No. 05-61087 consolidated/w No. 05-61089

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR
Petitioner
v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION;
SAW PIPES USA, INC.
Respondents.

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR
Petitioner
v.

JINDAL UNITED STEEL CORP;
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION;
Respondents

On Petition for Review of an Order of the
Occupational Safety and Health Review Commission

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STATEMENT REGARDING ORAL ARGUMENT

These consolidated appeals present important questions regarding the authority of the Occupational Safety and Health Review Commission to assess a single penalty for multiple willful violations below the statutory minimum of a $5,000 penalty for each willful violation. Petitioner Elaine L. Chao, Secretary of Labor, believes that oral argument would assist the Court in the disposition of these cases.

JURISDICTIONAL STATEMENT

1. *Agency jurisdiction.* The Occupational Safety and Health Review Commission had jurisdiction over these cases pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). Section 10(c) authorizes the Commission to adjudicate an employer's challenge to an OSHA citation if, within 15 working days of the citation's issuance, the employer notifies the Secretary of its intent to contest the citation.

Here, respondent Jindal United Steel Corporation notified the Secretary on November 9, 2000, that it intended to contest a citation that was issued on October 20, 2000. Jindal Record

Pleadings 1, 2 (record pleadings are hereinafter referred to by number only). Respondent Saw Pipes USA notified the Secretary on February 8, 2001, that it intended to contest a citation issued on January 19, 2001. Saw Pipes Pleadings 1, 2. Both notifications fell within section 10(c)'s 15 working-day time frame and therefore were timely.

2. *Appellate jurisdiction*. This Court has jurisdiction over these consolidated review proceedings pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b). Section 11(b) permits the Secretary to seek judicial review of a final Commission order by filing a petition for review with an appropriate court of appeals within 60 days following the issuance of the order.

In *Jindal*, an administrative law judge issued a decision on January 3, 2002. Jindal Pleading 107 (hereinafter "Jin. ALJ"). The Commission directed the case for review, but the two sitting Commissioners were unable to agree on the disposition and therefore vacated the direction for review on September 28, 2005. Jindal Pleading 122 (hereinafter "Jin. Dec."). As a result of that action, the ALJ's decision became

the Commission's final order by operation of law on September 28, 2005. *See* 29 U.S.C. §661(j); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1191 n.1 (10th Cir. 2004). The Secretary filed a timely petition for review with this Court on November 23, 2005.

In *Saw Pipes*, the ALJ issued a decision on May 20, 2002. Saw Pipes Pleading 41 (hereinafter "SP ALJ"). The Commission directed the case for review, but as in *Jindal* the two Commissioners could not agree on a disposition, and thus vacated the direction for review on September 28, 2005. Saw Pipes Pleading 50 (hereinafter "SP Dec."). The Secretary filed a timely petition for review with this Court on November 23, 2005.

The Secretary appropriately sought review in this circuit because the violations in both cases occurred in Texas. *See* 29 U.S.C. § 660(b) (the Secretary may obtain review of a final Commission order in the "court of appeals for the circuit in which the alleged violation occurred").

STATEMENT OF THE ISSUE

Section 17(a) of the OSH Act provides that an employer who willfully violates a regulation "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). In these cases, the Secretary alleged in its citations and the Commission found in its decision numerous individual, willful violations of OSHA's recordkeeping regulation. The issue is whether the Commission may "group" individual willful violations for penalty purposes and impose a single penalty that is less than $5,000 for each violation.

STATEMENT OF THE CASE

The Secretary cited Jindal and Saw Pipes for numerous willful violations of OSHA's recordkeeping regulation, 29 C.F.R. § 1904.2(a) (2000). Jindal and Saw Pipes challenged the citations before the Commission. After hearing evidence in both cases, an ALJ found that Jindal committed 82 individual willful violations and that Saw Pipes committed 59 individual willful violations. Rather than assessing a minimum penalty of $5,000 for each violation (*i.e.*, $410,000 for Jindal and

$295,000 for Saw Pipes) as required by section 17(a) of the OSH Act, the ALJ "grouped" each respondent's violations and assessed a $70,000 penalty against each respondent.

The Secretary petitioned the Commission for review of the ALJ's penalty determinations, and the Commission accepted the cases for review. The two sitting Commissioners, however, could not agree on an appropriate disposition, and the Commission therefore vacated its direction for review. The ALJ's decisions thus became the Commission's final decisions pursuant to section 12(j) of the OSH Act, 29 U.S.C. § 661(j). The Secretary petitioned this Court to review those decisions, and this Court consolidated the two proceedings by order entered January 11, 2006. Neither Jindal nor Saw Pipes filed a cross-petition for review.

STATEMENT OF FACTS

1. *Statutory and Regulatory Background*

Congress enacted the OSH Act "to assure so far as possible . . . safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To help achieve that goal, Congress created an "unusual

regulatory structure" that divides regulatory, enforcement, and adjudicative functions between two independent administrative actors. *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Specifically, Congress gave the Secretary regulatory, policymaking, and enforcement responsibilities under the Act, while conferring on the Commission purely adjudicative responsibilities. *Martin*, 499 U.S. at 147, 152-154.[1]

a. *The Secretary is responsible for promulgating and enforcing standards and regulations under the Act.*

The Secretary's regulatory responsibilities include "set[ting] mandatory occupational safety and health standards" and "prescrib[ing] regulations requiring employers to maintain accurate records of . . . work-related deaths, injuries and illnesses." 29 U.S.C. §§ 651(b)(3), 655, 657(c)(2). The specific requirement to promulgate recordkeeping regulations -- which the Secretary met in part by issuing the regulation at issue here (29 C.F.R. § 1904.2(a) (2000)) -- reflects the importance that Congress placed on recordkeeping

[1] Within the Department of Labor, the Secretary's responsibilities are carried out by the Occupational Safety and

in the OSH Act scheme. 29 U.S.C. §§ 651(b)(5), (b)(6), (b)(12); S. Rep. 91-1282 at 15 (1970). Recordkeeping raises employers and employees awareness of the kinds of injuries, illnesses and related hazards occurring in their workplaces and thus promotes voluntary correction of hazardous conditions. It also allows OSHA inspectors to focus on the hazards revealed by the records, and yields statistical data on

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Health Administration. *E.g.*, Secretary's Order 5-2002, 67 *Fed. Reg.* 65008 (Oct. 22, 2002).

workplace injuries and illnesses for policymakers to use in making decisions concerning safety and health legislation. *See Occupational Safety & Health: Assuring Accuracy in Employer Injury and Illness Records* (GAO/HRD-89-23, Dec. 30, 1988); 66 *Fed. Reg.* 5916, 5916-17 (Jan. 19, 2001) (preamble to 2001 revision of recordkeeping regulation); 29 C.F.R. § 1904.1 (2000) (describing purposes of recordkeeping).

The Secretary's enforcement responsibilities include conducting workplace inspections, issuing citations to employers who violate OSHA standards and regulations, and proposing civil penalties. *See* 29 U.S.C. §§ 657, 658, 659(a), 666; *see also Martin*, 499 U.S. at 147; *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 3-4 (1985) (*per curiam*).

The OSH Act delineates four categories of violations: non-serious, serious, willful, and repeated. 29 U.S.C. §§ 666(a)-(c). Because the OSH Act places enforcement responsibilities solely with the Secretary, matters falling within her prosecutorial discretion are generally unreviewable by the Commission and the courts. *See Cuyahoga Valley*, 474 U.S. at 6-7.

b. *The Secretary pursues flagrant violations of the Act pursuant to her "egregious/ willful" policy.*

One of the enforcement tools in the Secretary's arsenal is her "egregious/willful" policy. This case concerns her use of that policy.

When the Occupational Safety and Health Administration (OSHA) inspects a worksite and finds that an employer violated a requirement in a standard or regulation, the Secretary will usually cite the employer for a single violation of the requirement, rather than separately citing each instance in which the requirement was violated. In some circumstances, however, the Secretary has the authority to consider each instance as a separate violation and to cite the employer accordingly. Thus, where the violations at issue are willful and flagrant the Secretary will charge each one as a separate violation. The penalties in such cases are typically far in excess of the penalties assessed in cases where a single violation is cited, because each separate instance results in its own penalty. 29 U.S.C. § 666(a) (assessment of civil penalty of not more than $70,000 but not less than $5,000 for each

willful violation); s*ee also Pepperidge Farm*, 17 O.S.H. Cas. (BNA) 1993, 2050 (1997) (Commission upholds per-instance violations of OSHA recordkeeping standard and assesses penalty of $289,603).

The Secretary's "egregious/willful" policy guides her determination whether to cite an employer on a per-instance basis. *See* OSHA Instruction CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties* (Oct. 21, 1990) (found on OSHA's website in the "Directives" section under "Law and Regulations" heading, at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1657). That policy, which is for internal agency guidance purposes only and not legally binding, generally provides for separate penalties if the violations were willful and at least one other factor is satisfied. *Id.* at section H.2.b.[2] The goal of the egregious/willful policy is

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[2] The policy lists six additional factors besides willfulness: (1) the violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses; (2) the violations resulted in persistently high rates of worker injuries or illnesses; (3) the employer has an extensive history of prior violations of the Act; (4) the employer has intentionally

to create an incentive for employers to meet their OSHA responsibilities while at the same time conserving scarce enforcement resources: "The large proposed penalties that accompany violation-by-violation citations are not . . . primarily punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely, to increase the impact of OSHA's limited enforcement resources." *Id.* at sections G, G.1, G.2.a. Because egregious cases require a large investment of administrative resources and may garner widespread public attention because of the potentially large penalties, proposed egregious cases are carefully screened at both the regional and national offices of OSHA and by the Solicitor of Labor. *Id.* at sections H.6, H.6.f.

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disregarded its safety and health responsibilities; (5) the employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act; and (6) the employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place. *See* OSHA Instruction CPL 2.80, section H.2.b(2)-(7).

c. *The Commission has an adjudicative, non-policymaking role in the OSH Act scheme.*

The Commission, unlike the Secretary, has no policymaking role under the Act. *See Martin*, 499 U.S. at 154. Instead, the Commission is an independent adjudicative body within the Executive Branch that serves as a neutral arbiter of contested cases between the Secretary and employers who allegedly violate OSHA requirements. 29 U.S.C. § 651(b)(3); *Cuyahoga Valley Ry.*, 474 U.S. at 7. Thus, an employer may challenge an OSHA citation and proposed penalty in an adjudicatory proceeding before the Commission, and the Commission must "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). Final Commission orders are subject to review in the courts of appeals. 29 U.S.C. § 660(a), (b).

Although the Secretary may propose a suitable penalty for an OSHA violation, the Commission is not bound to accept the Secretary's proposal. Instead, section 17(j) of the OSH Act authorizes the Commission "to assess all civil penalties

provided in the [penalties] section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). Thus, while the Secretary proposes suitable penalties, the Commission has the final say, subject to appeal, on what constitutes the "appropriate" penalty. The Commission's discretion to fix an "appropriate" penalty, however, is subject to statutory limits. For example, an employer who commits a "serious" OSHA violation "shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. § 666(b). At issue here, an employer who willfully violates the Act or an OSHA standard or regulation "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. *The Secretary cited Jindal and Saw Pipes for numerous willful recordkeeping violations pursuant to her egregious/willful policy.*

Jindal and Saw Pipes are related companies that share a facility in Baytown, Texas, as well as common ownership and

managerial personnel. Jindal operates the plate mill portion of a steel manufacturing business, and Saw Pipes manufactures seamless welded line pipe. Jin. Dec. 1,4; SP Dec. 1,4 ("Jin. Dec." and "SP Dec." refer to the Commission decisions below.). OSHA inspected both companies' operations at the facility in 2000. As a result of the inspections, the Secretary cited Jindal and Saw Pipes for numerous violations of OSHA's recordkeeping regulation, 29 C.F.R. § 1904.2(a) (2000). Jin. Dec. 1-2; SP Dec. 1-2.[3]

The Secretary found that Jindal's and Saw Pipes' recordkeeping violations were deliberate and intentional, and she therefore elected to cite each recordkeeping error as a separate violation pursuant to her egregious/willful policy. Jin. Dec. 1, 4; SP Dec. 1, 4. The Secretary proposed a penalty of $9,000 for each recordkeeping violation in Jindal's case (a

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[3] The Secretary also cited Jindal for 28 additional violations, which the Commission affirmed as other than serious. Jin. Dec. 2. The Commission mistakenly stated that Saw Pipes was also cited for non-recordkeeping violations. Compare SP Dec. 1 with SP Pleadings 1, 4, 15.

total of $1,062,000) and $8,000 for each violation in Saw Pipes' case (a total of $536,000). Jin. ALJ 33; SP ALJ 21.

3. *The ALJ affirmed numerous willful violations of the recordkeeping regulation but assessed a total penalty of only $70,000 against each company.*

Jindal and Saw Pipes challenged the citations, and Administrative Law Judge James H. Barkley conducted separate evidentiary hearings for each company. After hearing the evidence, the ALJ found that Jindal committed 82 willful recordkeeping violations and that Saw Pipes committed 59 willful recordkeeping violations. Jin. Dec. 2; SP Dec. 2.

The evidence in support of the ALJ's rulings showed that both companies failed to record significant percentages of recordable injuries and illnesses during the time periods under review.[4] Specifically, Jindal failed to record 74% and

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[4] Neither Jindal nor Saw Pipes filed a petition for review with this Court to challenge the ALJ's affirmance of the willful violations. Consequently, they are not entitled to challenge the evidentiary bases for those determinations. *See Justice for All v. Faulkner*, 410 F.3d 760, 772 (5th Cir. 2005) (when an appellee does not cross-appeal, he may not "attack the decree with the view either to enlarging his own rights thereunder or of lessening the rights of his adversary") (internal quotation marks and citation omitted)). Therefore, the ALJ's factual

84% of its recordable injuries on its 1998 and 1999 OSHA injury and illness logs, respectively, and 53% in the first half of 2000. Jin. Dec. 4. And Saw Pipes failed to record 63.7% of its OSHA-recordable cases over 1998, 1999, and the first part of 2000. SP Dec. 4.

In both cases, moreover, the evidence showed that company management was fully aware of the deliberate failure to record injuries, and indeed explicitly approved of the practice. For example, Gary Jones, who served as Saw Pipes' human resource and labor relations director, specifically directed Jindal's recordkeeper, Craig Wetherington, "to record on the OSHA 200 [log form] only those injuries reported to workers' compensation, which excluded injuries for which Jindal absorbed the cost of an employee's lost work time and medical treatment," and not to record any injuries sustained by temporary workers. Jin. Dec. 4-5. When Wetherington complained to Jones and his superiors that these practices violated OSHA's recordkeeping guidelines, Jones threatened to

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findings are undisputed for purposes of these review proceedings.

fire Wetherington, and Jones's superiors did nothing. *Id.* Jones also "oversaw and participated in Saw Pipes' OSHA 200 compliance" and was "accountable for the vast errors contained in the company logs for the cited years." SP Dec. 6. Indeed, Jones even sought to persuade Saw Pipes' medical director to "refrain from ordering restricted work for injured employees," and to add "no restriction" notations from partially disabled employees' patient records. *Ibid.*

Despite finding that Jindal committed 82 separate willful violations and that Saw Pipes committed 59 separate willful violations, the ALJ declined to assess the penalty amounts proposed by the Secretary and further refused to assess a separate penalty for each violation. The ALJ stated that "[w]hile it is clear that the Secretary may propose multiple penalties for separate violations of the recordkeeping standard, Commission review of the proposed penalty is *de novo*, and the judge has discretion to assess a single penalty if deemed appropriate." Jin. ALJ 34; SP ALJ 21. Finding the Secretary's proposed penalties to be excessive, the ALJ "grouped" each company's violations for penalty purposes and assessed a

$70,000 penalty against each company. Jin. Dec. 8; SP Dec. 7.

4. *The Commission vacated the directions for review after the sitting Commissioners failed to agree on an appropriate disposition.*

The parties petitioned the Commission for review of the ALJ's decisions, and the Commission accepted both cases for review. The two sitting Commissioners, Chairman Railton and Commissioner Rogers, agreed that the ALJ properly affirmed 82 and 59 separate willful violations against Jindal and Saw Pipes respectively. Jin. Dec. 2; SP Dec. 2, 4-6. They disagreed, however, on the "appropriate penalty assessment for the willful violations," and in particular whether the Commission had the authority to group separately charged willful violations for the purpose of assessing a single penalty. Jin. Dec. 2; SP Dec. 2.

In Commissioner Rogers' view, the Commission lacks that authority because section 17(a) of the OSH Act specifically mandates a minimum $5,000 penalty for each willful violation. In her view, once the Secretary alleges and proves willful violations on an instance-by-instance basis, the

Commission is required to assess at least $5,000 for each violation. Jin. Dec. 13-14; SP Dec. 8-9. Commissioner Rogers took the position that the OSH Act clearly states that "a penalty 'not less than $5,000' must be assessed 'for each willful violation.'" *Ibid.* Moreover, since these words are unambiguous and both she and Chairman Railton found the violations willful, she believed the Commission must apply the statutory scheme as written. *Ibid.*

Chairman Railton disagreed. Jin. Dec. 9; SP Dec. 9. He contended that in cases where the Secretary charges an employer under the egregious/willful policy, the Commission must independently evaluate whether the policy's factors weigh in favor of instance-by-instance penalties. Jin. Dec. 9-10. "As the reviewing body within the administrative process," Chairman Railton reasoned, "the Commission is best able to determine whether the grounds upon which the penalties were proposed warrant application of the egregious policy at the penalty assessment stage." *Id.* at 10.

In his view, that authority is implicit in section 17(j)'s requirement that the Commission impose "appropriate"

penalties for OSHA violations. Applying the section 17(j) factors here, he expressed the opinion that the egregious/willful policy should not be invoked, in part because recordkeeping violations are of a "particularly low gravity" and "the injuries and illnesses that went unrecorded were relatively minor." Jin. Dec. 10-12; SP Dec. 7-8.

Because the Commissioners could not agree on the appropriate disposition, the Commission vacated the directions for review on September 28, 2005. Jin. Dec. 1-3; SP Dec. 1-3. As a result, the ALJ's decisions became the Commission's final orders by operation of law. *See* 29 U.S.C. § 661(j). The Secretary filed timely petitions for review with this Court on November 23, 2005.

SUMMARY OF THE ARGUMENT

The ALJ's penalty determinations should be vacated because they do not comply with section 17(a) of the OSH Act. That section plainly requires a penalty of at least $5,000 for each willful violation. 29 U.S.C. § 666(a). The Commission found that Jindal committed 82 willful violations of the OSHA recordkeeping regulation and that Saw Pipes committed 59

willful violations of that same regulation. Section 17(a) thus requires a minimum penalty of at least $410,000 against Jindal (82 x $5,000) and at least $295,000 against Saw Pipes (59 x $5,000). The penalties assessed by the ALJ -- $70,000 against each company -- do not come close to the minimum prescribed by section 17(a).

The ALJ attempted to evade section 17(a)'s minimum penalty requirement by "grouping" each respondent's numerous willful violations and treating them for penalty purposes as a single violation. That was error. Section 17(a)'s language and legislative history are clear: when the Secretary alleges and proves multiple willful violations, each violation must result in a penalty of at least $5,000. Had Congress wanted to enable the Commission to group multiple willful violations proven by the Secretary into a single violation for purposes of penalty assessment, it would have expressly given the Commission the discretion to do so. It did not, and the Commission may not avoid section 17(a)'s clear mandate by the sleight of hand known as "grouping."

Finally, the ALJ's decision to group the violations at issue cannot be justified on the ground that the Secretary did not apply her egregious/willful policy appropriately in these cases. The Secretary's decision to charge willful recordkeeping violations on a per-instance basis pursuant to her egregious/willful policy is a matter of prosecutorial discretion. As such, that decision -- like the Secretary's decision to issue or withdraw a citation -- is not subject to review by the Commission or the courts. The only question for the Commission is whether the Secretary met her burden of proving that the employer willfully committed each of the violations charged. When the Secretary meets her burden of proof, the Commission must impose a penalty for each violation proven that complies with section 17(a) of the OSH Act.

ARGUMENT

A. *The Standard of Review is De Novo.*

This Court's review of the Commission's decision is governed by the Administrative Procedure Act's scope of review provision, 5 U.S.C. § 706. *See Corbesco, Inc. v. Dole,* 926 F.2d

422, 425 (5th Cir. 1991). Under that provision, this Court must set aside an agency's conclusions that are "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 427 (5th Cir. 2001). In determining whether an agency conclusion is "not in accordance with law," this Court applies a *de novo* standard of review. *See Slingluff v. OSHRC*, 425 F.3d 861, 866 (10th Cir. 2005); *Dole v. East Penn MFG. Co., Inc.*, 894 F.2d 640, 643 (3rd Cir. 1990); *Horne Plumbing and Heating Co. v. OSHRC*, 528 F.2d 564, 567-68 (5th Cir. 1976).

B. *Section 17 of the OSH Act requires the Commission to impose a minimum penalty of $5,000 for each willful violation.*

The ALJ found that Jindal willfully committed 82 individual recordkeeping violations and that Saw Pipes willfully committed 59 such violations. Based upon that determination, the ALJ was required under section 17(a) of the Act to assess a penalty of at least $410,000 against Jindal and at least $295,000 against Saw Pipes. The ALJ violated section 17(a) by assessing penalties of only $70,000 against each company for these willful violations.

1. *Section 17(a)'s plain language requires a minimum $5,000 penalty for each willful violation.*

Section 17(a) of the OSH Act provides:

> Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter 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). The emphasized language leaves no room for doubt: each willful violation *must* result in a penalty of at least $5,000. *See Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001) (section 17(a)'s language "could hardly be clearer"); Jin. Dec. 14 (Commissioner Rogers' separate opinion stating "[I] would find that the words 'not less than $5,000 for each willful violation' mean just that . . .[T]hese words are unambiguous and can *only* be read to require that at least $5,000 must be assessed for *each* affirmed willful violation") (emphasis in original); *cf. Missouri, Kan. & Tex. R. Co. v. United States*, 231 U.S. 112, 119 (1913) (statute mandating penalty "for each and every violation" "cannot be made much plainer by argument").

The statute's plain language must be enforced as written. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (courts must "presume that [the] legislature says in a statute what it means and means in a statute what it says there" (internal quotation marks and citation omitted)). Thus, this Court's inquiry not only begins with section 17(a)'s unambiguous text, it ends there as well.

2. *Section 17's legislative history confirms that the statute means what it says.*

It is unnecessary to consider legislative history where, as here, the statute is clear on its face. Nonetheless, it is noteworthy that the legislative history of section 17 unequivocally supports what the statute's language so plainly states.

As originally enacted, section 17 authorized penalties up to $1,000 for each serious or non-serious violation, and up to $10,000 for each willful or repeated violation. *See* 29 U.S.C. § 666(a) (1970). The Act contained no mandatory minimum penalty for willful violations. In 1990, however, Congress concluded that the existing penalties were inadequate to "deter

violations and ensure adequate enforcement" of the Act. H.R. Conf. Rep. No. 101-964 at 688 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2393. Congress thus amended the Act to increase the penalty levels sevenfold, and also added the $5,000 minimum penalty for willful violations. 29 U.S.C. § 666(a) (Supp. II 1991).

The House Conference Report accompanying the amendment noted that the "mandatory minimum penalty of $5,000" was intended to "ensure that the most egregious violators are in fact fined at an effective level." 1990 U.S.C.C.A.N. at 2393. These "extreme violators," the conference report noted, included employers who "knowingly and intentionally violate *the recordkeeping and reporting requirements*." *Id.* at 2393-94 (emphasis added). "The mandatory minimum penalty for a willful violation," the conference report added, "is a penalty floor that is not intended to become a penalty ceiling. The conferees expect OSHA to issue fines well above this mandatory minimum level when the willful violation warrants such a penalty." *Id.* at 2394.

As the House Conference Report shows, Congress was fully aware that the minimum $5,000 penalty requirement would result in substantial penalties levied against employers who willfully violate OSHA recordkeeping regulations. Nothing in the legislative history suggests that Congress was uncomfortable with that result; to the contrary, the report stresses the need for penalties *above* the statutory minimum. *See* 1990 U.S.C.C.A.N. at 2394 (the $5,000 minimum "was not intended to become a penalty ceiling"). The legislative history thus makes clear that section 17(a)'s plain language is to be enforced precisely as written, even in cases involving willful recordkeeping violations. Jin. Dec. 14 (Commissioner Rogers' separate opinion stating "[t]he legislative history emphatically supports this [plain language] interpretation.").[5]

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[5] Congress knew about OSHA's egregious policy, which predated the 1990 amendment. *See* 1990 U.S.C.C.A.N. at 2394 (recognizing OSHA's "current practice" to charge willful citations against employers deliberately violating recordkeeping requirements); *see also* 136 Cong. Rec. S15776 (daily ed. Oct. 18, 1990) (statement of Sen. Hatch acknowledging that "OSHA, under its egregious policy, penalized several businesses in the multimillion dollar range").

3. *The Commission's authority to assess "appropriate" penalties does not extend to grouping violations for purposes of penalty assessment.*

Despite finding that Jindal committed 82 separate willful violations and that Saw Pipes committed 59 separate willful violations, the ALJ "grouped" all of the willful violations proven against each company into a single citation for purposes of penalty assessment and assessed a $70,000 penalty against each. Jin. ALJ 33-34; SP ALJ 21. To justify that result, the ALJ stated that "[w]hile it is clear that the Secretary may propose multiple penalties for separate violations of the recordkeeping standard, Commission review of the proposed penalty is *de novo*, and the judge has discretion to assess a single penalty if deemed appropriate." Jin. ALJ 34; SP ALJ 21. Chairman Railton found support for the ALJ's assertion of discretionary authority to group violations in section 17(j), which authorizes the Commission "to assess all civil penalties provided in the [penalties] section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of

previous violations." Jin. Dec. 11-12 (citing 29 U.S.C. § 666(j)). Both the ALJ and Chairman Railton deemed a single penalty appropriate in this case because, in their view, the violations were of sufficiently "low gravity" that they did not warrant the large fines that would have resulted from a strict application of section 17. Jin. ALJ 34; SP ALJ 21; Jin. Dec. 12; SP Dec. 7. This reasoning does not withstand scrutiny.

a. Although the ALJ and Chairman Railton were correct that the Commission may assess penalties for individual violations *de novo*, the Commission's authority does not extend to grouping multiple willful violations into a single violation for purposes of penalty assessment. Only the Secretary has the authority to determine whether multiple willful violations will be charged; for each willful violation that is charged and proven, the Commission is constrained by Section 17 to assess a penalty of at least $5,000.

The ALJ's and Chairman Railton's assertion that section 17(j) authorizes the Commission to group multiple charged and proven willful violations into a single violation for penalty assessment has no basis in the text of that section, and is

actually inconsistent with it. Section (j) only authorizes the Commission to assess the "civil penalties *provided in this section*." 29 U.S.C. 666(j) (emphasis added). Thus, the Commission must assess an "appropriate" penalty that comports with the substantive penalties otherwise provided in section 17. Accordingly, section 17(a)'s mandatory minimum penalty of $5,000 for each willful violation sets a statutory floor that is binding on the Commission.

Section 17(a) establishes a penalty range of $5,000 to $70,000 for *each* willful violation. As an initial matter, grouping multiple willful violations simply does not assess a penalty for *each* violation. Furthermore, if, as the ALJ and Chairman Railton contend, section 17(j) permits the Commission to impose a combined penalty of $70,000 for 82 separate willful violations -- as the ALJ did in Jindal's case -- then section 17(a) does not in fact require a minimum $5,000 penalty for each violation. Instead, it allows the Commission to decide, as the ALJ did in this case, that an "appropriate" penalty is about $1,186 for each Saw Pipes willful violation ($70,000/59 = $1,186.44) and $853 for each Jindal willful

violation ($70,000/82 = $853.65).[6] In effect, the ALJ's decision impermissibly changed the statutory mandatory minimum of $5,000 for *each* willful violation to a mandatory minimum of $5,000 for *all* willful violations. That result is impossible to square with section 17(a)'s plain language, and would defeat the congressional purpose behind the 1990 amendment that added the $5,000 minimum. *See* 1990 U.S.C.C.A.N. at 2394 (the $5,000 minimum "was not intended to become a penalty ceiling").[7]

Chairman Railton also argues that the legislative history of the 1990 amendment indicates that Congress did not intend

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[6] One perverse result of the Chairman's interpretation is that the greater the number of individual violations, the smaller the penalty per violation. Indeed, there is nothing in the Chairman's analysis that would require the Commission to impose the maximum $70,000 penalty after grouping the violations into a single violation, and thus nothing that provides a non-discretionary stopping point above zero.

[7] The OSH Act also provides for the assessment of a penalty for each non-serious, serious, or repeat violation. 29 U.S.C. § 666. Grouping these violations does not pose the same serious legal issue presented here because no statutory mandatory minimum applies to them. Willful violations are unique under the statute because Congress established a mandatory minimum penalty only for them.

the mandatory minimum to "straightjacket" the Commission. Jin. Dec. 11. But the statement he relies on -- "[t[he conferees do not intend to deprive the agency of the flexibility to settle cases involving willful violations" -- refers to the *Secretary's* authority to *settle cases*. 1990 U.S.C.C.A.N. at 2394; *Cuyahoga Valley*, 474 U.S. at 7 (Secretary's decision to settle cases is unreviewable by Commission); Jin. Dec. 16 (Commissioner Rogers' separate opinion stating that "any exception [to the mandatory minimum], by its terms and by virtue of the Secretary's prosecutorial authority, would apply only to the Secretary and only in the context of settlements."). Settlement is entirely different from imposing a penalty following the adjudication of a violation and typically permits prosecuting agencies to reduce penalties (or reclassify violations) to avoid an adjudication in the first place. Further, the authority spoken of is entirely the Secretary's: the Commission may approve a settlement, but it cannot "settle" a case.[8]

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[8] The ALJ also incorrectly relied on *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993 (1997). *Pepperidge Farm* applied

b. The ALJ and Chairman Railton deemed the willful recordkeeping violations to be of "low gravity," and therefore too insignificant to warrant a large penalty. Congress, however, did not distinguish between willful recordkeeping violations, on the one hand, and other types of willful violations, on the other, when it created the mandatory minimum. Indeed, as noted above, Congress acknowledged that willful recordkeeping violations were a significant problem when it imposed the $5,000 minimum in 1990. And Congress fully expected that the minimum penalty would result in significant fines for "extreme violators," including employers who "knowingly and intentionally violate the recordkeeping and reporting requirements." *See* 1990 U.S.C.C.A.N. at 2394.

Had Congress intended to exempt recordkeeping regulations from the $5,000 penalty floor for willful violations, it would have made that intention clear in the statute's

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section 17 before it was amended in 1990 to include the $5,000 mandatory minimum, *id.* at 2001 n.19, and thus is irrelevant here. Moreover, the Commission in *Pepperidge Farm* actually endorsed the assessment of separate penalties for individual recordkeeping violations – it did not group. *Id.* at 2000-2002.

language. It did not. And because the Commission is a neutral arbiter, not a policymaker, it must defer to the penalty regime established by Congress. *Cf. Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding the severity of punishment . . . these are peculiarly questions of legislative policy"); *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1198 (5th Cir. 1997) ("policy choices are for the political branches . . . It is simply not our place in the constitutional scheme to ignore the plain meaning of the Clause and offer our own free-wheeling policy judgment about the proper monetary deterrence."). Thus, the ALJ's disagreement with Congress's policy choice does not justify a departure from the express language of the statute.

Furthermore, from her perspective as statutory administrator, policymaker, and enforcer, *Martin*, 499 U.S. at 152-53, the Secretary strongly disagrees with the ALJ's and Chairman Railton's characterizations of the significance of the willful recordkeeping violations here. Accurate recordkeeping provides important benefits including making employers and workers more aware of the kinds of injuries and illnesses

occurring in the workplace, giving OSHA a source to consult to determine problem areas in particular industries or at particular workplaces, and providing safety and health policy makers with statistics "to make decisions concerning safety and health legislation, programs and standards." 66 Fed. Reg. 5916, 5916-17 (Jan. 19, 2001) (preamble to revised OSHA recordkeeping rule describing benefits of accurate recordkeeping). And, as discussed above, Congress recognized the importance of the reporting requirements, explicitly noting that willful recordkeeping violations would be included in the new statutory $5,000 minimum. *See* 1990 U.S.C.C.A.N. at 2394; 29 U.S.C. § 651(b)(12) (goals of Act to be achieved through appropriate reporting procedures that accurately describe the nature of the occupational safety and health problem); *General Motors Corp.*, 8 O.S.H. Cas. (BNA) 2036, 2041 (1980) (recordkeeping requirements "are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier").

C. *The Commission may not review the reasonableness of the Secretary's exercise of prosecutorial discretion in electing to charge individual recordkeeping violations separately rather than as a group under her egregious/willful policy.*

The OSH Act gives the Secretary the sole authority to inspect workplaces for violations and to issue citations and propose penalties when she finds them. Enforcement policy is thus exclusively the province of the Secretary. By contrast, the Commission has no policymaking role but acts as an administrative court in contested cases.

Notwithstanding this clearly defined division of authority, Jindal and Saw Pipes may be expected to argue, based on the views expressed in Chairman Railton's opinion, that grouping of citations by the Commission is a legitimate means to oversee the Secretary's implementation of her egregious/willful policy. *See* Jin. Dec. 10 ("[a]s the reviewing body within the administrative process, the Commission is best able to determine whether the grounds upon which the penalties were proposed warrant application of the egregious policy at the penalty phase"). This argument must be rejected because, in conflict with the clearly defined roles of the Secretary and

Commission under the OSH Act, it would impermissibly afford the Commission a role extending beyond adjudicating whether the evidence supports the Secretary's citation, to whether the Secretary made the right policy choice by charging violations individually rather than as a group. Such an extension would not only take the Commission outside its expertise, but also attack and undermine the Secretary's expertise as the prosecutorial authority.

The Supreme Court has twice stated that the Commission has no prosecutorial function, but serves only as a "nonpolicymaking adjudicator[]." *Martin*, 499 U.S. at 154; *Cuyahoga Valley*, 474 U.S. at 7 ("Commission's function is to act as a neutral arbiter. . . [Congress did not intend to] allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute."). The Court has made it equally "clear that enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley*, 474 U.S. at 6; *Martin*, 499 U.S. at 152.[9]

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[9] Besides misconstruing the Commission's legal authority, Chairman Railton wrongly asserted that the facts here did not

This division of responsibility between enforcement and adjudication is wholly consistent with the typical prosecutor-judge model. Just as a criminal prosecutor has the undisputed discretion to decide on the charges to bring and thereby to shape the limits of any future sentence, penalty, or fine, the Secretary has similar discretion to decide on the number and type of citations to issue, and by virtue of section 17(a)'s mandatory minimum, to affect the range of the ultimate penalty. *See United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998) ("Supreme Court has unambiguously upheld the prosecutor's ability to influence the sentence through the charging decision"); *United States v. Lewis*, 896 F.2d 246, 249 (7th Cir. 1990) ("the prosecutor has traditionally exercised

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justify invoking the egregious/willful policy. Jin. Dec. 10-11. For instance, the evidence amply demonstrates "bad faith" (one of the "plus-one" egregious policy factors). Among other facts, the ALJ found that Jindal and Saw Pipes had deliberately failed to record all injuries sustained by temporary workers; that Jindal deliberately under-recorded injuries of permanent employees according to corporate policy formulated by Gary Jones, who insisted that his subordinate under-record or risk losing his job; that Jones' superiors were put on notice of this illegal practice and did nothing; and that Jones criticized the prescribed work activity restrictions and attempted to persuade the treating doctor to remove them.

power over a defendant's ultimate sentence through his exclusive and unquestioned authority over what charges to bring"); *accord Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

Thus, the Secretary's charging decision to group individual recordkeeping infractions under one violation or to charge each instance separately is a matter of prosecutorial discretion. As such, it is the Secretary's decision alone. *See Kaspar Wire Works,* 268 F.3d at 1131 ("[t]he Secretary's decision to assess per instance penalties reflects use of an enforcement tool within her authority"); *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) at 2001 ("Commission precedent provides that the Secretary has discretion to cite each failure to record as a separate violation."); *Caterpillar,* 15 O.S.H. Cas. (BNA) 2153, 2173 (1993); *see also Chao v. OSHRC*, 401 F.3d 355, 368 (5th Cir. 2005) (the Secretary has discretion to cite

multiple violations where a regulation prohibits individual acts).[10]

The Commission no doubt has an important role to play. By exercising its adjudicatory role, the Commission ensures that each charged violation is proved by a preponderance of the evidence. And, the Commission has a penalty-setting authority that is akin to a judge's sentencing power. Thus, the Commission acts as a fundamental check on the decision to charge violations separately. As a nonpolicymaking adjudicator, however, the Commission is unsuited to review the Secretary's decision to charge multiple willful violations on

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[10] It is well established (and undisputed below) that the Secretary may charge recordkeeping violations on a per-instance basis or as a group. *See Kaspar Wire Works,* 268 F.3d at 1130 (the availability of per instance citations and penalties "is consistent with the general principle that each violation of a statutory duty exposed the violator to a separate statutory penalty"); *see also Caterpillar, Inc.*, 15 O.S.H. Cas. (BNA) at 2172-73. Here, the Commisison did not reject the Secretary's use of the egregious/willful policy; in fact, it affirmed 82 individual willful violations in Jindal's case and 59 individual willful violations in Saw Pipes' case. Because neither respondent petitioned this Court for review, the individual violations will remain in place regardless of the outcome of these proceedings.

a per-instance basis, and the statute therefore limits it to penalty determinations of proven violations.

The Secretary's charging decision stems from difficult policy choices, as reflected in the relevant guidance document:

> The Act intends that this incentive be directed not only to an inspected employer but also to any employer who has hazards and violations of standards or regulations. . . The large proposed penalties that accompany violation by violation citations are not therefore primarily punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely to increase the impact or OSHA's limited enforcement resources.

OSHA Instruction CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties*, section G.2, (Oct. 21, 1990). Only the Secretary can determine whether use of the egregious/willful policy in a given case will maximize the agency's limited resources and educate employers and the public on what OSHA requires. *Martin*, 499 U.S. at 152 (Secretary's "statutory role as enforcer [leads to] contact with a much greater number of regulatory problems than does the Commission"); *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("such factors as the strength of the case, the

prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake"). Therefore, the Commission has neither the legal authority nor the practical judgment to override the Secretary's use of the egregious/willful policy, and it should not be permitted to do so. *See Heckler v. Chaney*, 470 U.S. 821 (1985) (applying doctrine of prosecutorial discretion to administrative regulatory proceeding).

CONCLUSION

The ALJ's penalty determinations should be vacated and the cases remanded for the ALJ to conduct separate, individual penalty calculations for each willful violation in an amount not less than $5,000 per violation and not greater than $70,000.

Respectfully submitted.

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