No. 23-876

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES P. MCHUGH
CHRISTOPHER D. PENCE
Pence Law Firm PLLC
10 Hale St., 4th Floor
P.O. Box 2548
Charleston, WV 25329

ADITYA DYNAR
Counsel of Record
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Telephone: (202) 807-4472
ADynar@pacificlegal.org

DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

Counsel for Petitioner

Table of Contents

Table of Authorities

Cases

Reply Brief

The government agrees that the Petition should be held pending the Court's decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219. Accordingly, the Petition should be held—and after the Court's disposition of *Loper Bright* and *Relentless*, the Court should either grant the Petition outright, or grant the Petition, vacate the D.C. Circuit's decision, and remand in light of *Loper Bright* and *Relentless* (GVR).

I. The Court Should Hold the Petition until the Disposition of *Loper Bright* and *Relentless*

The government agrees with Petitioner KC Transport, Inc., that "it would be appropriate to hold the petition in this case pending the Court's decisions in *Relentless* and *Loper*" because "this case … presupposes the continued vitality of the *Chevron* framework, and this Court's decisions in *Relentless* and *Loper* could affect the proper disposition of the case." BIO at 12–13; *see also* Pet. at 26 ("Alternatively, the Court should hold the Petition until it decides the fate of *Chevron* deference and then dispose of this Petition accordingly.").

Given the agreement between the parties, the Petition should be "held pending the disposition of *Loper Bright* and *Relentless*." Pet. at 29.

II. Thereafter, the Court Should Either Grant the Petition Outright or GVR

The government makes only a perfunctory argument about why "plenary review … should be denied," BIO at 13, and ignores the 29 amici joining in two amicus briefs arguing for grant of certiorari. The

government does not dispute that "this case implicates a division of authority within the courts of appeals regarding the application of the Mine Act," nor that the D.C. Circuit relied on its *Chevron* Step One-and-a-Half doctrine. BIO at 13.

1. On the first question presented, to downplay the worsening circuit split regarding the interpretation of the Mine Act, the government asserts that the D.C. Circuit did not "actually" interpret the Mine Act. BIO at 13. Not so. The D.C. Circuit interpreted 30 U.S.C. § 802(h)(1)(C), and determined that it unambiguously extends beyond excavation and processing sites. App.20a–21a. The D.C. Circuit's interpretation goes further than the Sixth Circuit's, which concluded that the Mine Act is "unambiguously limited to extraction sites." Pet. at 7 (discussing *Maxxim Rebuild Co. v. Federal Mine Safety & Health Rev. Comm'n*, 848 F.3d 737 (6th Cir. 2017)). That circuit split remains unresolved. In Petitioner's view, the only plausible reading of the statute is either the one supplied by *Maxxim* or by Judge Walker's dissent below. App.25a–35a.

The first question, therefore, is squarely presented: whether the Mine Act should be interpreted to apply within or beyond extraction or processing sites. And given the split of authority on that question, an outright grant of certiorari would be appropriate—as would a GVR.

2. On the second question presented, the government says that the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine is "consistent with this Court's decision in *Negusie v. Holder*, 555 U.S. 511 (2009)." BIO at 14. Not so. In *Negusie*, the Fifth Circuit had issued a short *per curiam* opinion that

contained no mention of ambiguity or *Chevron* deference. *Negusie v. Gonzales*, 231 Fed. App'x 325 (5th Cir. 2007). This Court concluded that "the statute has an ambiguity that the agency should address in the first instance." 555 U.S. at 517. The Court, therefore, remanded to the Fifth Circuit "for further proceedings consistent with this opinion." *Id.* at 525.

This Court in *Negusie* neither established nor endorsed the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine. The government does not suggest (nor could it) that the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine necessarily follows from *Negusie*. Indeed, cases like *Negusie* have "no precedential effect" on whether the D.C. Circuit's doctrine is constitutional. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Arguments about the continued validity of the *Chevron* Step One-and-a-Half doctrine were "not … raised in briefs or argument[s] nor discussed in the opinion of the Court," so, cases like *Negusie* cannot be viewed as "a binding precedent" establishing for all time the validity of the now-challenged doctrine. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Nor does the mere existence of cases like *Negusie* indicate whether the doctrine the government says *Negusie* establishes or endorses is insulated from challenge. Although Justice Thomas, in his *Negusie* dissent, pointed out the flaws in the "Court's efforts to derive ambiguity from th[e] utmost clarity," *Negusie*, 555 U.S. at 549, neither party in *Negusie* had presented the arguments KC Transport presents here as to why the *Chevron* Step One-and-a-Half doctrine should be abrogated. Consequently, *Negusie* is simply inapposite to evaluating whether the second question presented is worthy of certiorari. To the extent *Negusie* could be viewed as endorsing

the D.C. Circuit's doctrine, the Court would be well positioned to evaluate that reading of *Negusie* on grant of plenary review.

Conclusion

Given the agreement of the parties, the Court should hold the Petition pending this Court's disposition in *Loper Bright* and *Relentless*. At that point, the Court should grant certiorari outright or GVR in light of *Loper Bright* and *Relentless*.

DATED: April 2024.

Respectfully submitted,

JAMES P. MCHUGH
CHRISTOPHER D. PENCE
Pence Law Firm PLLC
10 Hale St., 4th Floor
P.O. Box 2548
Charleston, WV 25329

ADITYA DYNAR
Counsel of Record
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Telephone: (202) 807-4472
ADynar@pacificlegal.org

DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

Counsel for Petitioner