority by establishing workplace health and safety standards, inspecting workplaces, and issuing citations if the Secretary determines that an employer is failing to comply with OSH Act requirements. *Id.* at 147, 152-154; see *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 6 (1985) (*Cuyahoga Valley*) (per curiam) ("enforcement of the Act is the sole responsibility of the Secretary"). The Commission acts as an independent adjudicator when an employer contests a citation. *Martin*, 499 U.S. at 147-148. It provides a hearing before an administrative law judge (ALJ), who makes findings of fact and issues an order affirming, modifying, or vacating the Secretary's citation or proposed penalty. The ALJ's order becomes the final order of the Commission unless the Commission grants discretionary review. *Id.* at 148; see 29 U.S.C. 659(c), 661(j). Final Commission orders may be reviewed in the courts of appeals. 29 U.S.C. 660(a) and (b).

Although the Secretary recommends penalties for OSH Act violations, the Commission is ultimately responsible for imposing penalties in contested cases. Section 17(j) of the Act provides that "[t]he Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business[,] * * * the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(j). The Commission's penalty-setting responsibility is limited, however, by more specific statutory requirements regarding the dollar amounts of penalties for various types of citations. See 29 U.S.C. 666(a), (b) and (c) ($70,000 limit for repeated violations and $7000 limits for serious and not serious violations). An employer who commits "willful" violations of the Act or an Occupational Safety and Health Administration (OSHA) standard or regulation, as petitioners did here, "may be assessed a civil penalty of not more than $70,000 for each violation, but *not less than $5,000 for each willful violation*." 29 U.S.C. 666(a) (emphasis added).

2. Petitioners Jindal United Steel Corp. (Jindal) and Saw Pipes USA, Inc. (Saw Pipes), share a plant in Baytown, Texas, where Jindal manufactures steel and Saw Pipes makes steel pipes. Pet. App. 22, 41, 79. In 2000, OSHA inspected the Baytown facility and discovered numerous violations of a regulation requiring employers to maintain accurate records of work-related injuries and illnesses. *Id.* at 41-42, 79-80; 29 C.F.R. 1904.2(a) (1999). In particular, the Secretary determined that, in 1998, 1999, and the first half of 2000, Jindal failed to record 75%, 86%, and 55%, respectively, of all recordable injuries. Pet. App. 93. The Secretary

determined that Saw Pipes' under-reporting resulted in a drop in its lost workday injury and illness rate from 9.6 per 100 employees in 1996 to reported rates of 2.7, 3.1, and 4.2 in 1997, 1998, and 1999, respectively. *Id.* at 56.

Normally, the Secretary does not cite each related violation of the same standard separately but instead issues one citation for the group. In a limited number of cases involving willful violations, however, the Secretary exercises her discretion to cite the violations separately. See Pet. App. 141-168 (Secretary's instruction for identifying and handling cases proposed for citation on an instance-by-instance basis). The Secretary has cited extensive record-keeping violations on an instance-by-instance basis because record-keeping plays "a crucial role in providing the information necessary to make workplaces safer and healthier." *Kaspar Wire Works, Inc.* v. *Secretary of Labor*, 268 F.3d 1123, 1127 (D.C. Cir. 2001) (citation omitted); see 66 Fed. Reg. 5916-5917 (2001). Given the extensive, willful, and deliberate violations here, the Secretary used her prosecutorial discretion to cite each record-keeping violation on a per-instance basis and proposed penalties of $9000 per violation for Jindal and $8000 per violation for Saw Pipes. See Pet. App. 11, 20-21. Petitioners contested the citations.

3. After holding hearings, an ALJ affirmed 82 separate violations against Jindal and 59 against Saw Pipes. Pet. App. 41-78, 79-138. The ALJ found that those violations were willful because Jindal's and Saw Pipes' management deliberately implemented record-keeping practices they knew were incorrect. *Id.* at 66-74, 121-129. For penalty purposes, however, the ALJ grouped each company's willful violations, treating them as if they

were one violation, and assessed each company a single penalty of only $70,000. *Id.* at 76, 135. That assessment amounted to an average, per-violation penalty of $854 for Jindal and $1186 for Saw Pipes, well under the $5000 per-violation minimum.

The Secretary appealed to the Commission, arguing that the ALJ did not have the authority to group separately-proven willful violations in order to impose penalties that are less than the statutory per-violation minimum. Pet. App. 11, 21. The companies challenged the characterization of their violations as willful, as well as the penalty assessment. *Ibid.*

4. The Commission initially accepted the cases for review, but the two sitting Commissioners, while affirming the willfulness of the violations, could not agree on whether grouping the violations was appropriate. Pet. App. 10-19, 20-40. The Commission therefore vacated its direction for review in both cases. *Ibid.* As a result, the ALJ's opinions became final Commission orders under Section 12(j) of the OSH Act, 29 U.S.C. 661(j). See *W.G. Yates & Sons Constr. Co.* v. *OSHRC*, 459 F.3d 604, 606 (5th Cir. 2006).

The Secretary petitioned the Fifth Circuit for review of the penalty assessments, and the court of appeals consolidated the cases for review. See Pet. App. 1-2; 29 U.S.C. 660(b). Petitioners did not seek review of the ALJ's determinations that the violations occurred and were willful. Pet. App. 2.

5. The court of appeals vacated the penalty assessments and remanded for further proceedings. Pet. App. 1-9. The court reasoned that 29 U.S.C. 666(a) requires "that *each* willful violation be assessed a penalty within the range of $5,000 to $70,000," and thereby constrains the Commission's authority under 29 U.S.C. 666(j) to

assess an appropriate penalty. Pet. App. 6-7. In particular, the court explained, an ALJ should not apply the "appropriateness" factors of 29 U.S.C. 666(j) first, as petitioners argued, and then manipulate the number of violations so that the penalty range fits his appropriateness determination. Pet. App. 6. Instead, the ALJ should determine the penalty range based on the number of violations separately charged and proven and then assess an appropriate penalty from within that range. *Ibid.* Therefore, the court concluded, "the Commission cannot group separately charged and proven willful offenses for the purposes of assessing a penalty." *Id.* at 9.

The court of appeals rejected petitioners' argument that the legislative history of the statute and its 1990 amendments support the grouping practice. Pet. App. 7. The court explained that, before 1990, there was no mandatory minimum penalty for willful violations, and the maximum penalty was $10,000. *Ibid.* The 1990 amendments, to increase penalties, added the $5000 mandatory minimum and raised the maximum to $70,000. *Ibid.* (citing Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3103(1), 104 Stat. 1388-29). The court reasoned that the clear intent of Congress was to limit the Commission's discretion in assessing minimum penalties for willful violations. *Ibid.*

The court of appeals also rejected petitioners' contention that the Commission's authority to reject the Secretary's recommended penalties allowed the Commission to group separately charged and proven willful violations. Pet. App. 7-8. The court explained that the Commission's authority to assess a penalty different from the one proposed by the Secretary does not encom-

pass the authority to disregard the number of violations charged and proven. *Id.* at 8.

The court further rejected petitioners' claim that requiring a mandatory minimum penalty contradicts an established practice by the Commission of grouping violations to lower penalties. Pet. App. 8-9. The court pointed out that even the two Commissioners who heard the case could not agree on the lawfulness of the grouping practice. *Ibid.* The court therefore vacated the penalty assessments and remanded for determination of appropriate penalties in conformity with the OSH Act. *Id.* at 9.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioners contend that the decision below misinterprets the OSH Act and its legislative history (Pet. 14-18), ignores the Act's "enforcement structure" (Pet. 19-20), and effectively gives the Secretary "[u]nreviewable [p]enalty [a]ssessment [a]uthority" in contravention of the Act (Pet. 13). Those contentions are incorrect.

a. As the court of appeals concluded, the penalty provisions of the OSH Act impose limits on the Commission's authority to assess penalties for proven violations. See Pet. App. 4-7. Section 17(a) provides that an employer who willfully violates OSH Act requirements "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. 666(a). The plain language of that provision requires a minimum penalty of $5000 for each willful violation.

Contrary to petitioners' contention (Pet. 17), Section 17(j) of the Act does not authorize the Commission to impose a lower penalty. As the court of appeals explained (Pet. App. 6), the Commission's authority under Section 17(j) is limited to assessing the penalties "provided in this section." 29 U.S.C. 666(j). For willful violations, the penalties provided "in this section" are between $5000 and $70,000 "for each violation," 29 U.S.C. 666(a). See Pet. App. 6-7. The Commission may not group violations in order to assess penalties outside that range. *Ibid.*

Petitioners also incorrectly argue (Pet. 15-17) that interpreting Section 17(a) to require the Commission to impose a minimum mandatory penalty of $5000 for each willful violation conflicts with Section 10(c) of the Act, 29 U.S.C. 659(c). Section 10(c) provides that, after holding a hearing on contested violations, the Commission "shall * * * issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." 29 U.S.C. 659(c). Petitioners contend that, unless the Commission's authority to "modify[]" a "citation" encompasses the authority to group violations for penalty purposes, the modification authority would be "mere surplusage." Pet. 16. That is incorrect. The modification authority still has ample meaning even though it does not include the power effectively to eliminate citations by grouping them for penalty assessment. The Commission may modify citations by changing the severity of individual cited violations. For example, the Commission may change a cited violation from "willful" to "serious" or "other-than-serious" if the Secretary fails to prove willfulness. See, *e.g.*, *RSR Corp.* v. *Donovan*, 733 F.2d 1142, 1143-1144 (5th Cir. 1984) (describing

the reclassification of citations by the Commission as modifications). Indeed, petitioners themselves cite examples of cases in which the Commission modified a violation by reducing its severity, thus disproving their own argument. See Pet. 16 n.10 (citing cases).

Petitioners also misinterpret the legislative history of the 1990 OSH Act amendments in arguing (Pet. 17-18) that the Commission had a longstanding practice of grouping willful violations for penalty purposes and Congress took no steps to remove the Commission's grouping authority. As the court of appeals observed (Pet. App. 8), petitioners' description of the Commission's historical practice is contradicted by both Commissioners in this case. See *id.* at 30 (views of Commissioner Railton) (stating that, "[w]here the cited provision is found susceptible to per-instance citation, the Commission has generally also assessed individual penalties"); *id.* at 35 (views of Commissioner Rogers) (describing the issue here as one of first impression).

The cases cited by petitioners (Pet. 8) also do not support their contention about the Commission's historical practice. As the court of appeals explained (Pet. App. 9 n.5), *H.H. Hall Construction Co.*, 10 O.S.H. Cas. (BNA) 1042 (O.S.H.R.C. 1981), involved serious violations of the Act, which have never been subject to a mandatory minimum penalty. Similarly, *MICA Corp.* v. *OSHRC*, 295 F.3d 447 (5th Cir. 2002) did not implicate Section 17(a)'s mandatory minimum penalty, because it did not involve willful violations. *Hackensack Steel Corp.*, 20 O.S.H. Cas. (BNA) 1387 (O.S.H.R.C. 2003), also did not present the question whether the Commission could assess penalties lower than the statutory minimum. In that case, the Commission grouped a non-willful violation with a single willful violation and assessed

a penalty of $70,000—the *maximum* penalty for a single willful violation. *Id.* at 1394-1395. And, in *Dakota Underground, Inc.* v. *Secretary of Labor*, 200 F.3d 564, 568 (8th Cir. 2000), the citations were grouped not by the Commission but by the Secretary at the charging stage. Although the Eighth Circuit stated that "the Review Commission sometimes groups violations together and assesses a single penalty even when the Secretary proposes multiple penalties," *id.* at 569, the case cited in support of that statement, *Pentecost Contracting Corp.*, 17 O.S.H. Cas. (BNA) 2133 (O.S.H.R.C. 1997), did not involve grouping that produced a per-violation penalty below the statutory minimum.

Moreover, even if the Commission had a historical practice of grouping willful violations, the legislative history of the 1990 amendments shows that Congress intended "to constrain the Commission's discretion in assessing minimum penalties for willful violations and to increase the amount of the penalties." Pet. App. 7. As enacted in 1970, the OSH Act contained no minimum penalty for willful violations. 29 U.S.C. 666(a) (1988). In 1990, aware of the Secretary's policy of citing egregious violators on an instance-by-instance basis, see, *e.g.*, 136 Cong. Rec. 30,635 (1990) (statement of Sen. Hatch), lawmakers added a minimum penalty of $5000 for each willful violation, so that "extreme violators" who "knowingly and intentionally violate the recordkeeping and reporting requirements" would be "fined at an effective level," H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 688-689 (1990) (Conf. Rep.).

Contrary to petitioners' contention, Pet. 18 (quoting Conf. Rep. 689), the statement in the Conference Report that the mandatory minimum applies to "*initial*, assessed penalties" does not mean that lawmakers did not

intend it to apply to final penalties issued by the Commission. Read in context, the statement simply clarifies that Congress did not want the new penalty provisions to constrict the Secretary's traditional prosecutorial discretion to settle cases for amounts below the minimum penalty. Conf. Rep. 689 ("[T]he conferees note that this mandatory minimum level applies to *initial*, assessed penalties. OSHA's existing authority to settle particular cases for amounts that are less than the penalties *initially* assessed remains unchanged.") (emphases added). Thus, the conferees meant to distinguish between the penalties initially proposed by the Secretary and the penalty amounts for which the Secretary might settle a case, rather than between the Secretary's proposed and the Commission's final assessed penalties. See 136 Cong. Rec. at 30,635 (statement of Sen. Kennedy).

b. Also contrary to petitioners' contention (Pet. 19-20), the court of appeals' decision is fully consistent with the OSH Act's enforcement structure. As this Court has recognized, "enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 6 (1985) (per curiam). "[O]nly the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions" or to withdraw a citation. *Id.* at 7. The Commission possesses only the "adjudicatory powers typically exercised by a *court* in the agency-review context," such as the power to hold hearings, to make factual findings, and to issue orders. *Martin* v. *OSHRC,* 499 U.S. 144, 154 (1991); see *id.* at 148. Thus, the Commission may affirm citations, vacate them, or modify them by downgrading their seriousness. 29 U.S.C. 659(c); *Cuyahoga Valley*, 474 U.S. at 7; *Super Excava-*

tors, Inc., 15 O.S.H. Cas. (BNA) 1313, 1317 (O.S.H.R.C. 1991) (downgrading a violation from "serious" to "other-than-serious"). But, when the Commission affirms violations charged by the Secretary, the Commission must assess penalties in a manner consistent with both the Secretary's charging decision and the Act's penalty provisions.

In this case, the Secretary exercised her discretion to issue citations on an instance-by-instance basis for numerous willful record-keeping violations. The Secretary's authority to issue instance-by-instance citations is well-established and is not challenged here. Pet. App. 4; Pet. 23; see *Kaspar Wire Works, Inc.* v. *Secretary of Labor*, 268 F.3d 1123, 1130-1131 (D.C. Cir. 2001). The determination that the violations were willful also is not at issue, because petitioners did not petition for review of the Commission's willfulness findings. Pet. App. 2. Accordingly, the ALJ was required to assess a minimum penalty of at least $5000 for each willful violation and had no authority to make any "findings" (Pet. 19) that penalties at that level were inappropriate.

c. Petitioners also err in contending (Pet. 13) that the decision below effectively grants the Secretary unreviewable penalty assessment authority. Under the court of appeals' decision, the Secretary may, in some circumstances, determine the minimum penalty that a willful OSH Act violator will face by deciding whether to cite one or multiple violations. But "any such discretion [is] similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring[,] * * * and is appropriate, so long as it is not based upon improper factors." *United States* v. *LaBonte*, 520 U.S. 751, 762 (1997). See *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Moreover, the Commission retains the authority to de-

termine whether the Secretary's charges are supported by the evidence and to determine the final penalty, thereby acting as a check on the Secretary's charging discretion. *Martin*, 499 U.S. at 154-155. Indeed, in these cases, the ALJ vacated several of the citations after determining that they had not been proven, see Pet. App. 77-78, 136-137, and the ALJ could have selected from a wide range of potential penalties for the violations that he concluded had been proven, see 29 U.S.C. 666(a). The ALJ could not, however, alter the charges brought or disregard charges that the Secretary had proven.

2. Petitioners also argue (Pet. 20-24) that review is warranted because the decision below adds to a circuit conflict on the interplay between the Secretary's prosecutorial discretion and the Commission's penalty-setting responsibility and misinterprets this Court's decision in *Cuyahoga Valley*. This case, however, does not implicate any conflict among the courts of appeals, and the decision below is fully consistent with *Cuyahoga Valley*.

a. There is disagreement among the courts of appeals on the question whether the Commission has authority to reclassify a cited violation as "de minimis," that is, a violation that has "no direct or immediate relationship to safety or health." 29 U.S.C. 658(a). The First, Third, and Ninth Circuits have held that the Commission has that authority. See *Chao* v. *Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9th Cir. 2001); *Reich* v. *OSHRC*, 998 F.2d 134 (3d Cir. 1993); *Donovan* v. *Daniel Constr. Co.,* 692 F.2d 818 (1st Cir. 1982). The Seventh Circuit, in contrast, has concluded "that the Commission cannot label a violation *de minimis* and disregard it." *Caterpillar, Inc.* v. *Herman*, 131 F.3d 666, 668 (1997).

This case, however, does not involve that disagreement. Whether the Commission may reclassify a violation as "de minimis" turns on an interpretation of 29 U.S.C. 658(a), a section that allows the Secretary either to issue a citation or "a notice in lieu of a citation with respect to de minimis violations." *Ibid.* If that section grants the Secretary sole prosecutorial authority to decide whether to issue a de minimis notice rather than a citation, the Commission cannot change a citation to a de minimis notice. See *Reich*, 998 F.2d at 142 (Becker, J., dissenting). If the section does not grant the Secretary such authority, then the Commission can recharacterize a cited violation as de minimis the same way it can recharacterize a serious violation as other-than-serious or a willful violation as something other than willful, if the facts support such a recharacterization. But the meaning of 29 U.S.C. 658(a) is not at issue in this case, which turns instead on the meaning of 29 U.S.C. 666(a). The disagreement among the courts of appeals identified by petitioners therefore provides no reason for the Court to grant review here.

b. Contrary to petitioners' contention (Pet. 22-24), the decision below is also entirely consistent with this Court's decision in *Cuyahoga Valley*. The court of appeals cited *Cuyahoga Valley* for the proposition that 29 U.S.C. 666(a) does not limit the Secretary's charging decisions. See Pet. App. 6 n.3 ("Although § 666(a) is a limitation on the Commission's authority to assess penalties, it should not be read as a restriction on the Secretary's prosecutorial discretion to cite only a single willful violation where the facts alleged would support numerous willful violations.") (citing *Cuyahoga Valley*, 474 U.S. at 7, and *Heckler*, 470 U.S. at 831). Petitioners do not contest that proposition. Pet. 23. And it is sup-

ported by *Cuyahoga Valley*, which held that "enforcement of the Act is the sole responsibility of the Secretary," 474 U.S. at 6, and that the Commission therefore lacks authority to determine whether a citation issued by the Secretary should be withdrawn, *id.* at 6-7. Indeed, *Cuyahoga Valley* also supports the court of appeals' conclusion that the Commission lacks authority to group citations for penalty assessment, because that authority would enable the Commission to nullify the Secretary's enforcement decision to issue the citations on a per-instance basis.

Finally, petitioners err in contending (Pet. 23) that the court of appeals' reliance on *Cuyahoga Valley* here was inconsistent with the Ninth Circuit's treatment of *Cuyahoga Valley* in *Symms Fruit Ranch, Inc.* In that case, the Ninth Circuit characterized *Cuyahoga Valley* as "holding that the Secretary, like a prosecutor or any civil plaintiff, can decide to drop her claim or dismiss her suit." 242 F.3d at 899. The Ninth Circuit did not address the implications of *Cuyahoga Valley* for the question presented here, and its characterization of *Cuyahoga Valley* is fully consistent with the court of appeals' reliance on *Cuyahoga Valley* for the proposition that the Secretary has discretion to charge citations on either a per-instance or a group basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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