No. 20-880

In the
Supreme Court of the United States

MICHAEL H. HOLLAND, as Trustee for the United Mine Workers of America Combined Benefit Fund and United Mine Workers of America 1992 Benefit Plan, et al.,

Petitioners,

v.

WESTMORELAND COAL CO., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review of a unanimous Fifth Circuit decision that "side[d] with the other two courts of appeals to decide the issue," App.17, and correctly held, after addressing several threshold issues that this Court has never resolved, that because "a debtor cannot bring a postassessment refund suit to modify its Coal Act obligations," App.15, a motion in bankruptcy court under 11 U.S.C. §1114 to modify Coal Act obligations falls within the exception to the Anti-Injunction Act recognized in *South Carolina v. Regan*, 465 U.S. 367 (1984).

2. Whether this Court should grant review of a unanimous Fifth Circuit decision correctly holding that Coal Act obligations—which Congress explicitly labeled "premiums," not "taxes"—are not "taxes" for purposes of the Anti-Injunction Act.

CORPORATE DISCLOSURE STATEMENT

Westmoreland Coal Company has no parent corporation, and no publicly held company owns more than 10% of its stock. The remaining respondents are all direct or indirect subsidiaries of Westmoreland Coal Company, and no publicly held company owns more than 10% of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rule

Other Authorities

INTRODUCTION

In 2018, after enduring years of crumbling market conditions, Respondents filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. To avoid liquidation, preserve the going-concern value of their operations, and—most of all—save jobs, Respondents forged an agreement with their lenders to sell their assets under a chapter 11 plan while their operations continued. That agreement, however, required Respondents to obtain modification of certain retiree medical obligations under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).

Section 1114 of the Bankruptcy Code provides a means for modifying those obligations: It prohibits companies in chapter 11 proceedings from unilaterally terminating "retiree benefits," but it allows negotiated or court-ordered modification or elimination of those benefits following a statutorily-defined process. Numerous coal companies have successfully invoked §1114 to modify Coal Act obligations during bankruptcy proceedings.

Petitioners nevertheless sought to prohibit Respondents from doing just that. Even though a successful reorganization—and the preservation of more than a thousand jobs—depended on Respondents' modification of their Coal Act obligations, Petitioners claimed that Coal Act obligations are not subject to modification under §1114. The bankruptcy court rejected that claim, and the Fifth Circuit did as well—joining every other court to address the issue, including the only other court of appeals, the Eleventh Circuit, which rejected the very same arguments by the very same Petitioners. *See In*

re Walter Energy, 911 F.3d 1121 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 2763 (2019).

The Fifth Circuit's decision does not merit this Court's review. The identified circuit splits are illusory, the case is an exceptionally poor vehicle, the questions presented are of insufficient and diminishing importance, and the decision below is plainly correct. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. Section 1114 of the Bankruptcy Code

Section 1114 of the Bankruptcy Code governs the means by which a reorganizing debtor may modify retiree benefits. *See* Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, §2, 102 Stat. 610. Before §1114's enactment in 1988, debtors could seek to unilaterally terminate such benefits during bankruptcy. Congress enacted §1114 to prohibit that unilateral practice. *See Walter Energy*, 911 F.3d at 1128-29. Yet Congress was also mindful that, sometimes, debtors may need to modify or terminate retiree benefits to successfully reorganize. Accordingly, §1114 explicitly "permits these obligations to be modified" either "by an agreement between the debtor and an authorized representative of retirees receiving benefits" or "by order of the bankruptcy court." *Id.* at 1129.

Section 1114 achieves this careful balance through a series of provisions. At the outset, it broadly defines "retiree benefits" as "payments to any … person for the purpose of providing or reimbursing payments for retired employees" for medical or

disability benefits under any "plan, fund, or program … maintained or established in whole or in part by the debtor." 11 U.S.C. §1114(a).

To modify such "retiree benefits," a debtor must first negotiate with an "authorized representative" of the retirees, *id.* §1114(f)—either a labor union or another court-designated "authorized representative," *id.* §1114(b)-(d). If negotiations fail, a debtor may ask the court to modify retiree benefits. *Id.* §1114(e)(1)(A), (g). The court may modify those benefits only if the modification (1) "is necessary to permit the reorganization of the debtor"; (2) "assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably"; and (3) "is clearly favored by the balance of the equities." *Id.* §1114(g)(3).

2. The Coal Act

The history predating the Coal Act's 1992 enactment has been exhaustively detailed elsewhere. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 504-15 (1998); *Walter Energy*, 911 F.3d at 1127-32. Respondents provide only the most relevant details here.

In 1947, the United Mine Workers of America (UMWA) and coal companies entered into a collective bargaining agreement (CBA) establishing a multiemployer fund providing pension and medical benefits to coal workers. *E. Enters.*, 524 U.S. at 504-06. The companies "funded these benefits using a pay-as-you-go system," based on "a royalty on each ton of coal produced" paid into a trust. *Walter Energy*, 911 F.3d at 1127.

In 1974, under another CBA, the UMWA and coal companies "agree[d] that coal workers and retirees

would be guaranteed health care benefits for life." *Id.*; *E. Enters.*, 524 U.S. at 509. The single trust was replaced by four trusts, two of which—the 1950 Benefit Plan and the 1974 Benefit Plan—provided medical benefits (and continued to be funded by coal royalties). *Walter Energy*, 911 F.3d at 1127; *E. Enters.*, 524 U.S. at 509.

Owing to declining coal production and increasing healthcare costs, the Benefit Plans experienced financial difficulties, leading to further changes under a 1978 CBA. *Walter Energy*, 911 F.3d at 1127-28. First, for current employees and recent retirees, each coal company set up and financed its own individual employer plan (IEP), which would not be financed by royalties. *Id.* at 1128. Second, the 1974 Plan was modified to provide healthcare benefits to retirees whose former employers were out of business—so-called "orphaned" retirees. *See id.*; *E. Enters.*, 524 U.S. at 510-11.

Macroeconomic factors led some companies to withdraw from the 1978 CBA and exit the coal business altogether, leaving fewer companies to cover the Benefit Plans' costs while increasing the number of "orphaned" retirees subject to them. *E. Enters.*, 524 U.S. at 511; *Walter Energy*, 911 F.3d at 1128. By 1989, the Benefit Plans "were on the brink of insolvency." *Walter Energy*, 911 F.3d at 1129.

In response, Congress passed the Coal Act, which established three different mechanisms:

Individual Employer Plans. Any coal company that signed the 1978 CBA or a subsequent CBA was required to continue to provide healthcare benefits

through IEPs for "as long as the company or a 'related person' remained in business." *Id.* at 1130.

The Combined Fund. The 1950 and 1974 Plans were merged into a new plan, the Combined Fund, and those plans' beneficiaries became Combined Fund beneficiaries. The Combined Fund "is funded primarily by premiums collected from coal companies" as well as money from the government. *Id.* Specifically, any company that signed the 1978 CBA or a subsequent CBA, or its "successor[] in interest," must "pay an annual premium to the Combined Fund to cover the cost of health care benefits for retirees assigned to" it. *Id.* at 1130-31; 26 U.S.C. §9704. The Act imposes a "penalty" of $100 per day per beneficiary on any company that fails to pay its premium. 26 U.S.C. §9707(a)(1), (b).

The 1992 Plan. The Act also created the 1992 UMWA Benefit Plan, which covers retirees not covered by IEPs or the Combined Fund, including: (1) retirees eligible to receive benefits from the 1950 or 1974 Plans but who had not yet retired; and (2) "orphaned" retirees entitled to coverage under an IEP. *Walter Energy*, 911 F.3d at 1131. Like the Combined Fund, the 1992 Plan is "funded by premiums from coal companies" as well as the federal government. *Id.* at 1132. Unlike the Combined Fund, there is no penalty if a company or a related person fails to pay the premiums.

B. Bankruptcy Court Proceedings

In October 2018, after years of worsening market conditions, Respondents filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, which were consolidated and jointly administered.

Respondents sought reorganization, rather than liquidation, to save jobs, minimize disruption, and protect the value of their operations. *See* App.5.

As part of their reorganization, Respondents "negotiated an agreement with creditors to sell the bulk of [their] assets through an auction" designed to preserve the going-concern value of the company. App.5. "Every bidder," however, "conditioned its purchase of [Respondents'] assets on the termination of successor liability for [Respondents'] Coal Act obligations." App.5.

With liquidation looming absent a successful auction, Respondents contacted the UMWA and proposed modifying their Coal Act obligations under §1114. App.5. Petitioners—the Trustees of the Combined Fund and the 1992 Plan—responded by initiating an adversary proceeding seeking "a declaratory judgment that Coal Act obligations are not 'retiree benefits' and thus cannot be modified under section 1114." App.5-6. Respondents moved for judgment on the pleadings, and Petitioners opposed. App.6.

Before the bankruptcy court ruled, the Eleventh Circuit decided *Walter Energy*, which held that Coal Act obligations are indeed subject to modification under §1114. 911 F.3d at 1126. Not only did *Walter Energy* involve "the same issue" as the proceeding Petitioners had commenced in this case, but Petitioners "were a party" in *Walter Energy* and were even represented by the same counsel in both cases. App.6.

The bankruptcy court ultimately ruled for Respondents, agreeing with the Eleventh Circuit in

Walter Energy that Coal Act obligations are "retiree benefits" and thus subject to modification under §1114. App.43-44. The court rejected Petitioners' arguments that §1114 applies only to contractual obligations, that neither the Combined Fund nor 1992 Plan is "maintained or established in whole or in part" by Respondents, and that the Anti-Injunction Act bars application of §1114. App.44-51.

After issuing its decision, the bankruptcy court "appointed a committee as the retirees' authorized representative" to negotiate with Respondents regarding Coal Act obligations. App.6 n.5; *see* 11 U.S.C. §1114(d). The two sides "had extensive negotiations in good faith and at arm's length," and they ultimately reached an agreement. Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of its Debtor Affiliates ¶57, *In re Westmoreland Coal Co.*, No. 18-35672 (Bankr. S.D. Tex. Mar. 2, 2019) ("Confirmation Order"). Rather than immediately terminate all Coal Act obligations (as Respondents had initially proposed), Respondents agreed, *inter alia*, to "facilitate the transition of Coal Act retirees from the IEP to the 1992 Plan so as to assure that there is no gap in benefit coverage" and to take other steps to guarantee "a smooth process" for retirees. *Id.* ¶59. On March 2, 2019, the bankruptcy court approved the agreement and Respondents' plan of reorganization. *Id.* ¶¶55-62; *see* App.6 n.5.

C. The Fifth Circuit's Decision

The bankruptcy court certified for direct appeal its judgment that Coal Act obligations are "retiree benefits" subject to modification under §1114. App.6;

see 28 U.S.C. §158(d)(2)(A)(i), (iii). The court of appeals accepted direct review and unanimously affirmed.

Before turning to "the heart of the matter," App.9, namely the question of "whether section 1114 allows for the modification of Coal Act obligations," App.2, the Fifth Circuit addressed two threshold issues: (1) whether the Eleventh Circuit's decision in *Walter Energy* precluded Petitioners from "relitigating the issues in the different bankruptcy in this circuit," App.7; and (2) whether "the Anti-Injunction Act bar[s] a section 1114 modification of Coal Act premiums," App.9.

The Fifth Circuit agreed with Respondents that "[t]his suit checks all three boxes" required for issue preclusion: "(1) the identical issue was previously adjudicated" in *Walter Energy*; "(2) the issue was actually litigated" in *Walter Energy*; and "(3) the previous determination was necessary to the [Eleventh Circuit's] decision." App.7. The court further acknowledged that Petitioners were parties in *Walter Energy*. Yet the court nonetheless declined to apply issue preclusion. App.7-8. Citing various treatises—but no decision of this Court—the court announced an "exception" to ordinary preclusion principles encompassing circumstances where, as here, "the other court that decided [the issue] was a fellow intermediate federal court" and "the Supreme Court has not decided" the issue conclusively. App.8. Applying that "exception," the court held that "preclusion is inappropriate" here. App.8.

The court next turned its attention to the Anti-Injunction Act (AIA), under which "no suit for the

purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). The court began by rejecting Respondents' argument—again without any citation to this Court's caselaw—that chapter 11 proceedings are not a "suit" for purposes of the AIA. Instead, the court stated, it would consider the "adversary proceeding" within Respondents' chapter 11 proceedings the relevant "suit," rather than "the bankruptcy as a whole." App.9-10.

The court then addressed Respondents' argument that, even considering the adversary proceeding as the relevant "suit," the AIA does not apply because Petitioners' "suit" sought to compel the payment of supposed taxes to a private entity, rather than to "restrain[] the assessment or collection of" taxes by the government. 26 U.S.C. §7421(a); App.10. Rather than answer this question, the court stated that because it ended up "holding that the AIA is not a bar," it would "assume" without deciding that "the declaratory judgment posture allows us to decide if the AIA would forbid the section 1114 proceeding." App.10. The court also "assume[d] without deciding" that the Declaratory Judgment Act (under which Petitioners had proceeded) did not bar Petitioners' "suit," even though that Act "does not allow courts to issue declaratory judgments 'with respect to Federal taxes.'" App.10 n.7 (quoting 28 U.S.C. §2201(a)).

Those threshold issues assumed away, the Fifth Circuit turned to "whether a Coal Act premium is a 'tax' under the AIA." App.11. The court looked to this

Court's decision in *NFIB v. Sebelius*, 567 U.S. 519 (2012), which held that "the label Congress uses" is the "best evidence of Congress'[] intent" as to whether an exaction is a "tax" for AIA purposes. App.11. The court concluded that "[t]he Coal Act's labels indicate that Congress did not intend premiums to be taxes for AIA purposes." App.11. For one thing, "Congress called the annual exactions on signatory operators 'premiums,' not taxes." App.12. For another, Congress' "use of the word 'tax' elsewhere in the Coal Act … shows that this word choice was intentional." App.12. For still another, the Coal Act's "provisions … are under the subtitle 'Coal Industry Health Benefits' while other subtitles expressly describe their contents as taxes." App.12.

After rejecting several of Petitioners' counterarguments, the court addressed Petitioners' "final argument," which relied on 26 U.S.C. §9707. App.13. That provision "imposes a penalty for failing to pay Combined Fund (but not 1992 Plan) premiums and states that the penalty 'shall be treated in the same manner as the tax imposed by section 4980B.'" App.13 (quoting 26 U.S.C. §9707(a), (f)). In the court's view, because "the label" in §9707 "makes the penalty a tax," that "potentially means" that the AIA "forbids not only suits involving the penalty for failing to pay Combined Fund premiums, but also suits involving the Combined Fund premiums themselves." App.13. The court did not decide that question, however; instead, it "assume[d] that, because the section 9707 penalty should be treated like a tax, Combined Fund premiums are effectively taxes under the AIA too." App.14. And based on that assumption, it proceeded to address "whether an exception to the AIA permits

litigation to modify Combined Fund premiums." App.14.

As to that question, the court cited *South Carolina v. Regan*, where this Court held that the AIA applies "only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." 465 U.S. 367, 381 (1984). The Fifth Circuit observed that, under *Regan*, "when no alternative avenue for federal court jurisdiction exists, the AIA will not bar a suit to restrain tax collection." App.14. The court then explained that "bankruptcy court motions to modify Coal Act obligations fit within the *Regan* exception" because "a debtor cannot modify its retiree benefits except through section 1114, which applies only to Chapter 11 proceedings in bankruptcy court." App.15. A debtor "cannot bring a postassessment refund suit to modify its Coal Act obligations because the district court entertaining that suit would lack the power to grant relief under section 1114." App.15. Noting that Petitioners had not identified "an alternative avenue that [Respondents] could pursue," the Fifth Circuit "side[d] with the other two courts of appeals to decide the issue" and held that, "because bankruptcy court is the only place a debtor can use section 1114 to modify its Coal Act obligations, the AIA does not bar adversary proceedings seeking to do so." App.15, 17 (citing *Walter Energy* and *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996)).

Having disposed of the threshold issues, the Fifth Circuit "finally reach[ed] the merits" and joined "all courts to consider the question" in holding that "Coal Act obligations are subject to modification" under

§1114. App.17. In a lengthy and thorough analysis, the court first determined that Coal Act obligations are "retiree benefits" under §1114. App.17-24. It then determined that nothing in the Coal Act "'block[s]' the negotiation process that section 1114 requires for a debtor to modify its Coal Act obligations." App.24-31. Among other things, the court rejected Petitioners' argument that "because the Coal Act's financing obligations are statutorily mandated … they are nonnegotiable and therefore cannot be modified under section 1114." App.29-31. Citing the two other federal appellate decisions that have addressed similar circumstances, the Fifth Circuit concluded: "Rather than create a circuit split that would result in different treatment of debtors in different circuits, we will follow the Fourth and Eleventh Circuit's view that the Coal Act does leave some room for negotiation." App.30-31 (citing *Leckie* and *Walter Energy*).

Last, the Fifth Circuit observed that "it may seem like this case decides whether retirees will receive their promised benefits," App.31, but, it explained, that proposition is incorrect. Rather, "the retired miners will receive their benefits regardless of this case's outcome," because the federal government will "pay those obligations." App.31.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant This Court's Review.

A. There Is No Circuit Split.

Petitioners initiated an adversary proceeding to obtain a declaratory judgment that "Coal Act obligations are not 'retiree benefits' and thus cannot be modified under section 1114." App.5-6; *see also*

Compl. ¶6, *Holland v. Westmoreland Coal Co.*, No. 18-03300 (Bankr. S.D. Tex. Oct. 23, 2018) ("Plaintiffs seek a judgment declaring that Defendants' Coal Act obligations are not subject to modification or elimination under section 1114 of the Bankruptcy Code."). Every court to have considered that issue has agreed with Respondents and held that Coal Act obligations *are* subject to modification or elimination under §1114. That includes the only two federal courts of appeals to have addressed the issue—the Eleventh Circuit in *Walter Energy* and the Fifth Circuit in this case—as well as numerous district and bankruptcy courts. *See Walter Energy*, 911 F.3d at 1142-51; *United Mine Workers of Am. 1974 Pension Plan & Trust v. Walter Energy, Inc.*, 579 B.R. 603, 617-18 (N.D. Ala. 2016); *In re Walter Energy*, 542 B.R. 859, 884 (Bankr. N.D. Ala. 2015); *In re Alpha Nat. Res., Inc.*, 552 B.R. 314, 337-38 (Bankr. E.D. Va. 2016); *In re Horizon Nat. Res. Co.*, 316 B.R. 268, 276 (Bankr. E.D. Ky. 2004).

The Fifth Circuit recognized that its holding is "[i]n line with every other court that has answered the question." App.2; *see also, e.g.*, App.17 (observing that "all courts to consider the question have held that Coal Act obligations are subject to modification"). And in their briefing below, Petitioners acknowledged that the Eleventh Circuit had ruled against them; they nevertheless made the exact same arguments and urged the Fifth Circuit not to follow the Eleventh Circuit's decision. *See* Br. of Appellants 4-5, *In re Westmoreland Coal Co.*, No. 19-20066 (5th Cir. Apr. 8, 2019) (arguing that "[t]his Court should not repeat the Eleventh Circuit's mistakes"). The Fifth Circuit declined to accept Petitioners' invitation, and instead

joined its sister circuit—and every other court to have addressed the question—in siding with Respondents.

In order even to allege a circuit split, therefore, Petitioners are forced to present a much narrower question than whether §1114 applies to Coal Act obligations. Instead, they present the question whether the "*Regan* exception to the Anti-Injunction Act [is] available to debtors who want to avoid paying a tax for reasons unrelated to the tax's validity." Pet.i. But this manufactured effort is unavailing, for the purported split is wholly illusory.

As a threshold matter, it bears noting that before discussing the supposed split over the question presented, Petitioners devote several pages to the argument that *Regan* was wrong from the outset and should be "revisit[ed]." Pet.12-15. Indeed, Petitioners devote almost as much space to that argument as to their argument that the circuits are divided over how to apply *Regan*, *see* Pet.15-20. But at no point in this case have Petitioners argued that *Regan* should be "revisit[ed]," the Fifth Circuit did not address that question, and the Petition does not present that question; it asks only for the Court to address the scope of *Regan* in a particular set of circumstances—a question that does not "fairly include[]" the question whether *Regan* should be "revisit[ed]" more broadly. R. 14.1(a); *see Wood v. Allen*, 558 U.S. 290, 304 (2010). This Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), and that rule applies with special force here, since the question of *Regan*'s continuing validity "was not raised or addressed below," *id.* at 533. In short, nearly one-

half of Petitioners' circuit-split discussion concerns an argument beyond this Court's review—a telling signal that their circuit-split assertion is on shaky ground from the start.[1]

And indeed, as the Fifth Circuit correctly recognized, *see* App.15-16 & n.10, there is no split. Prior to this case, two other courts of appeals, the Fourth Circuit and the Eleventh Circuit, had "held that bankruptcy court motions to modify Coal Act obligations fit within the *Regan* exception." App.15 (citing *Leckie* and *Walter Energy*). The Fifth Circuit's decision joins that unbroken wall of precedent: it "side[d] with the other two courts of appeals to decide the issue." App.17. No case has come out the other way.

In an attempt to gin up a split, Petitioners emphasize decisions from the Seventh, Eighth, and Ninth Circuits. But as the Fifth Circuit explained, those cases "are distinguishable." App.16. The Seventh, Eighth, and Ninth Circuit decisions addressed only the narrow issue of whether bankruptcy courts may enjoin the IRS from collecting taxes during bankruptcy proceedings. *See In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 391-93 (7th Cir. 1987); *In re Am. Bicycle Ass'n*, 895 F.2d 1277, 1278-80 (9th Cir. 1990); *Laughlin v. IRS*, 912 F.2d 197, 198 (8th Cir. 1990). The differences between those cases and cases like this one and *Walter Energy*

[1] Regardless, the notion that the *Regan* exception is some moribund doctrine is belied by the recent oral argument in *CIC Services, LLC v. IRS*, where the Court discussed it extensively and without criticism. *See* Tr. of Oral Arg., *CIC Servs., LLC v. IRS*, No. 19-930 (U.S. Dec. 1, 2020).

are obvious: whereas the former address the propriety of injunctions seeking to bar the government from collecting taxes, the latter involve private entities suing to compel the payment of (supposed) taxes. Furthermore, "alternative remedies were available" in those cases, but are not available here. App.16 n.10. Finally, those cases did not, as here, "address[] a situation where the AIA would have blocked the operation of an independent statute that entitles a party to seek relief from a certain category of tax liability." *Id.*

Petitioners deride as "superficial and unpersuasive" the numerous distinctions that the Fifth Circuit identified, but that description amply describes their own arguments. For example, Petitioners characterize the Coal Act obligations at issue here as "undisputedly lawful," like the "undisputedly lawful taxes" challenged in their cited cases. Pet.18-19. But Coal Act obligations are not "undisputedly lawful" in the relevant way that the taxes were in those cases, because they are subject to court-ordered modification or termination under §1114. Unlike in those cases, therefore, Petitioners' argument would necessarily result in the implied repeal of §1114 as to Coal Act obligations (a covered "retiree benefit" under §1114, as the Fifth Circuit held and Petitioners no longer contest), even though "repeals by implication are not favored," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007), and their argument would subject Respondents to obligations that, by court order, they otherwise would *not* have had to "lawful[ly]" pay under §1114.

Petitioners also suggest that §1114 is no different from the Bankruptcy Code provisions implicated in their cited cases, which, according to Petitioners, "give bankruptcy courts discretion to protect a debtor from a range of pre-bankruptcy obligations." Pet.19. But the only provisions those decisions involved (and that Petitioners cite) are Code provisions that allow for an automatic stay of non-bankruptcy proceedings or give bankruptcy courts generalized authority to "issue any order" that is "necessary" to carry out the provisions of the Bankruptcy Code. 11 U.S.C. §§105(a), 362(a); Pet.19. The analog here would be if Respondents had invoked one of those general provisions to avoid paying Coal Act obligations. But, of course, they did not; they invoked §1114, a provision that Congress specifically enacted for the explicit purpose of modifying retiree benefits like Coal Act obligations in order to facilitate reorganizations in circumstances exactly like those presented here. There is a world of difference between the two situations—not least that, again, Petitioners' argument would result in a partial implied repeal of §1114 absent any "clear and manifest" intention by Congress. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662.

Petitioners' remaining arguments are all unavailing. First, in an attempt to buttress the supposed split, Petitioners briefly contend that the Sixth Circuit is aligned with the Seventh, Eighth, and Ninth Circuits. Pet.16 (citing *RYO Mach., LLC v. Dep't of Treasury*, 696 F.3d 467, 472 (6th Cir. 2012)). But *RYO* was not even a bankruptcy case, much less one involving §1114. Second, Petitioners claim that the D.C. Circuit is aligned with the Fifth and Eleventh Circuits. But the majority decision in *Cohen v. United*

States, 650 F.3d 717 (D.C. Cir. 2011) (en banc), barely mentions *Regan*, citing it only as an example of "the nuance" that distinguishes cases where an alternative avenue is available from cases where it is not. *See id.* at 726. So too in *Z Street v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015), another non-bankruptcy case that simply described *Regan*'s holding. *See id.* at 29. Third, Petitioners suggest that the *Regan* exception only applies to "original actions in this Court," Pet.17 n.2, but that question also is not fairly included in their question presented and, as Petitioners concede, "[n]o court of appeals" has adopted that view. Pet.17 n.2.

The inescapable reality is that all three courts of appeals that have addressed whether the *Regan* exception applies in the §1114 context—the Fourth, Eleventh, and now the Fifth Circuits—have reached the same conclusion. Because there is no circuit split, certiorari should be denied.

B. This Case Is a Poor Vehicle to Address the Question Presented.

1. Numerous unresolved threshold issues are logically antecedent to the question presented.

Not only is there no split over the question presented, but this Court would have to address and resolve multiple threshold issues of first impression before even getting to that question. The Fifth Circuit incorrectly decided those issues in favor of Petitioners—without citing any decision by this Court—or assumed them in Petitioners' favor without deciding them. In either case, "[g]ranting the petition for certiorari … would require" this Court "to resolve"

those "threshold question[s]." *Wrotten v. New York*, 560 U.S. 959, 959 (2010) (statement of Sotomayor, J., respecting denial of certiorari). And because those "threshold questions" may "preclude [the Court] from reaching" Petitioners' question, this case is an exceptionally poor vehicle for review. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S.Ct. 928, 929 (2016) (Thomas, J., concurring in denial of certiorari); *see also Scenic Am., Inc. v. Dep't of Transp.*, 138 S.Ct. 2, 3 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting denial of certiorari) (where case is "burdened with … antecedent … questions," the "proper course is to deny certiorari").

First, this Court would have to decide whether issue preclusion bars Petitioners from relitigating the question presented in light of their unsuccessful efforts in *Walter Energy*. "Issue preclusion bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and … is essential to the judgment.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (ellipsis in original). Issue preclusion "prevent[s]" the same party from having "the same issue … decided more than once," which "wastes litigants' resources and adjudicators' time" and "encourages parties who lose before one tribunal to shop around for another." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 140 (2015).

These principles squarely apply to Petitioners. Whether Coal Act obligations are subject to §1114 is "the same issue" that Petitioners litigated and lost in the *Walter Energy* case. *Id.* There as here, Petitioners

argued, *inter alia*, that the AIA bars application of §1114 (because, in part, the *Regan* exception does not apply). Petitioners lost in *Walter Energy*, resulting in "a valid and final judgment." *Arizona v. California*, 530 U.S. 392, 414 (2000). And the Eleventh Circuit's determination on the AIA question was "essential to th[e] judgment." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Neither Petitioners nor the Fifth Circuit contested those points below. Accordingly, Petitioners should have been (and are) precluded from relitigating the same issues in this case. *See B & B Hardware*, 575 U.S. at 147.

Nevertheless, Petitioners argued for—and the Fifth Circuit accepted—an "exception to nonmutual issue preclusion for pure issues of law." App.7. Neither Petitioners nor the Fifth Circuit cited any decisions of this Court supporting such an "exception," however. This Court would thus need to confront and decide that question in order to address Petitioners' question presented.

Furthermore, this Court's precedents indicate that there is no such "exception"—or, at a minimum, that the Court would have to make new law to recognize such an exception here. Although, decades ago, the Court suggested that an "exception" to the "otherwise applicable rules of preclusion" might exist for "'unmixed questions of law,'" the Court's most recent decision addressing that "exception" cast serious doubt on its validity; the Court described it as "difficult to delineate" and its purpose as "far from clear." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169-72 (1984).

Regardless, *Stauffer* made clear that any such exception would apply *only* in "'successive actions involving *unrelated* subject matter.'" *Id.* at 169-70 (emphasis added). The Fifth Circuit did not acknowledge this limitation (or even cite *Stauffer*). Yet it plainly applies here, because this case and *Walter Energy* involve "related," indeed identical, subject matter. Thus, unless this Court is willing to abrogate *Stauffer*'s "unrelated subject matter" limitation—to an exception of which the Court is already skeptical—issue preclusion applies.

Second, this Court would have to decide whether there is a "suit" for purposes of the AIA. The AIA provides that "no *suit* for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. §7421(a) (emphasis added). This dispute, however, arises out of Respondents' chapter 11 petitions, and a chapter 11 petition is not a "suit." A "suit" is a "proceeding by a party or parties against another in a court of law." *Black's Law Dictionary* (11th ed. 2019). Chapter 11 petitions, however, are "formal written request[s], presented to a bankruptcy court, seeking protection for an insolvent debtor." *Id.* (defining "Petition in Bankruptcy").

The Fifth Circuit did not dispute any of this. Instead, it decided that, for purposes of the AIA, it could "look at this adversary proceeding rather than the bankruptcy as a whole." App.9-10. But in so concluding, the Fifth Circuit did not cite any precedent from this Court, which has never addressed the question of what constitutes a "suit" for AIA purposes in bankruptcy proceedings. The answer is by no

means clear, the Fifth Circuit's decision is highly questionable, and this case is far from an ideal vehicle in which to address the issue in any event.

For example, it is unclear why the Fifth Circuit would look to Petitioners' adversary proceeding seeking a declaratory judgment rather than to Respondents' §1114 motion, given that the latter is what actually sought to modify the Coal Act obligations. The distinction is important, because even if an adversary proceeding could be considered a "suit," a §1114 motion is not an adversary proceeding but a contested matter, and it is passing strange to think of every contested matter in a bankruptcy proceeding as a separate "suit." *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 505 (2015) (explaining that "disputes in bankruptcy are generally classified as" either "adversary proceedings," covering certain types of disputes, or "contested matters," an "undefined catchall for other issues the parties dispute"). The question of what is a "suit" in bankruptcy would also implicate the difficult question of whether a particular bankruptcy court order is "final" for immediate appeal. *See id.* at 501-02. These far-reaching issues cannot be assumed away or addressed only in passing in a decision of this Court.

Third, even if there is a "suit" for AIA purposes, and even assuming Combined Fund premiums are "taxes" for purposes of the AIA, *but see infra*, this Court would still have to decide whether this is a suit to "restrain[] the assessment or collection of any tax." 26 U.S.C. §7421(a). The answer to that question is no, because nothing about Petitioners' suit "seek[s] to stop the collection of taxes." *Hibbs v. Winn*, 542 U.S. 88,

103 n.6 (2004). Rather, Petitioners are trying *to force* Respondents *to pay* a (supposed) tax. As the bankruptcy court noted, the "entire premise" of Petitioners' suit "is to compel the Debtors or their successor to continue to pay the required premiums." App.45. Furthermore, while the typical suit implicating the AIA is against the government, and the AIA is intended to "protect[] the Government's ability to collect a consistent stream of revenue," *NFIB*, 567 U.S. at 543, here, (1) the government is not a party, (2) Coal Act obligations are received by Petitioners, a "private, non-governmental trust," *not* the government, and (3) Coal Act obligations are "[e]nforce[d] … by" Petitioners, *not* the government. *Walter Energy*, 551 B.R. at 639. The circumstances here are thus a complete mismatch for the AIA.

The Fifth Circuit dodged this question by "assum[ing]" the answer in Petitioners' favor because it "end[ed] up holding that the AIA is not a bar." App.10. This Court, however, cannot so easily elide that threshold question. Furthermore, the Fifth Circuit relied on the "declaratory judgment posture" of the proceedings. App.10. But that only raises two additional problems. First, that posture makes this case "different from that of other cases that addressed the AIA in proceedings where debtors actually moved to modify their obligations" without a declaratory-judgment action, App.10, underscoring that this case is a poor vehicle. Second, the Declaratory Judgment Act explicitly does not apply to cases "with respect to Federal taxes." 28 U.S.C. §2201(a); *see* App.10 n.7; Pet.22 (Petitioners conceding that "Coal Act premiums are 'Federal taxes' and thus beyond the reach of the Declaratory Judgment Act"). Accordingly, if Coal Act

obligations are indeed "taxes," then Petitioners cannot invoke the Declaratory Judgment Act at all.

Fourth, to address the question presented, the Court would have to decide whether Combined Fund *premiums* should be treated as "taxes" for AIA purposes just because the *penalty* for failing to pay them is treated as a tax.

Section 9707(f) of the Coal Act provides that "the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B." 26 U.S.C. §9707(f). The Fifth Circuit "assume[d] that, because the section 9707 *penalty* should be treated like a tax, Combined Fund *premiums* are effectively taxes under the AIA too." App.14 (emphases added). Based on that assumption, it proceeded to hold that the *Regan* exception to the AIA applied. *See* App.14-17.

Again, however, this Court cannot simply assume that critical premise; it would have to decide the threshold question. And, again, Respondents have the better argument. Just because Congress declared that the "penalty" for failure to pay a Combined Fund premium "shall be treated in the same manner the tax imposed by section 4980B" does not mean that the *premium* should be treated like a tax, too. Quite the opposite: because the rest of §9707 repeatedly refers to "premiums," §9707(f)'s reference to treating the "penalty" like a tax demonstrates that if Congress had intended for courts to also treat the premium "in the same manner as [a] tax[]," Congress knew how to say so and could have done so. But it did not, and that congressional judgment must be respected. *See NFIB*, 567 U.S. at 544-45.

Petitioners know this particular threshold question presents a major vehicle problem, because they consistently mischaracterize the Fifth Circuit's decision on this point. According to Petitioners, the court "*recogniz*[*ed*] that premiums for the Combined Fund are 'any tax' under the AIA," Pet.3, "*concluded* that Combined Fund 'premiums" are 'any tax' protected by the AIA," Pet.10, and "*accept*[*ed*] that Combined Fund premiums are 'any tax,'" Pet.21 n.4 (all emphases added). None of that is true. The court did not "recognize," "conclude," or "accept" that Combined Fund premiums are a "tax" under the AIA. The court simply "assume[d]" that premise, without actually deciding it, in order to proceed to the *Regan* issue. App.14.[2]

It is *this* Court that would have to "conclude[]" that Combined Fund premiums are "taxes" under the AIA—an antecedent question that, like the other threshold issues, presents a matter of first impression with far-reaching implications and was addressed only briefly in the briefing and decision below. Rather than confront and address those multiple threshold questions, the far better course is to deny certiorari.

2. The question presented applies only to one of the two "main parts" of Petitioners' case.

As noted, Petitioners' first question presented requires accepting that, because the *penalty* for failing to pay a Combined Fund premium should be treated

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[2] Just once do Petitioners acknowledge, in a tellingly vague concession, that the court "only *assumed*" this critical premise. Pet.11.

like a tax, the Combined Fund *premium* is a tax as well. Even if this Court were to endorse that dubious proposition and then hold in Petitioners' favor on the question presented because the *Regan* exception does not apply, all of that would only affect Respondents' obligation to pay *Combined Fund* premiums; it would have zero impact on Respondents' obligation to pay *1992 Plan* premiums. That is because there is *no* penalty for failing to pay a 1992 Plan premium, and there is no statutory language stating that any such penalty (even if it existed) should be "treated like" a tax.

As such, holding in Petitioners' favor on the first question presented would not foreclose Respondents' efforts to use §1114 to modify their 1992 Plan premiums.[3] Yet Petitioners themselves describe the Coal Act as having "two main parts"—"the Combined Fund and the 1992 Plan," Pet.6—and they likewise include both categories of premiums when describing the "obligations" at issue. *See, e.g.*, Pet.8. It makes little sense for this Court to grant review of the first question presented, and to address and resolve the numerous threshold issues necessary to get to that question, and then rule in Petitioners' favor, only for the Court's decision not to make a difference to a "main part[]" of Petitioners' case.[4]

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[3] To be sure, Petitioners contend that 1992 Plan premiums are "taxes" under the AIA, but only in their *second* question presented. Their first question presented accepts that 1992 Plan premiums are *not* "taxes" under the AIA.

[4] The Petition does not provide any actual figures illustrating the relative magnitude of the Combined Fund premiums and the

3. The question presented was not thoroughly ventilated below.

Petitioners give the impression that the Fifth Circuit proceedings were principally, if not exclusively, focused on the question whether the AIA bars the use of §1114 to modify Coal Act obligations. Indeed, their description of the Fifth Circuit's decision does not even mention the other issues that the Court decided, including whether Coal Act obligations are "retiree benefits," and, if so, whether they can be modified under §1114 given that they are statutory obligations. *See* Pet.10-11. In reality, however, those other issues were the "heart of the matter" below, App.9, and Petitioners barely addressed the *Regan* issue that they now offer as the first question presented here. In fact, the question Petitioners seek to raise here occupied four pages in Petitioners' 58-page opening brief below, two pages in Respondents' 67-page answering brief, and two pages in Petitioners' 31-page reply—meaning, eight pages out of 142 total. In short, this question was a veritable afterthought in the proceedings below. Were this Court ever inclined to review the first question presented, it should do so in a case where the issue was more thoroughly ventilated.

* * *

Despite all of these vehicle problems, Petitioners argue that the Court "should not wait" for another case because "appellate decisions on these important issues are infrequent." Pet.28-29. That assertion is

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1992 Plan premiums at issue, so there is no basis for assuming that one category is appreciably larger than the other.

not credible; in the last three years alone, two courts of appeals have addressed these issues. And while Petitioners posit mootness problems or jurisdictional impediments in other cases, Pet.28-29, Petitioners ignore that parties in bankruptcy can, and often do, fashion relief to permit issues to be litigated after a reorganization plan's confirmation. That is exactly what happened here: the confirmed reorganization plan "set[] aside money to pay the Petitioners if they prevail on appeal," Pet.9—specifically, $75,000—and Respondents agreed not to argue that this case is moot, *see* Confirmation Order ¶60. Petitioners offer no valid reason to disregard the many impediments to review here of the question presented.

C. The Question Presented Is Not of Sufficient Importance to Warrant Review.

The question presented also is of insufficient and diminishing importance to warrant this Court's review. As the Fifth Circuit noted, the Coal Act is an "unusual" law, App.32, and even Petitioners acknowledge that it is "unique," Pet.6. The Coal Act applies only to coal companies "that had entered into any National Bituminous Coal Wage Agreements from 1978 on." App.3; *see* 26 U.S.C. §9711(a). It "imposes obligations only on signatories to the wage agreements from 1978 onward that guaranteed lifetime health care benefits to miners." App.28. And it "does not cover coal miners who retired after September 30, 1994." App.3 n.1; *see* 26 U.S.C. §9711(b).

Consequently, the universe of miners covered by the Coal Act is small. And the universe of miners affected by the question whether §1114 can be used to

modify Coal Act obligations—which only arises if a company with Coal Act obligations is in bankruptcy and invokes §1114—is smaller still. And the universe of miners covered by Petitioners' first question presented is even smaller than that, because that question implicates only Combined Fund premiums, not 1992 Plan premiums.

The unusual, unique, and narrow scope of the Coal Act militates strongly against review by this Court. Indeed, while Petitioners appeal to "[t]he story of coal miners' fight to secure lifetime healthcare benefits," Pet.27, the issue was evidently so immaterial to actual coal miners that Petitioners were "unable to locate *any* Coal Act retiree willing to serve on [the] committee" authorized by the bankruptcy court to negotiate with Respondents. Confirmation Order ¶56 (emphasis added); *see* 11 U.S.C. §1114(d). The issue was also not so important as to garner any *amicus* support for the petition. The complete disinterest in this case may be explained by the fact that, as the Fifth Circuit noted, "the retired miners will receive their benefits regardless of this case's outcome," because the federal government will "pick up the slack," App.31—something Petitioners never mention. Indeed, the only remedy Petitioners could ever receive in this case, even if they completely succeeded, is $75,000. Put more directly, the outcome of this case will have *no effect* on *any* retiree's benefits, reinforcing that review is unnecessary.[5]

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[5] The federal government did not submit a brief below (or in *Walter Energy*). And given the many reasons for denying review, there is no reason for this Court to seek the views of the Solicitor General, and Petitioners do not so request.

Finally, Petitioners observe that the Fifth Circuit stated that the "questions presented 'are important ones the Supreme Court has not decided.'" Pet.29 (quoting App.8). But the Fifth Circuit was not specifically referring to Petitioners' narrow "questions presented" here, and, as noted, Petitioners have abandoned the issues that were the "heart" of the decision below. App.9. Nor is it material that the Fifth Circuit accepted direct review of the case under 28 U.S.C. §158(d)(2). That provision is designed to generate binding appellate precedent in bankruptcy cases and can be satisfied if any one of numerous conditions is met. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229, 241-42 (5th Cir. 2009). That is far different from satisfying this Court's stringent standards for certiorari.

D. The Fifth Circuit's Decision Is Correct.

Even assuming the many premises necessary to reach the question presented, the decision below correctly applied *Regan*. Petitioners do not even contend otherwise.

Regan held that the AIA "was not intended to bar an action where" there is no "alternative legal way to challenge the validity of a tax." 465 U.S. at 372-73. Because the AIA was designed to "require that the legal right to the disputed sums be determined in a suit for a refund," the AIA does not "apply in the absence of such a remedy." *Id.* at 374, 376 (emphasis omitted).

No remedy besides §1114 exists for challenging Coal Act premiums. As the Eleventh Circuit explained in *Walter Energy*, debtors in Respondents' shoes cannot obtain relief "by waiting to be assessed

[Coal Act] premiums, failing to pay those premiums, being assessed a penalty, and then bringing a suit in district court," because the relief offered "could be awarded *only* by a bankruptcy court in a Chapter 11 bankruptcy action"; the district court would "ha[ve] no power to award such relief." 911 F.3d at 1141-42 (emphasis added). Or, as the Fifth Circuit put it, "because bankruptcy court is the only place a debtor can use section 1114 to modify its Coal Act obligations, the AIA does not bar adversary proceedings seeking to do so." App.17.

Notably, Petitioners have never "point[ed] to an alternative avenue that [Respondents] could pursue." App.15. Nor have Petitioners ever come to grips with the havoc their position would wreak. Holding that a coal company cannot invoke §1114 even to modify Coal Act obligations would have disastrous consequences in terms of companies shuttered and jobs lost. This case proves the point, as no bidder would purchase the assets absent modification of Coal Act obligations, meaning that §1114 was essential to saving not only the company but more than a thousand jobs. Fortunately, the bankruptcy court permitted the use of §1114, which then led to a negotiated resolution agreeable to all sides. In short, §1114 functioned here exactly as Congress intended. The notion that the AIA forecloses all of this by prohibiting the use of §1114 to achieve its express purpose, instead condemning companies and employees to liquidation, defies plausibility.

II. The Second Question Presented Does Not Warrant This Court's Review.

A. There Is No Circuit Split.

Petitioners' second question presented is whether a Coal Act premium is a "tax" for purposes of the AIA. Pet.i.[6] Petitioners claim a circuit split warranting this Court's review, *see* Pet.21-24, but this argument lacks merit.

In the decision below and in *Walter Energy*, the Fifth and Eleventh Circuits squarely held that Coal Act premiums are not "taxes" under the AIA based on *NFIB v. Sebelius*, 567 U.S. 519 (2012), which held that "the label Congress uses" is the "best evidence of Congress'[] intent" as to whether an exaction is a "tax" for AIA purposes. App.11. Petitioners claim a split by citing decisions from the Second, Fourth, and Tenth Circuits. *See* Pet.22-23 (citing *In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998), *Adventure Res. Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998), *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), and *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995)). But as the Fifth Circuit explained, "only one" of those decisions, *Leckie*, even "addressed the application of the AIA." App.13. The others "considered whether Coal Act premiums were a 'tax' entitled to administrative-expense priority under the Bankruptcy Code." App.13 n.8. Decisions that do not

[6] As explained, the Fifth Circuit assumed that Combined Fund premiums might be considered "taxes" because the penalties for not paying those premiums are to be treated as taxes under §9707(f) (leading to Petitioners' first question presented)—but only after holding that Coal Act premiums themselves are not "taxes" (the subject of Petitioners' second question presented).

even mention the AIA simply do not create a circuit split over whether Coal Act premiums are "taxes" under the AIA.

That leaves only the Fourth Circuit's decision in *Leckie*. While that decision held that Coal Act premiums are taxes under the AIA, it "predated *NFIB* and relied on a functional approach that put little, if any, weight on congressional labels." App.13. Indeed, *Leckie* applied a four-part test asking in part whether the exaction imposed a "pecuniary burden, *regardless of name*." 99 F.3d at 583 (emphasis added). By contrast, *NFIB* put significant (if not dispositive) emphasis on "Congress's choice of label." 567 U.S. at 564.

Given *NFIB*, it is highly doubtful that the Fourth Circuit would continue to conclude that Coal Act premiums are "taxes" under the AIA. Indeed, in *Electrical Welfare Trust Fund v. United States*, 907 F.3d 165 (4th Cir. 2018), the Fourth Circuit cast doubt on *Leckie*'s functional approach. There, plaintiff sued under the Tax Refund Statute, arguing that a payment it had made was a "tax" because "it met a multi-factor test articulated in" *Leckie*. *Id.* at 167. Citing *NFIB*, the district court held that the payment was not a "tax," and the Fourth Circuit affirmed. While the Fourth Circuit first noted that "the payment here was made not to the Treasury," as required by the statute, it then added that *NFIB* "further undermines [plaintiff's] view," because *NFIB* "ma[de] clear that Congress's denominations do obviously matter," and Congress had labeled the payment in question a "contribution," not a "tax." *Id.* at 168-69. The Fourth Circuit then rejected plaintiff's reliance on

Leckie, noting, among other things, that "in the event of any conflict between the mode of analysis there and that employed in [*NFIB*], the Supreme Court's instruction in [*NFIB*] would control." *Id.* at 169 n.*.

Because *Leckie* predates—and in this respect is inconsistent with—*NFIB*, and given that the Fourth Circuit itself has questioned the continuing vitality of the multi-factor test under which *Leckie* concluded that Coal Act premiums are "taxes" for purposes of the AIA, *Leckie* provides no basis for asserting a circuit split that this Court should resolve. And because Petitioners do not cite a single post-*NFIB* decision that conflicts with the decision below and *Walter Energy* on the question presented, certiorari is not warranted.

B. This Case Is a Poor Vehicle to Address the Question Presented, and the Question Presented Is Not of Sufficient Importance to Warrant Review.

Nearly all of the vehicle problems that infect the first question presented apply to Petitioners' second question presented as well. *See* pp.18-28, *supra*. First, the Court would have to address and resolve at least three threshold questions of first impression (all but the fourth threshold question noted above). Second, the question whether premiums are "taxes" under the AIA was not the "heart of the matter" that Petitioners have been litigating and was not thoroughly ventilated below. App.9. And third, by Petitioners' own telling, their second question presented is focused on "[w]hether *1992 Plan Premiums* Are 'Any Tax' Under The AIA," Pet.21 (emphasis added)—only one of the "two main parts" of Petitioners' case. Pet.6. Likewise, for the same

reasons applicable to Petitioners' first question presented, the second question is not of sufficient importance to warrant review. *See* pp.28-30, *supra*.

C. The Fifth Circuit's Decision Is Correct.

Under *NFIB*'s governing framework, Coal Act premiums are not "taxes" under the AIA. *NFIB* held that the Affordable Care Act's statutory "penalty" for failing to maintain health insurance was not a "tax" under the AIA. 567 U.S. at 546. The Court so held by emphasizing Congress' decision to describe the exaction "not as a 'tax,' but as a 'penalty.'" *Id.* at 543. Congress' "choice of label," the Court explained, is "the best evidence" of whether Congress intended an exaction to be an AIA tax. *Id.* at 544, 564. The "label" that Congress used in the ACA—"penalty"—was "fatal" to application of the AIA. *Id.* at 564. The Court also noted that the ACA elsewhere used the word "tax," indicating that Congress "intentionally" chose the word "penalty." *Id.* at 544.

Applying *NFIB*'s principles here, it is clear that the Fifth Circuit got it right: Coal Act premiums are not "taxes" for AIA purposes. Congress called Coal Act premiums "*premiums*"—not "taxes." *See* 26 U.S.C. §9704(a) (Combined Fund), §9712 (1992 Plan). Indeed, the Coal Act refers to "premiums" eighty-seven times. While Petitioners contend that does not matter, because "both" labels "connote revenue-raising," Pet.25, that functional argument ignores *NFIB*'s holding that the actual choice of label is critical—if not "fatal"—to any argument that what are labeled "premiums" are actually "taxes" subject to the AIA. 567 U.S. at 564. Nor do Petitioners reckon with the "significant" fact that Congress repeatedly used

the word "tax" elsewhere in the Coal Act, *id.* at 544; *see, e.g.*, 26 U.S.C. §§9702(a)(4), 9705(a)(4)(B), 9705(a)(5), confirming that Congress knew how to describe Coal Act premiums as taxes if it wanted to—but did not. Under *NFIB*, the decision below is correct.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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