No. _____

In The
Supreme Court of the United States

KC TRANSPORT, INC.,

Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION; and FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

A federal mine inspector cited Petitioner KC Transport, Inc., for two alleged mining safety violations for trucks located in the company's maintenance yard, which the inspector held was a "coal or other mine," 30 U.S.C. § 802(h)(1), under the Federal Mine Safety and Health Amendments Act, *id.* §§ 801–966. This yard is not located at nor is it adjacent to any mining extraction site, processing plant, or appurtenant road.

Acknowledging a circuit split, the D.C. Circuit panel majority held below that a truck repair shop can be a mine even if it is not located at an extraction or processing site. Over a dissent, the majority found the statutory definition of "coal or other mine" to be ambiguous despite both the Secretary and KC having argued that the definition is unambiguous. But rather than resolve for itself this new-found ambiguity, the majority remanded the case, pursuant to the so-called *Chevron* Step One-and-a-Half doctrine, to give the Secretary yet another chance to override court decisions that the Secretary disagrees with by articulating a deference-worthy interpretation of the ambiguous statute.

The questions presented are:

1. Whether a truck or a truck repair shop that is not located at nor is adjacent to an extraction or processing site or an appurtenant road is a "coal or other mine" under 30 U.S.C. § 802(h)(1).

2. Whether the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine should be abrogated.

Parties

Petitioner KC Transport, Inc., was the respondent in the D.C. Circuit and, before that, at the Federal Mine Safety and Health Review Commission.

Respondent Secretary of Labor, Mine Safety and Health Administration was the petitioner in the D.C. Circuit and, before that, at the Federal Mine Safety and Health Review Commission.

Respondent Federal Mine Safety and Health Review Commission was a respondent in the D.C. Circuit.

Corporate Disclosure Statement

KC Transport, Inc., is a privately owned West Virginia corporation. No publicly held entity holds 10% or more of its stock.

Statement of Related Proceedings

The following proceedings are directly related to this case:

- *Secretary of Labor, Mine Safety and Health Administration v. KC Transport, Inc., et al.*, No. 22-1071, 77 F.4th 1022 (D.C. Cir. Aug. 1, 2023)
- *Secretary of Labor, Mine Safety and Health Administration v. KC Transport, Inc.*, No. WEVA 2019-0458, 44 F.M.S.H.R.C. 211 (Rev. Comm'n Apr. 5, 2022)
- *Secretary of Labor, Mine Safety and Health Administration v. KC Transport, Inc.*, No. WEVA 2019-458, 42 F.M.S.H.R.C. 221 (ALJ Mar. 3, 2020).

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Petition for Writ of Certiorari

KC Transport, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The panel opinion of the D.C. Circuit is reported at 77 F.4th 1022 and reproduced at App.1a–38a. The opinion of the Federal Mine Safety and Health Review Commission (Commission) is reported at 44 F.M.S.H.R.C. 211 and reproduced at App.41a–87a. The opinion of the Commission's administrative law judge (ALJ) is reported at 42 F.M.S.H.R.C. 221 and reproduced at App.88a–123a.

Jurisdiction

The date of the decision sought to be reviewed is August 1, 2023. The Chief Justice granted (No. 23A497) an extension of time within which to file the petition for writ of certiorari to and including February 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 30 U.S.C. § 816(a)(1) (last sentence).

Statutory and Regulatory Provisions at Issue

Pertinent provisions of 30 U.S.C. § 802 and 30 C.F.R. § 77.404 are reproduced at App.127a–130a.

Statement of the Case

A. Legal Framework

Congress enacted the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (Mine Act), to protect the "health and safety" of "miner[s]." 30 U.S.C. § 801(a). To that end, the Act directs the establishment of standards to "prevent death," "serious physical harm," and "occupational diseases." *Id.* § 801(c). This case, however, is not about those safety standards, "but rather the jurisdictional boundaries to which they apply." App.2a.

The Act applies to "[e]ach coal or other mine, … each operator of such mine, and every miner in such mine." 30 U.S.C. § 803. The Act regulates "any individual working in a coal or other mine," which individual the Act defines as a "miner." *Id.* § 802(g). And it regulates each "operator," that is, any "person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." *Id.* §§ 802(d), 802(f) (defining "person" to include "corporation").

Key to the statutory scheme is the definition of "coal or other mine," 30 U.S.C. § 802(h), because other definitions, including "miner," *id.* § 802(g), and "operator," *id.* § 802(d), are tied to it. The Act defines "coal or other mine" as "(A) an area of land from which minerals are extracted, (B) private ways and roads appurtenant to such area," and "(C) … facilities, equipment, … or other property … used in, or to be used in, or resulting from … the work of extracting such minerals … , or used in, or to be used in, the

milling of such minerals, or the work of preparing coal or other minerals." *Id.* § 802(h)(1).

To enforce the Act, Congress created the Mine Safety and Health Administration (MSHA or Secretary) within the Department of Labor. 29 U.S.C. § 557a; 30 U.S.C. § 802(n) (defining "Administration"). MSHA develops and promulgates mandatory health or safety standards under the Act. 30 U.S.C. § 811(a). MSHA enforces these standards by conducting "frequent inspections," *id.* § 813(a), promulgating safety orders, *id.* § 813(k), and issuing citations for violations and assessing a corresponding "civil penalty," *id.* §§ 813(a), 814(a), 815(a), 820(a).

Mine operators may contest citations issued by MSHA. Citation contests are administratively adjudicated within the Commission, *id.* § 802(o). A separate federal agency entirely outside the Secretary of Labor's chain of command, the Commission comprises "five members, appointed by the President by and with the advice and consent of the Senate." *Id.* § 823(a).[1] A challenge to a citation is first heard before a Commission ALJ, *id.* § 823(d)(1), whose ruling either party may then challenge before the Commission itself, *id.* § 823(d)(2)(A)(i). Appeals from the Commission's decisions are taken to the

[1] The Act sets staggered six-year terms for each of the Commissioners. 30 U.S.C. § 823(b)(1). The Commissioners "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Id.* The Commission "shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission. Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of Title 5." *Id.* § 823(b)(2).

appropriate circuit court, *id.* § 816(a)(1), and thenceforth to this Court under 28 U.S.C. § 1254.

B. Factual Background

Petitioner KC Transport is a small-town trucking company based in Emmett, West Virginia, that hauls coal for nearby mines. App.7a. KC has a truck maintenance facility "about four or five miles away" from the nearest extraction site, App.7a, "over one mile" from a coal processing plant, App.8a, and "about 1000 feet" from a "haulage road," App.8a. Trucks that are repaired at KC's Emmett facility are a "mix of … off-road trucks, providing haulage for … five nearby mines" as well as "on-road trucks used in earth and gravel haulage for other customers." App.8a.

Until March 11, 2019, MSHA's inspectors "had never inspected, or even attempted to inspect," KC's trucks at the Emmett facility. App.8a. But that day, a coal mine "inspector went 'looking for trucks.'" App.8a. At KC's Emmett facility, he observed two of KC's trucks undergoing maintenance, and "[b]ecause neither of the two trucks w[as] 'blocked against motion,'" the inspector held KC to have violated 30 C.F.R. § 77.404(c), and issued two citations. App.9a. The proposed civil penalties for the two citations were $3,908 and $4,343. App.10a.

C. Administrative Adjudication

KC then administratively contested MSHA's authority to issue the citations. App.2a. KC argued that (1) its repair shop and trucks are not a "mine" under 30 U.S.C. § 802(h)(1)(C) and, therefore, MSHA had no authority to cite KC for violating any mining safety regulation, and (2) KC did not qualify as an "operator" under 30 U.S.C. § 802(d) at the time of the

citations because KC was not then working at a mine site. App.9a–10a. The Secretary argued that each of KC's trucks constituted a mine and was, therefore, "subject to MSHA jurisdiction irrespective of its location." App.45a.

On a joint stipulation of facts, App.7a, and cross-motions for summary decision, the ALJ rejected both the Secretary's and KC's interpretation of § 802(h)(1)(C). App.10a. But the ALJ ruled in the Secretary's favor because KC's "facility and the mining-related equipment located therein were too connected to the mining process to be excluded from the Mine Act's jurisdiction." App.10a. According to the ALJ, the Emmett "facility constituted a 'mine,'" and the trucks, because they "were used in mining and parked at the facility" qualified as "equipment" under § 802(h)(1)(C). App.10a.

On review, the Commission reversed the ALJ and vacated the two citations. App.10a. According to the Commission, § 802(h)(1) "unambiguously limits the 'mine' definition to extraction sites and lands appurtenant thereto." App.10a. The Commission concluded that "an independent repair, maintenance, or parking facility not located on or appurtenant to a mine site and not engaged in any extraction, milling, preparation, or other activities within the scope of [§ 802(h)(1)(A)] is not a mine[.]" App.67a. It also concluded that "tools, equipment, and the like not on a mine site or any appurtenance thereto and not engaged in any extraction, milling, preparation, or other activities within the scope of [§ 802(h)(1)(A)] are not mines[.]" App.67a. As to "operator" status, the Commission held that KC "was not an operator under [§ 802(d)]" because independent contractors are

subject to the Act only "while performing work at a mine site," and KC "was not performing services in a mine." App.62a. The Commission relied extensively on *Maxxim Rebuild Co. v. Federal Mine Safety & Health Review Commission*, 848 F.3d 737 (6th Cir. 2017), in rejecting the Secretary's position that MSHA has authority over any tools or equipment "not on a mine site that at one time were used on the mine site, or that could be brought to the mine site again." App.51a; *see also* App.49a, App.53a n.12, App.58a, App.63a–65a, App.69a.

D. D.C. Circuit Proceedings

The Secretary then petitioned the D.C. Circuit for review of the Commission's decision. App.3a.

The panel majority began its analysis with the proposition that the Secretary's interpretation of the Mine Act must be given deference by "both the Commission and the courts," App.11a (quoting S. Rep. No. 95-181, at 49, 1977 U.S.C.C.A.N. 3401, 3448). The panel majority then observed that, if the Secretary and the Commission "advance differing interpretations," App.11a, the "Secretary's litigating position," App.14a, not the Commission's, "is entitled to the deference described in *Chevron*[*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]." App.11a (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)). The Secretary argued, however, that deference was unnecessary because the Act unambiguously makes KC's Emmett facility and the trucks a mine. App.12a.

The panel majority disagreed, reasoning that "practical implications" and "historical background" demonstrate the statute's ambiguity. App.18a.

Rejecting the Secretary's interpretation and finding ambiguity after having gone looking for it, the majority gave interpretive advice to the Secretary: the "context, structure, and Congress's use of the phrase 'coal or other mine' throughout Chapter 22 of Title 30" "indicate[s] … location is central to the Mine Act." App.15a. But, the majority added, "the statutory language, broader context, and numerous practical concerns render subsection (C)'s meaning ambiguous." App.21a. In so holding, the D.C. Circuit majority expressly disagreed with the Sixth Circuit's interpretation and holding in *Maxxim*, which had found § 802(h)(1) to be unambiguously limited to extraction sites, 848 F.3d at 740–44. *See* App.17a.

Because the Secretary "incorrectly treat[ed] the statute as unambiguous," the panel majority held that "deference [wa]s not appropriate." App.11a. But rather than decide the statutory question, the panel majority "remanded the case to the Commission, instructing the Secretary to interpret the statute in recognition of its ambiguities." App.11a (citing *Sec'y of Labor v. National Cement Co. of California, Inc.*, 573 F.3d 788, 791 (D.C. Cir. 2009) (*National Cement II*)).

The panel justified this further governmental bite at the litigation apple under the D.C. Circuit's *Chevron* Step-One-and-a-Half doctrine, according to which an agency may still receive *Chevron* deference despite having adhered in litigation to an erroneous interpretation of a statute, provided the agency can justify its interpretation post hoc as a "reasonable" construction of the same statutory language it previously misconstrued. *See generally PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 800 (D.C. Cir. 2004) (Roberts, J., concurring in part)

(critically reviewing *Chevron* Step One-and-a-Half). As a result, the majority "vacate[d] the Commission's decision and remand[ed] for it to obtain from the Secretary a *Chevron* step 2 interpretation." App.21a–22a, App.39a.

Circuit Judge Justin R. Walker dissented. App.25a–38a. In his view, "[t]o count as a 'mine,' a 'facility' like KC's shop must be located at an extraction site or a processing plant." App.25a. Because "KC's shop is not" so located, MSHA lacks authority over it. App.25a. In other words, he agreed with the Commission and the Sixth Circuit's *Maxxim* decision that the Act's definition of "mine" is a function of location, and thus certainly reaches mining "extraction sites." App.33a. But he would have added "processing plants," App.33a, to *Maxxim*'s "extraction site" geographic limit, 848 F.3d at 740.

Judge Walker then took issue with the majority's re-interpretive remand under the *Chevron* Step One-and-a-Half doctrine, calling it "[u]nwarranted." App.35a–37a. To remand for a "*Chevron* step 2 interpretation," App.22a, and then to defer, as that doctrine requires, "to the Secretary's interpretation of the now-ambiguous statute—at least if it's reasonable,"—relinquishes this Court's duty to decide all relevant questions of law and to interpret … statutory provisions." App.35a–36a (simplified). That is especially so given that the Secretary did "not as[k] ... for deference." *Id.*

Bolstering the inappropriateness of the re-interpretive remand were the "Secretary's shifting and self-serving interpretations." App.37a. At the ALJ stage, the Secretary insisted that "each *truck* independently constituted a 'mine,'" a position the

ALJ rejected as "absurd." App.37a. Then, on review before the Commission and the D.C. Circuit, the Secretary unsuccessfully "tweaked his position," claiming "that KC's truck-repair *facility* is a 'mine.'" App.37a. Remand in such situations would give the evidently interpretively-challenged Secretary "a third bite at the apple," while forcing a "small trucking business … once more to fight a moving target." App.37a.

Instead of such an ill-considered remand, Judge Walker would have simply employed "traditional tools of statutory construction" (as he did in explaining his reasons for concluding that KC's trucks and repair shop are not mines) to "discern Congress's meaning," App. 36a (quoting *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018)). He concluded that such uninvited "deference" to the Secretary's interpretation "is inappropriate." App.36a–37a (quoting *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in denial of certiorari)).

In sum, the ALJ, the Commission, and the D.C. Circuit majority and dissent all rejected the Secretary's interpretation of 30 U.S.C. § 802(h). Yet thanks to the re-interpretive remand under the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine, the Secretary now gets yet another chance to supply an interpretation that can be given *Chevron* deference by "both the Commission and the courts." App.11a.

Reasons for Granting the Petition

I. Courts Are Intractably Split in Construing the Mine Act

The majority and the dissent below acknowledged the rift amongst the circuits in construing the Mine Act—and dug it deeper. App.17a, 33a–34a. The D.C. and the Sixth Circuits have provided different answers to the question of whether a repair shop that works on mining-related vehicles or equipment is a "mine" for purposes of the Act.[2] The Sixth Circuit has held that a shop that repairs mining equipment but "is neither adjacent to nor part of a working mine" is plainly not a mine under the Act. *Maxxim*, 848 F.3d at 739. But the D.C. Circuit majority below held that at least some such shops could be regulated as mines.

Similarly, the Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have all provided different answers to the scope of MSHA's authority. The result is a statute that is plain in some circuits but fuzzy in others. Bringing uniformity to the Act's scope is a question of national importance that the Court should take up and resolve so lower courts, federal agencies, and regulated parties will have much-needed clarity.

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[2] The D.C. Circuit panel majority held that the Commission's discussion of the "operator" definition in the Mine Act, 30 U.S.C. § 802(d), was improper and declined to reach that issue. App.22a–24a.

A. The Splits Are Complex and Getting Worse

1. There Is a Split Among Location-Focused Circuits

Start with Judge Walker's dissent below (as for the panel majority's view, *see infra* Part I.A.2). App.25a–38a. He would conclude that "a 'facility' like KC's shop must be located at an extraction site or a processing plant" to "count as a 'mine.'" App.25a; App.29a ("processing plant" is a place "where minerals like coal are milled or prepared, turning them from ore into usable products"). The Sixth Circuit, however, construed the statute to require adjacency when it held that a repair shop that "is neither adjacent to nor part of a working mine" is not a "mine" because the definition "refers to locations, equipment and other things in, above, beneath, or appurtenant to active mines." *Maxxim*, 848 F.3d at 739. So, while the Sixth Circuit would limit the Act's scope to *extraction sites*, Judge Walker would expand it to *processing* plants. App.33–34a (discussing *Maxxim*, 848 F.3d at 740).

Judge Walker and *Maxxim* both started with the words Congress enacted but reached different conclusions. App.26a (quoting 30 U.S.C. § 802(h)(1)); *Maxxim*, 848 F.3d at 740 (same). Unlike Judge Walker, *Maxxim* viewed the Act's drafter as someone who "went to a mine and wrote down everything he saw in, around, under, above, and next to the mine," 848 F.3d at 740, as opposed to also considering processing facilities. *Maxxim*'s conclusion about adjacency nevertheless proceeds naturally from this "next to the mine" construction of the statute. And its view of confining the definition to extraction sites follows from "everything that one would see in or

around a *working* mine." *Id.* (emphasis added). Notably, even the D.C. Circuit has elsewhere underscored the importance of adjacency in holding that a "processing facility" "immediately adjacent to a quarry" was within the purview of the Act. *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1548, 1552 (D.C. Cir. 1984).

A strong focus on location flows directly and plainly from the text of the statute. According to *Maxxim*, it's "location, location, location." 848 F.3d at 742. Indeed, all three subsections of § 802(h)(1) are "place connected and place driven." *Id.* But even when jurists correctly focus on the location, they disagree about the Act's scope (as the panel dissent below exemplifies). Some circuits that would look principally to the location would also look to the work done at the location.

This approach is illustrated by the Third Circuit's *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), decided closest in time to the Act's passage in 1977. *Marshall* held that a "preparation plant, which separates a low-grade fuel from sand and gravel dredged from a riverbed," is a "mine" under the Act. *Id.* at 590. That is so because the preparation plant engages in "the work of preparing coal or other minerals." 30 U.S.C. § 802(h)(1). *Marshall* represents a straightforward statutory construction with respect to "stationary" items enumerated in the definition, App.20a, and thus is consistent with the Act's "locational focus," *Maxxim*, 848 F.3d at 742, although it proceeds one step beyond *Maxxim*'s extraction-site

limitation.[3] *Accord Cyprus Industrial Minerals Co. v. Federal Mine Safety & Health Rev. Comm'n*, 664 F.2d 1116, 1118 (9th Cir. 1981) (citing *Marshall* and holding that the work of digging "a tunnel into a hill to assess the value of the talc deposits" is "ordinarily … mining" activity); *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Ziegler Coal Co.*, 853 F.2d 529, 531–32, 535–37 (7th Cir. 1988) (concluding that MSHA lacked authority over an electrician in an electrical repair shop located more than a mile from the nearest coal extraction site repairing equipment brought to the shop from the mines).

2. There Is a Split Among Location-Plus Circuits

Still other circuits are location-plus jurisdictions, that is, location is pertinent but not determinative; also relevant is the nature of the off-site activity. The panel majority decision below falls squarely on the location-plus side of the circuit split. A "mine" is, the majority said, "(1) the physical extraction site, under subsection (A); (2) any 'private ways and roads appurtenant' to that extraction site, under subsection (B); and (3) the items 'used in, or to be used in, or resulting from' mining activity, under subsection (C)." App.14a–15a. Like *Maxxim*, which emphasized, "[l]ocation, location, location," 848 F.3d at 742, the

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[3] In a later decision, the Third Circuit held that "any lands integral to the process of preparing coal for its ultimate consumer" would qualify. *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 186 (3d Cir. 1997). Although still location-based, this interpretation would, per then-Judge Alito, be overbroad. *See id.* at 192 (Alito, J., dissenting) (limiting the "work of preparing coal" only to those "activities ... usually done by a coal mine operator, as that term is commonly understood").

D.C. Circuit majority acknowledged that "location is central to the Mine Act," App.15a. And based on that read, the majority rejected the Secretary's submission that "all 'machines, tools,' and even singular pieces of 'equipment,' could constitute a 'mine'—no matter their location—so long as they either were, or will be, 'used in' mining activity." App.15a.

But the majority rejected the proposition that location is determinative, concluding that § 802(h)(1)(C) is "ambiguous," App.21a, as to the extent to which activity outside of an extraction or processing site, or roads appurtenant thereto, can still be regulated. To so conclude, the majority relied on the Secretary's argument that "whether facilities or equipment constitute a 'mine'" depends on "a fact-based inquiry" that looks to "how closely related the relevant facility or equipment was to mining activity." App.19a. The panel majority below would thus consider "[l]ocation" as "but one factor that may be relevant to this 'use-in-mining' analysis." App.19a.

Although the Seventh Circuit has ostensibly taken this approach, the court has employed it to reduce MSHA's authority. For example, in *Jeroski v. Federal Mine Safety & Health Review Commission*, 697 F.3d 651 (7th Cir. 2012), the Seventh Circuit held that MSHA lacked authority to regulate janitors working at a cement plant. "[C]ement is made, not mined," Judge Posner wrote for the court. *Id.* at 652. And even though "minerals from which cement is made are mined, and the mined minerals are then milled" at the cement plant ("mine" includes "facilities … used in … the milling of [extracted] minerals," 30 U.S.C. § 802(h)), "janitors" at the cement plant are not

"engaged in milling," so MSHA lacked authority over the janitors. 697 F.3d at 652.

Likewise, the Eighth Circuit has adhered to a purpose-inflected interpretation of MSHA authority. In *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078 (8th Cir. 1999), the Eighth Circuit concluded that an electric utility "that receive[d] processed coal from a mine does not itself become a 'mine' by further processing the coal for combustion." *Id.* at 1083. "It is clear," the court noted, "that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section [802](h)." *Id.* at 1082. Nor can "all businesses that perform tasks listed under 'the work of preparing coal' in section 802(i) … be considered mines." *Id.* Rather, what mattered to the court is that the "coal-handling operations [at issue were] more properly characterized as 'manufacturing' than 'mining.'" *Id.* at 1083.

In contrast, the Fifth Circuit, observing that it "do[es] not entirely agree with the majority opinion of the Eighth Circuit in *Herman*," has concluded that § 802(h) expressly gives the Secretary the "authority to determine 'what constitutes mineral milling for purposes' of the Act." *In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 591, 593 (5th Cir. 2000) (quoting 30 U.S.C. § 802(h)(1) (second sentence)). The alleged mining company had argued that its processing plant was simply refining, not "milling," any material, just as the defendant in *Herman* had successfully argued that it was manufacturing, not mining. That would not matter, the Fifth Circuit concluded, because the Secretary's reasonable interpretation of what is "milling" for purposes of

§ 802(h) prevails. *Id.* at 591–93. *Kaiser* thus conflicts not only with *Herman*, but also with the Seventh Circuit's ruling in *Jeroski* which, as noted above, excluded from MSHA's regulatory ambit janitors working at a cement plant, despite the fact that the plant "mill[ed]" extracted minerals. 30 U.S.C. § 802(h)(1).

The Fourth Circuit's *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), adds another wrinkle, adopting an interpretation of the Act according to which what might well be an adequate basis for MSHA authority under even a strict location-based theory can still be not enough. In *Old Dominion*, the power company's employee "was electrocuted when he touched the energized transformer." *Id.* at 93. In challenging the resulting citation, the power company argued that the electrical substation where the fatality occurred was not a "mine" subject to MSHA's authority, and the Fourth Circuit agreed. *Id.* at 96. The court held that the power company's "only contact with the mine [was] the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity." *Id.* "MSHA regulations do not apply, and were not intended to apply, to electric utilities such as Old Dominion whose sole relationship to the mine is the sale of electricity." *Id.* at 99. To be sure, the electric substation where the fatality occurred was "located on the property adjacent to a mine-access road." *Id.* at 93. Yet, despite that geographic connection, and even though the substation was owned by a coal company and produced electricity to be used for mining, *id.*, the substation was not a mine. As the Fourth Circuit explained, the statute's words would prevent such a

reading because the power company's employees do not "perfor[m]," 30 U.S.C. § 802(d), "the work of extracting … minerals … or the work of preparing coal or other minerals," at that location, *id.* § 802(h)(1).

B. Resolving the Splits Is a Question of Critical National Importance

The multifaceted circuit split has spread uncertainty across the nation as to MSHA's authority. And the split has become worse over the years.

This case illustrates how the Secretary's preferred rolling-mines reading of the Mine Act will wreak havoc in the mining and mining-allied transportation industries. Consider what has transpired in this case alone. The ALJ held KC's Emmett facility and trucks were "too connected to the mining process to be excluded from the Mine Act's jurisdiction." App.10a. But the Commission concluded (properly) that KC's facility is "not located on or appurtenant to a mine site" and not used in "any extraction, milling, preparation, or other activit[y] within the scope of [§ 802(h)]" and thus held that MSHA lacked authority. App.67a. Yet the Secretary continued to insist that its "rolling mines" reading should prevail. App.45a, 48a, 51a, 70a n.21. According to the Secretary's rolling-mines reading, the Act gives MSHA roving nationwide authority to inspect every hammer and tack that is "used in, or to be used in" mining-related activity, 30 U.S.C. § 802(h)(1). *See* Brian Hendrix, *Haul Trucks and Hammers Aren't "Mines"*, Coal Age (June 24, 2022).[4] That is an unsustainable, impractical, and unworkable interpretation of the Act.

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[4] https://perma.cc/QLK7-MN47.

The majority below pointed to the open-ended nature of the rolling-mines interpretation as evidence of the statute's ambiguity. Still, the Act, as *Maxxim* correctly held, remains unambiguous, and where MSHA lacks authority, it is possible for the Secretary to assert authority through MSHA's cousin agency the Occupational Safety and Health Administration (OSHA). 848 F.3d at 742–43. *See, e.g.*, *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1287 (D.C. Cir. 1990) (Thomas, J., writing for the three-judge panel) (stating what is not within MSHA authority is under OSHA authority). But the Secretary cannot in one stroke amend both MSHA's and OSHA's spheres of authority by issuing a fly-by interpretation of the Mine Act. Then-Judge Thomas was correct to point out in *Otis* that MSHA's authority is purposefully narrow because OSHA's authority is so broad. KC does not "see[k] to hide from *any* regulation"; KC "thinks, quite reasonably, that the Secretary's authority applies to it through the Occupational Safety and Health Administration, not the Mine Safety and Health Administration." 848 F.3d at 743.

The Secretary of Labor, through OSHA, can "regulate these kinds of safety and health matters" at locations not covered by the Mine Act. *Maxxim*, 848 F.3d at 742. The result of the interpretation at issue, however, is that a hauling business that "occasionally uses its trucks to haul coal for nearby mines," App.25a, and its truck repair facility that "occasionally fixes mining trucks," App.27a, must guess whether MSHA or OSHA or both have inspection and citation authority over its trucks and facilities. The Secretary's broad interpretation would place every tire repair shop and fueling station within MSHA's authority.

Although many agencies have resorted to the self-help remedy of reading statutes to confer broad authority, this Court has consistently curtailed such efforts because broad interpretations would spread uncertainty across major sectors of the nation. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697 (2022) (stopping EPA from broadly reading the Clean Air Act); *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (halting HHS's broad reading of the Public Health Service Act as authorizing a nationwide eviction moratorium); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (barring the broad reading of the HEROES Act to permit the Secretary of Education to forgive student debt); *National Fed'n of Indep. Business v. OSHA*, 595 U.S. 109 (2022) (ending OSHA's employer vaccine mandate stemming from a broad reading of the OSH Act).

The Secretary's shifting interpretations are another such end-run around the statute's text. Instead of construing the statute as written, the majority below went to great lengths to figure out how it could defer to "the Secretary's litigating position," App.14a (citing *Excel Mining, LLC*, 334 F.3d at 6; *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 157 (1991))—even though this Court has directed quite specifically that courts "should decline to defer" to the agency's "'litigating position.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute" provided as "agency litigating positions."). Thus, resolving the split among the lower courts as to the Mine Act's scope merits this Court's review.

II. The *Chevron* Step One-and-a-Half Doctrine Is Egregiously Wrong and Should Be Abrogated

In situations where an agency declares that its preferred interpretation is compelled by Congress but the reviewing court concludes that the statute is ambiguous, the *Chevron* Step One-and-a-Half doctrine requires a remand for the agency to re-interpret the statute (even if the agency produces the same interpretation later). The key analytical move under *Chevron* Step One-and-a-Half is to say that deference at *Chevron* Step Two is reserved for situations where the agency "recognize[s]" the ambiguity in the statute. App.18a; *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *Prill v. NLRB*, 755 F.2d 941, 956–57 (D.C. Cir. 1985).

Put another way, the *Chevron* Step One-and-a-Half doctrine says that when, according to the reviewing court, an "agency wrongly believes" that the agency's interpretation is "compelled by Congress," then "deference to [the] agency's interpretation of a statute is not appropriate," App.13a (quoting *PDK Labs.*, 362 F.3d at 798). In such circumstances, the court must "remand" to the agency "allowing [the agency] to interpret the statute's ambiguous language," App.4a. The court below confirmed that such re-interpretive remands under the *Chevron* Step One-and-a-Half doctrine are an established feature of D.C. Circuit jurisprudence. App.13a (citing *Peter Pan*, 471 F.3d at 1354). The doctrine applies to agency

interpretation issued via rulemaking as well as administrative adjudication.[5]

This Court is aware of D.C. Circuit-specific doctrines and has taken cases to abrogate them. In *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015), for example, the Court took the case and abrogated the D.C. Circuit's *Paralyzed Veterans* doctrine. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Relevant to this case, the Court has implicitly criticized the *Chevron* Step One-and-a-Half doctrine, for example, in *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018). There, as here, "the Executive seems [to be] of two minds." *Id.* at 520. The Secretary of Labor would interpret the Act to mean X and the Commission to mean Y. In such a situation, any re-interpretive remand ordered with a view to then defer to the Secretary's interpretation but not the Commission's "surely" makes "political accountability … a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." *Id.* Having impliedly criticized the application of *Chevron* Step One-and-a-Half doctrine in *Epic Systems* to cases like KC's, the Court now has the opportunity to abrogate it.

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[5] *Alarm Industry Commc'ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997); *City of Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027, 1034 (D.C. Cir. 1997); *Baltimore & Ohio R.R. Co. v. ICC*, 826 F.2d 1125, 1129 (D.C. Cir. 1987); *see also* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2017).

A. *Chevron* Step One-and-a-Half Is Impractical, Unworkable, and Unfair

Chevron Step One-and-a-Half is particularly problematic in situations, as here, where MSHA's mine inspector issues peremptory citations premised on drive-by interpretations; then, the agency's attorneys issue a makeshift interpretation of the statute by way of evolving litigating positions taken to support the inspector's interpretation in front of a separate adjudicating body, the Commission. Where, as here, the agency appeals, it has an incentive to choose the D.C. Circuit, which would be all too happy to find ambiguity and issue a *Chevron* Step One-and-a-Half remand. *See, e.g.*, *Relentless, Inc. v. Dep't of Com.*, No. 22-1219, Oral Arg. Tr. 41:22–42:15 (Jan. 17, 2024) (noting the D.C. Circuit's well-exploited tendency).

Chief among the doctrine's critics was then-Judge John G. Roberts, Jr. *See PDK Labs.*, 362 F.3d at 808–10 (Roberts, J., concurring in part and in the judgment). His *PDK* concurrence noted that remand for re-interpretation is not called for unless there is "real and genuine doubt concerning what interpretation the agency would choose." *Id.* at 808. When, as with the Secretary's interpretation at issue here, there is no such doubt as to how the agency would interpret the Mine Act's scope, remand for reinterpretation "outstrips its rationale" and "'convert[s] judicial review of agency action into a ping-pong game.'" *Id.* at 809.

There is irrefutable logic to the *PDK* concurrence. "The very fact that an agency has read the statute in a particular way" is itself strong "evidence" that the agency "prefers the interpretation it adopted to the

one that it did not adopt." Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253, 297 (2017) (discussing *Prill*). That is particularly true in the context of split administrative enforcement actions like this one where both the Secretary and the Commission, two separate executive agencies, have each given starkly different interpretations of the Mine Act.

Judge Walker, dissenting below, flagged a related problem with the *Chevron* Step One-and-a-Half doctrine. He wrote that the doctrine "is [u]nwarranted" because "deference is inappropriate." App.35a–36a. *Chevron* Step One-and-a-Half "too readily relinquishes th[e federal courts'] duty to decide all relevant questions of law and to interpret statutory provisions." App. 36a (simplified). The result of turning interpretation into a ping-pong game is that "a small trucking business is forced once more to fight a moving target [and] … turn square corners … twice." App.37a (simplified).

The latter point about unfairness is particularly salient. *National Cement* illustrates it well. There, the D.C. Circuit remanded the case for re-interpretation over Judge Rogers' dissent. *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1077 (D.C. Cir. 2007). On remand, the Commission ordered full briefing from the Secretary and the company. *Sec'y of Labor v. National Cement Co. of California, Inc.*, 30 F.M.S.H.R.C. 668, 671 (Rev. Comm'n Aug. 26, 2008). The briefing comprised overlength briefs and even sur-replies. *Id.* at 671–72 & n.4. The Commission once again disagreed with the Secretary's interpretation, concluding that it was "not a permissible construction of " § 802(h)(1)(B). *Id.* at 682. The Secretary once

again appealed to the D.C. Circuit, where a different panel unanimously deferred to the Secretary's interpretation and concluded that it was "reasonable" under *Chevron* Step Two. *National Cement II*, 573 F.3d at 797.

That did not end the case. Having concluded that the Secretary has the authority to cite the cement company, the court remanded "for proceedings on the merits of the citation," *id.*, and the parties litigated that in front of the Commission's ALJ. *Sec'y of Labor v. National Cement Co. of California, Inc.*, 31 F.M.S.H.R.C. 1100 (Rev. Comm'n Oct. 26, 2009) (ordering ALJ to decide the merits).

Chevron Step One-and-a-Half, in practice, is a game designed to ensure the governmental litigant emerges victorious almost all of the time by the sheer act of fatiguing the regulated party to spend a lot of money and many a year going back and forth between the ALJ, Commission, and federal courts. This Court should call timeout and abrogate the doctrine.

B. *Chevron* Step One-and-a-Half, as Applied to the Mine Act, Disregards Congress's Split-Enforcement Scheme

When one agency disagrees with a sister agency's interpretation, the court's job is not to place an uninvited thumb on the scale and give the litigating agency interpretive supremacy over the adjudicating agency. The fact that Congress created a split-enforcement mechanism evinces Congress's intent that the *Commission*'s (not MSHA's) interpretation should be deferred to (if deference is owed at all). MSHA and the Commission are separate agencies. 29 U.S.C. § 557a; 30 U.S.C. § 823. And Congress gave the

Commission the authority to decide questions of law. 30 U.S.C. § 816. But the *Chevron* Step One-and-a-Half doctrine instructs the Commission to disregard its own well-considered interpretation and adopt the interpretation supplied by the agency litigating before it. *National Cement*, 494 F.3d at 1077 ("[W]e vacate the Commission's decision and remand for it to obtain from the Secretary a *Chevron* step 2 interpretation of [30 U.S.C. § 802(h)(1)(B)].").

Whatever its virtues may be in other contexts,[6] a remand frustrates Congress's scheme of separating enforcement and adjudication in the Mine Act context. And it exacerbates the separation-of-powers problem by converting statutory interpretation into a "ping-pong game," *PDK*, 362 F.3d at 809 (Roberts, J., concurring in part), while small businesses like KC Transport must either acquiesce and pay thousands in civil penalties or bounce around from ALJ to Commission to D.C. Circuit to Commission and back.

C. A *Chevron* Step One-and-a-Half Remand Contravenes the Mine Act's Authorized Remedies

Chevron Step One-and-a-Half re-interpretive remands are outside the scope of judicial remedies specified in the Mine Act. 30 U.S.C. § 816(a)(1). The statute permits the circuit courts to issue "a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified." *Id. Remand* is not within the court's toolbox

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[6] *See, e.g.*, Hemel & Nielson, 84 U. Chi. L. Rev. at 801–15 (discussing the *Chevron* Step One-and-a-Half doctrine).

under the Mine Act; it can only affirm, modify, or set aside.[7]

Perhaps the *Chevron* Step One-and-a-Half doctrine rests on the notion, mistaken or not, that remand falls within the ambit of remedies a court can award for agency action or inaction under the Administrative Procedure Act, 5 U.S.C. § 706. But that argument fails in the Mine Act context because 30 U.S.C. § 956 states that "the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." Remands like the ones available under 5 U.S.C. § 706 are therefore *not* available under the Mine Act's statutory scheme.

III. If the Court Is Not Prepared to Grant Certiorari Now, It Should Hold the Petition Pending Resolution of *Loper Bright* and *Relentless*

Both questions presented are certworthy now and, for the reasons stated above, the Court should grant the Petition. The scope of MSHA authority is a matter of critical national importance on which the circuit splits have become worse. And the continued validity of re-interpretive remands could remain an issue regardless of the outcome in *Loper Bright* and *Relentless*. Alternatively, the Court should hold the Petition until it decides the fate of *Chevron* deference and then dispose of this Petition accordingly.

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[7] The Act authorizes only a limited, non-substantive interim remand for the presentation of additional evidence to the Commission. *See* 30 U.S.C. § 816(a)(1).

Judge Walker, in dissent, was correct to point out that the *Chevron* Step One-and-a-Half doctrine is unwarranted because *Chevron* deference is inappropriate. App.35a–36a. The D.C. Circuit's *Chevron* Step One-and-a-Half doctrine is a consequence of *Chevron*. *See Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Rev. Comm'n*, 212 F.3d 1301, 1304–05 (D.C. Cir. 2000). *Chevron* incentivizes the D.C. Circuit to find ways to defer, and it perpetuates the ills of "reflexive deference" to "statutory provisions that concern the scope of [the agency's] authority." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). If *Chevron* goes out the window, then *Chevron* Step One-and-a-Half does too. Given the forthcoming decisions in *Loper Bright* (No. 22-451) and *Relentless* (No. 22-1219), this Court should hold the Petition until those cases 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 (GVR). GVR is "an integral part of this Court's practice." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (*per curiam*). This Court has "GVR'd in light of a wide range of developments." *Id.* 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. *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting).

If this Court decides to overrule *Chevron*, or even if it clarifies the proper application of *Chevron* deference without overruling the doctrine, that decision will affect the D.C. Circuit's interpretation of § 802(h)(1) and the outcome of this case. And if the D.C. Circuit can no longer apply the *Chevron*

framework, or if it must apply it differently, it would then have to decide whether and how the *Chevron* Step One-and-a-Half doctrine fits within that new framework announced by this Court in *Loper Bright* and *Relentless*.

The panel majority below did not offer a non-*Chevron* reason for its holding, and even criticized the Secretary for not presenting a *Chevron*-sensitive litigating position to the court. After oral argument, the court, on its own motion, issued a rare order for supplemental briefs asking parties to brief, among other things, whether the "Secretary waived *Chevron* deference when [the Secretary's] counsel stated at oral argument that the statute was unambiguous, and he was not asking for deference under *Chevron*." D.C. Cir. No. 22-1071, Order (Dec. 30, 2022). The Secretary's supplemental brief stated flatly that "if the statute is ambiguous," then the Secretary's "interpretation is owed *Chevron* deference." D.C. Cir. No. 22-1071, Pet'r's Suppl. Br. at 12 (Jan. 13, 2023). *Chevron* thus suffuses this case. Accordingly, the Court, if it is not prepared to grant review now on the specific questions presented, should then hold the petition pending resolution of *Loper Bright* and *Relentless* to be then disposed of accordingly.

Conclusion

The petition for writ of certiorari should be granted—or held pending the disposition of *Loper Bright* and *Relentless*.

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Respectfully submitted,

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