

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JASON WILHELM and CRYSTAL  
WILHELM,  
Petitioners,

v.

TUNNEL RIDGE, LLC,  
Respondent.

Docket No. \_\_\_\_\_

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Court of Appeals of West Virginia (24-ICA-  
118)

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**Brief On Behalf of *Amicus Curiae*  
The West Virginia Surface Owners' Rights Organization  
In Support of Petitioners**

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## **INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

The West Virginia Surface Owners' Rights Organization ("WVSORO") was established in 2007. We serve as resource for our members, other organizations, and the public who are looking for information and guidance on how to deal primarily with oil and gas related activities on their land and in their communities. Because we are so well known, we get communications from citizens who have been or who are about to be affected by long wall coal subsidence. We generally refer those to private counsel who are knowledgeable on coal issues. In addition to serving as a resource for our members, other organizations, and the public, we also advocate for public policy, case precedent, and statutory and regulatory changes that will help surface owners have their rights recognized and respected by oil and gas drillers and that will help surface owners protect their land, air and water. We have also, from time to time, assisted the West Virginia Association for Justice on regulations and statutes relating to long wall mining subsidence.

More than 900 persons have paid dues and become members of WVSORO. Only about 30% own any interest in the mineral tracts underlying their surface tracts. Often, those who do own any mineral interest are bound by leases that are antiquated, lacking the surface use protections that are negotiated into modern leases. WVSORO has an extensive website that receives hundreds of visits by individuals each month. It has myriad original content concerning surface owners' rights.

As discussed below, the Opinion of the Intermediate Court of Appeals made fundamental errors of law that threaten to seriously impair the rights of West Virginia surface owners. The Opinion will, at a minimum, make it harder for surface owners to seek relief for subsidence damage and encourage gamesmanship and bad faith tactics by operators to avoid repairing damages. For many, it will mean the total deprivation of a remedy, because common law provides no assistance and subsidence damage often does not become apparent until years (or decades or centuries) after

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<sup>1</sup> This brief has not been written in whole or in part by counsel for a party and no party has made any monetary contribution specifically intended to fund the preparation or submission of this brief. W. Va. R. App. P. 30(e).

mining has ceased—a fact which has been recognized by the United States Congress. WVSORO and its members have an interest in correcting these legal errors.

WVSORO has been granted *amicus curiae* status in the past. For example, in the West Virginia Supreme Court cases *Paulos v LBR Holdings, LLC*, 792 S.E.2d 588, 590 n.2 (W. Va. 2016) and *EQT Production Co. v. Crowder*, 828 S.E.2d 800, 804 n.7 (W. Va. 2019). It was also granted intervenor status by the Court in *Martin v. Hamblet*, 737 S.E.2d 80 (W. Va. 2012).

### **STATEMENT OF THE CASE**

This case is about the statute of limitations, if any, that applies to a claim under the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”), W. Va. Code § 22-3-1 (1994) *et seq.*, for property damage due to coal mine subsidence.

Jason and Crystal Wilhelm (“Petitioners”) are a married couple who own residential property in Valley Grove, West Virginia (the “Property”). *Wilhelm v. Tunnel Ridge, LLC*, No. 24-ICA-118, at 1 (Intermediate App. Feb. 28, 2025) (the “Opinion”). Beginning in 2017, Tunnel Ridge, LLC (“Respondent”) commenced long wall mining operations under or around the Property. *Id.* Beginning in 2018 and continuing to the present, the Property has suffered damage from the subsidence of the ground. *Id.* at 12.

Petitioners promptly notified Respondent of the damage. *Id.* at 1–2. Respondent conducted an inspection of the Property and, on March 20, 2019, informed Petitioners that it would not pay for any damage until Petitioners signed a release of all claims related to subsidence. *Id.* This release would have included claims for future subsidence damage, which can occur at random for decades or centuries. *Infra* § IV & n.4. The Parties continued negotiating but failed to reach a settlement.

On April 17, 2020, Petitioners filed a complaint against Respondent in the United States District Court for the Northern District of West Virginia seeking relief under the WVSCMRA, W. Va. Code § 22-3-25(f) (1994). *Op.* at 2. Respondent filed a motion to dismiss for lack of subject matter jurisdiction and, on July 22, 2020, Petitioners filed a notice of voluntary dismissal without prejudice. *Id.* The Parties continued to attempt to reach a settlement. *Id.* at 2, 9–10.

On September 24, 2021, the Wilhelms filed the underlying action in the circuit court of Ohio County, again seeking relief under the WVSCMRA. *Id.* at 2. On May 10, 2023, Respondent filed a motion for summary judgment on the ground that the action was barred under West Virginia’s two-year catchall statute of limitations. W. Va. Code § 55-2-12(a) (1959). On February 21, 2024, the Circuit Court granted the motion. *Op.* at 3. On February 28, 2025, the Intermediate Court of Appeals (“ICA”) affirmed. *Id.* at 13.

### **SUMMARY OF ARGUMENT**

Which statute of limitations (if any) applies to the WVSCMRA is an issue of first impression in West Virginia, though not under federal law. Below, both the circuit court and the ICA erred in applying the statute of limitations in W. Va. Code § 55-2-12(a) and holding that it barred Petitioners’ claims.

Initially, what statute of limitations applies to the WVSCMRA is an academic point in this case because any statute of limitations has not yet begun to run. It is settled law that, in the context of a statutory violation, so long as the defendant is currently in violation of that statute, the statute of limitations does not “accrue.” *Syl.* 10, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901 (W. Va. 1997); *see also id.* at 914. Since a coal mine operator is obligated to “correct material damage” to surface lands and structures, an operator which fails to do so is in violation of that regulation, and any statute of limitations under the WVSCMRA does not begin to run for as long as the operator is in violation. W. Va. Code St. R. § 38-2-16.2.c (2020). The existence of subsidence itself is *not* a violation of WVSCMRA, *McElroy Coal Co. v. Schoene*, 813 S.E.2d 128, 142 (W. Va. 2018), and is not actionable under Section 22-3-25(f), W. Va. Code; the ongoing failure to correct material subsidence damage *is* the violation.

Even setting aside the continuing-violation doctrine, there is simply no statute of limitations under the WVSCMRA. Federal law prohibits amendments to a state surface mining reclamation program “until approved as an amendment” by the secretary of the interior. 30 C.F.R. § 732.17(g) (2005). No such approval has occurred here. *See* 30 C.F.R. § 948.1 (1981) *et seq.* Moreover, the federal agency that administers the Surface Mining Control and Reclamation Act,

30 U.S.C. § 1251 (1977) *et seq.* (“SMCRA”), has twice concluded that imposing a statute of limitations on citizen suits for subsidence damage would violate SMCRA and so must be disallowed.

Moreover, if there were a statute of limitations on WVSCMRA claims, and if unrepaired subsidence damage were not a continuing violation, the equities of subsidence cases are such that this Court should exercise its discretion to equitably toll that statute of limitations. In particular, the nature of subsidence damage is so far reaching and so devastating to surface owners with no other remedy that applying a two- or three-year limit on claims would be unjust.

Finally, imposing a statute of limitations would not only contradict controlling federal authority, it would undercut the remedial schemes of Congress and the West Virginia legislature. It will likely result in the WVSCMRA being supplanted by federal law, since the Office of Surface Mining Reclamation and Enforcement (“OSM”) has done so twice before. Further, reading a limitations period into the statute will also devastate surface owners. Subsidence can occur unpredictably—years, decades, or even centuries after mining concludes—and the resulting (often catastrophic) damage is not ordinarily covered by homeowners’ insurance. It will also create a host of perverse incentives for mine operators to delay or evade repairs and avoid paying surface owners’ damage, knowing the clock is running against landowners, even where a surface owner is lucky enough to experience their injuries within the limitations window.

For a variety of reasons, both legal and pragmatic, the courts below erred in unilaterally reading a limitations period into a complex regulatory scheme where none exists. This Court should reject that approach and reaffirm the full scope of protections afforded to surface owners under the WVSCMRA.

## **ARGUMENT**

### **I. ANY STATUTE OF LIMITATIONS COULD NOT HAVE RUN BECAUSE THE STATUTORY VIOLATION IS ONGOING.**

The ICA first erred by fundamentally misunderstanding the elements of a WVSCMRA claim; any statute of limitations could not have run because it has not accrued. As relevant here,

a violation of WVSCMRA only exists where 1) subsidence 2) materially damages the landowner's property and 3) the operator has refused to correct it. *See* W. Va. Code St. R. 38-2-16.2.c. Subsidence itself is not a violation of WVSCMRA. *See id.* § 38-2-16.2.a (permitting operator to “adopt mining technology which provides for planned subsidence in a predictable and controlled manner”); *McElroy*, 813 S.E.2d at 142 (“[T]he coal operator must [repair subsidence damage as required by Section 38-2-16.2.c] even if there is no proven violation of a rule, order, or permit.”). An operator cannot be sued before any of these three elements occurs because it has not failed to correct the damage and, therefore, has not violated the WVSCMRA.<sup>2</sup> Therefore, the statute of limitations on Section 22-3-25(f) cannot begin to run when mining ceases or subsidence occurs because the claim has not accrued; instead, it must commence when the operator fails to repair the subsidence damage. Moreover, until those statutorily mandated repairs are made, the violation of Section 38-2-16.2.c is ongoing and the statute of limitations cannot accrue due to the continuing violation doctrine. *See Kermit*, 488 S.E.2d at Syl. 10 & 914.

The Opinion misunderstood the elements of the Petitioners' claim. The ICA held that “the act constituting the violation, rather than simply the resulting damages, must be ongoing” and, therefore, the continuing violation doctrine did not apply. Op. at 13 n.14. The ICA further held that “the Wilhelms' claim is based on a discrete act of mining in the vicinity of their property.” Op. at 12. Hence, the ICA correctly restated the law but misapprehended what “the act constituting the violation” was. As already discussed, neither subsidence nor mining are actionable injuries under the WVSCMRA. W. Va. Code St. R. § 38-2-16.2.a. The Wilhelms' claims are based on the Respondent's failure to make mandated repairs to their (ongoing) subsidence damage, *not* on

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<sup>2</sup> *See also State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 801 S.E.2d 216, 224 (W. Va. 2017) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” (citation omitted)).

“a discrete act of mining.” The Respondent’s failure to repair subsidence damage constitutes a “violation . . . of any rule, order or permit” under Section 22-3-25(f).<sup>3</sup> *McElroy*, 813 S.E.2d at 142. It is, therefore, a legal impossibility that the statute of limitations began running before Respondent’s failure to repair, since Petitioners’ claim could not have accrued, and Respondent’s violation is ongoing until Petitioners’ subsidence damage is repaired.

## II. THERE IS NO STATUTE OF LIMITATIONS ON CIVIL CLAIMS FOR SUBSIDENCE DAMAGE UNDER WVSCMRA.

The ICA further erred because it is unlawful—as against federal law and, therefore, the Supremacy Clause of the United States Constitution—for the State of West Virginia to unilaterally apply a statute of limitations to WVSCMRA claims. In SMCRA, Congress established “minimum national standards” for surface coal mining operations and then invited states to assume primary regulatory authority, provided they adopt provisions at least as stringent as the federal baseline and submit them for formal approval. *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 288 (4th Cir. 2001). “Federal law does not have time limitations on citizens’ rights to seek compensation, repair, or replacement” of subsidence damage.<sup>4</sup> *Pa. Regul. Program (2004 Ruling)*, 69 Fed. Reg. 71551, 71558 (December 9, 2004) (to be codified at 30 C.F.R. pt. 938) (attached hereto as **Appendix B**); *see generally* 30 U.S.C. § 1251 *et seq.* To be approved, a state program must contain, among other

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<sup>3</sup> For this reason, the courts below incorrectly computed the time for running the statute of limitations because the cause of action had not accrued yet. The circuit court commenced the statute of limitations when “Tunnel Ridge’s mining activity that allegedly damaged the Wilhelms’ property ended in November 2017.” *Op.* at 3. Therefore, even if Petitioners’ claims were not an ongoing violation, the Opinion would still have to be reversed for a proper computation of time.

<sup>4</sup> The reason for this becomes obvious in light of the fact that Congress found that post-mining “subsidence occurs on a random basis, at least up to 60 years after mining.” *Pa. Regul. Program (2001 Ruling)*, 66 Fed. Reg. 67010, 67018 (December 27, 2001) (emphasis added, cleaned up) (to be codified at 30 C.F.R. pt. 938) (attached hereto as **Appendix A**); *see also infra* § IV. Accordingly, because “subsidence can occur on a random basis at any time . . . an operator’s liability extends indefinitely into the future.” *2001 Ruling*, 66 Fed. Reg. at 67018 (speaking in the context of subsidence damage to water supplies); *see also id.* (disapproving of a state statute of limitations because, “once the three years have passed, there is no recourse for the landowner and no way to force an operator to restore or replace a water supply [damaged by subsidence] even though a water supply may be affected long after the three years”).

things, competent enforcement mechanisms and adequate civil and criminal penalties. *See* 30 U.S.C. § 1253 (1977). And even once a state program is approved, no “change to laws or regulations shall take effect for purposes of a State program until approved as an amendment” by the Secretary of the Interior. 30 C.F.R. § 732.17(g). The OSM ruled in 2001<sup>5</sup> and again in 2004<sup>6</sup> that a statute of limitations on citizen claims of subsidence damage violates the SMCRA.

West Virginia submitted its state program complying with SMCRA in 1980, the WVSCMRA, which was approved by the OSM in 1981. 30 C.F.R. § 948.10 (1983). The WVSCMRA does not contain a statute of limitations and a statute of limitations has never been added (let alone approved). *See id.* § 948.1 *et seq.* (approval and amendment history of WVSCMRA). Therefore, as a matter of federal law, it is a legal *impossibility* that a statute of limitations governs claims for subsidence damage under the WVSCMRA. *See* U.S. Const. Art. VI (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *see also Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 555 (W. Va. 2012) (“[T]he Supremacy Clause of the United States Constitution ‘invalidates state laws that interfere with or are contrary to federal law.’” (quoting Syl. 1, *Cutright v. Metro. Life Ins. Co.*, 491 S.E.2d 308 (W. Va. 1997))).

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<sup>5</sup> *See 2001 Ruling*, 66 Fed. Reg. at 67024 (“[A] time limit on subsidence damage claims is adverse to the general scheme of SMCRA . . . [in part because] [i]t could . . . preclude some citizen suits . . .”).

<sup>6</sup> *See 2004 Ruling*, 69 Fed. Reg. at 71554 (“[W]e are making a final determination to supersede [the statute of limitations provision] . . . because . . . the limitation on an operator’s liability for repair or compensation for subsidence damage . . . [is] inconsistent with the requirements of SMCRA and the Federal regulations. Neither SMCRA nor the Federal regulations provide for a time limitation to file subsidence damage claims.”). Notably, the statute at issue in the *2004 Ruling* was *more* landowner-friendly than the one imposed by the courts below because it commenced running after damage occurred, whereas the courts below commenced the time limit based on the date that mining under the property ceased. *Op.* at 12–13 & n.14. The OSM nonetheless disapproved it as too limiting on citizen suits, indicating that, given the chance, the OSM will almost certainly do the same here.

### III. IF THERE IS A STATUTE OF LIMITATIONS ON WVSCMRA CLAIMS, IT SHOULD HAVE BEEN EQUITABLY TOLLED IN THIS CASE.

Even if there were a statute of limitations on WVSCMRA claims (there isn't), and even if that statute of limitations had accrued on the Wilhelms' claims (it hasn't), that time limit should still have been equitably tolled by the courts below. This Court has held that "two types of equitable modification regarding the statute of limitations are generally recognized: (1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitations period and lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant." *Adkins v. Clark*, 875 S.E.2d 266, 272 (W. Va. 2022) (quotation marks and brackets omitted) (quoting *Bradley v. Williams*, 465 S.E.2d 180, 184 (W. Va. 1995)).

Below, the ICA decision leaves in place a statute of limitations scheme that is utterly inequitable. The statute begins running based on the conduct of the defendant at a moment in time that a would-be plaintiff cannot know about. A surface owner does not know when long wall mining takes place under their land that will result sometime later in planned subsidence. Additionally, the prospective plaintiff's damages at that point in time are likely not immediately apparent or, even if partially apparent, have latent aspects the magnitude of which the plaintiff cannot know about or appreciate until time passes.<sup>7</sup> Further, subsidence can occur at random and continue for decades or centuries with *devastating* consequences to the surface owner. *See infra* § IV.

This Court should extend equitable tolling to the circumstances here. It could do so either through traditional equitable tolling principles or by creating a common law extension of the

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<sup>7</sup> The first impact of subsidence may be minor, causing an unsophisticated surface owner to decide not to pursue legal action immediately. But as latent defects keep mounting, or the long-term effects of the initial subsidence become apparent, legal action may become the surface owner's only path to a remedy.

doctrine. Such an extension would be warranted here because the timing of the conduct of the defendant that gives rise to the damages is not known to the plaintiff; the damages are not immediately apparent and the magnitude of the damages are latent; and the cause of action is a remedial statute that does not have its own statute of limitation, so the statute of limitations is a default enacted without appreciation of circumstances herein presented. Any catchall statute of limitations—which did not contemplate long wall mining subsidence when it was enacted—should be liberally construed to allow for equitable tolling.

#### **IV. APPLYING A STATUTE OF LIMITATIONS TO WVSCMRA WILL DRASTICALLY UPSET THE FEDERAL AND STATE REGULATORY SCHEMES AND RESULT IN PREJUDICE TO SURFACE OWNERS.**

In addition to the legal issues with the Opinion described above, upsetting the detailed state and federal regulatory scheme will harm surface owners and defeat the aims of the legislatures passing these acts. These regulatory schemes were intended to be broadly applied to remediate injuries caused by subsidence. Both Congress and the West Virginia legislature found that unregulated surface coal mining had adverse effects, including “damaging the property of citizens” and “creating hazards dangerous to life and property.” W. Va. Code § 22-3-2(a)(2) (2016), 30 U.S.C. § 1201(c) (1977). Both stated that the purpose of their Acts was to assure that the rights of surface owners and other persons with legal interest in the land or appurtenances thereto are adequately protected from mining operations. W. Va. Code § 22-3-2(b)(2); 30 U.S.C. § 1202(b) (1977).

Accordingly, it is clear that SMCRA and WVSCMRA were intended by Congress and the West Virginia legislature to be remedial statutes.<sup>8</sup> This Court’s longstanding precedent counsels

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<sup>8</sup> See, e.g., *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 128 (N.D.W. Va. 1992) (“[T]he commentary which accompanied the passage and implementation of SMCRA . . . favor[s] an expansive interpretation of § 1232 in order to further its broad remedial purpose.”); *id.* at 129 (The application of “joint and several liability . . . demonstrates the broad reach of SMCRA’s remedial provisions.”); *Drummond Coal Co. v. Hodel*, 610 F. Supp. 1489, 1498 (D.D.C. 1985) (“[A] House Report that accompanied the SMCRA made clear that the reclamation fund provisions were designed to be remedial in purpose and function . . .”), *aff’d*, 796 F.2d 503 (D.C. Cir. 1986);

that remedial statutes are to be construed broadly in furtherance of the remedy. *See, e.g., Tug River Lumber Co. v. Smithey*, 148 S.E. 850, 853 (W. Va. 1929) (“This being a remedial statute, it will be construed most liberally to . . . advance the remedy.” (quoting 2 Sutherland, *Statutory Const.* § 585 (2d ed.))); *Willis v. O’Brien*, 153 S.E.2d 178, 181 (W. Va. 1967) (collecting authority for the holding that “a remedial statute . . . should be construed liberally to accomplish the purpose for which it was enacted”). Therefore, as a matter of West Virginia law, the ICA should have construed the WVSCMRA liberally in favor of its remedial purpose, *i.e.*, to prevent harm to property and assure that the rights of surface owners are adequately protected.

The courts below did the opposite. Far from advancing the remedy sought by Congress and the West Virginia legislature, the holding below will undermine their remedial purpose and, probably, result in the abrogation of the WVSCMRA by the SMCRA. First, and most fundamentally, WVSCMRA will be undermined because it will likely be superseded and rendered ineffective by the SMCRA. As a matter of statutory interpretation, “[i]t is always to be presumed that the Legislature designed the statute to take effect, and not to be a nullity.” *Donna S. v. Travis S.*, 874 S.E.2d 746, 752 (W. Va. 2022) (quoting Syl. 2, *Slack v. Jacob*, 8 W. Va. 612 (1875)). As discussed above, if the Opinion prevails and a statute of limitations is applied to WVSCMRA, it is highly likely that it will be supplanted by the federal SMCRA, since OSM has already done so twice before to another state’s statute. *See supra* § II; *2001 Ruling*, 66 Fed. Reg. at 67024; *2004 Ruling*, 69 Fed. Reg. at 71554. It is self-evident that having the WVSCMRA nullified would defeat the West Virginia Legislature’s purpose in enacting it.

Applying a statute of limitations to WVSCMRA claims will also seriously injure surface owners and their lands, undermining the remedial purpose of the statute. A statute of limitations “virtually assures that at some point in time, there will be [subsidence damage] that will not be restored or replaced because the landowner did not report the . . . [damage] within the noted time frame.” *2001 Ruling*, 66 Fed. Reg. at 67047. That possibility becomes a probability (or even a

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*United States v. Beaird Coal Co.*, 825 F.2d 1471, 1474 (11th Cir. 1987) (“[W]e endorse the trial court’s . . . approach as the best means of effectuating the broad remedial purposes of SMCRA.”).

presumption) where, as here, Congress and the OSM have found that post-mining “subsidence occurs on a random basis, at least up to *60 years after mining*.” *2001 Ruling*, 66 Fed. Reg. at 67018 (emphasis added, cleaned up). This has been amply borne out in Appalachia, where sinkholes and subsidence regularly occur around mines even older (sometimes much older) than that.<sup>9</sup>

Assuming that the date of subsidence damage can even be ascertained in the first place,<sup>10</sup> many of the affected surface owners are unsophisticated, have no experience with the legal system, and are unaware of their rights under WVSCMRA (because operators are not obligated to inform them). Those that are aware of their rights will probably attempt to negotiate with the operator and they, by accident or contrivance of the operator, may wait too long and exceed the statute of limitations that way—just as the ICA held the Wilhelms did below. Compounding this injustice is the fact that many injured surface owners do not have any interest in the mineral estate below their property, which may have been severed decades ago. Subsidence damage can be *devastating* to a surface owner, in the form of destabilizing foundations, ruining or disrupting water tables, breaking water pipelines or septic systems, causing natural gas to gather, breaking gas transmission or distribution pipelines, and diminishing property values, just to name a few. And subsidence damage “isn’t usually covered by homeowners’ insurance,” Guay, *supra* n.9, meaning that surface owners often have no other remedy for these injuries.

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<sup>9</sup> See, e.g., Mark Scolforo and Gene Puskar, *Police say searchers don’t expect to find woman in Pennsylvania sinkhole alive*, AP News (Dec. 4, 2024, 8:04 PM), <https://apnews.com/article/-pennsylvania-sinkhole-search-missing-woman-cat-46045d7dfdf7dc39a57487d9d56f4031> (sinkhole occurred due to mine closed in the 1950s); Jessica Guay, *Families plead for help after mine subsidence damaged Pittsburgh-area homes*, KDKA News (Oct. 3, 2023, 1:23 PM), <https://www.cbsnews.com/pittsburgh/news/mine-subsidence-damages-homes-washington-township-fayette-county/> (township has experienced numerous subsidence events due to historic mining, much of which occurred before the 1940s); *Fairmont, W. Va., Lives in Peril As Old Mines Under It Crumble*, New York Times (Nov. 23, 1980) (mines from the 1800s causing subsidence).

<sup>10</sup> The OSM has noted that a statute of limitations is contrary to the scheme of SMCRA in part because “it could be difficult to determine when [a] structure was initially affected” by subsidence damage. *2001 Ruling*, 66 Fed. Reg. at 67024.

Under these circumstances, commencing the statute of limitations on the date of mining or when subsidence is first noticed—as the ICA did—makes it a *certainty* that subsidence damage will go unrepaired in West Virginia, and possibly injure a party who never benefited from the mining in the first place. Needless to say, this is antithetical to the purposes of SMCRA and WVSCMRA. “Failure to repair or compensate a structure owner is in direct contrast with the purposes of . . . [federal laws] that require without a time limit, the repair or compensation of protected structures.” *2001 Ruling*, 66 Fed. Reg. at 67023. That is why the OSM has ruled that “a time limit on subsidence damage claims is adverse to the general scheme of SMCRA.” *Id.*

A statute of limitations also creates a host of perverse incentives. Initially, it invites operators to act in bad faith. As the facts below demonstrate, ascertaining the extent and effects of subsidence damage can take a considerable amount of time even under the best of circumstances. Operators and surface owners often need to conduct surveys to ascertain subsidence and resulting damage. *See 2004 Ruling*, 69 Fed. Reg. at 71557 (“[P]remining and postmining surveys are important tools in the process of ensuring appropriate structure repair/compensation by mine operators.”). Between acknowledging the subsidence, conducting a survey (especially for a large or severely damaged property), negotiating, promising to repair, conducting follow-up surveys, hiring contractors (and blaming subsequent delays on them), conducting piecemeal repairs, and generally throttling the process, it will be easy for an operator acting in bad faith to run out the clock.

Relatedly, any rational, informed surface owner must rush to court. Rushing to court and obtaining a judgment would be the only way for a surface owner to protect themselves against future subsidence damage and the prospect that any repairs by an operator would be insufficient (or even cosmetic). There are also landowners who are currently negotiating with operators. Believing that there is no statute of limitations on subsidence damage they have negotiated in good faith, eating through some or all of their limitations window. Also worth mentioning is that there is a statutory safe harbor of up to a year for the operator to complete repairs, meaning that in some cases the statute of limitations is actually one year shorter than it says. W. Va. Code St. R. § 38-2-16.2.c.4.

In any case, the Opinion effectively kills the prospect of out-of-court resolution of subsidence claims. This result is bad not only for all parties involved and the court system, but also counter to the regulatory scheme, which expressly contemplates the use of administrative remedies. *See* W. Va. Code St. R. § 38-2-16.2.c.

In conclusion, not only is the Opinion legally wrong for several independent reasons but it would also defeat the purpose of the legislature and, because of the unique nature of subsidence damage, work a manifest injustice on disproportionately vulnerable West Virginians who have no other remedy. The Opinion of the ICA must be reversed.

### **CONCLUSION**

For the foregoing reasons, the ICA's order should be reversed, and this matter should be remanded for further proceedings.

Signed,

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**CERTIFICATE OF SERVICE**

I, Joy D. Llaguno, Esq., counsel for *Amicus Curiae* The West Virginia Surface Owners' Rights Organization, hereby certify that I have served a true and correct copy of the foregoing "Brief On Behalf of Amicus Curiae The West Virginia Surface Owners' Rights Organization in Support of Petitioners" upon all counsel of record by placing said copies in the United States mail, with first-class postage prepaid, on this day, August 4, 2025, addressed separately as follows:

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