No. 19-1352

In the Supreme Court of the United States

WESTERN OILFIELDS SUPPLY COMPANY,
DBA RAIN FOR RENT, PETITIONER

v.

EUGENE SCALIA, SECRETARY OF LABOR, 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 RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the citation issued to petitioner by the Mine Safety and Health Administration, resulting in a $116 civil penalty, for a violation of a mine-safety standard promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, did not violate petitioner's Fourth Amendment or due-process rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 946 F.3d 584. The decision of the Federal Mine Safety and Health Review Commission declining to review the decision of the administrative law judge (Pet. App. 45-46) is unreported. The decision of the administrative law judge (Pet. App. 15-44) is reported at 40 FMSHRC 1267.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely pe-

tition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari in this case to June 5, 2020. The petition for a writ of certiorari was filed on June 4, 2020. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to decades of illnesses, injuries, and deaths in mines, Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 801 *et seq.*, to protect the health and safety of the Nation's miners. 30 U.S.C. 801(g); see *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 202 (1994). The Mine Act authorizes the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), to promulgate mandatory health and safety standards with which mine operators must comply. 30 U.S.C. 811(a); see 30 U.S.C. 814. The Act defines an "'operator'" to include a person who owns or operates a mine as well as "any independent contractor performing services * * * at such mine." 30 U.S.C. 802(d). An operator who violates an applicable health or safety standard faces civil monetary penalties, and, in the case of a willful violation, criminal penalties. 30 U.S.C. 820.

The Mine Act authorizes and requires MSHA to "make frequent inspections and investigations" of mines to assess an operator's compliance with applicable health and safety standards. 30 U.S.C. 813(a). Section 813(a) specifies that MSHA must inspect each surface mine in its entirety at least twice each year, and each underground mine in its entirety at least four times each year, to ensure that mine operators are complying with the Mine Act and with mandatory standards. 30 U.S.C. 813(a).

If an MSHA inspector conducting an inspection finds a violation, the inspector will issue a citation. 30 U.S.C. 814(a). MSHA then will issue to the operator a proposed penalty assessment specifying the violation and the penalty. 30 U.S.C. 815, 820; 29 C.F.R. 2700.25. If the operator timely contests the citation, the penalty, or both, see 29 C.F.R. 2700.20, .21, .26, MSHA must file a petition for assessment of the penalty with the Federal Mine Safety and Health Review Commission (Commission), an independent adjudicatory agency, 29 C.F.R. 2700.28; see 30 U.S.C. 823(d)(1). A Commission administrative law judge (ALJ) will then conduct a hearing, adjudicate the alleged violation, and determine the penalty amount. 30 U.S.C. 823(d)(1); 29 C.F.R. 2700.28, .30, .50-.69.

The Commission in its discretion may review the ALJ's decision, either upon a petition for review or sua sponte. 30 U.S.C. 823(d)(2); 29 C.F.R. 2700.70. If the Commission does not elect to review a decision, the ALJ's decision becomes the final decision of the Commission. 30 U.S.C. 823(d)(1). A person aggrieved by a decision of the Commission may obtain judicial review by filing a petition for review in either the D.C. Circuit or in the court of appeals in the circuit where the violation occurred. 30 U.S.C. 816(a)(1). If a mine operator elects not to contest MSHA's proposed penalty assessment, that proposed penalty assessment becomes the final order of the Commission and is not subject to further review. 30 U.S.C. 815(a); 29 C.F.R. 2700.27.

2. To facilitate mine inspections, the Act grants MSHA inspectors "a right of entry to, upon, or through any" mine. 30 U.S.C. 813(a); see *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981) (Section 813(a) "authorizes

warrantless inspections"). And the Act generally requires that MSHA's inspections be unannounced. 30 U.S.C. 813(a). With limited exceptions, Section 813(a) provides that "no advance notice of an inspection shall be provided to any person." *Ibid.* The Act makes a violation of that prohibition on providing advance notice a criminal offense punishable by a fine, imprisonment, or both. See 30 U.S.C. 820(e); see also *United States* v. *Gibson*, 409 F.3d 325, 333-334 (6th Cir. 2005) (discussing mining company officials' convictions under Section 820(e)); *Secretary of Labor* v. *Topper Coal Co., Inc.*, 20 FMSHRC 344, 348-349 (1998) (approving civil penalties for such violations).

Unannounced, warrantless inspections are crucial to the enforcement of the Mine Act. See *Dewey*, 452 U.S. at 602-604. As Congress recognized, "in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." S. Rep. No. 181, 95th Cong., 1st Sess. 27 (1977). Instead, "[i]n order to comply with Congress' directives, MSHA must conduct inspections that reflect the normal day-to-day working conditions of the mine," and "[s]uch meaningful inspections cannot occur when the mine environment is altered by advance notice of an inspection." *Secretary of Labor* v. *KenAmerican Res., Inc.*, 42 FMSHRC 1, 7 (2020).

MSHA has a variety of mechanisms at its disposal to prevent mine operators from impeding inspections. "If a mine operator refuses to allow a warrantless inspection," MSHA may "institute a civil action to obtain injunctive or other appropriate relief." *Dewey*, 452 U.S. at 596-597; see *id.* at 604-605; 30 U.S.C. 818(a). In addi-

tion, MSHA may issue a citation to the operator and assess daily civil penalties until the operator complies, see 30 U.S.C. 820(a) and (b); *Secretary of Labor* v. *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702, 1704 (1981), or order that miners be withdrawn from the mine (effectively shutting down the mine), see 30 U.S.C. 814(b).

Although the Mine Act does not permit a mine operator to refuse an inspection or to learn of an inspection in advance, it does authorize the operator to have a representative be present for the inspection, conferring what are commonly known as "walkaround" rights, Pet. App. 7; see 30 U.S.C. 813(f); *Thunder Basin*, 510 U.S. at 203. Section 813(f) provides that, "[s]ubject to regulations issued by the Secretary," both "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany" the MSHA inspector "during the physical inspection of any coal or other mine * * * for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f). Section 813(f) further states, however, that "[c]ompliance with th[at] subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter." *Ibid.*

3. a. Petitioner is a contractor that rents pumps for use in mines and provides pump maintenance. Pet. App. 3. On February 8, 2017, one of petitioner's employees, Jaime Tejeda, drove to a quarry in California operated by Lhoist North America of Arizona, Inc., to perform maintenance on a pump that he had previously installed. *Id.* at 3, 18. Tejeda parked his truck outside the mine office and entered the office to sign in. *Ibid.*

Meanwhile, an MSHA inspector was waiting in the same parking lot to meet mine representatives to begin

the second day of an ongoing inspection. Pet. App. 3. The inspector saw Tejeda's truck rock back and forth as Tejeda parked, and the inspector suspected that Tejeda had not set the parking brake, in violation of an MSHA safety standard. *Ibid.*; see 30 C.F.R. 56.14207 ("Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."). While Tejeda was in the mine office, the inspector approached the truck to check whether the parking brake had been set. Pet. App. 3. When the inspector could not see the brake clearly through the window, he opened the truck's door and found that the parking brake was not set. *Ibid.*

Tejeda returned to the parking lot from the mine office as the inspector was photographing the unengaged parking brake. Pet. App. 3. The two spoke briefly, and the inspector issued a citation alleging a violation of 30 C.F.R. 56.14207. Pet. App. 3. MSHA proposed a penalty of $116 for the violation. *Id.* at 16.

b. Petitioner contested the citation on multiple grounds, and MSHA petitioned the Commission for assessment of the proposed $116 penalty. Pet. App. 3, 20-21. Following an evidentiary hearing, *id.* at 16, a Commission ALJ affirmed the citation, *id.* at 15-44. As relevant here, the ALJ rejected petitioner's contentions that the MSHA inspector had violated petitioner's statutory "walkaround" rights under 30 U.S.C. 813(f), as well as the Fourth Amendment, when he began to inspect Tejeda's truck before Tejeda had returned from the mine office. Pet. App. 29-39. The Commission declined to review the ALJ's decision, which accordingly became the final decision of the Commission. *Id.* at 45-46.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1-14. As relevant here, the court determined that the MSHA inspector had not violated petitioner's statutory walkaround rights under Section 813(f) or the Fourth Amendment. *Id.* at 7-14.

a. The court of appeals observed that, by Section 813(f)'s terms, "the walkaround right is extended 'for the purpose of aiding [the] inspection.'" Pet. App. 7 (brackets in original). The court explained that "the provision gives an operator a chance to provide information that might be mitigating or material—to argue, for instance, that the brake was in fact set, or that the inspector had misunderstood how it worked." *Id.* at 7-8. And here, the court determined, petitioner "was not denied that chance because Tejeda returned while the condition of the brake was still plain to see and had an opportunity to say whatever he wanted to the inspector." *Id.* at 8. The court noted that petitioner had "point[ed] to nothing that it would have done differently if its employee had been present before the door was opened—other than refuse the inspection entirely." *Ibid.*

The court of appeals rejected petitioner's contention that the Mine Act granted petitioner a "'right to refuse'" the inspection. Pet. App. 8. The court explained that petitioner's contention contradicts Section 813(a) of the Act, which "grants the Secretary a 'right of entry to, upon, or through'" any mine. *Ibid.* (quoting 30 U.S.C. 813(a)). The court noted that it had previously held that "refusal to admit an authorized representative into a facility for purposes of conducting an inspection" therefore "is a violation of the Act." *Ibid.* (quoting *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1549 n.2 (D.C. Cir. 1984)) (brackets omitted). The

court also found petitioner's contention to be inconsistent with the Act's prohibition on providing advance notice of inspections. See *ibid.* "It is hard to understand," the court explained, "what good that [prohibition] would do if any operator could delay a surprise inspection by blocking it without penalty." *Ibid.*

The court of appeals also rejected petitioner's contention that the language of 30 U.S.C. 818 authorizing MSHA to bring suit when a mine operator "refuses to admit [the Secretary's] representatives" confers a right to refuse an inspection. Pet. App. 9 (quoting 30 U.S.C. 818(a)(1)(C)) (brackets in original); see *id.* at 8-9. The court explained that Section 818 "limits the Secretary's *remedies* when a mine operator refuses entry in contravention of the Act": specifically, it "'prohibits *forcible entries*, and instead requires the Secretary, *when refused entry* onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals.'" *Id.* at 9 (quoting *Dewey*, 452 U.S. at 604). The court found that the statutory prohibition on forcible entry by an MSHA inspector when an operator has refused entry "has no application in a case like this one, where there never was such a refusal." *Ibid.*

The court of appeals further determined that, "[e]ven if there had been a violation of [petitioner's] walkaround rights," such a violation would not "warrant[] vacatur" of the citation "or suppression" of evidence the inspector acquired inspecting Tejeda's truck. Pet. App. 10; see *id.* at 10-11. The court noted that the Mine Act's text does not "state the consequences of violating [Section 813(f)'s] walkaround right" apart from stating, "somewhat cryptically, that 'compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.'" *Id.* at 10

(quoting 30 U.S.C. 813(f)) (brackets omitted). "Whatever the 'not a jurisdictional prerequisite to enforcement' language means," the court determined, "it must at least mean that a harmless violation does not preclude enforcement." *Ibid.* The court noted that, like other circuits, it had construed a "substantially identical walkaround right" in another statute to require a party asserting a violation of that right to "show 'prejudice it suffered as a result of not being represented during the inspection.'" *Ibid.* (quoting *Frank Lill & Son, Inc.* v. *Secretary of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004)). Because petitioner "suggest[ed] nothing that it would have done differently if its employee had been present the moment the inspector opened the truck's door"—other than "refuse entry," which the Act does not permit—the court concluded that any violation was harmless and did not warrant vacatur or suppression. *Id.* at 10-11.

b. The court of appeals also rejected petitioner's contention that the warrantless inspection of Tejeda's truck violated the Fourth Amendment on the ground that petitioner "was not afforded an opportunity for precompliance review." Pet. App. 11; see *id.* at 11-14. The court disagreed with petitioner's assertion that this Court's decision in *Dewey*, which "upheld the Mine Act against a Fourth Amendment challenge," supports a precompliance-review requirement. *Id.* at 11. The court of appeals observed that "th[is] Court did not hold [in *Dewey*], nor has it ever held, that precompliance review is necessary for the constitutionality of warrantless administrative searches in a closely regulated industry like mining." *Ibid.*

The court of appeals explained that "*Dewey* state[d] the test for the constitutionality of a warrantless inspection program in such an industry" as follows:

> there must be a "substantial federal interest" that informs the regulatory scheme; Congress must have reasonably determined "that a system of warrantless inspections was necessary if the law is to be properly enforced and inspection made effective"; and the inspection program, "in terms of the certainty and regularity of its application," must "provide a constitutionally adequate substitute for a warrant."

Pet. App. 11-12 (quoting *Dewey*, 452 U.S. at 602-603) (brackets omitted). The court noted that "*Dewey* held that the Mine Act satisfied all of th[ose] elements" and that neither *Dewey*'s statement of the test nor the Mine Act itself contains a "requirement of precompliance review." *Id.* at 12.

The court of appeals rejected petitioner's argument that *Dewey*'s discussion of Section 818(a)—the provision authorizing MSHA to bring suit against an operator who refuses an inspection—showed that this Court viewed precompliance review as constitutionally required. Pet. App. 13. Petitioner relied on a passage of *Dewey* in which the Court, citing Section 818(a), observed that "[t]he Mine Act provides a specific mechanism for accommodating any special privacy concerns that a specific operator might have" by "prohibit[ing] forcible entries, and instead requir[ing] the Secretary, when refused entry onto a mining facility, to file a civil action . . . to obtain an injunction against future refusals." *Ibid.* (quoting *Dewey*, 452 U.S. at 604) (brackets omitted). The court of appeals expressed uncertainty as to whether that passage "[wa]s part of [*Dewey*'s] Fourth Amendment analysis, or simply a description of an additional—but not

constitutionally required—protection afforded by the Mine Act." *Ibid.* The court noted that this Court's subsequent decisions have not "include[d] anything like it in their descriptions of what is necessary to provide a constitutionally adequate substitute for a warrant in a closely regulated industry." *Ibid.*; see *id.* at 13 n.7. But the court of appeals found it unnecessary to resolve that issue because the court held that, even assuming that Section 818(a) embodies a constitutional requirement, that provision "does not create a freestanding right of refusal" and "has no application here because [MSHA's] inspector was not refused entry." *Id.* at 14.

ARGUMENT

Petitioner contends (Pet. i, 11) that the MSHA inspector violated petitioner's Fourth Amendment and due-process rights by beginning an inspection of a company truck when no representative of petitioner was present. The court of appeals correctly rejected petitioner's contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. The Mine Act requires mine operators—including independent contractors providing services at a mine—to comply with health and safety standards promulgated by MSHA. 30 U.S.C. 811(a). To ensure compliance with those standards, the Act authorizes and requires MSHA to conduct regular, warrantless inspections of mines to ascertain compliance with health and safety standards. 30 U.S.C. 813(a); see *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981). The Act generally requires that such inspections be unannounced, and it imposes civil and criminal penalties for providing advance notice of an inspection to any person. 30 U.S.C. 813(a), 820(e).

The Mine Act does not authorize a mine operator to refuse an inspection. To the contrary, because the Act expressly authorizes inspection, "refusal to admit" an inspector "is a violation of the Act." *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1549 n.2 (D.C. Cir. 1984) (brackets omitted). If an operator nevertheless refuses an inspection, the Act authorizes MSHA to bring suit seeking a court order compelling compliance. 30 U.S.C. 818(a)(1)(A)-(D). MSHA may also take other action against the operator, including proposing civil penalties and ordering that miners be withdrawn from the mine, effectively shutting it down. See 30 U.S.C. 814(b), 820(a) and (b); *Secretary of Labor* v. *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702, 1704 (1981).

Although the Mine Act does not allow mine operators to have advance notice of an inspection or to refuse an unannounced inspection, it does direct MSHA to afford a representative of the mine operator (and a representative of the miners) "an opportunity to accompany" the MSHA inspector "during the physical inspection of" the mine. 30 U.S.C. 813(f). Section 813(f) directs MSHA to provide that opportunity, commonly known as a "walkaround" right, Pet. App. 7, "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f). "[T]he provision" thus "gives an operator a chance to provide information that might be mitigating or material" to the inspection. Pet. App. 7. For example, where (as here) an MSHA inspector is examining whether a vehicle's parking brake is set, as required by MSHA's standards, 30 C.F.R. 56.14207, the walkaround right ensures that an operator's representative is able to explain "that the brake [i]s in fact set, or that the inspector ha[s] misunderstood how it work[s]," Pet. App. 7-8.

b. The court of appeals correctly determined that the MSHA inspector in this case did not violate petitioner's walkaround rights under Section 813(f). Pet. App. 7-9. Petitioner's representative—its employee, Tejeda, who had parked the company truck that the inspector found to be parked in violation of MSHA's safety standards—was present during the final portion of the inspection. *Id.* at 3, 8. Tejeda was absent when the inspector began examining the truck and opened the truck door to determine whether the parking brake was set. *Ibid.* But Tejeda "returned" while the inspector was "photographing the brake"—"while the condition of the brake was still plain to see"—and "had an opportunity to say whatever he wanted to the inspector." *Ibid.*

As the court of appeals observed, petitioner has "point[ed] to nothing that it would have done differently if its employee had been present before the door was opened—other than refuse the inspection entirely," which the court correctly held petitioner had no legal right to do. Pet. App. 8. To the contrary, by expressly granting the Secretary or his delegate a "right of entry to, upon, or through any" covered mine, 30 U.S.C. 813(a), the Act makes clear that an operator does not have a legal right to refuse an inspection. See Pet. App. 8 ("[R]efusal to admit an authorized representative into a facility for purposes of conducting an inspection" therefore "is a violation of the Act." (quoting *Carolina Stalite*, 734 F.2d at 1549 n.2)). Construing the Act to confer a right to refuse inspections would also seriously undermine Section 813(a)'s prohibition on providing advance notice of an inspection to an operator. As the court of appeals explained, "[i]t is hard to understand what good that provision would do if any operator could

delay a surprise inspection by blocking it without penalty." *Ibid.*

The court of appeals also correctly rejected petitioner's contention that a right to refuse inspection can be inferred from Section 818(a), which authorizes MSHA to seek (*inter alia*) a court order compelling compliance by a mine operator who has refused an inspection. Pet. App. 8-9. As the court explained, Section 818(a) merely "limits the Secretary's *remedies* when a mine operator refuses entry in contravention of the Act." *Id.* at 9. Because petitioner did not refuse an inspection in this case, the procedure that Section 818(a) establishes is not implicated. *Ibid.*

Moreover, even if the MSHA inspector had violated Section 813(f), the court of appeals also correctly determined that any violation would not warrant vacating the citation the inspector issued—the basis for the $116 penalty the Commission assessed—or exclusion of evidence derived from the inspection. Pet. App. 10-11. Nothing in the Act requires vacatur or suppression in the event the Commission finds that an MSHA inspector failed to comply with Section 813(f). Indeed, Section 813(f) itself states that "[c]ompliance with th[at] subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of" the Act. 30 U.S.C. 813(f). As the court explained, that language "at least mean[s] that a harmless violation does not preclude enforcement." Pet. App. 10. Because petitioner has not established any prejudice it suffered from the purported violation of Section 813(f), the asserted violation provides no basis to disturb the citation or the Commission's assessment of a $116 penalty based on it. *Id.* at 10-11.

2. In this Court, petitioner does not appear to seek review of the court of appeals' interpretation of the

Mine Act or of its conclusion that the inspection of Tejeda's truck did not violate the Act. Instead, petitioner urges the Court (Pet. i) to grant review to decide two constitutional questions: whether it "violates the Fourth Amendment" or "the Due Process Clause" of the Fifth Amendment "for an MSHA inspector arbitrarily to refuse a mine operator an opportunity to accompany the inspector on his investigation of that operator's property." See Pet. 11-24. Those questions do not warrant further review.

a. As a threshold matter, this case does not present any question of the constitutional implications of an MSHA inspector's "arbitrar[y] * * * refus[al]" (Pet. i) to allow a mine operator's representative to accompany the inspector during an inspection. As the court of appeals determined, petitioner "was not denied" the opportunity that Section 813(f) affords. Pet. App. 8. Petitioner's representative was present for the final portion of the inspection and had the opportunity to "aid[] [the] inspection and to participate in" discussions with the inspector. 30 U.S.C. 813(f); see Pet. App. 8. Through its employee, Tejeda, petitioner had the "chance to provide information that might be mitigating or material," and "to say whatever he wanted to the inspector." Pet. App. 7-8. The central premise of both constitutional questions petitioner presents—that petitioner was denied its walkaround rights—therefore is mistaken.

At a minimum, this case is an unsuitable vehicle to address any potential constitutional implications of a failure to comply with Section 813(f). The Court would have no occasion to consider such implications unless the Court first reviewed and reversed the court of ap-

peals' antecedent determination that no such failure occurred here. Petitioner has not sought review of that determination, and that case-specific, factbound conclusion would not warrant plenary review in any event.

b. Petitioner's constitutional objections also fail on their own terms.

i. The court of appeals correctly held that the inspection in this case did not violate the Fourth Amendment. Pet. App. 11-14. As the court observed (*id.* at 11-12), this Court in *Dewey* rejected a Fourth Amendment challenge to the Mine Act's framework authorizing warrantless, unannounced inspections. 452 U.S. at 602 ("[W]e conclude that the warrantless inspections required by the Mine Safety and Health Act do not offend the Fourth Amendment."); see *id.* at 602-605. The Court explained that the regulatory scheme furthers "a substantial federal interest" in "improving the health and safety conditions in the Nation's underground and surface mines"; that Congress "reasonably determine[d] * * * that a system of warrantless inspections was necessary 'if the law is to be properly enforced and inspection made effective'"; and that the Mine Act's framework, "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Id.* at 602-603 (citation omitted).

In concluding that the Mine Act provides a constitutionally adequate substitute for a warrant, the *Dewey* Court explained that the Act "applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions" and "is specifically tailored to address those concerns." 452 U.S. at 603. The Court further explained that the "the regulation of

mines [the Act] imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he will be subject to effective inspection." *Ibid.* (citation and internal quotation marks omitted). In particular, the Court pointed to the frequency and regularity of inspections required by the Act for various types of mines, as well as the Act's provisions requiring follow-up inspections of mines previously found to violate the Act and immediate inspections in response to a complaint asserting a violation or imminent danger. See *id.* at 604 (discussing 30 U.S.C. 813(a), (g), and (i)). The Court also observed that, if "a specific mine operator" has "special privacy concerns" and refuses MSHA entry, MSHA cannot forcibly enter the operator's mine but must instead obtain an injunction in federal district court against future refusals. *Id.* at 604-605 (discussing 30 U.S.C. 818(a)). Taken together, the Court determined, those provisions put operators on notice that they will be regularly inspected, inform operators what mandatory standards they must meet, limit MSHA's discretion about "what facilities to search and what violations to search for," and accommodate any special privacy interests that an operator might have. *Id.* at 605.

In the court of appeals, petitioner contended that *Dewey* "implie[d] a requirement of precompliance review." Pet. App. 12. The court correctly rejected that argument. As the court explained, the Court's opinion in *Dewey* "did not mention a precompliance review requirement." *Ibid.* Petitioner relied on *Dewey*'s discussion of Section 818(a) as prohibiting MSHA from forcibly entering a mine to conduct an inspection if the operator refuses entry and instead requiring MSHA to obtain a court order compelling the operator's compliance.

Id. at 12-14. Petitioner argued that the "rights" afforded by Section 818(a)—which petitioner contended include a right "to make a good faith denial of an inspection" and force MSHA to litigate—were central to *Dewey*'s holding and that, if those "rights are denied," an inspection violates the Fourth Amendment. Pet. C.A. Br. 16-17; see Pet. App. 12-14. As the court explained, however, even assuming arguendo that a failure by MSHA to respect whatever "rights" (Pet. C.A. Br. 16) Section 818(a) confers on mine operators would cause an inspection to violate the Fourth Amendment, those rights do not include "a freestanding right of refusal." Pet. App. 14. Section 818(a) provides for MSHA to seek judicial intervention if an operator refuses an inspection, which did not occur here. *Ibid.*; see pp. 4, 6, 8, 14, *supra*.

In this Court, petitioner appears to contend (Pet. i, 19-23) that an inspection violates the Fourth Amendment if MSHA fails to afford a mine operator its statutory walkaround rights under Section 813(f). That contention lacks merit. As discussed above, the court of appeals held that MSHA did not violate petitioner's walkaround rights in this case. See pp. 7-8, 13-14, *supra*; Pet. App. 7-9. In any event, *Dewey* did not mention Section 813(f) or walkaround rights, much less deem compliance with that provision essential for a warrantless inspection to satisfy the Fourth Amendment. Apart from *Dewey*, petitioner identifies no reason why noncompliance with the Mine Act's requirements by itself would render an inspection per se unreasonable under the Fourth Amendment, and this Court has repeatedly rejected similar arguments. See, *e.g.*, *City of Ontario* v. *Quon*, 560 U.S. 746, 764 (2010) (rejecting argument that violation of federal statutory requirements rendered

search per se unreasonable); *Virginia* v. *Moore*, 553 U.S. 164, 168 (2008) (similar as to state law); *California* v. *Greenwood*, 486 U.S. 35, 43 (1988) (same).

Petitioner also appears to suggest (Pet. 23-24) that MSHA's alleged failure to afford petitioner its walkaround rights was tantamount to forcible entry and that the decision below "can be read to nullify th[e] prohibition on forcible entry" following a mine operator's refusal of an inspection that *Dewey* derived from Section 818(a). That contention lacks merit. Even if petitioner's walkaround rights under Section 813(f) were violated when the MSHA inspector began his inspection of Tejeda's truck before Tejeda returned, that did not constitute forcible entry following a refusal of an inspection. As the court of appeals found, no refusal occurred. Pet. App. 9, 14. To the extent petitioner's contention is that noncompliance with an operator's walkaround rights deprives the operator of a right under the Act to refuse inspection, that contention lacks merit for the reasons explained above. See pp. 11-14, *supra*.

Even if petitioner were correct that the inspection in this case violated the Fourth Amendment, that conclusion would not provide a basis for disturbing the decision below upholding the citation and $116 penalty MSHA issued to petitioner unless petitioner also establishes that suppression of evidence uncovered during the inspection is required. "Suppression of evidence * * * has always been [this Court's] last resort, not [its] first impulse," in light of the "'substantial social costs'" that suppression "generates." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006) (citation omitted). The rule applies "only 'where its remedial objectives are thought most efficaciously served'—that is, 'where its deterrence benefits outweigh its "substantial social costs."'"

Ibid. (citations omitted). Suppression does not apply, for example, where a Fourth Amendment violation results from a reasonable mistake of law or fact. See *Heien* v. *North Carolina*, 574 U.S. 54, 57, 60-67 (2014).

If a violation of the Fourth Amendment had occurred, it is far from clear whether suppression of evidence obtained during the inspection of Tejeda's truck before Tejeda returned to the parking lot would have been appropriate in the proceedings before the ALJ in the circumstances of this case. The court of appeals did not reach that issue in light of its conclusion that the inspection did not violate the Fourth Amendment, and petitioner has not sought review of that issue in this Court. At a minimum, the prospect that the Fourth Amendment question petitioner presents may have no effect on the ultimate outcome of the case provides an additional reason why this case would be a poor vehicle for further review.

ii. Petitioner additionally contends (Pet. i) that its due-process rights were violated by the MSHA inspector's "refus[al]" to allow petitioner the "opportunity to accompany the inspector on his investigation of [petitioner's] property." See Pet. 11. But petitioner advances no argument as to why due-process principles would require MSHA to afford walkaround rights to mine operators at all—let alone why they would call into question the procedure the inspector followed in this case, where no citation was issued until Tejeda returned and had an opportunity to discuss with the inspector the state of his parking brake or any other issue.

Instead, petitioner's due-process argument appears to be a repackaging of its contention in the court of appeals that the MSHA inspector failed to comply with the Mine Act's walkaround provision. See Pet. 9-11, 22. In

the court of appeals, petitioner expressly framed its due-process argument in those terms. See Pet. C.A. Br. 27-28 (arguing that "the arbitrary denial of Mine Act rights is a due process violation"). Because the court correctly rejected petitioner's statutory argument, petitioner's reframing of that argument in due-process terms is necessarily unavailing as well.

Petitioner also suggests that the inspection here did not comply with MSHA's own policies. Pet. 6, 9-11, 23 (citing MSHA, Dep't of Labor, *Program Policy Manual* (Nov. 2013) (Manual), https://go.usa.gov/xG4vV). Even if the inspector failed to comply with those polices in this case, however, it would not follow that the inspection violated petitioner's due-process rights. See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741, 749-757 (1979) (holding that federal agents' monitoring and recording of a defendant's conversations in violation of federal regulations did not violate due process and did not warrant suppression at trial of the evidence obtained). The Manual "does not prescribe rules of law and is not binding on the Secretary." *Secretary of Labor* v. *Revelation Energy, LLC*, 35 FMSHRC 3333, 3339 n.7 (2013); see also *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-539 (D.C. Cir. 1986) (Scalia, J.) (explaining that, although "an agency must adhere to its own regulations, * * * it need not adhere to mere 'general statements of policy,'" and concluding that Secretary of Labor's "enforcement policy" for Mine Act matters was not "a 'binding norm' to which the Secretary was required to adhere" (brackets and citations omitted)). Petitioner does not explain why noncompliance with MSHA's Manual would give rise to a due-process violation in these circumstances.

In any event, petitioner's contention that the MSHA inspector did not comply with the Manual lacks merit. As petitioner notes (Pet. 6, 9, 11), the Manual does state that inspectors should make "every reasonable effort" to provide walkaround rights. I Manual 14 ("[E]very reasonable effort is to be made to provide both parties with an opportunity to participate in the physical inspection of the mine and in all pre-inspection and post-inspection conferences."). The Manual, however, does not state that the procedure followed here—beginning an inspection of a vehicle's parking brake while an operator's representative is absent, but completing the inspection and issuing a citation only after the operator's representative returns—is impermissible. Moreover, as the Manual recognizes, inspectors have discretion to determine how to accommodate walkaround rights in particular circumstances. See *id.* at 14-15; *Secretary of Labor ex rel. Wayne* v. *Consolidation Coal Co.*, 11 FMSHRC 483, 489 (1989).

That discretion is essential to enable inspectors to perform their primary duty: to inspect mines, without delay, to protect miners' safety and health. As MSHA observed decades ago, "[c]onsiderable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection." MSHA, Dep't of Labor, *Section 103(f) of the Fed. Mine Safety and Health Act of 1977*, 43 Fed. Reg. 17,546, 17,546 (Apr. 25, 1978). "While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection * * * it must be borne in mind that the inspection itself always takes precedence." *Ibid.* Apart from its statutory arguments, which lack merit for the reasons explained above, petitioner does not identify any basis for concluding that the

MSHA inspector in this case abused the discretion the Manual accords. That case-specific question, which the court of appeals did not address, would not warrant review in any event.

3. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. And petitioner does not contend that the absence of any lower-court conflict results from any impediment to other courts of appeals' ability to review such cases. Although any person aggrieved by a Commission decision may seek review in the D.C. Circuit, such a person may alternatively seek review in "the circuit in which the violation is alleged to have occurred." 30 U.S.C. 816(a)(1). As petitioner acknowledges (Pet. 23-24 & n.1), mine operators can and frequently do seek review in other circuits.

Instead, petitioner asserts (Pet. 11-18) that this Court's review is warranted to resolve inconsistency among the Commission's administrative decisions addressing walkaround rights. But any such inconsistency would not provide a basis for this Court's plenary review. See Sup. Ct. R. 10; cf. *Buford* v. *United States*, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity" in Sentencing Guidelines "is necessary, the [Sentencing] Commission can provide it." (citing *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991))).

Moreover, petitioner's assertion of inconsistency with respect to walkaround rights in the Commission's decisions is unsupported. Petitioner relies (Pet. 12-15) on the Commission's decision in *Secretary of Labor* v. *SCP Investments, LLC*, 31 FMSHRC 821 (2009), remanded, 32 FMSHRC 119 (2010) (ALJ). Although the Commission's decision produced multiple separate opinions, all four Commissioners in that case agreed that MSHA

may take enforcement actions even if an operator does not receive its walkaround rights. *Id.* at 831-834 (opinion of Commissioners Young and Cohen); *id.* at 838 (opinion of Chairman Duffy); *id.* at 842 (opinion of Commissioner Jordan). The Commissioners disagreed only about the appropriate remedy in the anomalous case when an operator has not been extended its walkaround rights. Petitioner has not sought review of that issue in this Court. The court of appeals' conclusion that neither vacatur nor suppression of evidence would be warranted here even if the MSHA inspector violated the Mine Act provides an additional basis to uphold the Commission's decision, not a reason for granting further review in this case.

Petitioner also cites (Pet. 15-17) three subsequent ALJ decisions purportedly illustrating the lack of clear guidance. Those decisions, however, do not conflict. Two applied the remedial approach adopted by the two-member plurality in *SCP Investments*, see *Secretary of Labor* v. *SCP Investments, LLC*, 32 FMSHRC 119, 130 (2010) (ALJ); *Big Ridge, Inc.* v. *Secretary of Labor*, 36 FMSHRC 1677, 1735-1740 (2014) (ALJ), and the third did not address the remedial issue because the ALJ found that the operator had an opportunity to exercise its walkaround rights, *Secretary of Labor* v. *DJB Welding Corp.*, 32 FMSHRC 728, 733-734 (2010). Moreover, ALJ decisions do not bind the Commission, 29 C.F.R. 2700.69(d), and the Commission can address any conflict that may arise by reviewing ALJ decisions on petitions for review or sua sponte, 30 U.S.C. 823(d)(2)(B). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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