No. 20-4102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KenAmerican Resources, Inc.,

Petitioner

v.

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

Respondents

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

Brief for the Secretary of Labor

STANLEY E. KEEN
Deputy Solicitor for National Operations

APRIL E. NELSON
Associate Solicitor

ARCHITH RAMKUMAR
Counsel for Appellate Litigation

EMILY TOLER SCOTT
Attorney

U.S. Department of Labor
Office of the Solicitor
201 12th Street South, Suite 401
Arlington, VA 22202
(202) 693-9333

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Statement in Support of Oral Argument

The Secretary requests oral argument. This case raises important issues about how to interpret the Federal Mine Safety and Health Act of 1977's prohibition against providing advance notice of mine inspections. That prohibition is essential to the Mine Safety and Health Administration's ability to enforce the Mine Act. The Secretary believes that oral argument will assist this Court's understanding and resolution of the issue.

Introduction

Mining is a dangerous and deadly job. To respond to the decades of preventable illnesses, injuries, and deaths in the industry, Congress gave MSHA the authority to conduct frequent and unannounced inspections of mines. These inspections are essential to MSHA's ability to ensure that mine operators are complying with the Mine Act. To enable MSHA to effectively carry out inspections, the Mine Act authorizes MSHA to conduct them without a warrant and without warning.

Congress recognized the "notorious ease with which many safety or health hazards may be concealed if advance warning of [an] inspection is obtained," and in section 103(a) of the Mine Act, prohibited providing advance notice of an inspection. *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981) (quotation omitted). The prohibition against advance notice is necessary for obvious reasons: advance notice gives operators the chance to hide hazards and violations, or fix them before MSHA discovers them. If hazards and violations are hidden or fixed, then MSHA cannot inspect mines as they *really* operate, and in turn, cannot determine whether operators are complying with mandatory standards and the Mine Act. And if MSHA cannot do those things, then MSHA cannot enforce the law.

For decades, the Secretary, the Federal Mine Safety and Health Review Commission, the mining industry, and miners have understood that the prohibition

against advance notice applies to operators. KenAmerican urges this Court to hold that it does not, and, separately, to adopt a strained and narrow interpretation about the scope of the prohibition. This unprecedented interpretation is not supported by the text, purpose, or design of the statute; it ignores the realities of how MSHA inspections work; and adopting it would make it near-impossible for MSHA to enforce the Mine Act.

KenAmerican also challenges the Commission's conclusion that it provided advance notice. During an MSHA inspection at KenAmerican's Paradise #9 mine, a miner underground called a dispatcher at the surface and, in order to find out whether MSHA was at the mine, asked, "Do we have any company outside?" The dispatcher responded, "Yeah, I think we do." The Commission was correct in finding that this exchange was advance notice of an inspection. KenAmerican argues that the Commission adopted an overly expansive definition of advance notice, and further contends that substantial evidence does not support the Commission's finding. But the Commission correctly applied the advance-notice provision and none of the crucial facts underlying the Commission's decision are in dispute.

In addition to its statutory-interpretation and substantial-evidence arguments, KenAmerican argues that the prohibition against advance notice violated its First

Amendment rights. It did not. The prohibition primarily regulates conduct, not speech; is content-neutral; in any event, satisfies strict scrutiny; and did not unconstitutionally burden KenAmerican's statutory walkaround rights.

Statement of Jurisdiction

A party adversely affected or aggrieved by an ALJ's decision must file a petition for discretionary review with the Commission within 30 days of the decision (or, if that day falls on a holiday or weekend, on the next business day). 30 U.S.C. 823(d)(2)(A)(i); 29 C.F.R. 2700.8(c). The Secretary filed a timely petition for discretionary review (AR 101-141) of the first ALJ decision on September 23, 2015 and a timely petition for discretionary review (AR 639-652) of the second ALJ decision on January 14, 2019. KenAmerican filed a timely petition for discretionary review (AR 765-785) of the third ALJ decision on September 8, 2020.

This Court has jurisdiction over KenAmerican's petition for review because the violation was alleged to have occurred at the Paradise #9 mine in Muhlenberg County, Kentucky. See 30 U.S.C. 816(a)(1).

Statement of the Issues

1. The Mine Act states, in part, "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person …."

30 U.S.C. 813(a). Consistent with ordinary principles of statutory interpretation, as well as the Mine Act's enforcement scheme and purpose, does this prohibition against advance notice apply to operators?

2. Congress prohibited advance notice so that operators will not have the opportunity to hide or fix hazards and violations before MSHA finds them. Does that prohibition apply to all conduct that has the effect of giving advance notice of an inspection?

3. During an inspection of KenAmerican's Paradise #9 Mine, a caller underground asked a dispatcher at the surface, "Do we have any company outside?" The caller meant, and the dispatcher knew the caller meant, is MSHA here to inspect the mine? The dispatcher responded, "Yeah, I think there is." Does substantial evidence support the Commission's finding that this exchange was advance notice of an inspection?

4. Is the prohibition against advance notice consistent with the First Amendment, as applied in this case?

Statement of the Case

1. Statutory background

The Mine Act was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. 801. It was also enacted against a backdrop of injury and

death: when it was passed, "at least 1 [miner] was killed and 66 miners were disabled every working day in the Nation's mines." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 209 (1994) (citing S. Rep. No. 95-181, at 4 (1977) (Senate Report)).

The Mine Act authorizes the Secretary, acting through MSHA, to promulgate mandatory safety and health standards and inspect mines. 30 U.S.C. 811(a), 813(a). Mine operators "have the primary responsibility to prevent the existence of" unsafe and unhealthy practices in mines, 30 U.S.C. 801(e); that responsibility includes complying with MSHA's mandatory standards and with the Mine Act. If, during an inspection, the Secretary believes that an operator has violated either, he "shall … issue a citation to the operator." 30 U.S.C. 814(a).

The Secretary proposes penalties for citations. 30 U.S.C. 820(a). Operators may contest citations and penalties before the Commission, an independent agency that adjudicates many Mine Act disputes. 30 U.S.C. 815(a), 823(d). Commission administrative law judges adjudicate citations and penalties, subject to Commission discretionary review and judicial review by a United States Court of Appeals. 30 U.S.C. 823(d), 816(a)(1).

2. MSHA's authority to inspect mines without warning or a warrant

The Mine Act authorizes—in fact, requires—MSHA to make frequent, unannounced inspections of every mine in the United States. 30 U.S.C. 813(a). MSHA must inspect every surface mine in its entirety at least twice a year, and every underground mine in its entirety at least four times a year. *Ibid.* MSHA has a "right of entry to, upon, or through any" mine, *ibid.*, and does not need a warrant to conduct an inspection. *Donovan*, 452 U.S. at 602-605.

Warrantless inspections are central to the Mine Act's enforcement scheme. *Hopkins Cty. Coal, LLC* v. *Acosta*, 875 F.3d 279, 293-294 (6th Cir. 2017). Congress recognized "that the mining industry is among the most hazardous in the country and that [it had a] poor health and safety record," and Congress determined "that a system of warrantless inspections was necessary 'if the law is to be properly enforced and inspection made effective.'" *Donovan*, 452 U.S. at 602 (quoting *United States* v. *Biswell*, 406 U.S. 311, 316 (1972)).

Warrantless inspections work, of course, largely because they are unannounced. This is so for a commonsense reason: if an operator knows that MSHA is coming to inspect the mine, the operator has the opportunity—and the incentive—to hide or fix violations before MSHA discovers them. (Hiding or fixing violations is a problem because MSHA must be able to see a mine as it *actually* operates to

determine whether operators are complying with mandatory standards and with the Mine Act.) To address this problem, Congress not only gave MSHA a right of warrantless entry, but also prohibited advance notice of inspections. 30 U.S.C. 813(a). Congress explained that, "in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." Senate Report 27.

Many hazards and violations are easy to hide or paper over. If miners in an underground coal mine have advance notice of an inspection, they can hang ventilation curtains, clean up accumulations of coal, or install support in the mine roof. Miners at surface mines can clean up tripping or falling hazards, don personal protective equipment, or take faulty equipment out of service. This is especially true at larger mines, where it can take more than half an hour (or even longer) for inspectors to get from their cars to the working areas, App. 111-112, and at underground mines, where inspectors depend on operators for transportation underground. App. 153.

These hazards and violations, though easy enough to hide or fix, can be deadly serious: they can conceal systemic flaws in a mine's ventilation system, or electrocution hazards posed by faulty circuits, or accumulations of coal dust that

can become a conflagration with a single spark. If these hazards are concealed from MSHA, or fixed before MSHA discovers them, they and their root causes are more likely to persist unaddressed, and to have deadly consequences for miners. For example, MSHA determined that the 2010 disaster at the Upper Big Branch Mine—a massive methane-and-coal-dust explosion that killed 29 miners—occurred in part because the operator's practice of providing advance notice enabled it to hide violations from MSHA, which compromised MSHA's ability to conduct meaningful inspections at that mine. MSHA, *Report of Investigation–Fatal Underground Mine Explosion–Upper Big Branch Mine-South* 5-6, 60-61 (Dec. 6, 2011), https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Coal/Upper%20Big%20Branch/FTL10c0331noappx.pdf.

Because of these risks, Congress took the problem of advance notice seriously. When the Senate debated the Mine Act, it rejected an amendment that would have permitted advance notice because that would "seriously reduce[] the effectiveness of the inspection program," noting that "the necessity of the inspector having the opportunity to arrive unannounced" is "a point that has been raised repeatedly." 123 Cong. Reg. 20,003 (1977). And not only did Congress prohibit advance notice in the Mine Act section authorizing MSHA to issue citations and orders (for which

a civil penalty is assessed), 30 U.S.C. 813(a), but Congress also made it a federal crime to provide advance notice of an inspection. 30 U.S.C. 820(e). In 2003, KenAmerican, two of its superintendents, and two of its foremen were convicted of (among other crimes) providing advance notice of inspections at the Paradise #9 mine. *United States* v. *Gibson*, 409 F.3d 325, 333-334 (6th Cir. 2005).

But despite these prohibitions, advance notice happens. Some operators provide advance notice explicitly and brazenly. The chief of security at Upper Big Branch, for example, "required his guards to announce [over the mine radio] whenever mine inspectors appeared at the front gate." *United States* v. *Stover*, 499 F. App'x 267, 269 (4th Cir. 2012). And the president of a coal company, whom inspectors told not to provide advance notice, "telephoned the working section and told a miner that 'two federal inspectors' were in the mine and that he wanted the miners to 'watch out and be careful.'" *Topper Coal Co.*, 20 FMSHRC 344, 346 (1998).

Other operators are savvy enough not to announce that "MSHA is here to inspect," but they often use coded language or conduct to achieve the same result. App. 108-109, 110. They may ask whether it's raining outside when they know the weather is clear. App. 109. They may ask what's wrong with a particular belt, even though the mine has no such belt. *Ibid.* And they may ask whether there is company

outside—not innocuously to inquire whether there are visitors, but to determine whether MSHA inspectors are on site. *Ibid.*

3. The inspection of Paradise #9

On April 20, 2012, a group of MSHA inspectors arrived at the Paradise #9 mine to conduct an inspection. App. 105. The mine is large, so it has two portals: one closer to the working areas (the new portal) and one farther away (the old portal). App. 106, 182, 229-30.

At the old portal, there is a dispatch shack. App. 119, 239, 241. Dispatchers work there, usually alone, monitoring various mine systems and relaying messages between personnel underground and personnel at the surface through the mine's phone system. App. 107, 238-239, 242-243. The phone system connects the dispatcher to every part of the mine and can broadcast calls mine-wide. App. 121.

When the inspectors arrived, two went to the dispatch shack at the old portal and the rest stayed at the new portal. App. 105-106, 244. One of the inspectors at the new portal was Doyle Sparks. He reviewed the mine's MSHA-required record books while another inspector monitored the phone to make sure that KenAmerican did not tell miners underground that MSHA was there. App. 105. The other inspector asked Sparks to take over while he prepared to go underground, and Sparks did. App. 107.

While Sparks was listening, someone underground used the mine's phone system to call the dispatcher at the old portal. App. 107. The caller said he was working on the number four[1] unit (underground) and asked, "Do we have any company outside?" App. 107, 139, 247. Sparks heard the dispatcher respond, "Yeah, I think there is." App. 108, 267.

Sparks, who had so far been silent (because the dispatcher and miners underground did not know he was monitoring the phones), asked the caller to identify himself. App. 108. Sparks got no response. *Ibid*. He determined that this exchange was advance notice of an inspection and issued a citation alleging that it violated section 103(a) of the Mine Act. See App. 264-266. The Secretary proposed a civil penalty of $18,742 for the violation. App. 7.

4. Commission proceedings

4.1 The first ALJ decision

The Secretary and KenAmerican filed cross-motions for summary decision, accepting for the purposes of the motions the facts described above. See 29 C.F.R. 2700.67. The ALJ found that there was no genuine dispute of material fact about either the caller's question (whether there was "company outside") or the

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[1] The transcript erroneously reads "number 40." See App. 122-125.

dispatcher's response ("yeah, I think there is"). App. 23. But the ALJ concluded that this undisputed exchange was "ambiguous and vague" and, as a matter of law, did not prove that KenAmerican provided advance notice. *Ibid.* The ALJ granted KenAmerican's motion for summary decision and vacated the citation.

4.2 The first Commission decision

The Secretary appealed, and the Commission reversed. App. 25-53. The Commission held that the material fact at the core of the dispute, namely, the "intent or meaning of the cited communication," remained unresolved. App. 30. It reasoned that advance notice can be communicated by ambiguous and coded language. Drawing all reasonable inferences in favor of the Secretary as the non-moving party, the Commission concluded that one could reasonably infer that the company-outside exchange conveyed advance notice. App. 31-32. The Commission held that the ALJ erred by failing to draw this inference in the Secretary's favor when deciding KenAmerican's motion for summary decision and remanded for a hearing. App. 32, 34.

4.3 The hearing

At the hearing, Sparks testified that he has worked in the mining industry for almost 40 years, for operators, state regulators, and MSHA. App. 98-99. He

testified that he has "mined a long time" and in "several places," and that advance notice "goes on more than people really like to admit." App. 108. Operators use code words—asking about the weather, or about a nonexistent belt, or whether there is "company"—to communicate that an MSHA inspection is coming. App. 108-109. These practices are widespread: Sparks experienced them "generally at every place [he has] been associated with." App. 110; see also App. 114 (at a different mine, miners told Sparks that "every time [MSHA] come[s] here, they call and tell us").

Sparks explained why he determined that the company-outside exchange at Paradise #9 was advance notice. The caller asked whether "there [was] company outside," which, to Sparks, "specifically meant are there inspectors outside." App. 109.

Sparks testified that advance notice is a problem because operators will start "correcting possible hazards and violations and hanging curtains and cleaning up and doing things that they normally wouldn't do without the advance notice." App. 111. These practices can conceal serious and systemic hazards like poor ventilation, inadequately supported roof, and explosive accumulations of coal. App. 111, 115.

On cross-examination, Sparks acknowledged that mine operators may need to arrange for escorts (miners' and operators' representatives accompanying MSHA inspectors, see 30 U.S.C. 813(f)) and rides (to get inspectors to various parts of the mine), but he rejected the idea that an operator needs to or is allowed to state that MSHA is on site in order to do so. App. 153-154, 159-160, 166-169. Instead, Sparks explained, the operator can simply call for a person or ride without specifying that it is for an inspection. App. 166-169. He agreed that inspectors were often at Paradise #9 for months at a time because it was large, App. 185-186, but did not agree that MSHA's frequent presence had anything to do with advance notice. App. 185. Sparks also rejected the idea that an advance notice violation can occur only if the operator knows, and tells miners, precisely which parts of the mine or which issues MSHA plans to inspect. App. 180. Instead, Sparks explained that the converse is true: "[if] they know you're on the mine property, they know they need to be taking care of business where they're at because they don't know where we're going." *Ibid.*

Lance Holz, the dispatcher, also testified. His testimony largely matched Sparks's. Holz testified that the caller asked whether there was company outside; that he assumed the question meant, is MSHA outside?; that after Holz responded,

Sparks asked the caller to identify himself; and that the caller did not respond. App. 247-250.

Holz's testimony differed from Sparks's in one way: Holz testified that, when the caller asked whether there was "company outside," he probably responded, "I don't know." App. 247. But Holz was not sure about his response. He repeatedly acknowledged that he might have said something else, including "I think there is," as Sparks testified. App. 247-248, 256.

4.4 The second ALJ decision

The ALJ concluded that KenAmerican did not provide advance notice and vacated the citation.

The ALJ reasoned that the question "Do we have company outside?" was neutral and not a potential part of advance notice, so Holz's response was dispositive of whether KenAmerican provided advance notice. App. 59, 61-62. The ALJ discredited Sparks's testimony that Holz responded, "Yeah, I think there is," and credited Holz's testimony that he responded, "I don't know." App. 59-62. Based on his conclusion that Holz's response was dispositive, the ALJ concluded KenAmerican had not provided advance notice. App. 62.

The ALJ also opined about the scope of the prohibition against advance notice in section 103(a). App. 62-66. He concluded that section 103(a) is "limited [in]

scope" and prohibits only specific, deliberate notice that MSHA is at a mine to conduct an inspection and does not prohibit notice that MSHA is at a mine, App. 63, 64; that intent to provide advance notice is required, App. 64, 65; that advance notice is more difficult to demonstrate at large mines (since mine personnel will not know exactly where MSHA will be inspecting) and at mines where inspectors are often present (since mine personnel will expect MSHA to be there anyway), App. 64-65; and that advance notice is permitted to arrange for rides and escorts, App. 64, 65.

4.5 The second Commission decision

Again the Secretary appealed, and again the Commission reversed. App. 68-75. The Commission found that the question "Do we have any company outside?" was meant to find out whether MSHA was at the mine and concluded that the dispatcher "knew the question presented a request for advance notice." App. 77; see also App. 69 n.5, 72 & n.8. Setting aside the ALJ's credibility finding, the Commission found that the dispatcher responded, "Yeah, I think there is." App. 72-73.

The Commission underscored that "Holz testified that he understood the question about 'company' to be directed at determining whether MSHA was present," and since "Holz thought the caller was asking whether MSHA

inspectors were on site and Holz's statement informed him that inspectors were present," an advance notice violation occurred. App. 72-73. The Commission further noted that the ALJ "himself recognized that the inquiring miner was using coded language." App. 72. In sum, it was undisputed that "an underground miner solicited advance notice of an MSHA inspection," and Holz's affirmative response to that solicitation was an advance notice violation. App. 69.

The Commission rejected KenAmerican's remaining legal arguments that proof of intent to provide advance notice is required, App. 72, and that section 103(a) applies only to the Secretary, not to operators, App. 73. It also rejected KenAmerican's argument that section 103(a) unconstitutionally burdened its free-speech rights, reasoning that even if section 103(a) was a content-based restriction on protected speech, it was narrowly tailored to serve the compelling governmental interest of meaningful inspections. App. 74. The Commission remanded for the ALJ to assess a penalty. App. 75.

4.6 The third ALJ decision

On remand, the case was reassigned, and a new ALJ assessed a penalty based on each of the six statutory penalty factors, see 30 U.S.C. 820(i). App. 77-79. The ALJ found that KenAmerican was a large operator, that the parties stipulated that the proposed penalty would not affect its ability to continue in business, and that no

party alleged a lack of good-faith abatement of the violation. App. 78. Regarding KenAmerican's history of violations, the ALJ "[took] note of the fact that two mine superintendents and a foreman were previously convicted of the crime of providing advance notice at this mine." App. 78 & n.1 (citing *Gibson*, 409 F.3d at 333). The ALJ also found that the gravity of the violation was serious and that KenAmerican was highly negligent. App. 78-79.

The ALJ assessed a penalty of $18,742. App. 79. KenAmerican filed a petition for discretionary review, the Commission declined to grant it, and the ALJ's decision became a final Commission order. App. 80; 30 U.S.C. 823(d)(1).

Summary of the Argument

Section 103(a) states, in pertinent part, "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person …." 30 U.S.C. 813(a). The plain meaning of this provision, which the Court should determine using the traditional tools of statutory construction, prohibits operators from giving advance notice.

Though the text alone is not dispositive, it supports this interpretation. The text specifies no particular giver and does not exempt operators. By contrast, other provisions in the same subsection apply only to the Secretary, suggesting that Congress deliberately did not apply the prohibition against advance notice only to

the Secretary. That provision is also drafted in the passive voice, which, as the Supreme Court has recognized, creates ambiguity about who the relevant actor is.

Other tools of statutory construction support this interpretation, which is consistent with section 103(a)'s placement in the statutory scheme as part of other provisions that require the Secretary to enforce the Mine Act against operators. The legislative history also demonstrates Congress's concern that operators would have the opportunity to hide or fix violations, and when mentioning the advance-notice prohibition does not limit that prohibition to the Secretary. Moreover, for decades, the Secretary, Commission, and the courts have understood that the prohibition applies to operators. Upending that understanding would unsettle the law and, by giving operators the opportunity to hide or fix hazards and violations before MSHA finds them, make it near-impossible for MSHA to enforce the Mine Act.

KenAmerican's arguments about what constitutes "advance notice of an inspection"—that the notice must explicitly mention an inspection, or state exactly where or what MSHA plans to inspect—would deprive the prohibition of any effectiveness. Whether an operator has provided advance notice of an inspection depends on the *effect* of its conduct, not on the particular language it uses or actions it takes. When MSHA inspects mines, it must issue a citation for every violation it

believes has occurred, so entire mines are fair game even if MSHA is onsite for a more limited purpose, and operators know that. Whether advance notice is specific or general, it creates the opportunity to hide or fix hazards and violations throughout the mine. So proscribed advance notice must include more than just notice about exactly where or what MSHA plans to inspect. And the Secretary does not have to prove an operator's intent to establish advance notice, because the text focuses on *whether* it occurred and not *why*.

Moreover, substantial evidence supports the Commission's finding that KenAmerican provided advance notice. A caller underground asked, "Do we have any company outside?" This question meant, is MSHA here? The dispatcher, who understood that meaning, responded, "Yeah, I think we do." KenAmerican does not dispute these facts, and they amply support the Commission's finding.

Finally, KenAmerican's constitutional argument is unpersuasive. As applied here, section 103(a)'s advance-notice prohibition comports with the First Amendment. That prohibition primarily regulates conduct, not speech; is content-neutral; and in any event satisfies strict scrutiny. And it did not unconstitutionally burden KenAmerican's walkaround rights; nothing prevented KenAmerican from exercising those rights while still complying with section 103(a), and any rate, those rights are statutory, not constitutional.

Standard of Review

This Court deems the Commission's factual findings "conclusive" if they are "supported by substantial evidence on the record considered as a whole." 30 U.S.C. 816(a)(1); *Con-Ag, Inc.* v. *Sec'y of Labor*, 897 F.3d 693, 699 (6th Cir. 2018). Under this deferential standard, the Court determines "whether there is such relevant evidence as a reasonable mind might accept as adequate to support the Commission's conclusion." *Pendley* v. *FMSHRC*, 601 F.3d 417, 423 (6th Cir. 2010) (quoting *Nat'l Cement Co.* v. *FMSHRC*, 27 F.3d 526, 530 (11th Cir. 1994)) (alteration omitted). This Court "will not reverse a factual determination" reviewed for substantial evidence unless "the evidence not only supports a contrary conclusion, but *compels* it." *Ceraj* v. *Mukasey*, 511 F.3d 583, 588 (6th Cir. 2007) (quotation omitted).

"The standard for assessing the Commission's legal determinations is more nuanced. This Court reviews the Commission's application of the law de novo." *Pendley*, 601 F.3d at 423. In cases involving questions of statutory interpretation, this Court determines "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Hopkins Cty. Coal*, 875 F.3d at 287 (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The Court uses the "traditional tools of statutory construction" to resolve any apparent

ambiguity. *Grand Trunk W. R.R. Co.* v. *United States Dep't of Labor*, 875 F.3d 821, 831 (6th Cir. 2017) (quoting *Mid-Am. Care Found.* v. *NLRB*, 148 F.3d 638, 642 (6th Cir. 1998)). If, after that inquiry, the Court still finds ambiguity, it "must determine the most reasonable interpretation of the statutory language at issue, giving deference to the interpretation presented by the Secretary." *N. Fork Coal Corp.* v. *FMSHRC*, 691 F.3d 735, 741 (6th Cir. 2012).

There is an intra-circuit split regarding what level of deference to give the Secretary's interpretation. *Pendley* holds that, when the Secretary and the Commission agree about how to interpret an ambiguous provision of the Mine Act, this Court gives *Chevron* deference to that interpretation, as long as it is reasonable. 601 F.3d at 423 & n.2 (stating that "[t]he Court must … give *Chevron* deference to the Commission's reasonable interpretation of ambiguous provisions of the Mine Act," but noting that the Secretary's interpretations "supersede" the Commission's when they conflict). In *North Fork*, this Court extended *Skidmore* deference to the Secretary's interpretation, even though the Commission had adopted it. 691 F.3d at 742.

This case does not turn on what level of deference the Secretary's interpretation should receive; because the only reasonable interpretation of the Mine Act is the Secretary's. But if the Court believes the level of deference is

dispositive, then it should follow *Pendley*, since it is the earlier-decided case and, without an intervening Supreme Court or an en banc decision, cannot be overruled by a later panel (including *North Fork*, which did not even discuss *Pendley*'s contrary holding). See *Salmi* v. *Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

Argument

1. The Mine Act prohibits operators from giving advance notice of inspections.

KenAmerican argues (Br. 16-24) that the prohibition against advance notice plainly applies only to the Secretary. Not so. The plain meaning of the statute as a whole is that it prohibits operators from providing advance notice of inspections. That interpretation is consistent with the text, history, and purpose of section 103(a) and of the Mine Act; the Secretary, the Commission, and the courts have applied it for decades; and especially given the disastrous practical consequences of KenAmerican's interpretation, it is the only sensible way to interpret the statute.

1.1 The text of section 103(a) does not exempt operators.

Consider, first, the language of the sentence prohibiting advance notice. That sentence states, "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out

the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections." 30 U.S.C. 813(a). This prohibits advance notice without limitation to any particular person.

The sentence also uses the passive voice ("no advance notice shall be provided to any person"). The passive voice focuses on the object of an action, not on the actor. See Bryan A. Garner, *Garner's Modern American Usage* 612-613 (3d ed. 2009). The Supreme Court has repeatedly recognized that when a statute uses the passive voice, it does not specify a statutory actor. *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (explaining that "the passive voice focuses on an event that occurs without respect to a specific actor"); *Watson* v. *United States*, 552 U.S. 74, 81 (2007); *United States* v. *Wilson*, 503 U.S. 329, 334 (1992); *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 102-103 (1979). This, the Court has explained, creates ambiguity about who the relevant actor is. *Wilson*, 503 U.S. at 334-335. Because the text of the prohibition against advance notice uses the passive voice, focuses on the prohibited action, and does not specify an actor, it does not plainly exempt operators.

It is true, as KenAmerican argues (Br. 20-24), that the advance-notice provision in section 103(a) contains the phrase "In carrying out the requirements of this subsection," and that the Secretary has primary responsibility for enforcing the

Mine Act. But it does not follow that the next clause ("no advance notice shall be provided to any person") plainly applies only to the Secretary. The text is somewhat awkward, and not exactly pellucid. At any rate, it can and should be read—as the Secretary reads it—to mean, "As the Secretary is carrying out these requirements, no advance notice of an inspection shall be provided to any person." Under this reading, the prohibition comfortably applies to operators.

KenAmerican's contrary interpretation asks this Court to read the sentence prohibiting advance notice in isolation from the rest of section 103(a), which would prevent comparison with other portions of 103(a) that specifically apply only to the Secretary. But interpreting that sentence requires considering section 103(a) as a whole, not any sentence in isolation. See *Babcock* v. *Comm'r of Soc. Sec.*, 959 F.3d 210, 214 (6th Cir. 2020) ("[W]e must read the words of the statutory provision in their context and with a view to their place in the overall statutory scheme.") (quotation omitted). The other provisions of section 103(a) show that when Congress wanted to, Congress knew how to limit those provisions to the Secretary. Congress specifically permitted the Secretary of Health and Human Services to give advance notice in some situations. 30 U.S.C. 813(a). And when Congress meant to direct only the Secretary's conduct, it did so explicitly. Many sentences in section 103(a) refer explicitly to what the Secretary must do: "the Secretary …

shall make frequent inspections and investigations in … mines"; "the Secretary shall make inspections of each … mine" at set intervals; "The Secretary shall develop guidelines for additional inspections of mines …." *Ibid.* And the last sentence of section 103(a) specifies that "the Secretary … shall have a right of entry to, upon, or through any coal or other mine," despite having a prefatory phrase similar to the prefatory phrase in the advance-notice sentence ("For the purpose of making any inspection or investigation under this chapter"). *Ibid.*

If Congress meant to prohibit only the Secretary from providing advance notice, it could have followed this pattern and enacted a statute that said, "In carrying out the requirements of this subsection, the Secretary shall not provide advance notice of an inspection to any person." But Congress did not. Congress's use of different language in the prohibition against advance notice—language that does not limit the prohibition to the Secretary—was presumably deliberate. See *N. Fork Coal Corp.*, 691 F.3d at 743 ("We presume that Congress's choice of language was purposeful.") (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

1.2 Other tools of statutory interpretation support applying section 103(a)'s prohibition against advance notice to operators.

This Court should also interpret section 103(a)'s advance-notice prohibition in light of the "fundamental canon of construction that the words of a text must be

read in their context and with a view to their place in the overall scheme." *United States* v. *Gillispie*, 929 F.3d 788, 790 (6th Cir. 2019).

Operators must comply with the Mine Act and have primary responsibility for safety and health in their mines. See 30 U.S.C. 801(e). Section 103(a)'s prohibition against advance notice makes sense only if it is actually enforceable. The Secretary is required to enforce violations of the Mine Act by assessing civil penalties against operators. 30 U.S.C. 820(a)(1). This civil-penalty provision does not give the Secretary the authority to assess penalties against MSHA inspectors and representatives. Indeed, there is no statutory basis to assess civil penalties against anyone *but* operators for violating the advance-notice prohibition in section 103(a). See 30 U.S.C. 820. So interpreting section 103(a) as applying only to the Secretary, and *not* to operators, would make this enforcement scheme nonsensical.

KenAmerican's interpretation produces other perplexing results. As noted, section 110(e) of the Mine Act makes it a crime for any person to provide advance notice, and as KenAmerican acknowledges (Br. 22-24), that provision applies to operators. It would be odd to interpret the Mine Act as authorizing criminal, but not civil, penalties for an operator that provides advance notice. Civil penalties are a cornerstone of the Mine Act. See Senate Report 15-17, 39-46. Congress believed that "the civil penalty is one of the most effective mechanisms for insuring [sic]

lasting and meaningful compliance with the law," and that "the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act ...." *Id.* at 15, 40. It would be strange for Congress, which believed so strongly in the deterrent and enforcement value of civil penalties, to have exempted operators from those penalties, especially since operators "have the primary responsibility to prevent the existence of" unsafe "conditions and practices" at mines. 30 U.S.C. 801(e). It would be stranger still for Congress to do so while also imposing criminal liability, leapfrogging more minor penalties to more serious ones. KenAmerican does not explain why Congress would have intended these anomalous results, and this Court avoids statutory interpretations that "would produce an odd result." *Broadcast Music, Inc.* v. *Roger Miller Music, Inc.*, 396 F.3d 762, 773 (6th Cir. 2005). The more natural, and sensible, reading of the Mine Act is to harmonize sections 103(a) and 110(e) by concluding that they both apply to operators, "foster[ing] a 'symmetrical and coherent regulatory scheme.'" *Grand Trunk W. R.R.*, 875 F.3d at 829 (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995)).

Relevant legislative history buttresses the Secretary's interpretation. "While reliance on legislative history has become less prevalent over time, substantive canons have not displaced legislative history." *Grand Trunk W. R.R.*, 875 F.3d at

829. This Court has relied on legislative history in construing different provisions of the Mine Act. *Hopkins Cty. Coal*, 875 F.3d at 293 ("[T]he Senate Report is persuasive to support the position that warrantless entry under § 103(a) was intended to apply equally to both inspections and investigations under the Act.").

The legislative history shows that Congress was concerned about the opportunities that advance notice gives operators. The Senate Report warned of the "the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained …." Senate Report 27. Accepting KenAmerican's interpretation would allow operators to provide (at least non-criminal) advance notice, creating precisely the problem Congress meant to avoid. The Senate Report repeatedly emphasizes that advance notice is prohibited and does not limit that prohibition to the Secretary. *Id.* at 26, 27, 64.

KenAmerican argues (Br. 22-24) that section 110(e) supports its interpretation, asserting that because Congress explicitly referred to "any person" in section 110(e) but not in section 103(a), Congress must not have meant to refer to "any person" in section 103(a). True, section 110(e) is broader than section 103(a); it prohibits *any person* from providing advance notice, while section 103(a) does not apply to the public broadly. Section 110(e) applies to, for example, a miner's spouse who sees MSHA inspectors traveling to a mine and calls his spouse at the mine to

report it, and to a guard at a nearby prison who from the guard tower sees MSHA vehicles approaching and calls a mine to report it. It even applies to MSHA inspectors. But the fact that section 110(e) is broader than section 103(a) does not mean that section 103(a) does not apply to operators.

KenAmerican argues that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Grand Trunk W. R.R.*, 875 F.3d at 825 (quoting *Russello*, 464 U.S. at 23). The Secretary agrees that section 110(e) is broader than 103(a), but that does not mean that section 103(a) does not apply to operators. And, as KenAmerican's own brief highlights (Br. 22-23), sections 103(a) and 110(e) bear almost no linguistic or structural resemblance to each other (apart from their common reference to advance notice). Compare 30 U.S.C. 813(a) with 30 U.S.C. 820(e). Given these significant differences, the fact that the latter refers to "any person" sheds little light on whom the former refers to.

KenAmerican also relies heavily on the interpretive canon of *expressio unius est exclusio alterius*. Br. 18, 21, 22. That canon, "which states that the mention of one thing implies exclusion of another," is useful only when a statute lists some items and excludes others, *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1357 (6th

Cir. 1995), and readily yields to "context" showing that the "statute was probably not meant to signal any exclusion." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). Section 103(a) does not use that pattern, so that canon is not much use.

KenAmerican suggests that a D.C. Circuit decision stating that section 103(a) applies to the Secretary supports its position. Br. 23 n.5 (citing *UMWA* v. *FMSHRC*, 671 F.2d 615 (D.C. Cir. 1982)). But that case involved an entirely different issue (when miners' representatives are entitled to be paid for time spent accompanying MSHA inspectors on inspections), and the language KenAmerican cites is just dicta in a footnote. *UMWA*, 671 F.2d at 624 n.28. Moreover, the D.C. Circuit's observation that section 103(a) generally prohibits the Secretary from providing advance notice, see *ibid.*, does not mean, and the D.C. Circuit did not suggest, that operators are not also prohibited from doing so.

1.3 KenAmerican's interpretation would disrupt decades of settled law and practice and would compromise MSHA's ability to enforce the Mine Act.

Practical considerations also favor reading the prohibition against advance notice as applying to operators. One consideration is the longstanding practice of doing so. See *N. Fork Coal Corp.*, 691 F.3d at 744 (noting that longstanding practice to the contrary may cut against adopting a new interpretation of a statute). MSHA's guidance explains that operators may not provide advance notice.

MSHA, Program Information Bulletin MSHA-P10-15 – Prohibition of Advance Notice of § 103(a) Inspections (Aug. 26, 2010), https://www.msha.gov/msha-p10-15. MSHA also has issued citations alleging that operators violated the Mine Act by providing advance notice. See *Northshore Mining Co.*, 41 FMSHRC 474 (2019) (ALJ); *DJB Welding Corp.*, 32 FMSHRC 728 (2010) (ALJ). For example, in December 2018, MSHA issued another citation to KenAmerican after discovering a message sent to miners underground; it read, "Leonard said you got company coming to the #1 unit." See MSHA Citation No. 9146273 (Dec. 16, 2018) (copy attached as Attachment A).[2] And MSHA issued a citation to Performance Coal Company, the operator of the Upper Big Branch mine, for providing advance notice that prevented MSHA from accurately inspecting the mine and contributed to the 2010 explosion that killed 29 miners. See MSHA Citation No. 8431853 (Dec. 6, 2011) (copy attached as Attachment B).

For decades, the Commission and its ALJs have applied the prohibition against operators. *Topper Coal*, 20 FMSHRC 344; *Northshore Mining Co.*, 41 FMSHRC 474; *DJB Welding Corp.*, 32 FMSHRC at 730-731. The Commission has also held

[2] MSHA issues these citations consistently, though not especially frequently, because violations are often difficult to catch. MSHA also issues citations for impeding or delaying inspections, since doing so gives an operator the opportunity to hide or fix violations and so is tantamount to providing advance notice. See, *e.g.*, *F.R. Carroll, Inc.*, 26 FMSHRC 97 (2004) (ALJ).

that operators who deny or delay MSHA's entry to a mine to conduct an inspection violate section 103(a), in part because denying or delaying an inspection is effectively providing advance notice of one. *John Richards Constr.*, 39 FMSHRC 959, 962-963 (2017); *Calvin Black Enters.*, 7 FMSHRC 1151, 1156-1157 (1985).

The courts also have recognized that the prohibition applies to operators. Federal district courts have enjoined operators from providing advance notice. Permanent Injunction, *Solis* v. *CAM Mining, LLC*, No. 7:11-CV-00104 (E.D. Ky. July 15, 2011); Consent Judgment, *Solis* v. *Rosebud Mining Co.*, No. 3:10-CV-00331 (W.D. Pa. May 16, 2011); *Solis* v. *Manalapan Mining Co.*, No. 10-115-GFVT, 2010 WL 2197534 (E.D. Ky. May 27, 2010). The D.C. Circuit has observed that "[i]t is hard to understand what good [the advance notice] provision would do if any operator could delay a surprise inspection by blocking it without penalty." *W. Oilfields Supply Co.* v. *Sec'y of Labor*, 946 F.3d 584, 589 (D.C. Cir. 2020).

Especially in the absence of any compelling textual reason to depart from this consistent and longstanding practice, there are good reasons for adhering to it. For one, KenAmerican's interpretation would disrupt the understanding that MSHA and the mining industry have functioned under for decades. Its interpretation would also upend decades of settled law. KenAmerican has identified no reason that would justify that dramatic departure. See *Gamble* v. *United States*, 139 S. Ct.

1960, 1969 (2019) (leaving settled law settled "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process") (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)).

For its part, KenAmerican argues (Br. 24) that adopting its interpretation of section 103(a) would have no serious practical consequences, because MSHA could still pursue criminal charges for providing advance notice under section 110(e). But obtaining criminal convictions can be a lengthy process, and Congress intended for the Mine Act to function not by protracted criminal proceedings, but by quick and effective assessment of civil penalties to deter violations. Senate Report 39-46. (As the near-decade history of this case illustrates, civil-penalty litigation can take long enough on its own.) And section 103(a) is the only mechanism that the Secretary has to prevent operators from providing advance notice (since United States Attorneys, not the Secretary, prosecute alleged violations of section 110(e)). KenAmerican's interpretation would strip the Secretary of the only mechanism he has to enforce a crucial piece of the Mine Act.

In fact, adopting KenAmerican's interpretation would fundamentally change—and undermine—MSHA's enforcement of the Mine Act. Effective enforcement depends in enormous part on unannounced, warrantless inspections. See Senate

Report 27. Violations, including serious ones that compromise fundamental aspects of mine safety and health, can easily be hidden or fixed if an operator knows that MSHA is coming. *Ibid.* If MSHA does not see mines as they actually are, then MSHA cannot ensure that operators are actually complying with the Mine Act and with health and safety standards. That compromises not only MSHA's enforcement at individual mines, but also MSHA's ability to identify and address new or recurring industry-wide hazards. It is "unlikely" that Congress hid this elephant of a result in a mousehole, *Grand Trunk W. R.R. Co.*, 875 F.3d at 828, and this Court should reject an interpretation that would hollow out the core purpose and effective functioning of the Mine Act. See *United States* v. *Fitzgerald*, 906 F.3d 437, 442-443 (6th Cir. 2018) ("working only within the range of 'textually permissible meanings,' we consider which of those interpretations would serve, rather than frustrate, the statute's manifest purpose") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 57 (2012)).

1.4 If section 103(a)'s prohibition against advance notice is ambiguous, the Secretary's interpretation is reasonable and deserves *Chevron* deference.

If there is any ambiguity about whether the prohibition against advance notice applies to operators, the Secretary's interpretation that it does is entitled to deference. MSHA has consistently issued citations on that basis; "when embodied

in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress, and is therefore as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a regulation." *Prairie State Generating Co.* v. *Sec'y of Labor*, 792 F.3d 82, 91 (D.C. Cir. 2015) (quotation omitted). The Secretary's interpretation is contained in precedential Commission decisions, see App. 25-54, 68-77; *Topper Coal*, 20 FMSHRC 344, and for that reason, is entitled to *Chevron* deference. *Pendley*, 601 F.3d at 423 & n.2. Given the language of section 103(a), the legislative history, and the structure and purpose of the Mine Act, the Secretary's interpretation is not only "reasonable," *ibid.*, but is also "consistent with the statutory text and the Mine Act overall." App. 73. The Secretary's interpretation commands *Chevron* deference if this Court concludes that the advance notice provision in section 103(a) is ambiguous.

The Secretary's interpretation is also the only one that would enable MSHA to carry out its obligation to enforce the Mine Act, and because Congress "intended the Act to be liberally construed" to meet that goal, courts are "obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable." *Secretary of Labor ex rel. Bushnell* v. *Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (quotation omitted); *RNS Servs.,*

Inc. v. *Sec'y of Labor*, 115 F.3d 182, 186-187 (3d Cir. 1997); *Secretary of Labor ex rel. Wamsley* v. *Mut. Mining Inc.*, 80 F.3d 110, 115 (4th Cir. 1996).

2. The Mine Act prohibits conduct that has the effect of providing advance notice of an inspection.

KenAmerican argues (Br. 25-29) that section 103(a) prohibits only advance notice of inspections, not advance notice of MSHA's presence at a mine. That is correct, as a general proposition. But KenAmerican's argument about what constitutes "advance notice of an inspection" is unrealistically narrow and unsupported by the statute. Whether an operator has provided advance notice does not depend on whether it did so explicitly or intentionally, or on whether it provided notice of exactly where or what MSHA planned to inspect. Instead, whether an operator has provided advance notice depends on the effect of the operator's conduct. The crucial question is, did the operator's conduct have the effect of giving advance notice of an inspection? KenAmerican's conduct did.

2.1 Advance notice is prohibited even if it is conveyed implicitly or in code.

Though KenAmerican does not come right out and say so, it suggests (Br. 30-38) that advance notice is prohibited only if operators literally reference an impending MSHA inspection—something along the lines of saying, "MSHA is

here to conduct an inspection." That suggestion is both at odds with the statute and completely impractical.

For one, section 103(a) does not prohibit only certain words or phrases; it prohibits advance notice broadly. That is because Congress was concerned not with exactly how advance notice was conveyed, but with what happened as a result. This is also reflected in Congress' use of the passive voice, which focuses on "whether something happened—not how or why it happened ...." *Dean*, 556 U.S. at 572. Moreover, the point of prohibiting advance notice is to avoid creating the opportunity for operators to conceal violations. Senate Report 27. Focusing on the precise content or nature of conduct that allegedly provides advance notice, instead of on whether that conduct has the effect of creating the opportunity to hide or fix hazards and violations, misses the point.

The Commission has taken a practical approach to this problem, recognizing that advance notice is prohibited because of its effects. It has held that when an operator delays or denies an inspection, it violates section 103(a) in part because delays and denials effectively give advance notice of an inspection. *John Richards Constr.*, 39 FMSHRC at 962-963; *Calvin Black Enters.*, 7 FMSHRC at 1156-1157. These cases show that advance notice can be provided implicitly.

KenAmerican's approach is also infeasible and creates impossible line-drawing problems: how specifically must an operator state that MSHA is there to conduct an inspection? Would "MSHA's here to work" be a violation? "MSHA's looking around"?

That difficulty illustrates why advance notice is prohibited, even if it is provided implicitly or in code. See App. 31-32. Other examples abound. Mine personnel might ask whether it's raining outside even though they know the weather is clear, or ask what is wrong with equipment that does not exist. App. 109. And the phrase KenAmerican used ("we've got company") is often used to communicate that unwanted visitors are arriving. It is used so often that it has become a trope, even a cliché. While Luke Skywalker and Han Solo rescue Princess Leia from the Death Star, Han tells Luke that Storm Troopers are approaching by shouting, "Luke, we're gonna have company!" *Star Wars: Episode IV - A New Hope* (Lucasfilm 1977). And a young John Connor tells his companions that the T-1000 has caught up to them in the factory by saying, "We've got company." *Terminator 2: Judgment Day* (Carolco Pictures 1991).

Mine operators could also use nonverbal means to convey advance notice. For example, from the surface, they could trigger alarms or flash warning lights underground. The only reasonable interpretation is that section 103(a) could cover

these examples, since (depending, of course, on the circumstances) they could all have the effect of providing advance notice.

KenAmerican also suggests (Br. 30-32) that there is a distinction between providing advance notice that MSHA is at a mine (in its view, permitted) and providing advance notice that MSHA is at a mine to conduct an inspection (not permitted). That is a distinction without a difference. When MSHA is at a mine to conduct an inspection, announcing that "MSHA is here" has the same effect as announcing that "MSHA is here to conduct an inspection": it creates the same opportunity to hide violations.

This does not mean that an operator may never provide notice that MSHA is at a mine. If MSHA is at a mine solely for non-inspection reasons, then the prohibition against advance notice does not apply. For example, the Mine Act "does not prohibit advance notice of investigative activities (activities which are not direct enforcement activities)," such as providing education and training or technical assistance, or demonstrating research or prototypes. I MSHA, *Program Policy Manual* 9 (Oct. 2010), https://arlweb.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20I.pdf.

2.2 Advance notice is prohibited even if an operator suspects that MSHA is already at a mine or needs to obtain rides and escorts for inspectors.

For similar reasons, advance notice is prohibited even if an operator suspects that MSHA is already at a mine (Br. 30-32). Advance notice still creates the opportunity to hide violations. KenAmerican argues that MSHA's frequent presence at the mine reduced the likelihood that the company-outside exchange communicated advance notice of an inspection. But *knowing* that MSHA is inspecting a mine creates an incentive to hide violations that mere suspicion does not. (If KenAmerican were right that miners underground *suspected* that MSHA was there already, so that *knowing* whether they were would have made no difference, there would have been no reason for the caller to ask.) And practically, because MSHA inspectors are frequently at large mines, KenAmerican's argument would exempt large mines from the prohibition against advance notice. No such statutory exception exists.

KenAmerican argues (Br. 33-35) that the dispatcher had to respond to the caller's question in order to secure rides and escorts for inspectors. That is both irrelevant and wrong; no statutory exception for providing rides and escorts exists, and operators can easily call for rides and escorts without providing advance notice. It may be true that when an operator summons a ride or a person in the middle of a shift, underground personnel may think it odd, or may even suspect that the reason

is MSHA. But that does not change the statutory language, which prohibits advance notice without an exception for securing rides and escorts. And if the question *did* make it impossible for the dispatcher to respond without providing advance notice, then the question should not have been asked.

2.3 Advance notice includes more than just notice of exactly where MSHA is going or what MSHA is looking for.

KenAmerican also argues (Br. 32-37) that section 103(a) prohibits only advance notice about precisely which parts of the mine or what safety or health issues MSHA plans to inspect. That narrow interpretation of the statute is unworkable and unrealistic.

According to KenAmerican, operators can give advance notice that MSHA is at a mine to conduct an inspection, as long as they do not say what kind of inspection MSHA is doing, where MSHA is going, or what MSHA is looking for; the only things an operator could not say would be things like "MSHA is here for a follow-up inspection on Unit B," or "MSHA is here to check respirable dust levels." But MSHA conducts many kinds of inspections: regular inspections, inspections in response to hazard complaints, impact inspections at mines that have compliance problems, spot inspections at mines that liberate large amounts of methane, spot inspections during major construction, impoundment inspections, and follow-up

inspections. III MSHA, *Program Policy Manual* 98 (June 2012), https://arlweb.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20III.pdf. When MSHA arrives at a mine, operators do not know what kind of inspection MSHA is doing or where or what inspectors will be inspecting; that is by design, in order to minimize opportunities for operators to hide violations. KenAmerican's argument would make the advance notice provision a near-nullity, as operators would violate it only in the highly unlikely event that they become privy to and communicate the minutiae of an upcoming MSHA inspection. And as a policy matter the Mine Act cannot be interpreted to prohibit the narrowest forms of advance notice but permit the broadest ones.

More fundamentally, KenAmerican's argument gets the reasons for prohibiting advance notice backwards. KenAmerican suggests that advance notice is a problem only if it reveals exactly where or what MSHA is inspecting. But the opposite is true. When inspectors are inspecting mines, all mine operations are fair game: inspectors are obligated to issue citations not only for violations they may be focused on, but for *any* violations they see. 30 U.S.C. 814(a) (if an inspector believes that an operator has violated statutory or regulatory requirements, "he shall … issue a citation to the operator"). For example, an inspector who is inspecting a mine's electrical system and sees a large accumulation of coal will

write a citation for the accumulation; an inspector investigating a complaint about an unguarded machine will write a citation for a miner who is not wearing necessary fall protection. Moreover, the bulk of MSHA's inspections are regular inspections of surface mines twice each year and of underground mines four times each year—inspections that must be conducted of each mine "in its entirety." 30 U.S.C. 813(a). And even if they are focused on particular areas or hazards, inspectors look for imminent dangers before they begin a targeted inspection. See App. 126. So giving advance notice of an inspection creates the opportunity and incentive for operators to hide or fix violations everywhere, precisely because they do not know exactly what the inspection might include, but do know that it can (and usually does) include everything.

2.4 Advance notice is prohibited, notwithstanding an operator's intent.

KenAmerican also argues (Br. 26-29) that the Commission decisions do not consistently hold whether intent to provide advance notice is required to establish a violation. It is unclear whether or why KenAmerican thinks this supposed inconsistency is reversible error, since KenAmerican acknowledges that any finding of intent was not the sole basis for either the ALJ's decision or the Commission's second one. But at any rate, the Commission decisions are not inconsistent. The first decision stated that "[t]he intent *or meaning* of the cited communication" was

a material factual question, App. 30 (emphasis added), and the second decision focused on that meaning—whether the meaning was to provide advance notice. App. 70-73.

Moreover, the second decision did not hold that intent is irrelevant; it simply held that it is not required. App. 72. That holding is correct. Because the advance notice prohibition uses the passive voice, whether advance notice is provided is assessed "without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572 (citation omitted). So the only question is whether the operator's conduct had the effect of providing advance notice irrespective of the operator's intent. See pp. 37-40, *supra*. Intent is instead relevant to an operator's negligence, one of the factors used to assess an appropriate civil penalty. *Topper Coal*, 20 FMSHRC at 349 (noting that intentional violations can support a finding of high negligence for penalty purposes).

3. Substantial evidence supports the Commission's finding that KenAmerican provided advance notice of an inspection.

Substantial evidence supports the Commission's ultimate finding that KenAmerican provided advance notice of an inspection. The crucial evidence is:

- MSHA was at the mine to conduct an inspection. App. 105.
- A person underground called the surface dispatcher and asked, "Do we have any company outside?" App. 107.

- The caller meant, and the dispatcher understood that the caller meant, are there MSHA inspectors here? App. 248-249.
- The dispatcher responded, "Yeah, I think there is." App. 108.

KenAmerican does not dispute these facts (Br. 26 n.8), and they amply support the Commission's advance-notice finding.

Despite these facts, KenAmerican asserts that substantial evidence does not support the Commission's finding. Br. 38. But KenAmerican's challenge to that finding mostly comprises legal arguments attempting to narrow the scope of what the statute prohibits and arguments that this Court should reverse the Commission's decision based on the "practical reality" of day-to-day operations at the mine. The Court should reject those arguments, see pp. 37-45, *supra*, since they are irrelevant to whether the Commission's holding is supported by substantial evidence.

KenAmerican's other challenges to the Commission's findings lack merit. Much of KenAmerican's brief is devoted to the ALJ's decision. Br. 25-38. But that decision is not at issue, because "[t]his Court reviews the Commission's decision and not the underlying decision of the ALJ as such." *Pendley*, 601 F.3d at 422.

KenAmerican faults the Commission for purportedly requiring proof of advance notice of MSHA's *presence*, rather than advance notice *of an inspection*. Br. 25-29. The Commission did sometimes use the shorthand "advance notice," rather than

the entire phrase "advance notice of an inspection." See App. 70-73. But no one disputes that the issue is the latter, and that is what the Commission analyzed. See *ibid.*; App. 69 ("In summary, Holz and Sparks both testified that an underground miner solicited advance notice *of an MSHA inspection* over the mine-phone and that Holz responded to the miner's solicitation.").

Similarly, KenAmerican argues that the citation alleges that it provided advance notice "that MSHA inspectors were on mine property," not advance notice of an inspection. Br. 30 (quoting App. 15). That is accurate, but unimportant. The citation on its face alleged a violation of section 103(a), see App. 15, which incorporated by reference the language of the statute. See *Simplex Time Recorder Co.* v. *Sec'y of Labor*, 766 F.2d 575, 585 (D.C. Cir. 1985) ("Administrative pleadings are very liberally construed"); *Brock* v. *Dow Chemical U.S.A.*, 801 F.2d 926, 930 (7th Cir. 1986). Moreover, the issue that was actually litigated was whether KenAmerican provided advance notice of an inspection. See, *e.g.*, App. 203-219 (KenAmerican's motion for directed verdict, addressing whether KenAmerican provided advance notice of an inspection). So it is clear that this case concerns advance notice *of an inspection*.

KenAmerican argues (Br. 33-34) that MSHA "essentially set [it] up to violate Section 103(a)" because MSHA waited one day before responding to a hazard

complaint and arrived at the mine during a shift, which meant that ride vehicles needed to be recalled from the working area. But the timing of MSHA's inspection has nothing to do with the company-outside exchange. MSHA's decision to investigate a hazard complaint the day after receiving it (which is both a rapid response and consistent with MSHA's regulations, 30 C.F.R. 43.5(a)) did nothing to prompt the caller's question. Nor did MSHA's arrival at the mine during a shift; there is no reason rationally related to MSHA's arrival timing that a miner underground would have needed to ask the dispatcher whether MSHA was on site.

4. **The prohibition against advance notice does not violate KenAmerican's First Amendment rights.**

This Court should also reject KenAmerican's alternative argument (Br. 38-45) that section 103(a) violates its First Amendment rights.

It is not clear whether KenAmerican is raising as an-applied or facial challenge to the statute. It claims (Br. 38-39) that it is asserting an as-applied challenge, but its argument relates to facial challenges. KenAmerican argues that section 103(a) is not narrowly tailored, which is a standard typically applied to analyze a statute's facial validity. Every legal authority KenAmerican cites to support this argument involves a facial, not an as-applied, challenge, and it is unclear how these authorities apply here. Br. 40 (citing *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015);

R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992)*; Turner Broad. Syst., Inc.* v. *FCC*, 512 U.S. 622 (1994); *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803 (1992)).

Notwithstanding, KenAmerican does not appear to claim that applying section 103(a) to other speech that provides advance notice of an MSHA inspection violates the First Amendment (i.e., a facial challenge). Instead, KenAmerican argues that section 103(a) is unconstitutional as applied to this particular company-outside exchange. Br. 41, 44. These arguments, however, simply repeat KenAmerican's assertions that it did not provide advance notice (Br. 30-32) and should be rejected for that reason alone.

KenAmerican also asserts (Br. 40), without serious analysis or justification, that section 103(a) is a content-based speech restriction subject to strict scrutiny and that it fails that test. But "statute[s] directed at conduct rather than speech" do not violate the First Amendment. *R.A.V.*, 505 U.S. at 389. And even when a statute does regulate speech, "[n]ot every interference with speech triggers the same degree of scrutiny under the First Amendment ...." *Turner Broad. Sys.*, 512 U.S. at 637. Courts apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id*. at 642. A content-based restriction satisfies strict scrutiny "only if the government proves that [it is] narrowly tailored to serve compelling state

interests." *Reed*, 576 U.S. at 163. In contrast, courts will uphold reasonable, content-neutral time, place, and manner restrictions on speech. *Consol. Edison Co.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980). If a statute does not regulate the expression of a particular point of view, but instead serves some other governmental interest, it is content-neutral, see *Turner Broad. Sys.*, 512 U.S. at 642, 647, and will be upheld if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989).

First, section 103(a) is valid because, even if it may "incidentally" regulate speech, it is really aimed at conduct. See *R.A.V.*, 505 U.S. at 389. Not all laws that incidentally restrict speech violate the First Amendment, since "words can in some circumstances violate laws directed not against speech but against conduct," and laws directed against conduct may be "justified without reference to the content of the regulated speech." *Ibid.* (quotation and emphasis omitted). For example, divulging defense secrets to an enemy, even though that is literally speech, could violate laws against treason, and "sexually derogatory 'fighting words'" in a workplace may violate Title VII. *Ibid.* Ultimately, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because" they happen to express an idea. *Id.* at 390.

Section 103(a) is valid because it is primarily aimed at conduct (and the secondary effects of that conduct), not the content of speech. What Congress intended to prohibit is the act of warning and the opportunities to hide or fix hazard and violations that the act of warning creates. See Senate Report 27. The expressive content of any regulated speech is ancillary to conduct that has the effect of providing advance notice. See *R.A.V.*, 505 U.S. at 389. KenAmerican's words were regulated as conduct providing advance notice, not protected speech.

Second, section 103(a) is content-neutral. Congress did not prohibit advance notice to restrict an operator's ability to express a particular point of view; it prohibited advance notice because advance notice compromises a pervasive federal safety-and-health program. Section 103(a) does not prohibit operators from telling miners that it does not like MSHA inspections or restrict an operator's ability to talk to miners about MSHA generally. (Other statutes or Mine Act provisions, depending on the circumstances, might. See *Marshall Cty. Coal Co.* v. *FMSHRC*, 923 F.3d 192 (D.C. Cir. 2019) (concluding that an operator illegally interfered with miners' rights, see 30 U.S.C. 815(c)(1), by discouraging them from filing anonymous complaints with MSHA, but not prohibiting the operator from expressing its dissatisfaction with MSHA)). Section 103(a) simply prohibits conduct that has the effect of providing advance notice.

Section 103(a) also promotes a substantial government interest: immediate and effective mine inspections, to ensure that miners are working in safe and healthful mines. KenAmerican does not appear to challenge this, and the Supreme Court agrees. See *Donavan*, 452 U.S. at 602 (observing that "it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"). This interest would be undermined without the advance-notice prohibition, since that prohibition eliminates (or at least reduces) the opportunities operators have to hide or fix hazards and violations. See *Ward*, 491 U.S. at 799.

Third, even if section 103(a) is a content-based restriction, it satisfies strict scrutiny. In *Donovan,* the Supreme Court upheld the Mine Act's warrantless inspection regime. 452 U.S. 594. The Court found the Mine Act to be "narrowly and explicitly directed at inherently dangerous industrial activity …." *Id.* at 602 n.7. The Court evaluated Congress's intent with respect to Section 103(a) in particular, highlighting that "Congress expressly recognized that a warrant requirement could significantly frustrate effective enforcement of the Act." *Id.* at 602. In other words, protecting miners' safety and health by enforcing the Mine Act—an undeniably compelling government interest—would be significantly frustrated without the prohibition against advance notice. The Commission made

that very point in holding that no First Amendment violation occurred: "[s]uch meaningful inspections cannot occur when the mine environment is altered by advance notice of an inspection." App. 74.

KenAmerican's argument (Br. 41-42) that Section 103(a) is not narrowly tailored rests in part on the premise that KenAmerican could not have secured rides and escorts without providing advance notice. That is mistaken; KenAmerican could easily call for rides and escorts without saying that they are needed for an inspection. Its argument (Br. 44-45) also erroneously assumes that section 103(a) prohibits only explicit notice of exactly what and where MSHA plans to inspect. See pp. 42-44, *supra*.

Finally, KenAmerican argues that the application of section 103(a) interfered with its section 103(f) walkaround rights (Br. 41), which supposedly constitutes infringement on KenAmerican's constitutional rights. But walkaround rights are *statutory*, not *constitutional*, rights. 30 U.S.C. 813(f). And as the Commission correctly found, section 103(a) does not interfere with this right generally or in this case, since it allows an operator to "simply call[] a miner to return to the surface" to exercise that right. App. 75 n.15.

KenAmerican cites *Big Ridge, Inc.*, 36 FMSHRC 1677 (2014) (ALJ) to illustrate how section 103(a) could supposedly be applied more narrowly than it was in this

case. Br. 42-43. But that non-precedential ALJ decision, see 29 C.F.R. 2700.69(d), did not concern the First Amendment, and it simply held that MSHA should balance the prohibition against advance notice with an operator's walkaround rights by giving operators an opportunity to exercise those rights. *Big Ridge*, 36 FMSHRC at 1727. That is exactly what happened here. Section 103(a) did not restrict KenAmerican's ability to call for escorts to exercise its walkaround rights; it restricted only KenAmerican's ability to say that those escorts were needed for an inspection.

Conclusion

KenAmerican urges the Court to adopt an unprecedented interpretation of the Mine Act that would fundamentally change—and undermine—MSHA's ability to enforce the Mine Act. The Court should decline that invitation, affirm the Commission, and deny the petition for review.

Respectfully submitted,

STANLEY E. KEEN
Deputy Solicitor for National Operations

APRIL E. NELSON
Associate Solicitor

ARCHITH RAMKUMAR
Counsel for Appellate Litigation

s/ EMILY TOLER SCOTT
Attorney
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th Street South, Suite 401
Arlington, VA 22202
(202) 693-9333

Attorneys for the Secretary of Labor

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s/ Emily Toler Scott

Certificate of Service

I certify that I electronically filed the foregoing with the Court's Clerk on January 20, 2021, by using the Court's CM/ECF electronic filing system, which will send notice to counsel of record.

Jason W. Hardin
Artemis D. Vamianakis
Fabian VanCott
215 S. State Street
Suite 2100
Salt Lake City, UT 84111

John T. Sullivan
Office of General Counsel
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW Suite 520N
Washington, D.C. 20004

s/ Emily Toler Scott

Addendum

Relevant Statutes

Mine Act Section 103(a), 30 U.S.C. 813(a)

(a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

Mine Act Section 103(f), 30 U.S.C. 813(f)

(f) Participation of representatives of operators and miners in inspections

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

Mine Act Section 110(e), 30 U.S.C. 820(e)

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

Copies of decisions not available in a publicly accessible electronic database
See FRAP 32.1(b); 6 Cir. R. 32.1(a)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY

SOUTHERN DIVISION

Eastern District of Kentucky
FILED
JUL 15 2011
AT COVINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

HILDA L. SOLIS, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff)
)
v.) Civil Action No. 7:11-CV-00104-ART
)
CAM MINING, LLC)
) **ORDER**
) **(Injunctive Relief Sought)**
)
Defendant)

PERMANENT INJUNCTION

1. Jurisdiction for this matter is granted by 30 U.S.C. § 818(b). The defendant CAM Mining LLC, owns and operates mines located in the Commonwealth of Kentucky which produce coal for resale in interstate commerce and thus are subject to the requirements of the Federal Mine Safety and Health Act of 1977 (30 U.S.C.§ 801 et seq).

2. This matter came before this Court on June 24, 2011 upon plaintiff's complaint and the declaration of Federal Coal Mine Inspectors Gerald W. McMasters, Anthony Burke, and Vickie Mullins that defendant committed acts in violation of 30 U.S.C. § 813(a). On June 17, 2011, inspectors from the Mine Safety and Health Administration attempted to inspect the Number 28 mine operated by Defendant CAM Mining LLC. The MSHA inspectors told the defendant's agents that no advance notice was to be given to the miners working underground about

the inspectors' presence. Before the inspectors started underground, the miners working underground were given advance notice of the inspection. The notice was given by means of a mine telephone by defendant's agents and employees. Such advance notice interfered with, hindered or delayed the inspectors from carrying out the provisions of the Federal Mine Safety and Health Act. This notice was given over an order issued under the provisions of the Act.

Pursuant to the power granted this court by 30 U.S.C. § 818(a) and Rule 65 of the Federal Rules of Civil Procedure it is:

ORDERED that defendant, its agents, servants, employees, vendors, visitors, all persons in active concert or participation with it and all other parties who receive actual notice of this order by personal service or otherwise be enjoined from interfering with, hindering or delaying the Secretary's inspection of the Number 28 mine by the giving advance notice to any person working underground of a pending inspection by the Mine Safety and Health Administration, United States Department of Labor. Advance notice constitutes any means of communication including, but not limited to, the mine telephone or any other device and includes any use of signals or devices intended to give notice of an inspection. Notice may only be given when an inspector from the Federal Mine Safety and Health Administration specifically orders that such notice be given as an exception to the prohibition as provided for in the Act;

It is further **Ordered** that defendant's agents, servants, employees and contractors at the Number 28 mine shall be trained in the requirements of this Order within 30 days of entry of the Order, that notice shall be given to the District Manager for District 6, Federal Mine Safety and Health Administration of the time(s) and date(s) for this training, that each person attending training shall be given a copy of the Order, and that a record shall be made of those attending each training

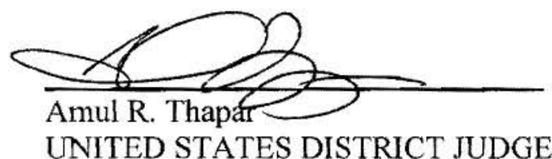
session which shall be returned to said District Manager within five(5) days following completion of the training; and

It is further **Ordered** that a copy of this Order shall be posted at any place where defendant maintains a communication device between any surface operation and the underground workings of the Number 28 mine including any place where lights may be turned off and on or belts may be shut down;

It is further **Ordered** that the terms of this Order shall be incorporated into the Defendant's Emergency Response Plan, Hazard Recognition Training, and Annual Refresher Training plans for the Number 28 mine; and

Further, the terms of this Order shall terminate three years after the entry of the Order. Defendant is not relieved of any statutory obligation against advance notice after the three year term of this injunction has expired. Defendant will remain under the obligation to prevent advance notice of inspections for so long as the prohibition remains in the Federal Mine Safety and Health Act.

Dated at Covington, KY, at ___ o'clock _.m., (EDT) on this the 15th day of July, 2011.



Amul R. Thapar
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
JOHNSTOWN DIVISION

HILDA L. SOLIS, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ROSEBUD MINING COMPANY, Defendant.	:	CIVIL ACTION No.: 3:10-cv-00331

CONSENT JUDGMENT

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor ("the Secretary"), filed a Complaint in this civil action pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801, et seq., alleging certain violations by Defendant Rosebud Mining Company ("Defendant").

The Secretary, through counsel, has engaged in settlement discussions with Defendant through its counsel. The parties have agreed to resolve this case without further litigation. Notwithstanding any answer and waiving further answer, Defendant consents to the entry of this Consent Judgment without contest.

1. The Secretary's Complaint alleges that Defendant violated Sections 103(a) and 108(a) of the Act, 30 U.S.C. §§ 813(a) and 818(a), by permitting advance notice of inspections by authorized representatives of the Secretary to be communicated from the surface operations to persons working underground at its Mine 78 mine on August 12, 2010, and at its Tracy Lynne mine on November 4, 2010.

2. For purposes of this Consent Judgment, Defendant agrees that this Court has jurisdiction over the subject matter of this action and over Defendant.

3. The Secretary has agreed to resolve all claims against Defendant for the following relief and this Court finds that the Secretary is entitled to such injunctive relief. It is therefore **ORDERED**, **ADJUDGED** and **DECREED** that:

For the period from the date of entry of this Judgment until December 31, 2011, Defendant, its officers, servants, and employees, shall be enjoined from giving advance notice in violation of Section 103 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. to any person working underground, of an inspection at Defendant's Mine 78 or Tracy Lynne mines by the Mine Safety and Health Administration, United States Department of Labor. Advance notice constitutes any means of communication including, but not limited to, the mine telephone or any other device and includes any use of signals or devices intended to give notice of an inspection. Notice may only be given when an inspector from the Federal Mine Safety and Health Administration specifically orders that such notice be given as an exception to the prohibition as provided for in the Act.

4. Defendant understands and agrees that entry of this Consent Judgment is without prejudice to the Secretary's right to investigate, redress and institute enforcement actions with respect to any future violations of the Act. It is further understood that this paragraph shall not constitute a waiver by Defendant of any defenses, legal or equitable, to any such future action.

5. The parties agree that Defendant is not hereby admitting or denying any liability by consenting to this Judgment and is entering into this agreement in order to settle

this matter without formal litigation.

6. Each party agrees to bear its own attorneys' fees, costs and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, 5 U.S.C. § 504.

7. This Consent Judgment shall operate as a final disposition of all civil claims asserted by the Secretary against Defendant in the Complaint as well as any investigations related to the allegations in the Complaint.

8. This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment.

9. This Court directs the entry of this Consent Judgment as a final order in the above-captioned matter.

Dated: ___________________

____
JUDGE KIM R. GIBSON
United States District Court

[signatures continue on next page]

Notwithstanding any answer and waiving further answer, Defendant Rosebud Mining Co. consents to the entry of this Consent Judgment:

MCGUIRE WOODS LLP

By: /s/ Gordon W. Schmidt
Gordon W. Schmidt
PA ID # 21265
Matthew G. Mazefsky, Esquire
PA ID# 204905
625 Liberty Avenue
23rd Floor, EQT Plaza
Pittsburgh, PA 15222
gschmidt@mcguirewoods.com
mmazefsky@mcguirewoods.com
(412) 667-6000 (phone)
(412) 667-6050 (fax)

Attorneys for Defendant

Plaintiff moves for the entry of this Judgment:

M. Patricia Smith
Solicitor of Labor

Catherine Oliver Murphy
Regional Solicitor

By: /s/ John A. Nocito
John A. Nocito
PA ID# 87973
Office of the Solicitor
Suite 630E, The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106
Nocito.John@dol.gov
(215) 861-5135 (phone)
(215) 861-5162 (fax)
U.S. DEPARTMENT OF LABOR

DAVID J. HICKTON
UNITED STATES ATTORNEY

By: /s/ Albert W. Schollaert
Assistant United States Attorney
PA ID# 23629
United States Attorney's Office
700 Grant Street, Suite 400
Pittsburgh, PA 15219
Albert.Schollaert@usdoj.gov
(412) 894-7416
(412) 644-6995 (fax)

Attorneys for Plaintiff