ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3848

HOPKINS COUNTY COAL, LLC,

Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION

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

THE SECRETARY OF LABOR'S RESPONSE BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor ("Secretary") requests that the Court grant oral argument because he believes argument will help the Court to resolve the statutory and constitutional issues raised by this appeal, and because the Court's holding in this case could have a significant impact on the Secretary's ability to perform his duties under the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act").

JURISDICTIONAL STATEMENT

The Secretary agrees with Petitioner Hopkins County Coal, LLC's ("Hopkins'") jurisdictional statement.

STATEMENT OF THE ISSUES

1. Section 105(c) of the Mine Act requires the Secretary to investigate alleged acts of retaliation against miners who engage in protected activity; Section 103(a) requires him to conduct frequent investigations to determine whether mine operators are complying with the Act; and Section 103(h) requires mine operators to provide the Secretary with any information he reasonably requires to perform his statutory duties. While investigating alleged retaliation against a miner at Hopkins' mine, the Secretary requested that Hopkins provide the miner's personnel file and the files of similarly situated miners. Hopkins refused.

A. Did the Secretary exceed the broad investigatory powers granted to him by the Mine Act?

B. Were the personnel files requested by the Secretary reasonably required to assist the Secretary's investigation?

C. Was the Secretary required to inform Hopkins of the precise nature of the protected activity he was investigating?

2. Because the mining industry is "pervasively regulated," all mine operators have reduced Fourth Amendment privacy interests and are subject to frequent warrantless inspections and investigations. *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). The Secretary did not obtain a warrant for the personnel files that he

requested that Hopkins provide, and issued citations to Hopkins for refusing to provide them. Did the Secretary's information requests or his issuance of the citations violate Hopkins' Fourth Amendment rights?

STATEMENT OF THE CASE

I. *Statutory and regulatory framework.*

The Mine Act, Pub. L. No. 95-164 (1977), 30 U.S.C. § 801 *et seq.*, was enacted to improve and promote safety and health in the Nation's mines in order to protect "the mining industry's 'most precious resource—the miner.'" *Richardson v. Sec'y of Labor*, 689 F.2d 632, 633 (6th Cir. 1982) (quoting 30 U.S.C. § 801). In enacting the Mine Act, Congress declared that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c); *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209–10 & nn. 12–14 (1994) (summarizing the Act's legislative history and the "[f]requent and tragic mining disasters" that led to its enactment).

Section 101(a) of the Mine Act directs the Secretary to promulgate mandatory safety and health standards for the protection of life and prevention of injuries in the Nation's mines. 30 U.S.C. § 811(a). Section 103(a) requires the Secretary, via the Mine Safety and Health Administration ("MSHA"), to "make frequent inspections and investigations" of every mine to assure compliance with such standards and with "other requirements of th[e] Act." 30 U.S.C. § 813(a).

In performing "any inspection or investigation under th[e] Act," Congress provided that the Secretary's authorized representatives—i.e., mine inspectors and investigators—"shall have a right of entry to, upon, or through any coal or other mine." *Id.* This provision provides the Secretary with a warrantless right of entry to perform his inspections and investigations. *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

In addition to warrantless inspections and investigations, the Mine Act provides several ways that the Secretary can gather information about mine operators' compliance with the Act. First, mine operators are required to collect and maintain for routine inspection certain information and records. *E.g.*, 30 U.S.C. §§ 813(c), (d), 825(c), 843(a), 862(a), 863(a),(d),(f),(g),(o),(t),(w), 865(g) 872(b); *see also*, *e.g.*, 30 C.F.R. Part 50; 30 C.F.R. § 75.360(g)–(h) (implementing this authority). Second, the Secretary can hold public hearings, to which witnesses and documents may be subpoenaed, "for the purpose of making any investigation of any accident or other occurrence relating to health or safety in a . . . mine." 30 U.S.C. § 813(b). Third, and most relevant to this case, Section 103(h) provides that "[i]n addition to such records as are specifically required by th[e] Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and *and provide such information*, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under

th[e] Act." 30 U.S.C. § 813(h) (emphasis added); *see Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 641 (7th Cir. 2013) ("*Big Ridge II*").

Section 104 of the Mine Act requires that MSHA inspectors issue citations to mine operators whenever they believe a mine operator has violated any provision of the Act or any implementing standard, rule, order, or regulation. 30 U.S.C. § 814(a). If an operator has not "totally abated" the violation within a period of time designated by the inspector, the inspector must issue an order, under Section 104(b) of the Act, requiring the withdrawal of most persons from the affected area of the mine. 30 U.S.C. § 814(b).

The Secretary must propose a civil penalty, which may be as little as $127, for any Section 104(a) citation. 30 U.S.C. §§ 815(a), 820(a); 30 C.F.R. § 100.3(g).[1] He *may* propose additional daily civil penalties if a mine operator continues to operate in violation of a subsequent Section 104(b) order. 30 U.S.C. §§ 815(b), 820(b)(1); *see Thunder Basin*, 510 U.S. at 204 n.4.

A mine operator may contest any citation, order, or proposed civil penalty. 30 U.S.C. § 815(d). Administrative review is provided by the Federal Mine Safety and Health Review Commission ("the Commission"). The Commission is an independent adjudicatory agency established by the Mine Act to provide trial-type administrative hearings and discretionary appellate review of Mine Act-related

[1] The minimum penalty the Secretary could propose at the time this case arose was $112. 30 C.F.R. § 100.3(g) (2009).

matters. 30 U.S.C. § 823; *see Thunder Basin*, 510 U.S. at 204, 207–08. Commission decisions may be appealed to the court of appeals for the circuit in which the mine in question is located or to the Court of Appeals for the District of Columbia Circuit. 30 U.S.C. § 816.

At Commission hearings, the Secretary has the burden of demonstrating that a violation occurred, and a penalty will be assessed only if the Secretary carries that burden. *See, e.g.*, *Asarco Mining Co. v. Sec'y of Labor*, 15 FMSRHC 1303, 1307 (1993). And under established law, "[o]nly the Commission has authority actually to impose civil penalties proposed by the Secretary, and the Commission reviews all proposed civil penalties *de novo* according to six criteria." *Thunder Basin*, 510 U.S. at 208 (citing 30 U.S.C. § 820(i)); *see Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984). Those criteria include the mine operator's degree of negligence, the gravity of the violation, and the operator's good faith in abating the violation. 30 U.S.C. § 820(i); *see Thunder Basin*, 510 U.S. at 208 n.10.

The Mine Act also includes a stringent anti-retaliation provision, Section 105(c), 30 U.S.C. § 815(c), that "serves an important function in accomplishing the legislation's broader goals of improving mine safety and protecting miners." *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 302 (7th Cir. 2012). Section 105(c) protects miners, representatives of miners, and applicants for

employment in a mine from suffering discrimination or interference relating to their exercise of protected rights under the Mine Act. Congress instructed that Section 105(c)(1) be interpreted "expansively to assure that miners will not be inhibited in any way from exercising any rights afforded by the legislation." *Donovan ex rel. Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (quoting S. Rep. No. 95-181, at 36 (1977)).

Under Section 105(c), after any miner files a complaint of discrimination, the Secretary "shall cause such investigation to be made as he deems appropriate." 30 U.S.C. § 815(c)(2). Such investigations must commence within 15 days of receiving a complaint. *Id.* If an investigation initially establishes that the miner's complaint is not frivolous, the Secretary must file an application with the Commission requesting that the miner be temporarily reinstated during the remainder of the investigation and the litigation of any resulting complaint filed by the Secretary. *Id.*; *see N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 738 (6th Cir. 2012). The rapid timeline for processing complaints and the availability of temporary reinstatement represent an "essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 95-181, at 37.

Section 105(c) protects miners who are retaliated against for engaging in a number of activities. As relevant here, a miner engages in protected activity whenever she reports hazards to mine management, *see Sec'y of Labor ex rel. Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 2016 WL 5594252, at *8 (2016), or refuses to work in unsafe conditions or violate a mandatory health or safety standard, *see Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *DiCaro v. U.S. Fuel Co.*, 5 FMSHRC 954, 964 (1983) (ALJ).

II. *Factual background.*

Hopkins operates the Elk Creek Mine, an underground coal mine in Kentucky. App'x, p. 31. Robert Gatlin was employed at the mine as a belt examiner. *Id.*, p. 25, 44. He was discharged on January 8, 2009. *Id.*, pp. 25, 44, 330. Hopkins maintained that Gatlin was terminated for insubordination—namely, for refusing to perform pre-shift examinations without receiving additional pay. *Id.*, pp. 224, 330.

On January 20, 2009, Gatlin filed a discrimination complaint with MSHA. App'x, pp. 25–26, 44, 293–95. The complaint, in its entirety stated: "I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and

backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me." *Id.*, p. 295.

Gatlin received some assistance in preparing his statement from an MSHA claims processor. App'x pp. 44, 143. Claims processors are not investigators or interrogators; their job is to "listen carefully" to the complainant "and then . . . reduce that complaint to just a few sentences to get the gist of what's going on." *Id.*, p. 143; *see also id.* at 44 n.1. Complaints are then forwarded to an investigator. *Id.*, p. 145.

After explaining the processors' ministerial role, Supervisory Special Investigator Kirby Smith further testified that "the majority" of complaints that reach investigators do not "clearly set forth a protected activity"—as was the case here. App'x, pp. 50, 145. Investigators therefore investigate each case, rather than triaging them based on the written complaint, because miners "may not know what a protected activity is," and because MSHA has encountered cases where miners initially "couldn't articulate" the gravamen of their complaint. *Id.*, pp. 50 & n.10, 219.

Because Gatlin requested temporary reinstatement, his investigation was "fast-tracked," and Smith interviewed Gatlin the next day. App'x, pp. 44, 158, 220. Based on this interview, Smith determined that Gatlin may have engaged in protected activity and been terminated as a result. *Id.*, pp. 25, 44–45. In particular,

Gatlin told Smith that he had been told not to record some dangerous conditions discovered during his pre-shift examinations and that his job had become so burdensome that he did not have time to correct hazardous conditions he observed, causing him to report more hazards. *Id.*, pp. 46 n.5, 50–51, 155–56.

Based on Gatlin's allegations, Smith drafted a letter to Hopkins, which was sent by MSHA District Manager Carl E. Boone II, requesting that Hopkins make five miners available for interviews. App'x, pp. 25, 45, 296. Smith felt it was necessary to speak with these five individuals because, based on Gatlin's interview, each had knowledge that could corroborate or contradict Gatlin's account. *Id.*, p. 158. In a February 6 letter, Hopkins declined to make the five miners available unless MSHA told Hopkins what specific protected activity was under investigation. *Id.*, p. 297.

On February 23, MSHA sent another letter to Hopkins requesting that Hopkins provide copies of six sets of documents: (1) Gatlin's personnel file; (2) any documents showing disciplinary action taken against Gatlin; (3) documents showing hazards at the mine, including pre-shift examination books, for the six months preceding Gatlin's termination; (4) Hopkins' employee handbooks or manuals; (5) personnel files "of all employees at the Elk Creek Mine who were disciplined, reprimanded or terminated during the period of January 1, 2004–January 20, 2009 for engaging in the conduct which led to the termination of

Robert Gatlin;" and (6) documents upon which Hopkins relied in terminating Gatlin. App'x, pp. 26, 45, 298–99.

MSHA and Hopkins exchanged further letters on March 2, 17, 18, 20, and 23. App'x, pp. 26–27, 45, 300–05. The upshot of these letters was that Hopkins agreed to provide some of the requested information but not Gatlin's personnel file or the personnel files of employees who had been reprimanded for the same conduct that led to Gatlin's termination. *Id.*, pp. 26–27, 45. Hopkins declined to make the files of other employees available unless MSHA informed it of the specific protected activity under investigation, and declined to make Gatlin's file available unless MSHA provided a signed release from Gatlin. *Id.*, pp. 27, 45, 302–03, 305. MSHA did not provide the information Hopkins demanded. *Id.*, p. 45.

At trial, Smith testified that informing operators of the specific allegations he is investigating can "distort[]" or "taint[] the investigation" by causing mine operators and witnesses to tailor or alter their responses in light of the allegations. App'x, p. 161. He also explained that Gatlin's personnel file would help determine whether Gatlin's story was factually accurate and whether he was an honest witness. *Id.*, pp. 163–64. He explained that personnel files of other miners disciplined for similar conduct would help determine whether Gatlin suffered

disparate treatment, i.e., whether he had been treated more severely than other miners who engaged in acts of insubordination. *Id.*, pp. 164, 166–67.

MSHA's March 20 letter informed Hopkins that Smith would visit the mine on March 23 to review the records Hopkins had agreed to make available. App'x, pp. 27, 304. The same letter informed Hopkins that MSHA expected it to make the contested personnel files available at that time. *Id.* When Smith appeared at the mine on March 23, Hopkins refused to make the personnel files available. *Id.*, pp. 27, 45, 175.

Smith then issued Hopkins a citation for violating Sections 103(a) and (h) of the Mine Act by failing to produce the requested documents. App'x, pp. 27–28, 45, 175, 306. After Hopkins informed Smith that it still would not comply, Smith issued a Section 104(b) order for Hopkins' failure to timely abate the violation. *Id.*, pp. 28, 45–46, 178–79, 307. Shortly thereafter, Smith issued a second citation for Hopkins' refusal to comply with the Section 104(b) order. *Id.*, pp. 29, 46, 182–83, 308. As a result of this procedure, Hopkins was subject to potential daily civil penalties if it continued to refuse to produce the documents and if a Commission ALJ were to conclude that its refusal to provide the requested information was unlawful. *Id.*, p. 46.

III. *Proceedings before the ALJ.*

Hopkins contested the two citations and the Section 104(b) order to the Commission on the day they were issued, and requested an expedited hearing. App'x, p. 29. On March 26, 2009, after negotiation between the parties, Hopkins abated all three violations by providing the Secretary with a full copy of Gatlin's personnel file and redacted files of four similarly situated miners who had been terminated for insubordination. *Id.*, pp. 30 & n.8, 46. Because Hopkins abated the violation, there was no longer any need for expedited proceedings. *Id*, p. 30.

After initially filing an erroneous penalty petition, App'x, pp. 9–12, the Secretary filed an amended petition proposing the minimum civil penalty of $112 for the original Section 103(a) citation and a $500 daily civil penalty (for a total of $1500) for the second citation, *id.*, pp. 21, 30. The Secretary did not seek a separate penalty for the violation of the Section 104(b) order.

After denying the parties' cross motions for summary decision, a Commission ALJ held a hearing on June 7, 2011. Two witnesses testified: Smith, and Hopkins' general mine manager, William Adelman. App'x, p. 110.

On April 2, 2012, the ALJ issued a decision affirming the citations and concluding, as relevant here, that: (1) the Secretary did not require a warrant to obtain the personnel files, App'x p. 34; (2) neither Hopkins' nor its employees' privacy interests justified Hopkins' refusal to disclose the files, *id.*, pp. 34–36; (3)

Sections 103(a) and (h) authorized the Secretary's requests for the personnel files, *id.*, pp. 37–39; and (4) the requests were not unduly burdensome, *id.*, pp. 40–41.

The ALJ assessed a $112 penalty for the first citation, and a penalty of only $1050 ($450 less than the Secretary proposed) for the second, reflecting the ALJ's view that Hopkins was not as negligent the Secretary believed. App'x, p. 42.

IV. *The Commission's decision.*

The Commission affirmed the ALJ's decision in all regards. First, in a holding Hopkins has not appealed, the Commission deferred to the Secretary's interpretation that the Mine Act authorizes him to investigate discrimination complaints that do not, on their face, state that the complaining miner engaged in protected activity. App'x, pp. 47–52.

Second, the Commission reiterated a prior holding that Section 103(h) authorizes the Secretary, during investigations, to demand documents other than those that mine operators are required to maintain under the Mine Act. App'x, pp. 52–53 (citing *Big Ridge, Inc. v. Sec'y of Labor*, 34 FMSHRC 1003 (2012) ("*Big Ridge I*"), *aff'd*, 715 F.3d 631 (7th Cir. 2013)).

Third, the Commission held that the requested personnel records were "'reasonably required'" for the Secretary to "carry out his investigative 'functions' under . . . the Act"—namely, investigating alleged acts of discrimination. App'x, pp. 54–55 (quoting 30 U.S.C. § 813(h)).

Fourth, the Commission held that MSHA is not required to notify a mine operator of the protected activity MSHA is investigating. App'x, pp. 55–57.

Fifth, the Commission held that MSHA's information requests did not violate Hopkins' rights under the Fourth Amendment for two reasons. App'x, pp. 57–60. First, the Commission found that the Secretary's information requests were reasonable warrantless inspections of a pervasively regulated entity under *Dewey*, 452 U.S. 594. App'x, p. 58. Alternately, the Commission found that the requests complied with the Fourth Amendment requirements that apply in the analogous context of administrative subpoenas—i.e., under the test used by the Seventh Circuit in *Big Ridge II*. *Id.*, pp. 58–60.

Finally, the Commission addressed two questions, neither at issue here, relating to the proper scope of Section 104(b) orders. App'x, pp. 60–63.

Two Commissioners dissented, arguing primarily that in order for a document request to be "reasonable," the Secretary must inform the mine operator of the protected activity he is investigating. App'x, pp. 64–73.

SUMMARY OF ARGUMENT

The Secretary's requests for the personnel file of a miner who filed a discrimination complaint and the files of similarly situated employees were authorized by the Mine Act, and did not run afoul of the Fourth Amendment.

Section 103(a) and Section 103(h) each authorize the Secretary to make information requests that are reasonably necessary to further an investigation. Section 103(h) does so expressly, requiring operators to "provide such information[] as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under th[e] Act." 30 U.S.C. § 813(h). This provision authorizes case-by-case investigatory requests for information. *Big Ridge II*, 715 F.3d at 641–42, 643. As to Section 103(a), that provision instructs the Secretary to engage in warrantless and frequent investigations of mines. 30 U.S.C. § 813(a); *see Dewey*, 452 U.S. at 602. It therefore implies the power to review documents that are reasonably required to complete such investigations. *See Sec'y of Labor v. BHP Copper, Inc.*, 21 FMSHRC 758, 764–65 (1999). To the extent either provision is ambiguous, the Secretary's interpretation is entitled to either *Chevron* or *Skidmore* deference.

Under either provision, the Secretary's information requests here were reasonably required to further his investigation. Smith had specific suspicions that Gatlin had been terminated for reporting mine hazards to management, for refusing to violate illegal orders from a supervisor, and/or for refusing to work in unsafe conditions. App'x, pp. 39 n.15, 50–51, 161–62, 194–95, 220. The requested files were needed to corroborate (or contradict) those suspicions. *Id.*, pp. 163–64, 166–67.

Contrary to Hopkins' argument, neither the Mine Act nor any other principle entitled Hopkins to be apprised of the *specific* protected activity the Secretary suspected that Gatlin might have engaged in. Rather, the rule is that investigative agencies are, *at most*, required to inform those under suspicion of the "general subject" of the investigation. *United States v. R. Enterps., Inc.*, 498 U.S. 292, 302 (1991). Here, Hopkins knew the general subject of the investigation: whether it had unlawfully retaliated against Gatlin. That was more than enough to put Hopkins on notice of why the Secretary wanted to review Gatlin's personnel files and the files of other similarly situated miners.

The Secretary's information requests also did not violate the Fourth Amendment. Because mining is a pervasively regulated industry, *see Dewey*, 452 U.S. at 599–603, mine operators have severely reduced privacy interests in business records, such as the ones here, that the Secretary will predictably and frequently need to inspect. *See New York v. Burger*, 482 U.S. 691, 701 (1987); *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 520 (6th Cir. 1981). Although the Secretary may not be permitted to seize such documents or rummage through a mine operator's file room without a warrant, information requests that merely require the operator itself to review its files and provide responsive documents require no warrant or other process given operators' reduced privacy interests.

To the extent the Fourth Amendment imposes additional limitations on the Secretary's information requests, this Court should apply the test used to evaluate "constructive searches" such as administrative subpoenas. *See Big Ridge II*, 715 F.3d at 645 (doing just that). Document requests are not traditional "searches" as they involve no direct governmental intrusion. *Id.*; *see Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984).

This Court's decision in *McLaughlin v. Kings Island, Div. of Taft Broadcasting Co.*, 849 F.2d 990 (6th Cir. 1988), is not to the contrary. Unlike this case, *Kings Island* arose in a non-pervasively regulated industry, involved an agency attempt to avoid using the administrative subpoena process Congress intended that agency to utilize, and involved an inspector's unsupervised and unilateral expansion of a narrow investigation into a general workplace inspection.

Hopkins has waived any argument that the Fourth Amendment prohibits the Secretary's use of citations as a mechanism to enforce his information requests by failing to make such an argument to the Commission. But to the extent this Court considers that issue, the Supreme Court has already found the Mine Act's use of citations accompanied by potential daily penalties to be constitutional because such procedures do not result in "any serious prehearing deprivation." *Thunder Basin*, 510 U.S. at 217. And the Seventh Circuit has properly held that *Thunder Basin* compels the conclusion that citations for refusals to comply with Section 103(h)

information requests are constitutional. *Big Ridge II*, 715 F.3d at 652–54. Indeed, the Secretary used just such a procedure in *Dewey*, which was also a Fourth Amendment case, without objection from the Supreme Court. 452 U.S. at 597 n.3.

The Secretary's argument is also consistent with courts' acceptance of numerous statutes that penalize regulated entities who resist information requests or inspections. *See, e.g.*, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *United States v. Gurley*, 384 F.3d 316, 326 (6th Cir. 2004). Again, *Kings Island* is not to the contrary—and if it were, the Supreme Court's subsequent decision in *Thunder Basin* would prevail over it.

Finally, assuming this Court applies the Fourth Amendment "constructive search" standard, the Secretary's information requests satisfy the standard because the Secretary sought a narrow set of personnel files that were directly relevant to furthering his statutorily authorized investigation into Hopkins' alleged act of discrimination.

STANDARDS OF REVIEW AND ADMINISTRATIVE DEFERENCE

Factual determinations by Commission ALJs are reviewed under the substantial evidence standard. *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 317 (6th Cir. 2013). Legal questions are reviewed *de novo*, *see id.*, but with appropriate deference to the views of the Secretary on questions of statutory interpretation.

This circuit has an intra-circuit split with respect to the proper level of deference owed to interpretations of the Mine Act that are urged by the Secretary in litigation and that have also been adopted by the Commission in a precedential decision. *Compare Pendley v. FMSHRC*, 601 F.3d 417, 423 & n.2 (6th Cir. 2010) (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 are in conflict), *with North Fork*, 691 F.3d at 742 (extending only *Skidmore* deference to the Secretary's interpretation even though it had been adopted by the Commission).

The Secretary does not believe the degree of deference he is owed to be dispositive in this case, but if the Court determines otherwise, *Pendley*'s holding must prevail. *Pendley* is the earlier of the two decisions, and a subsequent panel cannot overrule a prior panel absent a change in intervening law or en banc rehearing. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir.1985).

Pendley also represents the more accurate approach. The Secretary acknowledges that there is a circuit split on the question of whether the Secretary's litigation positions before the Commission, with respect to interpretation of the Mine Act, are entitled to deference when those interpretations are *contrary* to the

Commission's. *Compare Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 & n.1 (D.C. Cir. 2005) (*Chevron* deference); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012); *Olson v. FMSHRC*, 381 F.3d 1007, 1011 (10th Cir. 2004), *with Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159–60 (4th Cir. 2016) (*Skidmore* deference). In the analogous administrative scheme that exists under the Occupational Safety and Health Act ("OSH Act"), this Court has taken the position that *Skidmore* is the correct level of deference in such situations. *See Chao v. OSHRC*, 540 F.3d 519, 526–27 (6th Cir. 2008) ("*Manganas Painting*"); *see also Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227–28 (2d Cir. 2002) (same).

For courts that, like this one, give only *Skidmore* deference to Secretarial interpretations that have not been adopted by the relevant review Commission, the "most important[] reason" is that the Secretary's litigation positions before the review commissions are not "binding or precedential." *Knox Creek*, 811 F.3d at 159; *see Manganas Painting*, 540 F.3d at 527 (giving only *Skidmore* deference because the Secretary's interpretation was not offered in a regulation or any "other format that carries the force of law"); *Le Frois Builder*, 291 F.3d at 227–28 (2d Cir. 2002) (similar).[2] But that reasoning would not apply when, as here, the

[2] The Secretary believes these cases are wrongly decided. That is because, under the unique dual-enforcement schema established in the OSH Act and Mine Act contexts, the Supreme Court has held that the "Secretary's litigating position

Secretary's position *has* been adopted by a precedential Commission decision and thus unquestionably carries the force of law. This observation is reflected in *Pendley*. *See* 601 F.3d at 423 & n.2.

Significantly, aside from *North Fork*, the Secretary is unaware of any published case in which a court has not considered a statutory interpretation *shared* by the Secretary and the Mine Commission or OSH Commission under the *Chevron* framework. *North Fork* describes *Manganas Painting* as being binding precedent demanding that only *Skidmore* deference be given to the Secretary's interpretation of the Mine Act. *N. Fork*, 691 F.3d at 742. But *North Fork* neither acknowledges *Pendley*'s contrary holding nor mentions the critical fact that in *Manganas Painting* the Secretary and OSH Commission did *not* agree on the proper interpretation of the OSH Act. *See id.* at 742–43.

In sum, *Pendley* is the earlier—and the correctly—decided case. Thus, if this Court concludes that the level of deference is dispositive here, it should follow *Pendley* and afford *Chevron* deference to the Secretary's interpretation of any statutory ambiguity because the Secretary's interpretation has been adopted by the Commission.

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before the Commission *is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard*." *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (emphasis added). Nonetheless, the Secretary recognizes that this court is bound by *Manganas Painting* unless it goes en banc.

ARGUMENT

I. *The information requests made here were authorized by Sections 103(a) and (h) of the Mine Act.*

A. The Mine Act authorizes the Secretary to request information reasonably required during discrimination investigations.

Two separate provisions of the Mine Act require the Secretary to conduct investigations of potential acts of discrimination against miners. Section 105(c)(2) requires the Secretary to investigate, in an expedited fashion, and to the extent "he deems appropriate," any complaint of discrimination filed by a miner. 30 U.S.C. § 815(c)(2). Similarly, Section 103(a) instructs the Secretary to conduct "frequent inspections and investigations" to, *inter alia*, "determin[e] whether there is compliance with the . . . requirements of th[e] Act." 30 U.S.C. § 813(a).

Section 103(h) specifically addresses the Secretary's power to request documents and other information from mine operators. It says that "[i]n addition to such records as are specifically required by this Act," every mine operator "shall . . . provide such information[] as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

Taken together, these provisions establish "broad inspection and document review powers." *Big Ridge II*, 715 F.3d at 638; *id.* at 641; *see Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 461 (D.C. Cir. 1994) (recognizing that Section

103(h) "grants a broad delegation to the Secretary to require mine operators to provide information"). In particular, Section 103(h)'s "text permits MSHA to make information demands for a wide range of purposes—any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act." *Big Ridge II*, 715 F.3d at 641. The provision "contains little limitation on the type of information to be provided." *Energy West*, 40 F.3d at 461.

Section 103(h)'s "plain text" does not limit the Secretary's information requests to documents that mine operators are required to maintain by regulation. *Big Ridge II*, 715 F.3d at 643; *see also Sec'y of Labor v. Warrior Coal, LLC*, 38 FMSHRC 913, 916 (2016); *Big Ridge I*, 34 FMSHRC at 1012–13. Instead, it expressly allows the Secretary to request information "[i]n addition to" information mine operators are required to maintain under the Mine Act. 30 U.S.C. § 813(h). This interpretation is supported by the fact that Section 103(h) authorizes information requests to be made "from time to time," a phrase that shows that Congress expected the Secretary to make such requests on a case-by-case basis. *Big Ridge II*, 715 F.3d at 643 ("The Section does not say MSHA 'may reasonably require through rulemaking' but instead says only 'from time to time.'"); *see N. Fork*, 691 F.3d at 743 ("[W]e cannot construe [statutes] to add language that Congress omitted" (quoting *United States v. Graham*, 608 F.3d 164, 176 (4th Cir. 2010)) (alterations in *North Fork*)).

This interpretation of Section 103(h) is also in accord with courts' interpretations of other provisions that permit federal agencies to obtain information both categorically and on a case-by-case basis. In *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980), the Third Circuit examined a regulation that authorized the National Institute of Occupational Safety and Health ("NIOSH") to examine "records required by the [statute] and regulations, *and other records*." *Id.* at 575 (emphasis added). The *Westinghouse* Court refused to "read out of the regulation NIOSH's authority to examine 'other related records.'" *Id.*; *see also Matter of Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1133 (7th Cir. 1988) (interpreting a statute permitting the "'inspection of appropriate book, records, and papers relevant to determining' compliance with the [statute]" to include individual records beyond those required to be kept by law (quoting 15 U.S.C. § 2065(b))).

Section 103(a) also "can be reasonably interpreted to require a mine operator to disclose information" the Secretary requires in order to conduct his investigations "in an expeditious manner." *BHP Copper*, 21 FMSHRC at 764–65. That is because Section 103(a) requires the Secretary to perform "frequent inspections and investigations" to determine whether the mine operator is complying with all provisions of the Mine Act. 30 U.S.C. § 813(a). Where, as here, conducting an adequate investigation reasonably requires the Secretary to

review documents in the mine operator's possession, Section 103(a) implicitly compels the operator's cooperation.

The Secretary's power to request documents during investigations necessarily extends to discrimination investigations. Such investigations are not only one of the Secretary's "functions under this chapter," 30 U.S.C. § 813(h), they are a function Congress singled out to "receiv[e] high priority" and "rigorous[] enforce[ment]." S. Rep. No. 95-181, at 36. That mandate reflects Congress' determination that "to be truly effective," the Act needs to protect miners "against any possible discrimination which they may suffer" as a result of exercising their protected rights. *Id.*, at 35.

To the extent there is any ambiguity about the Secretary's power to request information under either Section 103(a) or Section 103(h), his interpretation of each provision is entitled to deference. In particular, because the Secretary's interpretation is now embodied in multiple precedential Commission decisions, *see* App'x, p. 53; *Warrior Coal*, 38 FMSHRC at 916–17; *Big Ridge I*, 34 FMSHRC at 1012–13; *BHP Copper*, 21 FMSHRC at 764–65, it is entitled to *Chevron* deference under *Pendley*, 601 F.3d at 423 & n.2. *See supra* at 22–24.

Furthermore, the Secretary's interpretation promotes his ability to investigate numerous vital aspects of mine safety. Among other things, MSHA has used information requests to investigate matters such as: suspicious injury reports

by mine operators, *Big Ridge II*, 715 F.3d at 636, 647, failures to comply with standards that prevent fatal roof falls (i.e., cave-ins), *Warrior Coal*, 38 FMSHRC at 917, the causes of fatal accidents, *BHP Copper*, 21 FMSHRC at 759, 766, and the identity of supervisors responsible for willful and repeated failures to clean up accumulations of combustible materials, *Freedom Energy Mining Co. v. Sec'y of Labor*, 32 FMSHRC 1495, 1501, 1505 (2010) (ALJ). Because Congress "intended the Act to be liberally construed" to protect miners, courts are "obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable." *Sec'y of Labor ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (internal quotation marks omitted); *see RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 186–87 (3d Cir. 1997) (similar); *Sec'y of Labor ex rel. Wamsley v. Mutual Mining Inc.*, 80 F.3d 110, 115 (4th Cir. 1996).

Deference would be owed even if the correct deference standard is provided by *Skidmore*. For all the reasons discussed above, the Secretary's interpretation reflects "thoroughness . . . in its consideration," "validity of . . . reasoning," and "consistency with earlier and later pronouncements." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In a single, terse, paragraph Hopkins asserts that "Section 103(h) does not give individual MSHA field investigators the discretion to demand documents

from an operator on a case-by-case-basis." Hopkins Br. at 9–10. But Hopkins does not analyze the statutory text and does not even *acknowledge* any of the caselaw discussed above. Instead, Hopkins does nothing more than cite *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), for the proposition that "the creation of a duty to maintain records by rulemaking is a necessary predicate to any enforcement action against an operator *for failure to keep records*." Hopkins Br. at 10 (emphasis added). But as Hopkins' own description of *American Mining* evinces, that case did not concern the scope of the Secretary's power to request information or records during investigations; it concerned what types of records mine operators were required by regulation to maintain. *American Mining* is irrelevant to the issue here.

Hopkins also misdescribes the facts. Smith did not make an *ad hoc* discretionary request for information. The information requests were made in the form of multiple formal letters to Hopkins, each signed not by Smith, but by the District Manager responsible for overseeing MSHA's activities in the entire region. *See* App'x pp. 296, 298–99, 301, 304.

Thus, the text of the Mine Act and unanimous Commission and judicial authority support the Secretary's interpretation that the Act authorizes him, when conducting investigations, to make case-by-case requests for records and information that mine operators are not required by regulation to maintain.

B. *The Secretary reasonably required the personnel records because he suspected that Gatlin had been terminated for engaging in protected activity.*

From the fact that the Secretary may make reasonable information requests during discrimination investigations, it follows ineluctably that the Mine Act authorizes the requests the Secretary made here. Two sets of documents were at issue: Gatlin's personnel file, and the files of similarly situated miners. Hopkins refused to provide *either* set of documents, so the citations can be affirmed as long as *either* request was reasonably necessary to further the investigation. As it is, *both* requests were proper.

The personnel file of a miner who may have suffered unlawful discrimination is plainly relevant to determining whether that miner was in fact unlawfully terminated. *See EEOC v. Children's Hosp. Med. Ctr. of N. Ca.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) ("The evidence sought here—the charging parties' personnel files and job descriptions, and lists of other individuals subject to similar disciplinary action . . . —is clearly relevant and material to the [discrimination] charges being investigated."), *overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 (9th Cir.1994). As Investigator Smith explained, "I wanted to get the personnel file so I could see of any disciplinary actions, letters, or reprimands, anything that was in his file that

might be detrimental to what he's telling me. I'm actually weighing his character." App'x, p. 163.

Almost as obviously, the files of similarly situated miners are also reasonably required as they can indicate disparate treatment. *See Parrish v. Ford Motor Co.*, 953 F.2d 1384 (6th Cir. 1992) (unpublished) (describing personnel files of similarly situated employees as "clearly necessary" to demonstrate disparate treatment); *see also, e.g.*, *EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035, 1039–40 (8th Cir. 2006); *EEOC v. Univ. of N.M.*, 504 F.2d 1296, 1306 (10th Cir. 1974). That is exactly why Smith sought them. App'x, pp. 164, 166–67.

Hopkins does not deny the general relevance of such files. Its only argument that the Secretary's requests were unreasonable is its perseverate assertion that "MSHA could not identify whether any protected activity had been *alleged*." Hopkins Br. at 4 (citing App'x, p. 197) (emphasis in original); *see also, e.g.*, *id.*, at 11 ("MSHA concedes that . . . at the time of the request for records, it was not aware of any alleged protected activity." (citing App'x, pp. 209–10)).

This characterization of the record simply is not true, no matter how many times Hopkins repeats it. Smith *was* aware of the protected activity Gatlin alleged; he simply had not yet determined whether Gatlin's allegations were meritorious. App'x p. 195 ("I had testimony or interview statements—signed statements from individuals that indicated what the protected activity was. I was trying to

substantiate that."), 220 ("[Gatlin] alluded to some things that could be construed to be a protected activity, but during the course of the investigation, it wasn't factual. It didn't pan out."); *see also* App'x, p. 161 ("He made a lot of allegations. Nothing that I could support at this point so we're in the fact finding segment of the investigation. I needed to talk with more people. Then it would become clearer if there was a protected activity."), 162 ("I have allegations, but they're not—not founded. I haven't talked to anybody but the complainant."), 194 ("I had a suspicion, but I couldn't prove anything based on what I had in front of me.").[3]

Smith's testimony shows that he was investigating whether Gatlin was terminated for any of the following forms of protected activity: (1) reporting an increased number of safety violations to management, (2) refusing to obey unlawful orders not to record some hazards he observed in the pre-examination book,[4] or (3) refusing to work in unsafe conditions. App'x, pp. 155–56. Hopkins does not dispute that it would be unlawful to punish a miner for any of these protected activities. Nor could it. *See supra* at 10 (discussing protected activities).

[3] For the same reasons, it not true that MSHA was conducting "an investigation of alleged conduct that, even if true, was not proscribed by the Mine Act . . . ." Hopkins Br. at 10–11.

[4] It is unlawful for a pre-shift examiner not to record every hazard or violation he encounters. 30 C.F.R. § 75.360(g).

The snippets from Smith's cross-examination that Hopkins wrenches out of their context are not to the contrary. They too merely reflect the fact that Smith had not yet determined what actually happened. *See* App'x, p. 197 ("Q: You didn't even know the [protected] conduct, right? A: I didn't know the conduct. *I had suspicions.*" (emphasis added)); *id.*, pp. 209–10 ("Q: Okay, as of March 23rd, had you *determined* what the protected activity was? A: No." (emphasis added)).

There is no need to take the Secretary's word for the state of the record though, because the Commission's findings of fact confirm it. After considering all of Smith's testimony, the ALJ found that Smith had a "reasonable understanding of the complainant's claim prior to making any requests to the operator for documents, interviews or other information. Smith's credible testimony demonstrates that he had such an understanding and did not, as [Hopkins] claims, embark, on a 'fishing expedition.'" App'x, p. 39 n.15. Citing this finding, the Commission stated that the "contention that the inspector failed to describe Gatlin's possible protected activity or how it could have related to adverse action is . . . incorrect." *Id.*, p. 51(citation omitted). These findings are supported by substantial evidence and cannot be disturbed on appeal. *See Cumberland River*, 712 F.3d at 317.

Accordingly, the Secretary's document requests were reasonably required for Smith's investigation. In fact, the investigation Smith conducted is precisely

the type of investigation a mine operator should, in principle, prefer. Faced with allegations that emerged during Gatlin's interview, Smith did the conscientious thing: rather than recommend that a complaint be filed with the Commission and resolve any discrepancies in discovery, he sought corroboration. Indeed, after obtaining the requested records, Smith was able to complete his investigation, App'x, p. 186, and the Secretary elected *not* to file discrimination charges against Hopkins as a result. Far from conducting an abusive "fishing expedition" as Hopkins alleges, Smith conscientiously attempted to ascertain the facts and hear from all sides before drawing conclusions.

C. *The Secretary was not required to disclose to Hopkins the specific nature of the alleged protected activity he was investigating.*

The only remaining statutory question is whether the Secretary was required to *disclose* the particular factual allegations he was investigating to Hopkins before requesting the personnel records.

No provision of the Mine Act imposes such a requirement. Section 103(h) states only that the *Secretary* may request information from the *operator*. 30 U.S.C. § 813(h). It is not a two-way street that requires the Secretary to explain the purpose of such requests.

Section 105(c)(2) requires the Secretary to provide one piece of information to mine operators, and one piece only—a copy of the miner's written complaint. 30 U.S.C. § 815(c)(2). The statute then requires the Secretary to conduct an

investigation, but conspicuously does *not* say that the Secretary must provide any additional information to the mine operator about the investigation. The Mine Act's silence in this regard strongly implies that the Secretary's *only* obligation is to provide the mine operator a copy of the original complaint. *Expressio unius est exclusio alterius*. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 28–29 (2001) (holding that it would "distort [statutory] text" to convert a single statutory exception into a rule); *N.W. ex rel. J.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611, 615 (6th Cir. 2014); *see also N. Fork*, 691 F.3d at 735. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (internal quotation marks omitted)).

For its part, Section 103(a), which standing alone would allow the Secretary to investigate suspected acts of discrimination under the Mine Act even absent a complaint, imposes no requirement that the Secretary provide *any* information to the mine operator as to the purpose of the investigation. 30 U.S.C. § 813(a). In fact, Section 103(a) prohibits the Secretary from providing advance notice of most investigations. *See id.*

Thus, no provision of the Mine Act requires the Secretary to disclose the specific alleged facts he is investigating during a discrimination investigation. This makes sense. The Secretary has the authority to follow a properly initiated discrimination investigation wherever it leads him. *See Sec'y of Labor v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (1997). And "it is the scope of the Secretary's *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed [by the Secretary] with the Commission." *Id.* (emphasis in original). Providing information to an operator about the Secretary's evolving investigation would not only be administratively cumbersome and intrude upon the Secretary's deliberative process privilege, it would also allow the operator to tailor its responses to mislead or minimize any misconduct, as Smith testified. *See* App'x, p. 161. Put simply, Hopkins has no right, statutory or otherwise, to monitor the Secretary's investigation or determine whether, in its eyes, the investigation remains "legitimate." Hopkins Br. at 13; *see generally United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (stating that agency investigations typically are "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not").

Indeed, even in the criminal context, where the rights of the accused are more protected than in the civil sphere, there is no pre-indictment right for the subject of an investigation to be apprised of the specific charges under investigation. A recipient of a grand jury subpoena *duces tecum* is entitled, at most, to be told of "the general subject of the grand jury's investigation." *See R. Enterps.*, 498 U.S. at 302. Protecting the integrity of investigations is a central justification for such secrecy. *See id.* at 299; *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681–82 & n.6 (1958).[5]

Similarly, when investigative agencies request documents in the analogous context of an administrative subpoena, it is not up to the entity under investigation (or a court) to determine whether the agency suspects facts that would justify the

[5] Hopkins relies on *EEOC v. Kronos, Inc.*, 620 F.3d 287 (3d Cir. 2010), in support of its claim that it had a right to know more about the Secretary's investigation. Hopkins Br. at 14. *Kronos* is inapposite for several reasons. *Kronos* involved the scope of the EEOC's subpoena power, which Congress specifically tethered to the "charge under investigation." *Kronos*, 620 F.3d at 296 (quoting 42 U.S.C. § 2000e-8(a)). But as discussed above, and as the Commission observed, App'x, pp. 52 n.15, 56 n.18, Section 105(c)(2) does not restrict the Secretary's investigation of discrimination cases to the "charges" made in a miner's initial complaint. *See N. Fork*, 691 F.3d at 743 (finding the fact that Section 105(c)(2) does not use the term "charge" to be significant in interpreting the statute's scope). Furthermore, even in the EEOC context, "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge." *Kronos*, 620 F.3d at 297 (citing, *inter alia*, *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) (per curiam)). The EEOC cases cited by the dissenting Commissioners, *see* App'x, pp. 71–72, are inapposite for similar reasons.

filing of charges or even whether the agency would have jurisdiction to bring charges. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (collecting cases). "[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case." *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977); *see United States v. Markwood*, 48 F.3d 969, 977 (6th Cir. 1995).

Here, Hopkins received Gatlin's complaint, so it was well aware of the "general subject" of the Secretary's investigation—namely, whether Gatlin was terminated for engaging in protected activity. That is the only notice to which Hopkins was entitled, and it sufficed for Hopkins to understand why an investigator would be interested in consulting Gatlin's personnel file and the files of similarly situated miners.

This did not leave Hopkins defenseless against Gatlin's allegations. *If* the Secretary had filed charges, Hopkins would have been entitled to depose and cross-examine both Smith and Gatlin, and to impeach Gatlin to the extent his testimony was in tension with his complaint. But Hopkins knew everything it needed to know, or had a right to know, at the investigatory stage.

II. The Secretary's request for the personnel files did not violate the Fourth Amendment.

A. *Because mine operators have severely diminished privacy interests, no pre-request process is required for the Secretary to make information requests under the Mine Act.*

The touchstone of any Fourth Amendment analysis is whether a governmental intrusion is "unreasonable." *Dewey*, 452 U.S. at 599. The Supreme Court has held that mining is a "pervasively regulated" industry in which "the federal regulatory presence is sufficiently comprehensive and defined" such that mine operators "cannot help but be aware that [their] property will be subject to periodic inspections undertaken for specific purposes." *Id.* at 600.

In so holding, the Court has said that warrantless inspections of pervasively regulated industries are unobjectionable unless they: (1) "are not authorized by law"; (2) "are unnecessary for the furtherance of federal interests"; or (3) "[are] so random, infrequent, or unpredictable that the owner for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* at 599; *see also Burger*, 482 U.S. at 702–03. The third condition is satisfied if the regulatory scheme imposes an inspection program that "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 452 U.S. at 603; *Burger*, 482 U.S. at 703.

Dewey held that the Mine Act's comprehensive inspection regime satisfies all three conditions. As to the first two conditions, the Mine Act pertains only to the mining industry—an industry that Congress reasonably subjected to warrantless inspections because of its "notorious history of serious accidents and unhealthful working conditions." *Id.* at 603.

As to the third condition, the Court explained that the Mine Act requires frequent inspection of *all* mines, *id.* at 603–04, requires a mine operator to comply with specific standards, *id.* at 604, and permits mine operators with "special privacy concerns" to raise those concerns by refusing entry and requiring the Secretary to secure injunctive relief in district court, *id.* at 604. With regard to the injunctive relief process, it is significant that in *Dewey*, the Secretary both sought injunctive relief *and* issued a citation—a procedure the Court specifically acknowledged without expressing any concerns. *Id.* at 597 n.3.

For the same reasons that there is no general warrant requirement for Mine Act inspections and investigations, the Secretary is not required to obtain a warrant or administrative subpoena prior to making a Section 103(a) or Section 103(h) information request. Such requests occur in the "notorious[ly] hazardous" mining industry and pursuant to the "frequent" inspection and investigation regime established by the Mine Act. *Dewey*, 452 U.S. at 603, 604. And just as in *Dewey*, if an operator has "unusual privacy interests" that justify withholding the requested

documents, he can obtain judicial review by refusing to provide the documents and forcing the Secretary to seek injunctive relief or issue a citation against which the mine operator may defend by raising any legitimate concerns. *See id.* at 604–05.

Dewey applies with at least as much force to requests to inspect documents as it does to inspections of the mine as a whole. When an entity "chooses to engage in [a] pervasively regulated business . . ., [it] does so with the knowledge that [its] business records . . . will be subject to effective inspection." *Burger*, 482 U.S. at 701 (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)). And this Court has recognized that mine operators retain, at most, "a substantially diminished [privacy] interest" in business records that must be kept by law. *See Blue Diamond*, 667 F.2d at 520 (single-judge opn. of Engel, J.); *id.* at 521 (Wiseman, J., concurring in the result) (arguing that the operator has "no privacy interests protected by the fourth amendment" in such records).

Hopkins is correct that a mine operator's records are not "public property" that can be *seized* without a warrant, and that the Secretary may not simply rummage through all of an operator's files. *Id.* at 519–20. But this does not mean that mine operators have a privacy interest sufficient to require the Secretary to obtain a warrant or subpoena prior to making a request to *review* records or information that the Secretary reasonably requires when, as here, such requests are made in advance and permit the operator itself to identify and produce the

responsive records.[6] Indeed, the *Blue Diamond* Court concluded that even though MSHA's warrantless *seizure* of a mine operator's records violated the limited privacy interests operators have, suppression of the fruits of the seizure was not justified because the "interest which the coal companies have in the records is not at the core of Fourth Amendment protection." *Id.* at 520.

It is true that the personnel records at issue here, unlike the documents in *Blue Diamond*, are not records that Hopkins was required to keep under the Mine Act. But the Mine Act nonetheless severely reduces any privacy expectations mine operators have in their personnel files. Section 105(c) establishes a regular and predictable presence by MSHA in discrimination matters by requiring the Secretary to conduct expedited investigations and promptly request interim relief whenever a complaint is "not frivolously brought." 30 U.S.C. § 815(c)(2). Thus, a mine operator can expect regular requests to "provide such information" (i.e.,

[6] At pages 16–17 of its brief, Hopkins cites *United States v. Consolidation Coal Co.*, 560 F.2d 214, 217 (6th Cir. 1977), for the proposition that "[e]ven where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records *without demand* in the absence of a search warrant." (Emphasis added.) Of course, here the Secretary *has* demanded the records in question, in advance, under the authority of Sections 103(a) and (h). In any event, in *Blue Diamond*, Judge Wiseman explained that the quote Hopkins now relies on is "dicta" and that "in light of *[Dewey*] and today's decision" it "no longer reflect[s] accurately the current state of the law." 667 F.2d at 521 & n.1 (Wiseman, J., concurring in the result); *see also Big Ridge I*, 34 FMSHRC at 1028–29 (same).

personnel files) as the Secretary "reasonably requires" to "perform his functions under the Act" (i.e., investigating discrimination complaints).[7] 30 U.S.C. § 813(h).

When, as here, "an entrepreneur embarks upon [a pervasively regulated] business, he has voluntarily chosen to subject himself *to a full arsenal* of government regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (emphasis added). The Mine Act's arsenal includes warrantless information requests. Under *Dewey*, the Fourth Amendment does not require the Secretary to do anything more than he did here before making reasonable information requests under Section 103(a) and Section 103(h).

B. *An investigative request for information is not a search, so Section 103(a) and Section 103(h) information requests should at most be analyzed under the Fourth Amendment restrictions that apply in the analogous administrative subpoena context.*

An administrative agency's investigative request for information in a manner authorized by statute, and that provides for judicial review, is not a "search" or "seizure" within the meaning of the Fourth Amendment. *See Lone Steer,* 464 U.S. at 414. Searches occur only when "government inspectors [seek] to make non-consensual entries into areas not open to the public." *Id.*; *see J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1050 (9th Cir. 2007) (O'Connor, J.) ("When the Bureau

[7] Mine operators can also expect the Secretary to review personnel files for a variety of other reasons. For example, in *Big Ridge II*, the Secretary needed to review personnel files to determine whether several operators' suspiciously infrequent injury reports were consistent with personnel records. 715 F.3d at 636.

[of Alcohol, Tobacco, and Firearms] merely sends a demand letter requesting certain limited information, no physical intrusion whatsoever occurs. This is a difference that matters.").

Information requests—which usually, but not always, take the form of administrative subpoenas—are treated as, at most, "constructive searches." *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 207 (1946). Constructive searches are permissible so long as they are "[1] sufficiently limited in scope, [2] relevant in purpose, and [3] specific in directive so that compliance will not be unreasonably burdensome." *Lone Steer*, 464 U.S. at 415 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); *see Morton Salt*, 338 U.S. at 652–53; *Oklahoma Press*, 327 U.S. at 208–09; *Doe v. United States*, 253 F.3d 256, 263 (6th Cir. 2001). These requirements "are not onerous," *United States v. Sturm, Ruger, & Co.*, 84 F.3d 1, 4 (1st Cir. 1996), and "when asking whether the documents requested are 'relevant' to an investigation, the courts broadly construe the term 'relevant,'" *In re Administrative Subpoena*, 289 F.3d 843, 845 (6th Cir. 2001).[8]

[8] In addition, courts consider whether the agency is already in possession of the requested information, whether the information request is authorized by the terms of the organic statute, and whether the subpoena constitutes abuse of process. *See id.* To establish abuse of process, the entity who has been requested to produce information bears a "'heavy' burden of proving bad faith, [which] cannot be proved simply by showing that an individual agency employee may have acted with improper motives." *Id.* at 846 (quoting *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314–16 (1978)); *Doe*, 253 F.3d at 272.

Addressing the exact question at issue here, the Seventh Circuit has held that Section 103(h) information requests should be analyzed under the constructive search standard because "MSHA is not seeking to require mine operators to permit inspectors to enter mine operators' private offices and search through mine operators' file cabinets and computer files." *Big Ridge II*, 715 F.3d at 645. Instead, Section 103(h) requests "seek[] only to require the mine operators to provide certain documents." *Id.*

Courts, including this one, have reached similar conclusions with respect to analogous information requests that are not styled as administrative subpoenas. *See Gurley*, 384 F.3d at 319, 321 (applying constructive search principles to analyze the validity of an EPA "general notice letter and information request"); *RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001) (applying the same standards to "demand letters" issued by the Bureau of Alcohol Tobacco and Firearms that are "analogous to an administrative subpoena"); *Markwood*, 48 F.3d at 976 (holding that certain DOJ information requests were administrative subpoenas because they were "a particular type of investigatory tool" given to the agency by Congress).

Hopkins' Fourth Amendment argument misunderstands the point when it spends several pages arguing that Section 103(a) and Section 103(h) information requests are not administrative subpoenas. *See* Hopkins Br. at 20–22. The Secretary is not arguing—and *Big Ridge II* and the Commission did not say—that

they are. The point is that such requests do not involve physical searches by government agents. Thus, they are, at most, constructive searches rather than actual searches, *Oklahoma Press*, 327 U.S. at 207, and should be subject, at most, to the Fourth Amendment standards that apply to constructive searches. *See Big Ridge II*, 715 F.3d at 645 ("*For Fourth Amendment purposes* . . . such demands are administrative subpoenas rather than physical searches carried out by government agents." (emphasis added)); *see* App'x, pp. 58–60 (Commission decision) (citing *Big Ridge II*).

Hopkins' argument that the constructive search standard is inapplicable because the Secretary has an administrative subpoena power that he did not use is also mistaken. Hopkins Br. at 20–22. As Hopkins acknowledges, the Secretary's formal administrative subpoena powers were not applicable here. *Id.* at 21. Section 103(b) of the Mine Act grants the Secretary the power to subpoena witnesses and documents from any party, but that power is applicable only when the Secretary is conducting *public* investigations of specific mine "accident[s] or other occurrence[s] relating to health or safety in a coal or other mine." 30 U.S.C. § 813(b); *Consolidation Coal*, 560 F.2d at 219 n.10. This power is necessary to hold meaningful public hearings because such hearings will often require calling witnesses and obtaining documents that may be in possession of third parties or individuals.

By contrast, when the Secretary conducts non-public investigations and inspections, Congress provided Section 103(a) and Section 103(h) as the means by which the Secretary could gather information. Those sections, while not authorizing the Secretary to subpoena witnesses or third party records, do provide a more efficient way to obtain information from the operator under investigation—an understandable approach given operators' reduced privacy interests.[9] *See Big Ridge II*, 715 F.3d at 642 (noting that although MSHA has sought administrative subpoena powers from Congress, which would include the power to subpoena witnesses in non-public investigations, "[t]his legislative attempt to expand MSHA's powers does not require us to interpret its existing powers narrowly").

This Court's decision in *Kings Island*, 849 F.2d 990, does not compel a different result. That case involved an OSHA investigation in response to an employee complaint about a specific health hazard. *Id.* at 991–92. "[T]here was no other reason for the inspection." *Id.* at 992. But the OSHA investigator, going beyond the scope of the investigation, requested that Kings Island produce three years of records "so he could review them for hygienic and environmental problems in general." *Id.* at 992. An OSHA operation manual stated that such records could be obtained by a subpoena or warrant, as provided by the OSH Act

[9] Notably, the Secretary made the information requests here only after Hopkins refused to make available several witnesses who Smith thought could corroborate (or contradict) Gatlin's account.

or by a request under a separate regulation that OSHA had promulgated. *Id.* at 993. This Court noted that the OSH Commission had held that "before the adoption of OSHA's regulations, the federal government could not have seized these records without some sort of legal process." *Id.* at 996 (citing *Barlow's*, 436 U.S. at 324 n.22).

In this context, *Kings Island* declined to treat OSHA's document demand as being akin to an administrative subpoena. In part, *Kings Island* said, this was because OSHA's records request "d[id] not involve . . . a pervasively regulated industry." *Id*. at 995 (citing *Blue Diamond*, 667 F.2d 510). *Kings Island* also emphasized that OSHA's document request was an "unannounced inspection accompanied by an arbitrary and discretionary demand to inspect company records not only as they related to a specific complaint, but for hygienic and environmental problems in general." In other words, OSHA had used the document request to expand its investigation into a general workplace inspection—a type of inspection that requires a warrant or administrative subpoena because it arises in the non-pervasively regulated context of the OSH Act. *See id.* at 994 ("[I]ndustries affected by OSHA regulation are not by definition pervasively regulated.").

This case, of course, *does* involve a pervasively regulated industry. That means that, unlike in *Kings Island*, here the Secretary has "show[n] that the owner has weakened or reduced privacy expectations that are significantly overshadowed

by government interests in regulating the particular industry or industries." *Id.*; *see Big Ridge II*, 715 F.3d at 645 (describing *Dewey* as "highly instructive" in deciding to apply the constructive search doctrine to Section103(h) requests).

Furthermore, in *Kings Island*, this Court viewed OSHA's *ad hoc* information demand, made pursuant to a regulation rather than a statutory provision, as an end-run around the normal requirement that OSHA seek a warrant or administrative subpoena before conducting a general workplace inspection. This Court viewed OSHA as "circumvent[ing] those limitations." *Id.* at 996. But the Secretary is not circumventing anything here. Section 103(a) and Section 103(h) provide a *Congressionally sanctioned* mechanism— indeed, the *only* mechanism—for requesting documents from pervasively regulated mine operators during non-public investigations, and the Secretary properly utilized that mechanism here.

Relatedly, unlike in *Kings Island*, here the Secretary followed his normal approach when making information requests: the request was made in writing, it was made in advance, and it was reviewed and signed by the district manager who oversees the entire district—which was one of 12 national districts at the time—rather than by an individual inspector. *See* App'x pp. 296, 298–99, 301, 304. The request also did not escalate the investigation into a general inspection of the whole mine. Instead, the investigation remained focused on the same individual who filed the complaint that triggered the Secretary's investigation.

For all of these reasons, this Court should follow the lead of *Big Ridge II* and the Commission and hold that, at most, the Fourth Amendment standards that apply to administrative subpoenas apply here.

C. *There is no constitutional problem with issuing a citation that is subject to administrative and judicial review as a penalty for an operator's refusal to comply with an information request.*

Hopkins has argued throughout this litigation that the Secretary's information requests violated its Fourth Amendment rights. Before this Court, it also argues that the fact that the Secretary issues citations prior to a Commission hearing raises specific Fourth Amendment concerns. Hopkins Br. at 22. Hopkins raised no such argument before the Commission. There, its Fourth Amendment discussion mentioned the Secretary's cite-then-litigate procedure in passing but did not suggest that this procedure raised separate Fourth Amendment concerns. *See* Supp. App'x, pp. 341–49, 364–65. No doubt as a result, the Commission did not address this unraised issue. Accordingly, this Court is barred from considering the argument. *See* 30 U.S.C. § 816(a) ("No objection that has not been urged before the Commission shall be considered by the court" absent a showing of "extraordinary circumstances"); *Chaney Creek Coal Corp. v. FMSRHC*, 866 F.2d 1424, 1432 (D.C. Cir. 1989); *see also Dixie Fuel Co. v. FMSHRC*, 82 F.3d 417 (6th Cir. 1996) (unpublished).

Should the Court nonetheless reach the issue, Hopkins' argument is wrong. The Fourth Amendment analysis is not changed by the fact that the Secretary cited Hopkins for its refusal to provide the requested personnel folders because Hopkins could (and did) seek review prior to the imposition of any penalty, and because the penalty could be discounted to the extent Hopkins' merits arguments were reasonable.

The Supreme Court has squarely held that mine operators who refuse to comply with citations "while challenging the Secretary's interpretation" of the Mine Act do not "face any serious prehearing deprivation" of a constitutional dimension. *Thunder Basin*, 510 U.S. at 217–18. The Court explained that "[a]lthough the Act's civil penalties unquestionably may become onerous if [the operator] chooses not to comply, the Secretary's penalty assessments become final and payable only after a full review by both the Commission and the appropriate court of appeals." *Id.* at 218. In the meantime, the operator "may request that the Commission expedite its proceedings, § 815(d), and temporary relief of certain orders is available from the Commission and the court of appeals. §§ 815(b)(2) and 816(a)(2)." *Id.* Thus, the Mine Act does not even "approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Id.*

That was so in *Thunder Basin* even though, as here, the issue involved mine operators' privacy rights. There, the Secretary interpreted the Mine Act to require operators to recognize non-employee union officials, who did not represent miners at the mine, as "representatives of miners"—a designation that would allow the officials to accompany MSHA inspectors during inspections. *Id.* at 204–05. The Secretary cited Thunder Basin for refusing to recognize such representatives of miners. Thunder Basin argued that the threat of civil penalties could unlawfully coerce operators to comply with the Secretary's orders. *Id.* at 205, 216. The Supreme Court rejected this argument, *id.* at 216–18, even though Thunder Basin drew the Court's attention to another operator who had capitulated after being threatened with daily penalties for the same conduct, *id.* at 205 n.6.

The analysis is no different when, as here, a mine operator alleges a Fourth Amendment injury. "Whether an injury has constitutional dimensions is not the linchpin in determining its capacity for meaningful judicial review [under *Thunder Basin*]." *Hill v. SEC*, 825 F.3d 1236, 1246 (11th Cir. 2016). Indeed, "[t]he opportunity for administrative review under the Mine Act exists precisely so that mine operators and miners can protect their constitutional interests." *Left Fork Mining Co. v. Hooker*, 775 F.3d 768, 775 (6th Cir. 2014).

This is demonstrated by the facts of *Dewey*. As noted above, *see supra* at 41, the *Dewey* Court was aware that the Secretary had issued a citation to a mine

operator for its refusal, on Fourth Amendment grounds, to permit an inspector to enter the mine without a warrant. 452 U.S. at 597 n.3. The Court also knew that a Commission ALJ had assessed a $1000 penalty (in 1981 dollars) for the violation. *Id.* Yet in upholding the constitutionality of such warrantless searches, the Court said nothing to in any way suggest a separate Fourth Amendment problem stemming from the citation or the resulting penalty.

Applying *Thunder Basin*, the *Big Ridge II* Court held that there is no constitutional defect with the Secretary's issuance of citations to operators who resist Section 103(h) information requests. *See Big Ridge II*, 715 F.3d at 653–54. *Big Ridge II* noted that by enacting the Mine Act, Congress sought to alleviate the "weak penalty scheme" that existed under prior mine safety legislation and "intended the [Mine Act's cite-then-litigate] scheme to allow MSHA to impose penalties with teeth, which would actually induce mines to comply with MSHA's orders . . . ." *Id.* at 652–53 (citing S. Rep. No. 95-181, at pp. 15–16). Relying on *Thunder Basin*, the Seventh Circuit concluded that the eventual imposition of penalties for mine operators' refusals to comply with Section 103(h) orders is constitutional because (1) operators can contest the citations and have a hearing before they became final, (2) operators can request stays of daily penalties during

Commission proceedings,[10] and (3) both the imposition, and the amount, of daily penalties is discretionary. *Big Ridge II*, 715 F.3d at 653–54.

Thunder Basin, *Dewey*, and *Big Ridge II* are consistent with the Supreme Court's repeated approval of statutory schemes that impose sanctions on pervasively regulated entities when those entities force federal agencies to resort to compulsory process to enforce statutory rights to enter premises or examine documents without warrants. For example, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), examined a provision that required liquor dealers to permit warrantless inspections by federal agents on pain of a $500 sanction. *Id.* at 73. The Court approvingly observed that Congress "ma[de] it an offense for a licensee to refuse admission to the inspector." *Id.* at 77. Similarly, in *Biswell*, the Court upheld the constitutionality of a warrantless inspection of a firearms dealer's books and a search and seizure of its inventory that was conducted pursuant to statutory authority that would have made it a crime for the dealer to refuse to permit the search. 406 U.S. at 315; *see also Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013) (plurality opn.) (holding that drunk driving suspects may refuse to give blood samples absent a warrant, but condoning state laws that suspend or revoke the licenses of drivers who insists that such warrants be obtained); *United States v. Jamieson-McKames Pharma., Inc.*, 651 F.2d 532, 539–40 (8th Cir. 1981)

[10] Hopkins did not even attempt to request a stay of the penalties here.

(noting with approval that it is a "separate violation of the [Food, Drug, and Cosmetic] Act" to insist that an FDA agent obtain a warrant before reviewing documents subject to inspection under the Act). Indeed, this Court has affirmed a *criminal* conviction of a defendant who prevented mine inspectors' warrantless entry where the defendant erroneously believed himself to have a Fourth Amendment right to resist the inspection. *See United States v. Ray*, 652 F.2d 670 (6th Cir. 1982) (per curiam).

Similarly, courts, including this one, have consistently upheld the constitutionality of statutory schemes that authorize federal agencies to request information and assess significant daily penalties if a court ultimately finds that the recipient of the request wrongfully refused to comply. For example, in *Gurley*, the EPA requested financial and pollution-related information from William Gurley under the Comprehensive Environmental Response, Compensation, and Liability Act. 384 F.3d at 319. When Gurley refused to provide the information, EPA filed suit in district court seeking daily civil penalties of up to $25,000 per day. *Id.* at 320. This Court held that there was no constitutional defect with the district court's imposition of $1.9M of daily penalties because the penalties were not actually imposed until after a hearing determined that Gurley unlawfully resisted the information request. *Id.* at 326. That was so despite the fact that the daily penalties dated back to the time of EPA's original request. *See id.* at 320.

Other circuits have reached similar conclusions with respect to various environmental statutes. *See, e.g.*, *United States v. Tivian Labs., Inc.*, 589 F.2d 49, 53 (1st Cir. 1978); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 691–92 (1st Cir. 1987). Indeed, so long as daily penalties are discretionary and take into account a good faith defense, courts have rejected challenges to the constitutionality of such statutes even when the regulated entities face daily penalties for failure to take actions that are far more intrusive than simply providing requested documentation. *See Gen. Elec. Co. v. EPA*, 610 F.3d 110, 118–19 (D.C. Cir. 2010); *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 911 (3d Cir. 1982); *see also Big Ridge II*, 715 F.3d at 654 (discussing additional cases).

The same type of discretion in penalty assessment that rendered the environmental statutes constitutional is also present under the Mine Act. *See Big Ridge II*, 715 F.3d at 654. Under the Mine Act, the Secretary proposes penalties taking into account, among other factors, the degree of the operator's negligence, the impact a penalty will have on the operator's ability to stay in business, and the operator's good faith in abating the violation. 30 U.S.C. § 820(i). Furthermore, the daily penalties provided by the Act for failure to correct a violation are discretionary and may be stayed by the Commission during review proceedings. 30 U.S.C. §§ 815(b), 820(b)(1)–(2); *see Thunder Basin*, 510 U.S. at 218.

Even more importantly, the Secretary's proposed penalties are just that—*proposals*. Under established caselaw, "*[o]nly the Commission* has authority actually to impose civil penalties proposed by the Secretary, and the Commission reviews all proposed civil penalties *de novo*" after considering the same factors as the Secretary. *Thunder Basin*, 510 U.S. at 208 (emphasis added). And the Commission is a completely independent adjudicatory agency whose decisions are appealable to the federal courts of appeals. 30 U.S.C. §§ 816(a), 823. Thus, the Secretary's *proposed* penalties are no more final than the penalties EPA presumably requests in complaints like the one it filed in *Gurley*. Just as was true in *Gurley*, no mine operator who resists a Section 103(a) or Section 103(h) information request will be forced to pay daily penalties until it has been "afforded all of the process that [it] was due . . . follow[ing] a full and fair hearing before a federal judge." *Gurley*, 384 F.3d at 326.[11]

Hopkins relies entirely on *Kings Island* (a case it did not cite before the Commission) for its (forfeited) argument that it would violate the Fourth Amendment for the Secretary to issue a citation to an operator for failing to accede to a Section 103(a) or Section 103(h) information request. Hopkins Br. at 19–20,

[11] For the same reason, Section 103(a) and Section 103(h) "afford an opportunity to obtain precompliance review before a neutral decisionmaker." *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015). In *Patel*, such review was lacking because hotel owners who refused to provide hotel registries to police officers upon a warrantless request "c[ould] be arrested on the spot" prior to receiving any sort of hearing. *Id.*

22. But *Kings Island* does not govern here. First of all, *Kings Island* (unlike *Gurley* and *Big Ridge II*) predates *Thunder Basin*. And as described above, *Thunder Basin* makes clear that the Mine Act's daily penalty scheme is not constitutionally suspect. To the extent *Kings Island* suggests a contrary conclusion, *Thunder Basin* prevails.

Regardless, there is no need to read *Kings Island* as conflicting with *Thunder Basin*, *Gurley*, or *Big Ridge II*. As discussed *supra* at pages 48–50, *Kings Island* concluded that OSHA was attempting to circumvent, by regulation, the statutory mechanism that Congress provided for OSHA to obtain documents and the constitutionally compelled procedures required by *Barlow's* for conducting general safety inspections in *non*-pervasively regulated industries. *Kings Island*'s statement that "[a]n employer may not be threatened with a penalty for asserting his Fourth Amendment rights," 849 F.2d at 997, must be read in the context of those facts. The statement cannot govern here, where the regulated entity *is* pervasively regulated and where the Secretary was conducting a discrete investigation pursuant to the exact procedures Congress provided for making information requests under the Mine Act. Were it otherwise, *Thunder Basin*, *Gurley*, *Big Ridge II*, and many of the other cases discussed above would all be wrongly decided.

Finally, even if this Court finds the foregoing arguments unconvincing and creates a circuit split with *Big Ridge II* as to the constitutionality of the procedure that the Secretary followed here, the problem would *not* be that the Secretary *requested information* pursuant to Sections 103(a) and (h), or even that the Secretary *issued a citation* for a violation of that Section. At most, any constitutional concern would presumably relate to *assessment of a penalty*. The remedy therefore would *not* be to vacate the citations and Section 104(b) order, as Hopkins requests, but, rather, to remand the $1,162 total penalty to the Commission for appropriate reassessment.

D. *The information requests at issue here satisfy the Fourth Amendment requirements for constructive searches.*

The Secretary's requests for the personnel files were "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance w[ould] not be unreasonably burdensome." *See*, 387 U.S. at 544. The Secretary's first request—for Gatlin's personnel file—is as limited, relevant, and specific an information request as could be imagined in a workplace retaliation case. Hopkins' refusal to accede to that request alone suffices to sustain the citations and orders at issue here.

The Secretary's other request—for the personnel files of miners who were "disciplined, reprimanded or terminated" over the prior five years for the same conduct that led to Gatlin's termination—is slightly broader but nonetheless

limited to information that was relevant to Smith's investigation of whether Gatlin was treated more severely than other miners for his act of insubordination. *See supra* at 32. And the request was limited in scope and specific enough in directive so as not to be unreasonably burdensome; Hopkins acknowledged that its search for the personnel files that it ultimately turned over took approximately five hours. App'x, pp. 59, 238.

The only argument to the contrary that the Secretary can discern in Hopkins' opening brief is its insistence that the Secretary was unaware of what alleged protected activity he was investigating.[12] Were Hopkins' description of the facts true, perhaps the Secretary's requests would have been unjustified. But as explained above, the Secretary *was* aware of the protected activity Gatlin had alleged, as the Commission found. *See supra* at 32–34. Thus, the Secretary's modest requests for personnel records constituted a proper constructive search.

CONCLUSION

The Secretary made a minimally intrusive request for information that is fundamental to any reasonable discrimination investigation. The Mine Act

[12] Before the Commission, Hopkins argued that the Secretary's information request was not sufficiently specific and had caused confusion as to its scope. The Commission rejected that argument, and noted that although Hopkins' letters to the Secretary had objected to the Secretary's power to request the personnel records at all, Hopkins had never asked for clarification as to *which* personnel records the Secretary sought. App'x, pp. 59–60 & n.19. Hopkins has not raised this argument again on appeal. It is therefore waived. Fed. R. App. Proc. 28(a)(8)(A); *see Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986).

specifically authorizes such investigations and information requests, and they constitute a central component of the Act's core goal of keeping the Nation's miners safe. In the context of the pervasively regulated mining industry, the Fourth Amendment poses no barrier to implementing Congress' will. Accordingly, the Court should dismiss the petition.

Alternately, if the Court were to determine that the Fourth Amendment prohibits the imposition of significant penalties against operators who resist Section 103(a) and Section 103(h) information requests, the Court should affirm the citations themselves, but remand for the assessment of an appropriate penalty.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length requirements of Fed. R. App. P. 32(a)(7)(B) because it contains 13,950 words, excluding the portions exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Windows in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served upon the following parties on the 15th day of November, 2016, via the CM/ECF system.

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ADDENDUM:

Key Statutory Provisions

ADDENDUM

Federal Mine Safety and Health Act of 1977

Section 103(a) of the Mine Act, 30 U.S.C. § 813(a), (b), and (h):

(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.

(b) Notice and hearing; subpoenas; witnesses; contempt

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(h) Records and reports; compilation and publication; availability

In addition to such records as are specifically required by this chapter, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health and Human Services may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary or the Secretary of Health and Human Services is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

Section 105(c)(1)–(2) of the Mine Act, 30 U.S.C. § 815(c)(1)–(2):

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of

such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his [sic] paragraph.

Section 110(i) of the Mine Act, 30 U.S.C. 820(i):

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.