No. 14-688

In the Supreme Court of the United States

SHAMOKIN FILLER CO., INC., PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's carbon plant is a coal mine as defined in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq*.

2. Whether the court of appeals correctly upheld an administrative law judge's exclusion of evidence about other companies' carbon plants as irrelevant and, alternatively, as evidence the limited probative value of which was outweighed by its potential for delay and confusion of the issues.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 772 F.3d 330. The decision of the Federal Mine Safety and Health Review Commission (Pet. App. 63a-93a) is reported at 34 F.M.S.H.R.C. 1897. The decision of the administrative law judge (ALJ) regarding coverage (Pet. App. 94a-145a) is reported at 33 F.M.S.H.R.C. 725, and the final decision of the ALJ (Pet. App. 26a-61a) is reported at 34 F.M.S.H.R.C. 2772. The pre-trial orders of the ALJ (Pet. App. 146a-153a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2014. A petition for rehearing was denied on September 8, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 4, 2014.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine 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); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 202 (1994). The Mine Act sets interim mandatory health and safety standards and authorizes the Secretary of Labor (Secretary) to promulgate improved standards. 30 U.S.C. 811(a), 841 *et seq*. The Secretary enforces these standards by issuing citations and in some cases issuing orders requiring withdrawal of miners from a mine. 30 U.S.C. 814. An operator may contest citations and orders before the Federal Mine Safety and Health Review Commission (Commission), an agency independent of the Department of Labor. 30 U.S.C. 815(d), 30 U.S.C. 823; *Thunder Basin*, 510 U.S. at 204. Administrative law judges (ALJs) of the Commission issue initial decisions, and final Commission decisions are reviewable in the United States courts of appeals. 30 U.S.C. 816.

The Mine Act's standards apply to "coal or other mine[s]." 30 U.S.C. 803. The Mine Act defines "coal mine" to include, among other things, an area of land and all structures and facilities on the land used in "the work of preparing coal," and "custom coal preparation facilities." 30 U.S.C. 802(h)(1)(C) and (h)(2). The Mine Act defines "work of preparing the coal" to mean "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. 802(i).

The Mine Act standards are more specific and extensive with respect to the hazards associated with handling coal than standards generally applicable to non-Mine Act employers through the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq*. Pet. App. 6a. Compare 30 C.F.R. Pt. 71 (Mine Act health standards for surface coal mines, including coal preparation facilities) with 29 C.F.R. Pt. 1910, Subpt. Z (OSH Act standards for toxic and hazardous substances). The Mine Act also confers on the Secretary more rigorous enforcement mechanisms than the OSH Act. See 30 U.S.C. 813(a) (mandatory Mine Act inspections), 814(d) and (e), and 817(a) (inspectors may order withdrawal of miners from the mine in certain circumstances); *Donovan* v. *Dewey*, 452 U.S. 594, 606 (1981) (warrant not required for Mine Act inspections). Where the Mine Act is ambiguous with regard to a particular facility or work area, the Secretary, who administers both the Mine Act and the OSH Act, receives deference for a reasonable judgment about whether to assert Mine Safety and Health Administration (MSHA) jurisdiction. *Secretary of Labor* v. *National Cement Co.*, 573 F.3d 788, 793-795 (D.C. Cir. 2009).

2. Petitioner operates a carbon plant in Pennsylvania that the Department of Labor has regulated under the Mine Act through the MSHA since 1977. Pet. App. 4a, 65a-66a, 106a-107a, 131a. The plant sells products consisting solely of anthracite coal, as well as products consisting of coal blended with other materials, and a variety of other carbon-based products. *Id.* at 65a, 106a-107a. For the purely anthracite products, petitioner purchases prepared coal from local mines and then further prepares it to meet customer specifi-

cations. *Id.* at 9a, 65a. In particular, petitioner puts the coal into a feed hopper (where coal is placed "before it proceeds by conveyor unit to [a] dryer"), then dries it and screens it to remove oversized pieces, and then stores, bags, and loads it for shipment. *Id.* at 9a, 65a, 108a, 135a-136a.

In 2009, new owners of the plant (the children of the plant's former owners) asked the Secretary to relinquish Mine Act jurisdiction. Pet. App. 8a, 66a & n.1, 107a & n.7. The Secretary investigated and concluded that petitioner's plant continued to be subject to Mine Act jurisdiction as a custom coal preparation plant. *Id.* at 8a, 66a, 108a. The Secretary also cited petitioner for numerous violations of Mine Act standards, including the respirable coal dust standards in 30 C.F.R. Pt. 71. Pet. App. 8a-9a, 26a-62a.

3. An ALJ of the Federal Mine Safety and Health Review Commission addressed whether petitioner's plant was subject to Mine Act jurisdiction before addressing the citations. Pet. App. 94a-145a. The ALJ found that the plant was a coal mine as defined in the Mine Act because the plant engaged in the work of preparing coal and its overall purpose was that of a custom coal preparation plant. *Id.* at 135a-136a; see 30 U.S.C. 802(h)(1) (coal mine includes structures and facilities used in "the work of preparing coal," and "custom coal preparation facilities"). In particular, the ALJ found that the plant's storing, loading, sizing, and drying of anthracite coal were activities listed in the Mine Act's definition of "work of preparing coal." Pet. App. 135a-136a; see 30 U.S.C. 802(i) ("work of preparing the coal" means "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and

such other work of preparing such coal as is usually done by the operator of the coal mine").

The ALJ recognized that many facilities—such as "hospitals, schools, steel mills, railroads and shipyards, foundries [and] private residences—store and load coal" but would not reasonably be subject to Mine Act jurisdiction. Pet. App. 137a. Accordingly, the ALJ considered not only whether petitioner's activities fall within the terms of the Mine Act's definition of "work of preparing the coal," but also the nature of the functions at petitioner's carbon plant. *Id.* at 138a. Under that analysis, the ALJ found that petitioner's "Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use." *Id.* at 138a-139a; see *id.* at 142a-144a (viewing petitioner's plant operations as a "collective whole," to find its functions involve custom coal preparation).

The ALJ also found that petitioner's chief witnesses offered contradictory, inconsistent, and suspect testimony, and concluded that the owners had attempted to "obstruct" the amount of coal used by the plant and the actual nature and extent of its coal operations. Pet. App. 139a. In particular, the ALJ found that in 2009 petitioner sold over 6000 tons of a product made of 100% anthracite coal and only a few tons of products containing no coal or coal mixtures. *Id.* at 140a.

The ALJ further rejected petitioner's attempts to introduce evidence, including internal Department of Labor memoranda, showing that the Occupational Safety and Health Administration (OSHA) had asserted jurisdiction over Keystone Filler and Manufacturing (Keystone Filler) and other facilities claimed

by petitioner to be similar to its carbon plant. Pet. App. 146a-153a (pre-trial orders granting Secretary's motion in limine and denying petitioner's motion to compel); *id.* at 101a-106a (decision on jurisdiction). The ALJ reviewed the evidence *in camera*, *id.* at 68a, and concluded that it was irrelevant because the jurisdictional question turned on the operations and processes at petitioner's plant, not on activities at other plants. *Id.* at 102a, 148a.

The ALJ also determined that the evidence, even if relevant, should be excluded because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, and needless presentation of cumulative evidence. Pet. App. 102a-103a, 149a-150a. The ALJ determined that a "comparative facility analysis approach to jurisdiction * * * is improper" because the Mine Act requires consideration of "the specific characteristics of a particular facility," and "no mine is exactly alike." *Id.* at 104a-105a; see *id.* at 105a (allowing "similar facility evidence into the record would" entail a "jurisdictional safari, searching out all similar facilities * * * and comparing like and non-like activities, structures, operations, and products"). The ALJ nevertheless allowed petitioner to introduce expert testimony and evidence showing that MSHA had previously decided that petitioner's plant should be excluded from Mine Act coverage. *Id.* at 106a, 150a-151a. The ALJ also permitted petitioner to introduce testimony from the president of Keystone Filler concerning its processes and similarities to petitioner's products. *Id.* at 123a.

4. The Mine Safety and Health Review Commission affirmed the ALJ's jurisdictional and evidentiary

rulings. Pet. App. 63a-93a. The Commission concluded that the ALJ had applied a proper legal test for jurisdiction by considering whether petitioner's plant engaged in any of the activities listed as "work of preparing the coal" in 30 U.S.C. 802(i) and considering the overall nature and function of petitioner's operation. Pet. App. 72a-76a. The Commission also concluded that substantial evidence supported the ALJ's findings that petitioner's plant functions as a custom coal preparation facility. *Id.* at 77a-79a. The Commission rejected petitioner's argument for a bright-line test for Mine Act coverage that would exclude facilities, like petitioner's, from the definition of "work of preparing the coal," 30 U.S.C. 802(i), if the facility handles only processed, market-ready coal. Pet. App. 79a. The Commission and courts have never applied such a test, the Commission stated, but instead have considered the nature of the coal in conjunction with the facility's types of coal preparation activities and evaluated the facility's end product rather than the initial state of the coal. *Ibid.*

The Commission also upheld the ALJ's exclusion of evidence. Pet. App. 80a-83a. Applying an abuse-of-discretion standard, the Commission agreed with the ALJ that the evidence petitioner sought to introduce was irrelevant because it concerned fact-specific inquiries into Mine Act coverage of other facilities that were not likely to be identical to petitioner's facility. *Id.* at 82a-83a. The Commission further agreed with the ALJ that the excluded evidence was of limited probative value and would have required a significant number of additional witnesses and an inordinate amount of trial time. *Id.* at 83a.

5. After petitioner stipulated to having violated the Mine Act, if the Act was applicable, and obtained a final Commission decision, Pet. App. 26a-61a, the court of appeals affirmed the Commission's decision on Mine Act coverage and the ALJ's exclusion of evidence. *Id.* at 3a-23a. Applying a functional analysis that examines how a company uses coal, the court agreed with the Commission that petitioner was engaged in "work of preparing the coal" as that phrase is used in 30 U.S.C. 802(i). Pet. App. 7a-8a, 13a. The court rejected petitioner's argument that Mine Act coverage applies only to work on unprocessed coal, finding no support for such a limit in the statutory language. *Id.* at 13a-16a. The court further rejected petitioner's contention that "courts routinely cut off Mine Act jurisdiction at the point where raw coal becomes usable," finding that none of the cases offered by petitioner precludes Mine Act coverage of "further processing of already processed coal." *Id.* at 17a. & n.5.

The court of appeals also upheld the ALJ's exclusion of evidence. Pet. App. 18a-21a. While agreeing with petitioner that, as a general matter, the consistency of an agency's application of a statute might be relevant in determining whether an agency action was arbitrary and capricious, the court concluded that the evidence petitioner sought to introduce concerning the exercise of Mine Act jurisdiction over the Keystone Filler facility was not relevant to this case because petitioner was mainly engaged in coal processing, while Keystone Filler was mainly engaged in manufacturing. *Id.* at 20a. The court agreed with the ALJ that introducing evidence concerning other facilities "could have opened up a stream of requests for

comparisons to facilities all around the country, causing an unnecessary delay in the proceedings to address collateral matters." *Id.* at 20a-21a. Accordingly, the court found no abuse of discretion in the ALJ's decision to exclude evidence of MSHA's decision not to assert Mine Act jurisdiction over other facilities. *Id.* at 21a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted of the court's fact-bound determination that petitioner operates a coal mine because its plant is a facility used for custom coal preparation. The court also properly found no abuse of discretion in the exclusion of evidence regarding the application of the Mine Act to other plants, given the limited relevance of such evidence to the Mine Act's highly fact-specific inquiry and the potential for unnecessary delay in addressing such collateral matters. The petition for a writ of certiorari should therefore be denied.

1. a. The court of appeals correctly concluded that petitioner's carbon plant is a "coal mine" subject to Mine Act jurisdiction under 30 U.S.C. 803. The Mine Act broadly defines "coal or other mine" to include not just areas of land involved in extraction of minerals, but also lands, structures, and facilities used in "the work of preparing coal or other minerals," including "custom coal preparation facilities." 30 U.S.C. 801(h)(1)(C). The statute also defines "work of preparing the coal" to mean "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually

done by the operator of the coal mine." 30 U.S.C. 802(i).

Petitioner's carbon plant falls squarely within these statutory definitions. As the ALJ found, and petitioner does not dispute, the plant is a custom coal preparation facility that purchases partially processed coal and then engages in "the work of preparing the coal" by storing, sizing, drying, and loading the coal to make it suitable for subsequent industrial use. Pet. App. 138a-139a; see also *id.* at 13a, 77a-79a. This work of preparing coal to meet customers' specifications is petitioner's primary function. See *id.* at 140a (ALJ's finding that in 2009 petitioner sold over 6000 tons of a product made of 100% anthracite coal and only a few tons of multiple products containing no coal or coal mixtures). Petitioner's assertion (Pet. 3) that most of its finished products are mixtures of coal and other products was rejected by the ALJ as a factual matter, finding it to be an attempt to minimize the amount of coal used by the plant and to "obstruct" an assessment of the actual nature and extent of its coal operations. Pet. App. 9a-10a, 69a; 139a; see *id.* at 141a ("[Petitioner's] emails in anticipation of an MSHA inspection * * * can reasonably be construed as attempts to obfuscate the facility's actual operations."). That factual determination was grounded in the record, including petitioner's customer invoices and product tables, and was further based on the ALJ's credibility determinations at the hearing. See *id.* at 139a-141a.

Contrary to petitioner's arguments (Pet. 7-12; see Pet. App. 13a-18a), it is irrelevant that petitioner prepares coal that has already been partially processed rather than raw, unprocessed coal. The Mine Act's definition of the phrase "work of preparing the coal" is

not limited to work on raw or unprocessed coal. There is also nothing in the Mine Act that requires coal to be prepared at only one facility. Accordingly, both the coal mines that prepare raw coal for sale, and petitioner, which further prepares the coal in accordance with its customers' specifications, are engaged in the work of preparing the coal.[1]

Petitioner is also incorrect in asserting (Pet. 12) that a "bright line distinction" between the processing of raw coal and the processing of already partially processed coal is necessary to give businesses certainty as to whether they will be subject to Mine Act rules and expenses. The functional test applied here by the Commission and the court of appeals limits Mine Act coverage and excludes activities that are too attenuated from the actual processing of coal, such as the mere handling of coal by a consumer or the use of coal for heating. Pet. App. 15a-16a; see *id.* at 72a-74a (discus-

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[1] Petitioner incorrectly asserts (Pet. 12) that the court of appeals' interpretation of 30 U.S.C. 802(i) is inconsistent with the definition of "coal preparation" by the U.S. Bureau of Mines, The American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* (2d ed. 1997), http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/. There is no inconsistency because the Bureau of Mines, a now defunct agency that was tasked with research rather than miner safety, Pet. App. 15a, was not interpreting the Mine Act. The Bureau of Mines' definition also does not require "coal preparation" to occur at only one facility. See *Dictionary of Mining, Mineral, and Related Terms*, *supra* ("coal preparation" means "[t]he various physical and mechanical processes in which raw coal is dedusted, graded, and treated"). Under this definition, petitioner's preparation of processed coal is "coal preparation" because it is one of the processes, started at other mines, that converts raw coal into coal that meets a customer's specifications.

sion of Commission precedents).[2] The test has been used for more than 30 years, see *id.* at 72a-74a (discussing decisions beginning with *Secretary of Labor* v. *Oliver M. Elam, Jr., Co.*, 4 F.M.S.H.R.C. 5, 7-8 (1982)), and has provided sufficient certainty to businesses that may engage in work of preparing coal, consistent with Congressional intent for broad Mine Act coverage. See S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977) ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under [the Mine] Act be given the broadest possibl[e] interpretation, and * * * doubts be resolved in favor of inclusion of a facility within the coverage of the Act.").

In contrast, petitioner's "bright line distinction" (Pet. 12) would introduce an arbitrary and illogical limit to Mine Act coverage. Under petitioner's theory, two plants that perform the same custom coal-preparation functions, and that expose their employees to the same dust or other hazards, would have their Mine Act coverage hinge on whether the coal received by the plant was partially processed or raw. See Pet. App. 18a (noting that petitioner's most serious citations involved violations of Mine Act respirable dust standards and that the activities at petitioner's plant trigger the types of safety concerns that the Mine Act was intended to remedy). There is no basis in the Mine Act's language, its purpose to ensure employee safety, or common sense to have Mine Act

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[2] The functional test therefore reaches similar results as a requirement that the activities listed in 30 USC. 802(i) be limited to those usually performed by operators of a coal mine. See *RNS Servs., Inc.* v. *Secretary of Labor*, 115 F.3d 182, 190-192 (3d Cir. 1997) (Alito, J., dissenting).

coverage depend on whether another operation first partially processed the coal. Rather, the court of appeals properly assessed the functions performed at the plant to determine whether they are covered by the Mine Act. There is no need for this Court to review the fact-bound determination that petitioner performs the functions of a custom coal-preparation plant.

b. Contrary to petitioner's argument (Pet. 7-12), the court of appeals decision is consistent with the decisions of other courts of appeals. No other court of appeals has rejected Mine Act coverage of a facility, like petitioner's carbon plant, that takes partially prepared coal and further prepares it for its customers' uses.

Petitioner is wrong in asserting (Pet. 7-8) that *Herman* v. *Associated Electric Cooperative, Inc.*, 172 F.3d 1078 (8th Cir. 1999) (*Associated Electric*), is in conflict with the decision below. In *Associated Electric*, the Eighth Circuit held that a coal-fired electric power plant that purchased processed coal to use in generating electricity was not a coal mine under the Mine Act. *Id.* at 1080, 1083. While the court in *Associated Electric* recognized that the power plant engaged in various preparation activities before burning the coal, it concluded that the plant functioned primarily as a utility that processed the coal for its own combustion, rather than as a coal mine that prepared coal for other customers under the Mine Act. *Id.* at 1082-1083. The Eighth Circuit therefore did not adopt petitioner's "bright line distinction" between facilities that process raw coal and facilities that handle partially processed coal. Rather, *Associated Electric* applied the same functional test as the court of appeals here,

but reached a different conclusion on coverage based on the different function of the facilities at issue. See Pet. App. 78a (finding that petitioner "is not handling the coal for its own consumption and thus is unlike the facilities in cases involving utilities or co-generation facilities where some courts have found Mine Act jurisdiction did not extend").

Petitioner's reliance (Pet. 8-9) on *United Energy Services, Inc.* v. *Federal Mine Safety & Health Administration*, 35 F.3d 971 (4th Cir. 1994), is similarly misplaced. *United Energy* did not preclude Mine Act jurisdiction over operations, like petitioner's plant, that receive partially prepared coal for further processing, but rather applied the same functional test as the court of appeals here to hold that the Mine Act covered a company that transported coal to a facility that both prepared and consumed the coal. *Id.* at 975. The Fourth Circuit observed, in dicta, that "delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act." *Ibid.* But the term "consumer" there referred to the entity (in that case, a power plant) that *consumes* the coal, rather than referring to a custom coal-preparation facility, like petitioner's, that purchases partially processed coal and further prepares the coal for sale and distribution to its own customers. In accord with the decision in this case, the court in *United Energy* found that the Mine Act extends to coal-preparation processes that occur "a step earlier" than the delivery of coal to the ultimate consumer. *Ibid.*

The Fourth Circuit's recent decision in *Power Fuels, LLC* v. *Federal Mine Safety & Health Review Commission*, No. 14-1450, 2015 WL 332128 (Jan. 27, 2015), further supports broad coverage of the Mine

Act. *Power Fuels* emphasized the breadth of Mine Act jurisdiction, stating that "the coverage of the Mine Act is not limited to extractive activities only" but, "crucially, extends to a variety of activities involved in preparing coal." *Id.* at *4. In that case, the Fourth Circuit held that the Mine Act applied to a "blending terminal" that "receives, tests, weighs, samples, mixes, blends, stores, loads, and transports coal to meet the specifications of its customer," which was a power plant. *Id.* at *4-*5. *Power Fuels* did not apply petitioner's "bright line distinction," and instead required a "particularized" inquiry that examines the functions of the operation to determine whether it involves the "work of preparing coal," and "whether the employees are exposed to the safety and health hazards associated with coal-preparation activities." *Id.* at *6.

The decision below is also consistent with decisions under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq*. The Black Lung Benefits Act awards benefits based on the total disability or death of a miner. 30 U.S.C. 901(a); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 683-684 (1991). A "miner" is defined in part as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. 902(d). Thus, the question whether a facility is a "coal mine" arises indirectly in black lung cases as part of the inquiry into whether an individual meets this definition of a "miner."

None of the black lung cases cited by petitioner (Pet. 9-11) squarely addressed the coverage question presented here, nor did any of those cases agree with petitioner that the phrase "work of preparing the

coal" in 30 U.S.C. 802(i) is limited to work on raw or unprocessed coal. See *Amax Coal Co.* v. *Fagg*, 865 F.2d 916, 917-919 (7th Cir. 1989) (an individual who did reclamation work at a strip mine was a miner); *Director, Office of Workers' Comp. Programs* v. *Ziegler Coal Co.*, 853 F.2d 529, 536-537 (7th Cir. 1988) (*Ziegler*) (electrician who worked in a coal company's off-site electrical repair shop was not engaged in the work of preparing the coal under 30 U.S.C. 802(i)); *Director, Office of Workers Comp. Programs* v. *Consolidation Coal Co.*, 923 F.2d 38, 40-42 (4th Cir. 1991) (*Consolidation Coal*) (riverman who loaded already-prepared coal at a dock house was not a miner); *Ray* v. *Brushy Creek Trucking Co.*, 50 Fed. Appx. 659, 661-662 (6th Cir. 2002) (unpublished) (worker on barge was not a miner, where his "minimal exposure to coal dust occurred" while loading partially processed coal; court "do[es] not wish to establish a firm line where the preparation of coal ends and the entry into the stream of commerce begins").[3]

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[3] Petitioner does not cite *Consolidation Coal* directly, but instead cites a resource tool used by ALJs in the Department of Labor in deciding black lung cases, which in turn cites *Consolidation Coal* for the proposition that coal is beyond the "preparation" stage when it is processed and prepared for market. Pet. 10 (citing U.S. Dep't of Labor Office of Admin. Law Judges, *Judges' Benchbook: Black Lung Benefits Act*, p. 6.5 (2013)). That statement is irrelevant because it does not address the issue presented here: whether a facility that buys processed coal and further processes and prepares it for market is a coal mine under the Mine Act. Petitioner also does not cite *Ziegler* directly, but instead relies on a district court decision citing *Ziegler* and *Amax Coal Co.* Pet. 10 (citing *Herman* v. *Commonwealth Edison*, No. 98 C 3308, 1999 WL 350644 (N.D. Ill. May 21, 1999) (unreported) (*Commonwealth Edison*)). *Commonwealth Edison* held that a utility that further processed market-prepared coal for its own consumption was not a

In sum, the court of appeals correctly held that petitioner's plant continues to be covered by the Mine Act, as it has been since 1977. The court's decision is consistent with the decisions of other courts of appeals, which have adopted a fact-bound, functional approach to Mine Act jurisdiction. This Court should therefore deny review on the first question presented.

2. The court of appeals also correctly upheld the ALJ's exclusion of petitioner's evidence that the Secretary had regarded allegedly similar facilities as outside Mine Act jurisdiction. Pet. App. 18a-21a. There is no merit to petitioner's argument that the court should have remanded that issue to the Commission and there is no conflict with this Court's decisions in *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985) (*Florida Power*), *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), and *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam).

a. As discussed above, the ALJ excluded evidence on Mine Act coverage of other facilities, including the Keystone Filler plant, because it was not relevant to the particularized, fact-specific inquiry at hand. The ALJ further found that even if such evidence were relevant, its probative value was substantially outweighed by the potential for prejudice, delay, and confusion of the issue. Pet. App. 102a-103a, 148a-150a. The Commission affirmed under an abuse-of-discretion standard, *id.* at 80a-83a, as did the court of

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"mine" under the Mine Act. 1999 WL 350644, at *3. That conclusion is essentially the same as the Eighth Circuit's conclusion in *Associated Electric*. As argued above, this case differs from both *Commonwealth Edison* and *Associated Electric* because petitioner is preparing coal for customers, and "is not handling the coal for its own consumption." Pet. App. 78a.

appeals, *id.* at 18a-20a, holding that while "consistency of an agency's application of a statute might be relevant" as a general principle, the operations of the Keystone Filler plant were of little relevance in this case because the Keystone Filler plant was engaged in manufacturing, not coal processing. *Ibid.* The court noted that petitioner "unsuccessfully" attempted to analogize its operations to Keystone Filler's manufacturing activities, but the Commission "determined this assertion was factually without merit," based on inspection results and petitioner's own records. *Id.* at 20a. The court of appeals also agreed with the ALJ that, even if relevant, the evidence was properly excluded because "introduction of this evidence could have opened up a stream of requests for comparisons to facilities all around the country, causing an unnecessary delay in the proceedings to address collateral matters." *Id.* at 20a-21a.

The court of appeals correctly affirmed the ALJ's exclusion of evidence under the deferential abuse-of-discretion standard. Pet. App. 18a-21a. There is no cause for further review of that fact-based evidentiary ruling, particularly given the factual distinction between the Keystone Filler plant's operation and petitioner's plant. Moreover, review is unwarranted of the ALJ's conclusion that introducing evidence of other plants' operations would cause unnecessary delay.

b. Contrary to petitioner's argument (Pet. 14-15), the court of appeals' decision to affirm the exclusion of evidence rather than remand the issue is consistent with this Court's decisions requiring remands in *Florida Power*, *Ventura*, and *Thomas*. *Florida Power* discussed the well-established principle of administra-

tive law that, if a reviewing court concludes that the record does not support the agency action or finds that the agency failed to consider all relevant factors, the court should remand to the agency for additional investigation or explanation rather than conduct its own *de novo* inquiry. 470 U.S. at 744. *Ventura*, 537 U.S. at 16-17, and *Thomas*, 547 U.S. at 186-187, found that courts of appeals erred by rejecting the Board of Immigration Appeals' reasons for its actions and deciding *de novo* an issue that the Immigration and Nationality Act entrust to the agency. The court of appeals in this case, by contrast, upheld the ALJ's ruling for the same reasons the ALJ provided. There was no need to remand in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2015