No. 23-

IN THE

Supreme Court of the United States

GMS MINE REPAIR,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JAMES P. MCHUGH
Counsel of Record
CHRISTOPHER D. PENCE
HARDY PENCE, PLLC
10 Hale Street, 4th Floor
Charleston, WV 25301
(304) 345-7250
jmchugh@hardypence.com

Counsel for Petitioners

325289

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) ("*Kisor*"), this Court sought to limit *Auer* deference and provided specific guidance for courts to interpret regulations, consistent with footnote 9 of *Chevron*. The fundamental issue underlying this petition is whether the D.C. Circuit misinterpreted and therefore misapplied *Kisor* by using the "traditional tools" of construction to create ambiguity and support the agency's position, rather than using the "tools" to dispel ambiguity and apply the regulation as written. Despite a specific "15-month" look-back rule in 30 C.F.R. §100.3(c), for determining a mine operator's violation history, the D.C. Circuit granted deference to the Secretary of Labor's inclusion of violations older than 15 months, due to perceived ambiguity. The improper use of the "tools" of construction to create ambiguity expands *Auer* deference in administrative cases, with significant adverse implications for independent judicial review.

The questions presented are:

1. Whether the Court should overrule *Kisor* or clarify that the "traditional tools" of construction must be used to dispel ambiguity in a regulation, rather than to create ambiguity and find support for an agency interpretation—a matter on which there is a conflict among the Circuit Courts.

2. Whether, under a proper application of *Kisor*, 30 C.F.R. §100.3(c) precludes the consideration of violations occurring before the specified "15-month" look-back period for determining a mine operator's "[h]istory of previous violations,"

to ensure the regulation is not expanded beyond its terms.

PARTIES TO THE PROCEEDING

The Petitioner is GMS Mine Repair. Respondents are the Federal Mine Safety and Health Review Commission and the Secretary of Labor, Mine Safety and Health Administration.

CORPORATE DISCLOSURE STATEMENT

Petitioner GMS Mine Repair, a d/b/a of GMS Mine Repair and Maintenance, Inc. ("GMS Mine Repair") is a privately owned nongovernmental corporate party. There are no parent corporations of GMS Mine Repair and no publicly held company holds 10% or more of GMS Mine Repair.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

> *GMS Mine Repair v. Fed. Mine Safety & Health Review Comm'n & Secy. of Labor, Mine Safety and Health Administration ("MSHA"),* No. 22-1143, 72 F.4th 1314 (D.C. Cir. July 7, 2023).
>
> *Sec'y of Labor, Mine Safety and Health Administration ("MSHA") v. GMS Mine Repair*, Docket No. WEVA 2021-0431, (June 16, 2022) (Federal Mine Safety and Health Review Commission Summary Denial of Discretionary Review);
>
> *Sec'y of Labor, Mine Safety and Health Administration ("MSHA") v. GMS Mine Repair*, Docket No. WEVA 2021-0431, A.C. No. 46-09029-537541 MVK, 44 FMSHRC 399 (May 13, 2022) (Federal Mine Safety and Health Review Commission Administrative Law Judge Decision);

There are no other proceedings in state, federal or administrative courts or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Whenever a mine operator or independent contractor is cited for a violation of a mandatory safety standard promulgated by the Secretary of Labor ("Secretary") pursuant to the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 801-965 ("Mine Act"), the Secretary determines a proposed penalty assessment in accordance with 30 C.F.R. § 100.3. One component of the proposed penalty is "History of Previous Violations," pursuant to 30 C.F.R. § 100.3(c). This subsection includes a "15-month" look-back period for determining "History." The Secretary's improper interpretation of the "15-month" look-back period led to a proposed penalty for GMS Mine Repair that was almost double the correct amount ($7,331 compared to $3,268).

The D.C. Circuit deemed the regulation ambiguous and deferred to the Secretary's interpretation. The D.C. Circuit's reading of 30 C.F.R. § 100.3(c) not only raises penalty assessments for all mine operators and contractors but also represents a significant departure from *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). This misinterpretation and misapplication undermine the Supreme Court's intent to restrict *Auer* deference[1] and will have lasting adverse effects on independent judicial review beyond this case.

Although the D.C. Circuit cited the "traditional tools" of construction, it applied them in a way not intended by this Court in *Kisor*. Rather than dispelling any ambiguity to apply the regulation as written, the D.C. Circuit

1. *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

invoked these canons of construction to create ambiguity and support the Secretary's proposed interpretation. The contrasting approaches of the D.C. Circuit, and of this Court in *Kisor,* are stark. The threat to this Court's directives in *Kisor* is heightened given the sheer volume of administrative appeals decided by the D.C. Circuit. *See* Fraser et. al, *The Jurisdiction of the D.C. Circuit*, 23 Cornell Journal of Law and Public Policy 131, 152 (2013).

The D.C. Circuit's approach is, in essence, an *Auer* version of "*Chevron* maximalism." *See e.g., Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1297-8 (D.C. Cir. 2023) (Walker, J.) (concurring in part and dissenting in part) (citing, *Buffington v. McDonough*, 143 S. Ct. 14, 21, 214 L. Ed. 2d 206 (2022) (Gorsuch, J., concurring in denial of certiorari). Like the over reliance on deference that led to the term "*Chevron* maximalism," the D.C. Circuit's approach can fairly be characterized as "*Auer* maximalism." If *Kisor* is not overruled or clarified by this Court, future litigants -- before administrative agency tribunals, the D.C. Circuit and other courts -- will be subjected to an expanded form of *Auer* deference, where such courts will make a passing reference to the *Kisor* "tools" of construction and then will use tools to create ambiguity, thereby frustrating the letter and intent of *Kisor.*

Petitioner, GMS Mine Repair, respectfully petitions for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, not only to prevent the Secretary from re-writing its own regulations under the auspices of unwarranted deference, without notice and comment rulemaking, but also to clarify that "tools" of construction

must be used by courts to independently analyze regulations and dispel ambiguity, rather than create ambiguity in order to support the agency interpretation, as occurred here. In the alternative, since the guidance in *Kisor* was based directly on *Chevron*, footnote 9,[2] the Court should hold this case until the Court decides *Loper Bright Enters. v. Raimondo,* 143 S. Ct. 2459 (May 1, 2023) (granting certiorari as to Question 2 in the Petition) and *Relentless, Inc. v. DOC*, 2023 U.S. LEXIS 4146, *1 (October 13, 2023), and then remand to the D.C. Circuit to apply the Court's decision with respect to the continued validity of *Chevron*, and by extension, *Kisor*.

OPINIONS BELOW

The DC Circuit's Panel Opinion is reported at 72 F.4th 1314 and reproduced at App. 1a-17a. The Commission's non-substantive denial of discretionary review, without analysis, is unpublished. The Commission ALJ's Decision (which became the Commission Decision after denial of discretionary review) is reported at 44 FMSHRC 399 (May 13, 2022) and reproduced at App. 18a-30a.

JURISDICTION

The D.C. Circuit issued its opinion on July 7, 2023. App. 1a-17a. The D.C. Circuit denied motions for hearing *en banc* and panel rehearing, on August 25, 2023. App 31a-34a. This Court has jurisdiction under 30 U.S.C. §816(a)(1) and 28 U.S.C. §1254(1).

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2. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

REGULATION INVOLVED

The Secretary of Labor's regulation at 30 C.F.R. §100.3(c) is involved here and provides:

> (c) History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

For additional essential context, the entirety of 30 C.F.R. §100.3 is reproduced at App. 35a-54a.

STATEMENT OF THE CASE

A. Legal Framework.

Congress authorized the Secretary of Labor to promulgate regulations to carry out its statutory obligations, pursuant to notice and comment rulemaking. 30 U.S.C. § 957. Such regulations include mandatory safety standards, as well as administrative procedural regulations. By statute, both the Secretary, in proposing penalties for violations of mandatory safety standards and the Administrative Law Judge ("ALJ") of the Federal

Mine Safety and Health Review Commission, in assessing penalties, follow the same six general statutory criteria. *see,* 30 U.S.C. § 815(b)(1)(B) and 30 U.S.C. § 820(i) (history, size, negligence, ability to remain in business, gravity and good faith).

Based on these general statutory penalty criteria, the Secretary has promulgated regulations, which include additional specific details related to each statutory criteria, to support the proposed penalty for mine operators, including for independent contractors performing services at a mine. These additional specific penalty criteria include: 1) Annual hours worked (30 C.F.R. § 100.3(b)); 2) *History of independent contractor's previous violations* during the designated 15-month period (30 C.F.R. § 100.3(c)); 3) History of independent contractor's repeat violations during the designated 15-month period (30 C.F.R. § 100.3(c)); 4) Negligence (30 C.F.R. § 100.3(d)); 5) Likelihood of the occurrence of the event against which a standard is directed (30 C.F.R. § 100.3(e)); 6) Severity of the illness or injury (30 C.F.R. § 100.3(e)); and, 7) Number of persons potentially affected (30 C.F.R. § 100.3(e)).

The level of each penalty criterion is determined either by the Secretary (criteria 1-3 above) or MSHA's Inspector (criteria 4-7 above) who issued the citation. The level assigned by the Secretary or the MSHA Inspector corresponds directly to a specific number of penalty points set forth in the various subsections and tables in section 30 C.F.R. § 100.3. The sum of the points for each criterion then corresponds to a total financial penalty for a given citation, although this total amount may be reduced by 10%, by the demonstrated good faith of the independent

contractor in abating a violation. 30 C.F.R. § 100.3(f). The penalty amount may also be reduced if it may affect the operator's ability to continue in business. 30 C.F.R. § 100.3(h).

In the underlying case, GMS contested a single penalty criterion in the penalty point calculations for five citations. This criterion is the "history" of an independent contractor's previous violations across all mines in the prior 15-months, under 30 C.F.R. § 100.3(c). 30 C.F.R. § 100.3(c) includes a "15-month" lookback period to determine a mining contractor's history of prior violations. This 15-month lookback period for "history of previous violations" results in a mathematical calculation which correlates a contractor's history directly to points and a resulting penalty, using Table VII ("Independent Contractor's Overall History of Number of Violations"), App. 42a-42b, and Table IX ("History of Previous Violations-Repeat Violations for Independent Contractors") in 100 C.F.R. § 100.3(c)., 45a-45b.

By applying the Tables, the Secretary uses 100 C.F.R. § 100.3(c) to determine a mining contractor's initial assessed penalty. The Commission ALJ, in turn, relies on the Secretary's assessed penalty as a starting point for making his determination of the appropriate penalty in a contested administrative case. The ALJ may deviate from the Secretary's proposed assessment, since facts may be developed during a contested administrative hearing that warrant a change in the penalty. However, to deviate from this assessed penalty, the Commission has repeatedly held that the ALJ must explain why a deviation from the

Secretary's proposed assessment is appropriate.[3] There was no contested administrative hearing here because the parties stipulated to all material facts.

B. Factual Background.

GMS Mine Repair is a mining contractor which provides a broad range of specialized services to mine operators in North America. ALJ Decision, Stip. No. 4, App. 20a. GMS was performing contract work for the operator at Mingo Logan Coal LLC's Mountaineer II Mine, controlled by Arch Resources, Inc., in Logan West Virginia, on April 20 and 27, 2021, the dates on which it was issued five citations at issue in this proceeding. ALJ Decision, Stip. No. 5, App. 20a.

In this case, the Secretary interprets 30 C.F.R. § 100.3(c) to mean that the calculation of "previous violations at all mines" includes *citations* which were issued prior to the 15-month lookback period described in 30 C.F.R. § 100.3(c), if the citation becomes final within the 15-month lookback period. ALJ Decision, Stip. 21, App.

3. In *American Coal Company*, 40 FMSHRC 1011, 1015, 2018 WL 4347355, at *3, the Commission held that "Commission judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100…." However, the Commission also held that ALJs must explain any substantial divergence from the penalty proposal of the Secretary. *Id.* at 1015 and 1025 (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 290-4 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984)). For this rule to be effectively implemented, the Secretary's penalty proposal must first be properly calculated. If, as here, the Secretary's proposed penalty is not properly calculated, then an ALJ's explanation of any potential divergence from the proposed penalty would be based on an inaccurate starting point.

22a. The Secretary's improper interpretation of 30 C.F.R. § 100.3(c) resulted in 16 prior citations, or 11 points being counted as the "history" for four of the citations issued to GMS and 15 prior citations, or 10 points being counted as the "history" for the last citation issued to GMS. ALJ Decision, Stip. No. 23, App. 23a, D.C. Cir. Joint Appendix, p. 10. Repeat violations were not an issue here, because there were none. Under the Secretary's approach, the assessed penalty for all citations was $7,331.

Conversely, GMS contends that the 15-month lookback period in 30 C.F.R. § 100.3(c) means what it plainly states and includes only those violations where citations were both issued and became final in the 15-month lookback period. ALJ Decision, Stip. No. 23, App. 23a. If GMS is correct, the parties agree that there would be 0 prior violations in the 15-month lookback period in this case. ALJ Decision, Stip. No. 24. App. 23a. If 30 C.F.R. § 100.3(c) is interpreted literally, as GMS contends, the total assessed penalty for all citations would be $3,268. ALJ Decision, Stip. No. 25, App. 23a.

C. Proceedings Below.

GMS timely contested the citations and proposed assessments for five citations, pursuant to 30 U.S.C. § 815(d), 30 U.S.C. § 823(d), 30 C.F.R. § 100.7 and 29 C.F.R. § 2700.26. ALJ Decision, App. 23a. The sole basis for GMS' contest was the manner in which the Secretary had assessed GMS's "History of Previous Violations" pursuant to 30 C.F.R. § 100.3(c). Since the dispute between the parties related solely to a legal issue, the Secretary and GMS agreed to a set of stipulations clarifying the dispute and then submitted opposing motions for summary

decision to the ALJ, pursuant to 29 C.F.R. § 2700.67. ALJ Decision, App.19a-23a.

On May 13, 2022, the Commission ALJ denied Respondent's Motion for Summary Decision and granted the Secretary's Motion for Summary Decision. App. 18a-30a. In the ALJ Decision, the Court declared 30 C.F.R. § 100.3(c) to be ambiguous "on its face." ALJ Decision, App, 27a (holding that 30 C.F.R. § 100.3(c) "can be read to support either party's position"). The ALJ failed to apply the text of MSHA's own regulation and declared, without the necessary analysis required by *Auer* and *Kisor*, that 30 C.F.R. § 100.3(c) is ambiguous. Based on the ALJ's conclusion of ambiguity, the ALJ adopted the Secretary's proposed interpretation of 30 C.F.R. § 100.3(c) and allowed citations that were issued for violations prior to the 15-month lookback period to be included in the operator's violation history, provided that such citation became final during the 15-month period. ALJ Decision, App. 19a, 29a.

GMS then submitted a Petition for Discretionary Review to the Commission pursuant to 30 U.S.C. § 823(d)(2)(A) and 29 C.F.R. § 2700.70. The Commission summarily refused to grant this request by Notice dated June 22, 2022, *citing* 30 U.S.C. § 823(d)(2)(B). Upon the Commission's refusal to grant Discretionary Review, the ALJ Decision effectively became the final Commission Decision, pursuant to 30 U.S.C. § 823(d)(1).

GMS then timely filed a petition for review with the Circuit Court of Appeals for the District of Columbia Circuit on June 30, 2022, pursuant to 30 U.S.C. § 816(a)(1). On appeal to the D.C. Circuit, GMS pointed out that the

ALJ had wholly sidestepped the requirements of *Kisor*. D.C. Cir., App. 4a. Against the regulatory and judicial backdrop, the issue before the D.C. Circuit was squarely about how to apply 30 C.F.R. § 100.3(c), pursuant to *Kisor*. The D.C. Circuit issued its Panel Decision on July 7, 2023. Absent any *Kisor* analysis by the ALJ, the D.C. Circuit acknowledged the importance of *Kisor* and undertook to apply *Kisor, de novo*, noting that "[o]ur analysis of Section 100.3(c) is guided by the Supreme Court's opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019), which provided clear instructions about how courts are to evaluate agency interpretations of regulations." D.C. Cir., App. 7a-7b.

However, even before undertaking any *Kisor* analysis on the meaning of the 15-month lookback period, the D.C. Circuit started with an effort to create an ambiguity in the regulation, by asserting that the term "violation" in the regulation was not defined and could have many meanings. D.C. Cir., Section II.B, App. 5a-6a. In the end, the potential meanings of the word "violation" were not at all material to the decision since the Court referred to two possible meanings alternatively in explaining and approving the Secretary's alternate positions. Even the Secretary never proffered a consistent definition of the term "violations." c*f,* Panel's characterization of the Secretary's interpretations of the regulation. App, 4a and 10a. Thus, the Court's initial reference to the term "violations," undertaken prior to the Court's *Kisor* analysis, was a distraction from the real issue before the Court, which was the meaning of the terms "in a preceding 15-month period," which received scant coverage. Under the Secretary's re-written rule, violations, whether defined as assessed violations, citations or orders, older

than 15 months were to be included in history. It seems that the D.C. Circuit sought to create an initial ambiguity that was not even at issue and use this to make it appear as though the entire regulation was ambiguous. The actual terms in dispute, "in the preceding 15-months," were relegated to a secondary issue. The D.C. Circuit concluded that "Section 100.3(c) is genuinely ambiguous. While the structure, history, and purpose favor the Secretary's reading, the text lacks useful detail. Nevertheless, the Secretary's proposed interpretation falls within the "zone of ambiguity…." D.C. Cir., App. 14a.

The D.C. Circuit did not use the tools of construction in the manner required by *Kisor*. Rather than using the canons of construction to dispel ambiguity and independently determine if the regulation could be applied as written, the D.C. Circuit effectively merged two distinct sentences in the regulation, seemingly incorporating the phrase "regardless of when issued" even though the regulation itself only specifies "violations, and the number of repeat violations of the same citable provision of a standard in a preceding 15- month period." Neither *Kisor,* nor the tools of construction were intended to justify the judicial re-working of regulations. The D.C. Circuit denied *en banc* review and Panel rehearing, by Orders dated August 25, 2023. App. 31a-34a.

REASONS FOR GRANTING THE PETITION

The skepticism expressed by some concurring Justices in *Kisor*, as to whether the solution adopted there would be enduring, appears justified, as evidenced by the D.C. Circuit's failure to properly apply the "tools" of construction mandated by *Kisor*. Instead of using these

tools to dispel ambiguity and independently determine the meaning of the regulation, the D.C. Circuit used them to create ambiguity and back the agency's stance, a practice this Court did not intend with its *Kisor* decision. This case underscores the resilience of the *Auer* doctrine, as Justice Gorsuch anticipated in his *Kisor* concurrence, and it points to a notable problem with the *Kisor* precedent. *Kisor*, 19 S.Ct. at 2448 (Gorsuch, J., concurring in judgment). In *Kisor*, this Court emphasized that the traditional tools of construction should be used to interpret regulations independently, "as though there was no agency [interpretation] to fall back on." *Kisor*, 139 S. Ct. at 2415. The tools are not meant to manufacture ambiguity or simply to justify the agency's stance, as was done in this case.

The D.C. Circuit's improper and deferential reading of 30 C.F.R. § 100.3(c) extends beyond GMS' case, impacting all future penalties for all operators and contractors. Prior violations will now be considered over a period extending well beyond the 15-month limit set by the plain language of the regulation. The D.C. Circuit's decision will not only unjustly increase penalties beyond what was intended with the drafting of 30 C.F.R. §100.3(c), but it also has broader implications. The Circuit's misapprehension and misapplication of *Kisor* will impact future administrative proceedings across various jurisdictions, as it deviates from this Court's intent to limit *Auer* deference.

This case serves as an excellent opportunity for the Court to refine the directives set out in *Kisor*. It illustrates the potential for the "tools" of construction to be manipulated to maintain ambiguity and uphold the *Auer* doctrine. Additionally, with *Chevron* – and

notably its footnote 9 – under review in *Loper Bright/ Relentless,* this case presents a timely opportunity for the Court to align the principles governing both *Chevron* and its procedural counterpart, *Kisor*. *Kisor's* attempt to integrate aspects of *Chevron* footnote 9 did not effectively curtail deference. Using the D.C. Circuit approach, courts may opt for deference over independent judicial interpretation, potentially re-writing a regulation and its plain intent. If this is the rule, then *Kisor* has not reduced *Auer* deference, and *Kisor* should be overruled or clarified.

I. This D.C. Circuit Misinterpreted and Misapplied *Kisor* Deference.

A. This Court in *Kisor* Intended the "Tools" of Construction to be Used to Dispel Ambiguity, Not to Create Ambiguity and Find Support for the Agency Position.

The *Kisor* rules were designed to reinforce the limits of *Auer* deference and to encourage courts to "perform their reviewing and restraining functions." *Kisor,* 139 S. Ct. at 2415. In *Kisor*, this Court required that "[b]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (adopting the same approach for ambiguous statutes)" *Id.* In setting forth this guidance, this Court noted that there are important "limits inherent in the *Auer* doctrine." *Id.* Like *Chevron* fn. 9, upon which *Kisor* was fashioned, the Court wanted to always steer courts to the plain (if hard) meaning of the regulation so that it can be applied as the agency drafted it, rather than as

the agency might want it applied long after the regulation was drafted. In this regard, this Court cautioned that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read….But hard interpretive conundrums, even relating to complex rules, can often be solved….To make that effort, a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on…..Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.*

The phrase "if it had no agency to fall back on" from *Kisor* is not mere surplusage. Rather, the phrase is critical to understanding what this Court was attempting to achieve in *Kisor.* When, as here, a reviewing court scours the "tools" of construction to find ambiguity or support for the agency interpretation, the goal of *Kisor* and its sequential analysis of a regulation is short-circuited and frustrated. *See Id.* at 2419 ("a court must apply all traditional methods of interpretation to any rule and must enforce the plain meaning those methods uncover. There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings…"). In other words, the agency position must take a backseat to the initial and detailed regulatory analysis by the Court. *See also, Milner v. Dep't of Navy*, 562 U.S. 562, 574, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) (extratextual sources may "clear up ambiguity, not create it").

Since the *Kisor* rule was borrowed from footnote 9 of *Chevron*, it is useful to consider that this Court

described that rule in footnote 9 as "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843 n.9 (1984). In the *Chevron* context, this Court never intended for the tools to be used to create ambiguities or measure the reasonableness of the Secretary's proffered interpretation. In this regard, in *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018), this Court held that "[t]he *Chevron* Court explained that deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity. 467 U. S., at 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694….Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" *Id.* at 1630.

In the context of a *Chevron* analysis, the Third Circuit similarly held that "…the Court treated *Chevron* as a canon of last resort, to be used if— but only if—the Court could not dispel ambiguity through a robust application of all the tools in its statutory toolkit." *Cabeda v. AG of the United States*, 971 F.3d 165, 187 (3d Cir. 2020); *Accord, Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007) ("this doctrine is one 'of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities'").

Ironically, in *Newman v. Ferc*, 27 F.4th 690 (D.C. Cir. 2022), a different panel of the D.C. Circuit followed an approach more in line with *Kisor*, when it held that "after examining the 'text, structure, history, and purpose of [the regulation' here…we conclude that FERC's interpretation of at least one clause of Account 426.4, is 'plainly …inconsistent with the regulation'….To

so depart from 'the regulation's obvious meaning' would permit the [Commission], under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 697.

This Court noted in *Kisor* that "if the law gives an answer…then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.'" *Kisor,* 139 S. Ct. at 2415 (*citing Christensen*, 529 U. S., at 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621).

The contrast between the D.C. Circuit approach in this case, of employing tools to introduce ambiguity, and this Court's approach in *Kisor,* of utilizing tools to eliminate ambiguity, led to unwarranted deference to the Secretary's position.

B. The D.C. Circuit's Decision Applying *Kisor* Was Based on a Misinterpretation and Misapplication of *Kisor*.

The D.C. Circuit's understanding of *Kisor* was wrong from start to finish. While the methodologies of the D.C. Circuit and *Kisor* may appear superficially similar, they are not. Unlike *Kisor,* the D.C. Circuit's new rule from this case allows the Court to use all the tools of construction to create ambiguity and support the agency's position. In this case, the D.C. Circuit started its flawed analysis by subtly altering the fundamental premise of *Kisor.* In this regard, the D.C. Circuit held that "[f]irst, courts must determine whether the regulation is 'genuinely ambiguous' *by* 'exhaust[ing] all the 'traditional tools' of construction.…'"

D.C. Cir., App. 8a (emphasis added). A close review of *Kisor* indicates that the actual rule is "[b]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction…" *Kisor*, 139 S. Ct. at 2415.

While the distinction between the two approaches is nuanced, when put in practice by the D.C. Circuit, one seeks out ambiguity and the other seeks to get rid of ambiguity. These approaches are a world apart and reveal that *Kisor* did not solve the tendency of courts to reflexively apply deference. The purpose of *Kisor* is to dispel ambiguity by using the tools of construction, as though the agency position did not exist. Consistent with this, Justice Kagan noted in *Kisor* that: "[t]o make that effort, a court must 'carefully consider [ ]' the text, structure, history, and purpose of a regulation, in all the ways it would *if it had no agency to fall back on*." *Id.* at 2415 (emphasis added). In this case, throughout the opinion, the panel used the text and the tools of construction to confirm the Secretary's position and create ambiguity. As any lawyer is aware, it is easier to create an ambiguity than to pass a new regulation through notice and comment rulemaking. See *Ramos v. Louisiana*, 140 S.Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part) ("Both by design and as a matter of fact, enacting new legislation is difficult."); *See also, Kent Barnett & Christopher J. Walker, Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (concluding that courts of appeals find ambiguity at *Chevron* step one 70% of the time).

The D.C. Circuit did not hide its approach. Rather, it began its analysis favoring the Secretary's interpretation, stating "the Secretary has the better argument." D.C.

Cir., App. at 10a. The D.C. Circuit, in effect, allowed the Secretary to re-write the regulation, which contradicts *Kisor's* second part. The D.C. Circuit's examination of the regulation's text, structure, history, and purpose showed no effort to dispel ambiguity. Instead, diverging from *Kisor*, the D.C. Circuit sought to validate the Secretary's interpretation for reasonableness rather than to ascertain if the regulation's text concerning "violations…in the preceding 15-month period" could be applied as written, without reference to the Secretary's proffered interpretation. D.C. Cir. App. 9a-10a.

Examples of the D.C. Circuit's analysis emphasize this point.[4] First, when analyzing the text, the D.C. Circuit never provided "its own independent textual analysis" to include the analysis of the sentences of 30 C.F.R. 100.3(c). *See, e.g., Kisor*, 139 S.Ct. at 2427 (Gorsuch, J., concurring) (highlighting the importance of an "independent" analysis). In this case, the D.C. Circuit noted that "[t]he regulation does not spell out the sequencing needed to compute an operator's history (i.e., violation, citation, assessment, final order) and when each thing must occur. This lack of detail makes the regulation susceptible to competing interpretations…" D.C. Cir., App. 10a. Yet the Court neglects to account for the fact that that the Secretary's alternative proffered versions use the terms violation and citation interchangeably and that the regulation has sequential sentences, with different terms used in each sentence, the consequence of which was never explained by the Court.

4. Of course, if *Chevron*, including footnote 9, is overruled in *Loper Bright/Relentless*, then *Kisor*, by implication would also be overruled and the whole issue of deference could become moot. In which case, the D.C. Circuit may be required to simply apply the regulation independent of any deference to the agency position.

When analyzing structure, the D.C. Circuit simply noted that "[g]iven the amount of process afforded by the Mine Act, it is difficult to conclude that the process must be completed within 15 months of a citation being issued…As such, the structure of the Mine Act favors the Secretary's reading, because the Secretary's reading does not restrict the process afforded to a fairly short 15 months." D.C. Cir., App. at 12a. Of course, the aim of the structural analysis in *Kisor* is to dispel ambiguity and determine if the regulation can be applied as it is plainly written, not to prefer one interpretation over another. A proper structural analysis would require comparing the regulation with its immediately surrounding provisions for context. For instance, 30 C.F.R. § 100.3(c)(2) indicates that MSHA intended to confine "history" to recent conduct leading to violations, not to older violations that simply happened to become final within the past 15-month period. This subsection was not discussed. Moreover, MSHA certainly considered processing times and deadlines under the Mine Act when it promulgated 30 C.F.R. §100.3(c) as this was discussed in the Preamble. *Criteria and Procedures for Proposed Assessment of Civil Penalties*, 72 Fed. Reg. 13,592, 13604 (March 22, 2007) ("Preamble"). To the contrary, the D.C. Circuit's structural concern is not found in the regulation or even the statute.

When analyzing history, the D.C. Circuit started its analysis by stating that "the history of the regulation also favors the Secretary's reading," once again demonstrating a departure from the independent review of "history" required by *Kisor.* D.C. Cir., App 12a. For history, the D.C. Circuit had access to an extensive eight-page historical account in the regulation's Preamble. *Id.*, 72 Fed. Reg. at 13602-13610. Included in the Preamble was direct evidence

that MSHA intentionally reduced the look-back period from 24 to 15 months as a trade-off for new penalties for repeat violations, yet this did not guide an unbiased analysis.

In that Preamble, the drafters clearly stated that "[u]nder the proposal, the period of time would be shortened to 15 months [from 24 months] and an operator's history of violations would include two components: the total number of violations and the number of repeat violations in that 15-month period." *Id.* at 13603. Further the Preamble stated that "MSHA believes that operators who violate the Mine Act… should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior." *Id.* at 13604. Finally, the Preamble noted that "…it takes approximately three months for a penalty assessment to become a final order of the Commission, the proposed 15-month period would provide the Agency with at least one full year of data…" *Id.*

Certainly, these external passages of the Preamble contextualize the regulation's structure and show an intent to shorten the historical lookback period and balance this by adding penalties for repeat violations, aiming to include 12 months of relevant history (and 3 months of processing), while focusing on recent rather than all past violations. The extensive historical record underscores this context. The D.C. Circuit selectively referenced a single clause from one of eight pages of the Preamble focusing on final orders, repeatedly citing the same provision about including a violation in an operator's history once it becomes final. D.C. Cir., App. 4a, 12a, 13a. (Citing the same sentence in

the Preamble, 13,604). The full sentence cited by the D.C. Circuit states, "[a]s each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final." App. 28a (*quoting* Preamble at 13,604). However, this cited clause did not make it into the regulation and the uncontested second sentence of the regulation, does not say what the D.C. Circuit infers, illustrating the problem with examining clauses or even sentences from the history in isolation and reading things into the regulation that are not there. Also, if this part of the history was not included in the regulation, why should it be "authoritative?" Kavanaugh, *Fixing Statutory Interpretation*, 129 Harvard Law Review, 2118, 2124 (2014).

The three provisions GMS highlighted contextualize the only clause identified by the D.C. Circuit. This Court has cautioned against relying on history to create ambiguity. *See, Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 70 S. Ct. 445, 94 L. Ed. 616 (1950) (declining to consult legislative history when "that history is more conflicting than the text is ambiguous"). Nowhere does the Preamble or the regulation state that citations, "regardless of when issued" will be included in the 15-month "history," as the D.C. Circuit ultimately concluded. D.C. Cir., App 4a, 10a.

Third, as to purpose, the D.C. Circuit cited the very broad aim of mine safety legislation to justify its interpretation, but this overlooks the specific regulatory mechanisms, like 30 C.F.R. § 100.3(c), that MSHA has authority to promulgate. The D.C. Circuit's assertion that "under GMS' reading, operators could avoid future consequences by prolonging penalty contests" misses the point. D.C. Cir., App, 14a. MSHA has the rule-making

authority to create and/or revise regulations as it sees fit, just as it did to shorten the lookback period and then offset this by adding penalties for repeat violations. However, by allowing the Secretary to effectively re-write the regulation by proclamation instead of through a formal amendment, the D.C. Circuit's approach was at odds with *Kisor,* and frustrated what MSHA was trying to achieve through the regulation by limiting history to recent history.

After its analysis of text, structure, history and purpose, the D.C. Circuit concluded that "These two sentences [in §100.3(c)] say nothing about when the underlying violation must have occurred or been cited." D.C. Cir, App. 14a. Respectfully, the first sentence quite clearly refers to "violations in a preceding 15-month period." 30 C.F.R. 100.3(c). This means the violations occurred in the preceding 15 months. This phrase occurs only twice in the D.C. Circuit's Decision. Yet, the words "regardless of when issued" as proffered by the Secretary appear nowhere in the regulation. *See,* D.C. Cir, App. 4a, 10a (describing the Secretary's proffered interpretation of the regulation).

Rather than exercise an independent analysis, the D.C. Circuit used the "tools" to create ambiguity and support the Secretary interpretation. This approach by the D.C. Circuit conflicts with *Kisor* and other precedents of this Court. For example, this Court noted that the analysis of text is to clear up ambiguity. In *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), this Court noted that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning." *Id.* at 2469.

This Court took the same approach to Legislative history, holding that "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *See, Milner v. Dep't of Navy*, 562 U.S. at 574; *Accord, United States v. Chisholm*, 940 F.3d 119, 133 (1st Cir. 2019). *See also, Humane Soc'y of the United States v. Kempthorne,* 579 F. Supp. 2d. 7, 18 (Dist. D.C. 2008) ("Nor can legislative history dispel the ambiguity identified above"). Consistent with this approach, this Court has also held that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

The D.C. Circuit misapprehended and misapplied *Kisor.*

C. If *Kisor* Permits the Methodology Used by the D.C. Circuit, the Court Should Overrule *Kisor* or Clarify *Kisor's* "Limits."

This case is a perfect example that courts can find creative ways to continue past practices, even when cautioned to change. In *Kisor*, Justice Gorsuch hopefully commented that "[t]he majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to 'exhaust all the 'traditional tools' of construction' before they even consider deferring to an agency." *Kisor,* 139 S. Ct. at 2448 (Gorsuch, J., concurring in judgment).

Given that Justice Kagan emphasized the words "limit" and "restraint" multiple times in *Kisor* (*Kisor,* 139 S.Ct. at 2414, 2415, 2416, 2417, 2423), Justice Gorsuch's concerns about the potential ineffectiveness of the ruling was plausible. The *Kisor* Court made it clear that it wanted to limit deference except in the most limited circumstances, while Justice Gorsuch's foresight suggested he had reservations about the *Kisor* rule's practical application. Justice Gorsuch also commented that "[a]lternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is…." *Id.* at 2448. This case exemplifies why Justice Gorsuch cautiously qualified his views and why he went so far as describing *Kisor* as "more a stay of execution than a pardon." *Id.* at 2435.

In this case, D.C. Circuit superficially cited *Kisor* and purported to follow it. Unfortunately, the reality is that D.C. Circuit took a different route. As a result, *Auer* has now proven not only to be "more resilient" (if the D.C. Circuit approach prevails), but *Auer* has morphed into something much stronger that it ever was. If this happens, the "zombified" *Auer* described by Justice Gorsuch in his concurrence in *Kisor*, will emerge from the darkness as a far more virulent form of deference than even the original *Auer* deference. *See, Kisor,* 139 S.Ct. at 2425, (Justice Gorsuch concurring) (calling the *Kisor* approach a "zombified" version of *Auer*). Moreover, if the D.C. Circuit version of *Kisor* prevails, this has subverted the predictability of "notice and comment rulemaking," as well as the Court's independent analysis. *See Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari). (Thomas, J.) (*quoting Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)). *See also, Perez v. Mortgage Bankers*, 135 S. Ct. 1221 (2015)

(Thomas, J.) ("When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check"). The reconsideration of *Auer* that Justice Thomas and several other Justices felt was necessary, did not achieve the desired result in *Kisor*.

This Court's intent in *Kisor* is underscored by the adoption of the principle from *Chevron's* footnote 9 – prioritizing the exhaustion of traditional interpretative tools before deferring to an agency's view. *Chevron,* 467 U.S. at 843, n. 9; *see Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J. concurring in judgment). This approach aimed to prevent bias toward agency interpretations, cautioning lower courts not to place "a thumb on the scale in favor of an agency." *Id.* However, when these tools are misapplied to foster ambiguity and back the agency, as occurred here, the thumb remains, contradicting the Court's objective, and effectively maintaining the bias *Kisor* sought to eliminate.

The D.C. Circuit's approach in this case could fairly be termed an "*Auer* maximalism," and is akin to the concept of "*Chevron* maximalism." where the tools of statutory interpretation are used not to discern the best reading of the text but to justify an agency's so-called "reasonable" interpretation. *See e.g., Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1297-8 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part) ("they use the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency's interpretation is "reasonable.")

Several Justices have strongly criticized *Auer* as being inconsistent with the Constitutional separation of powers. *e.g., Kisor*, 139 S.Ct. at 2436 (Gorsuch, concurring in judgment) ("Not only is Auer incompatible with the

APA; it also sits uneasily with the Constitution. Article III, § 1 provides that the 'judicial Power of the United States' is vested exclusively in this Court and the lower federal courts."); *see also, Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.) (*Auer* "represents a transfer of judicial power to the Executive Branch.").

The approach adopted by the D.C. Circuit could enable executive administrative tribunals and courts to misuse the tools of construction, to manufacture ambiguities that favor the agency interpretation, leading to automatic deference, instead of resolving seeming ambiguities and applying regulations as written. This approach is even more dangerous that the purely reflexive deference because it permits courts to use all the tools in the toolbox to create and build ambiguity and it allows agencies to effectively amend regulations without adhering to the essential notice and comment rulemaking procedures.

While it was clear that *Auer* deference survived *Kisor* in an altered form, this case demonstrates that such an altered form may encourage more *Auer* deference, not less. Along these lines, courts have never regularly agreed on what is "ambiguous" in the context of *Chevron*. *See* Kavanaugh, *Fixing Statutory Interpretation*, 129 Harvard Law Review at 2152. Since *Auer/Kisor* is based on *Chevron*, it is no surprise that things would be the same in the context of *Auer/Kisor*.

If the D.C. Circuit's approach and the resulting "*Auer* maximalism" is not what the Court intended in *Kisor*, then this Court should revisit the concept of *Auer* deference and either overrule or clarify the *Kisor* guidance to prevent other administrative tribunals and courts from following the example of the D.C. Circuit.

D. The Circuit Courts Have Inconsistently Applied *Kisor*.

Even before considering the application of *Kisor* directly, the distinction which GMS identifies in Section I.A has already been applied in the context of *Chevron*. *See Cabeda*, 971 F.3d at 187 (3d Cir. 2020) (referring to the robust application of all the "tools" to "dispel ambiguity"); *See also, Ruiz-Almanzar,* 485 F.3d at 198 (2d Cir. 2007) (referring to the use of "traditional means" to "dispel any ambiguities" in the context of lenity). By analogy, and based on the interrelationship between *Chevron* and *Kisor,* this authority conflicts with the D.C. Circuit's failure to use the "tools" of construction to dispel ambiguity.

In addition, conflicts in the application of *Kisor* are also already apparent, notwithstanding the fact that *Kisor* is relatively new. At least one other Circuit Court has noted that "[w]e thus find little or no ambiguity in the plain text of the regulation. Any ambiguity that might remain is dispelled by the purpose of the Standard and its regulatory history." *Sec'y of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1308 (9th Cir. 2019). Other Circuit Courts, following *Kisor,* have used the tools of construction to apply the regulation *before* considering the agency interpretation. For example, in *Bey v. City of New York*, 999 F. 3d 157, 166 (2d Cir. 2021), the Second Circuit held that "[C]ourt[s] should apply *Auer* deference only *after* having exhausted all of the 'traditional tools of construction' to determine that a rule or regulation is 'genuinely ambiguous.'" *Id.* (*quoting Kisor*, 139 S. Ct. at 2416) (emphasis added). Similarly, in *United States v. Malik Nasir*, 17 F.4th 459 (3rd Cir. 2021), the Third Circuit held that "a court must carefully consider the text,

structure, history, and purpose of a regulation, in all the ways it would *if it had no agency to fall back on*. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.* at 471 (emphasis added). The Second Circuit later noted that the regulatory "commentary that 'expanded and did not merely interpret' the Guidelines may not be entitled to deference." *United States v. Yu Xue,* 42 F.4th 355, 361 (*citing Nasir*, 17 F.4th at 470-71).

The Fifth Circuit highlighted specifically how the Circuit Courts were split on whether *Kisor* altered *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) (where the Court found that the guidelines commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"), with five Circuits deeming *Stinson* to be altered by the "less deferential standard of *Kisor*" (due to the requirement of applying the text) and five others holding to the contrary. *See United States v. Vargas*, 74 F.4th 673, 678 (5th Cir. 2023) (footnotes 2 and 3 listing the five cases on each side).

Further, at least one Circuit Judge noted frustration with the superficial application of *Kisor*, stating in a dissent that "the panel opinion barely even cracked the toolbox's lid before slamming it shut and locking it. As I've noted, the panel opinion looked at only three dictionary definitions for isolated words, gave up, and declared the provision unascertainable." *West Virginia v. United States Dep't of the Treasury*, 2023 U.S. App. LEXIS 24484, *22-23 (September 14, 2023) (Rosenbaum, J. dissenting in denial of *en banc* rehearing).

The DC Circuit is unique in using the tools of construction directly to create ambiguity and validate the government position.

E. This Case is an Ideal and Timely Vehicle to Resolve These Important Issues.

This case is an ideal and timely vehicle for the Court to review and clarify its holding and directives in *Kisor*. The D.C. Circuit's assertion in its decision that it followed this Court's directives in *Kisor* sets the stage for this Court to assess whether this claim is accurate. This case uniquely demonstrates how lower courts like this D.C. Circuit panel can misuse the "tools" of construction to create ambiguity to support an agency's position, effectively preserving the *Auer* legacy. It exposes significant shortcomings of *Kisor*, demonstrating the need for clearer guidance on the requirement for courts to undertake a genuinely independent analysis of regulations under review.

It is apparent that the rules applicable to *Auer* deference are intertwined with those related to *Chevron* deference and Justice Kagan cited footnote 9 when crafting *Kisor*. *Kisor,* 139 S.Ct. 2415. Justice Kagan also noted that "[u]nder *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* at 2416. (*citing Arlington v. FCC,* 569 U. S. 290, 296, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013)). Moreover, Justice Kagan noted that one facet of *Auer* deference outlined in *United States v. Mead Corp.*, 533 U. S. 218, 229-231, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) adopted "a similar approach to *Chevron* deference." *Id.* at 2414. If there was any question about the relationship between the *Kisor* template and footnote 9 of *Chevron,* Justice Kavanaugh

also noted that "[t]he majority borrows from footnote 9 of this Court's opinion in *Chevron*…" *Kisor,* 139 S. Ct. at 2448 (Kavanaugh, J. concurring in judgment)

As noted, *Chevron* (including footnote 9) is currently on review in *Loper Bright/Relentless*. This case presents a unique opportunity for this Court to ensure that whatever rule is announced for *Chevron* will also be applied to its regulatory sibling, *Kisor*. In *Kisor*, the Court sought to restrict *Auer* by incorporating principles from *Chevron* footnote 9, yet this approach proved ineffective. When deference remains an option, despite the required procedural steps, as opposed to independent analysis by the Courts, courts will still resort to it, leading to the re-writing of regulations beyond their original intent, as occurred in this case.

If not addressed, the issues raised in this Petition will lead to an expanded form of *Auer* deference where courts merely nod to *Kisor* before using interpretive tools to find ambiguity and support agency interpretations, undermining *Kisor's* framework and purpose. This concern is significant in the context of the expansive administrative state, where agency rulemaking predominates over legislative lawmaking. *See, INS v. Chadha*, 462 U.S. 919, 985-986 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress."). Allowing interpretive tools to be employed to affirm ambiguity, as was done here, risks courts routinely inventing ambiguities using the available canons of construction.

II. *Kisor* Did Not Allow the Secretary to Re-Write 30 C.F.R. 100.3(c), Absent Notice and Comment Rulemaking.

In *Kisor*, Justice Gorsuch highlighted that the APA's detailed rulemaking procedures, including notice and comment, imply that an agency cannot alter a substantive rule without following these steps. *Kisor*, 139 S. Ct. at 2434-35. (Gorsuch, J., concurring in judgment). Nevertheless, in this case, the Secretary effectively re-wrote 30 C.F.R. 100.3(c) without adhering to the notice-and-comment rulemaking procedures, and the D.C. Circuit sanctioned this action. Under the newly approved interpretation, the regulation is deemed to say what it does not actually say. Based on the D.C. Circuit's Decision, the Secretary's newly reworked version of 30 C.F.R. §100.3(c), which was not subject to notice-and-comment rulemaking, now apparently would look something like this:

> (c) History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard, that have been paid or finally adjudicated, or become final orders of the Commission, in a preceding 15-month period, regardless of when the citations and orders or violations were issued or occurred. ~~Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history.~~ The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator

> has received 10 violations or an independent contractor operator has received 6 violations.

The additional terms added to the regulation are taken directly from the D.C. Circuit's characterization of the Secretary's position, which it adopted. See, D.C. Cir, App. 4a, 10a.

By deference, the D.C. Circuit effectively merged two distinct and sequential sentences in the regulation and implicitly added the phrase "regardless of when issued," despite the regulation plainly specifying "in a preceding 15-month period" for history consideration. It is ironic that the D.C. Court then accused GMS of seeking to insert words into the regulation in violation of *Newman*, D.C. Circuit, App. 14a-14-b. However, the D.C. Circuit did just that by endorsing the inclusion of the "regardless of when issued" phrase instead of adhering to the regulation's plain text that stipulates a 15-month look back period. D.C. Cir., App 4a, 10a.

The Secretary's regulatory re-writing runs afoul of even the earlier standard of "plainly erroneous or inconsistent with the regulation" described in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). It is patently unfair to allow an agency to write a regulation one way and then, under the guise of deference, interpret it another. If *Kisor* can be interpreted as permitting this approach, then it is imperative for the Court to reconsider the *Kisor* precedent.

CONCLUSION

The D.C. Circuit's ruling represents a misinterpretation and consequent misapplication of the Supreme Court's

decision in *Kisor*, thereby warranting review. It was never the intent of this Court in *Kisor* for lower courts to misuse interpretative tools to manufacture ambiguity and unjustly expand *Auer* deference, rather than resolving ambiguities and applying the regulation as written.

This Court should take this opportunity to either overrule or clarify the *Kisor* framework to ensure that lower courts conduct genuinely independent analyses and prevent agencies from effectively rewriting regulations without proper notice-and-comment rulemaking. The broader implications for administrative law and the uniformity of judicial review make this an issue of national importance, meriting the High Court's intervention. Accordingly, the Court should grant this petition for a writ of certiorari. In the alternative, the Court should hold this case until the Court decides *Loper Bright/Relentless*, and then remand to the D.C. Circuit to apply the Court's decision with respect to the continued validity of *Chevron*, and by extension, *Kisor*.

Respectfully submitted,

James P. McHugh
Counsel of Record
Christopher D. Pence
Hardy Pence, PLLC
10 Hale Street, 4th Floor
Charleston, WV 25301
(304) 345-7250
jmchugh@hardypence.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

Appendix A

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 17, 2023 Decided July 7, 2023

No. 22-1143

GMS MINE REPAIR,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

On Petition for Review of a Decision of the Federal Mine Safety and Health Review Commission.

Before: HENDERSON, MILLETT and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

Appendix A

CHILDS, *Circuit Judge*: In this petition for review, a mine operator and the Secretary of Labor dispute the meaning of a regulation that governs which safety and health violations are counted as part of an operator's history when that operator violates federal standards and must be assessed penalties. We conclude that the regulation at issue is ambiguous, the Secretary's interpretation is reasonable, and that interpretation is entitled to deference. Therefore, we deny this petition.

I

A

The Federal Mine Safety and Health Act of 1977 (Mine Act or Act) charges the Secretary of Labor (Secretary) with establishing and enforcing safety and health standards for the operation of the nation's mines. *W. Oilfields Supply Co. v. Sec'y of Labor and Fed. Mine Safety & Health Rev. Comm'n*, 946 F.3d 584, 586, 445 U.S. App. D.C. 1 (D.C. Cir. 2020). The Mine Act intended to remedy the shortcomings of two prior laws, the Federal Metal and Non-Metallic Mine Safety Act of 1966 and the Federal Coal Mine Health and Safety Act of 1969. S. REP. NO. 95-181, at 6-9 (1977). As the Senate identified in 1977, these two laws failed to protect miners from hazards, slowed the federal response time to emerging dangers, provided for penalties that were "much too low, and paid much too long after the underlying violation," and created sanctions that were "insufficient to deal with chronic violators." *Id.* at 8.

To address these deficiencies, the Mine Act required the Secretary, through the Department of Labor's Mine Safety and Health Administration (MSHA), to investigate accidents and conduct frequent inspections at mines throughout the calendar year. 30 U.S.C. § 813; *see also Donovan v. Dewey*, 452 U.S. 594, 596, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). The Act also authorized the Secretary to promulgate mandatory standards and issue citations to operators who violate these standards. 30 U.S.C. §§ 811(a), 814(a)-(b) and (d). An independent commission, the Mine Safety and Health Review Commission (the Commission), then assigns an administrative law judge (ALJ) to review contested citations and, where appropriate, impose proposed penalties against operators.[1] 30 U.S.C. §§ 820(a)-(c), 823(d)(1). A five-person board constituting the Commission may, in its discretion, review an ALJ's determination; otherwise, the ALJ's determination becomes the final decision of the Commission. 30 U.S.C. § 823(d)(1). Ultimately, the penalties assessed by the MSHA must account for, among other things, "the operator's history of previous violations . . . ." 30 U.S.C. § 820(i). The MSHA sets forth how it accounts for this history in Section 100.3(c) of its regulations, which considers violations "in a preceding 15-month period" that "have been paid or finally adjudicated, or have become final orders of the Commission . . . ." 30 C.F.R. § 100.3(c); *see also* III MSHA, Program Policy Manual 97 (June 2012). Since 1982, the practice has been to include the violation

1. An "operator" is "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).

"in an operator's history as of the date it becomes final." Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592, 13,604 (Mar. 22, 2007) (Preamble).

B

GMS Mine Repair and Maintenance, Inc. (GMS) is a mining contractor that provides "specialized services" to mines in North America. Petitioner's Br. iii. GMS provided contract services at the Mountaineer II Mine in West Virginia on April 20 and 27, 2021, during which time the MSHA issued several citations against it. Although GMS stipulated to the "findings of gravity and negligence," it contested the $7,331 proposed penalty. J.A. 75-76. Thereafter, GMS went before an ALJ to dispute the MSHA's method of calculating the penalty, because it disagreed with "what precisely gets counted as the operator's violation history . . . ." J.A. 78.

The Secretary, representing the MSHA, argued that all citations and orders that have become final during the 15-month look-back period are counted toward an operator's history of violations, "regardless of when [the citations or orders] were issued." J.A. 78. In opposition to this view, GMS argued that only violations whose citations or orders were both issued during the look-back period and were finalized during that period could count toward an operator's history of violations. The ALJ deferred to the Secretary's reading, deeming the regulation ambiguous "[o]n its face." J.A. 78.

GMS petitioned the Commission to review the ALJ's determination, and when the Commission did not act, the ALJ's determination became the final decision. Had the Commission accepted GMS's reading, the company's penalties would have been $3,268—roughly half the amount assessed. GMS timely petitioned this Court for review.

II

A

GMS raises factual arguments that we quickly reject before considering the remainder of its petition. GMS argues that the ALJ "misinterpreted certain material facts" and made an inappropriate "policy pronouncement" in the underlying decision. Petitioner's Br. 41, 44. These arguments are meritless because the ALJ accurately summarized GMS's position on which violations may be counted in an operator's history of violations, and the ALJ could factor into the analysis a sampling of cases provided by the Secretary that reflected common timelines for resolving penalty contests. J.A. 78-79.

B

The Secretary has consistently maintained that violations that become final within the 15-month look-back period are to be included in an operator's history of

violations, but GMS's position has been far less stable.[2] At times, GMS alternatively argues for the inclusion of only:

1. Violations that occurred during the preceding 15-month period. *See* Petitioner's Br. 21 ("The language is clear and only refers to violations in the preceding 15 months. There is no reference to violations *before* 15 months as the Secretary assert[s].");

2. Citations that were issued and finalized during the preceding 15-month period. *See* Petitioner's Br. 21 ("Any citation issued more than 15 months prior to the citation in dispute will not count because . . . only the citations issued in the preceding 15 months are part of the universe of relevant citations in this first step of the process."); *see also* J.A. 76, ¶ 22; or

3. Violations that occurred and whose citations were issued and finalized during the preceding 15-month period. Oral Arg. Tr. 7:4-9 (agreeing that "violation and citation and finalization . . . [must happen] all within 15 months").

GMS's shifting interpretations might arise from its error of conflating a violation with a citation. It declares, without support, that it is "obvious[] a violation does not become a 'violation' for purposes of [Section 100.3(c)] until

2. "When calculating an operator's violation history for purposes of proposing a penalty amount, the Secretary considers the 15-month period immediately preceding the issue date of the citation/order that is being assessed." J.A. 30.

a citation is issued." Petitioner's Br. 23. But that is untrue. Violations are the unlawful acts of an operator, while citations are the sanctions that the Secretary imposes as a result of those unlawful acts. *See* 30 U.S.C. § 814(a). These two words describe distinct events that take place at different points in the enforcement process—violations occur before citations are issued.[3]

Notwithstanding the shifting interpretations, we take it that GMS asks for us to adopt its second reading, which is for an operator's history to include only citations that were both issued and finalized during the preceding 15-month period. This reading reflects GMS's most consistent position. Unlike the other interpretations, GMS made this argument before the ALJ as well as in its briefs in support of its petition. Moreover, GMS equates a violation with a citation, which aligns with its second interpretation requiring that a citation be issued and finalized during the look-back period.

III

Our analysis of Section 100.3(c) is guided by the Supreme Court's opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019), which provided clear

3. At oral argument, GMS continued to misuse these terms, referring to violations as occurring and being issued. *Compare* Oral Arg. Tr. 4:15-18 (asserting that "violation . . . **means an occurrence** under Webster's . . . .") (emphasis added), *with* Oral Arg. Tr. at 22:14-16 ("Nowhere in the Secretary's argument does the Secretary explain where in the regulation it says that you can include **violations that were issued** four years ago.") (emphasis added); *cf.* Petitioner's Br. 23 (referring to "'violations' issued").

instructions about how courts are to evaluate agency interpretations of regulations.

First, courts must determine whether the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). These traditional tools include the "text, structure, history, and purpose of [the] regulation." *Id.* Second, even if a regulation is genuinely ambiguous, "the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* at 2416 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013)). To this end, the work that courts do reviewing the text, structure, history, and purpose form the "outer bounds" of what is reasonable. *Id.* Lastly, courts must take a third step and identify the existence of "important markers for . . . [when] deference is . . . appropriate." *Id.* What should persuade a court is the "character and context" of the agency interpretation—namely, the authoritativeness of the position asserted, implication of the agency's substantive expertise, and whether the interpretation reflects the agency's "fair and considered judgment." *Id.* at 2416-17 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012)).

For the reasons below, we conclude that Section 100.3(c) is genuinely ambiguous, and the Secretary offers a permissible reading that is also entitled to deference.

Appendix A

A

1

Of the tools that we must employ, "[t]he most traditional tool, of course, is to read the text[.]" *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088, 319 U.S. App. D.C. 12 (D.C. Cir. 1996). Section 100.3(c) states, in relevant part:

> *100.3(c) History of Previous Violations*
>
> An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history.

An "assessed" violation is one for which the Secretary has formally determined a civil penalty amount. *See* 30 U.S.C. § 820(a)(1).

GMS contends that Section 100.3(c) includes only citations that were both issued within the preceding 15-month period and became final during that period as well. In GMS's view, the first sentence of Section 100.3(c) "clear[ly]" refers to only citations in the preceding 15 months, because it omits any discussion of citations that may have occurred before this period. Petitioner's Br. 21. Even more, the only qualification appears in the second

sentence and restricts the scope of citations to ones that have also been finalized during that period.

Seeing it differently, the Secretary argues that Section 100.3(c) is not as clear as GMS asserts. The Secretary interprets Section 100.3(c) to apply to any violation that becomes final within the relevant 15-month period, regardless of when the violation occurred or when its citation was issued. To the Secretary, the first sentence of Section 100.3(c) establishes the relevant look-back period (15 months), and the second sentence merely clarifies that the field of violations to be considered must have become final during these 15 months.

Between the two, the Secretary has the better argument. Section 100.3(c) speaks of only a look-back period and that the violations to be considered must have become final during that time. The regulation does not spell out the sequencing needed to compute an operator's history (i.e., violation, citation, assessment, final order) and when each thing must occur. This lack of detail makes the regulation susceptible to competing interpretations, as seen in this dispute, which is why, based on the text alone, no single correct reading of the regulation emerges.

2

Congress built into the Act a deliberate process for assessing and adjudicating violations; this process takes time to complete. Among its many provisions, the Mine Act permits inspections and investigations, 30 U.S.C. § 813(a); issuance of citations and follow-up orders; *see,*

e.g., *id.* § 814(a)-(b), (d); procedures for enforcing those citations and orders, *see generally id.* § 815; injunctions, *id.* §§ 818(a)(1)-(2); and judicial review, *see generally id.* § 816. Clearly Congress was aware that each of these steps could take time, which it provided for in various other provisions of the Act. *See, e.g.*, 30 U.S.C. §§ 815, 823.

Despite these provisions, the statutory deadlines contained within them still do not account for the normal hindrances and happenstance that often prolong adjudicatory proceedings. The procedural history of this petition provides a case in point. Roughly two weeks after receiving the briefing schedule from our Court, GMS filed an unopposed motion for an extension of time to file its opening brief. We granted that unopposed motion a few days later. Similarly, GMS requested to reschedule oral argument, and we likewise obliged. These types of scheduling changes are as common during administrative proceedings as they are in courts of law. One can expect that such run-of-the-mill realities might easily push a contest outside of the 15-month timeframe that GMS argues must include all aspects of the process owed before a penalty is imposed.[4]

4. Although we concluded that GMS asks this Court to adopt its second and most consistent reading of the regulation, we pause to comment on GMS's position at oral argument. There, GMS argued that a violation, citation, and final adjudication must all occur within 15 months. Oral Arg. Tr. 7:4-9. As the Commission highlighted, pre-citation investigations can take longer than 15 months to complete. The Upper Big Branch mining disaster on April 5, 2010, cost the lives of twenty-nine miners and remains one of the deadliest mining accidents in recent history. Press Release, U.S. Dep't of Lab., Statement by Sec'y of Lab. Marty Walsh on the Anniversary of

Given the amount of process afforded by the Mine Act, it is difficult to conclude that the process must be completed within 15 months of a citation being issued, or else a prior violation cannot be considered as part of an operator's history. As such, the structure of the Mine Act favors the Secretary's reading, because the Secretary's reading does not restrict the process afforded to a fairly short 15 months.

3

The history of the regulation also favors the Secretary's reading. The Preamble reveals that the MSHA "anticipate[d] [the] issue" the Secretary now raises as to GMS's proposed reading: the reading would encourage contests and thwart the Secretary's ability to include violations in an operator's history. *Kisor*, 139 S.

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the Upper Big Branch Explosion (Apr. 5, 2021), available at https://perma.cc/R92S-ZD7T (last visited June 26, 2023). The MSHA did not issue contributory citations for this disaster until it released its findings from the extensive investigation on December 6, 2011—twenty months after the disaster occurred. U.S. Dep't of Lab., Proposed Assessment and Statement of Account, 1-2, Att. Narrative Findings for a Special Assessment (Dec. 6, 2011), available at https://perma.cc/QEZ9-EPA4 (last visited June 26, 2023).

Under GMS's reading, operators, such as those who committed the serious violations leading to the Upper Big Branch disaster, would never have their violations counted towards their history, because the Secretary issued the citations after an investigation that required more than 15 months to complete. So, though it might go without saying, GMS's proposed reading could let operators escape accountability for even the most egregious violations of federal mine safety and health standards.

Ct. at 2412; *see also* Preamble, 72 Fed. Reg. at 13,604. In 2007, the MSHA explained its intention to continue a longstanding practice of "us[ing] only violations that have become final orders of the Commission" and to include those violations "in an operator's history as of the date [they] become[] final." Preamble, 72 Fed. Reg. at 13,604.

While the 2007 regulation shortened the look-back period from 24 to 15 months, the MSHA remained keen on "retain[ing] the final order language" and a decades-long practice of a violation becoming a part of an operator's history on the date that it became final. *Id.* at 13,604. Understanding this desire, the Secretary's reading of the regulation comports with the regulation's history as it reinforces the importance of finality rather than the lesser concerns—in this instance—of when the violation occurred or when the citations were issued.

4

Congress enacted coal mining legislation keeping in mind "its most precious resource—the miner." 30 U.S.C. § 801(a). The 1977 amendments expressly declared that the law intended "to prevent recurring disasters in the mining industry." Fed. Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977). And to this end, Congress placed the "primary responsibility" on mine operators to prevent unsafe conditions and practices. 30 U.S.C. § 801(e).

GMS's reading might capture some routine violations where the operator pays the proposed penalty, but

not contested violations or violations requiring special assessments. J.A. 42-43; *see also* Oral Arg. Tr. 14:23-15:8. These latter violations require longer to finalize, and under GMS's restrictive reading operators could avoid future consequences by prolonging penalty contests. An interpretation leading to this result would be "insufficient to deal with chronic violators" and could hardly protect miners in the way Congress intended. S. REP. NO. 95-181, at 8.

B

Having reviewed the text, structure, history, and purpose, we can conclude that Section 100.3(c) is genuinely ambiguous. While the structure, history, and purpose favor the Secretary's reading, the text lacks useful detail. Nevertheless, the Secretary's proposed interpretation falls within the "zone of ambiguity" created by our analysis of the regulation. *Kisor*, 139 S. Ct. at 2416.

The Secretary's interpretation cares only about when the violation becomes final, which comports with the text. This interpretation falls within the zone of ambiguity, under which the second sentence (that discusses finality) merely clarifies the first sentence (that establishes the look-back period). These two sentences say nothing further about when the underlying violation must have occurred or been cited. Notably, like the regulation, the Secretary's interpretation does not consider when the violation occurred or was cited. GMS's reading, by contrast, requires us to infer an intention for citations to have been issued during the look-back period in addition

to those citations being finalized during that period. We are not required to accept GMS's reading, nor should we be inclined to infer the presence of terms that fail to make an appearance in the regulation's plain text (here, the "issuance" of a "citation"). *See Newman v. FERC*, 27 F.4th 690, 698-99, 456 U.S. App. D.C. 73 (D.C. Cir. 2022) (declining to accept an interpretation that required our Court to infer the word "directly" as part of a regulation's intended meaning).

Equally, the Secretary's reading also comes within the zone of ambiguity considering the structure, history, and purpose. The Secretary's interpretation allows for operators to receive full process before being forced to pay penalties. Yet, it fulfills the purpose of the Act and implementing regulation by holding operators accountable for health and safety failures when determining an operator's history of violations. The Secretary's interpretation is thus reasonable and within our established bounds.

C

Finally, we decide whether the Secretary's interpretation warrants deference. *Kisor*, 139 S. Ct. at 2414. In other words, we examine "whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416. To do so, the interpretation must be the agency's "authoritative or official position;" "implicate its substantive expertise;" and "reflect [its] 'fair and considered judgment'" rather than evince an afterthought or litigation position. *Id.* at 2416-17 (citation

and internal quotation marks omitted). The Secretary's interpretation satisfies these criteria.

First, as the Preamble outlines, the Secretary's interpretation reflects its official and steadfast practice (circa 1982) of including a violation in an operator's history as of the date the violation becomes final. *See Kisor*, 139 S. Ct. at 2416 (citation omitted); *see also* Preamble, 72 Fed. Reg. at 13,604. The Preamble states that the MSHA included the phrase "final orders of the Commission" to clarify its intended continuance of this longstanding practice. Preamble, 72 Fed. Reg. at 13,604. In presenting us with a policy followed for over four decades, the Secretary certainly does not offer a post-hoc rationalization or "convenient litigating position." *Kisor*, 139 S. Ct. at 2417 (quoting *Christopher*, 567 U.S. at 155). GMS and other operators have been familiar with the Secretary's practice for quite some time.

Second, the subject matter of the regulation is within the Secretary's wheelhouse and implicates the Secretary's expertise. Congress tasked the Secretary with developing regulations for mine safety as well as the methods used to enforce those regulations. As such, imposing penalties for violations and ensuring compliance with federal mine health and safety standards is neither "distan[t] from the agency's ordinary duties," nor does it "fall within the scope of another agency's authority." *Kisor*, 139 S. Ct. at 2417 (first alteration in original, second alteration omitted) (quoting *Arlington*, 569 U.S. at 309). GMS counters that imposing sanctions does not implicate technical expertise because it is a procedural matter, which "[c]ourts deal

with . . . far more than executive agencies." Petitioner's Br. 17. But Congress did not give courts the authority to determine when and how to assess mine safety violations. It delegated that authority to the Secretary. *See* 30 U.S.C. § 801 *et seq.* Besides, this may be one instance in which even "more prosaic-seeming questions . . . [still] implicate policy expertise," which lies with the agency. *Kisor*, 139 S. Ct. at 2417.

IV

For the foregoing reasons, we deny this petition.

So ordered.

APPENDIX B — ADMINISTRATIVE LAW JUDGE OPINION, DATED MAY 13, 2022

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2021-0431
A.C. No. 46-09029-537541 MVK

Mine: Mountaineer II Mine

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Petitioner,

v.

GMS MINE REPAIR,

Respondent.

May 13, 2022

Appendix B

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION ORDER TO PAY

Before: Judge Lewis

On November 19, 2021, The Secretary of Labor ("Secretary") and GMS Mine Repair ("Respondent") filed with the undersigned cross-motions for Summary Decision in Docket No. WEVA 2021-0431. The Respondent filed its Reply Brief on November 23, 2021, and the Secretary filed its Reply Brief on December 10, 2021. The sole issue in question concerns the method of calculating an operator's violation history for purposes of proposing a penalty amount, and whether citations/orders that were issued prior to the 15-month period preceding the citation/order, but became final within the 15-month period, may be included in the operator's violation history.

Undisputed Facts

The parties submitted the following joint stipulations:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.

2. GMS Mine Repair is an operator under Section 3(d) of the Act.

3. Operations of GMS Mine Repair are subject to the jurisdiction of the Act.

4. GMS Mine Repair is a contractor who performs services at various mines.

5. Pursuant to contract with Mingo Logan Coal, LLC, the operator of the Mountaineer II Mine, GMS Mine Repair was performing services at the mine on April 20 and 27, 2021 when the citations at issue in this proceeding were issued.

6. MSHA Inspectors Andrew Bell and Paul Fought were acting in their official capacity and as authorized representatives of the Secretary of Labor when each of the citations at issue in this proceeding were issued.

7. The total proposed penalty amounts for the five citations at issue in this matter have been proposed by MSHA pursuant to 30 U.S.C. Section 820(a) of the Act and 30 CFR Part 100.3.

8. Payment of the total proposed penalty amount, $7,331, for the five citations at issue in this matter would not affect the ability of GMS Mine Repair to remain in business.

9. Copies of the citations at issue in this matter, along with all continuation forms and modifications, were served on GMS Mine Repair or its agent as required by the Act.

10. The copies of the five citations that were included with the Secretary's penalty petition, attached as part of Exhibit A, are accurate and authentic copies of those citations, with all modifications and abatements, and may be admitted into the record in this matter.

11. The violations cited in each of the citations at issue in this matter were abated in good faith and were subject to a 10% penalty reduction.

12. The Respondent agrees to accept all five citations at issue in this docket as issued, including any findings of gravity and negligence.

13. The only issues being contested by Respondent in this proceeding are the method of calculating the proposed penalty amounts used by the Secretary and the total amount of the proposed penalties.

14. The Respondent agrees that the penalty point computations shown on Exhibit A are correct except for the number of points assigned for history of violations in the column "VPID Pts."

15. "VPID" refers to violations per inspection day.

16. For a contractor, such as Respondent, the overall history of violations points is calculated based upon the total number of citations and orders issued to the contractor at all mines at which it operates which is different from a mine operator

which only considers citations/orders issued at a particular mine.

17. In assessing the penalty points for the VPID criteria MSHA considers all citations or orders that became final during the 15-month period immediately preceding the issuance of the citation or order being assessed.

18. For the four citations in this case that were issued on April 20, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 20, 2020 through April 19, 2021.

19. For the remaining citation in this case that was issued on April 27, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 27, 2020 through April 26, 2021.

20. The dispute in this case is over which citations and orders are to be included in determining the Respondent's history of violations.

21. Under the Secretary's approach, all citations and orders that became final during the relevant 15-month period are included in the determination of an operator's violation history.

22. The Respondent argues that only citations and orders that were both issued during the relevant 15-month period and became final during that

period should be included in the determination of the Respondent's violation history.

23. If the Secretary's approach is ultimately upheld, the penalty points for the VPID criterion is correct and the penalty amounts are correct as shown on Exhibit A.

24. Under the Respondent's approach to calculating the history of violations criterion for each of the citations at issue in this proceeding, five previous citations would be considered which corresponds to 0 penalty points.

25. Under the Respondent's approach to calculating the history of violations criterion for each of the citations in this docket, with 0 penalty points for history of violations, the following penalty amounts would be applicable per Part 100, 100.3:

Citation	Total Points	Penalty (including good faith reduction)
9298012	86	$1,006
9298012	86	$1,006
9298015	46	$125
9298016	46	$125
9293663	86	$1,006
Total		$3,268

26. Regardless of the administrative law judge's decision addressing this dispute, both parties reserve the right to appeal any decision to the Commission.

Secretary's Motion for Summary Decision, 3-6.

Summary Decision Standard

The Court may grant summary decision where the "entire record…shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence "in the light most favorable to … the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials

[supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party's claims. *Celotex*, 477 U.S. at 323. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

Analysis

Section 110 of the Mine Act, in relevant part, provides:

> (a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 [currently $73,901] for each such violation.
>
> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability

> to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 USC § 820(a)(1)(i).

The Secretary has promulgated regulations, which implement the statutory requirements contained in Section 110 of the Mine Act, which state in relevant part:

> *History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.
>
> (1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection

> day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

30 CFR §100.3(c).

The dispute in this case concerns what precisely gets counted as the operator's violation history in the 15-month period. There is no disagreement that citations and orders that have become final in the 15-month period are included. However, the Respondent argues that in order to count towards the operator's history, the violation must have both occurred and been paid, adjudicated, or have become a final order of the Commission during the 15-month period. The Secretary argues that all citations and orders that have become final in the 15-month period are counted, regardless of when they were issued.

On its face, the regulation is ambiguous and can be read to support either party's position. Based on the language of the regulation, it is unclear if the second sentence is intended to limit the violations mentioned in the first sentence to those that were issued and finalized in the preceding 15-month period, or if it is intended to clarify that the 15-month period is only in reference to the finalization date. Both competing interpretations are reasonable.

Appendix B

MSHA is entitled to deference of an MSHA regulation as long as its interpretation is not "plainly erroneous or inconsistent with the regulation." *MSHA v. Spartan Mining Co.*, 415 F.3d 82, 84 (D.C. Cir. 2005)(quoting *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)); *see Secretary of Labor v. Excel Mining, LLC,* 334 F.3d 1, 6 (D.C.Cir.2003). "In fact, deference is appropriate when the agency advances a permissible interpretation even if that interpretation diverges from what a first-time reader of the regulation would conclude is the best interpretation of the regulation." *MSHA v. Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016).

In support of its interpretation, the Secretary submits language from the Preamble to the Final Rule, as well as MSHA's Program Policy Manual. Courts have held that agency interpretations that lack the force of law, such as those in opinion letters and policy manuals, are not entitled to Chevron-style deference when used to interpret ambiguous statutes, but do receive deference under *Auer* when interpreting ambiguous regulations. *See Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). In response to some commenters' concerns about the changes, the Final Rule states, "As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final." *Secy. Mot.*, Exhibit B, at 13604. MSHA's Program Policy Manual states that "Overall history is based on the number of citations/orders issued to the mine operator at the applicable mine that became final orders of the Federal Mine Safety and Health Review Commission

(Commission) in the 15 months preceding the occurrence date of the violation being assessed." *Sec'y Mot.*, Exhibit C.

Various passages of the Preamble also support the Respondent's argument. *See Resp. Mot.* at 4. In response to some commenters' concerns about the Final Rule shortening the relevant time-period from 24 to 15 months, MSHA replied that the agency determined that it took approximately three months for a penalty assessment to become final, so the 15-month period would provide the agency with a full year of data. *Secy. Mot.*, Exhibit B, at 13604. Furthermore, the agency justified the shortening of the time-period by stating that it would provide the agency with "a more recent compliance history" and that "MSHA believes that operators who violate the Mine Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior." *Id.* However, it is not for this Court to determine which interpretation is the most reasonable. The Supreme Court has held that "it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991)(citations omitted).

Furthermore, Respondent's interpretation of the regulation would likely lead to an absurd application of the statutory provision in the Mine Act concerning an operator's history of previous violations. Section 110(i) of the Act makes clear Congress's intent that an operator's

history of previous violations is one of the criteria that must be considered in assessing a penalty. 30 USC 820(a)(1)(i). However, under the Respondent's interpretation of the regulation, most (if not all) violations would not be considered in the penalty assessment. This is due to the fact that when an operator contests a citation or order, it rarely becomes final within 15 months. *See Secy Mot.* at 13-16. Respondent's interpretation would likely lead to a perverse incentive for operators to simply contest every citation and order until the expiration of 15 months as a way of lowering assessed penalties by placing most previous violations out of the realm of consideration. This framework would wholly negate the clear congressional mandate that the operator's history of previous violations be considered in assessing penalties.

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's Motion for Summary Decision is **DENIED**. Furthermore, Respondent GMS Mine Repair is **ORDERED** to pay the Secretary of Labor the sum of $7,331.00 within 30 days of this order.[1]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

1. Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

APPENDIX C — DENIAL OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 25, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22-1143

SEPTEMBER TERM, 2022

MSHR-WEVA2021-0431

Filed On: August 25, 2023

GMS MINE REPAIR,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any members of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX D — DENIAL OF PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 25, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22-1143

SEPTEMBER TERM, 2022

MSHR-WEVA2021-0431

Filed On: August 25, 2023

GMS MINE REPAIR,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

BEFORE: Henderson, Millett and Childs, Circuit Judges

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on August 16, 2023, it is

ORDERED that the petition be denied.

Appendix D

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX E — 30 CFR 100.3

30 CFR 100.3 (up to date as of 10/23/2023) Determination of penalty amount; regular assessment.

This content is from the eCFR and is authoritative but unofficial.

Title 30 — Mineral Resources

Chapter I — Mine Safety and Health Administration, Department of Labor

Subchapter P — Civil Penalties for Violations of the Federal Mine Safety and Health Act of 1977

Part 100 — Criteria and Procedures for Proposed Assessment of Civil Penalties

Authority: 5 U.S.C. 301; 30 U.S.C. 815, 820, 957; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701.

Source: 72 FR 13635, Mar. 22, 2007, unless otherwise noted.

§ 100.3 Determination of penalty amount; regular assessment.

(a) ***General.***

(1) Except as provided in § 100.5(e), the operator of any mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of the Mine Act,

as amended, shall be assessed a civil penalty of not more than $85,580. Each occurrence of a violation of a mandatory safety or health standard may constitute a separate offense. The amount of the proposed civil penalty shall be based on the criteria set forth in sections 105(b) and 110(i) of the Mine Act. These criteria are:

(i) The appropriateness of the penalty to the size of the business of the operator charged;

(ii) The operator's history of previous violations;

(iii) Whether the operator was negligent;

(iv) The gravity of the violation;

(v) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and

(vi) The effect of the penalty on the operator's ability to continue in business.

(2) A regular assessment is determined by first assigning the appropriate number of penalty points to the violation by using the appropriate criteria and tables set forth in

this section. The total number of penalty points will then be converted into a dollar amount under the penalty conversion table in paragraph (g) of this section. The penalty amount will be adjusted for demonstrated good faith in accordance with paragraph (f) of this section.

(b) ***The appropriateness of the penalty to the size of the business of the operator charged.*** The appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year. In cases where a full year of data is not available, the coal produced or hours worked is prorated to an annual basis. This criterion accounts for a maximum of 25 penalty points.

Appendix E

Table I — Size of Coal Mine

Annual tonnage of mine	**Penalty Points**
0 to 7,500	1
Over 7,500 to 10,000	2
Over 10,000 to 15,000	3
Over 15,000 to 20,000	4
Over 20,000 to 30,000	5
Over 30,000 to 50,000	6
Over 50,000 to 70,000	7
Over 70,000 to 100,000	8
Over 100,000 to 200,000	9
Over 200,000 to 300,000	10
Over 300,000 to 500,000	11
Over 500,000 to 700,000	12
Over 700,000 to 1,000,000	13
Over 1,000,000 to 2,000,000	14
Over 2,000,000	15

Table II — Size of Controlling Entity — Coal Mine

Annual tonnage	**Penalty Points**
0 to 50,000	1
Over 50,000 to 100,000	2
Over 100,000 to 200,000	3
Over 200,000 to 300,000	4
Over 300,000 to 500,000	5

Over 500,000 to 700,000	6
Over 700,000 to 1,000,000	7
Over 1,000,000 to 3,000,000	8
Over 3,000,000 to 10,000,000	9
Over 10,000,000	10

Table III — Size of Metal/Nonmetal Mine

Annual hours worked at mine	**Penalty Points**
0 to 5,000	0
Over 5,000 to 10,000	1
Over 10,000 to 20,000	2
Over 20,000 to 30,000	3
Over 30,000 to 50,000	4
Over 50,000 to 100,000	5
Over 100,000 to 200,000	6
Over 200,000 to 300,000	7
Over 300,000 to 500,000	8
Over 500,000 to 700,000	9
Over 700,000 to 1,000,000	10
Over 1,000,000 to 1,500,000	11
Over 1,500,000 to 2,000,000	12
Over 2,000,000 to 3,000,000	13
Over 3,000,000 to 5,000,000	14
Over 5,000,000	15

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Table IV — Size of Controlling Entity-Metal/ Nonmetal Mine

Annual hours worked	**Penalty Points**
0 to 50,000	0
Over 50,000 to 100,000	1
Over 100,000 to 200,000	2
Over 200,000 to 300,000	3
Over 300,000 to 500,000	4
Over 500,000 to 1,000,000	5
Over 1,000,000 to 2,000,000	6
Over 2,000,000 to 3,000,000	7
Over 3,000,000 to 5,000,000	8
Over 5,000,000 to 10,000,000	9
Over 10,000,000	10

Table V — Size of Independent Contractor

Annual hours worked at all mines	**Penalty Points**
0 to 5,000	0
Over 5,000 to 7,000	2
Over 7,000 to 10,000	4
Over 10,000 to 20,000	6
Over 20,000 to 30,000	8
Over 30,000 to 50,000	10
Over 50,000 to 70,000	12
Over 70,000 to 100,000	14

Over 100,000 to 200,000	16
Over 200,000 to 300,000	18
Over 300,000 to 500,000	20
Over 500,000 to 700,000	22
Over 700,000 to 1,000,000	24
Over 1,000000	25

(c) ***History of previous violations.*** An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

(1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This

aspect of the history criterion accounts for a maximum of 25 penalty points.

Table VI — History of Previous Violations — Mine Operators

Mine Operator's Overall History of Violations Per Inspection Day	**Penalty Points**
0 to 0.3	0
Over 0.3 to 0.5	2
Over 0.5 to 0 7	5
Over 0,7 to 0.9	8
Over 0.9 to 1.1	10
Over 1.1 to 1.3	12
Over 1.3 to 1.5	14
Over 1.5 to 1.7	16
Over 1.7 to 1.9	19
Over 1.9 to 2.1	22
Over 2.1	25

Table VII — History of Previous Violations — Independent Contractors

Independent Contractor's Overall History of Number of Violations	**Penalty Points**
0 to 5	0
6	1

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7	2
8	3
9	4
10	5
11	6
12	7
13	8
14	9
15	10
16	11
17	12
18	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
Over 29	25

(2) Repeat violations of the same standard. Repeat violation history is based on the number of violations of the same citable provision of a standard in a preceding 15-month period. For coal and metal and nonmetal mine operators with a minimum of six repeat violations, penalty points are assigned on the basis of the number of repeat violations per inspection day (RPID) (Table VIII). For independent contractors, penalty points are assigned on the basis of the number of violations at all mines (Table IX). This aspect of the history criterion accounts for a maximum of 20 penalty points (Table VIII).

Table VIII — History of Previous Violations — Repeat Violations for Coal and Metal and Nonmetal Operators with a Minimum of 6 Repeat Violations

Number of Repeat Violations Per Inspection Day	**Final Rule Penalty Points**
0 to 0.01	0
Over 0.01 to 0.015	1
Over 0.015 to 0.02	2
Over 0.02 to 0.025	3
Over 0.025 to 0.03	4
Over 0.03 to 0.04	5
Over 0.04 to 0.05	6
Over 0.05 to 0.06	7

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Over 0.06 to 0.08	8
Over 0.08 to 0.10	9
Over 0.10 to 0.12	10
Over 0.12 to 0.14	11
Over 0.14 to 0.16	12
Over 0.16 to 0.18	13
Over 0.18 to 0.20	14
Over 0.20 to 0.25	15
Over 0.25 to 0.3	16
Over 0.3 to 0.4	17
Over 0.4 to 0.5	18
Over 0.5 to 1.0	19
Over 1.0	20

Table IX — History of Previous Violations — Repeat Violations for Independent Contractors

Number of Repeat Violations of the Same Standard	**Final Rule Penalty Points**
5 or fewer	0
6	2
7	4
8	6
9	8
10	10
11	12

12	14
13	16
14	18
More than 14	20

(d) ***Negligence.*** Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

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Table X — Negligence

Categories	**Penalty Points**
No negligence (The operator exercised diligence and could not have known of the violative condition or practice.)	0
Low negligence (The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.)	10
Moderate negligence (The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.)	20
High negligence (The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.)	35
Reckless disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	50

(e) ***Gravity.*** Gravity is an evaluation of the seriousness of the violation. This criterion accounts for a maximum of 88 penalty points, as derived

from the Tables XI through XIII. Gravity is determined by the likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

Table XI — Gravity: Likelihood

Likelihood of occurrence	**Penalty Points**
No likelihood	0
Unlikely	10
Reasonably likely	30
Highly likely	40
Occurred	50

Table XII — Gravity: Severity

Severity of injury or illness if the event has occurred or were to occur	**Penalty Points**
No lost work days (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	0

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Lost work days or restricted duty (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)	5
Permanently disabling (Any injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body.)	10
Fatal (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	20

Table XIII — Gravity: Persons Potentially Affected

Number of persons potentially affected if the event has occurred or were to occur	**Penalty Points**
0	0
1	1
2	2
3	4
4	6

5	8
6	10
7	12
8	14
9	16
10 or more	18

(f) ***Demonstrated good faith of the operator in abating the violation.*** This criterion provides a 10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.

(g) ***Penalty conversion table.*** The penalty conversion table is used to convert the total penalty points to a dollar amount.

Table 14 to Paragraph (g) — Penalty Conversion Table

Points	**Penalty ($)**
60 or fewer	$159
61	173
62	186
63	203
64	220
65	238
66	258
67	280

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68	302
69	328
70	354
71	385
72	418
73	453
74	488
75	530
76	576
77	621
78	674
79	731
80	792
81	858
82	927
83	1,006
84	1,089
85	1,182
86	1,280
87	1,385
88	1,501
89	1,626
90	1,762
91	1,908
92	2,065
93	2,238

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94	2,425
95	2,627
96	2,846
97	3,080
98	3,340
99	3,618
100	3,920
101	4,245
102	4,599
103	4,982
104	5,396
105	5,847
106	6,333
107	6,861
108	7,432
109	8,052
110	8,722
111	9,446
112	10,235
113	11,088
114	12,012
115	13,011
116	14,094
117	15,270
118	16,541
119	17,919

120	19,410
121	21,029
122	22,777
123	24,677
124	26,733
125	28,955
126	31,369
127	33,983
128	36,812
129	39,879
130	43,201
131	46,799
132	50,695
133	54,918
134	59,299
135	63,677
136	68,060
137	72,437
138	76,819
139	81,198
140 or more	85,580

(h) The effect of the penalty on the operator's ability to continue in business. MSHA presumes that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The operator may, however, submit information

to the District Manager concerning the financial status of the business. If the information provided by the operator indicates that the penalty will adversely affect the operator's ability to continue in business, the penalty may be reduced.

[72 FR 13635, Mar. 22, 2007, as amended at 73 FR 7209, Feb. 7, 2008; 81 FR 43455, July 1, 2016; 82 FR 5383, Jan. 18, 2017; 83 FR 14, Jan. 2, 2018; 84 FR 219, Jan. 23, 2019; 85 FR 2299, Jan. 15, 2020; 86 FR 2970, Jan. 14, 2021; 87 FR 2336, Jan. 14, 2022; 88 FR 2218, Jan. 13, 2023]