No. 13-645

In the Supreme Court of the United States

MACH MINING, LLC, PETITIONER

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Federal law requires the operator of an underground coal mine to adopt a ventilation plan "approved by" the Secretary of Labor and specifies that the plan "shall show * * * such additional or improved equipment as the Secretary may require" as well as "such other information as the Secretary may require." 30 U.S.C. 863(*o*). The question presented is whether a coal mine operator who challenges a citation for operating a mine without an approved ventilation plan is entitled to de novo review by the Federal Mine Safety and Health Review Commission of the Secretary of Labor's decision not to approve a proposed plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 728 F.3d 643. The decision of the Federal Mine Safety and Health Review Commission (Pet. App. 35a-91a) is reported at 34 F.M.S.H.R.C. 1784. The decision of the administrative law judge (Pet. App. 92a-128a) is reported at 32 F.M.S.H.R.C. 149.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2013. The petition for a writ of certiorari was filed on November 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, to establish health and safety standards for miners. § 2(g), 83 Stat. 743. Although originally administered by the Secretary of the Interior, § 3(a), 83 Stat. 743, the Act, as amended (Mine Act), is now administered by the Secretary of Labor, 30 U.S.C. 802(a). One of the Act's provisions, codified at 30 U.S.C. 863(*o*), requires coal mine operators to adopt a ventilation system "approved by the Secretary" and "suitable to the conditions and the mining system of the coal mine." § 303(*o*), 83 Stat. 772 (30 U.S.C. 863(*o*)). In particular, the plan must "show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require." *Ibid.*

The Secretary's current regulations delegate the authority over ventilation plans to district managers in the Mine Safety and Health Administration (MSHA). 30 C.F.R. 75.370. Mine operators must "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. 75.370(a). To obtain approval, operators must submit a written proposed plan to the district manager and allow representatives of miners to comment on the plan. 30 C.F.R. 75.370(a)-(b). The district manager then notifies the operator in writing of the approval or denial of approval for the plan and, if approval is denied, any deficiencies in the plan. 30 C.F.R. 75.370(c). "No proposed ventilation plan shall be implemented before

it is approved by the district manager." 30 C.F.R. 75.370(d).

As amended by the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, the Mine Act vests the Secretary with "broad authority to compel immediate compliance with Mine Act provisions through the use of mandatory civil penalties, discretionary daily civil penalties, and other sanctions." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 204 (1994); see 30 U.S.C. 814. A mine operator may challenge the Secretary's issuance of an "order," "citation," or "proposed assessment of a penalty" before the Federal Mine Safety and Health Review Commission, an adjudicatory agency created in the 1977 Act and independent of the Department of Labor. *Thunder Basin Coal*, 510 U.S. at 204; 30 U.S.C. 815, 823; see Pet. App. 3a n.2. Commission decisions are reviewable in the courts of appeals. *Thunder Basin Coal*, 510 U.S. at 204; 30 U.S.C. 816.

The Mine Act does not provide any explicit procedure for review of the Secretary's decision not to approve an operator's proposed ventilation plan. Pet. App. 16a. The Senate Report accompanying the 1977 amendments to the Mine Act explained that, in the context of mine-specific plans such as ventilation plans, "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977) (Senate Report). The MSHA has adopted a practice, however, of allowing an operator who disagrees with the MSHA's disapproval of a particular proposed ventilation plan to notify the MSHA of that disagreement and to state that it intends to operate without an ap-

proved plan on a specific day. Pet. App. 27a; see *id.* at 18a-28a (discussing historical development of this practice). The MSHA then issues a citation for the operator's "technical violation" of the regulatory prohibition against operating without an approved plan. *Id.* at 27a; see 30 C.F.R. 75.370(d). The operator may then avail itself of the Mine Act's procedures for Commission review of an enforcement action. Pet. App. 27a.

2. Petitioner operates an underground coal mine near Johnston City, Illinois. Pet. App. 2a. That mine uses a relatively new system of ventilation that pushes an unusually large volume of air into the mine with a blower fan at an intake shaft and then pulls air out of the mine with an exhaust fan at the back of the mine. *Id.* at 37a. The MSHA's district manager approved that system for two sections of the mine. *Id.* at 2a. During the mining of those two sections, however, conditions changed: the creation of additional open spaces made ventilation more complex, and, in response to worsening roof conditions, petitioner made an unapproved change to its system that caused its tunnels to no longer run in a straight line. *Id.* at 37a & n.3, 53a, 98a, 118a-121a. The MSHA issued a citation (not at issue in this case) to petitioner for continuing to operate the mine following the unapproved change. *Id.* at 99a.

The MSHA also declined to approve petitioner's proposal to use the same ventilation plan on the third section of the mine that the MSHA had approved for the other two sections. See Pet. App. 2a. The MSHA had conducted two ventilation surveys at the mine, which indicated to the MSHA that petitioner's proposed method of evaluating the effectiveness of one

part of the system was insufficient. *Id.* at 105a-109a; see *id.* at 38a-39a. Following the disapproval decision, petitioner submitted a revised ventilation plan to the MSHA, and the MSHA entered into discussions with petitioner about its suitability. *Id.* at 39a. The discussions included telephone calls, e-mails, letters, and meetings, at both the district and national levels of the MSHA. *Id.* at 3a. Petitioner eventually decided that it wanted to seek review of the MSHA's position. *Ibid.* It accordingly notified the MSHA that it intended to operate without an approved ventilation plan, and the MSHA issued citations for two "technical violations" of its regulations. *Ibid.*

3. The Commission assigned the challenge to an administrative law judge (ALJ), who held an expedited hearing and upheld the citations. Pet. App. 3a-4a; 92a-128a. Reasoning that the Secretary generally enjoys discretion to insist that specific provisions be included as a condition for approving a ventilation plan, the ALJ applied abuse-of-discretion review to the agency's actions. *Id.* at 117a-118a. The ALJ determined that the MSHA's district manager, who had been in the mining industry for over 40 years and had extensive experience with ventilation and ventilation plans, had acted reasonably in refusing to approve petitioner's plan in the absence of certain features that the MSHA had requested. *Id.* at 125a. The ALJ did not credit the testimony of petitioner's expert, who did not address the MSHA's recommendations, or the testimony of petitioner's general manager, who testified from notes handed to him by his attorney. *Id.* at 109a-110a.

4. The full Commission affirmed in relevant part. Pet. App. 35a-91a. The Commission concluded, as an

initial matter, that the ALJ had applied the correct standard of review. *Id.* at 44a-49a. The Commission observed that the "plain language" of 30 U.S.C. 863(*o*) requires a plan to contain "such information 'as the Secretary may require,'" and it explained that because "the Secretary is exercising discretion in determining which provisions should be included in a ventilation plan, it is appropriate to review that exercise against an 'arbitrary, capricious or abuse of discretion' standard." Pet. App. 46a-47a. The Commission also reasoned that an arbitrary-and-capricious standard was consistent with Commission and D.C. Circuit precedent. *Id.* at 48a-49a. Applying that standard, the Commission agreed with the ALJ that the district manager acted reasonably with respect to the disputed plan provisions (except for one provision that the parties later stipulated to be moot). *Id.* 50a-75a; see *id.* at 6a n.6.

Two Commissioners dissented in part. Pet. App. 77a-91a. In their view, the ALJ should have reviewed the MSHA's determinations about the proposed ventilation plan under a preponderance-of-the-evidence standard. *Ibid.*

5. The court of appeals affirmed the Commission's decision upholding the MSHA's determinations. Pet. App. 1a-34a.[*] After an extensive review of the Mine Act's text and history, including the development of the "technical violation" procedure for resolving disputes over ventilation plans, the court rejected peti-

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[*] The court of appeals explained that a potential procedural defect in the case—a late discovery that petitioner had actually paid the penalty assessed against it—had been corrected by the Secretary's imposition of a new penalty followed by additional administrative proceedings. Pet. App. 4a n.3.

tioner's argument that the Commission must review de novo the Secretary's refusal to approve a ventilation plan. *Id.* at 14a-32a.

The court of appeals recognized that 30 U.S.C. 815(d) requires the Commission to hold hearings in accord with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. 554, see Pet. App. 29a; that under *Steadman* v. *SEC*, 450 U.S. 91 (1981), a preponderance-of-the-evidence standard applies to hearings governed by Section 554 of the APA, see Pet. App. 7a-8a; and that, therefore, when an enforcement action is challenged before the Commission, the Secretary must prove by a preponderance of the evidence that the cited operator "acted as the Secretary alleged," *id.* at 29a. But the court concluded that "the Secretary's role of approving [a ventilation] plan is not really an enforcement role susceptible to de novo review, but rather a role imbued with a legislative or policy-making dimension to ensure that the plan is reflective of the public interest in mine safety." *Id.* at 30a. The court observed that the Mine Act "clearly places on the Secretary the duty to reach an independent judgment as to the adequacy of the standards" in a proposed ventilation plan, 30 U.S.C. 863(*o*). Pet. App. 15a; see *ibid.* ("The statute places on the Secretary's shoulders the obligation and prerogative of making a discretionary judgment as to whether the ventilation system developed by the operator will protect those who must expose their health, and indeed their lives, to risk by working at that specific site."). "Use of such a de novo standard of review in the ventilation plan situation," the court explained, "would undermine—substantially—the specific statutory language of 30 U.S.C. § 863(*o*) that the imple-

mented plan must be one approved by the *Secretary*, not by the Commission." *Id.* at 30a.

ARGUMENT

Petitioner contends (Pet. 8-32) that the court of appeals erred in applying a deferential standard of review to the Secretary's decisions about petitioner's ventilation plan. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals correctly concluded that the Secretary's disapproval of a ventilation plan should be reviewed deferentially. Since 1969, Congress has required that a ventilation plan must be "approved by the Secretary" and "shall show" both "such additional or improved equipment as the Secretary may require" and "such other information as the Secretary may require." Mine Act § 303(*o*), 83 Stat. 772 (30 U.S.C. 863(*o*)). When Congress created the Commission in 1977, it did not authorize direct review of the Secretary's ventilation-plan decisions. Instead, it recognized that "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." Senate Report 25.

As the court of appeals recognized, "a de novo standard of review in the ventilation plan situation would undermine—substantially—the specific statutory language of 30 U.S.C. § 863(*o*)." Pet. App. 30a. While Section 863(*o*) vests plan-approval authority in the Secretary, de novo review would shift that authority to the Commission. See *id.* at 30a-31a. While Section 863(*o*) states that the Secretary "may require" certain plan features, 30 U.S.C. 863(*o*), de novo review

would give the Commission a blank slate to decide that a particular feature should or should not be included. And while Section 863(*o*) contemplates that "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan," Senate Report 25, de novo review would allow the Commission's judgment to trump the Secretary's.

Petitioner largely disregards Section 863(*o*). It focuses instead on 30 U.S.C. 815(d), which provides that a Commission hearing following a mine operator's challenge to an "order," "citation," or "proposed assessment of a penalty" should generally be conducted "in accordance with section 554 of title 5." Pet. 13-18. Petitioner correctly notes (Pet. 13-14) that under 5 U.S.C. 554(c)(2), which incorporates 5 U.S.C. 556(d), an agency sanction must be supported by a preponderance of the evidence. *Steadman* v. *SEC*, 450 U.S. 91, 96-103 (1981). But that principle does not aid petitioner here. The agency action under review by the Commission in this case was a sanction against petitioner for operating without a ventilation plan. Pet. App. 3a; see, *e.g.*, Pet. 4-5. It is undisputed that, to support that sanction, the MSHA had to prove by a preponderance of the evidence that petitioner lacked an approved plan and was operating anyway. But that burden of proof was easily satisfied by petitioner's own representations to that effect. See Pet. App. 3a. Nothing in Section 815(d) suggests that petitioner was *also* entitled to a de novo hearing on the distinct issue of whether a particular ventilation plan proposed by petitioner should have been approved by the Secretary. To the extent that latter issue is reviewable, it must be reviewed in a manner consistent with the

discretion that Section 863(*o*) expressly vests in the Secretary.

As the court of appeals recognized (Pet. App. 31a-32a), such deferential review accords with this Court's decision in *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991). In *Martin*, this Court held that the Secretary of Labor, not an agency that (like the Commission here) adjudicated challenges to certain enforcement actions by the Secretary, had authority to interpret the Secretary's regulations. *Id.* at 151-157. The Court concluded that the adjudicative agency's authority to review the Secretary's enforcement actions could not be viewed as divesting the agency of its implicit authority to apply its expertise to the interpretation of its own regulations. See *ibid.* Analogously here, the Commission's authority to review the Secretary's enforcement actions should not be viewed as divesting the agency of its *explicit* authority to approve or disapprove, or shape the content of, ventilation plans. See 30 U.S.C. 863(*o*).

2. Petitioner fails to identify any conflict between the decision below and any decision of this Court or another circuit court. Petitioner errs in suggesting (Pet. 29-31) that further review is necessary in order to resolve a conflict between *Martin* and *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). The Court held in *Thunder Basin Coal* that the Mine Act's procedures for Commission review preclude district court jurisdiction over a pre-enforcement challenge to the Secretary's interpretation of the Act. *Id.* at 200, 204, 207-215. Nothing in *Thunder Basin Coal* undermines *Martin*'s conclusion that the Secretary may permissibly exercise his judgment and discretion in matters (such as interpreting governing regulations)

that may affect enforcement, even when challenges to enforcement actions are reviewed by an independent agency. And the holding of the decision below—that Section 863(*o*) vests the Secretary, rather than the Commission, with the authority to exercise his judgment and discretion to approve and require modification of ventilation plans—is consistent with both *Thunder Basin Coal* and *Martin*.

Petitioner also errs in suggesting (Pet. 8-9, 13-18) that the court of appeals' decision conflicts with *Steadman* v. *SEC*, *supra*, which the court of appeals expressly acknowledged and discussed, Pet. App. 7a-8a, 16a n.13. In *Steadman*, this Court, looking to the APA for guidance, held that the SEC properly applied the preponderance-of-the-evidence standard rather than a higher clear-and-convincing-evidence standard, in a disciplinary proceeding. 450 U.S. at 95-104. The decision in *Steadman* did not, however, address whether an adjudicatory agency may review de novo decisions requiring the exercise of technical expertise and policy judgment that Congress has expressly vested in the enforcing agency. It thus has no direct bearing on the question presented here.

Finally, petitioner errs in suggesting (Pet. 9, 19-20) that the decision below conflicts with the D.C. Circuit's 38-year-old decision in *Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398 (1976), which the court of appeals likewise acknowledged and discussed, Pet. App. 19a-24a. In *Zeigler Coal*, the D.C. Circuit held that "requirements of duly adopted ventilation plans are generally enforceable" under enforcement provisions of the 1969 Mine Act that, "by their literal terms, are triggered only by mandatory standard violations." 536 F.2d at 409 (footnote omitted). As the court of

appeals in this case observed, and petitioner does not dispute (Pet. 21), the D.C. Circuit "d[id] not address the standard of review" for the Secretary's ventilation-plan decisions, which is the question presented here. Pet. App. 20a. Indeed, unpublished D.C. Circuit precedent has applied an arbitrary-and-capricious standard of review to the MSHA's decision not to approve a particular ventilation plan. See *Peabody Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, No. 96-1205, 1997 WL 159436 (Mar. 3, 1997).

Petitioner is wrong in asserting that certain statements in *Zeigler Coal* conflict with the decision below. Contrary to petitioner's assertion (Pet. 21), the D.C. Circuit's statement that a mine operator "might contest an action seeking to compel adoption of a [ventilation] plan" on certain grounds, 536 F.2d at 407, is consistent with the court of appeals' holding here that the Secretary's ventilation-plan decisions should be reviewed under a deferential standard. And contrary to petitioner's contention (Pet. 7-8, 18-19), the D.C. Circuit's statement that a "ventilation plan is not formulated by the Secretary, but is 'adopted by the operator,'" 536 F.2d at 406, is consistent with the court of appeals' statement here that "the process of approving a ventilation plan proposed by the mine operator * * * involves the formulation of a standard," Pet. App. 28a (emphasis omitted). The court of appeals' statement here does not say that the Secretary formulates a plan, but instead recognizes that the approval process results in an approved plan, the requirements of which are enforceable as if they were mandatory standards. The D.C. Circuit shares that view. See *UMWA, Int'l Union* v. *Dole*, 870 F.2d 662, 667 n.7 (1989).

3. To the extent petitioner contends (Pet. 31-32) that review is warranted even in the absence of a circuit conflict, that contention is misplaced. Petitioner incorrectly assumes (Pet. 32) that a holding by the first court of appeals to address a question of law under the Mine Act becomes practically binding on the Commission. The decision of one regional court of appeals does not set nationwide rules of decision, particularly because an aggrieved operator can seek review not only in a regional court of appeals, but also in the D.C. Circuit. See 30 U.S.C. 816(a)(1). Moreover, the Commission (and its ALJs) sometimes do disagree with court of appeals decisions in cases subject to review in other courts of appeals. See, *e.g.*, *Otis Elevator Co.* v. *Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990) (Thomas, J.) (discussing different tests adopted by Fourth Circuit and Commission for determining when an independent contractor is a mine operator); *Secretary of Labor* v. *Northshore Mining Co.*, 34 F.M.S.H.R.C. 663, 674 (2012) (ALJ decision declining to follow a Ninth Circuit precedent), vacated, 709 F.3d 706, 711 & n.4 (8th Cir. 2013).

Petitioner's contention (Pet. 22-26) that a deferential standard of review will jeopardize the safety of miners is similarly misplaced. Had Congress believed that the Secretary lacked the necessary judgment or expertise to protect miners' safety, it would not have required that the Secretary evaluate and approve operators' ventilation plans. 30 U.S.C. 863(*o*). In assessing the proposed ventilation plans in this case, the MSHA district manager sought and received input from his inspectors, roof and ventilation-control specialists, supervisors, the MSHA's technical support division, and the MSHA's headquarters, and spent

months discussing the issues with petitioner's representatives, requesting further information, meeting with them, and reviewing materials. Pet. App. 125a; see also *id.* at 99a-100a, 124a-125a. Congress did not provide for de novo Commission review of that extensive process, and there is no sound reason to believe that such review would enhance miner safety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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