No. 19-1352

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

REPLY BRIEF FOR PETITIONER

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In 1981, this Court upheld the constitutionality of the warrantless inspection regime created by the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), reasoning that "in terms of the certainty and regularity of its application," it "provides a constitutionally adequate substitute for a warrant." *See Donovan v. Dewey*, 452 U.S. 594, 603 (1981). In the instant case, an inspector from the Mine Safety and Health Administration ("MSHA") conducted an inspection and failed to comply with the Mine Act's requirement that Rain for Rent "be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any . . . mine . . . ." *See* 30 U.S.C. § 813(f). The D.C. Circuit held that this did not amount to a constitutional violation. Central to that holding were its interpretations of an applicable section of the Mine Act which it called "somewhat cryptic[]," Pet. App. 10, and of language from *Dewey* which it called "frankly, ambiguous," *see id.* at 13. This case is an excellent vehicle for bringing clarity to those "cryptic" and "ambiguous" authorities.

I. The constitutional issues are cleanly presented here, and do not turn on any antecedent factual disputes.

The Secretary repeatedly asserts that this Court cannot reach the constitutional issues raised in Rain for Rent's petition without first reviewing and reversing the D.C. Circuit's antecedent determination that the inspector did not violate the Mine Act. *See* Opp. 15–16. This argument would only have force if

the D.C. Circuit's finding turned on a factual dispute. *See* S. Ct. R. 10. But it did not. Instead, the D.C. Circuit's ruling was driven entirely by its flawed construction of the Mine Act's text and of this Court's precedent, as there was no dispute between the parties as to the material facts.

There is no dispute that the inspector perceived no exigent circumstances or imminent hazards when he opened the truck door. There also is no dispute that when the inspector opened the truck door he knew where the truck's operator was and that he would return soon. And there is no dispute that the inspector nevertheless failed to notify the truck's operator of the inspection, much less to obtain his permission to open the truck door, before doing so. In fact, had the truck operator not returned while the inspector was present, Rain for Rent would not have known of the inspection until it received notice of the alleged violation. The facts are established; the only dispute here is whether these facts *matter* for constitutional purposes.

The Mine Act states 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 . . . ." *See* 30 U.S.C. § 813(f) (emphasis added). Consistent with this statutory command, the Secretary instructs that "every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection . . . ." MSHA, Dep't of Labor, Section 103(f) of the Fed. Mine Safety and Health Act of 1977, 43 Fed. Reg. 17,546, 17,546 (Apr. 25, 1978). Similarly, the MSHA Program Policy

Manual 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." *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*"). That did not happen here.

The D.C. Circuit nevertheless interpreted the Mine Act to mean that these requirements are merely suggestions which MSHA inspectors are free to disregard without any constitutional implications, pointing to 30 U.S.C. § 813(f)'s statement that "compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter." Rain for Rent contends that the D.C. Circuit's interpretation is inconsistent with this Court's decisions in *Donovan v. Dewey* and *New York v. Burger*, which held that the constitutionality of a warrantless inspection regime is conditioned on the "certainty and regularity of its application." *See Dewey*, 452 U.S. 594, 602–03 (1981); *Burger*, 482 U.S. 691, 703, 711–12 (1987). But regardless of which side has the better interpretation of these authorities, the essential point here remains that the disagreement centers on statutory language that the D.C. Circuit itself described as "somewhat cryptic[]," *see* Pet. App. 10, and on language from *Dewey* that the D.C. Circuit characterized as "frankly, ambiguous," *see id.* at 13.

In other words, whether Rain for Rent's rights under the Mine Act were violated is a purely legal question that is inextricably bound up with the constitutional inquiry. However "antecedent" the question of the Mine Act's meaning might be, it is one that is perfectly appropriate for this Court's plenary review. After all, under this Court's rules, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). And it is a question that is *not* a fact-dependent one in this case. The question is not whether, as a matter of fact, the inspector complied with the Mine Act; instead, the question is whether, as a matter of constitutional law, he even had to comply with the Mine Act in the first place. There is no impediment to this Court reaching the constitutional issues here, as they are cleanly presented on undisputed facts.

II. The questions presented concern whether constitutional violations occurred—not whether Rain for Rent suffered prejudice from them.

The Secretary also argues in its brief that Rain for Rent "has not established any prejudice it suffered," and that therefore "the asserted violation provides no basis to disturb the citation or the Commission's assessment of a $116 penalty based on it." *See* Opp. 14. Of course Rain for Rent disagrees, but this argument is entirely beside the point. Rain for Rent is not asking this Court to vacate the citation or set aside the penalty. That request will be made later, to a lower tribunal, on remand. Right now, Rain for Rent is

simply asking this Court to hold that a constitutional violation occurred in the first place. However, if, in the course of doing so, this Court were also to provide guidance on what remedies are available for such constitutional violations, then that guidance certainly would be welcome.

The issue of prejudice goes to the remedy—not to the wrong. In more traditional arenas, the question of prejudice is entirely irrelevant to that of whether a search or seizure violated the Fourth Amendment, as well as to whether the evidence obtained therefrom should be excluded. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Similarly, a finding that evidence was obtained in violation of the Fifth Amendment is preliminary to the exploration of what harm, if any, has resulted and what remedy is appropriate. *See, e.g.*, *United States v. Blue*, 384 U.S. 251, 255–56 (1966).

The Secretary's conflation of the prejudice inquiry with the constitutional inquiry mirrors the approach that was taken by the D.C. Circuit, which essentially held that the Mine Act was not violated because Rain for Rent suffered no prejudice, *see* Pet. App. 7–8, and that the constitution was not violated because the Mine Act was not violated, *see id.* at 14. This is emblematic of just how far adrift lower tribunals have strayed on these issues without any recent guidance from this Court. As the Secretary implicitly acknowledged, *see* Opp. 23–24, the Commission's precedent is as badly fractured on the remedial question as it is on the constitutional question. *Compare, e.g.*, *Sec. of Labor, Mine Safety and Health Admin. (MSHA) v. SCP Invs., LLC*, 31 FMSHRC 821, 834–37 (Aug. 6, 2009) (plurality

opinion proposing exclusionary rule that would require showing of actual prejudice), *with id.* at 838–39 (concurrence proposing that ALJ simply be afforded discretion to impose whatever penalty he deems appropriate); *see also Sec. of Labor, Mine Safety and Health Admin. (MSHA) v. SCP Invs., LLC*, 32 FMSHRC 119, 2010 WL 390288, at *9–*10 (Jan. 5, 2010) (finding prejudice *per se* from violation of walkaround rights and holding this sufficient to warrant vacating the resulting citation). The fact that in the realm of MSHA inspections it has become impossible to discern where the constitutional inquiry ends and the remedial inquiry begins, speaks to just how badly this Court's guidance is needed.

III. This Court's review will provide much-needed clarity to an important but badly confused and neglected area of law, regardless of whether it ultimately results in an outcome that is favorable to Rain for Rent.

A large portion of the Secretary's brief is devoted to the contention that Rain for Rent's constitutional objections fail on the merits. *See* Opp. 16–23. Here too, Rain for Rent disagrees; but here too, that is the wrong question to be asking at this stage.

As has already been discussed above and in Rain for Rent's original Petition, the D.C. Circuit's ruling below follows a series of decisions from the Commission that, considered as a whole, are so badly confused that it has become impossible to articulate what the tests even are for determining whether a given MSHA inspection complies with the Due Process Clause or the Fourth

Amendment. Are they different tests? The same test?[1] Do these tests even require inspectors to comply with the Mine Act? Do they require a showing of prejudice? Is there a good-faith exception?

This state of confusion is all the more significant given the D.C. Circuit's disproportionately prominent role in reviewing decisions of the Commission. As discussed in Rain for Rent's original Petition, the Commission has clearly and repeatedly demonstrated its unwillingness or inability to impose any uniformity on its decisions in this area. The D.C. Circuit's opinion only further exacerbates this confusion. That is reason enough to warrant this Court's review, given the importance of the constitutional issues at stake for an entire regulated industry. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.14 (1978) ("Since the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals.").

By reviewing the D.C. Circuit's decision in this case and answering the questions presented in Rain for Rent's Petition, this Court has the opportunity to restore clarity and consistency to an important area of

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[1] As the Secretary acknowledged, Rain for Rent argued below that its Due Process rights were infringed, *see* Opp. 21, and yet the D.C. Circuit's opinion failed even to reach the argument, *see id.* at 22–23, apparently conflating the Fourth Amendment and Due Process inquiries.

federal law that has become hopelessly muddled and that has strayed from the principles that were articulated by this Court the last time it entered the fray several decades ago.

Nor is it relevant that, as the Secretary repeatedly emphasizes, the penalty imposed on Rain for Rent was a mere $116. The issues presented in this case have significant implications for every inspection that is conducted under the MSHA. Rain for Rent is not fighting this citation because it cannot afford to part with a hundred dollars; Rain for Rent is fighting this citation because it—and every single other entity subject to warrantless inspections under the MSHA—needs assurance going forward that there is at least *some* constitutional limit to an MSHA inspector's discretion in carrying out warrantless inspections under the Mine Act.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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