No. 24-784

In the Supreme Court of the United States

ARCH RESOURCES, INC., FKA ARCH COAL, ET AL.,

Petitioners,

V.

DOUGLAS PENNINGTON, ACTING DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Sixth Circuit's decision below erodes the *Chenery* doctrine without any explanation. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). It does so in an acknowledged break with the Fourth and Seventh Circuits—the latter deciding an identical case just 14 days after the decision in this case. App. 26a. Neither the Sixth nor the Seventh Circuit voted to reconsider its decision en banc. That leaves this Court to vindicate *Chenery*'s "now-bedrock principle" of administrative law. *Food & Drug Administration* v. *Wages & White Lion Investments*, 604 U.S. ___, 145 S.Ct. 898, 928 (2025). As amici confirm, this issue is existential for the mining industry; it is equally important for agency accountability.

The briefs in opposition are silent where it matters and noisy where it doesn't. On the essential fact of a circuit split, neither the Department of Labor nor the claimant denies the split in this case. The Department then does something truly odd. It asserts that the split is deeper than the Petition argued. Dept. BIO 9–10. Rather than a 2–1 split, the government asserts that *Chenery*'s application to Black Lung Benefits Act ("BLBA") cases is actually 2–5. *Ibid.* Candidly, the split is not that deep. The cases the Department cites either do not discuss *Chenery* or arise in a context where *Chenery* does not apply. But even if the Department were right, a deeper split only increases the importance of this Court's review.

The Department's only other response is to say that acute and recent division among the circuit courts "could well disappear in the future." Dept. BIO 12. If that were a convincing response to a circuit split, this Court would never hear a case. It is always true that circuits "could" change their views and resolve a split on their own. That hypothetical resolution is especially implausible, however, when the split is recent and acknowledged, and both the Sixth and Seventh Circuits declined to reconsider their decisions en banc.

What remains are two merits arguments on whether *Chenery* includes an exception allowing a court of appeals to supply a justification that was not the basis for the agency's action—in fact, the ALJ and Board expressly rejected it—and no party had the opportunity to argue it. Dept. BIO 7–9; Claimant BIO 14-17. Arch is happy to have the merits debate and has requested summary reversal, Pet. 21–27, but even if the merits were difficult, that is only a reason to grant the petition rather than summarily reversing. As detailed below, the merits are not hard, and the only authority cited for the Department's proposed exception to *Chenery* is a concurring opinion from another Sixth Circuit case. Dept. BIO 8 (citing *Crockett Colleries, Inc.* v. *Barrett*, 478 F.3d 350, 358 (6th Cir. 2007) (Rogers, J., concurring)). Even the government's merits argument highlights the Sixth Circuit's aberrant approach to *Chenery*.

Finally, both the Department and claimant attempt a vehicle argument based on an issue that cuts exactly the other way. They point out that much of the Sixth Circuit's reasoning was focused on Arch's request to introduce evidence of a change in the Director's approach to self-insurance. Dept. BIO 14; Claimant BIO 17. Not only is Arch not appealing that issue, but the exclusion of evidence means that the Sixth and Seventh Circuits were reviewing identical cases. The Seventh Circuit in *Grimes* also considered a case in which the ALJ had excluded Arch's evidence of a policy change. Far from creating vehicle problems, the Sixth Circuit's evidentiary holding only makes this case a more perfect vehicle for the legal question of whether *Chenery* allows new justifications that the agency did not embrace. Because the obvious and long-standing answer to that question is "no," the Court should grant the petition and either summarily reverse or hear this case on the merits.

ARGUMENT

I. The Decision Below Creates an Acknowledged Split with Decisions in the Fourth and Seventh Circuits.

The common problem in all BLBA cases involving bankrupt operators is who pays the benefits for that operators' former employees who contract disabling pneumoconiosis. The statute and regulations include expansive liability provisions for former operators and

their parent companies. *E.g.,* 20 C.F.R. §§ 725.494 and 725.495. The Department's brief in opposition occasionally veers into citing those provisions. Dept. BIO 14. But the Department did not hold Arch liable as an operator, but "as an insurer." App. 118a–121a. In fact, it did the same for dozens of companies in hundreds of cases pending in the courts below. That raises the legal question whether any source of law allows the Department to impose insurance liability on former self-insured parent companies.

In its search for a legal basis to hold Arch responsible as an insurer, the Sixth Circuit considered several justifications from Respondents and apparently found them all wanting. So it conjured a justification of its own: 20 C.F.R. §§ 726.110(a)(1) and 726.4(b). App. 16a–17a. Setting aside the fabulous legal error of concluding that those provisions impose liability, *see* Pet. 24–27, App. 45a–47a (Seventh Circuit), the Sixth Circuit's adoption of a rationale on which the agency had not relied and which it had, in fact, eschewed offends *Chenery* as understood in the Fourth and Seventh Circuits.

Respondents do not dispute the circuit split. Nor could they. The decision below issued two weeks before the Seventh Circuit decided *Grimes*, which directly addresses this case and explains the error in the Sixth Circuit's reasoning as well as the division over *Chenery*, which it held "applies with ***full force***."

App. 42a (emphasis added). The Fourth Circuit's position is even more entrenched. For 25 years, the Fourth Circuit has held in numerous cases that "affirming the Board's decision on an alternative ground not actually relied upon by the Board is prohibited under the Chenery doctrine." *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421, 426 (4th Cir. 2006); see also *American Energy, LLC v. Director*, OWCP, 106 F.4th 319, 335 (4th Cir. 2024); *Gulf & W. Indus.* v. *Ling*, 176 F.3d 226, 230 (4th Cir. 1999).

The Department rightly concedes that the Fourth and Seventh Circuits have "reached the opposite conclusion" from the court below, Dept. BIO 10, before hypothesizing that they "could" change their approach in the future, *id.* at 12. As noted above, spontaneous resolution is always possible, but it is unlikely when both circuits have applied their correct approach within the last 12 months, and the Seventh Circuit did so even after the decision here. This split is not going away on its own.

The Department's only other response to the circuit split is the unexpected argument that it is actually ***deeper*** than Arch suggested. Dept. BIO 9–10. As the petitioner, Arch would ordinarily welcome that discovery, but the cases the Department identifies do not engage the issue in the present case. Three of the cases do not discuss or even cite *Chenery*. *Lauderdale* v. *Director, OWCP*, 940 F.2d 618 (11th

Cir. 1991); *J.M. Martinac Ship-building* v. *Director, OWCP*, 900 F.2d 180 (9th Cir. 1990); *United Brands Co.* v. *Melson*, 594 F.2d 1068 (5th Cir. 1979). The fourth case that the Department would add to the Sixth Circuit's side of the split cites *Chenery* in a footnote, but only to note that the doctrine did not apply because the parties had, in fact, argued the relevant point below. *Consolidation Coal Co. v. Smith*, 837 F.2d 321, 323 n.3 (8th Cir. 1988). The *Smith* court simply reversed the ALJ's application of 20 C.F.R. § 727.203, which necessarily had been before the ALJ and the Board. That is not a *Chenery* case at all.

Indeed, in *Lauderdale*, *J.M. Martinac* and *Smith*, the Director at least argued the position that the court ultimately adopted. Here, the Department never contended that Sections 726.110(a)(1) and 726.4(b) were a source of insurance obligations. If it had taken that position, Arch could have pointed out that the former provision does not ***create*** insurance obligations but merely requires self-insurers to make payment for obligations they ***already have*** "as required by the Act;" the latter provision is even farther afield because it addresses operator liability, whereas the Department held Arch responsible as an insurer. App. 121a-122a; see App. 46a–47a (Seventh Circuit). Indeed, the Director did not argue that Part 726 was a source of insurance obligations; the ALJ and Board expressly rejected that possibility, App.

122a, 149a; but the Sixth Circuit reversed and for the first time relied on the provisions everyone else had rejected. That posture—a new justification on appeal, which was not part of Respondents' position before the agency adjudicators—distinguishes three cases that the Department would add to the circuit split. It also shows the unfairness that *Chenery* prevents. The final case, *Melson*, is also not a *Chenery* case because its outcome turned on the Fifth Circuit applying an intervening judicial decision that was relevant to the agency's existing rationale, not a new rationale devised for the first time on appeal.

Respondents rightly concede the existence of a circuit split. The recency with which the circuits have confirmed that split—all three of them affirming their positions in 2024—and the failed en banc polls in both the Sixth and Seventh Circuit belie any hope that the split is going away. This Court should grant the petition.

II. On the Merits, the Sixth Circuit's Approach Is Incompatible with *Chenery*.

Respondents offer several merits arguments, either to distract from the question of certiorari or to stave off summary reversal. Each of them fails.

A. *Chenery* Applies to Adjudications.

The leading merits argument in both briefs in opposition is that *Chenery* should not apply to an

agency adjudication. Dept. BIO. 7–9; Claimant BIO 14–17. Respondents point out that the ALJ and Board serve a "quasi-judicial" function within the Department, and courts review their decisions under the familiar APA standard. Dept. BIO 8. Fair enough. But Respondents then err in ignoring these quasi-judicial bodies' place within the Department of Labor, focusing on the fact that they do not personally have policymaking authority. *Ibid*. That fact does not distinguish them from any other agency adjudication and would shrink *Chenery* even more drastically than the decision below.

The notion that an agency adjudicator must wield policymaking power for *Chenery* to protect regulated parties from post hoc justifications is made from whole cloth. For starters, the Director is the respondent in a petition for review, not the Board or the ALJ, and no one disputes that the Director wields policymaking power. Indeed, the Director's ***change*** of policy that is the heart of the underlying dispute. Pet. 12–13. That the Director's policies are challenged through adjudications brought before an ALJ and the Board is of no moment. The Director is a party before the quasi-judicial bodies and must at least present the argument that eventually prevails on judicial review. Otherwise, it cannot be the grounds "upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87. Here, the Director (correctly) never

argued that 20 C.F.R. §§ 726.110(a)(1) and 726.4(b) were a source of liability.

This Court and others consistently apply *Chenery* to adjudications made by quasi-judicial bodies within federal agencies. See, *e.g.*, *Poole* v. *Kijakazi*, 28 F.4th 792, 796 (7th Cir. 2022) (applying *Chenery* to ALJ decision); *Fargnoli* v. *Massanari*, 247 F.3d 34, 44 & n.7 (3d Cir. 2001) (same). Just as the Commissioner in *Poole* and the district court in *Fargnoli* could not supply justifications the ALJs did not adopt, so too the Sixth Circuit erred in supplying a justification the ALJ and Board did not adopt (and, in fact, affirmatively rejected). That makes sense because, like rulemaking, "adjudication is subject to the requirement of reasoned decisionmaking as well." *Allentown Mack* v. *NLRB*, 522 U.S. 359, 374 (1998). If it were not, an agency could dodge the APA by "promulgat[ing] virtually all the legal rules in its field through adjudication rather than rulemaking." *Ibid.* The Director has attempted just that and now attempts to complete the coup by distinguishing *Chenery* on the very basis that the new policy is appearing through adjudication rather than going through notice-and-comment rulemaking. Allowing that maneuver to succeed is an earthquake in administrative law.

The only authority the Department cites for this new rule is a concurring opinion in the Sixth Circuit.

Dept. BIO. 8 (citing *Crockett Colleries*, 478 F.3d at 358 (Rogers, J., concurring)). That concurrence eventually became the basis for the Sixth Circuit's departure from its sister circuits. *Arch of Kentucky v. Director, OWCP*, 556 F.3d 472, 480 (6th Cir. 2009) (citing *Crockett* concurrence). No other court has adopted its reasoning. Ultimately, the Department's merits argument only highlights the circuit split and the Sixth Circuit's idiosyncratic approach to *Chenery*.

B. Claimant's APA Argument Misunderstands Supreme Court Authority.

Claimant has a variety of policy grievance that are better addressed to Congress, ranging from the Bankruptcy Code to the congressional decision to exempt the federal government from BLBA penalties.[1] Claimant BIO 3–5. Claimant's only unique argument is the APA's harmless error exception to *Chenery*. *Id.* 14–16 (citing 5 U.S.C. § 706).

To suggest that the Sixth Circuit's error in imposing insurance liability without a legal basis was

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[1] Claimant also suggests that Arch somehow contributed to the Patriot fiasco. Claimant BIO 4. It did not. For one thing, Arch sold Apogee to Magnum—not Patriot—and Patriot only bought Magnum several years later. More importantly, both Apogee and Magnum were going concerns at the time of the acquisition.

harmless, Claimant cites the Court's recent decision in *White Lion*. In *White Lion*, the Court recognized that the APA's harmless error rule tempers *Chenery*'s remand rule. 145 S. Ct. at 928. At issue was an FDA policy statement saying that a company's marketing plans would be "critical" to obtaining approval for selling e-cigarettes. *Id.* at 913. The FDA argued that it harmlessly failed to comply with that policy because it had reviewed "materially indistinguishable" marketing plans for other companies. *Id.* at 929. The Fifth Circuit disagreed and limited the harmless error rule to cases "where the agency would be *required* to take the same action no matter what." *Id.* at 915. This Court rejected that legal standard and remanded for the Fifth Circuit to determine whether the error "had no bearing on the procedure used or the substance of [the] decision reached." *Id.* at 930 (quotation omitted).

None of that is relevant here. Harmless error applies to procedural foot faults at the agency level; it does not allow courts to consider new justifications that did not form the basis for the agency's action. For that reason, no one argued harmless error before now. Even if the APA's harmless error rule applied to new rationales inserted on judicial review, it would not excuse the Sixth Circuit's actions here. The Sixth Circuit's failure to follow *Chenery* is not harmless. By inventing new and incorrect legal bases for liability, the Sixth Circuit filled the void of positive law to hold

Arch liable for benefits. Absent that rationale, the court below would have dismissed Arch just like the Seventh Circuit did.

III. This Case Is an Ideal Vehicle to Confirm *Chenery*'s Application.

Respondents invent vehicle issues to offset the defined circuit split in this case. For instance, Claimant cites to new self-insurance regulations that are inapplicable to this case. Claimant BIO at 19 (citing 89 Fed. Reg. 100,304 (Dec. 12, 2024)). Those regulations merely set financial security requirements; they do not address the trigger for self-insurance liability. Additionally, they are not retroactive. 89 Fed. Reg. at 100,304 ("This rule is effective January 13, 2025.").

Respondents also argue that this case is a poor vehicle based on an evidentiary issue that Arch is not appealing. They have it exactly backwards. The Sixth Circuit's refusal to consider evidence of a changed policy makes this case identical to *Grimes*. If anything, a vehicle problem could only exist if the circumstances were reversed—*i.e.*, the ALJ admitted evidence and made a fact-bound determination. As it stands, there is no opportunity for vehicle issues. But, more importantly, the evidentiary dispute below is irrelevant to the legal question of whether *Chenery* applies.

Before the ALJ, Arch attempted to introduce evidence to show that the Director's policy in Bulletin 16-01 was a departure from DOL's regulations and past practice. Arch had not presented its evidence to the district director because the evidence did not relate to one of the five criteria for identifying a responsible operator (Arch was not held liable as an operator). The ALJ and Board nevertheless concluded that Arch should have presented it at the earlier stage. Arch appealed that decision to the Sixth Circuit, which sided with the Department. It has not appealed that issue to this Court.

Nothing about the evidentiary fight relates to the Question Presented. If anything, the exclusion of evidence makes this case a ***better*** vehicle for deciding the legal question of whether *Chenery* precludes the Sixth Circuit from identifying 20 C.F.R. §§ 726.110(a)(1) and 726.4(b) as the source of an insurance obligation, despite the Department never relying on those provisions. Because the ALJ excluded evidence of past practices, the legal question of how the Director can impose an insurance obligation on Arch is front and center. When all of Respondents' arguments failed to satisfy the Sixth Circuit, it found a rationale of its own and sprung it on Arch for the first time in the opinion. *Chenery*, as a rule in service of basic fairness, does not permit that approach.

CONCLUSION

The Court should grant the Petition.

April 29, 2025

Respectfully submitted,

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