No. 24-784

IN THE

Supreme Court of the United States

ARCH RESOURCES, INC., AND
APOGEE COAL COMPANY LLC,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U.S. DEPARTMENT OF LABOR AND
DAVID M. HOWARD,

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Mining Association ("NMA") is a national trade association that serves as the voice of the mining industry, including nearly every major coal company operating in the United States. The NMA has over 250 members, including companies and organizations involved in every aspect of U.S. mining. America's mining industry supplies the essential materials necessary for practically every sector of our economy, all delivered under world-leading environmental, safety, and labor standards. The NMA works to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American sourced materials necessary for U.S. manufacturing and national and economic security. A core mission of the NMA is working with Congress and regulators to advocate for public policies that will help America fully and responsibly utilize its vast natural resources. The NMA also has a long history of representing the mining industry in the courts.

Petitioner Arch Resources, Inc. ("Arch") is an NMA member. If the Sixth Circuit's decision is allowed to stand, NMA and its members will face confusion and uncertainty as to their liability under

[1] Pursuant to this Court's Rule 37.2, NMA provided timely notice to all parties of their intent to file this *amicus* brief. Further, pursuant to this Court's Rule 37.6, NMA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from NMA, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

the Black Lung Benefits Act and could face increased liability and exposure as self-insurers.

SUMMARY OF ARGUMENT

This case arose in response to the Department of Labor's ("DOL") search for a deep pocket: a solvent company to pay black-lung-insurance benefits to a miner's family rather than lawfully allocating liability for those benefits to the Black Lung Benefits Trust Fund ("Trust Fund"), which was teetering on insolvency due to DOL's own mismanagement.

After 17 years of mining, David Howard retired as a miner from his last employer, Apogee Coal Company ("Apogee"), in 1997. At that time, Apogee was self-insured through its corporate parent, Arch. *See Apogee Coal Co. v. Dir., OWCP*, 112 F.4th 343, 349 (6th Cir. 2024) ("*Howard*").

In 2005, Arch sold Apogee and all its past, present, and future black-lung liabilities. *See id.* Patriot Coal ("Patriot") ultimately purchased Apogee and its liabilities in 2008. *See id.* DOL then approved Patriot as a self-insurer of Apogee's liabilities. *See id.* As a result, Arch became a former self-insured parent of Apogee.

When Howard filed for benefits in 2014, the District Director investigating his claim identified Apogee, self-insured through Patriot, as the potentially liable operator and issued a notice naming it as such. *See id.* DOL then named Patriot as the presumptive insurer of Howard's claim. *See id.*

In October 2015, Patriot, along with its subsidiaries including Apogee, declared bankruptcy.

See id. Because Patriot, as a bankrupt self-insurer, could not assume liability for Apogee's payments, the Black Lung Benefits Act, 30 U.S.C. §§ 901, *et seq.* ("BLBA"), required that DOL find that Apogee was not "capable of assuming liability for the payment[s]," 20 C.F.R. § 725.408(a)(2)(v), and thus declare the Trust Fund as liable. *See* 26 U.S.C. § 9501(d)(1)(B) (stating that the cost of benefits falls to the Trust Fund when there is no operator liable to pay benefits); 20 C.F.R. § 725.490(a) ("Where no such operator exists or the operator determined to be liable is in default in any case, the fund shall pay the benefits due and seek reimbursement as is appropriate."); *see also* Preliminary Decision & Order, *Adkins v. Apogee Coal*, Case ID: B7MHB-2015029 (Feb. 16, 2016) (Charleston DOL), at Pet. App. 213a-214a (in a separate case, finding the Trust Fund liable because Patriot, the self-insurer, declared bankruptcy).

But DOL did not find the Trust Fund liable. Instead, citing concerns over the solvency of the Trust Fund, DOL ignored the statutory framework and decades of departmental practice and adopted a new policy—Bulletin 16-01—through which it declared that, as of November 2015, claims against nearly 50 bankrupt Patriot subsidiaries would be chargeable to those subsidiaries' *former* self-insured parents based on an occurrence trigger, to wit, the last day of the miner's employment with the later-sold subsidiary. *See* Bulletin 16-01 at 1. In so doing, DOL imported two rules governing commercial insurance (in which the policy in effect on the date of a miner's last coal-dust exposure covers the liability, *i.e.*, an occurrence trigger), see 20 C.F.R. §§ 725.494[2] and 725.495[3], into the self-insurer context (in which the self-insurer's policy in effect when a claim is filed is liable, *i.e.*, a claims-made trigger). What is more, it did so without subjecting this new policy to notice-and-comment rulemaking. *See* Pet. at 13.

On the basis of Bulletin 16-01, DOL declared Arch, rather than the bankrupt Patriot, liable as the insurer of Apogee's (the operator) liability for Howard's claim. *Howard*, 112 F.4th at 349.

DOL's decision was then reviewed by an Administrative Law Judge (the "ALJ") and the Board, both of which embraced DOL's new policy to affirm finding Arch responsible *as an insurer*. Pet. at 13. Importantly, the ALJ affirmatively disclaimed another set of DOL's BLBA regulations (20 C.F.R. §§ 726.110(a)(1) and 726.4) as forming any basis of Arch's liability, because those provisions[4] were not themselves a source of liability for self-insurers. *See* Decision & Order of U.S. Dep't of Lab., *Howard v.*

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[2] 20 C.F.R. § 725.494 (stating that "[a]n operator may be considered a 'potentially liable operator' with respect to a claim for benefits" so long as certain conditions are met, including that the miner's disability or death arose from the miner's employment and the operator can assume liability).

[3] 20 C.F.R. § 725.495 (stating that "[t]he operator responsible for the payment of benefits in a claim adjudicated under this part (the 'responsible operator') shall be the potentially liable operator … that most recently employed the miner").

[4] The Part 726 regulations govern insurance requirements of operators. Specifically, 20 C.F.R. § 726.110(a)(1) mandates that all self-insurers must agree to pay BLBA benefits when due, and 20 C.F.R. § 726.4 addresses operators and their responsibilities for insurance coverage.

Apogee Coal Co. (Feb. 25, 2020) ("ALJ Feb. 2020 Decision & Order"), at Pet. App. 122a-123a; Pet. at 14.

Arch appealed the Board's decision to the Sixth Circuit, which affirmed. *Howard*, 112 F.4th at 347. The court declined to follow this Court's instruction in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), that requires courts to evaluate agency action with reference to the grounds stated by the agency at the time it acts. Instead, the court affirmed the DOL policy by relying on the very regulations, 20 C.F.R. §§ 726.110(a)(1) and 726.4, that the ALJ had rejected as providing a basis to uphold the DOL policy.[5] *Howard*, 112 F.4th at 354; *see* Pet. at 14.

As the Sixth Circuit considered *Howard*, Arch was litigating a similar case in the Seventh Circuit. *See Apogee Coal Co. v. OWCP*, 113 F.4th 751 (7th Cir. 2024) ("*Grimes*"). Although *Grimes* involved a different miner, it concerned the same operator (Apogee), former self-insurer (Arch), self-insurer (Patriot), and decision by the ALJ and Board to follow Bulletin 6-10. *Id.* at 756-57. As in *Howard*, the Bulletin resulted in the ALJ and Board declaring Arch—rather than Patriot—liable as the responsible insurer. *Id.* Also as in *Howard*, the Board relied on

[5] *See* ALJ Feb. 2020 Decision & Order at Pet. App. 122a-123a ("[T]he self-insurance regulations simply do not govern the imposition of liability. Section 726 of the regulations governs only *how* an operator must secure its existing liability; it does not *create* liability. Whether an operator complies with the insurance requirements of section 726 (or whether the Department properly administers these requirements) does not initiate or terminate liability. Rather, it is the Act itself and the substantive requirements of section 725 (particularly subpart G) that impose liability.").

Part 725 regulations to find Arch liable as a self-insurer. *Id.*

However, unlike as in *Howard*, the Seventh Circuit followed *Chenery* and evaluated the agency action "on the reasoning given by the agency at the time of its decision." *Id.* at 759. This was in accord with an earlier BLBA benefits case in which the Fourth Circuit held that the *Chenery* doctrine applied with full force and effect. *See Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006). Following *Chenery*, the Seventh Circuit examined the Board's reliance on Part 725, found it incorrect, and held that Arch was not liable as a self-insurer. *Grimes*, 113 F.4th at 761-62.

First, the Seventh Circuit found that the Part 725 regulations, which govern responsible *operators*, does not make Arch legally liable as a responsible self-insurer. *Id.* at 760. In fact, the court concluded that it was "unable to identify a statutory or regulatory provision—identified by the ALJ or Board—that supports holding Arch liable for the benefits obligation owed by Apogee to [Grimes]." *Id.* at 761.

Second, the Seventh Circuit explicitly disagreed with the Sixth Circuit's application of the Part 726 regulations (20 C.F.R. §§ 726.110(a)(1), 726.4(b)) to find Arch liable. The Seventh Circuit read these regulations as governing operators' insurance requirements, not as a separate source of liability that allowed DOL to assign liability to an insurer. *Id.*

As a result, the Seventh Circuit concluded Arch could not be held liable for payment, and instead held that liability ran to the Trust Fund. *Id.* at 762.

In its petition, Arch persuasively explains that the Sixth Circuit erred in not applying the *Chenery* doctrine and misapplied the Part 726 regulations to find Arch liable.

NMA submits this brief as *amicus curiae* to provide additional context for how the Sixth Circuit's decision will negatively impact the coal mining industry if allowed to stand. This case stems from DOL's decades-long failure to manage the Trust Fund, which led to DOL's desperate search to find any company able to pay the agency's debt. The court of appeal's decision ignores the distinction between commercial and self-insurance, altering the nature of self-insurance in the coal mining industry and disincentivizing utilization of self-insurance in the future in contravention of congressional intent. The Sixth Circuit also placed DOL's interests over the reliance interests of self-insurers that depend on the certainty of BLBA's insurance regulations to structure black-lung benefit payments to mining families.

ARGUMENT

I. DOL Mismanaged the Trust Fund.

A. The Trust Fund finances assistance to miners.

The Trust Fund finances medical and cash assistance to certain coal miners who have been totally disabled due to pneumoconiosis (black lung disease). *See* U.S. Gov't Accountability Off., GAO-20-21, *Black Lung Benefits Program: Improved Oversight of Coal Mine Operator Insurance Is Needed*, at 1 (Feb. 2020) ("2020 GAO Report"). The primary source of revenue for the Trust Fund is an excise tax on coal produced and sold domestically. Congressional Research Service ("CRS"), *The Black Lung Program, the Black Lung Disability Trust Fund, and the Excise Tax on Coal*, at 1 (Feb. 7, 2023) ("2023 CRS Report"). If excise tax revenue is not sufficient to finance black lung benefits, the Trust Fund may borrow from the U.S. Treasury's general fund. *Id.*

Black lung benefits are generally to be paid by responsible coal-mine operators. *Id.* at 4. The BLBA states that an operator may secure the payment of benefits by obtaining independent liability insurance (commercial insurance), or by becoming a self-insurer, qualified under the BLBA. 20 C.F.R. § 726.1. If no entity can pay, either through its commercial policy or self-insurance, the Trust Fund must take responsibility for doing so. 20 C.F.R. § 725.408(a)(2)(v) (a liable operator must be "capable of assuming liability for the payment of benefits"); *see* Preliminary Decision & Order, *Adkins v. Apogee Coal*, Case ID: B7MHB-2015029 (Feb. 16, 2016) (Charleston DOL), at Pet. App. 213a-214a (where a company is self-insured but declares bankruptcy, it "no longer possesses sufficient assets to secure the payment of benefits" and, therefore, "is deemed not viable and [] is considered to be the responsibility of the Black Lung Disability Trust Fund").

Thus, when Patriot and Apogee went bankrupt, the Trust Fund was legally responsible for the liability to pay Apogee's miners' BLBA benefits. *See* 26 U.S.C. § 9501(d)(1)(B) (assigning the Trust Fund as responsible for payment of benefits when DOL cannot identify a responsible party).

The Trust Fund, however, is inadequately funded. It has been in debt, with its expenditures exceeding its revenues, almost every year since the Trust Fund's first complete fiscal year in 1979. *See* 2020 GAO Report at 1. Beginning in fiscal year 1990, however, Trust Fund revenue generally began to exceed combined benefit payments and administrative costs, and, in fact, total Trust Fund cumulative revenue collected from fiscal years 1979 through 2017 exceeded total cumulative benefit payments and administrative costs incurred during these years. Yet, interest owed from earlier years of borrowing led to more borrowing and debt. *See* U.S. Gov't Accountability Off., GAO-18-351, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, at 8-9 (May 2018) ("2018 GAO Report"). In January 2023 alone, the Trust Fund ran a $6 billion deficit and had to borrow from the U.S. Treasury to pay benefits and debt service. United Mine Workers of America ("UMWA"), Comments on Proposed Rule Regarding Black Lung Benefits Act: Authorization of Self-Insurers, at 1 (Apr. 19, 2023), https://www.regulations.gov/comment/WCPO-2023-0001-0011 ("UMWA Comments").

B. DOL mismanaged the Trust Fund for decades.

DOL's mismanagement of the Trust Fund threatens its solvency. For example, the DOL Deputy Inspector General found in 1998 that the department failed to guard against overpayments and payments to beneficiaries that were the legal liability of a mine operator. Patricia A. Dalton, DOL Deputy Inspector General, *The American Worker at a Crossroads*, Testimony, U.S. H.R., Comm. on Ed. & the Workforce, at 6 (Sept. 28, 1998). DOL's inability to rein in excessive administrative costs has also impaired the fund. In 2022, administrative costs totaled $75.2 million with a total of 23,642 beneficiaries receiving benefits through the Trust Fund or their employing coal company. "This suggests a 1,490 percent increase in administrative costs per claim since 1982, even though there was an 85 percent decrease in beneficiaries over the same period." Letter from Rep. Virginia Foxx, U.S. H.R., Comm. on Ed. & the Workforce, to Sec. Julie A. Su, U.S. Dep't of Lab., at 2-3 (Nov. 13, 2024).

Another key problem according to the 2020 GAO Report is DOL has not sufficiently overseen the coal-mine-operator insurance program, which has exposed the Trust Fund to financial risk. 2020 GAO Report at 1, 18. Among its major failures, DOL did not regularly review operators' finances to assess whether the required amount of collateral should change for them as self-insurers.

Agency regulations state that DOL may adjust the amount of collateral required from self-insured operators when experience or changed conditions so warrant. *Id.* at 20. Additionally, DOL's regulations specify that reauthorization of the ability to self-insure is not automatic but instead hinges on DOL's annual determination that existing security is sufficient:

> If the Office determines that such self-insurer's experience indicates a need for the deposit of additional security, *no reauthorization shall be issued for the ensuing fiscal year until the Office receives satisfactory proof that the*

> *requisite amount of additional securities has been deposited.* A self-insurer who currently has on file an indemnity bond will receive from the Office *each year a bond form for execution in contemplation of reauthorization, and the submission of such bond duly executed in the amount indicated by the Office* will be deemed and treated as such self-insurer's application for reauthorization for the ensuing fiscal year.

20 C.F.R. § 726.114(a) (emphasis added).

DOL, however, failed to regularly monitor these operators to reauthorize their ability to self-insure. In fact, in 2020, out of DOL's 22 self-insured coal operators, the agency had not reassessed black lung liabilities or collateral levels of almost half the operators in the previous 10 years. 2020 GAO Report at 19-20. And DOL had not reauthorized one operator in over 30 years. *Id.* at 20.

DOL's failure to regularly assess the ability of operators to self-insure led directly to the problems in *Howard*: When Patriot filed for bankruptcy in 2015, it transferred $230 million in black-lung liabilities to the Trust Fund but had only $15 million (or 6 percent) in collateral to cover those costs. UMWA Comments at 5. Patriot's bankruptcy exposed DOL's failure to ensure that certain self-insurers were adequately capitalized to avoid draining the Trust Fund. Pet. at 12.

Ultimately, the strains on the Trust Fund and mismanagement led DOL to take the desperate step of changing its policy (via the Bulletin) to transfer responsibility from the Trust Fund to any solvent party it could find to pay these liabilities, regardless of that party's insurance-contract terms. DOL fails to identify any authority that supports this new policy. *See Grimes*, 113 F.4th at 761 (concluding that it was unable to identify a statutory or regulatory provision that supports holding Arch liable for the benefits owed by Apogee to the miner); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing agencies have no power to act beyond the powers conferred on them by statute).

II. The Sixth Circuit Ignored the Distinction Between Commercial and Self-Insurance.

A. Commercial insurance is distinct from self-insurance.

The Sixth Circuit's decision to apply the Part 726 regulations—finding that they were a source of liability that could allow the DOL to assign liability to self-insurers—flat out ignored the distinction between commercial policies and self-insurance.

In the BLBA, Congress provides two methods for coal mine operators to secure their black-lung-benefit liability, 30 U.S.C. § 933(a), either through commercial insurance or self-insurance backed with financial security approved by DOL on an annual basis. Significant differences exist between commercial insurance and self-insurance that are important to the mining industry's insurance market. *Compare* Part 726, Subpart B ("Self-Insurers," §§ 726.101-726.115) *with* Subpart C ("Insurance Contracts" or "commercial insurance," §§ 726.201-726.213). Those differences include (1) timing for a claim and (2) the financial requirements of self-insurers versus commercial insurers.

First, for commercial insurance, the policy in effect on the date of a miner's last coal-dust exposure covers the liability, *i.e.*, an occurrence trigger. *See* 20 C.F.R. § 726.203(a). As a result, for commercial insurance, coverage depends on when the injury occurred—specifically, during the policy period—regardless of when the claimant files a claim. *See id.* Thus, commercial insurance, in effect, results in perpetual liability for claims by miners whose last day of work occurred during the policy period. Pet. at 9.

By contrast, for self-insurance, whoever self-insures an operator when a claim is filed is liable, *i.e.*, claims-made trigger. *See President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33, 37 n.1 (1st Cir. 2023) ("[A] claims-made policy . . . covers claims made against the insured during the policy period, regardless of when the event or act that instigated the claim occurred."). As a result, for self-insurance, coverage depends on when the claim is filed—specifically, during a period of self-insurance—regardless of when the event or act occurred. *Id.* Thus, self-insurance does not allow for perpetual liability; claims must be made during a set period. *See id.* at 39 (noting that broadly within the insurance industry, "the critical distinction . . . between occurrence-based and claims-made policies" includes when a claim can be made).

Second, commercial and self-insurance policies have different financial requirements. For commercial insurance, the BLBA does not require that companies have a certain amount of assets to obtain a commercial insurance policy. *See* 20 C.F.R. §

726.205 (stating that "the failure of an operator to obtain an adequate policy or contract of insurance shall not affect such operator's liability for the payment of any benefits for which he is determined liable").

By contrast, to self-insure, the BLBA requires an extensive application process and provision of financial instruments, typically bonds, to secure the self-insurer's potential liability. *See* 20 C.F.R. §§ 726.102 (application), 726.105 (calculating security). Further, following an initial approval, DOL may renew the self-insurance authorization at annual intervals, possibly with adjustments to the amount of financial security required. *See* Pet. at 9-10; 20 C.F.R. § 726.114(a).

B. The Sixth Circuit's decision removes incentives of self-insurance and eliminates self-insurance as a viable option.

A key incentive for companies to obtain self-insurance is the ability to limit liability and control costs. *See Harvard Coll.*, 77 F.4th at 38 (finding that the notice provisions of self-insurance policies are intended to promote fairness in companies' abilities to set rates). In the insurance industry, self-insurance agreements provide such cost certainty and stability for self-insurers. As the court in *Harvard College* recognized when it prevented Harvard from obtaining insurance proceeds because it filed a claim outside of the self-insurance policy's set period:

> The purpose of a claims-made policy is to minimize the time between the insured event and the payment. For that reason,

> the insured event is the claim being made against the insured during the policy period and the claim being reported to the insurer within that same period or a slightly extended, and specified, period. If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated. Accordingly, the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists. Prejudice for an untimely report in this instance is not an appropriate inquiry.

Id. at 38 (internal quotation marks and citation omitted).

The Sixth Circuit's decision strips away these incentives (limiting liability and controlling costs) because it gives DOL the power, via executive fiat (in this case, the Bulletin), to convert a self-insurance policy into a commercial policy without the self-insurer's consent and to find a former self-insurer liable even if the self-insurance coverage period ended years earlier. DOL implemented this policy change without allowing any of the companies impacted to comment on or challenge it during notice-and-comment rulemaking.

In addition, the Sixth Circuit's embrace of DOL's *ultra vires* policy creates negative consequences, like additional financial obligations for self-insurers that could potentially result in a system where an operator's liability could, in effect, be covered twice—by a current self-insurer and former self-insuring parent.

Operators are required to pay an excise tax, which is the primary source of revenue for the Trust Fund. *See* 2023 CRS Report at 1. Since 1990, excise tax revenue has generally exceeded combined benefit payments and administrative costs. *See* 2018 GAO Report at 8. Interest payments on the Trust Fund's outstanding debt from earlier years of borrowing, however, have meant the Trust Fund's total expenditures continue to exceed its total revenues. *Id.* at 9. "As a result, the principal amount of the Trust Fund's total outstanding debt to Treasury's general fund increased and exceeded $10 billion by fiscal year 2008." *Id.*

But if existing self-insurers, who sold their properties and liabilities before DOL's Bulletin, had known that DOL might still hold them responsible for such liabilities in the future, they likely would have sold these properties for more money to cover future potential claims. Without those additional resources, existing self-insurers are in a weaker financial position to meet future potential obligations to former subsidiaries.

In 2005, Arch sold Apogee and its liabilities. The sale price contemplated the elimination of federal black lung liabilities, but Arch was then held liable—due to DOL's Bulletin issued ten years after the sale—for Howard's benefits when Patriot went bankrupt in 2015. Had Arch known when it sold Apogee that it might still be liable a decade later, it likely would have sold Apogee and the liabilities for more money to cover this potential liability.

Ultimately, for future self-insurers, the Sixth Circuit's decision means uncertainty because DOL can now turn their self-insurance contracts into commercial-insurance agreements whenever the agency wants. As a result, self-insurers will need even more collateral—both for their existing properties' liabilities and their former subsidiaries' liabilities—to protect their interests. DOL's new policy will make securing additional collateral even more difficult given the tight insurance and bonding market for these types of obligations. *See generally* The Surety & Fidelity Association of America, Comments on Proposed Rule Regarding Black Lung Benefits Act: Authorization of Self-Insurers, at 1-2 (Apr. 19, 2023), https://www.regulations.gov/comment/WCPO-2023-0001-0019. The idea that an operator's liabilities would be covered twice—first, by its current self-insurer, and second, by its former self-insurer—flies in the face of what Congress intended in creating the Trust Fund.[6]

Allowing the Sixth Circuit's decision to stand will create negative consequences for the mining industry and its insurance market, leading to fewer self-insurers and potentially added burdens on the Trust Fund.

[6] Congress's "original intent of establishing trust fund financing for black lung benefits" was "'to reduce reliance on the Treasury and to recover costs from the mining industry.'" 2023 CRS Report at 15 (quoting U.S. Cong., Joint Comm. on Taxation, *General Explanation of Tax Legislation Enacted in the 110th Congress*, 110th Cong., JCS-1-09, at 302 (Mar. 2009)). Therefore, Congress's intent was not to overburden the mining industry by creating unending financial burdens for operators.

III. The Sixth Circuit Placed DOL's Interests Over the Reliance Interests of Self-Insurers.

The Sixth Circuit unreasonably deferred to and sided with DOL's interests over the reliance interests of self-insurers. These stakeholders' reliance interests include following the BLBA and current self-insurance rules to understand who must pay benefits. Moreover, the BLBA will no longer be able to provide assurances to self-insurers of what the law is if DOL can change BLBA's practical requirements upon mere issuance of a Bulletin, much less one that is not even subject to notice-and-comment rulemaking.

"[R]eliance interests in the Supreme Court's law of interpretation are intertwined with the legitimacy of judicial review and statutory implementation." William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 Vand. L. Rev. 681, 683 (Apr. 2023). Reliance interests provide justifications for doctrine and influence the way such doctrine is applied.

Where an agency's interpretation would impose liability for conduct that occurred well before that interpretation was announced, accepting an agency's interpretation "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks and citations omitted); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose "new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages").

Courts have consistently held against agencies that change their interpretation of long-standing rules because of the unfair surprise it causes regulated parties. *Christopher*, which concerned a provision of the Fair Labor Standards Act ("FLSA") that required employers to pay employees overtime wages unless the employee was employed as an exempt employee or "outside salesman," is a prime example. For decades, the pharmaceutical industry treated pharmaceutical sales representatives as outside salesmen. *See* 567 U.S. at 158-59. But in 2009, DOL decided—without providing opportunity for public comment—that under the FLSA, pharmaceutical sales representatives did *not* qualify as outside salesman, and therefore they were *not* exempt from FLSA's overtime-compensation requirement. *Id.* at 159. As a result, pharmaceutical sales representatives would be entitled to overtime pay per this new interpretation. This Court disagreed, finding that these sales representatives were exempt, thus the employers should not be required to pay overtime wages. As the Court explained, "[t]here are now approximately 90,000 pharmaceutical sales representatives; the nature of their work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week." *Id.* at 158. And "[o]ther than acquiescence, no explanation for the DOL's inaction is plausible." *Id.* "[W]here . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, *the potential for unfair surprise is acute*." *Id.* (emphasis added).

The same principle was at play in *Alabama Association of Realtors v. Department of Health & Human Services*, 594 U.S. 758 (2021). There, the CDC issued a 120-day eviction moratorium for property owners, which the CDC extended several times during the COVID-19 pandemic, that put associations of real-estate agents, rental-property managers, and millions of landlords across the country "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery" for months. *Id.* at 765. The Court held that the CDC did not have the authority to impose the eviction moratorium because Congress had not given the agency the authority to do so. *Id.* at 764. Notably, the Court emphasized that landlords' reliance on rent payments essentially outweighed the government's attempt to alleviate burdens caused by COVID-19. *See id.* at 765-66 (finding that as harm to the landlords increased because of the moratorium, the government's interests decreased); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410 (2024) (finding that "[r]ather than safeguarding reliance interests, *Chevron*[*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*] affirmatively destroys them" by allowing agencies to change course even when Congress has given them no power to do so).

DOL's Bulletin changed the agency's insurance practices in 2015, but Arch sold Apogee and its black-lung liabilities in 2005. Thus, for ten years, Arch and Apogee relied on traditional insurance law and DOL policy here, which did not require self-insurers to be liable for their former subsidiaries. The fact that the

DOL changed its policy a decade later, and in effect, turned Arch's self-insurance contract into a commercial-insurance contract, is the kind of unfair surprise that *Christopher* warned against. *See* 567 U.S. at 158 ("[W]here . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.").

DOL's Bulletin creates grave uncertainty for operators and insurers alike. Like the landlords in *Alabama*, where the uncertainty of receiving rent payments continued for months, if the Sixth Circuit's decision stands, operators will face uncertainty concerning what it means to obtain self-insurance versus commercial insurance and whether they can be perpetually liable for their former subsidiaries' insurance obligations.

IV. The Sixth Circuit Split Creates Inconsistencies for National Operators.

In addition to the circuit split identified by Petitioners concerning the *Chenery* doctrine and its impact on the Bulletin—with the Seventh Circuit (*Grimes*) and Fourth Circuit (*American Energy*) applying *Chenery* and the Sixth Circuit (*Howard*) not doing so—the Sixth and Seventh Circuits at least are now squarely split on the legality of DOL's Bulletin. This substantive split of authority creates even more uncertainty for self-insurers and inconsistencies for operators with national operations.

Companies like Arch have operations and employees across the country, and they will now be subject to the DOL's new policy in states like Kentucky (Sixth Circuit), but not in Illinois (Seventh

Circuit). In the long term, such a difference will destroy the uniformity that Congress intended when it enacted the BLBA and that federal courts seek to have concerning national policy. *Glen Coal Co.* v. *Seals*, 147 F.3d 502, 513 (6th Cir. 1998) (cautioning against adopting different rules from one circuit to another because it "destroy[s] the desired uniformity of application of the Black Lung Benefits Act"); *Nat'l Mining Ass'n v. Dep't of Lab.*, 292 F.3d 849, 865 (D.C. Cir. 2002) (reiterating that inconsistencies across circuit courts would run "afoul of the BLBA's statutory goal of uniformity"); *see also* Deborah Beim & Kelly Raider, *Legal Uniformity in American Courts*, J. of Empirical Legal Stud., vol. 16(3), 448-478, at 450-51 (Sept. 2019) ("[C]ircuit splits . . . can make it difficult for businesses to operate in multiple jurisdictions, or to make contracts that are enforceable nationwide" and, thus, "[p]art of the reason the Supreme Court resolves intercircuit splits is a preference for legal uniformity and a commitment to unifying doctrine across the country. Uniformity in the application of U.S. federal law by federal courts is a value as old as *Federalist 80*.").

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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