ORAL ARGUMENT HELD JANUARY 24, 2025

No. 22-1071

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,
Petitioner,

v.

KC TRANSPORT, INC., AND
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

On Petition for Review of a Decision of the
Federal Mine Safety and Health Review Commission

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT KC TRANSPORT, INC.

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Act or Mine Act	Federal Mine Safety and Health Act of 1977
APA	Administrative Procedure Act
APJ	Administrative Patent Judge
CFPB	Bureau of Consumer Financial Protection
CIR	Commissioner of Internal Revenue
Commission	Federal Mine Safety and Health Review Commission
DOJ	Department of Justice
EO14215	Executive Order 14215, Ensuring Accountability for All Agencies
EO14219	Executive Order 14219, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative
FDIC	Federal Deposit Insurance Corporation
FLRA	Federal Labor Relations Authority
FTC	Federal Trade Commission
GVR	Grant Vacate Remand
ICC	Interstate Commerce Commission
KC	KC Transport, Inc.
MSHA	Mine Safety and Health Administration
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board
OLC	Office of Legal Counsel
OSHA	Occupational Safety and Health Administration
OSHRC	Occupational Safety and Health Review Commission
PTAB	Patent Trial and Appeal Board
SEC	Securities and Exchange Commission
Secretary	Secretary of Labor
USPS	United States Postal Service

Introduction

KC Transport, Inc. (KC), respectfully answers the five questions the Court ordered the parties to brief.

In traditional administrative appeals, the *regulated party* seeks review of an adverse agency decision. *See, e.g.*, *Maxxim Rebuild Co. v. Commission*, 848 F.3d 737 (6th Cir. 2017). Courts then determine the "best reading of the statute" by "us[ing] every [interpretive] tool at th[e courts'] disposal." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024); *see also* EO14219, § 3, 90 Fed. Reg. 10,583, 10,584 (Feb. 19, 2025). In *Maxxim*, the Sixth Circuit engaged in a proper statutory analysis and held that an off-site repair shop was not a "coal or other mine" within the meaning of the Mine Act. 848 F.3d at 738-39. That remains the best reading of the statute.

The interpretation offered here by the Secretary of Labor (Secretary or MSHA) has been a constant "moving target." *Secretary v. KC Transport, Inc.*, 77 F.4th 1022, 1040 (D.C. Cir. 2023) (Walker, J., dissenting). First, trucks were mines. Then, repair shops were mines. *Id.* At the Supreme Court, MSHA, through the Solicitor General, ignored *Maxxim* to argue that there is no circuit conflict. BIO, No. 23-876, 2024 WL 1657115 (U.S. Apr. 15, 2024) (not a single citation to *Maxxim*). Returning to this Court on the Supreme Court's GVR, MSHA makes the implausible argument that support services (e.g., restaurants, people's living rooms) and anything resulting from mineral extraction (from

spoons to airplanes) are mines, and refrains from providing any limiting principle. At day's end, MSHA simply disagrees with everyone and continues to offer an interpretation that this Court should easily reject. KC asks this Court to affirm the Federal Mine Safety and Health Review Commission's (Commission) decision because the Commission's vacatur of MSHA's citations is the correct result, since 30 U.S.C. § 802(h) cannot be read to expand MSHA's jurisdiction beyond what the best reading of the statute encompasses.

But something much more nefarious is at play. Here, two agencies, both subordinate parts of the Executive Branch, disagree on what the Mine Act means. When two agencies disagree as to what a statute that they both administer means, the President has the power to "conclude the judgment" of the Executive Branch, *United States v. Dickson*, 40 U.S. 141, 161 (1841), because the Executive Branch is expected to speak with one voice. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 520 (2018). The Executive Branch's conclusion can be then challenged in courts by aggrieved regulated parties; an agency cannot submit such a dispute for the courts to resolve. *See* Jefferson-Jay Letters, *infra*.

KC is caught in the middle of this intra-Executive Branch standoff. This Court must, therefore, also answer the "antecedent question" whether Article III courts have power to resolve intra-Executive Branch disputes of this sort. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

The dispute between MSHA and the Commission—two limbs of the same Branch—poses a problem because "no person may sue himself." *United States v. ICC*, 337 U.S. 426, 430 (1949). Even though mere assertion of an intra-Executive Branch dispute is not "a barrier to justiciability," *United States v. Nixon*, 418 U.S. 683, 697 (1974), there is a "constitutional quandary" where two agencies, both "tasked with … administration" of the Mine Act, submit their interpretive disagreement to an Article III court. *USPS v. Postal Regul. Comm'n*, 963 F.3d 137, 143 (D.C. Cir. 2020) (Rao, J., concurring).

Argument

KC answers the Court's five questions as follows:

1.	Does MSHA have Article III standing?	No.
2.	Does the intra-Executive Branch dispute conflict with Article II?	Yes.
3.	Does the intra-Executive Branch dispute present a case or controversy for purposes of Article III?	No.
4.	Is 30 U.S.C. § 816(b) constitutional?	No.
5.	Did the parties forfeit any argument that the Constitution does not permit a lawsuit between MSHA and the Commission?	No.

1.

MSHA lacks Article III standing as to both Respondents in this case.

Article III requires the Court to "satisfy itself" that a petitioner has standing "even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Absent standing, "there is no authority to sit in judgment." *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 778 (2000).

Standing requires the petitioning party (Secretary) to satisfy each of the three components: injury, causation, redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

First, lacking here: redressability. President Washington's Secretary of State, Thomas Jefferson, asked the Supreme Court to render opinions on questions of "considerable difficulty" over which there was disagreement within the Executive Branch. *Letter to Chief Justice John Jay & Assoc. Justices* (July 18, 1793), https://t.ly/YDX_n. Chief Justice Jay, writing for the Court, declined to "extrajudicially decid[e] the questions" because the Constitution vests the power to resolve intra-Executive Branch differences of opinion in the President. *Letter to President George Washington* (Aug. 8, 1793), https://t.ly/h0YQ0 (referring to U.S. Const. art. II, § 2 (Opinion Clause)). The Supreme Court has used these Jefferson-Jay Letters as precedent to ascertain the scope

of Article III and the separation of powers.[1] Congress, DOJ, and the current President agree. 28 U.S.C. §§ 511-513; 28 C.F.R. § 0.25; EO14215, § 7, 90 Fed. Reg. 10,447, 10,448-49 (Feb. 18, 2025). MSHA's disagreement with the Commission's interpretation is not redressable in court under long-established precedent and practice.

Second, MSHA also cannot be viewed as being injured by the Commission's decision because "subordinate parts" of the Executive Branch "are not adverse to one another." *SEC v. FLRA*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). After *Loper*, if the President/OLC does not resolve that Secretary-Commission disagreement, MSHA must acquiesce in the Commission's decision and ask Congress to amend relevant statutes.

Third, although a "case or controversy" may exist between MSHA and KC in the lay sense of the phrase (they disagree about the scope of MSHA jurisdiction), that matter is not directly at issue here. MSHA's inability to enforce its citation of KC is not "fairly traceable" to KC; it is caused, if at all, by the Commission's interpretation. *Lujan*, 504 U.S. at 562. The action under review is the Commission's order vacating MSHA's citations, not MSHA's action against KC. This distinction underscores

[1] *See Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004); *Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968); *Muskrat v. United States*, 219 U.S. 346, 354 (1911).

that MSHA's beef in this Court is not against KC, as KC agrees with the Commission's order. So, MSHA lacks standing to sue KC.

As between MSHA and the Commission, assuming MSHA is "injured," and that this injury is "caused" by the Commission's interpretation, the injury is not "redressable" by Article III courts. *Id.* Intra-Executive Branch differences of opinion are redressable by the President, not the courts. *See* Jefferson-Jay Letters, *supra.* Having failed the redressability prong as to the Commission, MSHA lacks standing to sue the Commission.

Lacking standing against either of the two Respondents, the Court should dismiss MSHA's petition for review, which has the effect of letting stand the Commission's decision vacating MSHA's two citations issued to KC.

2.

Intra-Executive Branch disputes can be resolved by the President because the President has full Article II control over the disagreeing executive offices or officers. *See* Jefferson-Jay Letters, *supra*.

Courts' resolution of such a dispute brought to them by one of the disagreeing agencies violates Article II for three reasons. First, the Vesting Clause does not countenance the limiting of the President's exercise of the executive power of the United States. U.S. Const. art. II, § 1, cl. 1. Second, the Take Care Clause does not permit the shackling of the President's ability to faithfully execute the laws. U.S. Const. art. II,

§ 3, cl. 4; *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020). Third, as noted above, the Opinion Clause makes it the President's duty, not the courts', to resolve intra-Executive Branch differences. *See* Jefferson-Jay Letters, *supra* (referring to U.S. Const. art. II, § 2).

But *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), complicates the matter, as then-Judge Kavanaugh noted in *SEC*, 568 F.3d at 997 (Kavanaugh, J., concurring), because it holds that the President need not have full control over executive officers who perform quasi-legislative or quasi-judicial functions.[2] The Secretary and MSHA Assistant Secretary are appointed, and removable at will, by the President. 29 U.S.C. §§ 551, 557a. The Commission is an independent agency separate from the Department of Labor, and although its

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[2] *Harris v. Bessent*, Nos. 25-5037, 25-5055, 25-5057, 2025 WL 980278, at *13-*18 (D.C. Cir. Mar. 28, 2025) (Walker, J., concurring) (NLRB and MSPB members exercise purely executive authority); *id.* at *23 (Henderson, J., concurring) (same; substantial executive power), *vacated by* 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025) (*en banc*). The Commission, like NLRB/MSPB, "represents itself" in this Court as respondent, and it can also petition courts for relief under 30 U.S.C. § 823(e). 2025 WL 980278, at *23 (Henderson, J., concurring). The "*temporary* War Claims Commission" is unlike the "*permanent*" Commission here. *Id.* at *17 (Walker, J., concurring) (discussing *Wiener v. United States*, 357 U.S. 349 (1948)). Congress did not make Commissioners Article III adjuncts. *Cf.* 28 U.S.C. §§ 631-639 (magistrate judges). While *Harris* (*en banc*), *stayed by* 2025 WL 1063917 (U.S. Apr. 9, 2025), considers *Humphrey's* and *Wiener* relevant to "multimember adjudicatory boards," 2025 WL 1021435, at *1, the precedential effect of that motions ruling on this Merits Panel is obscure. *Cf. Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997).

commissioners are appointed by the President, they can be removed only for cause. 30 U.S.C. § 823(a)-(b); *United States v. Arthrex*, 594 U.S. 1, 17 (2021) (Commissioners, like PTAB APJs, "*must be*" executive officers because they exercise purely "executive Power[.]").

Only the Supreme Court can overrule *Humphrey's* or *Wiener*. *Seila* limited *Humphrey's* to its facts—to the multimember partisan-balanced FTC circa 1935. 591 U.S. at 218-20 (holding unconstitutional removal protection for single CFPB Director). *Seila* cautioned against applying *Humphrey's* to "new situation[s]." *Id.* Per *Seila*'s instructions, there is no room to apply *Humphrey's* to the Commission because, although it is a multimember agency, its commissioners are not partisan-balanced. *See* 30 U.S.C. § 823(a).

Assuming *Humphrey's* applies, and this Court holds that 30 U.S.C. § 823(b)'s removal protection is constitutional, three implications important for this case follow.

First, the President has no full control over both MSHA and the Commission. He can fire the Secretary and MSHA Assistant Secretary at will but not the Commissioners. At-will removal acts as a potent mechanism for the President to obtain acquiescence from the Secretary/ MSHA to his/OLC's interpretation.[3] Removal for cause, on the other

[3] Congress seems to have designated the Commission as the mouthpiece of the Executive Branch for interpreting the Mine Act. *See* 30 U.S.C. § 816; *but see* 28 U.S.C. §§ 511-513; 28 C.F.R. § 0.25.

hand, permits but does not require the Commission to acquiesce in the President/OLC's interpretation. *Humphrey's*, thus, limits the President's power to resolve the intra-Executive Branch dispute because he can only wield full power over MSHA but not the Commission. Applying *Humphrey's* here violates the Vesting Clause because it limits the President's exercise of the executive power. U.S. Const. art. II, § 1, cl. 1; *Seila*, 591 U.S. at 203.

Second, to the extent the President has full control over MSHA, he can resolve the Secretary-versus-Commission dispute in only one way—reject MSHA's interpretation over which the President has full control. As a practical matter, KC has no problem with that, as MSHA has consistently been interpretively challenged during this litigation. But doctrinally, were a President to objectively conclude that the Commission's interpretation is inconsistent with statutory text, the President would be required to defer to the Commission's interpretation even if he disagreed with it. That hinders the President's ability to faithfully execute the laws under the Take Care Clause. U.S. Const. art. II, § 3, cl. 4; *Seila*, 591 U.S. at 203.

Third, if the Court concludes that *Humphrey's* is on all fours with the situation here, then MSHA becomes sufficiently adverse to the Commission, as noted in the *SEC v. FLRA* concurrence, enabling the Court to reach the merits of the appeal, viz., *de novo* interpretation of the Mine Act.

Then-Judge Kavanaugh is right. *SEC*, 568 F.3d at 997 (Kavanaugh, J., concurring). Absent *Humphrey's*, the President would have full executive power to resolve the intra-Executive Branch interpretive disagreement. Such resolution would be constitutional under the Vesting, Opinion, and Take Care Clauses of Article II. Agencies (MSHA, Commission) subordinate to the President, then, must acquiesce in that final resolution; regulated parties aggrieved by that determination would have standing to petition courts for review of that decision under 30 U.S.C. § 816(a) or the Administrative Procedure Act.

If the Court chooses to apply *Humphrey's* (and consequently provide the best reading of 30 U.S.C. § 802(h)), *Humphrey's* would have necessitated a course of action that violates the Vesting, Take Care, and Opinion Clauses of Article II.

3.

This intra-Executive Branch dispute does not present a case or controversy for purposes of Article III.

Article III contains no case-or-controversy category under which this Secretary-versus-Commission dispute is justiciable. Neither Congress by statutory enactment, nor the President acting through MSHA, nor the Court through application of Supreme Court precedent (*Humphrey's*, or *Morrison*, explained *infra.*) to this split-enforcement scenario, can expand Article III jurisdiction beyond the categories of cases listed therein. If courts were to resolve such a dispute under

30 U.S.C. § 816(b), such resolution would put everybody on a collision course with Articles I, II, and III.

MSHA may argue that *Humphrey's* makes *some* traditional-versus-independent agency or independent-versus-independent agency disputes justiciable in Article III courts. *SEC*, 568 F.3d at 997 (Kavanaugh, J., concurring).[4] Such a reading should be rejected for three reasons.

First, the cases then-Judge Kavanaugh cited involved petitioning agencies or officers who were answerable to the respondent agency's regulatory authority. *SEC v. FLRA* and *USPS v. Postal Regulatory Commission* themselves were such cases; one agency was directly regulated by the other there.[5] Here, two agencies disagree over how the

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[4] The Supreme Court decided an intra-Executive Branch dispute like this one in *Martin, Secretary of Labor v. OSHRC*, 499 U.S. 144 (1991). OSHRC there, as the Commission here, vacated an issued citation and OSHA petitioned the Tenth Circuit for review. Setting aside the fact that *Martin* deployed the now-defunct *Chevron* deference methodology, the constitutional arguments at issue here were "not … raised in briefs … nor discussed in the opinion of the Court," so *Martin* cannot be considered as "binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

[5] *SEC*, 568 F.3d 990 (SEC-as-employer subject to FLRA's unfair-labor-practice determination); *USPS*, 963 F.3d 137 (USPS subject to Commission's ratemaking determination); *IRS v. FLRA*, 494 U.S. 922, 933 (1990) (IRS-as-employer subject to FLRA's unfair-labor-practice determination; courts cannot undertake task entrusted to FLRA) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 95 (1943); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)); *NLRB v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993) (NLRB-as-employer subject to FLRA's unfair-

Executive Branch should apply the law to a third party (KC). MSHA's dispute against the Commission relates to interpreting the Mine Act, which both agencies administer; MSHA is not subject to the regulatory power of the Commission or vice versa, as SEC, IRS, or NLRB, *qua employers*, are subject to FLRA's.

Second, the other independent-counsel or special-counsel cases then-Judge Kavanaugh cited ultimately depend on the continued validity of *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison* held constitutional removal protection for the independent counsel only because that independent counsel lacked policymaking or administrative authority. The Supreme Court has restricted *Morrison* to its unique facts. *Seila*, 591 U.S. at 219-20. *Morrison* would be inapplicable here because both MSHA and the Commission wield significant executive power. 30 U.S.C. §§ 811(a), 823.

Third, those independent-counsel or special-counsel cases are limited and distinguishable under *United States v. Nixon*, 418 U.S. at 696-97. They apply only to controversies (e.g., "evidence deemed … relevant and admissible in a pending [civil or] criminal case") that are all "of a type which are traditionally justiciable" in Article III courts. *Id.* This Secretary-versus-Commission case concerns intractable intra-Executive Branch policy disagreement as to the Mine Act's scope, which controversy

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labor-practice determination); *United States v. ICC*, 337 U.S. 426 (1949) (government-as-shipper subject to ICC's ratemaking authority).

is "of a type" that is "traditionally" *not* justiciable in Article III courts. *Id.* at 697; Jefferson-Jay Letters, *supra*; 28 U.S.C. §§ 511-513; 28 C.F.R. § 0.25.

4.

The judicial-review statute, 30 U.S.C. § 816(b), is unconstitutional to the extent it allows MSHA to petition for review.

The Executive Branch is expected to speak with one voice. *Epic*, 584 U.S. at 520. Absent specific statutory authorization, that voice is OLC. 28 U.S.C. §§ 511-513; 28 C.F.R. § 0.25; *see also Ali v. Barr*, 951 F.3d 275, 281-82 & n.3 (5th Cir. 2020) (describing the Attorney-General-as-tie-breaker role, tracing back to the 1789 Judiciary Act); *Dir., Off. of Workers' Comp. Progs., Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128-29 (1995) ("[T]he APA … does not include agencies within the category of 'persons adversely affected or aggrieved.'"); *Statesman Sav. Holding Corp. v. United States*, 38 Fed.Cl. 391, 392 (1997) (calling "unwarranted," court resolution of "intra-executive branch dispute[s]").

The Mine Act designates the Commission as the mouthpiece of the Executive Branch, not MSHA. That's so because 30 U.S.C. § 816 makes the Commission's "order[s]" judicially reviewable. Three conclusions follow:

(1) a regulated party aggrieved by the Commission's decision can petition for review, *id.* § 816(a), which is also consistent with the APA's judicial review provisions; and

(2) MSHA can petition for "enforcement" of the Commission's order, *id.* § 816(b), because enforcement is premised on Secretary-Commission agreement; but

(3) MSHA cannot, as occurred here, petition for "review" of the Commission's order because such review unconstitutionally submits an intra-Executive Branch dispute for judicial resolution.

Reading § 816 this way would bring the section into compliance with Articles II and III of the Constitution, as discussed.

5.

All questions here relate to the scope "of federal-court adjudicatory authority." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Courts have a duty to inquire "*sua sponte*," *id.*, into such matters, which "cannot be waived or forfeited" by the parties. *Boechler, P.C. v. CIR*, 596 U.S. 199, 203 (2022). The Constitution vests courts with judicial power; there is no such thing as Article III power conferred by party agreement.

Even if this Court thinks these questions are non-jurisdictional, the Court would still have discretion to address them because KC apprised the Supreme Court of the "constitutional oddity," *SEC*, 568 F.3d at 996 (Kavanaugh, J., concurring), of "the Executive seem[ing to be] of two

minds." Cert. Petn., No. 23-876, 2024 WL 645391, at *21 (U.S. Feb. 12, 2024) (quoting *Epic*, 584 U.S. at 520). Re-interpretive remands that this Court previously issued, directing the Commission to resolve the Secretary-versus-Commission disagreement in MSHA's favor "garble[s]" "political accountability," KC told the Supreme Court. *Id.*

Granted, KC said that in the context of this Court's now-inoperative *Chevron* Step One-and-a-Half Doctrine. But the constitutional problems with the prosecuting agency petitioning this Court to resolve its disagreement with the adjudicating agency remain the same even after *Chevron* and the Step One-and-a-Half Doctrine have now been abrogated. *KC Transport, Inc. v. Su*, 144 S.Ct. 2708 (2024). Those antecedent constitutional problems remain within the scope of the GVR here. The parties did not waive or forfeit those issues when they stuck to answering questions posed by the Court in its first post-GVR supplemental briefing order.

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The President can resolve intra-Executive Branch disagreements just as *en banc* circuit courts can resolve intra-circuit conflicts and the Supreme Court can resolve circuit splits. If MSHA disagrees with a circuit's precedent (as here, *Maxxim* (6th Cir.)), the usual course is for MSHA to acquiesce or seek certiorari; MSHA did neither. MSHA instead sent an inspector to KC's parking lot to seek expanded jurisdiction for itself. When the Commission foiled MSHA's plans, MSHA went, not to

the President/OLC, not to Congress, not even to the Fourth Circuit (Emmett, West Virginia), but asked this Court for an alternative ruling. This Court has been wise to caution agencies against such behavior. *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 22, 29 (D.C. Cir. 2016) (holding NLRB's "nonacquiescence" was in "bad faith," and ordering payment of attorney fees).

Conclusion

The Court should dismiss MSHA's petition because this controversy is not justiciable. That has the effect of letting stand the Commission's decision vacating MSHA's two citations because MSHA lacked jurisdiction under the best reading of "coal or other mine."

If the Court concludes that this case is justiciable, then the Court should affirm the Commission's decision, as previously briefed and argued.

DATED: April 15, 2025.

Respectfully submitted,

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Dated: April 15, 2025.

/s/ Aditya Dynar
ADITYA DYNAR

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