ORAL ARGUMENT HELD DECEMBER 15, 2022
SUBSEQUENT ARGUMENT NOT YET SCHEDULED
No. 22-1071

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Secretary of Labor,
Mine Safety and Health Administration,

Petitioner

v.

KC Transport, Inc. 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

Supplemental Brief for the Secretary of Labor

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Mine Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration

Summary of Argument

The Court has ordered the parties to file supplemental briefs on five questions.

Mine Act jurisdiction is not limited to the items listed in section 3(h)(1)(C) ("subsection C") of the Act only if they are located at an extraction site or processing plant. The text of the statute does not limit jurisdiction in that way, and this Court has already resolved this issue. *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).

And interpreting the statute as including moveable subsection (C) items only when they are located in or at a fixed physical manifestation enumerated in the same list would frustrate MSHA's ability to carry out its obligations because this interpretation would create arbitrary boundaries: operators could move moveable items off fixed subsection (C) locations to elude MSHA. Under this interpretation, KC Transport could simply drive its trucks off the maintenance facility to avoid enforcement. And while location is relevant to determining whether an item is subject to the Mine Act, it cannot be dispositive; a rigid line creates an edge to MSHA's enforcement and inspection authority that operators can simply cross.

Nothing in the statutory text requires moveable subsection (C) items to be located on the fixed locations in sections 3(h)(1)(A), (B), or (C). The statute does not distinguish between moveable and fixed items; subsection (C) presents a list of

both kinds of items, all of equal grammatical rank. And Congress provided instructions for interpreting this provision: interpretations should be as broad as possible in favor of Mine Act jurisdiction.

Operators can comply with sections 109(a) and (d) of the Mine Act, which deal with certain recordkeeping and notice-posting requirements, even if moveable subsection (C) items are not tethered to a physical location. While a hyper-literal reading of the statute would require each item to have a mine address and office with a bulletin board, that reading is impractical. Operators can supply an address for service of documents that is not a mine, and they can make notices available without a bulletin board. MSHA takes a practical, not hyper-literal, approach to the statute's administrative requirements. And these requirements are unrelated to the scope of Mine Act jurisdiction.

It is not disputed that 60% or more of the services at the facility supported Ramaco's mines or that any such "support" services fall within the meaning of "used in or to be used in" mining. The parties stipulated to the former, and KC Transport has not disputed the latter. And that the facility was used in mining is clear from the facts: it was used to maintain haulage equipment used to haul coal.

Ultimately, the Court need not reach the interpretive questions on whether moveable subsection (C) items need to be located on fixed locations in order to

resolve this case: the moveable items in this case (the coal haulage trucks) were undisputedly located at a fixed location (the maintenance facility). If this Court determines the latter is covered by the Mine Act, that is sufficient to resolve this case.

Argument

1. Must an item listed in 30 U.S.C. § 802[(h)](1)(C) be located at an extraction site or a processing plant to be a "mine" under the Act?

No. Items in subsection (C) of the Mine Act do not need to be located at an extraction site as described in 30 U.S.C. 802(h)(1)(A) ("subsection (A)") or at a processing plant to be a "mine." Several canons of statutory construction do not support that interpretation, and this Court has already held that subsection (C) items need not be located at an extraction site to be "mines." *Carolina Stalite*, 734 F.2d at 1552.

Nothing in the text of subsection (C) requires that the enumerated items in that section must be located on an extraction site (or any other location) to be a "mine," and reading the statute that way would elide subsection (C). Each subsection of section 3(h)(1) specifies a different category of "mine": (A) extraction sites; (B) private roads appurtenant to extraction sites; and (C) lands, certain structures, and "equipment, machines, tools, or other property" used in mining. These subsections are joined by "and." 30 U.S.C. 802(h)(1). The

coordinating conjunction "and" is used "to join clauses of equal grammatical rank." Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 146 (2016). "[L]inking independent ideas is the job of a coordinating junction like 'and . . . .'" *Bruesewitz* v. *Wyeth, LLC*, 562 U.S. 223, 236 (2011). The use of that conjunction here indicates that subsection (C) is equivalent to subsection (A), not subordinate to it. There is no basis in the text for making subsection (C) items "mines" only when located on subsection (A) extraction sites.

The statutory context confirms that subsection (C) provides an independent basis for jurisdiction. Subsection (A) refers to an "area of land" and (B) refers to roads "appurtenant to such area . . . ." 30 U.S.C. 802(h)(1). This shows that Congress knew how to include a locational element in the definition of "mine." "[W]here Congress includes particular language in one subsection of a provision but omits it in another subsection, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Vill. of Barrington, Ill.* v. *Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011) (citing *Russello* v. *U.S.*, 464 U.S. 16, 23 (1983)) (cleaned up). If Congress meant (C) to include a locational element, it would have said so.

Similarly, the definition of "mine" in the Mine Act's predecessor statute—the Federal Coal Mine Health and Safety Act of 1969—contained locational language

the Congress did not include in the Mine Act's definition. The Coal Act's definition included "an area of land" for extracting coal and "property, real or personal, placed upon, under, or above the surface of *such land*"—that is, non-land items were "mines" only if they were located on (or above or below) the "area of land" described in subsection (A). 30 U.S.C. 802(h) (1976) (emphasis added). The Mine Act's subsection (C), however, conspicuously does not connect any of the items listed in (C) to "such land" (even though subsection (B) does). That change shows Congress's intent to define as "mines" the items listed in (C), regardless of their location relative to any "such land." The Mine Act's amended definitions "reflect the broader jurisdiction of the Act." *Carolina Stalite*, 734 F.2d at 1554 (quoting S. Rep. No. 95-181, at 14 (1977) ("Senate Report")) (cleaned up).

Requiring subsection (C) items to be on extraction sites also would be nonsensical, given the language of the statute. Subsection (A) refers to "an area of land from which minerals are extracted," and (C) refers to "lands . . . used in, or to be used in . . ." mining. 30 U.S.C. 802(h)(1). If the items in (C) had to be *on* the lands described in (A) to be "mines," then (C) would refer in part to "lands" located on "an area of land." This Court rejects nonsensical interpretations. See, *e.g.*, *Emerald Mines Co.* v. *FMSHRC*, 863 F.2d 51, 57 (D.C. Cir. 1988) (rejecting a

mine operator's interpretation that was "susceptible of the characterization 'nonsensical'").

Moreover, this Court has already recognized that an item in subsection (C) need not be located on an extraction site to be a "mine." In *Carolina Stalite*, this Court held that a gravel processing facility nearby, but not on, a quarry was covered by subsection (C). 734 F.2d 1547. It reasoned that the Mine Act "defines a 'mine' as including 'structures' and 'facilities' used in 'milling' or 'the work of preparing ... minerals,'" and "does not require that those structure or facilities … be located on property where such extraction occurs." *Id.* at 1552. It emphasized that the Mine Act's "jurisdictional bases were expanded [from the predecessor statute's] accordingly to reach not only the 'areas ... from which minerals are extracted,' but also the 'structures ... which are used or are to be used in ... the preparation of the extracted minerals.'" *Id.* at 1554 (quoting Senate Report 14). It also emphasized Congress's "intention that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation.*" *Ibid.* (quoting Senate Report 14) (emphasis added). It recognized the statute provides a "'sweeping definition' of a mine," and that "the statute makes clear that the concept that was to be conveyed by the word is *much more encompassing than the usual meaning* attributed to it—the word means what the statute says it means." *Id.* at 1554

(quoting *Marshall* v. *Stoudt's Ferry Preparation Co.,* 602 F.2d 589, 591-592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980)). That decision binds this Court, because "[i]t is fixed law that 'this Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court.'" *Sierra Club* v. *Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (quoting *Maxwell* v. *Snow,* 409 F.3d 354, 358 (D.C. Cir. 2005)).

Other cases support this reading. See *Stoudt's Ferry*, 602 F.2d at 591-592, and *Harman Mining Corp.* v. *FMSHRC*, 671 F.2d 794, 795-796 (4th Cir. 1981). In *Stoudt's Ferry*, a plant where fuel was separated from gravel and sand was a "mine" under the Act. 602 F.2d at 591-592. A different entity dredged material from a river and deposited that material in a nearby basin. *Id.* at 591. The operator used a front-end loader to move the dredged refuse onto a conveyor belt and into a plant, where burnable fuel was sifted from the rest of the refuse. *Ibid.* MSHA attempted to inspect the plant and the operator argued that the plant fell under OSHA jurisdiction. The Third Circuit determined MSHA had jurisdiction and explained that "the statute makes clear that the concept that was to be conveyed by the word ['mine'] is much more encompassing than the usual meaning attributed to it—the word means what the statute says it means." 602 F. 2d at 592. In *Harman Mining*, a "car-dropping" facility where railroad cars were loaded with coal was a "mine"

under the Act. 671 F.2d at 796. The operator transported prepared coal from a prep plant to a storage facility by loading it into railroad cars at a car-dropping facility and then rolling those cars down an incline to the storage facility ("dropping cars.") *Id.* at 795. While dropping cars, the operator lost control of some cars; they picked up speed and sped down the incline, smashing into cars parked on the tracks and killing a railway worker. *Id.* at 796. MSHA asserted jurisdiction over the car-dropping facility, and the Fourth Circuit agreed. *Ibid*. The Fourth Circuit said, "it is clear that a 'mine' includes facilities and equipment 'used' in the work of preparing coal"—i.e., subsection (C). *Ibid*. In *Bush & Burchett, Inc.* v. *Reich,* the Sixth Circuit determined that a public road was not subject to MSHA jurisdiction (in that case, OSHA cited an employer and the employer raised MSHA jurisdiction as a defense). 117 F.3d 932, 937 (6th Cir. 1997). The Sixth Circuit did opine, however, that MSHA had jurisdiction over the coal trucks traveling that road (though those trucks were not at issue in the case). *Id.* at 939.

The same principles apply to processing facilities. Subsection (C) includes items "used in, or to be used in" the work of preparing coal and other minerals. And other mineral processing facilities are likewise covered by the Act as facilities used in, or to be used in, milling. See, *e.g.*, *Carolina Stalite*, 734 F.2d at 1552. Subsection

(C) also provides that the term "mine" includes "custom coal preparation facilities." 30 U.S.C 802(h)(1)(C).

Nothing in the text of subsection (C) requires the enumerated items to be located at a processing plant (and some of these items, like "lands," could not logically be located at a processing plant). See *Emerald Mines*, 863 F.2d at 57 (this Court rejects nonsensical interpretations). The enumerated list precedes the mention of coal preparation facilities, which appears in its clause at the end of 3(h)(1)(C). The inclusion of that clause does not subsume all the preceding text of subsection (C).

Thus, the statutory text and this Court's own precedent make clear that subsection (C) describes an independent basis for Mine Act jurisdiction. So does Congress's intent. As this Court recognized in its initial opinion, Congress was particularly interested in Mine Act jurisdiction over non-extraction site property—what the Court references as "physical manifestations"—in light of deadly accidents. The Senate Report referred to the 1972 Buffalo Creek disaster; a coal slurry impoundment dam that was not on an extraction site burst and flooded a hollow in West Virginia with wastewater, killing 125 people, injuring over a thousand more, and leaving more than 4,000 survivors homeless. Gerald M. Stern, *The Buffalo Creek Disaster* xiii (2d ed. 2008)); see Senate Report 14. This tragedy

illustrates why the Mine Act includes the items listed in subsection (C) regardless of whether they are on extraction sites or processing plants.

And this reading is in line with Congress's instructions in interpreting this provision: "what is considered to be a mine and to be regulated under this Act [is to] be given the *broadest possible interpretation*." Senate Report 14 (emphasis added). An interpretation of the statute limiting subsection (C) items to extraction sites or processing plants would contravene the purpose of the statute.

2. Would interpreting the statute's definition of "mine" to apply to movable objects in 30 U.S.C. § 802(h)(1)(C) (e.g., equipment, machines, and tools) only when they are located in or at a physical manifestation enumerated in the same list and that physical location is "used in, or to be used in, or resulting from, the work of" mining frustrate or reasonably contain MSHA's inspection obligations?

This would frustrate MSHA's inspection obligations because operators could escape enforcement by moving moveable objects across an arbitrary (and in some cases, shifting) line.

If subsection (C) items were "mines" only when on extraction sites, then inspectors would be forced to spend their time delineating boundaries instead of "determining whether there is compliance with the mandatory health or safety standards or" the Mine Act. See 30 U.S.C. 813(a). This is especially impractical because the boundaries of non-moveable mines—including subsection (A) lands

where minerals are extracted—are not always crisp and invariable. Mining operations track the minerals being mined. An underground coal mining operation, *e.g.*, typically follows the coal seam where it runs through the earth; as the operation advances, the boundaries of the extraction site shift and evolve. A quarry where stone is blasted from the rock face, *e.g.*, expands and changes as more stone is blasted away, widening and altering the periphery of the extraction site. So, where an extraction site (*e.g.*) ends is not always a precise, clean line. As boundaries of subsection (A) extraction sites shift, items like facilities and equipment might end up in or outside of those boundaries; facilities, *e.g.*, that continue serving a mining purpose (*e.g.*, maintenance of coal haulage trucks) might fall outside of a boundary as it shifts away.

And if jurisdiction ended at an arbitrary line, an operator could simply remove a moveable item from a fixed location to avoid an inspection. This kind of behavior is not merely theoretical. For example, in one case, MSHA was inspecting a stone mine; the operator used a truck to haul explosives. *Hoover Excavating & Trucking, Inc.*, 41 FMSHRC 761, 768 (2019) (ALJ). The MSHA inspector planned to inspect the truck, but the operator drove it across the street, apparently to avoid an inspection. *Id.* at 765. The MSHA inspector told the operator that he would contact local authorities and issued a citation to the operator for refusing the inspection. *Id.*

at 765-766. The operator ultimately acquiesced and allowed the MSHA inspector to inspect the truck. *Id.* at 765. In it, the MSHA inspector discovered explosives; they were improperly marked, improperly stored, and unaccompanied by the required chemical fire suppression equipment, creating a serious risk of an explosion. *Id.* at 767-768.

In fact, this appears to be the tack that KC Transport took here. KC Transport initially constructed its maintenance facility (after getting Ramaco's permission to use that area) at the edge of the private haul road. JA 7, 9. After MSHA cited KC Transport at that maintenance facility, KC Transport moved the facility a thousand feet back into the trees. JA 9. And now it claims MSHA lacks jurisdiction to inspect it. Nothing in the statute requires this kind of arbitrary result, and "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012).

If Mine Act jurisdiction extends to equipment, *e.g.*, only when it is located at one of the fixed locations in subsection (C), operators will be incentivized to store and move items across an invisible boundary to avoid MSHA enforcement and avoid abating violations. And assuming that KC Transport's shop is a facility

covered in subsection (C), KC Transport could simply drive its coal trucks a few feet further into the trees, off the maintenance facility lot.

In its previous decision, the Court asked how "without a clear locational limit . . . MSHA [could] monitor the equipment's location and complete the statutorily mandated inspection requirements." Dec. at 14. It is useful to understand how MSHA keeps records (including records of inspections, violations, citations, production, etc.) about each mine. MSHA assigns a unique identifier called a mine identification number, or mine ID. See MSHA Form 7000-51, Mine Operator Identification Request, https://www.msha.gov/sites/default/files/Support_Resources/Forms/7000-51_3.pdf (Mar. 2022). MSHA assigns mine IDs to various types of mines, including an "underground" mine, a "strip, quarry, pit, [or] dragline," an "auger," a "dredge," "independent shops and yards," a "prep plant, mill, [or] tipple," or "other mining"—a catch-all provision for types of mines other than those listed. *Ibid.* MSHA uses mine IDs for administrative tracking purposes. See 30 U.S.C. 813(a), (i). But MSHA does not assign separate mine IDs to every item or operation that meets the definition of mine; instead, MSHA "decide[s] on a case-by-case basis whether operations are related or independent for the purpose of assigning identification numbers." III MSHA, *Program Policy Manual* 1 (Jan. 2014), available at https://arlweb.msha.gov/regs/

complian/ppm/PDFVersion/PPM-Vol-III.pdf.[1] For example, some preparation plants and extraction operations share a mine ID, *ibid.*, even though each independently is a mine.

Similarly, MSHA does not generally assign separate mine IDs to pieces of equipment or other movable items. MSHA has authority to inspect moveable items "used in" mining, but it does not necessarily treat that item as its own totally independent operation with a distinct mine ID. There are, however, some exceptions. For example, MSHA assigns mine IDs to dredges, which are "[l]arge floating machine[s] used in underwater excavation for … recovering subaqueous deposits having commercial value." *Dictionary of Mining, Mineral, and Related Terms* 168 (2d ed. 1996).[2] MSHA assigns mine IDs to other portable plants (also called "portable crushers" and "portable screeners," or "portable rock crushing plants" and "portable rock screening plants"), which are "plant[s] mounted so that [they] can be moved over the highways on [their] own mounting and that

[1] MSHA's Program Policy Manual is "the official repository of the Secretary's interpretation of the regulations and of [her] enforcement practices . . . ." *Jim Walter Res., Inc.* v. *Sec'y of Lab.*, 103 F.3d 1020, 1024 (D.C. Cir. 1997).

[2] For a photograph of a dredge, see MSHA, *September 9, 2022 Fatality - Final Report* 1, available at https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Enforcement/2022/September%209%2C%202022%20-%20Final%20Report.pdf.

perform[] all the operations of a stationary plant, including crushing, scalping, secondary crushing, screening, washing, and sand separation." *Id.* at 420.[3] "When a mine operator has a portable plant which operates in several different locations, the mine identification number is to be assigned to the plant only and not to the pit." *Program Policy Manual* 1-2. And MSHA assigns mine IDs "to mobile or portable coal auger and highwall mining operations"[4] if those "operations move between locations . . . ." MSHA Program Policy Letter No. P13-III-01, 1, 2 (effective June 24, 2013), available at https://www.msha.gov/p13-iii-01-0.[5]

So even though MSHA does not assign mine IDs to each piece of equipment, machine, or tool that is used in mining, mine IDs enable it to take a realistic approach to its statutory obligations. Assigning a mine ID to every tool or piece of

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[3] For a photograph of a portable crusher, see MSHA, *December 3, 2021 Fatality - Final Report* 1, available at https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Enforcement/December%203%2C%202021%20-%20Final%20Report.pdf

[4] For a photograph of an auger mining machine, see MSHA, *Fatality #8 - October 17, 2018 - Final Report* 1, available at https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Coal/2018/CAI-2018-08%20SURNAME_0.pdf.

[5] "As the statute and formal regulations contain ambiguities, the MSHA from time to time issues Program Policy Letters ('PPLs') intended to coordinate and convey agency policies, guidelines, and interpretations to agency employees and interested members of the public." *Am. Min. Cong.* v. *MSHA*, 995 F.2d 1106, 1107 (D.C. Cir. 1993).

equipment is unrealistic; MSHA needs flexibility in its administrative functions. See *Program Policy Manual* 1-2. While MSHA has jurisdiction over each item used in mining, nothing in the Mine Act requires MSHA to issue a separate ID for each one. The assignment of IDs is an internal MSHA function and MSHA has done what makes sense.

Interpreting the statute to give MSHA authority to inspect movable items only when on a "physical manifestation" in subsection (C) would also effectively eliminate MSHA's ability to inspect movable items like portable plants. Portable plants move from place to place. See, *e.g.*, *Konitz Contracting*, 15 FMSHRC 1984, 1986 (1993) (ALJ) (explaining that portable plants are "very mobile" and are "on wheels" or can be "put on flatbed semi-trailers" and sent to different locations). Though they themselves mine (e.g., by crushing and sizing rock), they do not always or even *often* engage in mining on one of the "physical manifestations" of subsection (C). For example, in *State of Alaska, Department of Transportation*, the Commission determined that MSHA had jurisdiction over a portable plant that screened, sized, and sorted crushed rock extracted from sand and gravel pits. 36 FMSHRC 2642, 2647 (2014). The plant performed this work on a public road that was not itself covered by section 3(h)(1), but the Commission determined that the plant was subject to MSHA jurisdiction because it was equipment used in mining.

Ibid. Portable plants are often used (as *State of Alaska* illustrates) adjacent to road-construction projects, which do not usually take place on land or structures listed in (C). If MSHA had authority to inspect movable (C) items only when they were on fixed (C) locations, that would exclude many of the thousands of moveable mines that are operating today.

MSHA has an obligation to conduct multiple annual inspections, 30 U.S.C. 813(a), but that is not the only inspection obligation that the Mine Act imposes. MSHA also has a statutory obligation to determine whether an operator has abated a cited violation. 30 U.S.C. 814(b). That is what MSHA was doing in this instance: terminating previously issued citations. JA 4, 5. Drawing an arbitrary line around fixed locations would mean that rather than abating a dangerous violation, an operator could simply remove a cited moveable item off a non-moveable item and beyond MSHA's enforcement reach. MSHA would not be able to fulfill its obligation to determine whether the cited violation had been abated, see 30 U.S.C. 814(b); this outcome would stifle MSHA's ability to require operators to abate violations, endangering miners. It would also mean that MSHA would waste taxpayer and inspection resources conducting multiple visits to the same site to try to "catch" the equipment when it was back on the site. Many mines are in remote locations. Expecting MSHA to travel hours to visit a mine weekly, for example,

until it can verify abatement, would take resources from MSHA's enforcement obligations at other mines.

This does not mean that a movable item's location is irrelevant to whether it is a mine. In determining whether a subsection (C) item is "used in" mining, location is an important factor in a fact-bound analysis. See, *e.g.*, *United Energy Servs., Inc.* v. *Fed. Mine Safety & Health Admin.*, 35 F.3d 971 (4th Cir. 1994) (MSHA had jurisdiction over conveyor belt system that transported coal waste to an electric power plant; the court considered that parts of the conveyor belt were located on subsection (A) mine property); *Calmat Co. of Ariz.*, 27 FMSHRC 617 (2005) (MSHA had jurisdiction over haul trucks used in mining and located on a haul road at a facility where OSHA and MSHA split jurisdiction; the Commission discussed the proximity of an OSH Act-covered concrete batch plant and a Mine Act-covered maintenance shop); Sec'y Supp. Br. 18-20 (collecting cases). The point here is that the location of a moveable item is relevant to whether it is, in fact, "used in" extraction or milling—and an item very far away from where extraction or milling activity takes place may not be considered "used in" mining. But location is not dispositive. If it were, as discussed, operators would be able to avoid enforcement simply by crossing an arbitrary boundary, and that inhibits the Secretary's ability to carry out the remedial purposes of the Mine Act. "A textually permissible

interpretation that furthers rather than obstructs the document's purpose should be favored." *Reading Law* 63.

3. Does the statutory text and scheme indicate that the movable types of property identified in 30 U.S.C. § 802(h)(1)(C) remain "mines" when not physically located within the non-movable manifestations listed in subsections (A)-(C)?

Yes. In addition to the practical issues discussed in section 2, an interpretation that would require moveable items to be located on fixed locations in subsections (A), (B), and (C) is incongruous with the text and scheme of the statute.

Nothing in the text of the statute suggests that the moveable subsection (C) items must be located on a fixed subsection (C) location to be covered by the statute. Congress's decision not to including anything of that nature is presumed to be deliberate. *Vill. of Barrington*, 636 F.3d at 661.

In fact, the statutory text does not distinguish between the moveable and fixed items in the list in subsection (C) whatsoever; the text is merely a list that does not relate any one item to any other item. See 30 U.S.C. 802(h)(1)(C). And there is nothing relating the moveable items in subsection (C) to the "lands" and "roads" in subsections (A) and (B), as this Court recognized in *Carolina Stalite*. See 734 F.2d at 1554. Instead, the enumerated list in subsection (C) presents each item as grammatically equivalent to every other, and a distinct entry from every other. The

"other property" provision has an "includes" clause, so that "impoundments, retention dams, and tailing ponds," are written as a non-exhaustive subset belonging to the "other property" category. See *Reading Law* 132-133 ("include" verbs are presumed to introduce examples, not an exhaustive list). But this subset within a subset does not disrupt the grammatical equilibrium between the terms. They are simply that: a list of different, equally grammatically important items.

Congress did not intend to limit MSHA's jurisdiction to extraction sites, roads, and fixed locations used in mining alone, and this Court should take that legislative history into account. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 209-212 (1994) (reviewing the Act's legislative history in assessing administrative-exhaustion issues); *KenAmerican Res., Inc.* v. *Sec'y of Lab.*, 33 F.4th 884, 888-890 (6th Cir. 2022) (reviewing the Act's legislative history in determining that the prohibition on advance notice of MSHA inspections applies to operators); *Meredith* v. *FMSHRC*, 177 F.3d 1042, 1048 (D.C. Cir. 1999) (reviewing the Act's legislative history to interpret its judicial-review provision). Congress said that "what is considered to be a mine and to be regulated under this Act [is to] be given the *broadest possible interpretation*." Senate Report 14 (emphasis added). And where doubts exist as to jurisdiction, the matter should be "resolved in favor of inclusion . . . within the coverage of the Act." *Ibid.*; *Carolina Stalite*, 734 F.2d at

1554. Given this context, there is no reason to believe that Congress intended to limit MSHA jurisdiction to extraction sites, roads, and non-moveable subsection (C) items while excluding moveable items used in mining.

The Secretary is not aware of any prior interpretation, by the Commission, this Court, or any other, holding that moveable items are "mines" only if located on other, grammatically equivalent, items listed in subsection (C).

In any event, the Court need not reach the question of whether the moveable items in subsection (C) are "mines" when not physically located at a fixed location. There is no dispute that the (moveable) equipment in this case was located at a (fixed) maintenance facility. If the Court concludes that the maintenance facility is covered by the Mine Act, that is sufficient to resolve this case. And the maintenance facility is covered; it is a facility used in mining. See section 5, infra.

4. If the movable objects in 30 U.S.C. § 802[(h)](1)(C) need not be tethered to any physical location, could operators comply with registration obligations or identification obligations [under] 30 U.S.C. § 819(a), (d)?

Yes. Sections 109(a) and (d) require operators to supply an address for service of documents and to make certain documents available to miners; operators can comply with these requirements even if moveable items are not tethered to any particular physical location.

Sections 109(a) and (d) of the Mine Act impose on operators certain recordkeeping and notice-posting requirements. See 30 U.S.C. 819. Under section 109(a), at "each. . . mine," operators must maintain "an office" with a bulletin board and must post orders, citations, notices, and decisions where miners can access and read them. 30 U.S.C. 819(a). Under section 109(d), mine operators must file with the Secretary the name and address of "such mine" as well as the name and address of the person who controls or operates the mine, and the responsible official in charge of health and safety at the mine. 30 U.S.C. 819(d). MSHA's regulations implement section 109(d) and provide additional instructions to operators. 30 C.F.R. Part 41, Part 45. These include instructions for independent contractors to supply an address of record to MSHA for service of documents. 30 C.F.R. 45.3, 45.6.

A hyper-literal reading of sections 109(a) and (d) would require each item covered under subsection (C) to have offices, bulletin boards, and addresses. But canons of statutory interpretation discourage hyperliteralism, particularly where the result is "contrary to common sense." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

MSHA takes a practical approach to operators' compliance with section 109(a) when dealing with mines that do not have fixed locations. MSHA has not required

every mine to have its own bulletin board, because that would be overly rigid and impractical. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360-361 (D.C. Cir. 1979) (unless Congress was "extraordinarily rigid" in drafting a statute, de minimis exemptions are appropriate if regulation would have "trivial or no value"). For example, portable mining machines are large, see *supra* pp. 14-15 & n.3; MSHA permits citations to be posted on the machines themselves. MSHA also permits mine operators, including those that do not have bulletin boards, to fulfill notice-posting requirements with electronic communication. See, *e.g.*, Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection, 89 Fed. Reg. 28, 218, 28,328 (Apr. 18, 2024) (responding to a commenter's concern that a "requirement to post [dust sampling] results on a bulletin board is too prescriptive and may cause an issue for operators who do not have a bulletin board" and clarifying that "[f]or portable operations and other operators who prefer to communicate electronically, the final rule permits electronic notification in addition to posting the record on the bulletin board").

To satisfy section 109(d), operators that do not maintain a presence at a static physical location supply MSHA with an address where they can be reached and for service of documents. In MSHA parlance, this is an "address of record." See 30 C.F.R. 41.30, 45.6. This address is a requirement so that MSHA can serve

documents; it is not necessarily the address for the purpose of inspections. For example, the form MSHA requires operators to use to provide or update their section 109(d) information contains separate fields for operators to provide "Mine location address" and "Address of Record." See MSHA Form 2000-7, Legal Identity Report, https://www.msha.gov/sites/default/files/Support_Resources/Forms/2000-7_3.pdf (implementing 30 C.F.R. Part 41).

MSHA is pragmatic; it does not interpret these statutory requirements for mines in a way that makes no sense. Instead, consistent with the purpose of these specific statutory provisions, it ensures that miners are notified about citations, and that operators maintain an address of record.

Moreover, sections 109(a) and (d) do not concern the definition of "mine." While there is a "presumption that words used in different parts of the same act are intended to have the same meaning," that presumption "is not rigid and readily yields whenever there is such variation . . . to warrant the conclusion that they were employed in different parts of the act with different intent." *Envtl. Def.* v. *Duke Energy Corp.,* 549 U.S. 561, 574 (2007) (citing *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 433 (1932)). The Supreme Court has explained that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used

more than once in the same statute or even in the same section." *Ibid*. Thus, "the meaning [of the same words] well may vary to meet the purposes of the law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (citing *Atlantic Cleaners & Dyers,* 286 U.S. at 433). This principle holds true even where "terms share a common statutory definition. . . ." *Envtl. Def.,* 549 U.S. at 574.

This Court has recognized this principle, explaining that "[l]ike all rules of statutory construction," the general rule that words appearing in different provisions of a statute have the same meaning "is defeasible." *Weaver* v. *U.S. Information Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (citing *Atlantic Cleaners & Dyers,* 286 U.S. at 433).

The meaning of "mine" in section 3(h)(1) is not identical to the meaning of "mine" in section 109. Sections 109(a) and (d) deal with administrative functions unrelated to the question of where, if anywhere, subsection (C) items must be located to be "mines." Section 109's title is "posting of orders and decisions." 30 U.S.C. 819. Section 109(a) deals with providing notice to miners about citations issued to an operator and section 109(d) deals with providing MSHA with information about how to serve documents on operators. Sections 109(a) and (d) are not concerned with *what* constitutes a mine, or with location for the purposes of saying *where* such mine is; rather, those sections are concerned with conveying

information to miners and operators. So the fact that they refer to location has nothing to do with whether subsection (C) items have to be located in a particular place to be "mines."

5. Is it disputed whether 60% or more of the services at the facility supported Ramaco's mines, and is it disputed that any such "support" services fall within the meaning of "used in or to be used in" mining?

No. The parties stipulated that "about 60% of the services" at the maintenance facility "are to the five (5) nearby Ramaco Resource mines, including the 3 deep mines, a strip mine and a highwall mine." JA 7. These facts are thus not in dispute. See *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of the Law* v. *Martinez*, 561 U.S. 661, 677-678 (2010) ("[F]actual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'") (citing 2 K. Broun, McCormick on Evidence § 254, p. 181 (6th ed. 2006)). The parties also stipulated that the cited trucks maintained there "were regularly used to haul coal from the five Ramaco mines to the Elk Creek prep plant at the time of the citations," and that some of the "other 40% of KC Transport's work from this location" was for "other coal operators." JA 7, 8.

KC Transport never disputed that these services fall within the meaning of "used in or to be used in" mining. See, *e.g.*, JA 14-29.

Furthermore, that the facility was used in mining is clear from the facts. KC Transport uses the facility to house and repair coal haulage equipment. JA 5, 6, 8. The equipment serves extraction sites and at least one preparation plant (JA 6-7, 19), which indisputably conduct mining. The Commission has determined that maintenance facilities like this one are "used in" mining. See, *e.g.*, *U.S. Steel Mining Co., Inc.*, 10 FMSHRC 146, 148-149 (1988) ("a repair and maintenance shop for mine equipment was a "mine" because the repair shop was "used in" the work of extracting or preparing coal"); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 22, 25 (2000) (a supply shop whose "primary function" was "to warehouse materials and supplies used in [the operator's] nearby mines, preparation plants, and the adjacent Central Machine Shop" was a "mine" because it was "used in" mining). The facility is accessible only by traveling through a staffed security gate and along Ramaco's private haul road, then traveling about 1,000 feet down a path. JA 6, 9. It is about a mile from Ramaco's preparation plant and four miles from the closest coal extraction site. JA 9. And it is on land that KC Transport received permission from Ramaco to use. JA 7. These details conclusively demonstrate that the facility is "used in" mining. This was no far-afield maintenance facility that had only an attenuated relationship to the coal extraction sites and preparation plant. Instead, it was in their midst.

Should there be any doubt as to whether hauling coal for extraction sites constitutes "use in mining," Congress was clear as to how to resolve it. Congress explained that "what is considered to be a mine and to be regulated under this [Mine] Act [is to] be given the *broadest possible interpretation*," and that doubts as to jurisdiction should be "resolved in favor of inclusion . . . within the coverage of the Act." Senate Report 14 (emphasis added). And this Court need not reach the trucks and can resolve this case by determining only that the maintenance facility was "used in" mining; it was.

Conclusion

The Court should grant the petition for review, vacate the Commission decision, and reinstate the citations MSHA issued to KC Transport.

Respectfully submitted,

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on September 23, 2024 and the following registered users will be served via the CM/ECF system:

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Addendum – Pertinent Statutes and Regulations

Federal Coal Mine Health and Safety Act of 1969

30 U.S.C. 802(h) (1976)

"coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

Federal Mine Safety and Health Act of 1977

30 U.S.C. 802 - Definitions

(h)(1)

"coal or other mine" means

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,

(B) private ways and roads appurtenant to such area, and

(C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]

30 U.S.C. 813 - Inspections, investigations, and recordkeeping

(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.

(i) Spot inspections

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a

minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

30 U.S.C. 814 – Citations and orders

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. 819 – Posting of orders and decisions

(a) Mine office; bulletin board

At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this chapter to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

(d) Filing; designation of health and safety officers

Each operator of a coal or other mine subject to this chapter shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine. Any revisions in such names or

addresses shall be promptly filed with the Secretary. Each operator of a coal or other mine subject to this chapter shall designate a responsible official at such mine as the principal officer in charge of health and safety at such mine, and such official shall receive a copy of any notice, order, citation, or decision issued under this chapter affecting such mine. In any case where the mine is subject to the control of any person not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any such mine. The mere designation of a health and safety official under this subsection shall not be construed as making such official subject to any penalty under this chapter.

Code of Federal Regulations

30 C.F.R. 41 – Notification of Legal Identity

30 C.F.R. 45 – Independent Contractors

30 C.F.R. 45.3 - Identification of independent contractors

(a) Any independent contractor may obtain a permanent MSHA identification number. To obtain an identification number, an independent contractor shall submit to the District Manager in writing the following information:

(1) The trade name and business address of the independent contractor;

(2) An address of record for service of documents;

(3) A telephone number at which the independent contractor can be contacted during regular business hours; and

(4) The estimated annual hours worked on mine property by the independent contractor in the previous calendar year, or in the instance of a business operating less than one full calendar year, prorated to an annual basis.

30 C.F.R. 45.6 - Address of record and telephone number; independent contractors

(a) The address and telephone number required under this part shall be the independent contractor's official address and telephone number for purposes of the Act. Service of documents upon independent contractors may be proved by a Post Office return receipt showing that the documents were delivered to the address of record or that the documents could not be delivered to the address of record

because the independent contractor is no longer at that address and has established no forwarding address; because delivery was not accepted at that address; or because no such address exists. Independent contractors may request service by delivery to another appropriate address of record provided by the independent contractor. The telephone number required under this part will be used in connection with the proposed penalty assessment procedures in 30 CFR part 100.