No. _____

In the
Supreme Court of the United States

WESTERN OILFIELDS SUPPLY COMPANY,
DOING BUSINESS AS RAIN FOR RENT,
Petitioner,

v.

SECRETARY OF LABOR AND FEDERAL MINE SAFETY
AND HEALTH REVIEW COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Donovan v. Dewey*, this Court held that the warrantless inspection scheme in the Federal Mine Safety and Health Act of 1977 ("the Mine Act") does not violate the Fourth Amendment because, *inter alia*, the certainty and regularity of its application provides a constitutionally adequate substitute for a warrant. *See* 452 U.S. 594, 602–03 (1981). The Mine Act gives operators of mines the right to accompany inspectors from the Mine Safety and Health Administration ("MSHA") at every stage of such warrantless inspections. *See* 30 U.S.C § 813(f). These are commonly referred to as "walkaround rights." Decisions of the Federal Mine Safety and Health Review Commission ("the Commission") have found that MSHA inspectors violated the Due Process Clause by failing to provide walkaround rights as required by statute. However, in this case the D.C. Circuit held that an MSHA inspector's refusal to provide walkaround rights to the petitioner was not a constitutional violation, despite the absence of any exigencies that would have made the provision of such rights impracticable. The questions presented in this case are:

1. Whether it violates the Due Process Clause for an MSHA inspector arbitrarily to refuse a mine operator an opportunity to accompany the inspector on his investigation of that operator's property.
2. Whether it violates the Fourth Amendment for an MSHA inspector arbitrarily to refuse a mine operator the opportunity to accompany the inspector on his investigation of that operator's property.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption.

Petitioner Rain for Rent has no parent corporation. No publicly held company owns 10% or more of Rain for Rent's stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings in *Western Oilfields Supply Co., d/b/a Rain for Rent v. Sec'y of Labor and Fed. Mine Safety and Health Review Comm'n*, Case No. 18-1296 (D.C. Cir.), are directly related to the instant case in this Court. The D.C. Circuit entered judgment in this matter on January 7, 2020.

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Rain for Rent respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The District of Columbia Circuit panel opinion is reported at 946 F.3d 584 and reproduced in the appendix hereto ("App.") at 1. The decision of the administrative law judge (App., *infra*, 15–44) is reported at 40 FMSHRC 1267, and is also available at 2018 WL 4184673.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2020. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Mine Safety and Health Act of 1977 ("the Mine Act") requires that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." 30 U.S.C. § 803.

The Mine Act further states that "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C § 802(d).

30 U.S.C § 813(a) provides, in relevant part, that:

> Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections.

30 U.S.C. § 813(f) further provides, in relevant part, that:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or

> other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

And 30 U.S.C. § 818(a)(1)(D) states that:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent . . . refuses to permit the inspection of the coal or other mine . . . .

The Fourth Amendment to the Constitution of the United States guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Finally, the Due Process Clause of the Fifth Amendment to the Constitution of the United States ensures that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case concerns an inspection and related citation and fine that was imposed on petitioner Rain for Rent by the Mine Safety and Health Administration ("MSHA"). Those implicate several of our most fundamental constitutional rights, with significant consequences for closely regulated industries. In a nutshell, the question here is simple but highly important: do MSHA inspectors violate the Due Process Clause or the Fourth Amendment when they arbitrarily refuse to follow the procedures set forth in the Mine Act and in their own agency's directives?

The Federal Mine Safety and Health Review Commission ("the Commission") has issued a series of irreconcilable decisions on this question. Following on those decisions the instant matter found its way to the D.C. Circuit, which effectively held that, so far as the Constitution is concerned, MSHA inspectors are free to deviate from statutorily mandated procedures without consequence.

The straightforward and undisputed nature of the facts in this case make it an excellent opportunity for this Court to restore coherence—not to mention basic constitutional norms—to this badly jumbled area of the law.

A. Factual background.

Rain for Rent provides pumps for use in mines, and furnishes ongoing maintenance for those pumps as needed. On February 8, 2017, a Rain for Rent employee, Jaime Tejeda, drove a company truck onto the parking area outside the entrance to an

aboveground mine in Monterey County, California (the "Natividad Plant"). He was there to service a pump that he had previously installed. Mr. Tejeda parked the truck on level ground approximately ten yards from the office door. He then went directly from his truck into the front office to sign in and obtain the required permission to enter the mine site itself.

At that same time, an MSHA inspector (the "Inspector") was also in the parking lot, preparing to begin the second day of an eleven-day inspection at the Natividad Plant. The Inspector watched Mr. Tejeda pull in, park the truck, and walk inside the office. Although not noted in his contemporaneous notes, the Inspector testified that he saw the truck rock back and forth when Mr. Tejeda exited it, leading him to suspect that the truck's parking brake had not been set. While Mr. Tejeda was inside the office, the Inspector walked up to the truck to examine it. Peering through the driver's-side and passenger's-side windows, he was unable to see whether the parking brake was set.

It is undisputed that the Inspector did not perceive any exigent circumstances or imminent hazards when he inspected the truck. It is also undisputed that the Inspector knew where Tejeda was, understood what he was doing (signing in), and knew he would return to the truck imminently. Nevertheless, the Inspector opened the truck's door, without attempting to get Mr. Tejeda's permission to do so, and began searching and photographing the interior of the truck. Instead of doing this, the Inspector could have sought Mr. Tejeda's attention as he exited the parked truck, waited minutes for Mr. Tejeda to return, or walked ten

yards from the truck to the office where Mr. Tejeda was signing in, to inform Mr. Tejeda of the Inspector's presence and desire to search the truck. Doing any of those things would have imposed no burden on the Inspector and would have been consistent with the MSHA Program Policy Manual, which requires its inspectors to make "every reasonable effort" at providing "parties with an opportunity to participate in the physical inspection . . . and in all pre-inspection and post-inspection conferences." *See* MSHA, *Program Policy Manual Volume I: Interpretation and Guidelines on Enforcement of the 1977 Act* 14, (Nov. 2013), *available at* https://arlweb.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20I.pdf (hereinafter "*PPM*"). And yet, this Inspector made no effort at all to obtain Mr. Tejeda's participation or consent, even though he knew that Mr. Tejeda was only thirty feet away and soon to return.

During the search, Mr. Tejeda returned from the office to the truck, where he encountered the Inspector still photographing the interior with the door open. The Inspector identified himself, and informed Mr. Tejeda that he was going to issue a citation and penalty for not setting the parking brake. That citation was issued, and this case arose from it.

B. Procedural history.

Rain for Rent contested the citation under 30 U.S.C. § 815(d), and a hearing was held before an administrative law judge ("ALJ") on May 15, 2018. In an August 22, 2018 opinion, the ALJ affirmed the citation and ordered Rain for Rent to pay the Secretary of Labor a fine. *See* App., *infra*, 44. Rain for Rent filed

a petition for discretionary review with the Commission, which was denied on October 1, 2018. App., *infra*, 45. Thus the ALJ's decision became the final decision of the Commission. *See* 30 U.S.C. § 823(d)(1).

Rain for Rent filed a petition for review of the Commission's decision in the United States Court of Appeals for the D.C. Circuit under 30 U.S.C. § 816(a)(1). In that appeal, Rain for Rent advanced three arguments, all of which were ultimately rejected by the D.C. Circuit.

First, Rain for Rent argued that the MSHA Inspector lacked jurisdiction to issue the citation because Mr. Tejeda was not an "operator of [a] mine" within the meaning of 30 U.S.C. § 803, as he was not "performing services or construction at such mine," *id.* § 802(d), at the time the citation was issued. The D.C. Circuit rejected that argument for reasons that are not germane here; although Rain for Rent respectfully disagrees with the D.C. Circuit on this point, it recognizes that this issue may not implicate the considerations that govern review on certiorari under Supreme Court Rule 10.

Second, Rain for Rent argued that the MSHA Inspector violated Rain for Rent's Fourth Amendment right against warrantless searches and seizures by intruding into the truck without first attempting to obtain and allow walkaround rights. Rain for Rent relied on this Court's decision in *Donovan v. Dewey*, which held, *inter alia*, that the Mine Act's warrantless inspection scheme does not violate the Fourth Amendment because it includes specific procedural

mechanisms that sufficiently accommodate and protect the privacy concerns of mine operators. *See* 452 U.S. 594, 604–05 (1981). One such accommodation is the statutory requirement that when a mine operator refuses to permit an inspector to enter the premises, the Secretary of Labor must file a civil action in federal court to obtain an injunction against future refusals. *See* 30 U.S.C. § 818(a). In other words, as this Court observed in *Dewey*, "[t]he Act prohibits forcible entries." 452 U.S. at 604. The obvious predicate to this, as Rain for Rent argued below, is that the statutory provision of the Mine Act *must actually be complied with* for the Fourth Amendment to be satisfied. Here, that was not done.

The D.C. Circuit rejected this argument, observing that this Court's decision in "*Dewey* is, frankly, ambiguous as to whether" its discussion of the Mine Act's prohibition of forcible entry "is part of its Fourth Amendment analysis, or simply a description of an additional—but not constitutionally required—protection afforded by the Mine Act." *See* App., *infra*, 13. Regardless, the D.C. Circuit reasoned that the Mine Act's warrantless inspection scheme was complied with because the Act does not actually create a freestanding right to refuse entry to MSHA; rather, in the D.C. Circuit's view, "it creates only a prohibition against forcible entry when entry is refused." *See* App., *infra*, 14. And here, entry was not refused because the Inspector purposefully denied Mr. Tejeda the opportunity to refuse entry into the truck.

Rain for Rent's third argument before the D.C. Circuit was that the MSHA Inspector was required by

statute and by his own agency's directives to at least *attempt* to notify Mr. Tejeda in advance of the impending entry into the truck, and that his failure to do so was a violation of Rain for Rent's right to Due Process. 30 U.S.C. § 813(f) requires that "a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any . . . mine . . . ." As noted above, MSHA's own *PPM* requires its inspectors to make "every reasonable effort" at providing "parties with an opportunity to participate in the physical inspection of the mine and in all pre-inspection and post-inspection conferences." If the Inspector had complied with these requirements, Mr. Tejeda would have had the opportunity to refuse permission for the Inspector to enter the truck.

The D.C. Circuit rejected this argument as well. It first reasoned, again, that the Mine Act does not create a freestanding right of refusal. *See* App., *infra*, 8–9. This elides the more fundamental question of whether the MSHA Inspector had a duty to comply with the requirements of § 813(f) and of the *PPM* that he make *some* effort, if not "every reasonable effort", to give Mr. Tejeda an opportunity to accompany his inspection. In answer to that question, the D.C. Circuit pointed to the fact that § 813(f) "say[s], somewhat cryptically, that 'compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.'" *See* App., *infra*, 10 (internal alterations omitted). Then, it reasoned that "[w]hatever the 'not a jurisdictional prerequisite to enforcement' language means, it must at least mean

that a harmless violation does not preclude enforcement. Otherwise, compliance with section [813(f)] would effectively be an absolute prerequisite, whether denominated as 'jurisdictional' or something else." *Id.* Finally, the D.C. Circuit found that any failure of this Inspector to comply with § 813(f) was harmless, because if Mr. Tejeda had been asked, he would have had no meritorious grounds for refusing entry to the Inspector.

The D.C. Circuit's opinion committed several critical oversights on this last issue. For one, its calculation of harm did not include any assessment of the harm to Rain for Rent's privacy interests—which, as this Court recognized in *Dewey*, a statutory warrantless inspection scheme must accommodate in order to comport with the Fourth Amendment. Second, the D.C. Circuit never addressed the significance of MSHA's own implementation of § 813(f)'s walkaround rights through the *PPM*'s directives to inspectors, which plainly were not complied with here. The D.C. Circuit's failure to appreciate that the Inspector violated § 813(f) and that he also violated his own agency's regulations implementing that statute, resulted in a violation of Rain for Rent's Due Process rights.

The D.C. Circuit's opinion was unanimous. Judgment denying Rain for Rent's petition for review was entered on January 7, 2020, from which this petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case provides an excellent vehicle for this Court to bring much-needed clarity to an intersection of constitutional and administrative law. The material facts are straightforward and not in dispute: the MSHA Inspector searched Rain for Rent's truck after making no effort to give its representative the opportunity to accompany him or object. He failed to afford Rain for Rent the Mine Act's walkaround rights and failed to comply with his own agency's directives on walkaround rights. Thus the legal issues are cleanly presented: is it a violation of the Due Process Clause or of the Fourth Amendment for an MSHA inspector arbitrarily to refuse to comply with 30 U.S.C. § 813(f)'s requirement that "a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any . . . mine," and with the MSHA *PPM*'s requirement that inspectors make "every reasonable effort" at providing "parties with an opportunity to participate in the physical inspection of the mine and in all pre-inspection and post-inspection conferences"?

I. The Commission's Due Process and Fourth Amendment jurisprudence is inconsistent and unclear.

The instant case is not the first time the Commission has been presented with an MSHA inspector's refusal to honor a mine operator's walkaround rights. In a series of decisions spanning a little over a decade, the Commission has attempted to define constitutional constraints on warrantless inspections. But in so doing, it, at first gradually,

conflated Fourth Amendment and Due Process principles, and then, ultimately, created a confused jurisprudence that calls into question whether there are any effective constitutional constraints at all on this warrantless inspection regime.

The story begins with a case from eleven years ago, in which the Commission produced a fractured set of opinions with no majority in the case of *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. SCP Investments, LLC*, 31 FMSHRC 821 (Aug. 6, 2009) ("*SCP I*"). In that case, which had facts somewhat similar to the instant one, an MSHA inspector refused to permit a mine operator to accompany him on an inspection because the operator did not have twenty-four hours of new miner training as required by 30 C.F.R. § 46.5. *See* 31 FMSHRC at 824. The ALJ found this to be a violation of the operator's walkaround rights, and as a sanction he dismissed all of the citations resulting from that inspection. *See id.* at 826. On review, three of the four commissioners agreed with the ALJ that the inspector had violated the operator's walkaround rights, as section 46.5 was not a proper basis for excluding an operator from an inspection; but they believed it was improper for the ALJ to have vacated the citations without first considering the effect of the denial on the operator's ability to present its case. *See id*. at 822, 830. However, those commissioners disagreed on what test and remedy the ALJ should apply on remand. *See id*. at 822. The fourth commissioner would not have reached these issues, because he believed the operator's exclusion from the inspection should have no effect on the case. *See id.*

The plurality opinion in *SCP I* approved of the ALJ's statement that "the discretion of MSHA inspectors in conducting inspections must be 'balanced with the *fundamental right* of a mine operator to be present during an inspection.'" *See id.* at 826 (emphasis added). They observed that "the statutory language" of 30 U.S.C. § 813(f) "is mandatory," requiring that "a representative of the operator . . . *shall* be given an opportunity to accompany the Secretary" during an inspection. *Id.* at 827 (emphasis in original). However, they concluded that the final sentence of § 813(f) "plainly provides that enforcement actions otherwise properly taken by MSHA cannot be vacated due to the failure of an inspector to comply with any of [that subsection]'s requirements." *See id.* at 834. That final statutory sentence—which, as noted *supra* in this petition's Statement of the Case, was described by the D.C. Circuit in the instant matter as "cryptic" —provides that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter." 30 U.S.C. § 813(f).

The plurality, understandably, was "extremely troubled" by the possibility that this could leave operators with "no legal remedy" for violations of their walkaround rights. *See* 31 FMSHRC at 834. "This idea," they explained, "is contrary to our fundamental belief in ordered liberty, and to the development of Anglo-American law since the Magna Carta nearly 800 years ago." *Id.* However, they noted that "[t]he only possible basis to overcome the statutory language would have to be constitutional in nature, such as a violation of the Due Process Clause"—a "complex issue"

that they declined to reach because it had "not been presented" to them. *See id.* at n.15. Instead, drawing upon this Court's Fourth Amendment jurisprudence, they concluded that an operator's fundamental walkaround rights could be harmonized with § 813(f)'s no-jurisdictional-prerequisite language by excluding evidence resulting from the inspection if the operator could demonstrate the existence of prejudice resulting from the violation of his rights. *See id.* at 834–37 (citing, *inter alia*, *United States v. Leon*, 468 U.S. 897 (1984); *Terry v. Ohio*, 392 U.S. 1 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960); *Weeks v. United States*, 232 U.S. 383 (1914)).

Another commissioner concurred with the plurality on everything except in their "proposed 'remedy' for an inspector's impermissible failure to grant walkaround rights." *Id.* at 838. Instead, he believed the better route would be for the ALJ to determine whether the denial of walkaround rights prevented the operator from offering probative evidence to support its case, and if it did, then for the ALJ simply to exercise his discretion to impose an appropriate penalty. *See id.* at 839.

The fourth commissioner dissented from his other three colleagues' opinion that it was unlawful for the inspector to exclude the operator from his inspection. Relying on § 813(f)'s no-jurisdictional-prerequisite language, he reasoned that "[u]nlike in Fourth Amendment cases, to which my colleagues cite, the health and safety violations observed by [the inspector]

do not constitute evidence obtained by virtue of an illegal action." *See id.* at 841.

On remand, the ALJ thus had to make sense of the three-way decision of the Commission. He was required to consider the effect of the denial of the operator's walkaround rights on its ability to present its case, but he was not given any binding directive on how to go about doing so. He opted to go in a different direction from either test proposed by the Commission, seizing instead on the plurality's passing reference to not having been presented with Due Process arguments. *See Sec. of Labor, Mine Safety and Health Admin. (MSHA) v. SCP Invs., LLC*, 32 FMSHRC 119, 2010 WL 390288, at *6 (Jan. 5, 2010) ("*SCP II*"). He observed that a majority of the commissioners had agreed both that there was jurisdiction to conduct the inspection and that the operator's walkaround rights were violated. *See id.* at *2. But, he reasoned, while "a mine operator cannot successfully attack citations on jurisdictional grounds simply because it was not available during an inspection or refused to participate," this "[s]urely . . . does not give the Secretary the authority to arbitrarily deny a fundamental statutory walkaround right that the legislative authors noted the Secretary was 'required' to respect." *Id.* at *3.

The *SCP II* ALJ concluded that the operator "was the victim of an abuse of government authority that constitutes a due process violation," explaining thus:

> The exercise of a section [813(f)] right is not contingent on an operator's showing of a need to accompany the inspector for purposes of

> litigation. Although walkaround rights are qualified rather than absolute, they can only be denied pursuant to the Secretary's regulations, or in instances where there is a legitimate government need to preclude the mine operator's participation. Government officials must not be permitted to arbitrarily decide when statutory rights will be granted. Consequently, the unreasonable denial of a section [813(f)] walkaround right is prejudicial *per se* regardless of whether it interferes with an operator's ability to defend itself."

Id. at *9. He further found that the operator had also in fact suffered actual prejudice, but, regardless, the *per se* prejudice provided a sufficient basis for vacating the citations. *See id.* at *10.

Commission precedent was already rather confused by the time the *SCP* proceedings drew to a close, but the splintered opinions and the final ALJ decision collectively signaled a clear majority view that there are constitutional limits on MSHA inspectors' discretion to exclude operators from inspections, notwithstanding § 813(f)'s no-jurisdictional-prerequisite language. Subsequent cases affirmed this modest principle, while diverging on how to apply it. For example, in *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. DJB Welding Corporation*, the ALJ found that an inspector did not abuse his discretion by inspecting a building that was being used by a contractor at a plant site while the contractor was not present, because the inspector only did so after repeatedly attempting to contact the

contractor, waiting until the end of his inspection to enter the building, and doing so while accompanied by the plant manager. *See* 32 FMSHRC 728, 734–35 (June 28, 2010). In the case of *Big Ridge, Incorporated v. Secretary of Labor, Mine Safety and Health Administration (MSHA)*, after finding that the deprivation of an operator's walkaround rights constituted a Due Process violation, *see* 36 FMSHRC 1677, 1732 (June 19, 2014), and that the operator was actually prejudiced by this violation, *see id.* at 1736, the ALJ applied the exclusionary rule against some—but not all—of the evidence obtained from the offending inspection, *see id.* at 1737–40.

However, the ALJ's decision in the instant Rain for Rent matter is a stark departure from the principle that there are any effective constitutional constraints on MSHA inspectors. Here, the ALJ found that it was not an arbitrary denial of Rain for Rent's walkaround rights under § 813(f) for the Inspector to enter Rain for Rent's truck and conduct a search without first making any effort at all to give Mr. Tejeda the opportunity to oppose the search or accompany his search. *See* App., *infra*, 37. He also found that this was not an abuse of discretion. *See id.* at 38–39. In making these findings, the ALJ gave no consideration to whether it was feasible or impractical for the Inspector to attempt to contact Mr. Tejeda before intruding on the truck; rather, it was sufficient that the Inspector suspected a violation had occurred. *See id.* This is all the more notable when one recalls that in *SCP*, the inspector at least articulated a *reason* for his decision to exclude the operator from his inspection, however mistaken his reason may have been as a matter of law. Here, the

Inspector had no reason to deny Rain for Rent's walkaround rights.

When the Commission declines to review the decision of an ALJ, that decision becomes the final decision of the Commission. *See* 30 U.S.C. § 823(d)(1). By declining to review decisions like the instant one, the Commission is effectively applying different legal standards to different parties in similar situations—but "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases." *Wester Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). An agency acts arbitrarily and capriciously when it "fail[s] that basic test." *See SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1220 (D.C. Cir. 2014) (Kavanaugh, J., dissenting). The Commission's precedent on these issues has become so inscrutably inconsistent that it is impossible for mine operators within its regulatory purview to have even the most basic understanding of what their constitutional rights are *vis-à-vis* MSHA inspections, much less what their remedies for violations of such rights might be. Rain for Rent asks this Court to provide clarity to that confusion.

II. This Court's precedent is ambiguous on whether the Constitution requires MSHA inspectors to comply with the Mine Act's procedural requirements.

A significant contributing factor to this state of doctrinal confusion is this Court's underdeveloped precedent on the interaction between the Constitution and the Mine Act. In *Donovan v. Dewey*, this Court held that the Mine Act's warrantless inspection program comported with the requirements of the Fourth Amendment because the scheme satisfied three conditions: (1) "there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"; (2) Congress determined "that a system of warrantless inspections was necessary if the law is to be properly enforced and inspection made effective"; and—most importantly—(3) "the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *See* 452 U.S. 594, 602–03 (1981) (internal quotation marks omitted). The ambiguity here concerns what is meant by "certainty and regularity."

At first glance that might seem surprising. After all, if the phrase "certainty and regularity" is given a common-sense interpretation, it clearly does not describe the procedures that were applied to Rain for Rent in this case. When the D.C. Circuit essentially declares that neither it nor the Commission knows what the Mine Act's no-jurisdictional-prerequisite language means, *see* App., *infra*, 10 & n.4, then that is hardly a situation characterized by "certainty." And

"regularity" is probably not the first word one would use to describe an MSHA inspector's capricious refusal to follow his own agency's directives for conducting warrantless inspections. However, this Court has never had the occasion to explicitly observe that "certainty and regularity" requires an agency to actually *comply* with the warrantless inspection procedures found in its own enabling statute and in the written directives that it provides to its own inspectors and mine operators. That silence is understandable, as the question seems never to have been squarely presented to this Court; and, at any rate, one would think the point should be an obvious one. But as it turns out, that silence has led lower tribunals to find that "certainty and regularity" in warrantless inspection procedures depends entirely on what the agency inspection procedures *say* rather than on what the agency *does*.

In the *Dewey* Court's discussion of "certainty and regularity" in the Mine Act's application, it identified three considerations. First, it noted that "the Act requires inspection of *all* mines and specifically defines the frequency of inspection." 452 U.S. at 603–04 (emphasis in original). Second, the Court observed that "the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations." *Id.* at 604. The third guarantee of "certainty and regularity" identified by the *Dewey* Court was described thus:

> Finally, the Act provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The

> Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. 30 U.S.C. § 818(a) (1976 ed., Supp. III). This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have.

Id. at 604–05. There have been relatively few cases in the past 40 years that have interpreted and applied *Dewey*.

The D.C. Circuit, in the opinion from which this petition follows, stated that "*Dewey* is, frankly, ambiguous as to whether this discussion of section [818] is part of its Fourth Amendment analysis, or simply a description of an additional—but not constitutionally required—protection afforded by the Mine Act." App., *infra*, 13. Rain for Rent does not see quite so much uncertainty here as the D.C. Circuit does. The *Dewey* Court's discussion of § 818 is *obviously* part of its Fourth Amendment analysis, as can plainly be seen by the sentence that immediately follows it: "Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide." 452 U.S. at 605. But it is nevertheless true that *Dewey* never explicitly states whether the three examples of "certainty and regularity" it identifies in the Mine Act are all *essential* to satisfy Fourth Amendment concerns, or whether one or

another could perhaps be overlooked without running afoul of the Constitution.

The D.C. Circuit below seemed confused on this question, relying on the case of *New York v. Burger*, in which this Court upheld a New York warrantless search regulatory scheme that does not appear to have contained any provision analogous to that of § 818 in the Mine Act. *See* 482 U.S. 691, 711–12 (1987). In doing so, the D.C. Circuit appears to have missed the forest for the trees; after all, *Burger*, like *Dewey*, repeatedly emphasized that for the "certainty and regularity" prong to be satisfied, the scheme in question "must limit the discretion of the inspecting officers," *see id.* at 703, 711–12, and *Burger* listed various examples of such constraints in the scheme under consideration, including that inspections could only be made during certain times of day, and on certain types of records and objects, *see id.* The *Burger* Court apparently concluded that it should go without saying that a necessary corollary to such regulatory constraints on discretion is that for them to have any relevance to the constitutional inquiry, *the inspectors must actually obey them*—which, in the end, is Rain for Rent's entire point, no matter whether one frames it as a Fourth Amendment issue or a Due Process issue.

Nevertheless, the fact remains that this Court has never definitively stated whether the Mine Act's guarantee of "certainty and regularity" in its warrantless inspection scheme is fatally undermined when an inspector, exercising his discretion, refuses to adhere to the limitations that are explicitly provided in the Mine Act, as well as in his own agency's directives.

The instant case presents an opportunity for this Court to address that issue and provide clarity, and assurance, to entities subject to the Mine Act's inspection protocols.

III. The D.C. Circuit's opinion effectively obviates the Mine Act's prohibition of forcible entry by MSHA inspectors.

Dewey held the Mine Act's warrantless inspection program complies with the Fourth Amendment because it sufficiently accommodates mine operators' privacy interests by, *inter alia*, prohibiting inspectors from making forcible entry. The D.C. Circuit's opinion can be read to nullify that prohibition on forcible entry. In this case, an inspector denied Rain for Rent its walkaround rights —in violation of both the Mine Act and of the MSHA's own *PPM*. The precedent set by the D.C. Circuit's opinion below tells any MSHA inspector that walkaround rights and the right to question an inspection can be denied, without consequence. Rain for Rent submits that however "ambiguous" or "cryptic" *Dewey* and § 813(f) may be, surely this is not what those authorities contemplate.

There is no need for this Court to wait for these conflicts to develop further or to resolve themselves in future cases, because there is effectively nowhere left for them to develop. The Commission has already signaled its unwillingness to resolve the conflict in its own precedents by declining to review the ALJ's opinion in this case. The D.C. Circuit's opinion has only further muddled the picture, in the forum where

a very large plurality of MSHA appeals are filed.[1] In other words, jurisprudence on the interaction between the Constitution and the Mine Act has reached an intractable state of confusion in the forums where these issues are ordinarily heard. This Court is the only forum capable of bringing clarity soon and definitively to this area of the law, and this Court is unlikely ever to see a cleaner factual presentation on which to bring such clarity. For this reason, Rain for Rent asks the Court take up these issues, grant this Petition, and resolve the significant Constitutional issues that have lingered since *SCP I*.

[1] A Westlaw search for "MSHA" among all federal jurisdictions yields 306 cases in federal courts of appeals, 113 of which are from the D.C. Circuit. The Sixth Circuit has the second most cases, with forty-five.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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