No. 08-63

In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION, PETITIONER

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, generally prohibits surface coal mining operations in certain specified areas but makes that prohibition "subject to valid existing rights." 30 U.S.C. 1272(e). The question presented is whether the definition of "valid existing rights" contained in regulations issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement in 1999 is a permissible construction of the SMCRA under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 512 F.3d 702. The opinion of the district court (Pet. App. 17a-36a) is not published in the *Federal Supplement* but is available in 36 Envtl. L. Rep. (Envtl. L. Inst.) 20,090, and is available at 2006 WL 1194224.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. A petition for rehearing was denied on March 14, 2008 (Pet. App. 37a-38a). On June 4, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 12, 2008, and the petition was filed on July 14, 2008

(Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA or Act), 30 U.S.C. 1201 *et seq.* In the Act's statement of purpose, Congress declared that its aim was to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. 1202(a), while "strik[ing] a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy," 30 U.S.C. 1202(f). See *Citizens Coal Council* v. *Norton,* 330 F.3d 478, 480 (D.C. Cir. 2003) (upholding regulations defining "surface coal mining operations"), cert. denied, 540 U.S. 1180 (2004).

The SMCRA is administered by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM). See 30 U.S.C. 1211(c). States may assume jurisdiction over surface coal mining operations on non-Indian lands within their borders by developing a regulatory program that is no less stringent than the SMCRA and no less effective than federal regulations issued under it, see 30 U.S.C. 1253, 1272(a); 30 C.F.R. 730.5, 731.14, 732.15, but OSM retains oversight authority even in those States, see *National Mining Ass'n* v. *United States Dep't of the Interior*, 251 F.3d 1007, 1012 (D.C. Cir. 2001).

2. The SMCRA identifies five types of areas where, subject to certain exceptions, "no surface coal mining operations * * * shall be permitted." 30 U.S.C. 1272(e); see 30 U.S.C. 1272(e)(1)-(5) (listing, *inter alia*, lands within the boundaries of the National Park Sys-

tem, federal lands within the boundaries of a national forest, lands "within one hundred feet of the outside right-of-way line of any public road," and lands "within three hundred feet" of homes, schools, churches, and community or institutional buildings). That general prohibition does not apply, however, to "operations * * * which exist[ed] on August 3, 1977," 30 U.S.C. 1272(e), the date on which the SMCRA was enacted. It is also made "subject to valid existing rights." *Ibid.*

The issues presented in this case involve whether the Department of the Interior has permissibly interpreted the phrase "valid existing rights" in 30 U.S.C. 1272(e).

a. The first permanent regulations interpreting the SMCRA were published on March 13, 1979. See 44 Fed. Reg. 14,902 (1979 regulations). The 1979 regulations defined "valid existing rights" as encompassing two types of situations. The first was where the property owner "[h]ad been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands." *Id.* at 15,342. That standard is known as the "all-permits" standard. The second situation covered by the 1979 regulations was where a property owner "[could] demonstrate to the regulatory authority that the coal [was] both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977." *Ibid.* That standard is known as the "needed-for-and-adjacent-to" standard.

Several parties, including the National Coal Association (NCA), one of petitioner's predecessors, and the National Wildlife Foundation (NWF) challenged the 1979 regulations. NCA challenged the "all permits standard," while NWF supported it. On February 26, 1980, the district court issued an opinion in which it agreed

with the NCA that a party claiming the right to conduct surface coal mining operations under the "valid existing rights" provision of 30 U.S.C. 1272(e) should not be required to have obtained all permits before the SMCRA's August 3, 1977, enactment. See *In re Permanent Surface Mining Regulation Litig.*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C. 1980) *(PSMRL)*. Instead, the district court concluded that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice," and it remanded the relevant sub-paragraph of the 1979 regulations to the agency. *Ibid.* On May 16, 1980, the district court issued a further opinion in which it "ordered the Secretary [of the Interior] to affirmatively disapprove any provision in a State program under consideration which incorporate[d] a suspended or remanded Federal regulation." 45 Fed. Reg. 51,548 (1980).[1]

While that litigation was pending, "OSM recognized the need to propose changes to certain sections of" the 1979 regulations. 45 Fed. Reg. at 51,548. OSM issued orders suspending various sections of the 1979 regulations in November 1979, December 1979, and January 1980. *Ibid.* On August 4, 1980, OSM issued an order (August 1980 suspension order) that suspended the portion of the 1979 regulations that defined "valid existing rights" "insofar as it require[d] that all permits must have been obtained prior to August 3, 1977." *Ibid.* The August 1980 suspension order stated: "Pending further rulemaking, the Secretary will interpret this regulation as requiring a good faith effort to obtain all permits."

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[1] NCA and others appealed the district court's decisions, but the court of appeals never reached the merits because OSM was reconsidering the 1979 rules. *PSMRL,* No. 80-1810 (D.C. Cir. Feb. 1, 1983).

Ibid. That standard is known as the "good faith/all permits" standard. See 64 Fed. Reg. 70,770 (1999).

b. In 1982, OSM published proposed regulations that contained six possible definitions of "valid existing rights" in 30 U.S.C. 1272(e). See 47 Fed. Reg. 25,279-25,282. When OSM finalized those regulations the following year, it rejected all six options and instead adopted a "takings" standard. See 48 Fed. Reg. 41,313-314 (1983) (1983 regulations). Under that standard, a property owner would be deemed to have "valid existing rights" to conduct surface coal mining operations "if the application of any of the prohibitions contained in [30 U.S.C. 1272(e)] to the property interest that existed on [August 3, 1977] would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* at 41,349.[2]

The NWF and others challenged the 1983 regulations' definition of "valid existing rights," contending that it was issued without sufficient notice and comment. The district court agreed, and remanded that provision to the agency for additional proceedings. See *PSMRL,* 22 Env't Rep. Cas. (BNA) 1557, 1564 (D.D.C. 1985), aff'd in part and rev'd in part *sub nom.*, *NWF* v. *Hodel*, 839 F.2d 694 (D.C. Cir. 1988); see 64 Fed. Reg. at 70,770.

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[2] The 1983 regulations also provided that the "valid existing rights" exception to the general prohibition contained in 30 U.S.C. 1272(e) applied not only to lands that were covered by that provision as of the SMCRA's August 3, 1977, enactment, but also to lands that become covered by that section at a later date, such as "when a park is created or expanded or a protected structure is built." 64 Fed. Reg. at 70,770; see *ibid.* (describing this provision as "continually created VER"); 48 Fed. Reg. at 41,349. The D.C. Circuit upheld the validity of the "continually-created VER" concept in *NWF* v. *Hodel,* 839 F.2d 694, 748-751 (1988).

On November 20, 1986, OSM issued an order suspending portions of the 1983 regulations in response, in part, to the district court's March 22, 1985, decision. See 51 Fed. Reg. 41,952 (1986) (November 1986 suspension order). In the November 1986 suspension order, OSM suspended "the definition of 'valid existing rights'" contained in the 1983 regulations. *Id.* at 41,961. The effect of that suspension was to reinstate the "good faith/all permits" standard that had been in place before the issuance of the 1983 regulations. *Id.* at 41,954-41,955.

c. On December 27, 1988, OSM proposed to amend the regulations in order to permit an applicant to demonstrate "valid existing rights" by satisfying one of three standards: (1) the good faith/all permits standard; (2) the needed-for-and-adjacent-to standard; or (3) a new "[o]wnership and [a]uthority" standard. 53 Fed. Reg. 52,374, 52,383 (December 1988 proposal). "Under the ownership and authority standard, a person could establish [valid existing rights] by demonstrating both a property right to the coal and the right to mine it by the method intended, as determined by State law." 64 Fed. Reg. at 70,771. On July 21, 1989, OSM withdrew the December 1988 proposal for further study. See 54 Fed. Reg. 30,557 (1989).

d. On July 18, 1991, OSM proposed a definition under which an applicant could demonstrate "valid existing rights" by satisfying the good faith/all permits standard, the needed-for-and-adjacent-to standard, *or* the takings standard. See 56 Fed. Reg. 33,163-33,164 (1991 proposed rule).

The 1991 proposed rule was never finalized. In Section 2504(b) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 3105, Congress directed the Secretary of the Interior to "continue in force and effect,"

for at least one additional year, the "valid existing rights" standard contained in the November 1986 suspension notice, which, as noted previously, incorporated the good faith/all permits and needed-for-and-adjacent-to standards. In addition, the relevant appropriations acts for the next two years specifically prohibited the Department of the Interior from using any appropriated funds to publish a rule defining "valid existing rights" or to disapprove any existing state definition of that term. See Act of Nov. 11, 1993, Pub. L. No. 103-138, § 111, 107 Stat. 1399; Act of Sept. 30, 1994, Pub. L. No. 103-332, § 111, 108 Stat. 2519.

3. a. On January 31, 1997, OSM published a proposed rule under which an applicant seeking to demonstrate "valid existing rights" would be required to satisfy either the good faith/all permits standard or the needed-for-and-adjacent-to standard. 62 Fed. Reg. 4844-4846, 4860.

b. On December 17, 1999, OSM published the final rule that is at issue in this case. See 64 Fed. Reg. at 70,766 (1999 regulations). The 1999 regulations define "valid existing rights" as "a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where [30 U.S.C. 1272(e)] would otherwise prohibit such operations." 30 C.F.R. 761.5. The 1999 regulations provide that, in order to establish "valid existing rights," a claimant must first demonstrate that, at the time the land came under the protection of Section 1272(e), some legally binding document vested the claimant "with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. 761.5(a). If that initial state-law-based standard is satisfied, the 1999 regulations provide that the claimant must also satisfy either the

good faith/all permits standard or the needed-for-and-adjacent-to standard. See 30 C.F.R. 761.5(b).[3]

The preamble to the 1999 regulations spans 65 pages in the *Federal Register*. 64 Fed. Reg. at 70,766-70,830. The preamble contains an exhaustive review of the SMCRA and its legislative history, OSM's previous efforts to define "valid existing rights," and the case law arising from those attempts. See *id.* at 70,767-70,771. It also explains the provisions of the new regulations, discusses how they coincide with or differ from prior regulations, responds to comments, and explains why OSM chose the options it did. See *id.* at 70,771-70,783, 70,787-70,790. The preamble specifically addresses why OSM rejected the taking and ownership-and-authority standards. See *id.* at 70,783-70,786. It also contains an extensive discussion of how the definition of "valid existing rights" adopted in the 1999 regulations "[c]ompares with" the use of the words "valid existing rights" "[u]nder [o]ther [f]ederal [s]tatutes." *Id.* at 70,793-70,794; see Pet. App. 23a-29a (district court's description of the preamble).

With respect to the impact of the alternatives it considered, OSM concluded that, over the 20-year period from 1995 to 2015, the "good faith/all permits" standard would result in mining of only 2855 fewer acres than a "takings" standard and 3000 fewer acres than the "ownership and authority" standard. See Pet. App. 25a (cit-

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[3] The 1999 regulations set out a different mechanism for establishing "valid existing rights" with respect to use or construction of roads. In that context, a claimant may either: (1) satisfy the test described above; or (2) establish that a road, right-of-way, or permit to construct a road already existed at the time the property became covered by 30 U.S.C. 1272(e), and that the claimant had a legal right to use that road or right-of-way for surface coal mining operations. See 30 C.F.R. 761.5(c).

ing 64 Fed. Reg. at 70,776). Against that background, OSM found only "negligible differences among the alternatives in terms of their economic impact." 64 Fed. Reg. at 70,776.

4. a. Petitioner filed a complaint and petition for judicial review under 30 U.S.C. 1276(a)(1), which authorizes review of "[a]ny action of the Secretary [of the Interior] to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to [the SMCRA]." That section also provides that "[a]ny action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." *Ibid.*

b. The district court granted summary judgment in favor of respondents. Pet. App. 17a-36a. The court quoted the D.C. Circuit's statement in *NWF* v. *Hodel*, 839 F.2d 694, 749 (1988), that "[n]either the statutory language nor the legislative history [of the SMCRA] elaborate[s] on the meaning of the phrase 'valid existing rights.'" Pet. App. 31a. The district court concluded that the 1999 regulations satisfied the only evident guideposts of congressional intent applicable at *Chevron* step one because they "include[] a good-faith exception, encompass[] recognition for state law property rights at the property right demonstration prong * * *, and reveal[] concerns over minimizing takings." *Id.* at 32a.

The district court concluded at *Chevron* step two that OSM had "considered the relevant factors" and "articulate[d] a rational explanation for its actions." Pet. App. 32a, 34a. The court determined that "[t]he 'good faith/all permits' standard adopted by OSM reasonably strikes a balance between protecting the environment and ensuring an adequate supply of coal." *Id.* at 33a; see

ibid. (noting that OSM had determined "that its final rule would have no 'significant economic impact on the mining industry and the cost of producing or delivering coal'") (quoting 64 Fed. Reg. at 70,776). The district court further noted that "OSM reports, and [petitioner] does not dispute, that the 'good faith/all permits' standard is * * * consistent with current state regulatory standards," and it pointed out that the same standard had "been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress." *Id.* at 33a-34a.

The district court rejected petitioner's contention that the 1999 regulations violated either the Just Compensation or Due Process Clause of the Fifth Amendment to the United States Constitution. Pet. App. 34a-35a. The court noted that this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), "held that the 'mere enactment' of [the] SMCRA [did] not constitute a taking, nor [did] it, 'on its face, deprive owners of land within its reach of economically viable use of their land since [the SMCRA] does not proscribe nonmining uses of such land." Pet. App. 34a (quoting *Hodel*, 452 U.S. at 296 n.37). The district court held that petitioner "ha[d] not demonstrated that the new regulation results in an unconstitutional taking," both for the reasons identified in *Hodel* and because "it is clear that if valid existing rights are denied, compensation is available under the Tucker Act." *Ibid.*

5. The court of appeals affirmed in a unanimous published opinion. Pet. App. 1a-16a. The court first determined "that [valid existing rights] is an ambiguous phrase." *Id.* at 7a-8a. It noted that, in its 1986 decision in *NWF*, it "ha[d] * * * determined that the phrase is subject to multiple and divergent interpretations" and

"that the legislative history of the SMCRA does not illuminate the meaning of [valid existing rights]." *Id.* at 8a & n.2 (citing *NWF*, 839 F.2d at 748-751). The court of appeals stated that "[t]he major source of [valid existing rights'] ambiguity is the word 'rights.'" *Id.* at 8a. It explained that that word has "multiple and often vague meanings," some of which are synonymous with "property rights" and others of which are not. *Id.* at 8a-10a. The court of appeals also concluded that the term "valid" was ambiguous as used in this context. *Id.* at 9a. It observed that if "[valid existing rights] operates as a 'term of art,' as [petitioner] suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity." *Id.* at 10a.

The court of appeals next held that the 1999 regulations' definition of "valid existing rights" was "a reasonable interpretation of the statute." Pet. App. 12a. The court viewed the statute as a whole as making clear that "protecting against the harmful effects of surface mining" was "the primary aim of the [SMCRA]," and it stated that it was "not surprising that the Secretary has promulgated an interpretive rule that cuts against the interests of some miners." *Id.* at 12a-13a. The court of appeals also concluded that petitioner's "suggestion that the SMCRA effected robust protection of miners' property rights is belied by the way Congress used the word 'property' in that statute." *Id.* at 13a. It noted that "only one [of the 29 instances in which that term appears in the SMCRA] refers to protecting the property rights of subsurface owners of the mineral estate," and it determined that "several mentions of 'property' [in the Act] run counter to miners' property rights, in that they authorize government entry onto mined property to assess and remedy environmental degradation caused by

strip mining." *Ibid.* The court also stated that petitioner's accusation of "flip-flopping" by OSM "ignore[d] the agency's obligation to 'consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Id.* at 13a n.5 (quoting *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 863-864 (1984) (*Chevron*)).

The court of appeals agreed with petitioner that the "canon of constitutional avoidance trumps *Chevron* deference." Pet. App. 14a. The court emphasized, however, that "we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem: the argument must be serious," and the court determined that the constitutional arguments in this case did not satisfy that standard. *Ibid.* Petitioner had argued "that the 1999 Rule * * * work[s] a taking of subsurface coal interests." *Id.* at 15a. The court of appeals responded that "[a] taking * * * is only unconstitutional if the government fails to pay just compensation, and the Tucker Act provides for such a remedy." *Ibid.*

The court of appeals emphasized that it did not "say that the canon of constitutional avoidance can be ignored with respect to every argument sounding in the Takings Clause." Pet. App. 15a. The court noted that this Court has recognized that, even where just compensation would be available for individual takings, the doctrine of constitutional avoidance applies "if a statute creates 'an identifiable class of cases in which application of [the] statute will necessarily constitute a taking.'" *Id.* at 15a-16a (quoting *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 128 n.5 (1985)). The court of appeals also observed that it had previously "refused *Chevron* deference to an agency interpretation that created an 'identifiable class' of takings victims." *Id.* at 16a (citing *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C.

Cir. 1994)). But the court of appeals concluded that petitioner "ha[d] shown no 'identifiable class' of miners whose taking claims would expose the Treasury to such liability." *Ibid.* The court noted that petitioner had declined to contend at oral argument "that the government would be on the hook for a 'massive and unforseen' sum" if the 1999 regulations were upheld, and it stated that "[t]he record is devoid of evidence it is so." *Ibid.* The court thus viewed petitioner as having made an "implicit concession that the 1999 Rule will have relatively insignificant takings implications that can be readily addressed in the Court of Claims," and it noted that it had previously concluded that "[t]he avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain circumstances." *Ibid.* (quoting *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999)).

6. Petitioner filed a petition for rehearing en banc. That petition was denied after no judge requested a vote on it. Pet. App. 38a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals merely upheld a regulatory standard that the Department of the Interior has employed since 1986, and its decision cannot be expected to have broader implications. Further review is not warranted.

1. Petitioner first contends (Pet. 15-25) that the District of Columbia Circuit erred in concluding that the words "valid existing rights" in Section 1272(e) are ambiguous under *Chevron* step one. See *Chevron U.S.A.*,

Inc. v. *NRDC,* 467 U.S. 837 (1984). That claim does not merit further review.

a. The premise of petitioner's argument is that the court of appeals reached the conclusion that it did solely because the word "rights" "has multiple entries in the dictionary." Pet. 15; see Pet. i. That premise is erroneous.

Like the district court before it, see Pet. App. 31a, the court of appeals explained that it had *already* concluded—20 years ago—that the entire phrase "valid existing rights" in 30 U.S.C. 1272(e) "is subject to multiple and divergent interpretations." *Id.* at 8a (citing *NWF* v. *Hodel*, 839 F.2d 694, 748-751 (D.C. Cir. 1988)); *id.* at 8a n.2 (same). In *NWF*, the D.C. Circuit rejected a challenge to the "continually-created [valid existing rights]" portion of the 1983 regulations. See 839 F.2d at 748-751; note 2, *supra*. The panel in that case observed that "[n]either the statutory language nor the legislative history elaborate[s] on the meaning of the phrase 'valid existing rights.' " 839 F.2d at 749. The *NWF* panel concluded that "[t]he statutory language appear[ed] to be susceptible to either" the interpretation that it applies exclusively to rights that were "existing as of the date of [the SMCRA's] enactment" or that it applies as well to situations where "a permit ha[d] been validly issued" before the land came under the protection of 30 U.S.C. 1272(e). 839 F.2d at 750. The panel also noted that the SMCRA's legislative history "d[id] not answer the specific question before [it]," though it observed that a committee report indicated that Congress did not intend for "operating mines" to "be shut down." *Ibid.* (citing H.R. Rep. No. 218, 95th Cong, 1st Sess. 94 (1977)).

In this case, the court of appeals could have justified its conclusion that the phrase "valid existing rights" in

Section 1272(e) was ambiguous based solely on that established conclusion in *NWF*. But the panel went further. It explained that the "major source"—not the only source—of the ambiguity in "valid existing rights" was Congress's use of the word "rights." Pet. App. 8a (emphasis added). Petitioner is correct (Pet. 13-14) that the panel relied in part on dictionary definitions of the word "rights" in reaching that conclusion. Pet. App. 8a-9a. But consulting dictionaries is one of the standard techniques of statutory interpretation,[4] and petitioner *itself* cited dictionary definitions of "rights" in its brief to the court of appeals. *Id.* at 8a (citing Pet. C.A. Br. 34). In addition, the court of appeals *also* examined the meaning of "valid," and concluded that that term too failed to resolve the ambiguity it had already identified in *NWF*. *Id.* at 9a.[5] Nor did the court of appeals ignore SMCRA's

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[4] See, *e.g.*, *Cuellar* v. *United States*, 128 S. Ct. 1994, 2000 (2008); *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008); *Begay* v. *United States*, 128 S. Ct. 1581, 1586 (2008); *Knight* v. *Commissioner*, 128 S. Ct. 782, 789 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007).

[5] The court of appeals also found it "illuminating" that extensive academic commentary about the meaning of "valid existing rights" in 30 U.S.C. 1272(e) had "reached no consensus" and been "unable to distill a single, clear meaning" of that phrase. Pet. App. 10a n.3. The court observed that a subject-matter expert in whose views petitioner had "place[d] great faith"—and who both petitioner and amicus American Petroleum Institute (API) continue to cite before this Court (see Pet. 16; API Amicus Br. 9, 15, 23)—had acknowledged that Congress had not "list[ed] what interests it mean[t] to include within the 'valid existing rights' phrase." Pet. App. 10a n.3 (quoting Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 Harv. Envtl. L. Rev. 1, 19 (1987)). Cf. Jan G. Laitos, *The Nature and Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399, 399-400 (1989-1990) (observing that use of the term "valid existing rights" exemplifies

structure. It simply did not find petitioner's few structural arguments persuasive enough to warrant discussion in the context of *Chevron* step one. See *id.* at 12a-13a (addressing statutory context when assessing reasonableness of OSM's interpretation under *Chevron* step two).

Petitioner's claim that the D.C. Circuit applied a "novel approach to *Chevron*" in this case (Pet. 25) under which "a single word" can render an entire statutory phrase ambiguous (Pet. 15) is further belied by its subsequent decisions. The D.C. Circuit has continued—in decisions issued after its decision in this case—to rely on the very precedents petitioner accuses it of having abandoned here. Compare Pet. 19 (quoting this Court's statement in *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), that "[a]mbiguity is a creature not of definitional possibilities but of statutory context"), with *HolRail, LLC* v. *STB*, 515 F.3d 1313, 1317 (D.C. Cir. 2008) ("Although the term 'cross' may have multiple meanings in some circumstances, '[a]mbiguity is a creature not of definitional possibilities but of statutory context'" (quoting *Brown*, 513 U.S. at 118)).

b. Petitioner also fails to demonstrate that the district court and the court of appeals erred in concluding that the phrase "valid existing rights" in Section 1272(e) is ambiguous with respect to the specific question presented here. That phrase is undefined in the statute, and its meaning is not specifically addressed in the SMCRA's legislative history. See *NWF*, 839 F.2d at 749.

Congress's "tendency to rely on unclear wording to express a federal law-maker's intent," and stating that "[b]ecause the phrase is never defined, one is never certain what kinds of interests are intended to fall within its scope").

Petitioner and its amici err in asserting that the 1977 Senate Report indicates that the "fundamental purpose" of the "valid existing rights" language was "to clarify that '*all valid existing property rights must be preserved.*'" Pet. 9 (quoting S. Rep. No. 128, 95th Cong., 1st Sess. 56 (1977) (*Senate Report*)); accord National Council of Coal Lessors (NCCL) Amicus Br. 4. The section of the *Senate Report* in which the quoted language appears does not refer to the "valid existing rights" language in Section 1272(e). Instead, it is contained in a section entitled "Protection of Surface Owner Rights." *Senate Report* 56. That section declares Congress's intent that "disputes about property rights which might arise" in situations where "the mineral and surface estate [have been] separated" should continue to be governed by "State laws" and that Congress "has no intention whatsoever * * * to change *such* rights." *Ibid.* (emphasis added). When viewed in context, the language upon which petitioner and its amici rely clearly does not address the wholly separate question of under what circumstances the SMCRA itself bars surface coal mining operations in situations where such mining would previously have been allowed under state law.[6]

Although petitioner is correct that Congress has used the phrase "valid existing rights" in numerous fed-

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[6] Amicus NCCL contends (at 13-15) that the approach to "valid existing rights" in the 1999 regulations displaces state law, and implies that, in so doing, the rule contradicts congressional intent. That argument is incorrect as well. The 1999 regulations' definition of "valid existing rights" expressly defers to state law on questions relating to the first part of the analysis, that is, whether "a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. 761.5(a).

eral statutes (see Pet. 6-8 & nn.1-16), petitioner errs in contending that that phrase has any "settled meaning" (Pet. 20) that applies regardless of the particular statutory context in which it is used or the expert determinations of an agency charged with administering it. So far as we are aware, Congress has never defined "valid existing rights" in any of the statutes in which it has used that phrase. See 64 Fed. Reg. at 70,794. In addition, petitioner cites no judicial decision (and we are aware of none) that holds that "valid existing rights" is a term of art that always includes the sort of property interests —coupled with an ability to mine (or engage in other activity) as a matter of state law—that petitioner contends the phrase "valid existing rights" as used in 30 U.S.C. 1272(e) was intended to protect.[7] See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning against "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of

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[7] The only lower-court decisions that petitioner cites regarding the meaning of "valid existing rights" are three Ninth Circuit decisions, one D.C. Circuit decision, a district court decision, and a decision by the Supreme Court of Alabama; those decisions are cited in a footnote contained in petitioner's Statement of the Case. See Pet. 8 n.16. Petitioner does not assert that the D.C. Circuit's decision in this case conflicts with any of those decisions, and none of them interpreted the words "valid existing rights" in the SMCRA.

Amicus NCCL errs in suggesting (at 7) that this Court's decision in *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306, 316-318 (1930), supports the view that "valid existing rights" has "a well-established purpose and meaning." The phrase "valid existing rights" does not appear in *Wilbur* at all, and it was *conceded* in that case that the particular claim at issue "was valid and existent when the" relevant statute had been enacted. *Id.* at 316.

them") (citation omitted); see also *Environmental Defense* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1432-1434 (2007) (holding that the Environmental Protection Agency had not exceeded the scope of its lawful authority in interpreting the same term in a single statute in different ways)

Petitioner's invocation of statutory structure (Pet. 23-24) does not warrant a different result. First, petitioner's argument is premised on a misreading of the 1999 regulations. The 1999 regulations do not "require miners to *obtain* [all] permits to *qualify* for [valid existing rights] in the first place." Pet. 24 (first emphasis added). To the contrary, OSM made clear, as it has since 1986, that a property owner need only have made a *good-faith effort* to obtain the necessary permits at the time the property became covered by Section 1272(e), and that that standard does not necessarily require the claimant even to have *submitted* all relevant permit applications. See 64 Fed. Reg. at 70,777 ("We do not interpret the good faith/all permits standard as requiring submission of applications for all necessary permits" before the land comes under the protection of Section 1272(e)). Petitioner's argument also ignores the fact that the 1999 regulations provide two other methods by which a claimant may establish "valid existing rights" —satisfaction of the needed-for-and-adjacent-to standard or satisfaction of the alternate for roads. See *id.* at 70,787, 70,790; note 3, *supra*. Accordingly, the fact that Congress "condition[ed other] exemptions * * * on the *attainment* of regulatory permits" (Pet. 24) (emphasis added), does not demonstrate that Congress intended to preclude OSM from identifying a good-faith *effort* to obtain such permits as one method by which a claimant may establish "valid existing rights" under 30 U.S.C.

1272(e). See 64 Fed. Reg. at 70,778 (stating "that the statute's use of different terminology for each of these exceptions means that Congress probably intended a somewhat different meaning for the [valid existing rights] exception under [30 U.S.C. 1272(e)] than for the exceptions provided under the other statutory provisions cited by the commenters").

Second, petitioner's argument is inconsistent with other structural features of the SMCRA. The overall purpose of 30 U.S.C. 1272(e) is to protect certain areas from the impacts of surface coal mining operations. See *Senate Report* 55 (stating that Congress included Section 1272(e) because it "made a judgment that certain lands simply should not be subject to new surface coal mining operations"). But if the phrase "valid existing rights" applies whenever a person had a property interest in coal in the ground and state law would not have prohibited the coal from being mined in the absence of Section 1272(e), as petitioner appears to suggest, then Section 1272(e) would have virtually no effect. See 64 Fed. Reg. at 70,772, 70,778, 70,784, 70,785, 70,826. In addition, petitioner's proposed interpretation of "valid existing rights" would mean that Section 1272(e) "would offer no significant protection * * * beyond that independently afforded by" 30 U.S.C. 1257(b)(9), which already requires that permit applicants have a property right in the coal to be mined. 64 Fed. Reg. at 70,785; accord *id.* at 70,826 (stating that the interpretation proposed by petitioner "would result in a finding of [valid existing rights] whenever a person met the permit application requirements for property rights," and thus render Section 1272(e)'s independent protections "meaningless").

2. Petitioner also contends (Pet. 26-33) that the D.C. Circuit erred in applying *Chevron* in this case because "OSM's statutory construction * * * will trigger takings claims." Pet. i. That contention does not merit further review.

a. This Court has made clear that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property" provides "no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (*Riverside Bayview*); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 297 n.40 (1981) (noting that "an alleged taking is not unconstitutional unless just compensation is unavailable."). The Court has explained that, "[u]nder such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, [but merely] frustrates permissible applications of a statute or regulation." *Riverside Bayview*, 474 U.S. at 128 (citing *Ashwander* v. *TVA*, 297 U.S. 288, 341-356 (1936) (Brandeis, J., concurring)); accord *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005) (stating that the constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it").

The Court stated in *Riverside Bayview* that a narrowing construction of a statute may be appropriate where there is "an identifiable class of cases" or an "identifiable set of instances" in which the mere "application of a statute [or regulation] will *necessarily consti-*

tute a taking." 474 U.S. at 128 n.5 (emphasis added).[8] In *Riverside Bayview,* the Court cited as an example the statute at issue in *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), where there was a substantial argument that the retroactive application of a provision of the Bankruptcy Code "would *in every case* constitute a taking," and "the solution was to avoid that difficulty by construing the statute to apply only prospectively." *Riverside Bayview*, 474 U.S. at 128 n.5 (emphasis added). No such situation is present here. Moreover, because *Security Industrial Bank* involved purchase-money security interests obtained in transactions between private parties—a setting in which it is exceedingly unlikely that Congress would have intended for the United States to pay compensation if a taking was found —the Court in that case appears to "have assumed the lack of compensatory remedy" under the Tucker Act. *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion).

The court of appeals correctly held that this case falls into the general rule of *Riverside Bayview* rather than its exception. In the first place, here, unlike in the *Security Industrial Bank* example cited in *Riverside Bayview*, the court of appeals properly concluded that "the Tucker Act [would] provide[] * * * a remedy" in situations where application of the "valid existing rights" standard established in the 1999 regulations would result in a Fifth Amendment taking. Pet. App. 15a.[9] Nor has petitioner in any event demonstrated that

[8] But see Pet. i (framing inquiry as whether the standard set forth in the 1999 regulations "will trigger takings *claims*") (emphasis added).

[9] Amicus NCCL asserts (at 16) that there are certain circumstances in which such a claim would have to be brought in state court rather than in the Court of Claims under the Tucker Act, 28 U.S.C. 1491(a).

application of the 1999 regulations will "*necessarily* constitute a taking" in any "identifiable class of cases." *Riverside Bayview*, 474 U.S. at 128 n.5 (emphasis added). As explained earlier, OSM employed the good faith/all permits standard between August 4, 1980, and September 14, 1983, and has been employing it continuously since November 20, 1986. See pp. 4-8, *supra*. OSM found that the United States and the States that employ the same standard have *never* been required to pay just compensation for a taking of property resulting from application of the good faith/all permits standard. See 64 Fed. Reg. at 70,823. The court of appeals also determined that petitioner had implicitly conceded at oral argument that the definition of "valid existing rights" contained in the 1999 regulations "will have relatively insignificant takings implications." Pet. App. 16a; see pp. 8-9, *supra*.

Petitioner repeatedly quotes (Pet. 4, 12, 31) a statement from the preamble to the 1999 regulations that the definition of "valid existing rights" "has significant takings implications." 64 Fed. Reg. at 70,781. Petitioner fails to mention, however, that the preamble makes clear that it is using the phrase "significant takings implications *as that term is defined by Executive Order 12630*," *ibid.* (emphasis added), for purposes of undertaking a "takings implication assessment," see *ibid.*; see Exec. Order 12,630, 3 C.F.R. 554 (1989). OSM performed an assessment under that definition in the preamble to the 1999 regulations, see 64 Fed. Reg. at 70,822-70,827, applying the *Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Un-*

Regardless of whether that is so, the important point is that neither petitioner nor its amici deny that *some* court would always be available to hear such a circumstance-specific claim.

anticipated Takings, id. at 70,827. Petitioner also fails to note that the preamble states—two sentences after the "significant takings implications" language quoted by petitioner—that OSM "anticipate[s] that" the definition of valid existing rights in the 1999 regulations "will result in *very few compensable takings*." *Id.* at 70,781 (emphasis added); see *Riverside Bayview*, 474 U.S. at 128 n.5 (framing inquiry as whether application of a statutory or regulatory standard will actually "constitute a taking" in "an identifiable class of cases").

Takings claims based on adverse "valid existing rights" determinations under the standard set forth in the 1999 regulations might fail for a wide variety of reasons. Such a claim failed in *Stearns Co.,* v. *United States*, 396 F.3d 1354 (Fed. Cir.), cert. denied, 546 U.S. 875 (2005), for example, because the plaintiff had not sought a compatibility finding under 30 U.S.C. 1272(e)(2), which could have allowed it to mine even absent a determination of "valid existing rights." Other exemptions in Section 1272(e) might similarly allow access to coal even absent a determination of "valid existing rights." See 64 Fed. Reg. at 70,824. A takings claim based on an adverse "valid existing rights" determination could also fail if the plaintiff lacked a compensable property interest in the coal or was able to make alternate uses of the property, see *id.* at 70,823-70,825, or if the restriction on mining did not have the sort of economic impact that would result in a taking, see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987). Particularly given the dearth of decisions requiring the government to pay compensation based on adverse "valid existing rights" determinations in all the years that standard has been in effect, the court of appeals correctly declined to frustrate permissible applica-

tions of the 1999 regulations based on the speculative possibility that takings might arise in the future.

Nor is petitioner correct that the D.C. Circuit has rendered the exception noted in *Riverside Bayfield* "a dead letter." Pet. 31. As the court of appeals noted in its decision (see Pet. App. 16a), the D.C. Circuit applied that exception in *Bell Atlantic Telephone Cos.* v. *FCC*, 24 F.3d 1441, 1445 (1994), and its decision in this case announced no plans to change course in the future. Instead, the court of appeals simply determined that this case was governed by the general rule that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions." *Riverside Bayview*, 474 U.S. at 128. That case-specific determination was entirely correct and does not merit further review.

b. Although petitioner suggests that the lower courts "[a]re [c]onfused [a]bout" (Pet. 27) the proper application of the exception to the general rule stated in *Riverside Bayview*, it pointedly does not assert that the court of appeals' decision in this case conflicts with any of the decisions cited on pages 27 to 30 of the petition for a writ of certiorari. To the contrary, petitioner acknowledges (Pet. 27-29) that the Fifth, Eighth, and Federal Circuit decisions that it cites all *rejected* arguments that the prospect of takings claims required the courts to disregard standard *Chevron* principles and apply a narrowing construction.

Petitioner is therefore left to suggest (Pet. 29-30) that the D.C. Circuit's decision in this case may be in tension with that court's own previous decisions. But this Court has made clear that it is the province of each court of appeals to ensure consistency with, and resolve

conflicts among, its own decisions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In addition, the unanimous panel opinion in this case discussed the decision that petitioner describes (Pet. 30) as having given "fullest exposition of the *Riverside Bayview Homes* rule." See Pet. App. 16a (discussing *Bell Atl. Tel. Cos.*, *supra*). It is also telling that, notwithstanding petitioner's contention that the panel's decision in this case constitutes "a sharp—but unexplained—break with its own precedent" (Pet. 31), no member of the D.C. Circuit voted to grant petitioner's petition for rehearing en banc.

3. Petitioner and its amici also fail to demonstrate that the D.C. Circuit's decision in this case will have "grave" or "far-reaching implications" (Pet. 34) either in the particular context of the SMCRA or more generally. As for the former: The Department of the Interior has applied the good faith/all permits standard for 25 of the 31 years since the SMCRA was enacted and has done so continuously since 1986. See pp. 4-8, *supra*. In addition, the preamble to the 1999 regulations explains that "[t]wenty of the 24 States with approved regulatory programs * * * already rely upon a good faith/all permits or all permits standard for" determining the existence of "valid existing rights." 64 Fed. Reg. at 70,767. Accordingly, to the extent that the words "valid existing rights" in Section 1272(e) have any "settled meaning" upon which "property owners [could] have relied," Pet. 20, the good faith/all permits standard would be that meaning.

Nor have petitioner or its amici demonstrated that the definition of "valid existing rights" in the 1999 regulations will have significant consequences with respect to other statutes. This Court has rejected the proposi-

tion that a single agency must always interpret the same term even within a single statute in precisely the same manner. See *Environmental Defense*, 127 S. Ct. at 1432-1434. It follows *a fortiori* that there is no requirement that the words "valid existing rights" must be interpreted in precisely the same way in "well over 100 federal statutes and proclamations" (Pet. 6) that were enacted and made over the course of a century, particularly in light of the fact that Congress does not appear to have defined that phrase in any of them. See 64 Fed. Reg. at 70,794 (stating that OSM "found no definitions of [valid existing rights] in other Federal statutes").

There is no indication that the Department of the Interior intends to apply the definition of "valid existing rights" that the 1999 regulations adopt with respect to the SMCRA to other statutes it administers.[10] To the

[10] Amicus API expresses concern (at 8-10, 13-20) that the 1999 regulations could establish a precedent with respect to the oil and gas industry. API did not comment on the 1999 regulations while OSM was considering the matter, nor did it raise its concerns before the district court or the court of appeals. In addition, API's assertion (at 23) that a 1998 opinion by the Solicitor of the Interior regarding the meaning of "valid existing rights" in the Wilderness Act, 16 U.S.C. 1131 *et seq.*, "diverges 180 degrees" from the approach taken in the regulation currently before this Court was not presented either to the agency or the lower courts. And, at any rate, the fact that Interior interpreted a similar phrase in a different statute in a different manner simply underscores, as Interior observed in the preamble to the 1999 regulations, that SMCRA "is not analogous" to other statutes. 64 Fed. Reg. at 70,794.

contrary, the preamble to the 1999 regulations concludes that the interpretations of "valid existing rights" under other federal statutes did not "provide[] useful guidance" in this context because "[v]alid existing rights under [30 U.S.C. 1272(e)] is not analogous to [voluntary existing rights] under other Federal statutes." 64 Fed. Reg. at 70,794.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused from this case.