No. 17-1335

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners who are totally disabled by "pneumoconiosis," defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. 902(b). Consistent with judicial decisions, the Department of Labor's regulations provide that the statutory term includes both "clinical" pneumoconiosis, *i.e.*, a group of diseases recognized by the medical community as pneumoconiosis, and "legal" pneumoconiosis, *i.e.*, other chronic lung diseases arising out of coal mine employment, 20 C.F.R. 718.201(a). The Department's regulations further provide that the 15-year rebuttable presumption in 30 U.S.C. 921(c)(4) applies to both clinical and legal pneumoconiosis. 20 C.F.R. 718.305(d)(1).

The questions presented are:

1. Whether the agency has properly applied the 15-year presumption to both clinical and legal pneumoconiosis.

2. Whether applying the presumption to legal pneumoconiosis violates substantive due process.

3. Whether applying the presumption to legal pneumoconiosis violates procedural due process or the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is reprinted at 719 Fed. Appx. 819. The decisions and orders of the Department of Labor's Benefits Review Board (Pet. App. 8-30, 132-151, 199-209) and Office of Administrative Law Judges (Pet. App. 31-131, 152-198, 210-264) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2017. A petition for a writ of certiorari was filed on March 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health

and Safety Act of 1969, to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 683-684 (1991) (citation omitted). The statute, now known as the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. 901 *et seq.*; see 30 U.S.C. 901(b), has been substantially amended over the years. Two of those changes—the expansion of the statutory definition of "pneumoconiosis" and the addition, deletion, and reinstatement of a statutory presumption—are particularly relevant here.

a. The BLBA provides benefits to coal miners and their surviving dependents for death or total disability due to "pneumoconiosis." 30 U.S.C. 901(a). On several occasions, Congress has broadened the statutory definition of "pneumoconiosis."[1] Most relevant here, in 1978, Congress amended the definition of "pneumoconiosis" from "a chronic dust disease of the lung arising out of employment in a coal mine," 30 U.S.C. 902(b) (1976), to "a chronic dust disease of the lung *and its sequelae, including respiratory and pulmonary impairments*, arising out of coal mine employment," 30 U.S.C. 902(b) (emphasis added). See Black Lung Benefits Reform Act of 1977 (BLBRA), Pub. L. No. 95-239, § 2(a), 92 Stat. 95 (enacting current 30 U.S.C. 902(b)); *Pauley*, 501 U.S. at 688 (discussing amendment); see also

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[1] For example, prior to 1972, the BLBA defined pneumoconiosis as "a chronic dust disease of the lung arising out of employment in an underground coal mine." 30 U.S.C. 902(b) (1970). Congress expanded that definition in 1972, eliminating the requirement that the mine be "underground." See 30 U.S.C. 902(b) (1976) (defining "pneumoconiosis" as "a chronic dust disease of the lung arising out of employment in a coal mine.").

Black's Law Dictionary 1572 (10th ed. 2014) (defining "sequela" as "that which follows").

Following the 1978 amendment, "many circuits" recognized that while the prior version of the statute encompassed only what is now known as "clinical" pneumoconiosis, *i.e.*, a group of diseases that the medical community would term pneumoconiosis, the 1978 definition encompasses both the clinical and the "legal" form, which is broader. See *Consolidation Coal Co.* v. *Director, OWCP*, 864 F.3d 1142, 1147 (10th Cir. 2017) (*Noyes*) (collecting cases) (reprinted at Pet. App. 265-287); *Andersen* v. *Director, OWCP*, 455 F.3d 1102, 1103 n.2 (10th Cir. 2006) (same). In 2000—after a nearly four-year notice-and-comment process—the Department of Labor "promulgated regulations expressly codifying this interpretation." *Noyes*, 864 F.3d at 1147; see *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79,920 (Dec. 20, 2000) (*Regulations*). As the agency explained, the new regulations were intended to "conform" the regulatory definition "to the statute" and to "the terminology uniformly adopted by the courts to distinguish between the two forms of lung disease compensable under the statute: pneumoconiosis, as that disease is defined by the medical community, and any chronic lung disease arising out of coal mine employment." *Regulations*, 65 Fed. Reg. at 79,937; see *id.* at 79,938 (noting that the regulations "acknowledg[e] the distinction already adopted by the circuit courts of appeals in construing and applying the statutory definition").

According to the current regulations, "clinical pneumoconiosis" refers to "those diseases recognized by the

medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. 718.201(a)(1). "Legal pneumoconiosis" refers to a broader category of conditions, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. 718.201(a)(2). "This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Ibid.* A disease arises out of coal mine employment for purposes of the regulation if it is a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. 718.201(b).

b. An individual claiming benefits under the BLBA generally must show that the miner is totally disabled by pneumoconiosis (or, in the case of survivors' claims, that the miner died from the disease) and thus is entitled to benefits. See generally 30 U.S.C. 921(a); 20 C.F.R. 718.204. The Act contains a number of presumptions to aid claimants in making that showing, which have changed over time.

As relevant here, prior to 1981, 30 U.S.C. 921(c)(4) provided what is known as the 15-year presumption: "If a miner was employed for fifteen years or more in one or more underground coal mines * * * and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis." 30 U.S.C. 921(c)(4) (Supp. IV 1980). In 1981, the 15-year presumption

was eliminated for claims filed after that year. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Tit. II, § 202(b)(1), 95 Stat. 1643. In 2010, however, Congress restored the 15-year presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 260; see 30 U.S.C. 921(c)(4). Thus, as relevant here, the statute now includes the same 15-year presumption that it did prior to 1981.

On September 25, 2013, the Department of Labor revised its regulations to implement the restored 15-year presumption. See 20 C.F.R. 718.305. In relevant part, the regulations specify that the presumption of total disability due to pneumoconiosis may be rebutted by:

> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

20 C.F.R. 718.305(d)(1).

2. a. Respondent Robert Thompson worked for petitioner Consolidation Coal Company as an underground coal miner in Utah for at least 17 years, ending in 2003. Pet. App. 92, 217. Thompson filed a claim for BLBA benefits in 2008. *Id.* at 212. In 2011 and 2012, administrative law judges (ALJs) awarded benefits to Thompson, but the Benefits Review Board (Board)

vacated and remanded those decisions. See *id.* at 132-151 (vacating and remanding 2012 decision); 199-209 (vacating and remanding 2011 decision). While the reasoning in those decisions generally is not relevant here, in 2012 the Board rejected petitioner's argument that retroactive application of the current version of the statute violated the Due Process and Takings Clauses of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment. Pet. App. 208. In addition, in 2014, the Board rejected petitioner's contention that petitioner could rebut the 15-year presumption merely by showing that Thompson did not have clinical pneumoconiosis. *Id.* at 143. The Board explained that "invocation of the Section [921](c)(4) presumption provides claimant with a presumption of both clinical and legal pneumoconiosis," and the "employer must disprove the existence of both clinical and legal pneumoconiosis" to "rebut the * * * presumption." *Id.* at 143-144.

b. On remand from the 2014 Board decision, a different ALJ awarded disability benefits to Thompson, payable by petitioner. See Pet. App. 10. The ALJ invoked the 15-year presumption based on Thompson's 17 years of qualifying coal mining and medical evidence proving that Thompson suffered from a totally disabling respiratory condition, chronic obstructive pulmonary disease (COPD). *Id.* at 88-109.

The ALJ then turned to whether petitioner had rebutted the presumption by showing either that (1) Thompson did not have pneumoconiosis (in either its clinical or legal form), or (2) pneumoconiosis did not cause Thompson's disability. Pet. App. 110 (citing 20 C.F.R. 718.305). As to the first rebuttal method, the ALJ found that petitioner had shown that Thompson did not suffer from clinical pneumoconiosis. *Id.* at 119.

But the ALJ concluded that petitioner had failed to prove that Thompson did not suffer from legal pneumoconiosis. *Id.* at 119-122. The ALJ further determined that petitioner did not rebut the presumption under the second method, because the testimony of petitioner's experts failed to prove that no part of Thompson's disability was due to pneumoconiosis. *Id.* at 122-127. Because the 15-year presumption was invoked and not rebutted, the ALJ awarded BLBA disability benefits to Thompson, payable by petitioner. *Id.* at 127.

c. The Board affirmed the award, holding that the ALJ properly found that Thompson had invoked the 15-year presumption of entitlement, and that petitioner had failed to rebut it. Pet. App. 24-30.

3. The court of appeals likewise affirmed. Pet. App. 1-7. The court determined that the ALJ committed no error in reviewing the evidence and concluding that Thompson had invoked the 15-year rebuttable presumption and petitioner had failed to rebut it. *Ibid.*

The court of appeals further explained that petitioner's "principal legal arguments on appeal were recently resolved against its position" by the court's decision in *Noyes*, *supra*, Pet. App. 2, which upheld application of the 15-year presumption to legal pneumoconiosis, 864 F.3d at 1146-1152.[2] *Noyes* explained

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[2] *Noyes* involved a claim for BLBA survivor's benefits. 864 F.3d at 1144. As relevant here, the 15-year presumption applies to claims by miners and their survivors in an identical manner. Survivors invoke the presumption by showing that the miner worked underground or in substantially similar conditions for at least 15 years and had a totally disabling respiratory impairment. 30 U.S.C. 921(c)(4); 20 C.F.R. 718.305(b)(1). Rebuttal is established by proving either (1) that the miner did not have pneumoconiosis in either its clinical or legal form; or (2) that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. 718.305(d)(2).

that when the 15-year presumption was first promulgated in 1972, "pneumoconiosis" was understood to encompass only the clinical form of the disease. *Id.* at 1147. But after Congress expanded the definition of pneumoconiosis in 1978, "numerous circuits recognized that the revised definition encompasses both legal and clinical pneumoconiosis" and that "the term pneumoconiosis is generally used in the statute to refer to both clinical and legal pneumoconiosis." *Ibid.* "Thus, for purposes of the BLBA, 'pneumoconiosis' has been consistently defined—statutorily, judicially, and administratively—to include a wide range of respiratory and pulmonary conditions arising out of coalmine employment that do not all constitute pneumoconiosis as the term is used by the medical community." *Ibid.* Applying the "'settled canon[] of statutory construction * * * that identical terms in the same statute have the same meaning,'" *Noyes* held that the term "pneumoconiosis" has the same broad meaning in Section 921(c)(4), such that an employer seeking to rebut the presumption by proving that the miner did not have pneumoconiosis must demonstrate the absence of both clinical and legal pneumoconiosis. *Ibid.* (citation omitted).

Noyes further rejected petitioner's arguments that the rebuttal standard violates the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, by shifting the burden of persuasion to the party opposing entitlement. 864 F.3d at 1149-1150. The court explained that the APA states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." *Id.* at 1149 (brackets in original) (quoting 5 U.S.C. 556(d)). Here, *Noyes* continued, the BLBA expressly "shifts the burden of proof by statute and

thus § 556(d) does not apply." *Ibid.* In addition, *Noyes* rejected petitioner's contention that the rebuttable presumption is "impermissibly high." *Id.* at 1150. Although the regulation's second means of rebutting the presumption requires the employer to "rule out any relationship" between pneumoconiosis and the miner's disability, *ibid.* (citing 20 C.F.R. 718.305(d)(2)(ii)), the court agreed with the other courts of appeals to have considered the question that the "rule-out standard * * * is consistent with both Congress' intent in enacting the fifteen-year presumption and the broad remedial purposes of the BLBA," *id.* at 1151. Thus, relying on its decision in *Noyes*, *supra*, the court of appeals in this case affirmed the decision of the Board. Pet. App. 2, 7.

ARGUMENT

The court of appeals correctly held that to rebut the 15-year presumption set forth in 30 U.S.C. 921(c)(4), an employer must prove that a miner has neither clinical nor legal pneumoconiosis. That decision is correct, does not violate any of the constitutional or statutory provisions petitioner invokes, and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that an employer cannot rebut 30 U.S.C. 921(c)(4)'s 15-year presumption of entitlement merely by proving that a miner does not have clinical pneumoconiosis.

a. Under Section 921(c)(4), any miner who demonstrates a totally disabling respiratory or pulmonary condition and at least 15 years of underground or substantially similar coal mine employment is entitled to a rebuttable presumption that he is totally disabled by "pneumoconiosis." 30 U.S.C. 921(c)(4); 20 C.F.R.

718.305(b). Once invoked, the presumption can be rebutted by showing, *inter alia*, that the miner does not suffer from "pneumoconiosis." 30 U.S.C. 921(c)(4); see 20 C.F.R. 718.305(d).

As the court of appeals explained in *Consolidated Coal Co.* v. *Director, OWCP*, 864 F.3d 1142 (10th Cir. 2017) (*Noyes*), the statutory definition of pneumoconiosis in 30 U.S.C. 902(b) "encompasses both clinical and legal pneumoconiosis." 864 F.3d at 1144. "Under settled canons of statutory construction"—in particular, the rule that "identical terms in the same statute have the same meaning"—that definition applies to Section 921(c)(4). *Id.* at 1147 (quoting *United States* v. *Richards*, 87 F.3d 1152, 1157 (10th Cir.), cert. dismissed, 519 U.S. 1003 (1996)). Thus, the statute's plain language compels the conclusion that, once invoked, Section 921(c)(4) presumes the existence of both clinical and legal pneumoconiosis; to rebut the presumption, a party must show that a miner does not have either form of the disease.

b. Petitioner attempts to cast doubt on that reasoning by suggesting that the Department of Labor "creat[ed]" legal pneumoconiosis by regulation in 2000. Pet. 4; see also, *e.g.*, *id.* at 14-15, 21, 27, 32-33. That is incorrect. While the Act initially defined pneumoconiosis to include only what is now known as clinical pneumoconiosis, Congress amended the Act in 1978 to define "pneumoconiosis" more expansively as "a chronic dust disease of the lung *and its sequelae, including respiratory and pulmonary impairments,* arising out of coal mine employment." 30 U.S.C. 902(b) (language added in 1978 emphasized); see BLBRA § 2(a), 92 Stat. 95. "Following this statutory amendment, numerous cir-

cuits recognized that the revised definition encompasses both legal and clinical pneumoconiosis." *Noyes*, 864 F.3d at 1147. Thus, when the Department of Labor amended its regulations in 2000, it merely "conform[ed]" the regulatory definition to the Act and to "the distinction already adopted by the circuit courts of appeals." *Regulations*, 65 Fed. Reg. at 79,937-79,938; see *id.* at 79,938 (citing cases from the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits); see also *National Mining Ass'n* v. *DOL*, 292 F.3d 849, 869 (D.C. Cir. 2002) (per curiam) (explaining that the revised regulatory definition "merely adopts a distinction embraced by all six circuits to have considered the issue").[3] And when Congress reenacted the 15-year presumption in 2010—ten years after the Department promulgated the regulatory definition—Congress had every reason to expect that the presumption would apply to both clinical and legal pneumoconiosis. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").[4]

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[3] In fact, prior to the 2000 regulations, several courts of appeals had held that COPD—the particular lung disease from which Thompson suffers, see, *e.g.*, Pet. App. 26—was covered by the statutory definition of pneumoconiosis. See, *e.g.*, *Bradberry* v. *Director, OWCP,* 117 F.3d 1361, 1368 (11th Cir. 1997); *Warth* v. *Southern Ohio Coal Co.,* 60 F.3d 173, 175 (4th Cir. 1995); *Consolidation Coal Co.* v. *Hage,* 908 F.2d 393, 395 (8th Cir. 1990); *Old Ben Coal Co.* v. *Prewitt,* 755 F.2d 588, 591 (7th Cir. 1985).

[4] Petitioner cites *National Mining Ass'n*, 292 F.3d at 862-863, for the proposition that "[l]egal pneumoconiosis was never intended to be a 'presumed' disease." Pet. 7-8 (emphasis omitted). But that decision predated Congress's reenactment of the 15-year presump-

c. *Noyes* and the decision below are in accord with the only other court of appeals decision to expressly address whether a party seeking to rebut the 15-year presumption in Section 921(c)(4) must demonstrate the absence of both clinical and legal pneumoconiosis. In *Barber* v. *Director, OWCP*, 43 F.3d 899 (1995), the Fourth Circuit held that the presumption applies to both clinical and legal pneumoconiosis, *id.* at 900-901. The court explained that "[t]he legal definition of 'pneumoconiosis' is incorporated into every instance the word is used in the statute and regulations." *Id.* at 901 (citing 30 U.S.C. 902 (definition applies "[f]or purposes of this subchapter"); 20 C.F.R. § 718.201 (definition applies "[f]or the purpose of the Act")). "Neither authority nor logic supports the proposition that the legal definition can be ignored for selected purposes," including the 15-year presumption. *Ibid.*

Petitioner nonetheless contends (Pet. 9-10) that the decision below conflicts with the Tenth Circuit's decision in *Andersen* v. *Director, OWCP*, 455 F.3d 1102 (2006). As an initial matter, even if petitioner's characterization were correct, any disagreement within the Tenth Circuit would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

But no such conflict exists. *Andersen* held that a different provision, the ten-year presumption in 30 U.S.C. 921(c)(1), applies only to clinical pneumoconiosis. The

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tion. And while petitioner cites (Pet. 8) the 2000 regulatory preamble for the suggestion that DOL stated that legal pneumoconiosis would not be presumed, the language petitioner quotes does not appear there. In any event, 20 C.F.R. 718.201 does not itself provide the 15-year presumption; instead, since 2010, the Act includes that presumption.

ten-year presumption applies to miners who (1) suffer from pneumoconiosis and (2) worked in coal mines for at least ten years. 30 U.S.C. 921(c)(1). Once invoked, it supplies "a rebuttable presumption that [the miner's] pneumoconiosis arose out of such employment." *Ibid.*[5]

The *Andersen* claimant did not have clinical pneumoconiosis, but suffered from COPD. *Andersen*, 455 F.3d at 1105; see 20 C.F.R. 718.201(a)(2). He sought to use the ten-year presumption to prove that his COPD was compensable legal pneumoconiosis. *Andersen*, 455 F.3d at 1105. But that argument would have led to an obvious "circularity." *Noyes*, 864 F.3d at 1148. To invoke the ten-year presumption, miners must prove that they have pneumoconiosis. 30 U.S.C. 921(c)(1). In the context of legal pneumoconiosis, this means that the miner must have already proven that his lung disease "ar[ose] out of coal mine employment." 20 C.F.R. 718.201(a)(2). Yet the miner in *Andersen* sought to rely on the ten-year presumption to prove that very point. See *Andersen*, 455 F.3d at 1107. To avoid that "absurd" result, *Andersen* held that Section 921(c)(1)'s ten-year presumption applies only to miners seeking to prove that their *clinical* pneumoconiosis arose out of their employment; for those miners, the ten-year presumption may be used to prove that their disease arose out of mining, rather than from some other source. *Id.* at 1106.

In contrast to the ten-year presumption, applying the 15-year presumption to both legal and clinical pneumoconiosis "creates no redundancy or overlap." *Noyes*,

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[5] In full, 30 U.S.C. 921(c)(1) provides: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment."

864 F.3d at 1148. To establish their entitlement to federal black lung benefits, miners who are totally disabled by a chronic respiratory or pulmonary condition need to prove that they have pneumoconiosis and that their pneumoconiosis contributes to their disability. See 20 C.F.R. 725.202(d). For totally disabled miners with at least 15 years of qualifying employment, Section 921(c)(4) provides a rebuttable presumption to assist them in those endeavors.

d. Petitioner also contends (Pet. 30-36) that this Court should grant certiorari to determine whether the Department of Labor's interpretation of the statute is entitled to deference. In particular, petitioner contends that the agency's view that the 15-year presumption applies to both clinical and legal pneumoconiosis should not receive deference because, in its view, the Department of Labor has taken "contradictory positions regarding the presumptive nature of legal pneumoconiosis." Pet. 30 (capitalization and emphasis deleted). That question is not implicated here. Petitioner's principal objection to the decision below is that it treated Section 921(c)(4) as applying to both legal and clinical pneumoconiosis. As discussed above, that conclusion is a product of the BLBA, not of any regulation. See pp. 9-11, *supra*.

In any event, the Department has consistently taken the view that Section 921(c)(4) applies to both clinical and legal pneumoconiosis. See, *e.g.*, Director's Informal Resp. Br. at 15-16, *Barber*, *supra* (No. 93-1833) (To rebut the 15-year presumption by establishing that the miner "did not have pneumoconiosis," the "employer must prove not only that the miner did not have 'medical' [i.e., clinical] pneumoconiosis but also that he did not have 'legal' pneumoconiosis."); 20 C.F.R.

718.305(d)(1)(i) (same). Petitioner nevertheless points to the Department's brief in *Andersen*, which stated that a presumption linking COPD to coal mine employment "would be far less rational" than a presumption linking clinical pneumoconiosis to coal mine employment, "if rational at all." Pet. 14 (quoting Pet. App. 307); see also Pet. 30-31. As explained above, however, the 15-year presumption was not at issue in *Andersen*, which involved Section 921(c)(1)'s ten-year presumption. See pp. 12-13, *supra*. In any event, the statement on which petitioner focuses is consistent with the view that Section 921(c)(4)—which is limited to miners with at least 15 years of significant exposure to coal mine dust *and* who suffer from a totally disabling respiratory or pulmonary condition—rationally applies to both clinical and legal pneumoconiosis. See pp. 15-17, *infra*.

2. Petitioner further contends (Pet. 6-17) that application of the 15-year presumption to legal pneumoconiosis violates substantive due process because it is "arbitrary," "irrational," and lacks a "legitimate legislative purpose." Pet. 6. As petitioner acknowledges, however, the BLBA is "a legislative Act adjusting the burdens and benefits of economic life," and it is thus entitled to a "presumption of constitutionality." *Ibid.* (citing *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Petitioner has failed to rebut that presumption here.

Petitioner's substantive due process argument rests on its assertion that "[n]o legitimate legislative purpose was provided or considered by Congress" when it restored the 15-year presumption in 2010. Pet. 6. But it is not Congress's burden to prove that Section 921(c)(4) is constitutional; it is petitioner's burden to prove that it is not. *Usery*, 428 U.S. at 15; see also *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[W]e never

require a legislature to articulate its reasons for enacting a statute[.] * * * [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") (addressing equal protection challenge). As petitioner acknowledges, legislative presumptions in civil statutes are permissible so long as there is "some rational connection" between the fact established and the fact presumed and the inference is not "so unreasonable as to be a purely arbitrary mandate." Pet. 11 (quoting *Mobile, Jackson & Kansas City R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910)). Petitioner therefore bears the burden of showing that there is no rational connection between the facts Thompson established to invoke the 15-year presumption (that he engaged in more than 15 years of underground coal mine work and suffers from a totally disabling pulmonary impairment) and the facts presumed as a result (that his COPD is legal pneumoconiosis and contributes to his disability).

Petitioner attempts to meet that burden (Pet. 12-14) by pointing to a study addressing the link between exposure to coal mine dust and obstructive lung disease discussed in the preamble to the Department of Labor's 2000 regulations. The study reported that 7.7% of nonsmoking miners, and 14.2% of smoking miners, develop "severe" obstructive lung disease. *Regulations*, 65 Fed. Reg. at 79,940 (cited in Pet. 14, 18, 22). Since 7.7% and 14.2% are both lower than 50%, petitioner suggests (Pet. 14-15) it is irrational to presume that miners who invoke the 15-year presumption suffer from legal pneumoconiosis.

As the court of appeals explained in *Noyes*, the cited study does not show that the 15-year presumption is irrational in the context of legal pneumoconiosis. The

study "reflects the incidence of respiratory impairment among *all* miners, healthy or unhealthy." *Noyes*, 864 F.3d at 1149 n.2. The 15-year presumption, by contrast, applies only to long-term miners who suffer from a totally disabling respiratory or pulmonary condition. 30 U.S.C. 921(c)(4). Thus, "miners who successfully invoke the presumption have already shown that they fall within the class of miners with significant pulmonary dysfunction." *Noyes*, 864 F.3d at 1149 n.2. Moreover, work as a miner is indisputably correlated with legal pneumoconiosis.[6] This provides the required "logical connection between the proven fact and the presumed conclusion" that petitioner contends is missing. Pet. 16 (citing *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 158-159 (1987)).

3. Petitioner next argues (Pet. 18-25) that including legal pneumoconiosis "in the 15-year presumption deprives the party opposing entitlement of its right to a full and fair hearing" in violation of procedural due process and the APA. Pet. 18 (capitalization and emphasis omitted). That argument fails.

a. Petitioner contends (Pet. 25) that the 15-year presumption violates procedural due process because it "more closely resembles an irrebuttable presumption."

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[6] See, *e.g.*, *Regulations*, 65 Fed. Reg. at 79,939 ("[C]oal miners have an increased risk of developing COPD[.]") (quoting Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health & Human Servs., *Criteria For a Recommended Standard—Occupational Exposure to Respirable Coal Mine Dust,* § 4.2.3.2, at 57 (Sept. 1995), www.cdc.gov/niosh/docs/95-106/pdfs/95-106.pdf ?id=10.26616/NIOSHPUB95106); Thompson Br. in Opp. 14 (noting that the study upon which petitioner relies found that nonsmoking miners have a 7.7% likelihood of developing legal pneumoconiosis, which is more than twice as high as the rate among nonsmokers in the general population).

In support, petitioner offers its own survey of Board decisions issued from 2011 through 2017 in which the 15-year presumption was invoked. Pet. App. 315-344. According to petitioner, the Board found that the presumption was rebutted in only 3.3% of those cases (24 of 729). Pet. 18-19, 25.

Contrary to petitioner's suggestion, petitioner's study —even if credited—demonstrates that it *is* possible to rebut the 15-year presumption. Moreover, petitioner's survey is an insufficient basis to support even the conclusion that rebuttal is rare. Only a small minority of black lung claims are appealed to the Benefits Review Board; the sample thus may not reflect claims for which rebuttal was established at an earlier stage of the proceedings. And even for those claims considered by the Board, many of those claims may have resulted in awards even without the presumption.

b. Petitioner next contends that because Section 921(c)(4)'s presumption, once invoked, shifts both the burden of persuasion and the burden of production to the party opposing entitlement,[7] it violates the APA. Pet. 19. Section 7(c) of the APA states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). As the court of appeals recognized in *Noyes*, Section 921(c)(4)'s rebuttable presumption expressly "shifts the

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[7] See, *e.g.*, *Morrison* v. *Tennessee Consol. Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011) ("Under the * * * 15-year presumption, the burden of production and persuasion lies on the employer * * * to rebut the presumption of disability due to pneumoconiosis."); *Blakley* v. *Amax Coal Co.*, 54 F.3d 1313, 1320 (7th Cir. 1995) (similar); *Alabama By-Prods. Corp.* v. *Killingsworth*, 733 F.2d 1511, 1515 (11th Cir. 1984) (similar); *United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1028 (5th Cir. 1979) (similar).

burden of proof by statute." 864 F.3d at 1142. It therefore does not violate the APA. *Ibid.*[8]

c. Petitioner further argues (Pet. 22-23) that the "rule-out" standard, which permits a party to rebut the 15-year presumption by showing that "no part" of the miner's disability was caused by pneumoconiosis, 20 C.F.R. 718.305(d)(1)(ii), violates procedural due process. In particular, petitioner contends (Pet. 22) that the "rule-out" standard is more demanding than the "substantially contributing cause" standard claimants must meet to establish that their disability is caused by pneumoconiosis in claims unaffected by a presumption. 20 C.F.R. 718.204(c).

Petitioner's argument lacks merit. Petitioner concedes (Pet. 22) that the rule-out standard "may have been proper for clinical pneumoconiosis," but claims that "the same cannot be said for legal pneumoconiosis." *Ibid.* Petitioner does not explain, however, why the distinction between legal and clinical pneumoconiosis makes a difference in this context. A "rule out" standard is "in accord with workers' compensation principles," *Helen Mining Co.* v. *Elliott*, 859 F.3d 226, 238

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[8] Petitioner briefly suggests (Pet. 21) that "[r]equiring a mine operator to bear both the burden of production and the burden of proof" regarding legal pneumoconiosis violates procedural due process because "DOL, not Congress, * * * created legal pneumoconiosis," and the "connection between COPD and coal dust is not nearly as strong as the connection between clinical pneumoconiosis and coal dust exposure." For the reasons discussed above, pp. 10-11, *supra*, petitioner is wrong to suggest that DOL created legal pneumoconiosis. Petitioner also fails to explain why the undeniable connection between coal dust and legal pneumoconiosis—even if less significant than the connection between coal dust and clinical pneumoconiosis—is so weak as to make the rebuttable presumption a violation of procedural due process, see pp. 15-17, *supra*.

(3d Cir. 2017), regardless of the type of pneumoconiosis at issue. Indeed, every court of appeals to address the question has upheld the requirement that an employer seeking to rebut the 15-year presumption by attacking the link between pneumoconiosis and the miner's disability must rule out any such link. See, *e.g.*, *Noyes*, 864 F.3d at 1150-1151; *Helen Mining Co.*, 859 F.3d at 234-239; *West Virginia CWP Fund* v. *Bender*, 782 F.3d 129, 137-145 (4th Cir. 2015); *Big Branch Res., Inc.* v. *Ogle*, 737 F.3d 1063, 1069-1071 (6th Cir. 2013).

d. Petitioner also briefly contends (Pet. 24-25) that the BLBA's implementing regulations improperly limit the amount of evidence that parties may submit. That issue is not properly before this Court. The Tenth Circuit did not address it, see generally Pet. App. 1-7; *Noyes*, 864 F.3d at 1146-1152, and petitioner does not contend that the evidentiary rules it challenges had any impact on this case, see Pet. 24. In any event, two courts of appeals have considered the issue and held that the evidence-limiting rules are consistent with the BLBA and the APA, and are an appropriate exercise of the Department of Labor's regulatory authority. See *National Mining Ass'n*, 292 F.3d at 873-874; *Elm Grove Coal Co.* v. *Director, OWCP*, 480 F.3d 278, 291-295 (4th Cir. 2007).

4. Finally, petitioner contends (Pet. 26) that "[i]ncluding legal pneumoconiosis in the 15-year presumption is also unconstitutional as an unlawful taking of property in violation of the Fifth Amendment's Takings Clause." See *id.* at 26-29.

Petitioner's argument is not properly before the Court. Petitioner did not invoke the Takings Clause in the court of appeals. See generally Pet. C.A. Br.; Pet. C.A. Reply Br.; cf. *Cutter* v. *Wilkinson*, 544 U.S. 709,

718 n.7 (2005) (declining to consider issue not addressed below because this Court is one of "review, not of first view"). Nor is the Takings Clause issue fairly included within the Question Presented, which, with respect to the Fifth Amendment, asks only whether the inclusion of legal pneumoconiosis within the 15-year presumption violates "due process rights stemming from the Fifth Amendment." Pet. i; see Sup. Ct. R. 14(1)(a).

Even if it were presented, petitioner's newly minted Takings Clause argument would not warrant this Court's review. Petitioner points to no division among the courts of appeals. And given that petitioner's due process challenges are unavailing, "it would be surprising indeed to discover" that Section 921(c)(4) violates the Takings Clause. *Connolly* v. *PBGC*, 475 U.S. 211, 223 (1986).

Petitioner invokes three factors that this Court has held have particular significance to the Takings Clause inquiry: "(1) the economic impact of the regulation on the regulated entity, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the governmental action." Pet. 27 (citing *Connolly*, 475 U.S. at 225). As to the first two factors, petitioner notes that three large coal mine operators have filed for bankruptcy in recent years. Pet. 28. But petitioner offers no sound reason to believe that federal black lung liabilities—much less federal black lung liabilities resulting from the inclusion of legal pneumoconiosis in the 15-year presumption—were significant factors in those bankruptcies. As for the third prong, petitioner asserts that "providing benefits to miners for diseases of the general public is not part of the common good." Pet. 29. But it is well-established that exposure to coal mine dust can cause a number of

"diseases of the general public" (*i.e.*, diseases that can also be caused by other exposures), including COPD. See pp. 16-17 & n.6, *supra*. Compensating former miners whose working conditions result in their total disability on account of those diseases is a legitimate legislative goal.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner briefly contends (Pet. 35) that the Department of Labor's regulations implementing the BLBA "usurped the powers of both the legislative and judicial branches in contravention of Article I and Article III of the U.S. Constitution." Particularly in light of Congress's decision to restore the 15-year presumption after the Department of Labor issued regulations regarding legal pneumoconiosis, that conclusory assertion does not warrant further review.