No. 08-63

IN THE
Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT KENTUCKY RESOURCES COUNCIL, INC.'S BRIEF IN OPPOSITION

WALTON D. MORRIS, JR.
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
(434) 293-6616

ADINA H. ROSENBAUM
Counsel of Record
SCOTT L. NELSON
Public Citizen
Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent Kentucky Resources Council, Inc.

October 2008

QUESTIONS PRESENTED

1. Did the D.C. Circuit correctly hold that the term "valid existing rights" in the Surface Mining Control and Reclamation Act (SMCRA) is ambiguous?

2. Did the D.C. Circuit correctly conclude that the agency's interpretation of "valid existing rights" does not create an identifiable class of cases in which application of SMCRA will necessarily constitute a taking?

CORPORATE DISCLOSURE STATEMENT

Respondent Kentucky Resources Council, Inc., has no parent company and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

CORPORATE DISCLOSURE STATEMENT. ii

TABLE OF AUTHORITIES. iv

INTRODUCTION. 1

STATEMENT OF THE CASE. 1

A. Factual Background. 1

B. Proceedings Below. 4

REASONS FOR DENYING THE WRIT. 8

I. The D.C. Circuit Properly Applied *Chevron*. . . . 8

II. There Is No Confusion or Circuit Split Over *Riverside Bayview Homes*. 11

III. The Decision Below Is Correct. 18

CONCLUSION. 20

TABLE OF AUTHORITIES

CASES Pages

AFL-CIO v. FEC,
333 F.3d 168 (D.C. Cir. 2003) 6

Appolo Fuels, Inc. v. United States,
54 Fed. Cl. 717 (2002) 18

Bell Atlantic Telephone Cos. v. FCC,
24 F.3d 1441 (D.C. Cir. 1994) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4, 11

Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989) 18

Getty Oil Co. v. Clark,
614 F. Supp. 904 (D. Wyo. 1985) 20

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 1, 17, 20

HolRail, LLC v. Surface Transportation Board,
515 F.3d 1313 (D.C. Cir. 2008) 11

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).. 6

National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 6

National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) 5

Natural Resource Defense Council v. EPA, 529 F.3d 1077 (D.C. Cir. 2008) 11

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978) 14, 17

Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001) 18

Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335 (9th Cir. 1990) 20

United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000) 20

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 1, 7, 11, 12, 15

STATUTES AND REGULATION

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (Aug. 3, 1977) , (*codified at* 30 U.S.C. §§ 1201 *et seq.*). 1

30 U.S.C. § 1201(e) 19
30 U.S.C. § 1211(c)(2) 2

30 U.S.C. § 1272(e) 2

64 Fed. Reg. 70766 (Dec. 17, 1999) . . . . . *passim*

OTHER AUTHORITIES

Supreme Court Rule 10.. 15

Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (June 30, 1988) (reprinted in 18 Envtl. L. Rep. 35168 (1988)).. 16

INTRODUCTION

In the decision below, the D.C. Circuit held that the term "valid existing rights" (VER) in the Surface Mining Control and Reclamation Act is ambiguous and deferred to the Secretary of the Interior's reasonable interpretation. Petitioner National Mining Association (NMA) objects to that interpretation and contends that the term should be interpreted more favorably to the coal industry's interests. But a court of appeals does not err every time it defers to an expert agency's interpretation that the regulated industry dislikes. Despite NMA's attempts to paint the D.C. Circuit's decision as unprecedented and extreme, the court conducted a standard *Chevron* analysis, correctly held that VER is ambiguous, and appropriately deferred to the Secretary's interpretation. And despite NMA's claims of a conflict, there is neither confusion nor a circuit split over how to apply *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), and the court of appeals correctly concluded that constitutional avoidance principles do not require rejection of the Secretary's construction. The lower court's decision is unremarkable and correct, and the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (Aug. 3, 1977) (*codified at* 30 U.S.C. §§ 1201 *et seq.*), is a "comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). Section 552(e) of SMCRA seeks to accomplish this purpose by

prohibiting most surface mining in or near America's parks, backyards, schoolyards, and graveyards. Specifically, it prohibits surface mining operations, with some exceptions, within the boundaries of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, and any national forest; when it will adversely affect any publicly owned park or historic site; within one hundred feet of a public road or cemetery; and within three hundred feet of an occupied dwelling, a public, community, or institutional building, a school, a church, or a public park. 30 U.S.C. § 1272(e). The prohibitions of § 522(e) do not apply to surface mining operations pre-dating SMCRA and are subject to "valid existing rights" (VER), a term that the statute does not define. *Id.*

SMCRA authorizes the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM), to promulgate regulations to implement the Act. 30 U.S.C. § 1211(c)(2). Accordingly, on December 17, 1999, after engaging in notice-and-comment rule-making procedures, OSM published a final rule defining VER for purposes of § 552(e). *See* 64 Fed. Reg. 70766 (Dec. 17, 1999). Under the rule, a person can demonstrate VER by showing that a legally binding document vests that person with the right to conduct the intended type of surface mining operation and that either 1) all permits required to conduct the mining had been obtained or a good-faith effort had been made to obtain them before the land came under the protection of § 552(e) (known as the "good faith/all permits" standard); or 2) the

land is needed for and immediately adjacent to a surface coal-mining operation for which all permits had been obtained or a good-faith attempt to obtain them had been made before the land came under the protection of § 552(e) (known as the "needed for and adjacent" standard). *See id.* at 70831. Versions of the "good faith/all permits" and "needed for and adjacent" standards adopted in the final rule have been in use for most of the time since 1980, when the U.S. District Court for the District of Columbia remanded an earlier regulation to the agency, stating that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." *Id.* at 70770 (quoting *In re Permanent Surface Mining Regulation Litigation I*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C., Feb. 26, 1980)); *see also id.* at 70782 ("[W]e have used the good faith/all permits standard most of the time since SMCRA's enactment."); Pet App. 34a ("The 'good faith/all permits' rule previously has been applied as the federal standard, having been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress.").

The 72-page preamble to the final rule described in detail the context in which VER appears in SMCRA; the legislative history of the VER provision in § 522; the regulatory history of OSM's efforts to define VER; the alternative definitions for VER that OSM considered; why OSM rejected those alternative standards; and how OSM's definition compares with the definition of VER under other federal statutes. *See* 64 Fed. Reg. 70766. The preamble explained that OSM chose the "good faith/all permits" standard because it believed that standard "best achieves

protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment," while also protecting "the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e)" before those lands came under § 522(e)'s protection. *Id.* at 70776. It pointed out that the "good faith/all permits" standard was consistent with the Act's legislative history, and that "20 of the 24 approved State regulatory programs under SMCRA already rely upon either the good faith/all permits standard or the all permits standard," so "adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs." *Id.*

With regard to the rule's takings implications, the agency noted that insufficient information was available to assess the rule's takings consequences accurately and that, therefore, the rule had "significant takings implications" under Executive Order 12630, which requires agencies to identify the takings implications of proposed actions. *See id.* at 70827, 70781. It explained, however, that it "anticipate[d] that the rule will result in very few compensable takings." *Id.* at 70781.

B. Proceedings Below

NMA challenged the final rule. After describing in detail both the regulatory history of the VER definition and OSM's rule-making process, the district court granted summary judgment to the Secretary, applying the two-step test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, noting that courts "employ 'traditional tools of statutory construction'" in

determining whether Congress has spoken to the precise issue under *Chevron* step one, Pet. App. 30a (citation omitted), the court held that the final rule was not contrary to congressional intent. *Id.* at 32a. Then, pointing out that the agency had considered all relevant factors and articulated a satisfactory explanation for its decision, it held that the final rule was a permissible construction of the statute. *Id.*

The court of appeals affirmed in a unanimous opinion by Judge Griffith. With regard to *Chevron* step one, the court explained that the question was "whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill." *Id.* at 7a. The court answered that question in the affirmative, noting that it had earlier "determined that the phrase [VER] is subject to multiple and divergent meanings." *Id.* at 8a (citing *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 748-51 (D.C. Cir. 1988) and pointing out that the court in that case had noted "the ambiguity inherent in VER" and deferred to "the Secretary's reasonable interpretation of the phrase"). The court explained that its "reading of the SMCRA's language" convinced it "that VER is an ambiguous phrase," and that it had previously concluded, in *National Wildlife Federation,* "that the legislative history of the SMCRA does not illuminate the meaning of VER." *Id.* at 7a-8a (citing *Nat'l Wildlife Fed'n*, 839 F.2d at 749).

The court then responded to NMA's argument that the plain meaning of VER did not allow for the agency's interpretation of the phrase. Using the same dictionary NMA had cited, the court explained that the word "rights" could mean property rights, as NMA claimed, but that it could also mean rights more generally. The court found it

hard to conclude that Congress had directly spoken to the precise question at issue "by using a word with multiple and often vague meanings." *Id.* at 9a. Similarly, the court pointed out that the word "valid" injected further ambiguity into the statute "because it requires yet another question: Under law, what makes a miner's rights sufficient?" *Id.* Accordingly, the court concluded that the "dictionary counsels in favor of more deference to the agency, not less." *Id.* (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992); *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003)).

The court then stated that nothing in § 522(e) suggested that Congress meant VER to mean valid existing property rights, rather than a narrower interpretation of the phrase. It pointed out that Congress did not use the more precise term "valid existing property rights," instead of the ambiguous term "valid existing rights." Citing cases in which courts deferred to various agency interpretations of VER under other statutes, and noting that academics could not reach consensus on VER's meaning in SMCRA, the court concluded that if "VER operates as a 'term of art,' as the NMA suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity." *Id.* at 10a.

Having found VER ambiguous, the court turned to *Chevron* step two. The court pointed out that the agency had thoroughly considered the issue, that it had demonstrated that its interpretation was consistent with the statute, and that the rule was true to the statute's primary purpose of protecting against the harmful effects

of surface mining. The court therefore determined that the agency's interpretation of VER was reasonable.

Finally, the court addressed NMA's argument that it should not apply *Chevron* deference because of constitutional avoidance principles. The court explained that although "constitutional avoidance trumps *Chevron* deference," courts "do not abandon *Chevron* deference at the mere mention of a possible constitutional problem." *Id.* at 14a. With regard to NMA's argument that *Chevron* deference was not applicable because the rule would work a taking, the court, following this Court's holding in *Riverside Bayview Homes*, 474 U.S. at 127-28, pointed out that a taking is unconstitutional only if the government does not pay compensation, but that the Tucker Act provides for compensation. "Given this protection," the court explained, "the NMA's takings challenge raises no serious question about the 1999 Rule that would preclude *Chevron* deference." Pet. App. 15a.

The court did recognize that there are times when application of constitutional avoidance principles is appropriate under the Takings Clause. Specifically, it recognized that avoidance principles come into play when "a statute creates 'an identifiable class of cases in which application of [the] statute will necessarily constitute a taking.'" *Id.* at 15a-16a (quoting *Riverside Bayview Homes*, 474 U.S. at 128 n.4 (1985)). However, the court noted, NMA had "shown no 'identifiable class' of miners whose takings claims would expose the Treasury to such liability." *Id.* at 16a. The court further pointed out that NMA had not claimed that the government would be on the hook for massive, unforseen sums due to the rule, and that the record was "devoid of evidence suggesting it is

so." *Id.* "Given this implicit concession that the 1999 rule will have relatively insignificant takings implications that can readily be addressed in the Court of [Federal] Claims," the court determined that there was "no serious constitutional problem to be avoided." *Id.* It concluded that the usual *Chevron* analysis applied and deferred to the Secretary's reasonable interpretation of VER.

NMA filed a petition for rehearing and rehearing en banc, which was denied without any member of the court of appeals requesting a vote. *Id.* at 37a-38a.

REASONS FOR DENYING THE WRIT

I. The D.C. Circuit Properly Applied *Chevron*.

NMA's primary argument for why the Court should review its policy disagreement with OSM is that, in NMA's view, the court of appeals announced "a new rule" that a "statutory phrase is categorically ambiguous if just one word in that phrase . . . has multiple dictionary definitions." Pet. at i. The court of appeals did no such thing.

Contrary to NMA's claims, the court of appeals did not just rely on the dictionary definition of the word "rights" in determining that VER is ambiguous. The court also looked to its own previous case law on the term, noted that the legislative history was unhelpful, discussed the ambiguity of the word "valid," indicated that it had given thought to all of the language in § 552(e), pointed out that the academy could not reach consensus on the meaning of VER, and cited other cases in which courts had looked to agency interpretations of VER. Pet. App. 7a-11a. In short, NMA's assertion that the D.C. Circuit based its entire analysis on the dictionary definitions of the word

"rights" is simply not true. *Contrast*, *e.g.*, Pet. at 13 (stating that the court of appeals "ignor[ed]" the words "valid" and "existing") *with* Pet. App. 9a (discussing the ambiguity of the word "valid"). Thus, NMA's first "question presented"—whether "a statutory phrase is necessarily ambiguous and triggers *Chevron* deference because a single word within that phrase is itself ambiguous"—is not properly presented.[1]

To be sure, the court of appeals did not say it was going to examine text, structure, purpose, and context, and then proceed to categorize each of its points into one of those categories. But this Court has never required such a mechanical application of the tools of statutory interpretation. Nor has it required courts to discuss every tool or canon of statutory construction, whether or not they would affect the holding in the case. That the D.C. Circuit decided not to address certain of NMA's arguments in its opinion does not mean that it categorically held that those sorts of arguments are irrelevant. *See* Pet. at 24 (claiming that, by not specifically addressing a particular structural

---

[1]NMA's repeated claim that the D.C. Circuit deferred to the agency about whether or not the term VER is ambiguous is equally fictitious. *See* Pet. at 3, 15, 25. The D.C. Circuit did not purport to defer to the agency in determining VER's ambiguity; indeed, in its discussion of *Chevron* step one, it never even mentioned that the agency found the word ambiguous. Pet. App. 7a-11a. NMA's insistence that the court of appeals deferred to the agency's view on VER's ambiguity seems to stem from its unexplained belief that "focus[ing] exclusively on abstract definitional possibilities" is equivalent to deferring to the agency on the issue of ambiguity. Pet. at 15. But even if the D.C. Circuit had based its holding solely on the fact that the word "rights" is capable of many dictionary definitions (which it did not), deference to the dictionary is not the same as deference to the agency.

argument, the court of appeals "effectively announc[ed] that a statute's structure need not be consulted to interpret it"). It just demonstrates that the D.C. Circuit disagreed with NMA about whether those particular arguments were telling in this case.

NMA similarly attributes to the D.C. Circuit a categorical rule of NMA's own invention in claiming that the court of appeals held that "the more Congress uses a term, the less settled its meaning becomes." Pet. 20-21. The D.C. Circuit did not hold that *all* terms of art are means by which Congress delegates policy-making authority. Rather, it noted, based on its reading of VER cases, that *this particular* term of art (if it is a term of art at all) demonstrates Congress' intent to delegate authority to the agency because the term has been subject to agency interpretation when used in various other statutes. In doing so, the D.C. Circuit followed the exact presumption NMA claims (at 21) it inverted: It assumed that the term VER means the same thing across statutes, specifically that Congress intended to delegate authority to the agency. Pet. App. 10a-11a. But the D.C. Circuit did not say that all terms of art have this same policy-delegation meaning, and NMA's Chicken Little claims about the "serious mischief" that will follow from the decision below are misplaced. Pet. at 23.

In short, despite NMA's best attempts to find a "novel" and "troubling" categorical rule in the D.C. Circuit's opinion that would justify this Court's attention, Pet. at 25, the court below conducted an unremarkable *Chevron* analysis. Indeed, that the opinion below did not introduce a "newly minted rule of decision," Pet. at 25, is clear from the fact that, following its decision in this case, the D.C.

Circuit has continued applying traditional tools of statutory construction in determining whether statutory provisions are ambiguous. *See Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008) (looking at text, legislative history, and other provisions of statute in determining that Congress drafted provision to be ambiguous); *HolRail, LLC v. Surface Transp. Bd.*, 515 F.3d 1313, 1316 (D.C. Cir. 2008) (explaining that under *Chevron* step one the court employs "'traditional tools of statutory construction' to determine 'whether Congress has directly spoken to the precise question at issue'") (citing *Chevron*, 467 U.S. at 842, 843 n.9)). In other words, the court of appeals' decision did not usher in a new mode of interpretation in the D.C. Circuit. Although the court of appeals did not reach the conclusion NMA would have liked, its analysis was appropriate and does not require this Court's review.

II. There Is No Confusion or Circuit Split Over *Riverside Bayview Homes.*

The D.C. Circuit's application of *Riverside Bayview Homes*, 474 U.S. 121, likewise does not warrant review. There is neither confusion nor a circuit split over when the takings implications of an agency's construction of a statute warrant deviation from the usual *Chevron* analysis, and the D.C. Circuit correctly concluded that the canon of constitutional avoidance is not implicated here.

1. In *Riverside Bayview Homes*, this Court considered whether takings issues justify narrowly construing a statute and held that "if compensation will . . . be available in those cases where a taking has occurred," constitutional avoidance principles generally are not implicated and a

narrowing construction is not required. 474 U.S. at 128. "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty[;] it merely frustrates permissible applications of a statute or regulation." *Id.*

In a footnote, the Court suggested a limited exception to its holding that takings issues do not implicate constitutional avoidance principles and require a narrowing construction when compensation is available under the Tucker Act: Distinguishing a prior holding, the Court said that it would be "sensible" to construe a statute narrowly where "there is an identifiable class of cases in which application of a statute will *necessarily* constitute a taking." *Id.* at 128 n.5 (emphasis added).

NMA claims that there is "confusion" and "a rift among the circuit courts," Pet. at 33, 4, over the application of *Riverview Bayview Homes*. But the only evidence it cites of this purported confusion is that three circuits have followed *Riverside Bayview Homes* in declining to adopt narrowing statutory constructions to avoid takings issues "in the particular factual contexts in which [the case] has been invoked," Pet. at 29, while the D.C. Circuit, considering different facts, "has applied the [exception in the footnote] on multiple occasions and even enforced it." *Id.* (citing one case in which the D.C. Circuit relied on the exception to narrowly construe a statute, four cases in which the court noted the exception but found it inapplicable under the circumstances before it, and one case in which the court found an agency's interpretation unreasonable without relying on constitutional avoidance

principles or mentioning *Riverside Bayview Homes*).[2] That the application of *Riverside Bayview Homes* can lead to different results when applied to different facts does not demonstrate any confusion among the lower courts about the case, let alone that the courts "have long struggled to understand and apply" it. Pet. at 4. Rather, the cases cited reflect broad agreement among the circuits with the case's principal holding that narrowing constructions are generally not warranted to avoid takings issues absent unusual circumstances.

2. The circuit split that NMA claims was caused by the D.C. Circuit's decision in this case is similarly elusive. NMA claims that the decision below conflicts with the precedent of all "the other Circuits that have recognized the validity" of *Riverside Bayview Homes*. Pet. at 31. But as described by NMA itself, the holdings of the other circuits that NMA claims have "struggled" with the meaning of *Riverside Bayview Homes* are entirely consistent with the result and the reasoning of the decision below. Like those courts, the court below recognized the validity of *Riverside Bayview Homes*. And like those courts, the court below determined that *Riverside Bayview Homes* did not warrant narrowly construing the statute at issue. Indeed, NMA cites no decision from any other circuit that has applied *Riverside Bayview Homes* to give a narrow construction to a statute to avoid takings concerns. It is difficult to see where the conflict lies.

---

[2]In the cases from other circuits cited by NMA, two (from the Eighth and Federal Circuits) did not even cite the footnote, while one (from the Fifth Circuit) cited the footnote but held it inapplicable under the circumstances.

NMA's assertion that the decision below created a conflict seems to rest principally on its contention that the D.C. Circuit's decision departs from its *own* prior precedent applying the *Riverside Bayview Homes* footnote. Such a purported intra-circuit is generally not a basis for granting certiorari, particularly where, as here, the lower court has *unanimously* denied rehearing en banc, indicating that no judge on the court saw the decision as a departure from circuit precedent. Moreover, the court in this case not only specifically cited the *Riverside Bayview Homes* footnote, *see* Pet. App. 15a-16a, but also acknowledged and distinguished its one precedent applying the footnote to narrowly construe a statute in circumstances (unlike the circumstances in this case) where a broader construction necessarily involved takings in an identifiable category of cases. *See id.* at 16a (citing *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994)). And that case, which involved a physical taking, *itself* distinguished cases involving allegations of regulatory takings (such as this case) explaining that because regulatory takings are judged under "the factually sensitive standards of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978)," the "'identifiable class' principle" was inapplicable. *Bell Atl. Tel. Cos.*, 24 F.3d at 1446. In light of the court's careful treatment of its precedent, and *Bell Atlantic*'s own distinction of regulatory takings cases, NMA's assertion that the *Riverside Bayview Homes* footnote is now a "dead letter in the D.C. Circuit," Pet. at 4, is untenable. On the contrary, it remains true that the D.C. Circuit is the only circuit that has ever applied the footnote to support a narrow construction of a statute, and the decision below

expressly recognizes the continued vitality of the case in which it did so.[3]

Ultimately, NMA's argument rests not on conflict among the circuits, but on NMA's view that "it is hard to imagine the circumstances in which the [exception] *would* apply" if it does not apply here. Pet. at 4 (emphasis in original). In other words, despite NMA's claims of confusion and a circuit split, its argument about *Riverside Bayview Homes* ultimately boils down to the assertion that the D.C. Circuit was wrong in determining that there was no identifiable class of mining companies who would necessarily have takings claims, thereby "misappl[ying] . . . a properly stated rule of law." S. Ct. R. 10. Even if that assertion were correct, it would hardly justify granting a writ of certiorari.

3. In any event, the D.C. Circuit did not misapply the *Riverside Bayview Homes* footnote. According to NMA, the D.C. Circuit erred because OSM itself said that the "good faith/all permits standard" would create an identifiable class of takings cases and because it is easy to

---

[3]NMA also attempts to manufacture a conflict between the decision below and *Riverside Bayview Homes* by contending that the footnote only requires it to have a "substantial argument" that the rule would cause takings, while the D.C. Circuit required it to present "evidence." Pet. at 31-32. What the footnote specifically says, however, is that a narrow construction is sensible "where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking." 474 U.S. at 128 n.5. And what the D.C. Circuit concluded was that "NMA has shown no 'identifiable class' of miners whose takings claims would expose the treasury to such liability," Pet. App. 16a, *i.e.*, that there did not appear to be such an identifiable class. Once again, the conflict is difficult to discern.

discern what that class would be. Pet. at 31-32. NMA is wrong on both accounts.

First, although NMA is correct that OSM acknowledged that the final rule "is expected to have a greater *potential* for takings implications than the other alternatives considered," 64 Fed. Reg. at 70787 (emphasis added), NMA ignores OSM's conclusion about takings under the final rule: that although the agency anticipated that the rule would result in "very few" takings, *id.* at 70781, "insufficient information is available to enable an accurate assessment of the extent to which significant takings consequences might result from adoption and application of this rule." *Id.* at 70787. NMA repeats like a mantra that OSM stated the final rule would have "significant takings implications," but what OSM specifically stated was that the rule would have "significant takings implications *as that term is defined by Executive Order 12630*." *Id.* at 70781 (emphasis added). The relevant definition is found in the *Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings* (June 30, 1988) (reprinted in 18 Envtl. L. Rep. 35168 (1988)), under which an action is deemed to have significant takings implications if "the proposed policy or action poses a substantial risk that a taking of private property may result" or if "[i]nsufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action." *Id.* at 35170. OSM concluded that the rule had significant takings implications under the *second* of these two definitions. *See* 64 Fed. Reg. at 70827. In other words, it concluded that it did not know what the takings implications would be.

Even if OSM had found significant takings implications under the colloquial use of that term, however, that would not mean that there was an *identifiable* class for whom application of the rule would *necessarily* constitute a taking. No such class exists here. *See Penn Cent.*, 438 U.S. at 124 (explaining that determining whether a regulation constitutes a taking involves "essentially ad hoc, factual inquiries"); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295 (in rejecting facial challenge to § 552(e), noting that "these 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"). Contrary to NMA's contention, "miners with valid property rights to surface mine coal estates in a protected area who did not secure (or make a good effort to secure) all permits or authorizations before the area came under SMCRA's protections," Pet. at 31-32, do not constitute such a class.

In the preamble to the final rule, OSM provided multiple reasons why such miners might not have takings claims. For example, it noted that "if VER for surface mining were denied, but underground mining were possible and economical, we expect that a takings claim would be difficult to sustain." 64 Fed. Reg. at 70824. Similarly, miners may not have takings claims if they are able to access the coal through "compatibility findings, waivers and joint approvals authorized under paragraphs (e)(2) through (e)(4) of section 522 [or through the] outright purchase of a protected feature such as an occupied dwelling to remove it from protected status." *Id.* And if the "holder determines that the coal is not

economically minable" or if the "holder of coal rights purchased those rights after the land came under the protections of section 522(e)" and was therefore "on notice of the applicability of the prohibitions in section 522(e)," the owner might not have reasonable investment-backed expectations. *Id.* Overall, OSM noted that it was "aware of no final decisions in which the U.S. Court of Federal Claims has held that a person who could not meet the good faith/all permits standard suffered a compensable taking." *Id.* at 70782. And courts have repeatedly rejected takings claims based on surface coal mining prohibitions in specific areas, demonstrating that such bans do not, in fact, necessarily constitute takings. *See, e.g., Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001) (denying takings claim where plaintiff lacked reasonable investment-backed expectation); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 736 (2002) (denying takings claim where plaintiff lacked reasonable investment-backed expectation, the mining ban abated a nuisance, and plaintiff could mine outside the prohibited area); *Dep't of Natural Res. v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989) (denying takings claim based on prohibition on surface mining in archaeologically significant area). In short, there is no identifiable class of miners for whom the final rule will necessarily constitute a taking as required for a narrowing construction under the *Riverside Bayview Homes* footnote, and the D.C. Circuit was therefore correct to apply a normal *Chevron* analysis.

III. The Decision Below Is Correct.

Not surprisingly, given that it applied the correct analysis, the D.C. Circuit also reached the correct result:

VER is ambiguous and the Secretary's reasonable interpretation is deserving of deference.

As the court of appeals noted, the words "valid existing rights" can bear multiple meanings. The legislative history does not clarify the issue. And neither SMCRA's purpose, nor its structure, nor the context in which the term VER appears gives VER the plain meaning NMA wants it to have.[4] To the contrary, the Secretary's interpretation best furthers SMCRA's goal of "minimiz[ing] so far as practicable the adverse social, economic, and environmental effects of [surface coal] mining operations." 30 U.S.C. § 1201(e).

Accordingly, NMA's primary argument why VER is not ambiguous rests not on the analysis of any of these factors, but on the fact that, in its view, VER is a term of art the meaning of which is consistent across statutes. But, as OSM explained in the preamble to the final rule, the interpretation of VER in other statutory contexts does not provide useful guidance because "SMCRA has a fundamentally different nature" from the federal public land laws that use the term VER. 64 Fed. Reg. at 70794. "Unlike those laws, SMCRA regulates the use of non-Federal lands." *Id.* And, unlike those laws, whose VER clauses "typically relate to when a person may complete an already initiated process to obtain a property interest in public lands if there is a change in the laws or other requirements governing the vesting or perfecting of

---

[4]NMA's structural arguments (at 24-25) are inapposite. NMA contends that other SMCRA provisions demonstrate that Congress did not intend to require miners to obtain permits to qualify for VER, but the rule at issue does not so require.

interests in those lands," "the VER exception in section 522(e) of SMCRA concerns a person's eligibility to obtain a permit to conduct surface coal mining operations when vested property rights already exist." *Id.* at 70793, 70794. In any event, courts have found VER ambiguous in other statutory contexts as well. *See, e.g.*, *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341-42 (9th Cir. 1990) (giving *Chevron* deference to Secretary's interpretation of VER in Alaska Native Claims Settlement Act); *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1236 (D. Utah 2000) (noting that VER may "constitute a latent ambiguity in the statute"); *cf. Getty Oil Co. v. Clark*, 614 F. Supp. 904, 921 (D. Wyo. 1985) ("[T]he proper construction of the term 'valid existing rights' [in the Wyoming Wilderness Act of 1983] is far from clear under applicable precedent. . . . The Department of the Interior must pass upon this issue in the first instance . . . .").

As NMA notes (at 10), this Court stated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n* that an all-permits test for VER "is not compelled by either [SMCRA's] statutory language or its legislative history." 452 U.S. at 297 n.37. Indeed, the statutory language and legislative history of SMCRA do not compel *any* specific interpretation of VER. The term is ambiguous, and, despite NMA's dislike for the Secretary's interpretation, the court of appeals was correct to defer to it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ADINA H. ROSENBAUM
Counsel of Record
SCOTT L. NELSON
Public Citizen
Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

WALTON D. MORRIS, JR.
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
(434) 293-6616

Counsel for Respondent Kentucky
Resources Council, Inc.

October 2008