

No. 11-2860

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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VULCAN CONSTRUCTION MATERIALS, LP,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR on behalf of PETER L. DUNNE,

Respondents.

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ON PETITION FOR REVIEW OF A DECISION  
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUE .....	3
STATEMENT OF THE CASE .....	3
A. Nature of the Case and Statutory Framework .....	3
B. Course of Proceedings and Disposition Below .....	5
SUMMARY OF THE ARGUMENT .....	8
ARGUMENT	
I. THE COMMISSION CORRECTLY READ SECTION 105(c) OF THE ACT AS REQUIRING TEMPORARY REINSTATEMENT ORDERS TO REMAIN IN EFFECT UNTIL THERE IS A FINAL COMMISSION ORDER ON THE MERITS OF THE MINER'S UNDERLYING DISCRIMINATION COMPLAINT, REGARDLESS OF WHETHER THE COMPLAINT IS LITIGATED BY THE SECRETARY UNDER SECTION 105(c)(2) OF THE ACT OR BY THE MINER UNDER SECTION 105(c)(3) OF THE ACT .....	10
A. Standard of Review .....	10
B. The Plain Meaning of Section 105(c)(2) Is That a Temporary Reinstatement Order Must Remain In Effect Until There Is A Final Commission Order on the Merits of the Miner's Underlying Discrimination Complaint, Regardless of Whether the Complaint Is Litigated By the Secretary Under Section 105(c)(2) or By the Miner Under Section 105(c)(3) .....	19

1. The Language and Structure of Section 105(c)(2) Plainly Mean That A Temporary Reinstatement Order Must Remain In Effect Pending A Final Commission Order On the Miner’s Underlying Complaint .....	19
2. The Legislative History and Purpose of Section 105(c)(2) Support the Secretary’s Interpretation .....	29
3. Requiring Temporary Reinstatement To Remain In Effect Pending A Final Commission Order On the Miner’s Underlying Discrimination Complaint Is Consistent With Due Process.....	33
CONCLUSION .....	36
CERTIFICATE OF COMPLIANCE .....	38
CERTIFICATE OF SERVICE .....	39
ADDENDUM -- Section 105(c) of the Mine Act, 30 U.S.C. § 815(c) .....	40

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Adams Fruit Co. v. Barrett</i> , 494 U.S. 638 (1990) .....	14
<i>Adams v. Slonim</i> , 924 F.2d 256 (D.C. Cir. 1991).....	23
<i>Adkins v. Ronnie Long Trucking</i> , 21 FMSHRC 171 (1999).....	28
<i>Ali v. Achim</i> , 468 F.3d 462 (7th Cir. 2006), <i>cert. dismissed</i> , 552 U.S. 1085 (2007) .....	11
<i>American Bus. Association v. Slater</i> , 231 F.3d 1 (D.C. Cir. 2000) .....	21, 22
<i>American Forest &amp; Paper Ass'n v. FERC</i> , 550 F.3d 1179 (D.C. Cir. 2008).....	22
<i>Arnett v. C.I.R.</i> , 473 F.3d 790 (7th Cir. 2007) .....	16
<i>Brock v. Roadway Express, Inc.</i> , 481 U.S. 252 (1987) .....	33, 34
<i>Cassim v. Bowen</i> , 824 F.2d 791 (9th Cir. 1987) .....	34, 36
<i>Catlin v. United States</i> , 324 U.S. 229 (1945) .....	1
<i>Chevron USA, Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	9, 11, 12, 13, 14, 15, 17, 18, 32, 37
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985) .....	34
<i>Dominion Energy Braton Point LLC v. Johnson</i> , 443 F.3d 12 (1st Cir. 2006).....	17
<i>Dutil v. Murphy</i> , 550 F.3d 154 (1 <sup>st</sup> Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 2064 (2009) .....	35
<i>Eldridge v. Sunfire Coal Co.</i> 5 FMSHRC 408 (1983) .....	28

<i>Energy West Mining Co. v. FMSHRC</i> , 40 F.3d 457 (D.C. Cir. 1994).....	11
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502, 129. S.Ct. 1800 (2009) .....	18
<i>Flandreau Santee Sioux Tribe v. United States</i> , 197 F.3d 949 (8th Cir. 1999), <i>cert. denied</i> , 530 U.S. 1231 (2000).....	21, 22
<i>Haas v. Peake</i> , 525 F.3d 1168 (Fed. Cir. 2008) .....	17
<i>Howard v. Cumberland Coal Co.</i> , 32 FMSHRC 983 (2010) .....	28
<i>Jim Walter Resources, Inc. v. FMSHRC</i> , 920 F.2d 738 (11th Cir. 1990) .....	1, 2, 28, 29,33, 34
<i>Kahn v. United States</i> , 548 F.3d 549 (7th Cir. 2008) .....	11
<i>Leal-Rodriguez v. INS</i> , 990 F.3d 939 (7th Cir. 1993).....	17
<i>Martin v. Occupational Safety and Health Review Commission</i> , 499 U.S. 144 (1991) .....	15
<i>Martin v. Pav-Safer Mfg. Co.</i> , 933 F.2d 528 (7th Cir. 1991).....	13
<i>Matter of Reese</i> , 91 F.3d 37 (7th Cir. 1996) .....	36
<i>Meek v. Essroc Corp.</i> , 15 FMSHRC 606 (1993).....	28
<i>NAACP v. American Family Mutual Insurance Co.</i> , 978 F.2d 287 (7th Cir. 1992), <i>cert. denied</i> , 508 U.S. 907 (1993) .....	12, 31
<i>National Cable &amp; Telecommunications v. Brand X Internet</i> , 545 U.S. 967 (2006) .....	16, 18
<i>National R.R. Passenger Corp. v. Boston and Maine Corp.</i> , 503 U.S. 407 (1992) .....	13
<i>Paul v. Newmont Gold Co.</i> , 18 FMSHRC 181 (1996).....	28
<i>Pendley v. FMSHRC</i> , 601 F.3d 417 (6th Cir. 2010) .....	11

<i>Peter J. Phillips v. A&amp;S Construction Co.</i> , 31 FMSHRC 975 (2009) .....	18, 20, 30, 31
<i>Piambra Cortes v. American Airlines, Inc.</i> , 177 F.3d 1272 (11th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1136 (2000) .....	32
<i>RAG Cumberland Resources LP v. FMSHRC</i> , 272 F.3d 590 (D.C. Cir. 2001).....	12
<i>Roland v. Secretary of Labor</i> , 7 FMSHRC 630 (1985) .....	28
<i>Ross and Gilbert v. Shamrock Coal Co., Inc.</i> , 15 FMSHRC 972 (1993) .....	28
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	22
<i>Security and Exchange Commission v. Wealth Management LLC</i> , 628 F.3d 323 (7th Cir. 2010) .....	2
<i>Secretary of Labor v. Excel Mining, LLC</i> , 334 F.3d 1 (D.C. Cir. 2003) .....	9, 11, 15, 25, 32
<i>Secretary of Labor v. National Cement Co. of California, Inc.</i> , 573 F.3d 788 (D.C. Cir. 2009).....	18
<i>Secretary of Labor v. Twentymile Coal Co.</i> , 456 F.3d 151 (D.C. Cir. 2006).....	5, 32
<i>Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co.</i> , 21 FMSHRC 947 (1999) .....	27
<i>Secretary of Labor on behalf of Kevin Baird v. PCS Phosphate Co.</i> , 33 FMSHRC 5 (2011) .....	18
<i>Secretary of Labor on behalf of Charles Dixon v. Pontiki Coal Corp.</i> , 19 FMSRHC 1009 (1997) .....	24, 25
<i>Secretary of Labor on behalf of Mark Gray v. North Fork Coal Corp.</i> , 33 FMSHRC 27 (2011); appeal docketed, No. 11-3398 (6th Cir. April 21, 2011); appeal docketed, No. 22-3684 (6th Cir. June 25, 2011).....	7, 15, 18, 20, 21 23, 28, 30, 31

<i>Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.</i> , 80 F.3d 110 (4th Cir. 1996) .....	5, 11, 12, 13, 14, 15
<i>Simpson v. Federal Mine Safety and Health Review Commission</i> , 842 F.2d 453 (D.C. Cir. 1988) .....	28
<i>Smiley v. Citybank (South Dakota), N.A.</i> , 517 U.S. 735 (1996) .....	17
<i>Speed Mining Inc. v. FMSHRC</i> , 528 F.3d 310 (4th Cir. 2008) .....	27
<i>Stowell v. Secretary of HHS</i> , 3 F.3d 539 (1st Cir. 1993) .....	13
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994) .....	5
<i>Time Warner Cable v. Doyle</i> , 66 F.3d 867 (7th Cir.), <i>cert. denied</i> , 516 U.S. (1995) .....	11
<i>Tolbert v. Chaney Creek Coal Co.</i> , 9 FMSHRC 580 (1987) .....	28
<i>United States v. Montgomery County</i> , 761 F.2d 998 (4th Cir. 1985) .....	32
<i>United States v. Salerno</i> , 481 U.S. 739 (1987) .....	35
<i>Womak v. Graymount Western US, Inc.</i> , 25 FMSHRC 235 (2003) .....	28
<i>Yusupov v. Attorney General of United States</i> , 518 F.3d 185 (3d Cir. 2008) .....	24

## STATUTES AND CODES

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, <i>et seq.</i> (1977)	
Section 2, 30 U.S.C. § 801 .....	3
Section 2(c), 30 U.S.C. § 801(c) .....	3
Section 101, 30 U.S.C. § 811 .....	3
Section 103, 30 U.S.C. § 813 .....	3
Section 104, 30 U.S.C. § 814 .....	3
Section 105(a)(1), 30 U.S.C. § 815(a)(1) .....	2
Section 105(c), 30 U.S.C. § 815(c) .....	4, 22, 29

Section 105(c)(1), 30 U.S.C. § 815(c)(1).....	3, 5, 9, 26, 30
Section 105(c)(2), 30 U.S.C. § 815(c)(2).....	2-5, 7-10, 12-15, 19-21, 24, 26 27, 29, 30, 32, 33, 26
Section 105(c)(3), 30 U.S.C. § 815(c)(3).....	2-4, 6-10, 20, 22-26, 28, 30, 32-36
Section 105(d), 30 U.S.C. § 815(d) .....	1
Section 106, 30 U.S.C. § 816 .....	1
Section 106(a), 30 U.S.C. § 816(a).....	5
Section 106(a)(1), 30 U.S.C. § 816(a)(1).....	33
Section 106(b), 30 U.S.C. § 816(b).....	5
Section 113, 30 U.S.C. § 823 .....	4, 5
Section 113(d), 30 U.S.C. § 823(d). .....	1

Miscellaneous

71 Fed. Reg. 560 (January 5, 2006) .....	16, 18
71 Fed. Reg. 44,190 (August 4, 2006) .....	16, 18
Conf. Rep. No. 95-461, 95th Cong., 1st Sess. (1977), <i>reprinted in</i> Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., <i>Legislative History of the Federal Mine Safety and Health Act of 1977</i> .....	30, 31
S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), <i>reprinted in</i> Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., <i>Legislative History of the Federal Mine Safety and Health Act of 1977</i> .....	14, 29, 30, 31
Black's Law Dictionary (5th ed. 1979), 1324.....	22

## JURISDICTIONAL STATEMENT

Vulcan Construction Materials, LP's ("Vulcan's") jurisdictional statement is not complete.

The Secretary agrees with Vulcan that this Court has jurisdiction over proceedings for review of a decision of the Federal Mine Safety and Health Review Commission ("the Commission") under Section 106 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 816. The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d).

Vulcan filed its petition for review on August 15, 2011. Vulcan seeks review of the Commission's July 14, 2011, temporary reinstatement order.

Although the Commission's temporary reinstatement order from which Vulcan appeals is not a final order because it does not "end[] the litigation on the merits," the Court has jurisdiction over this matter because Vulcan's appeal of the order falls within the collateral order exception to finality principles. *See Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990) (citing and quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

The collateral order doctrine permits review of an order that: (1) conclusively determined the disputed question, (2) resolved an important issue completely separate from the merits of the underlying action, and (3)

would be effectively unreviewable on appeal from a final judgment. *See Securities and Exchange Commission v. Wealth Management LLC*, 628 F.3d 323, 332 (7th Cir. 2010). All three requirements are met here.

First, the Commission's order conclusively determined the question of whether a temporary reinstatement order remains in effect pending a decision on the merits of the miner's underlying discrimination complaint, regardless of whether the miner's discrimination complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act.

Second, the issue of whether a temporary reinstatement order remains in effect pending a decision on the merits of the miner's discrimination complaint raises an issue of fundamental importance to the enforcement of the Mine's Act's anti-discrimination provision, 30 U.S.C. § 815(a)(1), that is separate from the merits of the miner's discrimination complaint.

Finally, the Commission's order will be effectively unreviewable on review of a final order on the merits miner's discrimination complaint. *See Jim Walter Resources*, 920 F.2d at 745. Vulcan's asserted injury in having to temporarily reinstate Mr. Dunne pending a decision on the miner's discrimination complaint will evaporate once there is a decision on the merits of the miner's discrimination complaint. *Id.*

## STATEMENT OF THE ISSUES

Whether the Commission correctly read Section 105(c)(2) of the Mine Act as requiring temporary reinstatement orders to remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Mine Act or by the miner under Section 105(c)(3) of the Mine Act.

## STATEMENT OF THE CASE

### A. Nature of the Case and Statutory Framework

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated 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).

Sections 101 and 103 of the Mine Act authorize the Secretary, acting through the Mine Safety and Health Administration ("MSHA"), to promulgate mandatory safety and health standards for the Nation's mines and to conduct regular inspections of those mines. 30 U.S.C. §§ 811 and 813. Section 104 of the Mine Act authorizes the Secretary to issue citations and orders for violations of the Mine Act or MSHA standards. 30 U.S.C. § 814.

Section 105(c) of the Mine Act prohibits operators from discriminating against miners for exercising any Mine Act right. 30 U.S.C. § 815(c). A miner who believes that he has been discriminated against may file a complaint with the Secretary. 30 U.S.C. § 815(c)(2).

Section 105(c)(2) of the Mine Act requires the Secretary to begin an investigation of a miner's discrimination complaint within 15 days. 30 U.S.C. § 815(c)(2). If the Secretary finds that the miner's complaint was "not frivolously brought," she must apply to the Commission for an order temporarily reinstating the miner, and the Commission, on an expedited basis, must order the miner temporarily reinstated "pending final order on the complaint." 30 U.S.C. § 815(c)(2).

If, after an investigation, the Secretary determines that a violation has occurred, Section 105(c)(2) of the Mine Act provides that she must file a complaint with the Commission. 30 U.S.C. § 815(c)(2). If the Secretary determines that a violation has not occurred, Section 105(c)(3) of the Mine Act authorizes the miner to file an action in his own behalf before the Commission. 30 U.S.C. § 815(c)(3). The Secretary must notify the miner of her determination whether a violation has occurred within 90 days after receiving the miner's underlying discrimination complaint. 30 U.S.C. § 815(c)(2).

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate

review in cases arising under the Mine Act. 30 U.S.C. § 823. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204 (1994); *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). Under the split-enforcement scheme of the Mine Act, Commission judges hear discrimination cases brought under Section 105(c). *See Secretary on Behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 111 (4th Cir. 1996).

By filing a petition for discretionary review, a party may seek review of an adverse judge's decision before the Commission. 30 U.S.C. § 823. An adversely affected party may obtain review of a Commission decision in an appropriate Court of Appeals. 30 U.S.C. § 816(a), (b).

#### B. Course of Proceedings and Disposition Below

On September 16, 2010, Vulcan indefinitely suspended and then fired Peter Dunne, a roof bolt operator at Vulcan's Bartlett Underground Mine. Vulcan's Supplemental Appendix ("S.A.") 8. Alleging that he was unlawfully fired for engaging in safety-related activity protected under Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), Mr. Dunne, on December 2, 2010, filed a written discrimination complaint with MSHA under Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). *See* S.A. 11-12, 15-16.

Finding that Mr. Dunne's complaint was not frivolously brought, the Secretary, on January 25, 2011, filed an application for Dunne's temporary reinstatement by Vulcan. S.A. 1. Accompanying the application was a settlement agreement and motion for temporary reinstatement, signed by

counsel for the Secretary and counsel for Vulcan, in which Vulcan waived its right to a hearing on the issue of whether Mr. Dunne's discrimination complaint was frivolously brought and agreed not to oppose the entry of an Order of Temporary Reinstatement "until the merits of Mr. Dunne's discrimination complaint ha[ve] been determined." S.A. 22. The Secretary and Vulcan also agreed that Dunne's temporary reinstatement would be economic temporary reinstatement rather than actual return to work. Id.

On January 28, 2011, an administrative law judge entered an Agreed Temporary Economic Reinstatement Order. S.A. 28. On March 8, 2011, the Secretary informed the judge that she had notified Mr. Dunne that MSHA had concluded, based on its investigation, that the facts did not warrant her pursuing Dunne's discrimination complaint before the Commission. S.A. 30. On March 16, 2011, Mr. Dunne filed a discrimination action of his own pursuant to Section 105(c)(3) of the Mine Act. That action is presently pending before the Commission. *See* S.A. 33-47.

On April 28, 2011, Vulcan moved to dissolve the temporary reinstatement order. S.A. 48. The Secretary opposed the motion, and on June 7, 2011, an administrative law judge denied the motion. S.A. 52, 59. Vulcan filed a petition for discretionary review of the judge's denial of the motion, which the Commission granted on July 14, 2011. S.A. 60, 67.

Also on July 14, 2011, the Commission, through a three-member majority, issued a decision affirming the judge's order denying Vulcan's motion to

dissolve the temporary reinstatement order. Vulcan Short App. at 1. Two members of the Commission affirmed the judge's order based on their opinion in *Secretary of Labor on behalf of Mark Gray v. North Fork Coal Corp.*, 33 FMSHRC 27, 33-44 (2011), appeal docketed, No. 11-3398 (6th Cir. April 21, 2011) and No. 22-3684 (6th Cir. June 25, 2011), in which they determined that the plain language of Section 105(c)(2) of the Mine Act provides that a temporary reinstatement order continues during the pendency of a discrimination case, regardless of whether the Secretary files a discrimination complaint with the Commission on the miner's behalf under Section 105(c)(2) or the miner files his own discrimination action with the Commission under Section 105(c)(3). *See* Vulcan Short App. at A-2 (citing *North Fork*, 33 FMSHRC at 33-44). The third member of the majority voted to affirm based on his concurrence in *North Fork*, in which he determined that the language of Section 105(c)(2) is ambiguous as to whether a temporary reinstatement order survives the Secretary's decision not to file a discrimination complaint with the Commission on behalf of the miner, but that the Secretary's interpretation of the provision that it does so survive is a reasonable interpretation warranting deference by the Commission. *See* Vulcan Short App. at A-3 (citing *North Fork*, 33 FMSHRC at 45-52). The two dissenting Commissioners cited their dissent in *North Fork*, in which they determined that the plain language of Section 105(c)(2) provides that a temporary reinstatement order is extinguished upon the Secretary's decision

not to file a discrimination complaint with the Commission on behalf of the miner. *See* Vulcan Short App. at A-4 (citing *North Fork*, 33 FMSHRC at 53-58).

### **SUMMARY OF THE ARGUMENT**

The plain meaning of Section 105(c)(2) of the Mine Act is that a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner’s underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act. The plain meaning is evident from the language and the structure of the Mine Act. The plain meaning is also supported by the legislative history of the Mine Act and the purpose of temporary reinstatement.

Resolution of the meaning of Section 105(c)(2) turns on the proper reading of the term “the complaint” in the phrase “pending final order on the complaint” in Section 105(c)(2). Because Section 105(c)(2) refers to the miner’s underlying complaint five times prior to the phrase “pending final order on the complaint,” the term “the complaint” in the provision plainly refers to the miner’s underlying complaint. A Section 105(c)(2) complaint filed by the Secretary has the same relationship to the miner’s underlying complaint as does a Section 105(c)(3) action filed by the miner. The plain meaning reading of the phrase “pending final order on the complaint” is therefore that temporary reinstatement remains in effect until there is a final

Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act.

The Secretary's plain meaning reading of Section 105(c)(2) is consistent with Section 105(c)(2)'s requirement that temporary reinstatement be ordered when there is a finding that the miner's underlying discrimination complaint "was not frivolously brought." The question whether a miner's underlying complaint was "frivolously brought" and the question whether the Secretary decides that Section 105(c)(1) has "not been violated" are very different questions. Reading Section 105(c)(2) to require orders of reinstatement be dissolved when the Secretary determines that she will not file a complaint under Section 105(c)(2) conflates the two questions.

Even if the Court determines that the meaning of Section 105(c)(2) is not plain, the Court must accept the Secretary's interpretation. *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003). The Secretary's interpretation is entitled to full *Chevron* deference because the Secretary is the administrator of the Act and has the expertise to determine how Section 105(c)(2) should be interpreted to best effectuate Congress' purpose of encouraging miners to participate in health and safety matters. Under a split-enforcement scheme such as the Mine Act, the fact that the Secretary's

interpretation was advanced in a proceeding before the Commission does not make it undeserving of *Chevron* deference. Id.

Reading Section 105(c)(2) to require temporary reinstatement orders to remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act, is consistent with due process. Particularly in light of Section 105(c)(3)'s explicit requirement that the Commission expedite Section 105(c)(3) proceedings, Vulcan does not and cannot show that Congress' plainly manifested statutory intent violates the Due Process Clause on the basis that there is no "expeditious review."

## ARGUMENT

### I.

#### **The Commission Correctly Read Section 105(c) Of The Act As Requiring A Temporary Reinstatement Order To Remain In Effect Until There Is A Final Commission Order On The Merits Of The Miner's Underlying Complaint, Regardless Of Whether The Complaint Is Litigated By The Secretary Under Section 105(c)(2) Of The Act Or By The Miner Under Section 105(c)(3) Of The Act**

##### A. *Standard of Review*

Determination of whether a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act, requires the Court to review the

Secretary's interpretation of Section 105(c)(2) of the Act. "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Ali v. Achim*, 468 F.3d 462, 468 (7th Cir. 2006), *cert. dismissed*, 552 U.S. 1085 (2007) (citing and quoting *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Courts use the traditional tools of statutory construction in determining whether the meaning of a statutory provision is plain. *Time Warner Cable v. Doyle*, 66 F.3d 867, 877 (7th Cir.), *cert. denied*, 516 U.S. 1141 (1995). If, after looking at the language and structure of the statute as a whole, the plain meaning of a provision cannot be discerned, the Court may look to the origin, purpose, and legislative history of the statute to discern its meaning. *Kahn v. United States*, 548 F.3d 549, 556 (7th Cir. 2008).

If a provision does not have a plain meaning, the Secretary's interpretation is owed deference and is entitled to affirmance as long as it is reasonable. *Pendley v. FMSHRC*, 601 F.3d 417, 423 and n.2 (6th Cir. 2010); *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). *See also Secretary on Behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113-16 (deferring to the Secretary's interpretation of Section 105(c)(2)'s remedial provisions). "Where, as here, the Secretary and

the Commission agree, there is no question but that [the Court] must accord deference to their joint view.” *RAG Cumberland Resources, LP v. FMSHRC*, 272 F.3d 590, 596 (D.C. Cir. 2001).

Vulcan asserts that the Secretary’s interpretation of Section 105(c)(2) is not entitled to *Chevron* deference because her involvement in a discrimination complaint ends when she decides not to litigate the miner’s complaint under Section 105(c)(2) of the Act. Vulcan Br. at 20. Vulcan misunderstands deference.

The Secretary, through her administration of the Act, has the “historical familiarity and expertise” (*Mutual Mining*, 80 F.3d at 113) to determine how Section 105(c)(2) should be interpreted to best effectuate Congress’ purpose of encouraging miners to participate in health and safety matters without retaliation.<sup>1</sup>

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<sup>1</sup> Of the two entities established by the Act -- the Secretary of Labor, acting through MSHA and the Commission -- “[o]nly one . . . can retain the ability to render authoritative interpretations of the Act.” *Mutual Mining*, 80 F.3d at 113. Under Vulcan’s approach, however, both of those entities would have the ability to render interpretations of Section 105(c)(2) -- a situation under which, depending on the nature of the proceeding, the very same provision could be given different interpretations in different cases. The scenario of two entities rendering conflicting interpretations of the same provision is a scenario Congress cannot have intended. *See NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 293 (7th Cir. 1992), cert. *denied*, 508 U.S. 907 (1993) (deferring to the enforcement agency’s interpretation of a statute in a private enforcement action when the statute provided for both administrative enforcement and private enforcement, and stating that it would be “weird” if an agency’s interpretation of a statute were accorded deference only when the agency brought an enforcement action).

Vulcan’s attempt to deny the Secretary’s interpretation of Section 105(c)(2) deference by carving the Secretary’s authority under the Mine Act into separate slivers is unsupported by, and inconsistent with, the case law on *Chevron* deference. See *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992) (“In ascertaining whether the agency’s interpretation is a permissible construction of the [statutory] language, a court must look to the structure and language of the statute as a whole”); *Mutual Mining*, 80 F.3d at 113-14 (granting *Chevron* deference to the Secretary’s interpretation, even though it pertained to relief fashioned by the Commission under Section 105(c) of the Act, because only the Secretary has the ability “to render authoritative interpretations of *the Act*”) (emphasis added); *Stowell v. Secretary of HHS*, 3 F.3d 539, 544 (1st Cir. 1993) (recognizing that *Chevron* deference is appropriate when the statute contains complicated and interrelated provisions and the agency, through its administration of the statute, has an understanding of “the relationship of a given provision to the statute as a whole”) (citation and internal quotation marks omitted). See also *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 530 (7th Cir. 1991) (recognizing that under the Occupational Safety and Health Act’s split-enforcement scheme, “the power of enforcement, and, therefore, the delegated legislative power to implement the policy of the [ ] Act, is the exclusive prerogative of the Secretary”).

Nor, as Vulcan asserts, is *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990), to the contrary. *See* Vulcan Br. at 20. In *Adams*, the Supreme Court declined to give deference to the Secretary's interpretation of a provision of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") regarding the pre-emptive scope of the statute because Congress' delegation of authority to the Secretary did not include the authority to decide the pre-emptive scope of AWPA. 494 U.S. at 649-50 ("No such delegation regarding [the statute's] enforcement provisions is evident in the statute.") In contrast, the Secretary's interpretation of Section 105(c)(2) of the Mine Act is entitled to *Chevron* deference because Congress delegated to the Secretary the responsibility to enforce the Act, including the anti-discrimination provisions of the Act. *See Wamsley v. Mutual Mining, Inc.*, 80 F.3d at 114 ("developing rules and enforcing them endow the Secretary with the historical familiarity and policymaking expertise, that are the basis for judicial deference to agencies" (internal citations and quotation marks omitted)); S. Rep. No. 95-181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* ("Leg. Hist.") at 637 ("Since the Secretary of Labor is charged with responsibility for implementing [the Mine Act,] ... the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.")

Vulcan also argues that if Section 105(c) is ambiguous, the Secretary's interpretation is not entitled to *Chevron* deference because the Secretary's interpretation is a litigating position. Vulcan Br. at 20-21. Contrary to Vulcan's argument, "[i]n the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard, and is therefore deserving of deference." *Excel Mining*, 334 F.3d at 6 (internal quotation marks and citations omitted). Under a split-enforcement scheme like the Mine Act, an interpretation advanced by the agency charged with rulemaking and enforcement responsibilities is not a "litigating position" undeserving of deference. *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 156-57 (1991) (involving the Occupational Health and Safety Act of 1970). The interpretation "*is* agency action, not a *post hoc* rationalization of it." *Id.* Because the Mine Act charges the Secretary with rulemaking and enforcement responsibilities, *Mutual Mining*, 80 F.3d at 114, if Section 105(c)(2) is ambiguous, the Secretary's interpretation is entitled to *Chevron* deference.

Also contrary to Vulcan's argument (Vulcan Br. at 21), the fact that the Commission's rules prior to 2006 provided that temporary reinstatement ended when the Secretary decided not to file a Section 105(c)(2) complaint

does not lessen the deference owed the Secretary's interpretation. That is so for two reasons.

First, contrary to Vulcan's suggestion, before the Commission's decision in *North Fork*, the Commission had not clearly adopted an interpretation of Section 105(c)(2). Indeed, in explaining its 2006 decision to amend its rules to "leave[] open for litigation" the question whether the miner's underlying complaint remains in effect after the Secretary decides not to go forward -- a decision it made in response to the Secretary's assertion of her interpretation -- the Commission explicitly stated that it "ha[d] not decided" the question. 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006) (discussing 71 Fed. Reg. 560 (Jan. 5, 2006)). *Id.* The Commission's response to the Secretary's assertion implicitly recognized that the Secretary's interpretation was a reasonable interpretation to assert in litigation.

Second, even if the Commission had clearly adopted an interpretation different from the Secretary's interpretation, that fact would not alter the principle that if the statute is ambiguous, the Commission and the Court must give deference to the Secretary's interpretation. *See National Cable & Telecommunications Ass'n v. Brand X Internet*, 545 U.S. 967, 982-83 (2006) (explaining that "[w]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur"); *Arnett v. C.I.R.*, 473 F.3d 790, 704 (7th Cir. 2007) (same effect).

Contrary to Vulcan’s suggestion (Vulcan Br. at 21), the Secretary’s silence on the issue until the Commission sought comments on its rules (*see* 71 Fed. Reg. at 44198), is hardly the type of binding formal agency interpretation from which the Secretary’s current interpretation constitutes a change. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (rejecting assertion that statements in two letters could be characterized as binding agency interpretations warranting rejection of deference because one statement was too informal and one statement did not purport to represent the agency’s interpretation in all circumstances); *Haas v. Peake*, 525 F.3d 1168, 1190 (Fed. Cir. 2008) (holding that an agency’s interpretation of a regulation was not undeserving of deference even though the agency had asserted a different interpretation in some previous adjudications and seemed to assert a different interpretation in its Adjudications Manual, in part because the agency had never formally adopted the prior interpretation); *Leal-Rodriguez v. INS*, 990 F.3d 939, 946 (7th Cir. 1993) (a non-precedential unpublished decision is not binding on an agency “any more than we ourselves are bound by our own unpublished decision” and is not a valid basis for rejecting deference).<sup>2</sup>

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<sup>2</sup> Nor, as Vulcan’s argument suggests, does the fact that the Commission procedural rules prior to 2006 were longstanding, lessen the deference owed the Secretary’s interpretation. *See, e.g., Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16-18 (1st Cir. 2006) (citing *National Cable* and holding that the *stare decisis* effect of a 28-year old decision of the Supreme Court interpreting an ambiguous statutory provision, must, under *Chevron*,

Finally, even if the Secretary’s interpretation in this case did constitute a change, “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *Smiley*, 517 U.S. at 742; *National Cable*, 545 U.S. at 982 (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”) In response to the Commission’s request for comments on its procedural rules (*See* 71 *Fed. Reg.* at 560), the Secretary urged the Commission to amend its rules to reflect her interpretation. Once the Commission changed its rules to “leave[] open for litigation the issue” (71 *Fed. Reg.* at 44199), the Secretary formally asserted her interpretation in numerous Commission cases. *See, e.g., Peter J. Phillips v. A&S Construction Co.*, 31 FMSRHC 975 (2009) (“*A&S Construction*”); *North Fork*, 31 FMSHRC 1167; *Secretary of Labor on behalf of Kevin Baird v. PCS Phosphate Co.*, 33 FMSHRC 5 (2011). Under the circumstances, any change in interpretation would not be a valid basis for withholding *Chevron* deference. *See Secretary of Labor v. National Cement Company of California, Inc.*, 573 F.3d 788, 793 (D.C. Cir. 2009) (citing and quoting *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 129 S.Ct. 1800, 1804-05 (2009) (*internal quotation marks omitted, emphasis in original*) (“An agency changing course must ordinarily display awareness that it *is* changing

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yield to the administering agency’s contrary yet reasonable interpretation of the statute).

position, but need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one").

B. *The Plain Meaning of Section 105(c)(2) Is That a Temporary Reinstatement Order Must Remain In Effect Until There Is A Final Commission Order on the Merits of the Miner's Underlying Discrimination Complaint, Regardless of Whether the Complaint Is Litigated By the Secretary Under Section 105(c)(2) or By the Miner Under Section 105(c)(3)*

1. *The Language and Structure of Section 105(c)(2) Plainly Mean That a Temporary Reinstatement Order Must Remain In Effect Pending A Final Commission Order on the Miner's Underlying Complaint*

Section 105(c)(2) states in relevant part:

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 [she] 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, [s]he shall immediately file *a complaint* with the Commission  
.....

30 U.S.C. § 815(c)(2) (emphases added). This case turns on the proper reading of the term "the complaint" in the phrase "pending final order on the

complaint” in Section 105(c)(2).<sup>3</sup> The Secretary, in agreement with the Commission majority, reads the term “the complaint” as referring to the miner’s underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) or by the miner under Section 105(c)(3). *See North Fork*, 33 FMSHRC at 42. The dissenting Commissioners, in contrast, read the term “the complaint” to refer to a complaint filed under Section 105(c)(2), but not to refer to a miner’s action filed under Section 105(c)(3). 33 FMSHRC at 53 (the dissenting Commissioners in *North Fork* adopting their opinion in *A&S Construction*) and *A&S Construction*, 31 FMSHRC at 180). Vulcan reads the term “the complaint” slightly differently from the dissenting Commissioners and asserts that it refers both to the miner’s underlying discrimination complaint and to the Secretary’s Section 105(c)(2) complaint when the Secretary decides to file an action under Section 105(c)(2), but does not refer to the miner’s underlying discrimination complaint or to the miner’s Section 105(c)(3) action when a miner files an action under Section 105(c)(3). *See Vulcan Br.* at 8, 13-

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<sup>3</sup> The Commission has held, and Vulcan does not dispute, that the phrase “pending final order” in Section 105(c)(2) refers to final Commission orders and not to the Secretary’s determination whether discrimination has occurred. *A&S Construction*, 31 FMSRHC at 981.

The plain meaning of Section 105(c) compels that conclusion. Section 105(c) uses the word “order” nine times and in every instance refers to the Commission’s order. Moreover, Section 105(c) uses the word “determination” (rather than the word “order”) to refer to the Secretary’s conclusion whether her investigation revealed discrimination. *See* 30 U.S.C. § 815(c); *A&S Construction*, 31 FMSHRC at 981.

14. Both the dissenting Commissioners' and Vulcan's interpretations are inconsistent with the language of the Act.

The Secretary's reading, unlike the dissenting Commissioners' reading, is consistent with the "rule of law well established that the definite article 'the' particularizes the subject which it precedes." *American Bus. Association v. Slater*, 231 F.3d 1, 4 (D.C. Cir. 2000) (internal quotation marks and citation omitted). *See also Flandreau Santee Sioux Tribe v. United States*, 197 F.3d 949, 952 (8th Cir. 1999), *cert. denied*, 530 U.S. 1231 (2000) ("The: used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned") (internal quotation marks and citation omitted). The only "complaint" referred to in Section 105(c)(2) preceding the phrase "pending final order on the complaint" is the miner's underlying complaint. Indeed, Section 105(c)(2) refers to the miner's underlying complaint five times prior to the phrase "pending final order on the complaint," and the sentence containing the phrase "pending final order on the complaint" refers to the miner's underlying complaint two times prior to the phrase "pending final order on the complaint." Thus, the term "the complaint" in the phrase "pending final order on the complaint" plainly refers to the miner's underlying complaint.

Contrary to Vulcan's and the dissenting Commissioners' reading, the miner's underlying complaint does not somehow merge into and become the same "complaint" as a complaint the Secretary may file under Section

105(c)(2). *See* *Vulcan Br.* at 14; *North Fork*, 33 FMSHRC at 53; *A&S Construction*, 31 FMSHRC at 980. Immediately following the language in Section 105(c)(2) stating that a temporary reinstatement order remains in effect “pending final order on the complaint,” Section 105(c)(2) states that “[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file *a complaint* with the Commission” (emphasis added). If Congress had intended the Secretary’s complaint to be viewed as the same complaint as the miner’s underlying complaint, Congress would have again used the definite article “the.” *See American Bus. Association*, 231 F.3d at 4. It did not do so. Instead, Congress used the indefinite article “a” -- a fact that indicates that Congress intended the Secretary’s complaint to be viewed as something different than the miner’s underlying complaint. *See American Forest & Paper Ass’n v. FERC*, 550 F.3d 1179, 1181 (D.C. Cir. 2008) (when Congress uses different words, it is presumed to have intended different meanings -- especially when the different words occur “in neighboring sentences”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). *See also Flandreau Santee*, 197 F.3d at 952 (“Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles ‘a’ and ‘the’ . The most unlettered persons understand that ‘a’ is indefinite, but ‘the’ refers to a certain object.” (citing and quoting Black’s Law Dictionary 1324 5th ed. 1979)).

Vulcan's and the dissenting Commissioner's interpretation that the term "the complaint" does not refer to the miner's underlying discrimination complaint when the miner files an action under Section 105(c)(3) is refuted by two other aspects of Section 105(c). First, it is refuted by the fact that Section 105(c)(3) continues to speak in terms of "the complainant" -- a fact that indicates that, when a miner proceeds under Section 105(c)(3), he continues to advance the underlying complaint he filed under Section 105(c)(2). *See North Fork*, 33 FMSHRC at 37-38. Second, it is refuted by the fact that Section 105(c)(3) speaks in terms of the miner filing an "action" rather than in terms of the miner filing a "complaint" -- a fact that indicates that, when a miner proceeds under Section 105(c)(3), he is merely taking an administrative action to carry his underlying complaint forward, not filing a new complaint that takes the place of a previously filed complaint that has somehow ceased to exist. *See Adams v. Slonim*, 924 F.2d 256, 258 (D.C. Cir. 1991) (application of the *Russello* principle is especially appropriate when the different words occur in "two subsections [that] are closely related").

When the Secretary files a complaint, the miner's underlying complaint is carried forward through the Secretary's complaint, and the "final order on the complaint" is the Commission's final order on the miner's complaint. When the Secretary declines to file a complaint, the miner's underlying complaint continues to exist in its original form and is carried forward by the miner's action, and the "final order on the complaint" is the Commission's final order

on the miner's complaint. *See Secretary on behalf of Charles Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (1997) (holding that a Section 105(c)(2) complaint filed by the Secretary has the same relationship to the miner's underlying complaint as does a Section 105(c)(3) action filed by the miner). In *both* instances, the "final order on the complaint" is the Commission's final order on the miner's underlying complaint.

Vulcan's assertion that its interpretation is supported by the fact that Section 105(c)(3) does not refer to the term "temporary reinstatement" is unpersuasive. Vulcan Br. at 13. Because Section 105(c)(2) specifically provides for temporary reinstatement, sets forth the procedure for obtaining temporary reinstatement, and sets forth the duration of temporary reinstatement, there was no need for Congress to refer to temporary reinstatement in Section 105(c)(3). Any such reference would have been redundant. *See Yusupov v. Attorney General of United States*, 518 F.3d 185, 203 (3d Cir. 2008) (the fact that Congress did not use a particular term establishes nothing if the term likely "would be redundant.")

Also unpersuasive is Vulcan's assertion that its interpretation is supported by the fact that Section 105(c)(2) and Section 105(c)(3) involve "independent and separate" proceedings, as evidenced by the fact that the Commission assigns different docket numbers to temporary reinstatement proceedings, Section 105(c)(2) proceedings, and Section 105(c)(3) proceedings. *See Vulcan Br.* at 15. Regardless of whether Section 105(c)(2) and Section 105(c)(3)

involve independent and separate proceedings, the Commission has long recognized, as already noted, that a Section 105(c)(2) complaint filed by the Secretary has the same relationship to the miner's underlying complaint as does a Section 105(c)(3) action filed by the miner. *Pontiki*, 19 FMSHRC at 1017. Until the Commission issues a final order, either in a Section 105(c)(2) proceeding if the underlying complaint is being litigated by the Secretary, or in a 105(c)(3) proceeding if the underlying complaint is being litigated by the miner, there is no "final order on the complaint" and, under the plain language of Section 105(c)(2), temporary reinstatement must remain in effect.<sup>4</sup>

Nor, as Vulcan suggests, is the "sole purpose" of Section 105(c)(3) to provide the miner a proceeding in which to bring his own case -- a proceeding in which the Secretary plays no part. *Vulcan Br.* at 17. When the Commission upholds the miner's action under Section 105(c)(3), the Secretary is required to issue a civil penalty under Section 110(a) of the Act. 30 U.S.C. § 815(c)(3) ("Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title"). The Secretary also has the right to seek an injunction in district court if the operator fails to comply

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<sup>4</sup> In any event, even if the way in which the Commission assigns docket numbers supported Vulcan's interpretation of the phrase "final order on the complaint" -- which it does not -- that would not be a basis for disregarding the plain meaning of Section 105(c)(2). And even if Section 105(c)(2) were ambiguous on the issue, that would not be a basis for refusing to accept the Secretary's reasonable interpretation, because the Secretary's interpretation, not the Commission's interpretation, is entitled to deference. *Excel Mining*, 334 F.3d at 6.

with a temporary reinstatement order or fails to pay the penalty or comply with the Commission's order for relief in the Section 105(c)(3) case. Id. Further, Section 105(c)(3) mandates that "proceedings under this section shall be expedited by the *Secretary* and the Commission." 30 U.S.C. 815(c)(3) (emphasis added). If, as Vulcan asserts (Vulcan Br. at 17), Congress did not contemplate the public interest being served through the Secretary's involvement in Section 105(c)(3) proceedings, it would not have given the Secretary a role in such proceedings.

The Secretary's reading of Section 105(c)(2), unlike Vulcan's and the dissenting Commissioners' reading, is also consistent with Section 105(c)(2)'s requirement that temporary reinstatement be ordered when there is a finding that the miner's underlying discrimination complaint "was not frivolously brought." The question whether a miner's underlying complaint was "frivolously brought" and the question whether Section 105(c)(1) has "not been violated" are very different questions. Reading Section 105(c)(2) to require that orders of temporary reinstatement be dissolved when the Secretary determines that Section 105(c)(1) has "not been violated" incorrectly conflates the two questions.

Recognizing the fundamental distinction between the two questions, the Commission has held that, because there has been a "not frivolously brought" finding, temporary reinstatement orders remain in effect pending appeal to the Commission of a judge's decision in a Section 105(c)(2) action even when

the same judge who affirmed the “not frivolously brought” finding finds, after a full hearing on the merits, that Section 105(c)(1) has not been violated.

*Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (1999).

Moreover, although the Act speaks in terms of the Secretary determining that Section 105(c)(1) has “not been violated,” the Secretary’s determination in reality is not a determination that a violation has not occurred -- let alone a determination that the miner’s complaint was “frivolously brought.” The determination that a violation has not occurred can only be made by an adjudicator -- and under the Mine Act, the adjudicator is the administrative law judge and/or the Commission, not the Secretary. The Secretary is merely the prosecutor, and the Secretary’s determination is merely a discretionary prosecutorial determination that, in all of the circumstances, the Secretary cannot *prove* that a violation occurred. *See Roland v. Secretary of Labor*, 7 FMSHRC 630, 635 (1985) (recognizing that the Secretary has “wide discretion” in determining whether the facts underlying a miner’s discrimination complaint require her to file a Section 105(c)(2) complaint with the Commission). *Cf. Speed Mining v. FMSHRC*, 528 F.3d 310, 318-19 (4th Cir. 2008) (recognizing that a “complicated balancing of a number of factors” affects the Secretary’s discretionary decision whether to prosecute a violation).

Moreover, reading Section 105(c)(2) to require that a temporary reinstatement order remain in effect pending a final Commission order on the miner's underlying complaint is consistent with Congress' decision to give miners "an independent avenue of adjudication" under Section 105(c)(3) if the Secretary decides not to proceed under Section 105(c)(2). *Roland*, 7 FMSHRC at 635-36. Inherent in Congress' decision was a recognition that even if the Secretary decides not to proceed under Section 105(c)(2), there is still a realistic possibility that discrimination occurred -- a recognition borne out by the significant number of cases over the years in which the Secretary declined to file a complaint, the miner filed an action on his own, and the judge and/or the appellate tribunal ultimately found that the miner's complaint should be sustained on the merits. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453 (D.C Cir. 1988); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983 (2010); *Womack v. Graymount Western US, Inc.*, 25 FMSHRC 235, 261-63 (2003); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (1999); *Paul v. Newmont Gold Co.*, 18 FMSHRC 181, 191 (1996); *Ross and Gilbert v. Shamrock Coal Co., Inc.*, 15 FMSHRC 972, 974-76 (1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612-13 (1993); *Tolbert v. Chaney Creek Coal Co.*, 9 FMSHRC 580 (1987); *Eldridge v. Sunfire Coal Co.*, 5 FMSHRC 408 (1983). As the Commission majority observed in *North Fork*, to hold that the Secretary's determination not to proceed under Section 105(c)(3) transforms the miner's underlying complaint into a frivolous action would mean that

“Congress implemented a statutory provision (section 105(c)(3)) devoted to the litigation of frivolous claims.” 33 FMSHRC at 31.

Furthermore, “in enacting the ‘not frivolously brought’ standard, [Congress] clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.” *Jim Walter*, 920 F.2d at 748 n.11. As the *Jim Walter* Court recognized, “[a]ny material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits.” *Id.*

## *2. The Legislative History and Purpose of Section 105(c)(2) Support the Secretary’s Interpretation*

In enacting the Mine Act, Congress made clear its intent that Section 105(c) “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Leg. Hist.* at 624. Congress also recognized the important role that individual miners play under the Act in ensuring a safe and healthful working environment. 95th Cong. 1st Sess. 35, *Leg. Hist.*, at 623.

Recognizing that “mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity,” Congress stressed that “temporary reinstatement is an essential protection for complaining miners who may not be in the financial

position to suffer even a short period of unemployment . . . .” S. Rep. No. 95-181 at 35 and 37, *Leg. Hist.* at 623 and 625. Interpreting Section 105(c)(2) to require that, once a “not frivolously brought” finding is made and affirmed, a temporary reinstatement order remains in effect pending a final Commission order on the merits of the miner’s underlying complaint is consistent with Section 105(c)’s purpose of encouraging miner participation in safety and health matters.

Moreover, in discussing the need for temporary reinstatement, Congress stated that “temporary reinstatement is an essential protection . . . pending the *resolution* of the discrimination complaint.” S. Rep. No. 95-181 at 37, *Leg. Hist.* at 625 (emphasis added). There is no “resolution” of the miner’s underlying discrimination complaint until there is a final Commission order on the complaint. Similarly, in explaining the process for obtaining temporary reinstatement, Congress stated that “the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending *final outcome* of the investigation *and complaint*.” *Id.* (emphases added). Although there may be a final outcome of the investigation if the Secretary determines that Section 105(c)(1) “has not been violated,” there is not a “final outcome” on the miner’s underlying complaint until there is a final Commission order on the complaint.<sup>5</sup>

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<sup>5</sup> Latching on to a snippet in the legislative history, Vulcan and the dissenting Commissioners assert that Congress intended temporary reinstatement to protect miners from bureaucratic delay only during the

Finally, in discussing Section 105(c)(3) proceedings, Congress repeatedly referred to the miner as the “complainant” and to the Section 105(c)(3) proceeding as an “action” brought by the miner. *See* S. Rep. No. 95-181 at 37, *Leg. Hist.*, at 625; S. Conf. Rep. No. 95-461 at 52-53 (1977), *Leg. Hist.* at 1330. As stated above, Congress’ use of those terms in describing Section 105(c)(3) proceedings indicates Congress’ view that when a miner files a Section 105(c)(3) action, the miner is taking an administrative action to advance the underlying complaint he filed under Section 105(c)(2). The legislative history thus reflects that Congress did not, as Vulcan suggests, consider the miner’s underlying complaint to have “closed” when the Secretary decides not to file a complaint under Section 105(c)(2). *See* Vulcan Br. at 15.<sup>6</sup>

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Secretary’s investigation of the miner’s complaint. *See* Vulcan Br. at 17 and *A&S Construction*, 31 FMSHRC at 984 (citing S. Rep. No. 95-461 at 52-53 reprinted in *Leg. Hist.* at 1330-31, in which Congress indicated that it provided temporary reinstatement “[t]o protect miners from the adverse and chilling effect of loss of employment while such matters are being investigated . . . .”) As the Commission majority recognized, reading the statement in the “cramped fashion” in which Vulcan and the dissent read the statement is inconsistent with the legislative history set forth above indicating Congress’ intent that temporary reinstatement remain in effect until the resolution of the miner’s discrimination complaint, and with the history set forth above indicating Congress’ intent that miners not suffer during “even a short period of unemployment.” *North Fork*, 33 FMSHRC at 39-40 (citing S. Rep. No. 95-181 at 37, *Leg. Hist.* at 625). Moreover, reading the statement in the manner urged by Vulcan and the dissent is inconsistent with Vulcan and the dissent’s own interpretation, under which temporary reinstatement extends beyond the time period when the Secretary investigates the miner’s underlying complaint and through the pendency of a Section 105(c)(2) complaint. *North Fork*, 33 FMSHRC at 39-40.

<sup>6</sup> The dissenting Commissioners in *North Fork* stated that their interpretation was supported by the fact that a bill had been introduced in Congress that would amend the Act to specifically require temporary

In sum, the plain meaning of Section 105(c)(2) is that a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act.

*Excel Mining*, 334 F.3d at 6 (discussing the first step of the *Chevron* analysis). Even if the meaning of Section 105(c)(2) is not plain, the Secretary's interpretation of Section 105(c)(2) is reasonable and entitled to acceptance. *See id.* (discussing the second step of the *Chevron* analysis).

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reinstatement orders to remain in effect until a final Commission order on the miner's underlying complaint. *See North Fork*, 33 FMSHRC at 53-54. Their position is unavailing for several reasons.

First, an unenacted proposal to amend the law carries little interpretive significance. *See NAACP v. American Family Mutual Insurance Co.*, 978 F.2d at 299-300. Moreover, it is well established that Congress may propose amending a statute "purely to make what was intended all along even more unmistakably clear." *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985). An important factor in determining whether an amendment was intended to clarify rather than change prior law is whether a conflict existed with respect to the interpretation of the prior law. *Piambra Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000). Significantly, at the time the bill on which the dissenting Commissioners relied was introduced, the only decision addressing the issue was *A&S Construction*, in which the Commission evenly split on whether temporary reinstatement orders remain in effect until a final decision on the merits of the miner's underlying complaint. *See* 31 FMSHRC 975 (2009). Accordingly, Congress' intent in introducing the proposed legislation is best viewed as an attempt to make "more unmistakably clear" the meaning of the provision. *Montgomery County*, 761 F.2d at 1003.

3. *Requiring Temporary Reinstatement To Remain In Effect Pending A Final Commission Order On the Miner's Underlying Discrimination Complaint Is Consistent With Due Process*

The Court reviews questions of law *de novo*. *E.g., Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006).

Vulcan argues that requiring temporary reinstatement orders to remain in effect until there is a final Commission order on the miner's underlying complaint when the complaint is litigated by the miner under Section 105(c)(3) violates the Due Process Clause of the Fifth Amendment. Vulcan Br. at 22. Vulcan, however, never raised this argument to the Commission. *See* S.A. 60-65 (Vulcan's petition for discretionary review). Accordingly the Court has no authority to consider it. *See* 30 U.S.C. § 816(a)(1) ("No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.")

In any event, the argument is unavailing. Vulcan asserts that requiring temporary reinstatement orders to remain in effect until there is a final Commission order when the complaint is litigated by the miner under Section 105(c)(3) violates the Due Process Clause because there is no "expeditious review." Vulcan Br. at 23 (citing *Jim Walter Resources*, 920 F.2d at 748 n.11 and *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987)).<sup>7</sup> In support of

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<sup>7</sup> In making its argument, Vulcan relies on a passage in *Jim Walter Resources* in which the Eleventh Circuit, in holding that the "not frivolously brought" standard for obtaining temporary reinstatement "far exceed[s]" the

its argument, Vulcan points out that the Section 105(c)(3) trial on the merits of Mr. Dunne's underlying discrimination complaint is not scheduled until December 13, 2011. Vulcan Br. at 23. It is well established, however, that a mere recitation of the duration of a proceeding and an assertion that the proceeding took too long do not state a claim of constitutional deprivation.

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985);

*Cassim v. Bowen*, 824 F.2d 791, 798 (9th Cir. 1987) (citing *Loudermill* and

stating that "it is not enough merely to assert that the denial of a 'speedy resolution' violates due process"). *See also Brock v. Roadway*, 481 U.S. at 268

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minimum requirements of due process (920 F.2d at 747), emphasized the temporary nature of temporary reinstatement. *See* Vulcan Br. at 23 (citing 920 F.2d at 738 n. 11). This passage proves nothing. Temporary reinstatement is temporary under the Secretary's reading, and ends with a decision on the merits of the miner's underlying complaint.

Although the statement in *Jim Walter* indicated in dictum that temporary reinstatement would end if the Secretary decided not to bring a formal complaint or there was a decision of the merits in the employer's favor, because the Court's statement was made at a time when the Commission rules required that temporary reinstatement end when the Secretary decided not to proceed under Section 105(c)(2). For that reason, the Court's statement cannot fairly be read as suggesting that the Court interpreted Section 105(c)(2) in the same way Vulcan argues that Section 105(c)(2) should be interpreted.

Vulcan does not assert, and nothing in *Jim Walter* suggests, that the Court's holding in *Jim Walter* would be different under the Secretary's and the Commission majority's reading. Indeed, it is apparent that it would not be different, because the same "panoply of procedural [predeprivation] protections" relied on by the Court (920 F.2d at 745) in determining that the "not frivolously brought" standard "far exceed[s]" the minimum requirements of due process ((920 F.2d at 747) applies regardless of whether temporary reinstatement continues while the Secretary litigates the miner's complaint under Section 105(c)(2) or while the miner litigates his complaint under Section 105(c)(3).

(declining to consider an argument of excessive delay because there was no evidence concerning the reason for the delay).

Moreover, by asking the Commission to reject the Secretary's plain meaning reading, Vulcan is effectively making a facial challenge to that reading. To support such a challenge, Vulcan would be required to show that if temporary reinstatement orders remain in effect until there is a final Commission order on the miner's Section 105(c)(3) action, there will be excessive delay in every Section 105(c)(3) case. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). (“[a] facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid[]”). Vulcan does not, and cannot make such a showing, particularly because Section 105(c)(3) itself explicitly requires the Commission to expedite Section 105(c)(3) proceedings. *See Dutil v. Murphy*, 550 F.3d 154, 162 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2064 (2009) (rejecting an argument that a statute requiring a “speedy hearing” violated due process because the plaintiff “failed to show that ‘no set of circumstances exist[ed] under which the [‘speedy hearing’ language of the . . . statute] would be valid,’” and holding that “despite the obvious ambiguity in the phrase ‘speedy hearing,’ those words permit interpretations that would be consistent with even an exacting due process requirement . . . .” (citing and quoting Salerno)).

If Vulcan believes that the delay in this case has become so excessive as to constitute a violation of due process, it should raise the issue in an as-applied challenge. Tellingly, it has not. The Court should not reject the Secretary's reading of the statute in this case "because it might, but need not, be applied in an unconstitutional manner." *Cassim*, 824 F.2d at 798. *Accord Dutil*, 550 F.3d at 162.

In effect, Vulcan asks the Court to declare Congress' plainly manifested statutory intent unconstitutional on the basis of Vulcan's mere assertion that "expedited proceedings are not a reality" (Vulcan Br. at 23), and in disregard of the fact (1) that the statute itself explicitly requires the Commission to expedite such review and (2) that if and when the Commission fails to carry out that statutory requirement, the operator can request appropriate relief from the Commission based on the facts in that case. The Court should decline to act "in so fell and portentous a manner." *Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (emphasizing that constitutional challenges to Congressional enactments "ask the courts to confront another branch of government").

## CONCLUSION

For all of the foregoing reasons, the plain meaning of Section 105(c)(2) is that a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by

the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act. *Excel Mining*, 334 F.3d at 6 (discussing the first step of the *Chevron* analysis). If the meaning of Section 105(c)(2) is not plain, the Secretary's interpretation of Section 105(c)(2) is reasonable and entitled to acceptance. *See id.* (discussing the second step of the *Chevron* analysis).

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in compliance with Fed. R. App. P. 32(a) using Microsoft Word for Windows, in Century font, 12 point, and according to the word processing system's word count, there are no more than 9,278 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System.

Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in this case are not CM/ECF users. I have mailed the foregoing document by First-Class, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM-ECF participant.

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# ADDENDUM

**Section 105(c) of the Mine Act**  
**30 U.S.C. §815(c)**

(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 paragraph.

**(3)** Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). 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, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of section 818 and 820(a) of this title.