No. 15-541

In the Supreme Court of the United States

WESTERN WORLD, INC., PETITIONER,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under 29 U.S.C. 660(a), judicial review of petitioner's challenges to a final order of the Occupational Safety and Health Review Commission (Commission) is barred because petitioner failed to present those challenges to the Commission.

2. Whether, in adjudicating petitioner's challenge to a citation issued by the Secretary of Labor, a Commission administrative law judge violated petitioner's due process rights by excluding deposition testimony on the grounds that it constituted inadmissible hearsay and that petitioner had failed to provide proper notice of the deposition to the Secretary.

3. Whether the Commission's determination that petitioner failed to establish the affirmative defense of unpreventable employee misconduct is supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not published in the *Federal Reporter* but is reprinted at 604 Fed. Appx. 188. The decision and order of the administrative law judge (Pet. App. 13-55) is reported at 24 O.S.H. Cas. (BNA) 2116 and 2014 O.S.H.D. (CCH) ¶ 33381.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2015. A petition for rehearing was denied on May 27, 2015 (Pet. App. 56). On October 16, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 26, 2015, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2006, the Secretary of Labor issued petitioner a citation for violating the general duty clause of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 654(a)(1). Pet. App. 14. After a multi-day hearing, an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (Commission or OSHRC) upheld the citation and $1250 penalty. *Id.* at 53-55. The court of appeals denied a petition for review. *Id.* at 1-10.

1. The OSH Act was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). The general duty clause of the OSH Act requires an employer to provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). To establish a violation of the general duty clause, the Secretary of Labor (Secretary) must demonstrate that: (1) an activity or condition in the employer's workplace presented a hazard to an employee; (2) either the employer or the employer's industry recognized the condition or activity as a hazard; (3) the hazard was likely to or did cause death or serious physical harm; and (4) there existed a feasible means to eliminate or materially reduce the hazard. *Fabi Const. Co.* v. *Secretary of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007); see *Babcock & Wilcox Co.* v. *OSHRC,* 622 F.2d 1160, 1164 (3d Cir. 1980).

The Secretary, through the Occupational Safety and Health Administration (OSHA), enforces the general duty clause by issuing a citation to an employer when a violation occurs. 29 U.S.C. 659(a). In ap-

propriate cases, OSHA also proposes civil penalties against a cited employer. *Ibid.* If the employer timely contests a citation or penalty, the Commission is required to "afford an opportunity for a hearing," and "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(a) and (c). Hearings are presided over by a Commission ALJ. 29 U.S.C. 661(j). The Federal Rules of Evidence apply in those hearings. 29 C.F.R. 2200.71.

A party that is dissatisfied with the decision of the ALJ may petition the Commission for discretionary review. 29 U.S.C. 659(c), 661(i). If the Commission denies such review, the ALJ's "ruling becomes the order of the Commission." *Martin* v. *OSHRC*, 499 U.S. 144, 148 (1991). Final decisions of the Commission are reviewable in the courts of appeals. 29 U.S.C. 659(c), 660(a). A court, however, may hear only objections 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 addition, the court "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)). 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).

2. This case arises from an incident at a New Jersey theme park called Wild West City, where employees reenacted historic "Wild West" events, including gun fights. Pet. App. 2, 14. Petitioner Western World owned and operated the park. *Id.* at 2. During the

reenacted gun fights, petitioner's employees used non-functioning prop guns or firearms loaded with blank ammunition. *Id.* at 3. Petitioner provided blank ammunition and also permitted employees to bring in their own blank ammunition; petitioner's policy provided that no live ammunition was permitted inside the park or in employees' automobiles. *Id.* at 2.

On July 7, 2006, employee Scott Harris was shot in the head while performing as a cowboy in the Sundance Kid show at Wild West City. Pet. App. 25. Subsequent investigation revealed that, on the day of the shooting, another employee (Al Morales) had brought two boxes of live ammunition and left them in his unlocked gun case in the dressing room, next to a box of blank rounds. *Id.* at 25-26. Petitioner discovered on the day of the shooting that Morales had violated its firearms policy, but did not terminate Morales until three weeks after the incident. *Id.* at 27. A third employee who performed in the reenactments, DaSean Sears, later made statements admitting that he had been in the dressing room, had loaded a gun issued by petitioner, and had fired one or two live rounds during the performance when Harris was shot. *Id.* at 3; Sec'y C.A. Br. 37-38.

3. After conducting an inspection, OSHA issued petitioner a citation for violating the general duty clause, 29 U.S.C. 654(a)(1), and proposed a penalty of $1250. Pet. App. 4, 13-14. Petitioner contested the citation, and the case was assigned to an ALJ for a hearing. *Id.* at 3; see *id.* at 13-55 (ALJ's decision and order). Before the hearing, the Secretary moved in limine to exclude statements that Sears had made during a March 2013 deposition in a related civil action. Contrary to two prior statements, Sears testified

in that deposition that he had loaded his own gun with live ammunition and purposely shot Harris; Sears was not represented by counsel during the deposition, which ended prematurely because of concerns about Sears's mental health and well-being. Sec'y C.A. Br. 37-38; C.A. App. 222a. The ALJ granted the Secretary's motion in limine, concluding that the testimony was inadmissible hearsay and was not trustworthy, and that petitioner had taken the deposition without notifying the Secretary in advance, as required by civil discovery rules. Pet. App. 4; C.A. App. 223a-225a. The ALJ reaffirmed those findings in denying petitioner's motion for reconsideration. C.A. App. 227a-228a.

Following the hearing, the ALJ upheld the citation and assessed the $1250 penalty. Pet. App. 53, 55. The ALJ found that the petitioner had violated the general duty clause because the use during live performances of guns capable of firing live ammunition presented a hazard that petitioner recognized, that was likely to cause death or serious physical harm, and that could have been eliminated or materially reduced through feasible and effective means. *Id.* at 30-49. The ALJ rejected petitioner's "affirmative defense" that the violation resulted from "unpreventable employee misconduct," concluding that petitioner had "not take[n] adequate steps to prevent violations of its" policy against live ammunition, *id.* at 49-52, and had failed to effectively enforce that policy when it discovered that employee Morales violated it on the day that Harris was shot, *id.* at 52-53.

Petitioner filed a petition for discretionary review with the Commission. Pet. App. 83-101. The petition did not mention the ALJ's pre-hearing ruling exclud-

ing the deposition testimony. *Ibid.* Approximately one month later, petitioner submitted to the Commission an addendum to the previously filed petition for discretionary review.[1] *Id.* at 79. Petitioner argued in the addendum that the ALJ had erred in excluding the deposition testimony and thereby denied petitioner the opportunity to present evidence of employee misconduct. *Id.* at 79-82. The Commission did not direct the case for review, and the ALJ's decision became a final order of the Commission. *Id.* at 11.

4. Petitioner sought judicial review of the Commission's final order in the court of appeals, which denied the petition in an unpublished opinion. Pet. App. 1-10. The court of appeals held as a threshold matter that it lacked jurisdiction under 29 U.S.C. 660(a) to consider two arguments that, on the court's understanding, petitioner had failed to raise before the Commission: namely, that the ALJ improperly excluded the Sears deposition testimony, and that the ALJ should have ordered the Secretary to provide petitioner with an unredacted copy of OSHA's investigation report containing witnesses' names. Pet. App. 4-5.[2]

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[1] The addendum was timely under the Commission's rules, which permit the filing of a petition for discretionary review up to 20 days after the ALJ's decision has been docketed by the Commission's Executive Secretary. 29 C.F.R. 2200.91(b). Here, although the ALJ issued his decision in December 2013, the Commission did not docket it until January 6, 2014. See 14-1838 C.A. Doc., at 8 (3d Cir. May 22, 2014) (Certified List of the OSHRC, Entry 114).

[2] The court of appeals was apparently unaware of the addendum (Pet. App. 79-82) in which petitioner presented to the Commission a challenge to the ALJ's exclusion of the deposition testimony. That may be because, as the court noted, petitioner did not include its petition for discretionary review in its appendix on appeal, requiring the court to retrieve the petition from the Commission

The court of appeals reached and rejected petitioner's remaining claims on the merits. Pet. App. 5-9. The court held that substantial evidence supported the ALJ's conclusion that petitioner had failed to establish the elements of the defense of unpreventable employee misconduct based on Morales's conduct. *Id.* at 5-8. The court similarly found substantial evidence in the record that petitioner violated the general duty clause because its "employees were exposed to a hazardous working environment" and the hazard at issue—"being struck be a live bullet—was likely to cause death or serious harm." *Id.* at 9.

ARGUMENT

The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or another court of appeals. Four of the six arguments that petitioner advances in this Court were not raised before the Commission and are therefore statutorily barred under the OSH Act. Of the remaining two arguments, one challenges the ALJ's discretionary decision to exclude an item of evidence, and the other repeats a claim that the court of appeals correctly rejected under the deferential substantial evidence standard of review. Further review is unwarranted.

1. As an initial matter, four of the six arguments that petitioner advances in this Court are statutorily barred because petitioner did not raise them to the Commission. Those arguments also lack merit.

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itself. *Id.* at 5 n.4. The court was correct, however, that petitioner did not raise any argument about the OSHA investigation report in either its original petition for discretionary review or the subsequent addendum. See *id.* at 79-101.

a. The OSH Act generally bars judicial review of arguments that were not raised before the Commission. Specifically, the Act provides that "[n]o 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." 29 U.S.C. 660(a). This Court has held that virtually identical language in other federal labor statutes serves to bar judicial consideration—including consideration by this Court—of issues not presented to the agency. See *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (per curiam); *Woelke & Romero Framing, Inc.* v. *NLRB,* 456 U.S. 645, 665-666 (1982). And the courts of appeals have reached the same conclusion under Section 660(a), including with respect to constitutional claims. See *Bethlehem Steel Corp.* v. *OSHRC,* 607 F.2d 871, 876 (3d Cir. 1979), see also, *e.g.*, *National Eng'g & Contracting Co.* v. *Herman*, 181 F.3d 715, 720 (6th Cir.), cert. denied, 528 U.S. 1045 (1999); *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 (2d Cir. 1997); *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 105-107 (1st Cir. 1997).

Four of petitioner's arguments—those numbered two, three, four, and six in the questions presented, Pet. i-ii—are subject to Section 660(a)'s bar to judicial review. Petitioner did not present any of those arguments to the Commission. Indeed, petitioner raised only one of the four arguments—its claim (Pet. 32-26) that it was unlawfully denied access to the unredacted version of OSHA's investigation report—in the court of appeals, which properly rejected the argument as barred under Section 660(a). Pet. App. 4-5. Petitioner

has presented the three other arguments for the first time in this Court.[3] Because petitioner does not identify any "extraordinary circumstances" for its failure to raise the arguments before the Commission, judicial review of all four arguments is barred by Section 660(a). And because petitioner raises three of the arguments for the first time in its petition for a writ of certiorari, those arguments are not properly before the Court even apart from Section 660(a)'s limitation on judicial review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below") (citation omitted); see also, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks and citation omitted).

b. Even if petitioner's arguments were subject to judicial review in this Court, they lack merit.

i. Petitioner argues (Pet. 10-14) that the ALJ's exclusion of the Sears deposition testimony prevented petitioner from showing that this case involves workplace violence to which the OSH Act should not apply. The ALJ's ruling, however, was clearly correct as an evidentiary matter. C.A. App. 227a; see 29 C.F.R. 2200.71 (Federal Rules of Evidence applicable at the

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[3] In its petition for discretionary review to the Commission, petitioner suggested in passing that it "did not have fair notice of its obligations under the Act," Pet. App. 94, but did not present that claim as a constitutional challenge (as it does now, Pet. 16-17), or develop it sufficiently for further review. See *Durez Div. of Occidental Chem. Corp.* v. *OSHA*, 906 F.2d 1, 5 (D.C. Cir. 1990) (declining to consider issue noted, but not discussed, in a petition for review to the Commission).

administrative hearing). Sears's deposition testimony constituted hearsay because it was a statement outside of the hearing offered to prove the truth of the matter asserted—*viz.*, that Sears shot employee Harris purposely, not accidentally. See Fed. R. Evid. 801(c). Petitioner does not explain (Pet. 9) how the statement could qualify as an opposing party's nonhearsay admission under Rule 801(d)(2), when it would be admitted against the Secretary, not Sears himself or petitioner as Sears' former employer. The testimony also does not fall within the hearsay exception for statements against penal interest, Fed. R. Evid. 804(a) and (b)(3), because petitioner did not establish that Sears was "unavailable" to testify at the administrative hearing. Cf. C.A. App. 224a (ALJ notes petitioner's statement that it attempted to subpoena Sears for a deposition, but makes no finding as to his unavailability to testify at hearing). Nor did the ALJ err in finding the deposition testimony inadmissible under Federal Rule of Civil Procedure 32(a)(1), because the Secretary was not present at or given reasonable notice of Sears's deposition in the civil action. See C.A. App. 224a-225a (finding that petitioner "fail[ed] to advise the Secretary's representative *in advance* of its intent to" depose Sears).

Moreover, petitioner errs (Pet. 10-14) in suggesting that its violation of the general duty clause depends on the OSH Act's application to incidents of workplace violence. The ALJ upheld the Secretary's citation after finding that petitioner permitted the existence of a recognized workplace hazard by failing to ensure that its employees used only blank ammunition during reenacted shoot-outs. Pet. App. 32-37. That finding would support a violation of the general duty clause

whether the live ammunition used to shoot Harris in July 2006 came from employee Morales or whether Sears brought the ammunition himself. See Gov't C.A. Br. 40 n.7.[4]

ii. Petitioner asserts (Pet. 15-24) that the citation issued by OSHA resulted in a denial of due process because reasonable employers lacked fair notice of the prohibited conduct, and was arbitrary and capricious because OSHA did not analogize the hazard in this case to the hazard posed by nail guns in the workplace. Substantial evidence, however, supports the ALJ's common-sense finding that a reasonably prudent employer that reenacts gunfights would know that operable firearms and live ammunition are hazardous. Pet. App. 33-36. Furthermore, OSHA had no reason to apply the standard set forth in 29 C.F.R. 1926.302(e), which regulates power-operated hand tools that are powder-actuated. See Pet. 18-21. That standard applies to employers "engaged in construction work," 29 C.F.R. 1910.12(a), which the regulations define as "work for construction, alteration, and/or repair, including painting and decorating." 29

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[4] In any event, petitioner's cited authorities (Pet. 11) do not support the assertion that the OSH Act cannot reach acts of workplace violence. The cited Standards Interpretation Letter (Pet. App. 58-61) reiterated the Secretary's guidance that the general duty clause of the OSH Act *would* apply "[i]n a workplace where the risk of violence and serious personal injury are [s]ignificant enough to be 'recognized hazards.'" *Id.* at 59. And the Tenth Circuit's decision in *Ramsey Winch, Inc.* v. *Henry*, 555 F.3d 1199, 1202 (2009), addressed whether the OSH Act preempts state laws that hold employers criminally liable for prohibiting employees from keeping firearms in locked vehicles on company property. That decision is therefore factually (and legally) inapposite.

C.F.R. 1910.12(b). Petitioner's theme-park business does not constitute construction work.

iii. Petitioner's contention (Pet. 24-28) that OSHA lacks the authority to regulate "entertainment and recreational activities" is equally meritless. The OSH Act applies to "each employer," 29 U.S.C. 654(a); see 29 U.S.C. 652(5) (defining "employer"), and does not exclude those in an industry that might be characterized as entertainment. Moreover, the absence of a standard specifically tailored to entertainment workplaces does not mean that OSHA lacks authority with respect to petitioner's theme-park activities. The general duty clause is designed to protect workers from hazards that, while recognized, are uncommon enough that the agency has not promulgated a specific standard to address them. See *SeaWorld of Fla., LLC* v. *Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (citing H.R. Rep. No. 1291, 91st Cong., 2d Sess. 21-22 (1970)). Contrary to petitioner's assertion (Pet. 27), this is also not a case in which hazards posed by normal activities intrinsic to an industry cannot be feasibly eliminated. Cf. *SeaWorld of Fla.*, 748 F.3d at 1216-1218 (Kavanaugh, J., dissenting) (discussing normal activities of sports events or entertainment shows) (quoted at Pet. 24-26). The use of live ammunition is not intrinsic to reenactments of gun fights, and it can be feasibly eliminated, as the ALJ found. Pet. App. 39-46; see *id.* at 44 (explaining that, after the Harris shooting in 2006, petitioner went "beyond the abatement measures suggested by the [Secretary]" and allowed only "blank-firing guns").

iv. Finally, petitioner had no constitutional right of "access to the unredacted investigative report from OSHA." Pet. 32. Petitioner bases its contrary claim

on *Brady* v. *Maryland*, 373 U.S. 83 (1963), which recognizes a due process right to exculpatory evidence in criminal cases. But *Brady* does not apply in this civil administrative proceeding. See *Fox* v. *Elk Run Coal Co.*, 739 F.3d 131, 138-139 (4th Cir. 2014); *United States ex rel. (Redacted)* v. *(Redacted)*, 209 F.R.D. 475, 482 (D. Utah 2001). Even if it did, petitioner's claim that OSHA withheld exculpatory information is admittedly based on "speculat[ion]," Pet. 34, which is "not . . . sufficient to sustain a *Brady* claim." *United States* v. *Brown*, 360 F.3d 828, 833 (8th Cir. 2004) (internal citation omitted). Furthermore, OSHA regularly refrains from identifying persons who provide the agency with information about violations of the Act. See *Birdair, Inc.*, 23 O.S.H. Cas. (BNA) 1493, 1494 (2011) ("The Commission has long recognized the applicability of an informer's privilege in its proceedings."); cf. *Roviaro* v. *United States*, 353 U.S. 53, 59-60 (1957) (discussing informer's privilege). Petitioner's speculation (Pet. 34-35) about the utility of additional disclosures is similarly insufficient to overcome that privilege. See Sec'y C.A. Br. 42-43.

2. Petitioner renews (Pet. 5-10, 28-31) its contentions that the ALJ violated its due process rights by excluding Sears's deposition testimony and erred in rejecting its affirmative defense of unpreventable employee misconduct. Both contentions are fact-bound, fail on the merits, and do not warrant further review.

a. Petitioner argues (Pet. 5-10) that the ALJ's exclusion of the deposition testimony violated its due process rights by preventing it from presenting an affirmative defense of unpreventable employee misconduct based on Sears's allegedly intentional acts.

As petitioner points out (Pet. 6), the court of appeals did not reach the merits of that argument because—apparently unaware that petitioner had presented the argument in an addendum to its petition for discretionary review before the Commission, see note 2, *supra*—the court held that the argument was barred from judicial review under Section 660(a). See Pet. App. 4-5.

Regardless, the judgment below is correct because petitioner's due process claim lacks merit. Even in criminal cases, a litigant's due process right to present relevant evidence in his defense yields to evidentiary rules that serve legitimate interests in the trial process. See, *e.g.*, *Clark* v. *Arizona*, 548 U.S. 735, 770 (2006); *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991). That includes rules, such as longstanding restrictions on hearsay, see *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality), that are designed to avoid the introduction of evidence that is unreliable or has the potential to confuse or mislead the factfinder. See *Clark*, 548 U.S. at 770. As explained above, pp. 9-10, *supra*, the ALJ here excluded Sears's deposition testimony under just such established rules—specifically, the Federal Rules of Evidence governing hearsay, and Federal Rule of Civil Procedure 32(a)(1)(A), which limits admission of deposition testimony against a party to those situations in which "the party was present or represented at the taking of the deposition or had reasonable notice of it." See C.A. App. 227a (noting petitioner's concession that it did not provide the Secretary "fair notice of the deposition of Mr. Sears"). Because petitioner had no due process right to present evidence that is inadmissible under rules of evidence and civil procedure that serve legitimate pur-

poses, its constitutional challenge to exclusion of the deposition testimony fails.

b. Petitioner also argues (Pet. 28-31) that the ALJ erred in concluding that it had not established the affirmative defense of unpreventable employee misconduct. The court of appeals correctly rejected that fact-specific argument, Pet. App. 5-8, and its decision does not conflict with any decision of this Court or of any other court of appeals.

To establish the affirmative defense of unpreventable employee misconduct, an employer must show that "(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered." *Secretary of Labor* v. *GEM Indus., Inc.*, 17 O.S.H. Cas. (BNA) 1861, 1863 (1996), aff'd, 149 F.2d 1183 (6th Cir. 1998) (Tbl.); *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); Pet. App. 5-6. The ALJ's finding that petitioner failed to establish the defense is subject to review under the substantial-evidence standard. 29 U.S.C. 660(a). That deferential standard does not demand "a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). And under the substantial-evidence standard, a reviewing court may set aside an agency's finding of fact only if "a reasonable factfinder would have to conclude" that a contrary determination was required. See *INS* v. *Elias-*

Zacarias, 502 U.S. 478, 481 (1992); see *id.* at 481 n.1, 483-484.

The court of appeals correctly upheld the ALJ's finding under that standard. In arguing to the contrary, petitioner suggests (Pet. 29) that the court did "not elaborate on" what evidence supported the ALJ's findings. But the court explained that the ALJ had rejected the defense because petitioner "had allowed employees to utilize their own firearms and ammunition (albeit blank) with only an inspection of the employee's firearm the first time he brought it into the Park." Pet. App. 6. And the court expressly approved that determination, calling it "inexplicable" that petitioner permitted its employees to use their own weapons and ammunition without checking each day "that these firearms were not loaded with live ammunition." *Id.* at 7; see *id.* at 51-52 (ALJ's findings). In addition, the ALJ found—and the court of appeals agreed—that petitioner's delay in terminating employee Morales once it learned that he had violated the no-live-ammunition policy showed that petitioner "did not effectively enforce its posted rules," *id.* at 7-8, as is required to satisfy the final prong of the employee-misconduct defense. See *id.* at 52-53. In short, the court of appeals properly applied the substantial-evidence standard in denying the petition for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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