No. 23-551

IN THE

Supreme Court of the United States

GMS MINE REPAIR,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, *et al.*,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The D.C. Circuit employed the "tools" of construction in a manner oriented toward achieving a specific outcome, identifying ambiguity and supporting the agency's interpretation, rather than using these "tools" to dispel ambiguity and analyze the regulation "in all the ways it would if it had no agency [interpretation] to fall back on." The Solicitor General does not even mention the "no agency to fall back on" requirement of *Kisor* and concedes that the D.C. Circuit inferred the inclusion of the phrase "regardless of when issued" into 30 C.F.R. §100.3(c), despite its absence in the regulation.

Failing to properly apply the "tools" of construction, as the D.C. Circuit did, is a *Kisor* "soft spot." What court could not leverage the various "tools" of construction to introduce ambiguity and support an agency's position if that is the objective? If permitted, this exploitable soft spot will significantly influence many regulatory interpretations across various agencies and at multiple levels, impacting a wide array of regulated entities. This case presents the perfect vehicle for this Court to address a problem of national significance.

Respondents dedicate page after page in their BIO attempting to demonstrate that the D.C. Circuit did "analyze" the "tools" of construction. However, this extensive response overlooks the essence of Petitioner's argument, which is that the D.C. Circuit, during the first step of *Kisor*, incorrectly utilized the "tools" of construction, rather than *independently* interpreting the regulation "before" declaring ambiguity or assessing support for the agency position.

Since the foundational basis of *Kisor* is *Chevron*, which is presently under review in *Loper Bright/Relentless*, certiorari becomes even more compelling. Tellingly, Respondents elected not to address Petitioner's request for this Court to hold the Petition pending a decision in *Loper Bright/Relentless*. This Court's decision in *Loper Bright/Relentless* will impact *Kisor*.

I. The D.C. Circuit's Application of *Kisor* is Indefensible and Merits This Court's Review.

A. Respondents, Like the D.C. Circuit, Ignore the *Kisor* Rule that the Tools of Construction Should be Used to Interpret Regulations Independently, "in all the ways it would if it had no agency [interpretation] to fall back on."

Kisor was clear 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*." *Kisor v. Wilkie,* 139 S. Ct. 2400, 2415 (2019) (emphasis added). Petitioner discussed this throughout the Petition (Pet. 12, 14, 17, 28). Yet, the Solicitor General chose not to acknowledge this holding in *Kisor*. The phrase "if it had no agency to fall back on" is conspicuously absent from the BIO, the D.C. Circuit's decision and even all D.C. Circuit cases interpreting *Kisor*.

The Solicitor General's response to GMS's arguments regarding conflicting approaches to *Kisor* in other Circuits is superficial. *cf*, Pet. Sec.I.D. and BIO.20. Respondents contend that "petitioner's examples all involved other regulations," and "[t]he courts of appeals in those cases recited the governing principles set forth in *Kisor* in terms

that are not materially different from the … the decision below." BIO.20. The regulation under consideration has nothing to do with the appropriate methodology for analyzing that regulation. Regarding the second point, in the cases Petitioner cited, the courts used the tools of construction to apply the regulation *before* considering the agency interpretation. This is a stark contrast between the D.C. Circuit's approach and other courts. Many decisions from other circuits, unlike the D.C. Circuit, reference the pivotal language of *Kisor*, directing courts to interpret the regulation as "if it had no agency to fall back on." *See, e.g.*, *United States v. Malik Nasir*, 17 F.4th 459, 471 (3rd Cir. 2022); *Romero v. Barr*, 937 F.3d 282, 291 (4th Cir. 2019).

The Solicitor General likely ignores *Kisor's* "if it had no agency to fall back on" mandate because the D.C. Circuit's methodology simply cannot be squared with these words, which require an independent analysis of the regulation using the "tools" of construction during Step 1 of *Kisor*. The D.C. Circuit's assertions that the Secretary has the better argument or, that the "tools" favor the Secretary, demonstrates that the D.C. Circuit was not conducting an independent *Kisor* Step 1 analysis. Pet. App. 10a, 12a. Also, the government's response to GMS's main point -- that the Circuit Court used the tools of construction to find ambiguity and support the agency, as opposed to an independent review -- is notably brief. BIO.17-19. Rather than addressing the methodology issues, a substantial portion of the government's response is to summarize the Court's discussion of the "tools." This is an inappropriate emphasis in response to Petitioner's assertion of a flawed methodology. BIO.12-19.

B. If *Kisor* Tolerates the Result Below, the Court Should Overrule or Clarify it.

In response to the Petitioner's point that the D.C. Circuit misapplied *Kisor*, Respondents state that the "contention lacks any basis in the court's actual stated reasoning" BIO.17. Isn't that the point? If a Court is short-circuiting a methodology, it will be more subtle and not announce this. In the Petition, GMS noted that the D.C. Circuit fundamentally *altered* the *Kisor* analytical template by holding, "[f]irst, courts must determine whether the regulation is 'genuinely ambiguous' *by* 'exhaust[ing] all the 'traditional tools' of construction.…" App. 8a (emphasis added). However, the holding in *Kisor* provides, *"[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. Pet. 16-17 (emphasis added). Rather than addressing this distinction, Respondents assert that the D.C. Circuit evaluated the "tools" "before affording any deference" (BIO.18), which is not the same as "before concluding" that a regulation is ambiguous. Also, this discussion omits the "no agency to fall back on" requirement.

Respondents assert, "[t]he fact that the court applied the traditional tools of construction and determined, on the basis of that analysis, that….the traditional tools 'favor the Secretary's reading,'….does not suggest that the court was creating ambiguity rather than seeking to dispel it." BIO.17. Of course, the process of "favoring the Secretary's position" fundamentally violates the independent analysis requirement set forth in Step 1 of *Kisor*. By comparing the agency position and aiming to support the agency, the D.C. Circuit introduced ambiguity and neglected to use

the tools to ascertain the regulation meaning or provide its own independent textual analysis. *See, Kisor,* 139 S. Ct. at 2415 and 2428 (Gorsuch, J, concurring).

Further, the Secretary's construction of 30 C.F.R. §100.3(c), is flatly wrong. Yet, the D.C. Circuit used the "tools" of construction to find ambiguity where there was none, thereby jumping to deference and effectively *adding* the words "regardless of when issued" to the regulation. D.C. Cir., App 4a, 10a. This approach improperly expands *Auer* deference. If courts are permitted to manufacture ambiguity and fill resulting "gaps" with agency interpretation, it becomes imperative for this Court to intervene and redefine the limits of deference.

Respondents do not dispute that the D.C. Circuit effectively inserted the phrase "regardless of when issued" into the regulation. BIO.19. Paradoxically, Respondents defend this unfounded position by asserting:

> Of course, the agency's interpretation would be beyond dispute *if the agency had also added, in the regulatory text, a clause to the effect that assessed citations are included in an operator's history when finalized "regardless of when issued."*…But the court reasonably deferred to the Secretary's interpretation of the current text, *which is best read to mean the same thing.*
>
> BIO.19 (emphasis added)

This point demonstrates forcefully the Secretary's desire to interpret the regulation to say what it does

not actually say. If undisturbed, the decision effectively allows the Secretary to craft a new regulation under the pretense of merely interpreting an existing one, as criticized in *Kisor*, where the Court warned against allowing an agency to "create de facto a new regulation" under the guise of interpretation. *Kisor*, 139 S. Ct. at 2415 (citation omitted).

Respondents defend the result here by asserting that, since 1982, the Secretary has included violations in the history as of the date when they become final, regardless of when the violations occurred. BIO.6, 8-9. However, the Petitioner is not aware of any other entity challenging the Secretary's practice. GMS cannot speak to other contractors; however, the incorrect application here resulted in a 100% increase in the penalties charged to GMS. Further, even if the agency has such a practice, this consideration is only relevant during the reasonableness inquiry in *Kisor* Step 2. *Kisor,* 139 S. Ct. 2400, 2416 (referring to the "zone of ambiguity"), and only if words are not added to the regulation. At *Kisor* Step 1, this Court intended the analysis to be conducted "in all the ways it would if it had no agency [interpretation] to fall back on," to ensure the regulation is applied as written.

Respondents, like the D.C. Circuit, argue Petitioner was inconsistent in defining the term "violations." BIO.6. Yet, as the Petition makes clear, the lower court itself approved interchangeable definitions for the term "violations." c*f,* App., 4a and 10a. Under the Secretary's proposed and accepted re-written rule, "violations," *whether defined as assessed violations, citations or orders*, regardless of when they *occurred* or were issued (i.e., older than 15 months) were to be included in the

history calculation, if they became final within 15 months. Yet, the regulation says "violations…in a preceding 15-month period" App. 9a), not "violations *outside of* a preceding 15-month period." The BIO seeks to perpetuate the D.C. Circuit's erroneous conclusion that "[t]hese two sentences say nothing further about when the underlying violation [however defined] must have occurred." App. 14a. They do, it is the word "in."

Although the crux of the Petition deals with the D.C. Circuit's methodology, Respondents spent a large part of their BIO discussing the merits of the various "tools" of construction (text, structure, history, and purpose) (BIO.12-19). Although this emphasis is premature, a reply is in order. First, regarding "text," Respondents take conflicting positions. First, Respondents acknowledge that "[t]he second sentence then adds the qualifications that only 'assessed violations' are counted, and only if the assessed violations were 'paid or finally adjudicated' within the look-back period." BIO.13. Yet Respondents in the next paragraph assert, more broadly, that the second sentence of Section 100.3(c) "'clarifies that the field of violations to be considered must have become final during' the 15-month look-back period, without expressly addressing whether a citation must also have been issued within that period." BIO.13. Then, without addressing that the words "regardless of when issued" are not in the text, Respondents conclude with the D.C. Circuit's finding that "As between those two textual positions [Petitioner's and Secretary's], the court of appeals observed that 'the Secretary has the better argument'…." BIO.13. This overlooks the critical point: the D.C. Circuit did exactly what the Petitioner asserts, by creating an ambiguity and interpolating language to endorse the agency's position.

In response to Petitioner's argument that the D.C. Circuit never gave "its own independent textual analysis." Pet.18, Respondents assert the following as a supposed independent textual analysis: "[t]he court reviewed the first two sentences of the regulation, *discussed the parties' competing views of the text*, and reasonably concluded that the text in isolation 'lack[s]' sufficient 'detail' to address the precise timing question at issue here." BIO.18 (emphasis added). Comparing the parties' assertions is not an independent review. Nor is a regulation ambiguous merely because the parties disagree about its meaning. *Kenan v. Fort Worth Pipe Co.*, 792 F.2d 125, 128 n. 8 (10th Cir. 1986). If mere disagreement between lawyers was the test, deference would be achieved in almost every case. The Court waived the "ambiguity flag" before using the "text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Kisor,* 139 S. Ct. at 2415.

For "structure" and "purpose" the Respondents do not dispute that the D.C. Circuit only considered the broad lens of comparing the regulation to the "Mine Act as a whole." BIO.19. Yet, this is only one component of a detailed structural analysis envisioned in *Kisor*. *See, Diaz-Rodriguez v. Garland*, 55 F.4th 697, 706 (9th Cir. 2022) ("The Court also considers … surrounding provisions of the terms at issue. Additionally, a court may consult relevant contemporaneous federal statutes that use the same language…"). As with "text," in a rush to ratify the Secretary's version, the D.C. Circuit did not narrow the lens to undertake a more detailed "structural" and "purpose" analysis "in all the ways it would if it had no agency [interpretation] to fall back on."

Regarding "history," Respondents, like the D.C. Circuit selected one clause in the eight-page Preamble, to wit: "[a]s each penalty contest becomes final, … the violation will be included in an operator's history as of the date it becomes final." *Cf.* 72 Fed. Reg. at 13,603 with 72 Fed. Reg. at 13602-13610. BIO.16. However, this clause can be read in a way that does not require alteration of the regulation. Nor was it included in the final regulation. This truncated historical analysis fails to reconcile several other important portions of the Preamble and regulatory history, which explain what the Secretary was then attempting to accomplish with 30 C.F.R. §100.3(c), including: 1) shortening the look-back period from the prior 24 months to 15 months and adding a repeat history to offset this; 2) ensuring that the violations counted are close in time to the cited violation; and 3) an effort to capture 12 months of historical violations because "…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…" Pet.20, citing 72 Fed. Reg. at 13,603-4. These other important considerations which provide "history" context, are largely rendered meaningless by the Respondents.

Respondents also note that the Court found it "'difficult to conclude' that the Secretary would adopt a regulation under which a mine operator's prior violations are taken into account only when the violations result in the issuance of a citation that becomes final within 15 months" (BIO.14) and the citations at issue would not be counted. BIO.15. Yet, the selectively discarded historical references explain precisely why the lookback period was shortened to 15 months to obtain approximately 12 months

of history. See, 72 Fed. Reg. at 13,603-4. Respondents also note that the "significant" violations would be excluded because they involve lengthy administrative proceedings. BIO.14. But 30 C.F.R. §100.3(c) makes no distinction between significant and non-significant violations. Pet. App. 45a. This selective historical analysis is flawed.

II. When *Loper Bright*/*Relentless* are Decided, the Rules for Regulatory Interpretation will need to be Aligned with Those Decisions and This Case is the Ideal Vehicle to Accomplish This.

The interrelationship between *Chevron* and *Kisor* is reason to grant GMS's request that this Court hold this case until the Court decides *Loper Bright Enters. v. Raimondo,* 143 S. Ct. 2459 (May 1, 2023) and *Relentless, Inc. v. DOC*, 144 S. Ct. 325 (October 13, 2023), and then remand to the D.C. Circuit to align this Court's pending Loper *Bright/Relentless* decisions. See Pet. 3, 13, 18, 30, 33 (discussing *Kisor's* references to *Chevron*). Tellingly, Respondents did not address this.

At the oral arguments in *Loper Bright*, the Solicitor General suggested "*Kisorizing*" *Chevron*. Oral Arg., *Loper Bright Enters v. Raimondo*, No. 22-451 (Jan. 17, 2024), Tr. 49:16-17; 81:6-83:22. Of course, *Kisor* was an attempt to "*Chevronize" Auer.* This Court may also decide not to "*Kisorize" Chevron*. Either way, this Court should hold the Petition until *Loper Bright/Relentless* are resolved. And then, if appropriate, the Court should grant certiorari, vacate the D.C. Circuit's decision, and remand to the D.C. Circuit. "The GVR order has…become an integral part of this Court's practice." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam).

This Court "regularly hold[s] cases" when "plenary review is being conducted" in a case that, when it is decided, would make GVR in the held case appropriate. *Id.* at 181 (Scalia, J., dissenting).

In opposing certiorari, the government argues that it will not make a difference because it will prevail even if the D.C. Circuit misapplied *Kisor* since it has a "better reading" of the regulation. BIO.21. While the government is substantively wrong, this Court routinely grants certiorari to resolve important questions, even if a party might not prevail on remand. *See, e.g., Kisor, 139 S. Ct.* at 2423*; see also, Zivotofsky v Clinton,* 566 U.S. 189, 201 (2012). (When the Court reverses "on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing"). If the Court reverses, whether for the inappropriate application of *Kisor* or because *Chevron* is no longer the law, this Court may leave *de novo* construction of Section 100.3(c) for remand pursuant to any newly promulgated rules, as occurred in *Kisor.*

Respondents also contend that *Kisor* is only five years old and Petitioner "fails to acknowledge…*stare decisis*." BIO.22. *Stare decisis* does not prevent correcting a wrong methodology. Such issues can be addressed in the merits' briefs, if necessary. Of course, they may also become moot after *Loper Bright/Relentless*. Petitioner does not advocate overruling individual decisions applying *Kisor*, other than this one. *Stare decisis* should not prevent that. *Kisor*, 139 S. Ct. at 2444 (Gorsuch, J. concurring). There is a special justification here and resolution of the problem identified here will improve reliance and stability.

In *Kisor*, the concurring Justices aptly noted that the majority invoked *stare decisis* "to vacate that judgment and tell the court of appeals to try again using its newly retooled, multi-factored, and far less determinate version of *Auer*." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J). This case is a timely vehicle to allow this Court to overrule or clarify *Kisor* and align it with *Loper Bright/Relentless*.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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