No. 04-978

In the Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 4 of the Federal Coal Mine Health and Safety Act of 1969 (Mine Act), 30 U.S.C. 803, provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." The question presented is whether the Mine Act applies to petitioner's sand and gravel mine, the products of which are sold exclusively to intrastate customers.

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 1a-9a), is reported at 386 F.3d 460. The notice of the Federal Mine Safety and Health Review Commission denying the petition for discretionary review of the administrative law judge's decision (Pet. App. 10a-11a) is unreported. The decision and order of the administrative law judge (Pet. App. 12a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2004. A petition for rehearing was denied on October 15, 2004 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on January 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Coal Mine Health and Safety Act of 1969 (Act or Mine Act), 30 U.S.C. 801 *et seq.*, was enacted to improve safety and health in the Nation's mines. 30 U.S.C. 801. The Act authorizes the Secretary of Labor to promulgate mandatory safety and health standards and to enforce those standards through regular mine inspections. 30 U.S.C. 811, 813. Section 4 of the Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." 30 U.S.C. 803. The Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States." 30 U.S.C. 802(b).

2. Petitioner D.A.S. Sand & Gravel, Inc., operates a mine at which it extracts sand and gravel for sale to the general public. Pet. App. 13a.[1] In September 2000 and November 2001, investigators from the Department of Labor's Mine Safety and Health Administration (MSHA) inspected petitioner's mine and issued citations for multiple violations of Mine Act safety standards. *Id.* at 14a-18a (describing citations). Petitioner contested the citations, asserting both that the violations were not serious in nature and that its mine was not covered by the Act because its products are not sold in interstate commerce, as required by Section 4 of the Act. *Id.* at 18a.

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[1] Section 3(h)(1)(A) of the Act defines a "mine" as, among other things, "an area of land from which minerals are extracted in nonliquid form." 30 U.S.C. 802(h)(1)(A). Petitioner does not dispute that its sand and gravel operation is a "mine" within the meaning of Section 3(h).

After a hearing, the administrative law judge (ALJ) affirmed the citations on the merits and rejected petitioner's contention that its mine is not covered by Section 4. Pet. App. 12a-28a. The ALJ found that petitioner sells its products, sand and gravel, only to intrastate buyers. *Id.* at 13a. He also stated, however, that purchasers may have used the products for "purposes with multi-state consequences, *e.g.*, road construction," and that equipment used in the operation "has been purchased from suppliers in other states." *Ibid.* The ALJ held that, even if petitioner's mine is a small operation whose products are sold locally, it affects interstate commerce because of the cumulative effect that small scale operations have on interstate pricing and demand. *Id.* at 19a (citing and quoting *Secretary of Labor* v. *Tide Creek Rock, Inc.*, 24 F.M.S.H.R.C. 201 (2002)).

The ALJ rejected petitioner's argument that this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), compels a narrow interpretation of Section 4 of the Mine Act. Pet. App. 19a-20a. The ALJ concluded that the Mine Act "is very different from the Clean Water Act," which was at issue in *SWANCC*, "on the issue of congressional intent to occupy the field," *id.* at 20a, and that the Mine Act's broad definition of a mine and its legislative history show that "Congress intended to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine." *Id.* at 21a. Accordingly, the ALJ concluded that "Congress exercised sufficient authority under the Commerce Clause of the Constitution to make [petitioner's] sand and gravel business subject to regulation" under the Act. *Id.* at 21a-22a.

The ALJ assessed $2400 in penalties for petitioner's violations, Pet. App. 28a, and petitioner sought discretionary review by the Federal Mine Safety and Health Review Commission. The Commission denied the petition, *id.* at 10a-11a, and accordingly the ALJ's decision became the final decision of the Commission. See 30 U.S.C. 823(d)(1).

3. The court of appeals affirmed. Pet. App. 1a-9a. The court reasoned, first, that "the statutory term 'affecting . . . commerce,' . . . when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause." Pet. App. 5a (quoting *Jones* v. *United States*, 529 U.S. 848, 854 (2000)) (alterations in original). Second, it noted that Congress expressly found that "'the disruption of production and the loss of income' caused by mining accidents and mining-related illnesses" impede and burden commerce, including by restricting the growth of the coal-mining industry. *Id.* at 5a-6a (citing 30 U.S.C. 801(c), (d) and (f)). Those congressional findings, the court observed, support the ALJ's conclusion that Congress chose "to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine." *Id.* at 6a. Finally, the court noted that the Act's legislative history confirms that Congress intended to exercise the full extent of its commerce power when it enacted the Mine Act. See *id.* at 6a-7a.

The court further concluded that the Commerce Clause permits Congress to regulate mines whose products are sold entirely intrastate. Pet. App. 7a-8a. The court observed that "the Supreme Court has long held that the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential

to affect an interstate market the regulation of which is within Congress's power." *Id.* at 7a-8a (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)).

ARGUMENT

Petitioner challenges the court of appeals' conclusion that the Mine Act applies to its mine.[2] The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Relying on the canon of constitutional doubt and this Court's decisions in *Jones* v. *United States*, 529 U.S. 848 (2000), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), petitioner contends that the Mine Act should not be interpreted to authorize federal regulation of mines that sell their products exclusively to intrastate buyers. Petitioner acknowledges (Pet. 2), as it must, that words like "affect commerce," 30 U.S.C. 803, which Congress employed in defining the coverage of the Mine Act, generally invoke the full sweep of Congress's power under the Commerce Clause.[3] Petitioner nonetheless asserts (Pet. 4-6)

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[2] Petitioner has not renewed, in this Court, its contention that Congress lacks the power under the Commerce Clause to regulate its mine.

[3] See *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (the terms "'affecting commerce' . . . [are] words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power"); *Jones* v. *United States*, 529 U.S. 848, 854 (2000) ("term[s] 'affecting . . . commerce,' * * * when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause"); see also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell* v. *United States*, 471 U.S. 858, 859 & n.4 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571-572

that Congress in the Mine Act "qualified" the words "affect commerce" by twice using the phrase "products of which." Petitioner thus argues (Pet. 7) that the Mine Act does not apply to a mine unless the products of that mine "affect commerce" in that they are sold across state lines.

Petitioner's argument founders on the text of Section 4 of the Mine Act. That section establishes that the Mine Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce." 30 U.S.C. 803. As an initial matter, petitioner's proposed interpretation of Section 4, under which a mine is not covered by the Act unless its products *enter* interstate commerce, would render superfluous the entire second clause of that Section, which provides coverage over "[e]ach coal or other mine, * * * the operations or products of which *affect* commerce." 30 U.S.C. 803 (emphasis added). Petitioner's interpretation thus contravenes a fundamental rule of statutory construction. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 262 (2000).

In addition, petitioner's exclusive focus on the statutory phrase "products of which"overlooks the fact that the statutory text does not limit the Mine Act's jurisdictional sweep on the basis of the "qualifying words" cited by petitioner, but instead unambiguously extends the Act to every mine "the *operations* * * * of which affect commerce." 30 U.S.C. 803 (emphasis added). As Congress was well aware, that language reflected an intent, in light of this Court's cases, to invoke the full jurisdictional authority that Congress possesses under the Commerce Clause. See *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("[W]hen [Congress] wants to bring aspects of commerce within the

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(1977); *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975).

full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.").

The congressional findings and declaration of purpose set forth in the Mine Act confirm Congress's intent to exercise the full scope of its commerce power. In adopting the Act, Congress recognized "an urgent need to * * * improv[e] the working conditions and practices in the Nation's coal or other mines" because "the disruption of production and the loss of income" caused by mining accidents and mining-caused diseases "unduly impedes and burdens commerce." 30 U.S.C. 801 (c) and (f). Congress further found that "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines * * * cannot be tolerated" because it constitutes a "serious impediment to the future growth of the coal or other mining industry." 30 U.S.C. 801(d); see *Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981) ("Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.").

Because the text of the Mine Act clearly expresses Congress's intent to exercise the full scope of its commerce power in regulating the mining industry, it follows that the Act applies to petitioner's mine. Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States," U.S. Const. Art. I, § 8, Cl. 3, and Congress has corresponding authority under the Necessary and Proper Clause, *id.* Cl. 18, to pass legislation that constitutes a reasonable means to effectuate the regulation of interstate commerce. "Congress' commerce authority includes the power to regulate those activities having a sub-

stantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)). Thus, it has long been established that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States* v. *Darby*, 312 U.S. 100, 118 (1941); accord *Wickard*, 317 U.S. at 124 (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) ("[T]he power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'") (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)). The congressional findings contained in the Mine Act, discussed above, show that Congress chose to regulate the economic activity of mining to ensure the safety of those who work in the mining industry, an issue that, Congress found, has a direct effect on interstate commerce. 30 U.S.C. 801. Accordingly, the Mine Act applies to petitioner's mine, even though the products of that mine are not sold to customers in other states, because the economic activity of mining substantially affects interstate commerce. See *United States* v. *Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (concluding that the Mine Act was a constitutional exercise of the commerce

power as applied to a small mine whose sales of coal were entirely local).[4]

2. Contrary to petitioner's view, the court of appeals' decision in this case does not conflict with this Court's decisions in *Jones* v. *United States*, 529 U.S. 848 (2000), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). *Jones* involved a federal arson statute covering buildings "used * * * in any activity affecting interstate * * * commerce," 18 U.S.C. 844(i). See 529 U.S. at 854. Emphasizing that the "key word [in that statutory formulation] is 'used,'" *ibid.*, the Court held that a building used by its owner as a private residence was not used in any activity affecting commerce, *id.* at 859. Nothing in *Jones* suggests that a commercial mining operation should be excluded from Mine Act coverage because its products are sold solely intrastate. The Mine Act does not contain the key limiting term "used"; rather, its provisions apply to every mine "the operations or products of which affect commerce." 30 U.S.C. 803. Moreover, *Jones* did not disturb the holding of *Russell* v. *United States*, 471 U.S. 858, 862 (1985), which concluded that Section 844(i) applies to a building used as a rental property. See *Jones*, 529 U.S. at 853. The rental property in *Russell* presents a much closer analogy to peti-

[4] Even if a particularized connection between petitioner's operations and interstate commerce were required, that connection would exist here. Petitioner's operations affect interstate commerce because, as the ALJ found, Pet. App. 13a, petitioner uses equipment purchased from suppliers in other states. Cf. *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964) (holding in a case involving Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, that a restaurant affected interstate commerce because a substantial portion of the food it served came from out of state). Additionally, petitioner's products are used for a variety of construction projects, which the ALJ indicated could have "multi-state consequences." Pet. App. 13a.

tioner's mine, a commercial enterprise, than does the owner-occupied private dwelling in *Jones*.

In *SWANCC*, the Court refused to "hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the Clean Water Act's] definition of 'navigable waters' because they serve as habitat for migratory birds." 531 U.S. at 171-172. The Court also stated that, even if the meaning of "navigable waters" in the Clean Water Act were not plain, it would not defer to the Army Corps of Engineers' interpretation of the phrase "navigable waters" as encompassing the abandoned sand and gravel pit at issue there, because deferring to the Corps would raise a grave and doubtful constitutional question. See *id.* at 172-174. Here, by contrast, the text of the Mine Act unambiguously covers petitioner's mine; thus, there is no need for this Court to consider whether deference is appropriate. As explained above, moreover, application of the Mine Act to petitioner's commercial enterprise does not raise a serious constitutional question. Thus, the decision below is fully consistent with *Jones* and *SWANCC*.[5]

[5] Petitioner criticizes (Pet. 5-8) the court of appeals' reliance on a committee report construing the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, which amended the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742. (Section 4 of the 1969 Act, as amended, is at issue in this case.) Because the text of the Mine Act unambiguously establishes that it applies to commercial mines like petitioner's, there is no need for this Court to consider the Act's legislative history. *E.g.*, *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002) ("reference to legislative history is inappropriate when the text of the statute is unambiguous").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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