ROBERT THOMAS, Complainant, *v.* CALPORTLAND COMPANY, Respondent.	Discrimination Proceeding Docket No. WEST 2018-0402
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, *v.* CALPORTLAND COMPANY, Respondent.	Civil Penalty Proceeding Docket No. WEST 2019-0205 Mine: Sanderling Dredge Mine ID: 45-03687

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Introduction

This case began as an ordinary discrimination case. Robert Thomas, a dredge operator at a CalPortland sand mining operation, asserts he was fired for making safety complaints and cooperating with MSHA. CalPortland argues he was fired for misconduct (or, alternately, that he voluntarily quit). The ALJ and the Commission both applied the longstanding *Pasula-Robinette* test to his claims. On appeal, the Ninth Circuit rejected *Pasula-Robinette* and required that the complainant[1] prove that but for the protected activity, the operator[2] would not have taken the adverse action.

For the reasons discussed below, the Secretary believes that *Pasula-Robinette* is the correct test for discrimination under Section 105(c). It also is not clear precisely what aspects of *Pasula-Robinette* the Ninth Circuit rejected. But in any event, the Commission should apply the Ninth Circuit's test only to Ninth Circuit cases, and should retain as far as possible its miner-protective, *Pasula-Robinette* framework.

Statutory and Procedural Background

The Mine Act is a workplace safety statute. Like many statutes designed to protect workers, it contains an anti-discrimination provision: Section 105(c) provides that no person shall discriminate against a miner for exercising their statutory rights. 30 U.S.C. 815(c)(1). Unlike other statutes, however, the Mine Act was passed in response to several catastrophic mining

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[1] In Section 105(c)(2) cases, this burden is the Secretary's, and in Section 105(c)(3) cases, it is the complainant's; for simplicity, this brief uses "complainant."

[2] Because most respondents in Section 105(c) cases (including this one) are operators, and for simplicity, this brief uses "operator." But Section 105(c) prohibits "any person" from unlawfully discriminating against miners, miners' representatives, and applicants for employment. 30 U.S.C. 815(c)(1).

accidents. S. Rep. No. 95-181, at 3-5 (1977) (reviewing several "tragic mining disasters" that indicated a need for strong legislation in mine safety and health). It is designed to address the industry's particular and pervasive dangers. *Ibid.* It is written, the saying goes, in miners' blood. See Sentencing Mem. at 3, *United States* v. *Blankenship*, No. 5:14-00244 (SD WV, Mar. 28, 2016); *Jewel Ridge Coal Corp.* v. *Local 6167, United Mine Workers of Am.*, 325 U.S. 161, 181 (1945).

In light of this history, Congress intended the Mine Act to be construed broadly to effectuate its protective purpose. *Sec'y of Labor ex rel. Gray* v. *North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (Congress intended protected rights to be construed expansively). Congress recognized the need for miners' active participation in Mine Act enforcement and created a strong anti-discrimination provision to encourage miners' engagement with safety and health issues. S. Rep. No. 95-181, at 35 (1977) ("[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.") Congress explicitly required that Section 105(c) "be construed expansively to assure that miners will not be inhibited *in any way* in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (emphasis added). In explaining how to identify Section 105(c) discrimination, Congress was clear: "[w]henever protected activity is *in any manner a contributing factor* to the retaliatory conduct, a finding of discrimination should be made." S. Rep. No. 95-181, at 36 (emphasis added).

For over forty years, the Commission has used the *Pasula-Robinette* test to analyze discrimination claims under Section 105(c). *Sec'y of Labor ex rel. Pasula* v. *Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981);

Sec'y of Labor ex rel. Robinette v. *United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The test uses a burden-shifting framework. *Ibid.*

Under *Pasula-Robinette*, the entire burden of proof is on the complainant to make out a prima facie case:

(1) the miner engaged in protected activity,

(2) the operator took an adverse action against the miner, and

(3) the adverse action was motivated in part by the protected activity.

Pasula, 2 FMSHRC at 2799.

If the operator offers a rebuttal, the operator has the burden of production and must offer evidence in support of its rebuttal. *Robinette,* 3 FMSHRC at 818 n.20. But the burden of persuasion remains with the complainant, who must persuade the factfinder that the rebuttal evidence is insufficient or pretextual. *Ibid*.

The operator can rebut any of the three prima facie elements. It can rebut the protected activity, alleging that it never occurred or was not protected. It can rebut the adverse action, alleging that it was never taken or was not adverse. And it can rebut the motivation, alleging the protected activity in no part motivated the adverse action. In this case, the burden of persuasion remains on the complainant to t disprove the rebuttal.

The operator can also offer an affirmative defense, agreeing that the prima facie elements are satisfied but alleging that unprotected activity *also* motivated the adverse action, and that it would have taken the adverse action against the complainant for that activity alone (a "mixed motive"). *Pasula*, 2 FMSHRC at 2799-2800. Under *Pasula-Robinette*, the *entire* burden of proof shifts to the

operator to prove such an affirmative defense. *Ibid*. This differs from other antidiscrimination burden-shifting frameworks, under which the burden of production may shift to an employer, but the burden of persuasion remains with the employee. See, e.g., *Shelley* v. *Geren*, 666 F.3d 599, 607-608 (9th Cir. 2012).

If an operator makes out a successful affirmative defense, under *Pasula-Robinette*, the entire burden of proof returns to the complainant, to prove that, ultimately, the operator would not have taken the adverse action but for the protected activity. *Pasula*, 2 FMSHRC at 2800; *Robinette,* 3 FMSHRC at 818 n.20.

On April 14, 2021, in this Section 105(c)(3) case, the Ninth Circuit held that a complainant in Mine Act discrimination cases has the entire burden of proof in establishing that but for their protected activity, the operator would not have taken the adverse action.

Complainant Robert Thomas alleged CalPortland fired him for engaging in protected activity. A Commission judge agreed. *Thomas* v. *CalPortland*, 40 FMSHRC 1503 (Dec. 2018) (ALJ). The Commission disagreed and reversed. *Thomas* v. *CalPortland*, 42 FMSHRC 43 (Jan. 2020). Both the judge and Commission applied the longstanding *Pasula-Robinette* burden-shifting test. *Thomas*, 40 FMSHRC at 1508; *Thomas*, 42 FMSHRC at 50-53.

Thomas appealed to the Ninth Circuit. There, without the Secretary's participation, the Ninth Circuit determined that the proper test for discrimination was a but-for test that placed the entire burden of proof on the complainant (a complainant must show that but for the protected activity, the respondent would not have taken the adverse action). *Thomas* v. *CalPortland Co*., 993 F.3d 1204, 1209-1210 (9th Cir. 2021). Under this test, the burden never shifts to the operator to

prove it had a sole non-discriminatory reason for the adverse action. The Ninth Circuit relied on recent Supreme Court case law interpreting Title VII's anti retaliation provision and the Age Discrimination in Employment Act anti-discrimination provisions to rule that *Pasula-Robinette* "conflicts with the [Supreme Court]'s instruction that the ordinary meaning of 'because' incorporates the 'simple and traditional standard of but-for causation.'" *Id.* at 1209.

The *Pasula-Robinette* test *is* a but-for causation standard: ultimately, assuming an operator attempts to prove an independent reason it would have taken the adverse action, it requires a complainant to prove that but for the protected activity, the operator would not have taken the adverse action. *Pasula*, 2 FMSHRC at 2800; *Robinette,* 3 FMSHRC at 818 n.20. The difference between the *Pasula-Robinette* test and Ninth Circuit test is not but-for causation, but which party bears the burden of proof, at which stage.

It is unclear what exactly the Ninth Circuit decision's impact on *Pasula-Robinette* is, but there are at least two possibilities. First, that the decision requires a complainant to prove but-for causation at the prima facie stage. Relatedly, that the burden of persuasion now never shifts to the operator. The Secretary disagrees with both outcomes.

Argument

1. The *Pasula-Robinette* test advances the Mine Act's remedial purpose.

Only a few years ago, the Commission reaffirmed that, given the Mine Act's history, *Pasula-Robinette* is the correct test for Section 105(c) discrimination claims. *Sec'y of Labor ex rel. Riordan* v. *Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919-1921 (Aug. 2016). The Secretary agrees.

In *Riordan*, the Commission rejected the argument that Section 105(c) requires a complainant to bear the whole burden of proof. 38 FMSHRC at 1919-1921. The Commission acknowledged

that the Supreme Court had interpreted similar language in the ADEA and Title VII as requiring that. *Id.* at 1920 (citing *Gross* v. *FBL Financial Servs., Inc.*, 557 U.S. 167, 175-177 (2009) (ADEA) and *Univ. of Texas Southwestern Medical Ctr.* v. *Nassar*, 570 U.S. 338, 346-350 (2013) (Title VII)). But the Commission correctly recognized that the differences in statutory context are crucial to understanding statutory meaning. *Ibid.* In fact, "courts need not read phrases like 'results from' to require but-for causality where there is 'textual or contextual' reason to conclude otherwise." *Paroline* v. *United States*, 572 U.S. 434, 458 (2014) (citing *Burrage* v. *United States*, 571 U.S. 204, 211 (2014)). And though the Supreme Court has held that where a statute does not speak to the allocation of the burden of proof, "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims," *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005), this is true only "[a]bsent some reason to believe that Congress intended otherwise." *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U.S. 84, 92-93 (2008).

The history of Section 105(c) makes clear that Congress envisioned a reduced burden in making the prima facie case, allowing for a miner to show retaliation *in any part*, which then shifts the burden to the operator to show that the adverse action was for an unprotected reason alone before the complainant must prove but-for causation. Section 105(c)'s predecessor, Section 110(b) of the Coal Act, prohibited discrimination "by reason of" a miner's protected activity. 30 U.S.C. 820(b)(1) (1970) (amended 1977). The purpose of the predecessor Coal Act provision was to grant "the same protection against retaliation which we give employees under [the National Labor Relations Act.]" 115 Cong. Rec. 27948 (Oct. 1, 1969). At that time, the NRLA employed a burden-shifting test in assessing retaliation. See *NLRB* v. *Transp. Mgmt. Corp.*, 462 U.S. 393, 398-

401 (1983) (describing burden-shifting in NLRA retaliation cases dating back to the 1930s), abrogated on other grounds by *OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 276-78 (1994).

In 1977, Congress passed the Mine Act, amending the Coal Act. The Mine Act replaced the "by reason of" language with "because of," prohibiting discrimination and retaliation *because of* the exercise of rights. 30 U.S.C. 815(c)(1). The Senate Report on the updates to Section 105(c) explained that "whenever protected activity is *in any manner* a contributing factor to the retaliatory conduct, a finding of discrimination should be made." S. Rep. No. 95-181, at 36 (emphasis added).[3] As this is the "only legislative history that speaks to this change," the Commission concluded reasonably that the updated "because of" language was "calculated to *expand* the scope of the… retaliation provision…. [The Senate Report] suggests that, if anything, the 'because of' language was intended to *reduce* the causation standard in mine health and safety cases – not to heighten it." *Riordan*, 38 FMSHRC at 1921 (emphasis in original).

Additionally, Congress updated the Mine Act in 2006. See MINER Act, Pub. L. No. 109-236 (2006). Congress did not change the language of Section 105(c) at that time, and in 2006, the *Pasula-Robinette* test had been in use by the Commission and federal courts for 25 years. This suggests that Congress did not want to change what, at the time, was a consistent and unanimous application of the burden-shifting test. See *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has

[3] *Pasula* does not require a contributory motive test, but it recognized that Congress intended a reduced standard of causation and incorporated that by combining the "in any part" test with the "but- for" test in a burden-shifting framework. *Pasula*, 2 FMSHRC at 2798; see p. 12, *infra*.

amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (internal quotations omitted).

As the Commission explained in *Riordan*, Section 105(c) embodies special concerns that other anti-discrimination statutes do not. Congress recognized the need for miners' active participation in Mine Act enforcement: "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 95-181, at 35. Section 105(c) was designed to encourage miners' engagement with safety and health issues by protecting them from reprisal if they reported problems. "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35.

One of the Mine Act's principal concerns is preventing any chilling effect on protected activity. *Moses* v. *Whitely Development Corp.*, 4 FMSHRC 1475, 1478-1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Such a chilling effect impacts not only individual miners seeking to protect their rights, but *all* miners. *Ibid.* In keeping with this concern, the *Pasula-Robinette* framework protects all miners, not just individual complainants. Its burden-shifting paradigm was designed to encourage all miners to participate in protected activity. *Pasula*, 2 FMSHRC at 2798. Per the Commission, "[m]iners may be skeptical of a finding that their fellow miner would have been fired anyway; they would be even more discouraged if their statutory rights can be exercised only if they could prove that they would not have been fired anyway." *Ibid*. The *Pasula-Robinette* test reduces the burden; before miners must prove they would not have been fired anyway, initially they need show only that the action was motivated in part by the protected activity and

the operator must show that it would have fired them for an unprotected reason alone. This test makes it somewhat easier to prove the operator would not have taken the adverse action but for the protected activity, it reduces the chilling effect discrimination might have on miners' inclination to report problems and protect themselves and one another.

This burden-shifting and reduced prima facie burden also alleviate a power imbalance for miners, who are often vulnerable workers. They may work in isolated areas and have few other options for work. S. Rep. No. 95-181, at 35 (recognizing that "mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity") This kind of isolation gives mine operators the chance to exploit miners by suggesting that if miners report safety issues (or engage in other protected activity) and are fired (or the mine is closed as a result), they will not be able to get other jobs. See, *e.g.*, *Marshall Cty. Coal Co.* v. *FMSHRC*, 923 F.3d 192, 197 (D.C. Cir. 2019) (mine operator gave a presentation discouraging safety complaints to MSHA that included PowerPoint slides reading, "Take a Moment to Think About Your Job Being Suddenly Gone," and "There Are No Jobs in This Area that Pay Anywhere Close to What Is Paid [at the mine]") (formatting in original). Miners often lack institutional power relative to mine operators, and the *Pasula-Robinette* test's requirement that the operator shoulder some of the burden of proof alleviates this inequity somewhat.

For similar reasons, it is especially difficult for Mine Act complainants to carry the sole burden of proving but-for causation. The D.C. Circuit, determining that constructive discharge claims should be evaluated under an objective standard, noted that "[t]he Commission…has been sensitive to the proof problems that confront Mine Act complainants; the proof hurdle

would become formidable, for many complainants, insurmountable, if a miner were required to establish subjective operator motivation. Evidence relevant to such motivation inevitably will be within the control of the operator." *Simpson* v. *FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988). And in *Pasula*, the Commission explained that "problems of proof may be almost insurmountable for the employee." 2 FMSHRC at 2798.

The *Pasula-Robinette* test was developed with this history and context in mind. In constructing the *Pasula-Robinette* test, the Commission considered both an "in any part" test (derived from the Senate Report "in any manner" language) and a "but-for" test (another common approach), weighing the pros and cons of each. *Pasula*, 2 FMSHRC at 2797-2798. An "in any part" test is logical because "it is the rare employee who can prove more than that the protected activity played a part in his firing," it reflects the Mine Act's aim to encourage miners to engage proactively to help make mines safer, and it places "the burden of an adverse decision upon the party better able to bear it—the employer." *Pasula*, 2 FMSHRC at 2797-2798. But, the Commission reasoned, the "in any part" test might be overbroad and protective of miners "who would have been fired anyway for unprotected activities." *Id.* at 2798. And the "but-for" test had the advantage that it would not insulate a miner who engaged in "outrageous" non-protected activity as well as protected activity. *Ibid.* But the "but-for" test had the disadvantage that it might chill miners' willingness to engage in protected activity and requiring the miner to bear the entire burden of proof "may be almost insurmountable for the employee." *Id.*

The Commission determined that the drawbacks of each test were not inherent in the tests themselves, but located in the allocation of burdens. *Pasula*, 2 FMSHRC at 2798. Ultimately, the Commission adopted *both* the "in any part" test and the "but-for" test: a complainant has the

burden to prove the prima facie case (the adverse action was motivated *in any part* by the protected activity), but if the operator proves that it took the action for a legitimate reason alone, the burden reverts to the Secretary to disprove that. *Robinette*, 3 FMSHRC at 818 n.20 (further explaining the allocation of burdens). This approach reflects careful consideration of both tests. *Pasula*, 2 FMSHRC at 2800. It captures Congress's intentions for Section 105(c) by incorporating the language of the Senate Report and the concerns over miner participation and potential chilling effects. *Ibid.* It balances those concerns with fairness to operators. *Ibid.* And it acknowledges power imbalances by focusing on which party has the access and capability to prove which facts. *Ibid.*

2. Section 105(c) does not require the sole burden but-for test.

The Ninth Circuit opined that the text of Section 105(c) and its prohibition on discrimination "because of" a miner's protected activity is clear and unambiguous. *Thomas*, 993 F.3d at 1209-1210. The court reasoned that this language requires the but-for test that the Supreme Court applied in Title VII and the ADEA. *Id.* at 1209. But ultimately the *Pasula-Robinette* test *is* a but-for test; if the evidence shows the operator would have taken the action anyway for a legitimate reason alone, the complaint fails. The difference is where the burdens lie, and the Mine Act does not plainly address that question. If a statute is silent or ambiguous as to "the precise question at issue," courts defer to the Secretary's reasonable interpretation. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). The Mine Act does not answer the precise question of whether burden shifting is appropriate in Section 105(c) antidiscrimination cases. The Commission's lengthy discussion of that issue in *Pasula* (as well as the Mine Act's legislative history and context) make that ambiguity obvious. See 2 FMSHRC 2797-2800; *supra* p. 8-10.

Because the Mine Act does not plainly answer this question of burden shifting, the Secretary's interpretation deserves deference. The Secretary has enforcement responsibility and policymaking authority, which "are the basis for judicial deference to agencies." *Secretary of Labor ex rel. Wamsley* v. *Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) (quoting *Martin* v. *OSHRC*, 499 U.S. 144, 153 (1991)). Given the Secretary's role, it is within the Secretary's authority to decide between "policies that were committed to the agency's care by the statute," and courts do not disturb those choices unless the statute or legislative history suggests that Congress would not have accepted it. *Chevron*, 467 U.S. at 845 (quotation omitted). Congress obviously did not disagree with *Pasula-Robinette*'s burden-shifting approach; the legislative history supports that approach, and Congress—despite amending the Mine Act in other ways—did not change this part of Section 105(c). See *supra* p. 9-10.

Deference to the Secretary's interpretation is especially warranted on this issue. The Secretary has defended *Pasula-Robinette* as the correct interpretation of Section 105(c). See *Riordan*, 38 FMSHRC at 1919-1921. The Secretary also has litigated cases under *Pasula-Robinette* for decades; those cases embody *Pasula-Robinette* as the Secretary's interpretation, and that interpretation is entitled to *Chevron* deference. See *Sec'y of Labor* v. *Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003). Moreover, the Secretary and Commission have agreed that the *Pasula-Robinette* burden-shifting test is correct. *Riordan*, 38 FMSHRC at 1919-1921. Where the Secretary and Commission share the same interpretation, courts must accord deference to their joint view. *Cumberland Coal Res., LP* v. *FMSHRC*, 717 F.3d 1020, 1025 (D.C. Cir. 2013).

Also, the Ninth Circuit's discussion focused only on the text of Section 105(c), and courts have recognized that text alone does not always establish a statute's plain meaning. *Univ. of Texas*

Southwestern Medical Ctr. v. *Nassar*, 570 U.S. 338, 356 (2013). Instead, interpreting a statute requires considering a statutory provision's history, text, and context. See, *e.g.*, *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 781-783 (D.C. Cir. 1974) (interpreting the predecessor provision to Section 105(c), rejecting an overly literal construction of the provision in favor of a "liberal construction" as Congress intended). And even a precept of statutory interpretation that focuses solely on "the words on the page" can incorporate legislative history "to clear up ambiguity." *Bostock*, 140 S Ct. at 1738, 1749.

In requiring a new test, the Ninth Circuit cited a line of Supreme Court cases interpreting "because of" language in the context of Title VII of the Civil Rights Act's anti-retaliation provision and the ADEA. *Gross*, 557 U.S. at 175-177; *Nassar*, 570 U.S. at 346-350. It is true that those cases interpreted those particular provisions as requiring a but-for test (without burden shifting). But both *Gross* and *Nassar* emphasized that additional context beyond the bare text was necessary. *Gross,* 557 U.S. at 174 ("[W]e must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); *Nassar*, 570 U.S. at 356 ("Text may not be divorced from context."). The Ninth Circuit did not consider these aspects of the cases it cited.

The Ninth Circuit acknowledged *Riordan*'s reasoning that, per the Supreme Court in *Gross* and *Nassar*, legislative history and context were essential to interpreting the anti-discrimination provision. *Thomas,* 993 F.3d at 1211.The court concluded that focusing on the statute's history was a flawed approach, opining that neither *Gross* nor *Nassar* incorporated legislative history into their analyses. *Thomas*, 993 F.3d. at 1211 ("[I]n neither [case] did the Court look to the legislative history to determine the causation standard…."). But this is simply not true.

In *Gross*, the Court discussed at length the fact that the Civil Rights Act of 1991 had amended Title VII's anti-discrimination provision to adopt a burden-shifting approach but had not amended the ADEA (the statute at issue in *Gross*) in the same manner, despite amending it in other ways. *Gross,* 557 U.S. at 174-175. The *Gross* Court thus concluded that Congress had not intended to extend the burden-shifting approach in Title VII anti-discrimination to the ADEA. Likewise, in *Nassar*, the Court applied the *Gross* holding to Title VII's anti-retaliation provision and determined it required a sole burden but-for test. The Court focused on Congress's conspicuous decision *not* to amend Title VII's anti-retaliation provision, despite amending the causation standard to require burden-shifting for the anti-discrimination provision. *Nassar*, 570 U.S. at 348-351, 353-354, 357. The Court revisited this history briefly in *Bostock*, 140 S Ct. at 1739-1740. Clearly the "the Court look[ed] to the legislative history to determine the causation standard." *Thomas*, 993 F.3d. at 1211. Had the Ninth Circuit properly employed the Supreme Court's approach, it would have considered, at the very least, Congress's decision *not* to amend Section 105(c) in its 2006 updates to the Mine Act, a decision that reflects Congress's satisfaction with the burden-shifting approach then in use. *Rutherford*, 442 U.S. at 554 n.10.Other courts of appeals have recognized that the plain meaning of Section 105(c) cannot be derived from an overly literal, text-based analysis that ignores the statute's context, protective purpose, and history. In *Donovan ex rel. Anderson* v. *Stafford Construction Co.*, the D.C. Circuit determined that Section 105(c) protection extended to a miner who refused to lie to MSHA investigators about a coworker's retaliatory firing, though he did not testify or otherwise make a statement to the investigators. 732 F.2d 954, 958-960 (D.C. Cir. 1984). A literal reading of Section 105(c) protects miners who have "testified or [are] about to testify in any… proceeding," 30 U.S.C.

815(c)(1), and would not protect that activity. But the Court recognized that to adopt a "hypertechnical and purpose-defeating interpretation" would contravene the remedial purpose of the statute and flout Congress's instruction that Section 105(c) be broadly construed. *Donovan*, 732 F.2d at 959-960. That court has repeatedly refused to accept literal but contextually unreasonable interpretations of Section 105(c). See, *e.g.*, *Sec'y of Labor ex rel. Keene* v. *Mullins*, 888 F.2d 1448 (D.C. Cir. 1989) (holding that, though Section 105(c) does not explicitly say miners are protected from discriminatory offers of reemployment, the provision nonetheless protects them from such offers, based on a review of the legislative history evincing Congress's intent to "protect miners… against the more subtle forms of discrimination."); *Gilbert* v. *FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989) (holding that miners have the right to refuse unsafe work under Section 105(c), though that right is not explicitly spelled out in the statute, because "the legislative history of the statute unequivocally supports [that conclusion].").

The Ninth Circuit did not consider the context and history of the Mine Act and read into the statutory text a nonexistent evidentiary burden on complainants. The *Pasula-Robinette* test does, in fact, require proof that an operator took an adverse action "because of" protected activity, and Congress clearly intended its burden-shifting framework.

As the Commission likely is aware, the Ninth Circuit's approach also is inconsistent with the case law in other circuits. The *Pasula-Robinette* test is good law in every other circuit that has reviewed a Section 105(c) discrimination case (the Third, Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits). *Harrison Cnty. Coal Co.* v. *FMSHRC*, 790 F. App'x 210, 213 (D.C. Cir. 2019); *Hopkins Cnty. Coal, LLC* v. *Acosta*, 875 F.3d 279, 288-289 (6th Cir. 2017); *Metz* v. *FMSHRC*, 532 F. App'x at 312; *Cordero Min. LLC* v. *Sec'y of Lab. ex rel. Clapp*, 699 F.3d 1232, 1236 (10th Cir.

2012); *Nat'l Cement Co.* v. *FMSHRC*, 27 F.3d 526, 532 (11th Cir. 1994); *Eastern Assoc. Coal Corp.* v. *FMSHRC,* 813 F.2d 639, 642 (4th Cir. 1987). The statute's plain meaning does not address the burden of proof, the legislative history is clear on Congress's intent, and the Secretary's position on this issue is reasonable, longstanding, and entitled to deference.

3. The Commission should apply the Ninth Circuit's test only in Ninth Circuit cases.

The Commission generally is required to follow decisions from the courts of appeals. See *Yellow Taxi Co. of Minneapolis* v. *NLRB*, 721 F.2d 366, 382-383 & 383 n.38 (D.C. Cir. 1983) (collecting cases). More specifically, it must apply circuit precedent to cases in that circuit. *NLRB* v. *Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). The Commission is bound to follow the Ninth Circuit's decision in the Ninth Circuit, whatever the Commission, taking into account the Secretary's views, determines that that decision means. But the Commission need not apply this decision outside the Ninth Circuit.

The Commission generally should apply courts of appeals' decisions to all cases. But this case is an exception for three main reasons. First, in the other circuits, *Pasula-Robinette* is good law, and the Commission should comply with the law of those circuits. Second, the Secretary, as the Mine Act policymaker, can advance an interpretation that disagrees with the Ninth Circuit's in the other courts of appeals. See, *e.g.*, *Ray, employed by Leo Journagan Constr. Co., Inc.*, 20 FMSHRC 1014, 1025 (Sept. 1998) (noting that the Secretary can "attempt[] to persuade other Courts of Appeals" that a case was wrongly decided). Third, the Commission can comply with its obligation to follow the courts of appeals and with its obligation to defer to the Secretary's interpretation by taking this approach.

4. An approach the Commission could apply to discrimination cases in the Ninth Circuit

The Ninth Circuit did not explain precisely which parts of *Pasula-Robinette* conflict with its test. There seem to be two possibilities: (1) the prima facie case, and (2) the affirmative defense (burden-shifting).

The prima facie case required to prove but-for causation in other types of discrimination in that Circuit would require a complainant to show (1) that they engaged in protected activity; (2) that the operator took an adverse action against them; and (3) a causal connection between the protected activity and the adverse action. See, *e.g.*, *Sandowski* v. *McAleenan*, 423 F. Supp. 3d 959, 975 (D. Haw. 2019) (Title VII retaliation). This is not significantly different from *Pasula-Robinette*.

The courts of appeals are split about whether but-for causation must be proved as part of the prima facie case, or whether but-for causation is part of the complainant's ultimate burden of proof. See *Foster* v. *Univ. of Md.–E. Shore*, 787 F.3d 243, 251 n.10 (4th Cir. 2015) (collecting cases). To the extent the Ninth Circuit requires but-for causation as part of a Mine Act prima facie case, the Commission is likewise bound to require it. But if the Ninth Circuit does not, the Commission should not either, given the Mine Act's legislative history and special protective purpose.

Regarding burden-shifting, under the Ninth Circuit test, the burden of persuasion does not shift to the operator. See *Gross*, 557 U.S. at 180 ("The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."). This conflicts with *Pasula-Robinette*'s affirmative-defense analysis. For now, the Commission would adopt an

approach (again, in Ninth Circuit cases only) that respects the Ninth Circuit test and mirrors common approaches to other antidiscrimination statutes: if a complainant establishes a prima facie case, the burden of production (but not proof) is on the operator to articulate a legitimate, nondiscriminatory reason for the adverse action; the complainant then must prove that the reason is pretextual, and ultimately that the protected activity was the but-for cause of the adverse action. (Note, though, that but-for is not *sole* or even *primary* cause. *Bostock*, 140 S.Ct. at 1745.)

Conclusion

Section 105(c) does not address burdens of proof, but the legislative history is clear: once a miner shows that protected activity was one reason for an adverse action, Congress intended that the burden of proof shift to operators to establish a legitimate reason for the action. This approach balances fairness to operators with access to evidence for miners. The *Pasula-Robinette* test is the correct test for Mine Act discrimination, and the Secretary's interpretation is entitled to deference.

The Commission should continue to use *Pasula-Robinette* outside of the Ninth Circuit. In the Ninth Circuit, the Commission is obliged to follow Ninth Circuit case law, interpreted as liberally as that law will allow in order to encourage miners to exercise their rights.

Respectfully submitted,

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Certificate of Service

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