ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1196

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Monongalia County Coal Company, et al.,

Petitioners

v.

Federal Mine Safety and Health Review Commission and Secretary of Labor, Mine Safety and Health Administration,

Respondents

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

Brief for the Secretary of Labor

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Certificate as to Parties, Rulings, and Related Cases

1. Parties and amici

All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and in this Court are listed in the Brief for Petitioners.

2. Rulings under review

References to the rulings at issue appear in the Brief for Petitioners. The rulings are reported at *Secretary o/b/o Greathouse v. Monongalia County Coal Co., et al.*, 38 FMSHRC 941 (2016) (ALJ) and *Secretary o/b/o Greathouse v. Monongalia County Coal Co., et al.*, 40 FMSHRC 679 (2018).

3. Related cases

This case was not previously before this Court or any other court. Counsel is unaware of any related cases pending before this Court or any other court.

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Introduction

Mines are dangerous places, and although the Federal Mine Safety and Health Act of 1977 (Mine Act) created a strong federal mine safety and health program, federal inspectors cannot be in every mine at all times to enforce it. So the Mine Act depends on miners' participation. To encourage that participation, the Mine Act gives miners many important rights, including the right to anonymously report hazards to the Mine Safety and Health Administration (MSHA), the right to accompany MSHA inspectors while they inspect mines, the right to report injuries to mine management, and the right to refuse to work in dangerous conditions. Congress recognized that miners were not likely to exercise these rights if they feared retaliation. S. Rep. No. 95-181, at 35 (1977) (Senate Report). So the Mine Act prohibits both discriminating against miners for exercising protected rights and interference with protected rights. 30 U.S.C. § 815(c)(1).

This case concerns the meaning and application of the prohibition against interference. Petitioners Murray Energy Corporation and its subsidiaries submit that the Mine Act prohibits only interference motivated by miners' exercise of protected rights. The Secretary of Labor, however, interprets the Mine Act as prohibiting acts that reasonably tend to interfere with protected rights, the motive for those acts notwithstanding. *See, e.g.*, *Marshall Cnty. Coal Co. v. FMSHRC*, 923 F.3d 192, 198–99 (D.C. Cir. 2019); *Franks v. Emerald Coal Res., LP*, 36 FMSHRC

2088, 2108 (2014). This "*Franks*" test is consistent with the Supreme Court's approach to interpreting antidiscrimination statutes, with the Mine Act's legislative history and purpose, with Congressional intent, and with this Court's and Commission precedent. It also accommodates mine operators' legitimate interests while ensuring that miners are not deterred from exercising their rights, which in turn ensures productive, safe, and healthful mines.

This case arose in response to Murray's imposition, at six of its mines, of "Safety and Production Bonus Plans." The plans rewarded miners with bonuses based on how much coal they produced. The plans also disqualified miners from earning bonuses, or reduced the amounts of their bonuses, if they were not physically present for the whole shift, if MSHA issued certain kinds of citations or orders, or if miners sustained certain kinds of injuries. Under some of these circumstances, entire crews of miners could be disqualified from earning any bonus for an entire week.

The Secretary of Labor filed a complaint with the Federal Mine Safety and Health Review Commission, alleging that the plans interfered with miners' rights. At the hearing, the Secretary's witnesses gave unrebutted testimony about how the plans pressured miners to work unsafely and deterred miners from reporting injuries, refusing unsafe work, accompanying MSHA inspectors, and making safety complaints to MSHA. The Administrative Law Judge applied the Secretary's

(*Franks*) test for interference, found that the plans interfered with miners' exercise of rights, and assessed a civil penalty of $25,000 per mine. The ALJ was correct in every respect.

Jurisdictional Statement

The Commission's decision was issued on June 27, 2018. Murray filed its petition for review on July 26, 2018, within the Mine Act's 30-day deadline. 30 U.S.C. § 816(a)(1).

Statement of the Issues

1. Is the *Franks* test for interference a reasonable interpretation of the Mine Act?
2. Does substantial evidence support the ALJ's finding that the bonus plans interfered with miners' rights?
3. Is the ALJ's penalty assessment adequately explained and a valid exercise of discretion?

Pertinent Statutes and Regulations

Except for the statute contained in the Addendum, all applicable statutes and regulations are contained in the Brief for Petitioners.

Statement of the Case

1. Statutory background

"Congress adopted the Mine Act 'to protect the health and safety of the Nation's . . . miners." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994) (quoting 30 U.S.C. § 801(g)). To achieve this goal, "[t]he Mine Act charges two separate agencies with complementary policymaking and adjudicative functions." *Prairie State Generating Co. LLC v. Sec'y of Labor*, 792 F.3d 82, 85 (D.C. Cir. 2015). The Secretary, acting through MSHA, exercises "'rulemaking, inspection, and enforcement authority,'" while the Commission is "'an adjudicatory body, independent of the Secretary,' that reviews challenges to MSHA's actions." *Marshall Cnty.*, 923 F.3d at 195 (quoting *Wilson v. FMSHRC*, 863 F.3d 876, 879 (D.C. Cir. 2017)).

2. Miners' rights

Mining coal is a dangerous job. Major disasters—fires, floods, explosions—are an omnipresent threat. But equally pernicious are the quotidian hazards miners face. Miners can suffer concussions, amputations, and lacerations. They can be electrocuted by energized equipment, pulled into unguarded machines, or crushed by falling rock. And every minute underground, they risk breathing poisonous gases and dust.

The Mine Act and MSHA's standards aim to prevent these hazards. But the rules work only if they are followed, and miners are often pressured to produce coal rather than prioritize safety.

Sometimes this pressure comes from mine management or other miners. *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974) ("Safety costs money. . . . Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine [foremen] or mine top management."); *Marshall Cnty.*, 923 F.3d at 196 ("miners have an interest both in working in a safe environment and in maintaining good relationships with fellow workers and mine management" and should not be "forced to weigh those competing interests"). Sometimes this pressure is monetary. Miners were once paid based on how much coal they dug, which encouraged them to take shortcuts that risked sparking explosions. *See* Davitt McAteer, *Monongah: The Tragic Story of the 1907 Monongah Mine Disaster* 63–65 (2007) (discussing these practices at two mines that exploded, killing at least 360 people). Sometimes this pressure is a combination. *See* Bonnie E. Stewart, *No. 9: The 1968 Farmington Mine Disaster* 30–32 (2012) (detailing how a "high-production culture," including "bonuses based on productivity," encouraged shortcuts at a mine that exploded, killing 78 miners).

This pressure is also acute: mines are often in remote places and offer "the only real employment opportunity," Senate Report 35, so miners know they cannot afford to lose their jobs. And when miners succumb, the consequences can be catastrophic. *See, e.g.*, MSHA, *Report of Investigation – Upper Big Branch Mine-South* 2, 5, 40–54, 58–60 (2011) (discussing how "a workplace culture that valued production over safety" and pressured miners not to report hazards contributed to an explosion that killed 29 miners), *available at* https://arlweb.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf.

To counteract this pressure, the Mine Act gives miners many safety-promoting rights. These rights aim to ensure that miners will actively participate in the enforcement of the Mine Act, because their participation is "essential to the achievement of safe and healthful mines." *Sec'y o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2790 (1980); *see* 30 U.S.C. § 801(e).

Hazard complaints. Miners have the right to obtain an immediate inspection of a mine by anonymously reporting safety and health hazards, violations of the Mine Act, and imminent dangers to MSHA. 30 U.S.C. § 813(g); 30 C.F.R. §§ 43.4–43.6. MSHA inspectors cannot be at every mine all the time, so they cannot know about every hazard. *Pasula*, 2 FMSHRC at 2790. Miners, however, are in a better "position to detect and report hazards," so Congress encouraged them to do so. *Meredith v. FMSHRC*, 177 F.3d 1042, 1056 (D.C. Cir.

1999). Miners' hazard complaints "play an integral part in the enforcement" of the Mine Act. Senate Report 29–30; *Pasula*, 2 FMSHRC at 2790 ("The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction.").

Walkaround rights. Representatives of miners (any person or organization that represents two or more miners for the purposes of the Mine Act, 30 C.F.R. § 40.1(b)(1)) have the right to accompany MSHA inspectors during, and participate in, inspections. 30 U.S.C. § 813(f). This "walkaround" right is "vitally important" to ensuring safe and healthful mines. *Emery Mining Corp.*, 10 FMSHRC 276, 284 (1988). Miners' representatives, who may be more familiar with a mine than are inspectors who are not there every day, can raise and discuss concerns with inspectors. Participating in inspections helps miners understand safety and health requirements, which makes mines safer and healthier. Senate Report 28. And to ensure that miners are not discouraged from exercising these walkaround rights, operators must compensate employees who do so. 30 U.S.C. § 813(f).

Injury reporting. Miners have the right to report injuries to mine management, *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (1994), and operators have the obligation to accurately record and report miners' injuries. *See* 30 C.F.R. §§ 50.1–20-7. Accurate injury reports are important because they help

MSHA identify and investigate risks to miners, which is central to improving mine safety and health. *Richmond Sand & Stone, LLC*, No. YORK 2018-31-M, slip op. at 4 (FMSHRC Aug. 13, 2019).

Work refusals. Miners have the right to refuse to work in conditions they "reasonably and in good faith" believe are hazardous. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Pasula*, 2 FMSHRC at 2789–93. This right ensures that miners do not have to make the impossible choice between losing their jobs and protecting their safety. *Pasula*, 2 FMSHRC at 2790, 2792–93.

Congress recognized the obvious: miners may not exercise these rights unless they are protected from retaliation for doing so and from intrusion into their ability to do so. Senate Report 35. So § 105(c)(1) of the Mine Act prohibits both discrimination and interference. In relevant part, it states:

> No person shall discharge or in any manner discriminate against . . . any miner . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

Congress intended § 105(c) to broaden the existing antidiscrimination provision in the Mine Act's predecessor statute, § 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), 30 U.S.C. § 820(b)(1) (1976). Senate Report 36. Section 105(c) is "to be construed expansively to assure that

miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Ibid.* Congress also meant to prohibit both "the common forms of discrimination, such as discharge, suspension, [and] demotion," and the "the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Ibid.*

In the Secretary's experience, miners are deterred from exercising their rights not just by deliberate, overt threats, but also by indirect or inadvertent intimidation. Consistent with that experience and with Congress's intent to protect miners as broadly as possible, the Secretary has adopted a two-prong test for determining when a person has interfered with a miner's exercise of rights:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108 (Jordan, Chairman, and Nakamura, Comm'r); *Marshall Cnty.*, 923 F.3d at 204; *Wilson*, 863 F.3d at 879. This test considers the objective effects of an action, not the subjective reasons that motivated it.

3. The bonus plans

This case involves six underground coal mines clustered in and around the northern panhandle of West Virginia. The miners there are represented by the United Mine Workers of America International Union. In September and October 2014, Murray sent letters to Union officials announcing its "intention to install a bonus plan" at each mine (but providing no details about the plans). J.X. 8–13. Murray and Union representatives met at each mine over the next few weeks to discuss the plans. J.S. 34. Union representatives expressed concern that the plans would encourage miners to focus on production rather than safety. Tr. 33–34, 149, 208. After the meetings, Murray tweaked, but did not fundamentally change, the plans. Tr. 271–75.

The plans were quite similar. *See* J.X. 20–25. They established a minimum footage amount miners had to achieve in order to receive a bonus. J.X. 20–25, at 1. Based on how much more than that minimum they achieved, miners on production crews could earn a bonus of $50–$150 each (for continuous mining machine crews) and $50–$200 each (for longwall crews) per shift. J.X. 20–25, at 2. Miners not assigned to production crews earned 10% of the amount the production crews earned. J.X. 20–25, at 1. Mine foremen earned double what the production crews did. Tr. 308.

The plans contained four main disqualification provisions. First, any miner who was not "physically present" for the entire shift was disqualified for that shift. J.X. 20–25, at 2. If production miners left the production section, such as to accompany MSHA inspectors, they could earn only the 10% share on that shift. Tr. 282–83.

Second, if MSHA issued a "significant and substantial" citation (a citation alleging that a violation "could significantly and substantially contribute to" a hazard, 30 U.S.C. § 814(d)(1)) inby the tailpiece (i.e., between the working face where coal is cut and the belt that carries it out of the mine), every shift on that working section that entire day was disqualified. J.X. 20–25, at 3.

Third, if MSHA issued an order under § 104(b) or (d) of the Mine Act (an order issued in response to a violation or hazard that stops production until the violation or hazard is eliminated, 30 U.S.C. §§ 814(b), (d)) inby the tailpiece, and mine management deemed it "attributable to the crews working on that section," all the crews on that section were disqualified for seven days. J.X. 20–25, at 3.

Fourth, if any miner was incapacitated by a lost-time accident, the entire crew was disqualified for that shift. J.X. 20–25, at 3.

Murray inaccurately states (Br. 5–6) that a disqualification would apply to only one miner for one shift. The plans in fact could disqualify many miners,

possibly for many shifts, which is important because that created intense peer pressure. *See* pp. 14–15, *infra*.

The plans went into effect in January 2015. J.S. 36, 39, 43, 46, 50. The Union filed grievances challenging the plans, which led to arbitration decisions requiring Murray to discontinue the plans at three mines. J.S. 49, 53, 57. Until the ALJ ordered the plans discontinued, *see* p. 17, *infra*, they remained in effect at the other three. J.S. 38, 42, 45.

4. Commission proceedings

A. The hearing

After receiving and investigating complaints from Union representatives about the plans at each mine, the Secretary filed a complaint with the Commission, alleging that the plans interfered with miners' rights. A.R. 1–76. Murray filed a motion to dismiss, which the ALJ denied, A.R. 191–98, and this case proceeded to a hearing.

At the hearing, five witnesses (local Union officials from the mines) testified for the Secretary, explaining how the bonus plans affected miners. The bonuses were addictive, like "crack": because the goals were achievable, miners "[got] a little taste of" the bonuses and "would do what [they] had to do to get more and more out of it." Tr. 44. One witness averred his commitment to safety but explained that the bonuses are too enticing to resist: "It is human nature to make

that bonus. Whether we disregard safety or not, it is human nature to make that $50 a day more, $100 a day more, whatever it might be." Tr. 140.

After the plans were implemented, safety issues were neglected. Mines must cover explosive coal dust with rock dust (pulverized stone) in order to prevent explosions. 30 C.F.R. § 75.402. After the plans, miners did not adequately rock dust. Tr. 49, 52, 106, 119, 153, 217, 227. Mines must install bolts in the mine roof in order to keep it from collapsing. 30 C.F.R. §§ 75.204–05, 75.222(b). After the plans, miners did not adequately bolt the roof. Tr. 105–06, 119, 141, 153. Mines must be adequately ventilated, and may generally not produce coal if methane is in the mine air, in order to prevent explosions. *See* 30 C.F.R. §§ 75.300–389. After the plans, miners cut coal even in poor ventilation and high methane. Tr. 49, 51–52, 106–07, 109, 119, 165. Miners also neglected other safety issues, like inspecting equipment and cleaning up accumulations of coal dust. Tr. 49.

The reason for this neglect is obvious: time spent on safety was time not spent on production, and time not spent on production meant a smaller bonus or no bonus at all. Tr. 49–50 ("anything you do is going to take away from cutting, and you have got to cut to get footage, and the more footage you do, the more money you get"), 105 ("[W]e neglect [MSHA safety standards] because we got our eyes set on the bonus at the end of the day.").

After the plans, miners also were less likely to exercise their protected rights. Miners were unwilling to exercise their walkaround rights, since doing so meant earning a smaller bonus. Tr. 47, 72–73, 152, 155, 166, 230. One miner who *was* willing to do so was told to stop, since he was making it more difficult for his crew to earn bonuses. Tr. 113–14, 135. Miners were unwilling to report hazards to MSHA: because MSHA inspects mines in response to complaints, reporting hazards created the risk that MSHA would issue disqualifying citations or orders. Tr. 48–49, 51, 114–15, 141, 161–62. Miners were unwilling to report injuries, worried they would disqualify their crew. Tr. 54–55, 112, 116, 226, 229. And miners were unwilling to refuse to work in unsafe conditions, because any time spent not working reduced their bonuses. Tr. 50.

Peer pressure exacerbated these effects. Bonuses depended on maximizing production, so miners' crew members could pressure them into taking shortcuts. Tr. 50 ("They may be willing to do something and you may not be willing to do something, and you get six or seven guys saying, listen, shut up, it is okay, we are going to run [produce coal], then you are going to run."), 162. Because many of the plans' disqualification provisions applied to entire crews, miners did not want to "screw everybody," Tr. 226, by doing something—reporting an injury, or contacting MSHA—that might disqualify the people they worked with. Tr. 112, 114, 116. When miners did report issues that cost other miners their bonuses, they

were derided as "rats." Tr. 220. Mine foremen also pressured miners to produce coal, since they earned double the bonus the rank-and-file miners did. Tr. 58, 60, 153–54, 180, 182, 308.

Murray's only witness was Senior Vice President John Forrelli, who designed the plans. Tr. 265. Forrelli testified that he set production goals he thought were reasonable, Tr. 277, 280, and bonus amounts he thought were not high enough to encourage miners to take shortcuts. Tr. 315. He believed that per-shift bonuses were less likely to encourage miners to take shortcuts than were larger bonuses that accrued over multiple shifts. Tr. 278–79. He assumed that the plans would not deter protected activity, but did nothing to determine whether that assumption was correct. Tr. 291–93, 295–96. And when he reviewed data after the plans were implemented, he could not determine how they affected production or safety. Tr. 293–301. Forrelli did not rebut the testimony of the Secretary's witnesses, and Murray called no witness that did.

B. The ALJ's decision

The ALJ applied the *Franks* test, Dec. 6–9, and concluded that the bonus plans interfered with miners' rights. At prong one, she found that the plans generally "creat[ed] a climate adverse to safety" and pressured miners to "work as fast as possible so as not to take away from potential bonuses" for other miners. Dec. 10. She also found that the plans interfered with specific protected rights.

Hazard complaints. The ALJ found that the disqualification provisions concerning MSHA citations and orders "penalize miners who make safety complaints to MSHA, since a complaint to MSHA that results in a violation" disqualifies not only that miner, but the entire crew, from a bonus. Dec. 11. She reasoned that MSHA is "substantially more likely" to discover a hazard that a miner has reported, so that a disqualifying citation or order was much more likely to be issued if miners exercise their hazard reporting rights. Dec. 11.

Walkaround rights. The ALJ found that the physical-presence requirement discouraged miners from exercising their walkaround rights. Dec. 11–12. Production crew miners who did so would be eligible for only the 10% bonus, rather than for the (likely) larger bonus they would earn on the production crew. Dec. 12.

Injury reporting. The ALJ found that the injury disqualification provision discouraged miners from exercising their right to report injuries, because they had to "choose between exercising [that right] and getting a bonus." Dec. 12. She emphasized that peer pressure also discouraged miners from reporting, since reporting could disqualify the entire crew for that shift. Dec. 12.

The ALJ also found that, although the per-shift bonus amounts were not "extraordinarily large, the amounts for production crewmembers are large enough

to matter to most miners" and that miners faced intense peer pressure to earn bonuses. Dec. 13.

At prong two of *Franks*, the ALJ found that Murray had not proven that its legitimate interest in production outweighed the harm the plans caused miners' protected rights. Dec. 14–15. She reasoned that miners' "rights are essential to safety at the mines," that the harm to them was "evident," and that Murray had not identified any actual safety or production benefits from the plans. Dec. 14–15.

Having found a violation of § 105(c), the ALJ imposed a penalty based on the six factors in § 110(i), 30 U.S.C. § 820(i). Dec. 15. The penalty was $25,000 per mine, $5,000 more per mine than the Secretary had proposed. Dec. 15. The ALJ also ordered Murray to rescind the plans at the three mines where they were still in effect. Dec. 15.

C. The Commission's decision

The Commission evenly divided about whether to affirm the ALJ. Then-acting Chairman Jordan and Commissioner Cohen voted to affirm. Comm'n Dec. 7–29. They concluded that § 105(c)(1) does not plainly require proof of motive to establish interference, Comm'n Dec. 7–20, and that the *Franks* test is a reasonable interpretation of the statute. Comm'n Dec. 20–22. They concluded that substantial evidence supported the ALJ's findings that the bonus plans interfered with miners'

rights and that Murray's justification for the plans did not outweigh the harm to protected rights. Comm'n Dec. 22–25.

Commissioners Althen and Young voted to reverse. Comm'n Dec. 30–51. They concluded that § 105(c)(1) plainly requires proof that protected activity motivated an act of alleged interference, Comm'n Dec. 30–48, and found that the Secretary did not prove motive. Comm'n Dec. 30 n.1, 50. They did not explain why they had affirmed the ALJ's application of the *Franks* test in another case two years earlier. *See Sec'y o/b/o McGary v. The Marshall Cnty. Coal Co.*, 38 FMSHRC 2006, 2011–12 (2016), *aff'd*, 923 F.3d 192.

Summary of the Argument

The *Franks* test is the proper test for interference. Section 105(c)(1) does use the phrase "because of," but that phrase does not establish that Congress unambiguously intended to require proof of motive to establish interference. The Court should not consider that phrase in isolation, but should consider the statute as a whole: the verb "interfere" does not necessarily suggest motive, and § 105(c)(1) follows a pattern that the Supreme Court has found *not* to unambiguously require motive for liability. Moreover, Congress intended § 105(c)(1) to be expansively interpreted so that miners will not be deterred in any way from exercising their rights, and the Mine Act is a remedial statute whose successful operation *depends* on miners' exercise of those rights. Interpreting

§ 105(c)(1) as requiring proof of motive would frustrate both Congress's intent and the Mine Act's purpose.

The *Franks* test is consistent with this Court's and Commission precedent. For decades, this Court has broadly interpreted § 105(c)(1) and its predecessor statute. This Court has rejected interpretations based on the bare words of the statute, instead accepting interpretations that effectuate Congress's intent and promote the Mine Act's remedial purpose. It has also declined to require proof of subjective motive. Similarly, the Commission's interference cases share the core principles of *Franks*: that the interference analysis focuses on effect, and that motive is not dispositive of whether interference occurred.

The legislative history and purpose of the Mine Act also support the *Franks* test. As Congress intended, the *Franks* test interprets § 105(c)(1) broadly to ensure that miners' protection from interference is not contingent on an operator's motivation. The *Franks* test also gives effect to Congress's intent to provide National Labor Relations Act-style protections to miners because it mirrors the test for NLRA interference. And it promotes two core purposes of the Mine Act: it encourages miners' active participation in the operation of the Mine Act, which in turn improves mine safety and health.

The *Franks* test for interference is different from the Commission's test for discrimination, but it is not less demanding. Prong one is an objective standard,

satisfied only if an action has a reasonable tendency to interfere with protected rights; not all actions, measured objectively, will have that tendency. And even if an act satisfies prong one, an alleged interferer can justify that act with a legitimate and substantial interest at prong two. In other words, *Franks* balances operators' interests with miners' rights and is practical, workable, and fair.

The ALJ correctly applied *Franks*, and substantial evidence supports her finding that the bonus plans interfered with miners' rights. The plans generally pressured miners to subordinate safety tasks to production goals, and they specifically pressured miners not to exercise their walkaround rights, report injuries to mine management, refuse unsafe work, or make complaints to MSHA. Murray has a legitimate interest in ensuring that its mines are productive, but substantial evidence supports the ALJ's finding that the plans did not necessarily advance this interest and that Murray's justification did not outweigh the harm the plans caused to miners' rights. When assessing a monetary penalty for the violation, the ALJ considered the statutory factors and adequately explained her rationale.

Argument

1. This Court reviews the ALJ's decision.

The Commission's split decision "made the ALJ's ruling the final agency decision." *Sec'y of Labor, MSHA v. Consolidation Coal Co.*, 895 F.3d 113, 116

(D.C. Cir. 2018). For this reason, the Court reviews not the Commission's split decision, but the ALJ's decision. *Id.* at 117 n.2; *Am. Coal Co. v. FMSHRC*, __ F.3d __, 2019 WL 2563155, at *2 (D.C. Cir. 2019).

2. The *Franks* test is the proper test for interference.

This Court applies "the familiar two-step Chevron standard" when reviewing the Secretary's interpretation of the Mine Act. *Am. Coal Co. v. FMSHRC*, 796 F.3d 18, 23 (D.C. Cir. 2015). At the first step, the Court determines "whether Congress has unambiguously addressed" the precise question at issue. *Id.* at 24. Whether a statute is ambiguous depends on "its text, legislative history, structure, and purpose . . . ." *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Considering all that context, if a statute has multiple plausible meanings, then it is ambiguous. *Am. Coal*, 796 F.3d at 24. So for Murray "to prevail under *Chevron* step one, [it] must do more than offer a reasonable or, even the best, interpretation; it must show that the statute unambiguously forecloses the [Secretary's] interpretation." *Vill. of Barrington, Illinois v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011).

If a statute does not unambiguously foreclose the Secretary's interpretation, the Court determines "whether [that] interpretation is reasonable." *Am. Coal*, 796 F.3d at 24. Because the Mine Act is "a remedial health-and-safety act," the Court "must 'liberally construe' the Act's terms, meaning that [it is] all the more 'obliged

to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable.'" *Id.* (quoting *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989)).

A. Section 105(c) does not plainly require proof of motive to establish interference.

Murray argues (Br. 14–20) that § 105(c)(1) plainly requires proof of motive to establish interference. Precisely what Murray means by "motive" is unclear; it argued to the Commission that an action is interference only if it is motivated by a miner's *prior* protected activity (Br. 15–16, 17 n.12), but now argues that an action may be interference if motivated by a miner's prior or potential *future* protected activity (Br. 17 n.12) and suggests that motive might mean *intent* (Br. 27, 40). But no matter what Murray means, § 105(c)(1) does not plainly require it.

One problem with Murray's argument is that, knowing that the test for interference is unsettled, this Court has twice applied *Franks*. *Marshall Cnty.*, 923 F.3d at 204; *Wilson*, 863 F.3d at 879. Since this Court must apply the plain meaning of a statute if one exists, *Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1200 (D.C. Cir. 2011), it would not have twice applied a test that ignores the plain meaning of § 105(c)(1).

Another problem is that Murray assumes that the literal meaning of "because" is clear, so that § 105(c)(1) plainly requires proof of motive. Br. 15–17.

Literal meaning and plain meaning, however, are not the same. In *Meredith*, this Court rejected an argument like Murray's, holding that MSHA officials, although they are literally "persons," are not "any person" as used in § 105(c)(1). 177 F.3d at 1052–56. The Court emphasized that the meaning of "person" was found not in isolation, but by reference to other statutory provisions and language. *Id.* at 1054–56. Other statutory language confirms that § 105(c)(1) does not plainly require motive.

The verb "interfere," for example, does not necessarily suggest intentional action, even when paired with the word "because." Consider these examples: "The cooks interfere with each other because of their proximity"; "The infants interfere with the ceremony because they cry." Neither the cooks nor the infants are acting deliberately or in response to any activity, but the effect of their acts—interference—occurs nevertheless.

The phrase "otherwise interfere with" is also significant. The Supreme Court has explained that, in antidiscrimination statutes, an "otherwise" phrase refers not to the intent of the actor, but to the effects of the action. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2518–19 (2015) (discussing *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). When an "otherwise" phrase is located after a list of other prohibited actions but before the phrase "because of," it "serve[s] as a

catchall phrase[] looking to consequences, not intent." *Id.* at 2519. This is because "'[o]therwise' means 'in a different way or manner,' thus signaling a shift in emphasis from an actor's intent to the consequences of his actions.'" *Id.* (quoting Webster's Third New International Dictionary 1598 (1971)).

Section 105(c)(1) follows precisely that pattern: it begins with a list of prohibited conduct, then uses the phrase "otherwise interfere with," then uses the phrase "because of." The Supreme Court has held that statutes drafted in this way do not plainly require motive to establish liability. *See Inclusive Cmtys.*, 135 S.Ct. at 2518–19; *Griggs*, 401 U.S. at 429–32; *Smith*, 544 U.S. at 235–36 (plurality op.), 243–47 (Scalia, J., concurring). The result should be the same here. It does not matter that those cases presented a different question (whether the statutes authorized disparate-impact liability) than this case; disparate-impact and interference are similar analyses (both address actions that have prohibited effects and are not otherwise justified, *Inclusive Cmtys.*, 135 S.Ct. at 2513), and the interpretive principles the Court used in those cases were not limited to disparate-impact cases. Murray's citation to other Supreme Court cases that might suggest a different result (Br. 17–18) demonstrates only that § 105(c)(1) is ambiguous.

This is especially true in light of other indicators of statutory meaning: Congress's intent and the Mine Act's purpose. Congress intended § 105(c) "to be construed expansively to assure that miners will not be inhibited in any way in

exercising any rights afforded by the [Mine Act].” Senate Report 36. And miners’ participation is essential to the successful operation of the Mine Act (and, therefore, to ensuring safe and healthful mines). Senate Report 35; 30 U.S.C. § 801(e). Ensuring that miners are not deterred *in any way* from exercising rights is not consistent with requiring proof of motive to establish interference, because that interpretation would, at least in some cases, permit operators to deter miners from exercising their rights. *See* p. 27, *infra*.

The remaining cases Murray cites do not establish that § 105(c)(1) unambiguously requires motive. *Performance Coal Company v. FMSHRC*, 642 F.3d 234 (D.C. Cir. 2011), concerned an entirely different subsection of § 105. *Id.* at 239–40 (discussing 30 U.S.C. § 815(b)(2)). And *Secretary o/b/o Pepin v. Empire Iron Partnership*, 38 FMSHRC 1435 (2016) (ALJ), is an unreviewed ALJ decision that neither the Commission nor any of its other ALJs have adopted. It does not bind the Commission, 29 C.F.R. § 2700.69(d), and should be equally unpersuasive to this Court. *See Olson v. FMSHRC*, 381 F.3d 1007, 1014 (10th Cir. 2004).

Even if § 105(c)(1) did unambiguously require proof of motive to establish interference, that meaning must yield to “a more flexible, purpose-oriented interpretation” because “the literal application” of § 105(c) “will produce result[s] demonstrably at odds with the intentions of its drafters.” *Envtl. Def. Fund, Inc. v.*

EPA, 82 F.3d 451, 468 (D.C. Cir. 1996) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

If § 105(c)(1) prohibited only actions that were motivated by prior exercise of protected rights, it would allow preemptive interference—efforts to dissuade miners from exercising their rights before they do so. Imagine that, before hiring any miners, an operator tells all prospective miners that they will be fired if they exercise walkaround rights. Or imagine that, while training new miners, an operator tells them that it will close the mine if they report hazards to MSHA. According to Murray, these actions would be lawful. But they are precisely the kinds of "threats of reprisal" that Congress meant to prohibit. Senate Report 36.

Or, if § 105(c)(1) prohibited only actions motivated by past or potential exercise of protected rights, an operator "would be legally permitted to interfere with a miner's statutory rights because [it] doesn't like the miner, because there was a lack of resources, because [it] was ignorant of the miner's statutory rights, or [for] a host of other reasons . . . ." Comm'n Dec. 20 (quoting *Wilson v. Armstrong Coal Co.*, 39 FMSHRC 1072, 1092 (2017) (ALJ)). Interference has the same deterrent effects, no matter whether it is motivated by protected activity, personal animus, or pure ignorance. Because Congress meant to prohibit interference broadly, *see* Senate Report 35–36, permitting interference as long as it is not motivated by protected activity would permit what Congress meant to prohibit.

B. The *Franks* test is consistent with this Court's precedent.

For decades, this Court has broadly interpreted § 105(c) (and its predecessor statute). It has rejected interpretations that hinge on the bare words of the statute, adopting instead interpretations that protect miners' rights, give effect to Congress' intent that mine safety and health statutes be liberally construed, and promote the remedial purpose of the statutes.

In *Phillips*, this Court considered the scope of § 105(c)'s predecessor, § 110(b) of the Coal Act. 500 F.2d 772. That statute prohibited discriminating against miners because they (among other things) reported a hazard to the Secretary of the Interior or instituted a Coal Act proceeding. 30 U.S.C. § 820(b)(1) (1976). The Court held that § 110(b) protected a miner who reported a hazard to mine management, even though he neither reported the hazard to the Secretary of the Interior nor instituted a Coal Act proceeding. *Phillips*, 500 F.2d at 778–79. The Court acknowledged that this interpretation went beyond the language of the statute, *id.* at 779, and reasoned that this "liberal construction" was justified by, and necessary to achieve, the statute's remedial purpose. *Id.* at 782–83; *see also Munsey v. Morton*, 507 F.2d 1202, 1207–09 (D.C. Cir. 1974) (reaffirming *Phillips*).

In *Donovan o/b/o Anderson v. Stafford Construction Co.*, 732 F.2d 954 (D.C. Cir. 1984), this Court considered whether § 105(c), which protects miners who have "testified or [are] about to testify in" a Mine Act proceeding, protected a

miner who refused to lie to MSHA investigators about why another miner was fired, but never actually gave the investigators a statement. *Id.* at 958–61. The Court held that it did. *Id.* The Court recognized that a "literal reading" of § 105(c) would not protect that activity, but refused to adopt a "hypertechnical and purpose-defeating interpretation," especially in light of Congress' "direction that the Act's anti-discrimination provisions be broadly interpreted." *Id.* at 959–60 (discussing *Phillips*, 500 F.2d 772, and *Baker v. Interior Bd. of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978)).

In *Secretary o/b/o Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989), this Court held that § 105(c) protects miners "against discriminatory offers of reemployment," even though the statute does not explicitly say so. *Id.* at 1452. This interpretation was supported by Congress's statement that § 105(c) is to "be *construed expansively* to assure that miners will not be inhibited in any way in exercising" protected rights and intent "to protect miners . . . against the more subtle forms of discrimination." *Id.* (quoting Senate Report 36) (emphasis in *Keene*).

And this Court has held that miners have the right to refuse to work in conditions they reasonably and in good faith believe to be hazardous, even though the text of § 105(c) does not give miners this right. *Gilbert*, 866 F.2d at 1439; *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988) (Ginsburg, R.B., J.). That

interpretation, this Court explained, is necessary to give effect to Congress's intent to protect that right. *Simpson*, 842 F.2d at 458 (discussing Senate Report 35).

This Court has also rejected interpretations that would make miners' protection contingent on proof of motive. In *Baker*, this Court held that § 110(b) of the Coal Act protected miners who made safety complaints to mine management, notwithstanding whether those miners also intended to complain to federal authorities. 595 F.2d at 748–50. (The complaint to federal authorities, of course, is the literal protected activity. *See id.* at 748.) The Court reasoned that protecting only miners who had that intent would "frustrate the congressional purpose to encourage the reporting of safety violations" in two ways. *Id.* at 749. It "would allow [operators] to fire with impunity miners who had not yet realized that management will not consider their safety complaints, and thus had not yet formed an intent to seek federal aid," and it would require even miners who did have intent to bear the difficult burden of proving it, which "might well leave a miner without recourse against the most blatant acts of employer discrimination," a result that could not be squared with Congress' desire to encourage miners to report violations. *Id.* at 749–50.

And in *Simpson*, this Court considered whether § 105(c) constructive discharge claims were evaluated under an objective test (whether an operator created or maintained conditions so intolerable that a reasonable miner would quit)

or a subjective test (whether an operator was motivated to create or maintain those conditions in order to compel the miner to quit). 842 F.3d at 461–63. The Commission had applied the subjective test, but this Court reversed. *Id.* It reasoned that Congress intended § 105(c) to be interpreted broadly, and that the Commission's "severely restrictive interpretation" was not "compatible with Congress' remedial purpose." *Id.* at 463. This Court also explained that requiring proof of an operator's subjective motive would impose a "formidable, [and] for many complainants, insurmountable" evidentiary hurdle, and would "frustrate Congress' intent that miners not be inhibited in the exercise of their rights." *Id.*

If the *Franks* test is not compelled by this line of cases, it at least fits comfortably within it. It avoids limiting miners' protection with a literal or hypertechnical interpretation of the statutory text, consistent with *Phillips*, *Anderson*, *Keene*, *Gilbert*, and *Simpson*. It avoids the risks of making miners' protection contingent on proof of motive, consistent with *Baker* and *Simpson*. And it gives effect to Congress's intent that § 105(c) be expansively construed and advances the remedial purpose of the Mine Act.

C. The *Franks* test is consistent with Commission precedent.

The Commission's interference cases share the core principles of *Franks*: that the ultimate question is what effect an act of alleged interference has, and that motive is not dispositive of whether interference occurred.

In *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982), the Commission held that "coercive interrogation and harassment over the exercise of protected rights" can constitute interference. *Id.* at 1478. It explained that "[a] natural *result* of such practices" is to make miners fear retaliation; that such practices "may *cause* other miners" not to exercise their rights; that such practices "could logically *result* in a fear of reprisal and a reluctance to exercise [rights] in the future"; and that "[t]his *result* is at odds with the goal of encouraging miner participation in enforcement of the Mine Act." *Id.* at 1478–79 (emphasis added). That is, the Commission analyzed not the operator's motive for interrogating the complaining miner, but the effect of the interrogation.

In *Secretary o/b/o Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (2005), the Commission considered whether an operator interfered with a miner's rights when a foreman said to the miner, who had been subpoenaed to testify before a grand jury about unsafe practices at the mine, "I'll kill you." *Id.* at 10. The ALJ found no violation, focusing on what the foreman intended his statement to mean. *Id.* The Commission reversed, holding that whether an act is interference depends not on only the actor's intent, but on the totality of the circumstances. *Id.* at 8 (quoting *Moses*, 4 FMSHRC at 1479 n.8), 10.

The Commission has recognized that *Franks* is "consonant with" these cases. *McGary*, 38 FMSHRC 2012 (Young, Nakamura & Althen, Comm'rs). It has

stated that "the first prong of [*Franks*] is entirely consistent with *Moses* and *Gray*," and that the "second prong of [*Franks*] is similarly grounded in Commission precedent." *Id.* Though the Secretary's interpretation of the Mine Act (not the Commission's) deserves deference, that the Commission has recognized this consistency demonstrates the reasonableness of *Franks*. *See RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 596 (D.C. Cir. 2001).

D. The *Franks* test effectuates Congress's intent and promotes the Mine Act's purpose.

Section 105(c)(1) should also be interpreted to give effect to Congress's intent and advance the purpose of the Mine Act. The *Franks* test does both.

Congress intended § 105(c) to be "construed expansively to assure that miners will not be inhibited in any way in exercising any" protected rights. Senate Report 36. Murray's interpretation would permit miners to be inhibited from exercising rights as long as the deterrent action was not improperly motivated. The *Franks* test, however, would ensure that miners are not inhibited *in any way*, notwithstanding the reasons for the deterrent act.

Congress also meant to broaden and strengthen the Coal Act's anti-retaliation provision, Senate Report 36, which already prohibited "discrimination." *See* 30 U.S.C. § 820(b)(1) (1976). "Discrimination" includes all retaliatory "adverse actions" that are "harmful to the point that they could well dissuade a

reasonable worker" from engaging in protected activity. *Sec'y o/b/o Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1932 (2012) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). So the additional prohibition against interference was meant to prohibit more conduct than already-prohibited retaliatory (i.e., motive-based) actions.

Murray argues that § 105(c)(1) uses "more direct" language than Coal Act § 110(b), so Congress meant to require motive to prove interference. Br. 26–27. But there is no meaningful difference between "by reason of the fact that" (§ 110(b)) and "because of" (§ 105(c)(1)), and nothing in the legislative history suggests otherwise.

What the legislative history does show is that Congress intended to provide NLRA-style protections for miners. Section 110(b) "was introduced with the announced intention of giving to miners the same protection against retaliation which we give employees under other Federal labor laws," including the NLRA. *Phillips*, 500 F.2d at 782 (quoting 115 Cong. Rec. 27,948 (1969)). Congress reaffirmed this intent when it enacted § 105(c): it meant to "protect miners against . . . promises of benefit or threats of reprisal," Senate Report 36, which are (and were) well-known terms used to describe conduct prohibited by § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278–79 (1973) (promises of benefit); *NLRB v. Gissel Packing Co.*, 395 U.S. 575,

618 (1969) (threats of reprisal). Congress did not use those terms coincidentally; Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)). The *Franks* test gives effect to Congress's intent to prohibit NLRA-style interference by mirroring the NLRA test for interference. *See, e.g.*, *Am. Freightways Co.*, 124 NLRB 146, 147 (1959).

The Commission has recognized the close relationship between § 105(c) and the NLRA. It has stated that "the Mine Act's antidiscrimination provisions are modeled" on the NLRA. *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 558 n.11 (1996) (collecting cases using NLRA precedent to interpret § 105(c)). It has also recognized that § 8(a)(1), in particular, is relevant to interpreting § 105(c) because "the Congressional objectives reflected in" the two sections are so similar. *Id.* at 558. And in *Gray*, it analogized § 8(a)(1) to interference cases, emphasizing that whether there is a violation of § 8(a)(1) "does not turn on the employer's motive . . . The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the NLRA." 27 FMSHRC at 9 (quoting *Am. Freightways Co.*, 124 NLRB at 147 (alteration omitted) and *NLRB v. Burnup & Sims, Inc.*, 379

U.S. 21, 23 (1964) ("Over and again the Board had ruled that section 8(a)(1) is violated . . . despite the employer's good faith . . . .")).

Section 8(a)(1) and § 105(c)(1) are, as Murray argues (Br. 27–30), drafted differently. But that is not as significant as Murray thinks. Congress intended to provide NLRA-style protections, including § 8(a)(1) protections, to miners. That it did so by prohibiting discrimination and interference in the same subsection, rather than creating separate subsections, does not mean that it meant to foreclose the application of NLRA-style tests to the Mine Act; the legislative history suggests that it meant to do exactly the opposite. *See Simpson*, 842 F.2d at 458 (recognizing that clear evidence of legislative intent can overcome statutory language that imperfectly expresses intent).

The *Franks* test also advances the remedial purpose of the Mine Act. Miners' participation is essential to the Mine Act's effective operation. That participation will only occur if miners are not deterred in any way from exercising their rights. Allowing operators to interfere with miners' rights as long as they are not motivated by protected activity is not consistent with those statutory goals. *See* p. 27, *supra*. The *Franks* test recognizes this point and ensures that miners will feel free to exercise their rights, which in turn will ensure safer and more healthful mines.

E. The *Franks* test is practical, workable, and fair.

Murray contends that the *Franks* test is a different, less-demanding test for interference than the test for discrimination. Br. 23–24. The *Franks* test is different, but it is not easier to satisfy.

Prong one of *Franks* is satisfied only if, from the perspective of a reasonable miner and under the totality of the circumstances, an action would tend to interfere with the exercise of protected rights. Not every action that may *conceivably* interfere with protected rights has a *reasonable tendency* to do so. *See, e.g.*, *Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 730–33 (D.C. Cir. 2016) (warning an employee not to file frivolous information requests did not, under the totality of the circumstances, have a reasonable tendency to interfere with protected rights); *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 931 (D.C. Cir. 2013) (employer's statement made during a meeting to discuss workers' concerns explained disadvantages of unionization but did not, under the totality of the circumstances, tend to interfere with protected rights). The objective nature of prong one, *see Wilson*, 863 F.3d at 882, also ensures that interference claims are evaluated by what is reasonable, which weeds out frivolous or idiosyncratic claims.

Prong two of *Franks* also demonstrates that it is not an "easier" test. It gives operators latitude to run their mines productively and lawfully: when operators have legitimate and substantial reasons for an action that tends to interfere with

protected rights, they can identify those reasons to establish that there is no violation of § 105(c). *See, e.g.*, *Southcoast Hosps. Grp., Inc. v. NLRB*, 846 F.3d 448, 455–57 (1st Cir. 2017) (hiring policy that aimed to treat union and nonunion applicants more equally was a legitimate and substantial business justification); *CSX Hotels, Inc. v. NLRB*, 377 F.3d 394, 398–400 (4th Cir. 2004) (employer's legitimate concerns about traffic safety justified calling local police to address picketing employees).

For these reasons, contrary to Murray's allegation (Br. 24), there is no "perverse incentive" for the Secretary to repackage discrimination claims as interference claims. Some § 105(c) cases are interference cases, and the Secretary treats them as such. The significant majority of § 105(c) cases, though, involve miners who have suffered adverse actions after engaging in protected activity, and the Secretary treats these as discrimination cases. *See, e.g.*, *Sec'y o/b/o Ebert v. Marshall Cnty. Coal Co.*, 40 FMSHRC 67 (2018) (ALJ); *Sec'y o/b/o Groves v. Con-Ag, Inc.*, 39 FMSHRC 1811 (2017) (ALJ).

Nor will the *Franks* test have apocalyptic consequences. A similar test has been used for seventy-some years under the NLRA, *see NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946), and American business has hardly been destroyed. There is no reason to suspect that the mining industry will be. *Cf. Simpson*, 842 F.2d 463 (an objective standard for constructive discharge claims

"simply captures the legal commonplace that an employer 'must be held to have intended those consequences it could reasonably have foreseen'") (quoting *Clark v. Marsh*, 665 F.2d 1168, 1175 & n.8 (D.C. Cir. 1981)).

F. The *Franks* test is a reasonable interpretation of the Mine Act.

The *Franks* test is eminently reasonable. It gives effect to Congressional intent; it is consistent with both this Court's and Commission precedent; it works no unfairness on operators; and it promotes the remedial, miner-protective purposes of the Mine Act. It is, at the very least, a permissible interpretation of § 105(c)(1). *See Am. Coal*, 796 F.3d at 24.[1]

3. Substantial evidence supports the ALJ's finding that the bonus plans interfered with miners' rights.

This Court must affirm the ALJ's finding that Murray violated § 105(c) if it is supported by substantial evidence. 30 U.S.C. § 816(a)(1); *see Donovan o/b/o Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 90–92 (D.C. Cir. 1983). The Court may not "substitute a competing view of the facts for the view the ALJ reasonably reached," *Chacon*, 709 F.2d at 92; its "only task in reviewing substantial evidence questions is to determine whether there is such relevant evidence as a reasonable

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[1] Murray argues that the Secretary lacks statutory authority to interpret § 105(c). Br. 21–22. This argument is meritless: the Secretary has authority to issue regulations implementing, i.e., to interpret, any provision of the Mine Act. 30 U.S.C. § 957.

mind might accept as adequate to support the [ALJ]'s conclusion." *Jim Walter Res., Inc. v. Sec'y of Labor, MSHA*, 103 F.3d 1020, 1023–24 (D.C. Cir. 1997) (quoting *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1431 (D.C. Cir. 1989)).

A. The bonus plans tended to interfere with miners' walkaround, hazard complaint, injury reporting, and work refusal rights.

Whether an action tends to interfere with miners' rights is an objective question, so "the relevant perspective on the issue is that of the reasonable miner," not any particular complainant. *Wilson*, 863 F.3d at 882. It also depends on the totality of the circumstances, including the nature, purpose, and setting of the action; the manner in which it was done; whether it was repeated; the positions of the parties; any evidence of hostility or animus; and miners' economic dependence on operators (which is of particular importance since mining is often the only real employment opportunity for miners in remote areas, Senate Report 35). *Wilson*, 863 F.3d at 880; *Gray*, 27 FMSHRC at 10–11; *Moses*, 4 FMSHRC at 1479.

Murray makes three main arguments. First, it argues that the plans, on their faces, do not prohibit miners from exercising, or directly penalize miners for exercising, protected rights. Br. 32–35. That is not the question; the question is what *effects* the plans would have on reasonable miners.

Second, Murray objects to the ALJ's consideration of hearsay. Br. 34. Hearsay, though, is admissible in Commission hearings, 29 C.F.R. § 2700.63(a),

and this hearsay (assuming it actually *was* hearsay) was reliable: it was consistent and unrebutted. Nor does it matter that the miners' representatives who testified were not themselves deterred from exercising protected rights, because the "the relevant perspective on the issue is that of the reasonable miner," not any miner in particular. *Wilson*, 863 F.3d at 882. The ALJ correctly evaluated the testimony as establishing that reasonable miners—miners who are imperfect human beings, vulnerable to temptation and especially to the allure of money—would tend to be deterred from exercising their rights.

Third, Murray argues that the ALJ incorrectly found that the plans exerted "extreme pressure" on miners. Br. 37–39. But the ALJ mentioned that phrase just once, Dec. 13, and the only fair reading of her decision is that she found the plans did *not* exert "extreme pressure," but *did* exert enough pressure to interfere with protected rights. *See* Dec. 13 (noting that the bonus amounts were not "extraordinarily large" but were "coercive pressure").

The ALJ's findings are amply supported by the evidence.

Hazard complaints. Miners were deterred from reporting hazards to MSHA for an obvious reason: calling MSHA created the chance that MSHA would issue a disqualifying citation or order. Tr. 48–49, 51, 114–15, 141, 161–62. Miners also knew that if they called MSHA, MSHA might discover additional violations and issue disqualifying citations or orders that miners did not anticipate. Tr. 114. These

deterrents were compounded by the plans' draconian disqualification provisions: a single S&S citation (which are far from uncommon) would disqualify every shift on the section for the entire day; a § 104(b) or (d) order would disqualify *every* crew on the section *for an entire week.* These provisions would obviously pressure a miner not to risk "screwing everybody." *See* Tr. 226.

Walkaround rights. Production miners were deterred from exercising their walkaround rights because, if they did so, they were eligible for only the 10% bonus available to outby miners. Tr. 47, 72–73, 152, 155, 166, 239. The 10% bonus might conceivably have been greater, but it likely would not have been, and the evidence supports the ALJ's commonsense conclusion that miners would choose the production bonus.

Injury reporting. It is easy to understand why miners were unlikely to report injuries: they risked disqualifying themselves and their entire crew. Tr. 54–55, 112, 116, 226, 229.

Work refusals. The ALJ did not specifically find that the plans interfered with miners' rights to refuse unsafe work, but she did find that the plans pressured miners "to work as fast as possible so as not to take away from potential bonuses for" their peers. Dec. 10. The fair reading of that finding is that miners felt pressured not to refuse work, which obviously would reduce production. *See* Tr.

165 (a miner who shut down production to correct a ventilation issue was accused of "knock[ing] us out of our Bonus Plan").

The ALJ's finding that the plans created significant peer pressure is crucial. Witnesses explained (Tr. 50, 162), and common human experience shows, that people—even reasonable people—can be pressured into making decisions, like taking safety shortcuts or risking noncompliance with rules, that may not be reasonable. So Murray's argument that its plans would *never* deter a reasonable miner from exercising rights, Br. 37, is unrealistic. *See Consolidation Coal Co.*, 895 F.3d at 118 (explaining that miners are imperfect human beings).

Even more unrealistic is its argument (Br. 39) that bonuses of $50 to $200 per shift are not large enough to pressure miners. These amounts are significant, especially in the aggregate. Assuming a miner works 5 shifts a week for 50 weeks a year, another way of saying "$50 per shift" is "$12,500 per year." That covers tuition and fees for a daughter at West Virginia University. *Cost and Aid*, West Virginia University, https://admissions.wvu.edu/cost-and-aid (last visited Aug. 24, 2019). Another way of saying "$100 per shift" is "$25,000 per year." That is a down payment on a home in northern West Virginia. *U.S. Census Bureau QuickFacts: West Virginia*, https://www.census.gov/quickfacts/fact/table/WV/ (last visited Aug. 24, 2019). Another way of saying "$200 per shift" is "$50,000 per year." That is double a West Virginian's per capita income. *Id.* The potential

bonuses miners could earn were substantial; reasonable miners, subject (like us all) to human frailty, would be hard-pressed not to seek them.

B. Murray's legitimate interest in production did not outweigh the plans' harm to protected rights.

Murray has a legitimate interest in ensuring that its mines are productive. But substantial evidence supports the ALJ's finding that this interest did not outweigh the plans' harm to miners' rights.

Murray's only argument on this point is that the Commission's decision in *Swift*, 16 FMSHRC 201, and an ALJ decision applying it, *Secretary o/b/o Feagins v. Decker Coal Co.*, 23 FMSHRC 47 (2001) (ALJ), compel the conclusion that the plans did not interfere with miners' rights. Br. 41–43. Those cases, however, concerned whether operator policies were facially discriminatory, not whether they interfered with miners' rights.

Swift concerned a policy that progressively disciplined miners who suffered certain numbers of injuries. The Commission considered "whether the [policy was] facially, or per se, discriminatory." 16 FMSHRC at 201, 204 ("We first consider . . . whether the [policy] is facially discriminatory"), 206 ("We address the issue of whether the [policy] . . . was facially discriminatory") (quotation omitted). The Commission explained that a policy is facially discriminatory if, by its explicit

terms, it penalizes a miner for exercising protected rights. *Id.* at 206; *see Decker*, 23 FMSHRC at 50.

Swift does, as Murray argues (Br. 43), allude to interference. But it is clear that the question was whether the policy was facially discriminatory, *not* whether it interfered with miners' rights. These are wholly different questions. The Commission made that clear in *Gray*, where it cited *Swift* as a discrimination case that "stands in contrast" to its interference cases. 27 FMSHRC at 8 n.6. *Decker* is distinguishable for the same reason. *See* 23 FMSHRC at 49–50.

Moreover, *Swift* and *Decker* predate the Commission's modern interference cases, which hold that whether an action is interference depends on its effects, considering the totality of the circumstances. *See Gray*, 27 FMSHRC at 10; *McGary*, 38 FMSHRC at 2012. Even the interference test Murray urges the Court to apply (Br. 19–20) focuses on effects. The ALJ correctly applied that analysis, rather than considering only whether the terms of the bonus plans, on their face, interfere with miners' rights.

The ALJ's finding that the plans did not improve or maintain safety (Dec. 15) is also supported by substantial evidence. *See* Tr. 49–52, 105–09, 153, 159, 218–19 (explaining how safety was neglected after the plans), 297–98 (Forrelli could not say the plans improved safety). The plans may have been unsuccessful because they did not reward miners for promoting safety or even penalize miners

for safety hazards; they just penalized miners when MSHA caught those hazards.[2] The predictable result of plans like these was that miners would be discouraged both from reporting safety hazards (lest they and their crew be disqualified) and from preventing hazards in the first place (lest they not produce enough to earn a bonus).

This shortcoming illustrates why it is not true, as Murray warns (Br. 43), that "any bonus plan related to safety is prohibited under the Mine Act." Plenty of bonus plans that are actually related to safety, rather than to MSHA consequences, could be acceptable. Plans could guarantee that miners who exercise walkaround rights will not forfeit any bonus. They could reward miners not just for production, but also for identifying safety and health hazards, or for diligently performing safety tasks. They could assure that miners will not be penalized when MSHA takes enforcement actions. These kinds of provisions tend to accommodate, rather than interfere with, miners' rights; depending on the circumstances at a mine, they could well be lawful. That Murray's plans are unlawful does not mean that all plans are.

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[2] The plans did disqualify a crew for a "major deviation" from production and safety standards, J.X. 20–25, at 3, but the ALJ found that miners were unlikely to report "deviations" (and thereby disqualify themselves or other miners), so that this provision had little effect. Dec. 6. Murray has not argued otherwise; its brief does not even mention this provision.

4. The ALJ's penalty assessment is adequately explained and a valid exercise of discretion.

ALJs assess penalties based on the six factors listed in § 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Am. Coal*, 2019 WL 2563155, at *3. ALJs should make findings about each factor, but those findings "need not be exhaustive; rather, they must be sufficient to provide [a reviewing body] with a basis for determining" that the ALJ considered the statutory factors. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 484 (2015). In keeping with this flexible standard, this Court reviews "the ALJ's penalty calculation for abuse of discretion." *Am. Coal*, 2019 WL 2563155, at *2. The ALJ acted well within her discretion to assess the penalties she did.

Murray argues that the ALJ did not provide sufficiently detailed information on its history of violations. Br. 44. The ALJ did not count the violations, but she gave enough information to explain how she considered them. She referred to "a recent interference complaint in which [Murray was] fined $30,000 per mine." Dec. 15. That case involved a series of "intimidating and threatening" meetings during which Murray's CEO "discourage[d] miners from filing complaints" with MSHA. *See generally Marshall Cnty.*, 923 F.3d 192 (affirming the Commission's decision finding interference). The ALJ's mention of those serious violations, *see id.*, sufficiently explained her evaluation of Murray's history.

Murray also argues that the ALJ should have explained how the discontinuation of the plans at three mines was evidence of good faith abatement of

the interference violations. Br. 45. This argument suggests that Murray voluntarily discontinued the plans; in fact, it did so only because arbitration decisions required it to. J.S. 49, 53, 57. That is not evidence of good faith abatement, so the ALJ did not need to give Murray credit for it.

Nor did the ALJ abuse her discretion by assessing the same penalty for each mine. *See* Br. 44–45. The plans were introduced in practically identical ways, were practically identical in content, and had practically identical effects. That is also why the Secretary presented no testimony about three of the mines: the ALJ concluded that the testimony would be practically identical, so she did not allow it. Tr. 191–96. And the ALJ did not ignore mitigating evidence about gravity or negligence (Br. 45–46); the evidence supports her finding that the plans created serious safety problems, and her finding that Murray had a legitimate, though inadequate, justification for the plans supports her finding of moderate, rather than high, negligence.

The ALJ could have explained in greater detail why each finding justified a penalty higher than the proposed penalty. *See Cantera Green*, 22 FMSHRC 616, 622 (2000). But her findings about the statutory factors do explain the increase, and they certainly provide enough detail for Murray to understand the basis for the penalty. *See* Br. 46. The ALJ's explanation did not have to be exhaustive, *Signal Peak*, 37 FMSHRC at 484, and it was sufficient.

Conclusion

The successful operation of the Mine Act depends on miners' participation. Because interference with miners' participation compromises that operation, the Mine Act should be interpreted to prohibit unjustified interference, no matter the motive. That is what *Franks* does. It is reasonable, workable, and miner-protective, and this Court should accept it.

Murray's petition for review should be denied.

Respectfully submitted,

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Addendum

Section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(b)(1) (1976)

(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary, or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.