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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit properly declined to disturb the black lung benefits of a deceased coal miner by affirming his award on alternative grounds in part, a regular practice in other circuits too given the Administrative Procedure Act's rule of "prejudicial error" from 5 U.S.C. § 706(2) and the Benefits Review Board's role as a nonpolicymaking, quasi-judicial body that does not raise concerns under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)?

LIST OF PARTIES

Petitioner: Arch Resources, Inc. (f/k/a Arch Coal, Inc.); and Apogee Coal Company, LLC

Respondents: Douglas Pennington, Acting Director, Office of Workers' Compensation Programs ("OWCP"), Department of Labor; the Estate of David Howard; and Cynthia E. Howard (widow of David Howard).[1]

Amicus Curiae: National Mining Association; and Milliman, Inc.

Case Name: Arch Resources, Inc., fka Arch Coal, et al. *v.* Douglas Pennington, Acting Director, Office of Workers' Compensation Programs, Department of Labor, et al.

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1. Cynthia E. Howard—widow of named respondent David M. Howard—provides notice that her husband died on July 15, 2023. She also seeks to be added as a party in this case in her individual capacity. She is a directly interested party under 20 C.F.R. § 725.360(b) because she would be the recipient of the unpaid retroactive benefits in this claim and has filed her own survivor's claim which is legally derivative of her husband's award that is at issue here. *See* 30 U.S.C. § 932(*l*). This is not a substitution motion under Rule 35.1 because Mrs. Howard has not determined yet whether she will seek to be appointed over Mr. Howard's estate. There is not a disagreement among the family, Mrs. Howard has simply not yet determined whether opening a probate court case in Kentucky is necessary. Mrs. Howard thus seeks at this time to be added in her individual capacity rather than as a representative of Mr. Howard's estate, as no such representative exists at present.

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STATEMENT OF THE CASE

This is a case about corporate maneuvers and a coal mining family whose modest black lung benefits remain in limbo during this litigation.

A. The Howard Family and Their Interest in This Case

David M. Howard was an underground coal miner in Harlan County, Kentucky, a part of Appalachia made famous for its Twentieth Century labor struggles.[2] He spent his entire career as a coal miner, from 1977 to 1997, working in a mine in Lynch, a town that was originally a company town owned by U.S. Steel.

The owner of that mine changed during Mr. Howard's employment. In 1984, U.S. Steel sold the mine to Arch Mineral Corporation. Arch operated the mine under the name of various subsidiaries, including Apogee Coal Co. The history of this transition at the mine where Mr. Howard worked is explained in *International Union, United Mine Workers of America v. Apogee Coal Co.*, 330 F.3d 740, 741–43 (6th Cir. 2003).

There is no dispute in this case that at the end of Mr. Howard's career in 1997, his direct employer was Apogee Coal Co., an Arch subsidiary which Arch self-insured. *See* Petition 11.

There is also no dispute at this point that Mr. Howard suffered from a totally disabling respiratory impairment

2. *E.g.,* Florence Reece, *Which Side Are You On?*, *on* Classic Labor Songs (Smithsonian Folkways Recordings 2006); Harlan County, USA (Cabin Creek Films 1976).

due to black lung disease. *See* App. 2a. Black lung is a "severe, and frequently crippling, chronic respiratory impairment . . . caused by long-term inhalation of coal dust." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976). Congress created the black lung benefits system to "spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.* at 18.

Eventually, as this claim was being litigated, black lung cost Mr. Howard his life—as it does many coal miners. He died on July 15, 2023 with his primary cause of death listed on his death certificate as respiratory failure.

The only dispute in this case concerns who should pay the benefits at issue here and whether the Howard family should have to wait longer to receive the benefits that Mr. Howard was owed—but never paid—before his death. Specifically, when the U.S. Department of Labor awarded Mr. Howard's claim in 2016, it determined that Arch Coal owed Mr. Howard $22,083 for the period between when he filed this claim in November 2014 until the Department of Labor initially awarded the claim in September 2016. Because Arch declined to pay these benefits and sought review of Mr. Howard's award, the agency's Black Lung Disability Trust Fund began paying interim benefits to Mr. Howard. However, the Trust Fund cannot pay retroactive benefits like the $22,083 that Mr. Howard was owed. *See* 26 U.S.C. § 9501(d)(1)(A).

Over the past nine years as Arch has litigated this claim, Mr. Howard's $22,083 has remained unpaid. As a result, the amount owed to the Howard family has increased due to interest, penalties, and similar

retroactive benefits that are unpaid in his widow Cynthia Howard's survivor's claim. The total amount that Arch owes to Cynthia Howard[3] is now nearly $60,000.[4]

This $60,000 that Mrs. Howard is owed depends on the outcome of this petition. If the Court denies certiorari, the litigation of Mr. Howard's claim will conclude and Mrs. Howard should be paid. If the Court grants certiorari, then at minimum Mrs. Howard will have longer to wait, and if the Court were to agree with Arch, then Mrs. Howard could lose the majority of what she is owed, as the Department of Labor's regulations do not allow for interest or penalties to be paid by the agency's Trust Fund. *See* 20 C.F.R. §§ 725.607(c), 725.608(e).

B. The Context of Patriot Coal and This Claim

In the past few decades, coal companies have engaged in reorganization schemes whereby large coal corporations unload minimally profitable assets and enormous amounts of liability. *See* Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 Stan. L. Rev. 879 (2019). To

3. The amounts that Mr. Howard was owed prior to his death are now owed to his surviving spouse rather than to his estate because the black lung benefits system directs that such underpayments are paid directly to family members outside of the estate process, with surviving spouses like Mrs. Howard given priority. *See* 20 C.F.R. § 725.545(c).

4. In addition to the $23,083 in retroactive benefits in Mr. Howard's claim, Arch owes Mrs. Howard $20,975.28 in penalties under 20 C.F.R. § 725.607, $14,680.05 in interest under § 725.608 (as of April 16, 2025), and $2,213.70 in retroactive benefits in her survivor's claim.

do so, these coal companies create new, smaller companies that take on these assets and insulate the larger company from liabilities. *Id.* at 906. And while this scheme may extend the larger company's lifespan, it sets up the smaller company for failure. These smaller companies are burdened with so much liability in comparison to the amount of assets they own that any unexpected dip in the coal market is enough to send them into bankruptcy.

America's two largest coal companies, Peabody Energy and Arch Resources, used this strategy as they sought to shed their less profitable coal operations in the eastern United States. When Peabody created Patriot Coal in 2008, it assigned 13% of its coal reserves to Patriot, but 40% of its health care liabilities. *Id.* at 912. A year later, Patriot bought Magnum Coal Co., which Arch created in 2005 and transferred some of its holdings to including Apogee Coal (Mr. Howard's direct employer). *Id.* In Magnum's creation, Arch assigned it 12.3% of its assets but 96.7% of Arch's retirement liabilities. *Id.* (citing *In re Patriot Coal Corp.*, 493 B.R. 65, 89 (Bankr. E.D. Mo. 2013)). Patriot's purchase of Magnum included the purchase of over $500 million in retirement liabilities that brought Patriot's liability total to over $2 billion. *Id.* In 2013, a bankruptcy judge observed that "over 90% of the health care beneficiaries who now receive post-retirement benefits from [Patriot Coal] were former employees or dependents of former employees of Peabody, Arch or their subsidiaries, and never worked one day for [Patriot Coal]." 493 B.R. at 90.

The heavy debt load that Patriot faced from its creation is why the United Mine Workers of America alleged that Patriot Coal was "created to fail." Macey

& Salovaara, 71 Stan. L. Rev. at 913 (quoting Ken Ward Jr., *Patriot Bankruptcy Case Heating Up*, Charleston Gazette-Mail (Aug. 25, 2012)). Even Patriot's CEO, Ben Hatfield, admitted that Patriot was destined for failure, "Frankly, . . . 'how could that work?' It looks like a bad balance . . . [with] too many liabilities and not enough assets . . . . Something doesn't quite smell right here." *Id.* (quoting Daniel Flatley, *Patriot Coal: An American Bankruptcy, Part III; The Strange, Brief Life of Patriot Coal*, 100 Days in Appalachia, https://perma.cc/L88Z-CA76) (modification in original).

Ultimately, Patriot Coal proved not to be viable and had to go through two rounds of Chapter 11 bankruptcy before liquidating most of its assets in 2015. *Id.* at 913–18.

C. This Claim's Procedural History

When Mr. Howard filed this claim in November 2014, Patriot Coal was still in the bankruptcy process. During the first step of this claim though, Patriot's 2015 bankruptcy plan was confirmed. After that, on December 8, 2015, the U.S. Department of Labor's Office of Workers' Compensation Programs ("OWCP") determined that the proper course was to look past Patriot Coal and hold Arch liable in this claim. *See* App. 191a.

Arch had an opportunity within 90 days of December 8, 2015 to develop and submit documentary evidence regarding its liability. *See* App. 193a; 20 C.F.R. § 725.408(b)(1). However, it declined to do so. Instead, Arch made a legal argument based on the Patriot Coal bankruptcy.

On September 26, 2016, the Department of Labor awarded Mr. Howard benefits and found Arch to be

liable as Apogee Coal's self-insurer. Arch then requested a formal hearing before an Administrative Law Judge ("ALJ"). Before the ALJ, Arch sought discovery from OWCP to develop documentary evidence regarding its liability. Through a series of prehearing orders, the ALJ denied discovery as it was then too late for such liability evidence. *See* Order Denying Request for Subpoenas (May 28, 2019);[5] Order Granting Motion to Reconsider & Denying Request for Subpoenas (June 17, 2019);[6] Order Denying Employer's Motion to Transfer Liability (July 10, 2019);[7] Order Granting Director's Motion for Protective Order (July 31, 2019).[8]

The ALJ reawarded benefits on February 25, 2020, maintaining that Arch's efforts to defeat liability were presented too late in this claim. *See* App. 49a–125a.

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5. https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/HOWARD_DAVID_M_v_APOGEE_COAL_COMPANY__2017BLA05163_(MAY_28_2019)_125326_ORDER_PD.PDF

6. https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/HOWARD_DAVID_M_v_APOGEE_COAL_COMPANY__2017BLA05163_(JUN_17_2019)_111846_ORDER_PD.PDF

7. https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/HOWARD_DAVID_M_v_APOGEE_COAL_COMPANY__2017BLA05163_(JUL_10_2019)_162649_ORDER_PD.PDF

8. https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/HOWARD_DAVID_M_v_APOGEE_COAL_COMPANY__2017BLA05163_(JUL_31_2019)_082022_ORDER_PD.PDF

Arch appealed to the agency's Benefits Review Board, an entity that Congress formed in 1972 to serve the role that U.S. District Courts had traditionally played in reviewing agency decisions in black lung and longshore cases. *See* 33 U.S.C. § 921(b); House Rep. No. 92-1441, 1972 U.S.C.C.A.N. 4698, 4709. The "Benefits Review Board is not a policymaking agency." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Instead, the Board reviews decisions under a handful of occupational injury statutes for substantial evidence and legal error.[9] *See* 33 U.S.C. § 921(b).

The Board affirmed the ALJ's award in full on October 18, 2022. *See* App. 126a–161a. At that point, Arch sought Article III review, which Congress channeled directly to the U.S. Court of Appeals (as the District Courts' role was replaced by the Board). *See* 33 U.S.C. § 921(c).

The Sixth Circuit denied Arch's petition for review. *See Apogee Coal Co. v. Director, OWCP*, 112 F.4th 343 (6th Cir. 2024); App. 1a–23a. The Sixth Circuit first analyzed evidentiary issues and determined that Arch's requests to expand the record both before the Court and before the agency were each unpersuasive. *See id.* at 350–53; App. 8a–15a. As a result, this case's liability record is limited to what Arch submitted in 2016. To the merits, the Sixth Circuit determined that due to the parent-subsidiary relationship between Arch and Apogee, Arch was

9. The Benefits Review Board was created as part of the Longshore and Harbor Workers' Compensation Act, *see* 33 U.S.C. § 921(b), but the Board also reviews ALJ decisions under the Black Lung Benefits Act, 30 U.S.C. § 932(a), the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), the Defense Base Act, 42 U.S.C. § 1651(a), and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171(a).

properly named under the black lung benefits regulations' exceptionally broad definition of liable parties.[10] *Id.* at 354; App. 17a. While part of this involved an analysis of black lung regulations that the Board did not explicitly cite, part of the Sixth Circuit's decision also came back to Arch's failure to show that it was not the liable party "within the procedural requirements of the [statute] and accompanying regulations"—i.e., Arch was too late. *Id.* at 354; App. 18a. The Sixth Circuit also held that the U.S. Department of Labor did not violate the Administrative Procedure Act or due process in determining that Arch was liable in this claim. *Id.* at 354–57; App. 18a–23a.

After Arch unsuccessfully sought en banc review, it petitioned this Court for certiorari.

At the same time, in a parallel proceeding that is still before the U.S. Department of Labor, Arch is challenging whether it was correctly named as the liable party in Mrs. Howard's survivor's claim. *See* Order, *Cynthia Howard v. Apogee Coal Co.*, No. 2024-BLA-05158 (DOL OALJ Jan. 6, 2025).[11] In that claim, Arch has submitted extensive

10. The broad definition of liable parties in black lung claims flows from 30 U.S.C. § 932(i). A Senate Report explaining that section said, "Many coal operators have avoided liability for claims arising out of employment in their mines because of various corporate transactions and changes in corporate operations," and the legislative intent was to "ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operators' mines *to the maximum extent feasible*." S. Rep. No. 95-209, at 9 (1977).

11. https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2024/Howard_v_Apogee_Coal_Company__2024BLA05158_(JAN_06_2025)_064209_HRGCL_PD.PDF

liability evidence that is not part of the record in this claim. Briefing will be complete before the ALJ in that claim on April 25, 2025. *Id.* at 2.

SUMMARY OF THE ARGUMENT

Arch asks the Court to grant certiorari concerning the application of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), to black lung cases. That issue though is not worth this Court's review, especially considering the harm to the Howard family that further delay would cause.

First, any difference among the circuits on this issue is functionally slight and not of an importance that this Court should settle. All courts apply the Administrative Procedure Act's "prejudicial error" rule from 5 U.S.C. § 706(2) in black lung cases, which has the practical effect of affirming on different grounds. As this court recently held in *FDA v. Wages & White Lion Investments*, 145 S. Ct. 898, 928–29 (2025), the remand rule from *Chenery* must be understood alongside the harmless-error rule that the APA introduced after *Chenery*.

Further, considering the reasons for *Chenery*, it is proper for Courts of Appeals to affirm decisions of the Benefits Review Board on alternative grounds due to that quasi-judicial body's unique, non-policymaking role. The Board serves the traditional role of the U.S. District Courts, not the more common role of agency heads who adjudicate as part of the agency's policy purpose. When a Court of Appeals affirms a Board decision on alternative grounds, it is no different than when it does so for a District Court's decision in statutes that channel judicial review in that manner. While there is some difference

among the circuits on how the Board's role interacts with *Chenery*, most circuits align with the Sixth Circuit's approach. The last decision from the Fourth Circuit addressing the intersection between *Chenery* and black lung cases recognized that the Fourth Circuit's approach is mistaken. *See American Energy v. Director, OWCP*, 106 F.4th 319, 335 (4th Cir. 2024). Any practical difference among the courts can be harmonized without this Court's involvement.

Second, Arch's real issue in this case is not with *Chenery* doctrine, but rather with the U.S. Department of Labor's decision to hold it liable in this and hundreds of other claims. In other claims though—including in Mrs. Howard's survivor's claim that is currently before the agency—Arch is developing a better evidentiary record to address the underlying issue in this case. The core dispute in this case will be better presented by future cases that lack the evidentiary issues that deeply affect Mr. Howard's claim here.

Third, after the Sixth Circuit's decision in this case, the U.S. Department of Labor finalized new regulations about self-insurance that are relevant to future cases like this. Given that this case applies the old regulations, it would be improvident to grant certiorari to discuss how self-insurance issues involving parent-subsidiary companies were handled under prior black lung regulations.

Lastly, the Howard family has already suffered too much and waited too long during the decade that this public benefits claim has remained pending. Due to the extensive litigation of this claim, Mr. Howard died without getting the benefits to which he was statutorily entitled. His widow is now owed nearly $60,000—an amount that

would allow her to pay off the mobile home that she and her deceased husband shared. Mrs. Howard deserves peace of mind and financial security that granting certiorari would endanger.

REASONS TO DENY CERTIORARI

A. An Important Circuit Split Does Not Exist on This Issue

Arch asks this Court to grant certiorari to resolve a disagreement among the Courts of Appeals about how *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), applies in the black lung context. Arch though exaggerates the differences among the circuits and the degree to which *Chenery* applies when the courts review decisions of the Benefits Review Board—a quasi-judicial body that Congress formed to serve the role of the U.S. District Courts, not to make agency policy.

A.1. The Courts Agree that the Harmless-Error Rule Applies to Black Lung Cases.

While the Sixth Circuit and Seventh Circuit reached different conclusions about Arch's liability in two black lung cases involving Patriot Coal, the split between the courts was more about the specific facts and regulations in those cases regarding Arch's liability than about *Chenery* doctrine. The Sixth Circuit decision that Arch asks this Court to review did not mention *Chenery*, and a broader examination of judicial review in black lung benefits cases shows that affirming on different grounds is common and required by the Administrative Procedure Act's "prejudicial error" rule. 5 U.S.C. § 706(2); *see also Shinseki v. Sanders*, 556 U.S. 396, 406–07 (2009).

The Court's 1943 decision in *Chenery* (often known as *Chenery I*), held that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. at 95. As the Court recognized, this is of course different than the Court's more general rule that a decision can be affirmed "on another ground within the power of the appellate court to formulate." *Id.* at 88. For example, even where the alternative basis "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it," appellate courts have wide discretion in choosing their reasons for affirming. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). However, *Chenery* broke from the general practice for situations where the agency's decision involved "a determination of policy or judgment which the agency alone is authorized to make and which it has not made." *Id.* In those situations, *Chenery* created what has come to be known as the "remand rule."[12]

12. The importance of agency policymaking in *Chenery* doctrine is demonstrated by the Court's second decision in that case, often known as *Chenery II*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). There, the Court held that agencies like the SEC can make policy either via rule or adjudication. Even though the SEC has "the ability to make new law prospectively through the exercise of its rule-making powers," "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 202–03. In contrast with the SEC, the Benefits Review Board lacks rulemaking authority; instead, Congress gave that power to the Secretary of Labor who has subdelegated it to the Director, OWCP, not the Board. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 644 (6th Cir. 2014); 20 C.F.R. § 1.2(f).

As the Court just recently explained in *FDA v. Wages & White Lion Investments*, 145 S. Ct. 898, 928 (2025), the reach of *Chenery I* was complicated three years after it was decided when Congress enacted the Administrative Procedure Act ("APA"). That statute says that when courts are reviewing agency decisions that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706(2). "The most natural interpretation of the APA's language is thus that reviewing courts should adapt the 'rule of prejudicial error' applicable in ordinary civil litigation (also known as the harmless-error rule) to the administrative-law context, which, of course, includes the remand rule." 145 S. Ct. at 928–29. As *Wages & White Lion*'s holding shows, the remand rule from *Chenery* cannot be understood in a wooden way that requires remand anytime an agency order contains an error but rather is subject to exceptions to avoid needless remands. *Id.* at 929–31. "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality).

Accordingly, all circuits agree that petitioners in black lung benefits claims must show not only an error by the agency, but also prejudice flowing from that error. *Helen Mining Co. v. Director OWCP*, 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621 (4th Cir. 2006); *Dixie Fuel Co. v. Director, OWCP*, 820 F.3d 833, 842 (6th Cir. 2016); *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 558 (7th Cir. 1991); *Hunter v. Director, OWCP*, 861 F.2d 516, 518 (8th Cir. 1988); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1347 (10th Cir. 2014); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984).

While Arch presents this case as demonstrating a split between the Sixth and Seventh Circuits, recent decisions from both courts show that their black lung precedents largely align. For example, the Seventh Circuit recently declined to address an alleged error by the Benefits Review Board because "any misstep by the Board stands to be corrected by our subsequent review of the ALJ's decision"—i.e., the court could affirm on grounds different than the Board's. *Consolidation Coal Co. v. Director, OWCP*, 129 F.4th 409, 418 (7th Cir. 2025). And in a concurring opinion from a Sixth Circuit case, Judge Thapar recognized that under *Chenery*, the court "can't reconstruct better reasoning on the ALJ's behalf"—but should still determine whether an ALJ's error is merely a "hiccup" or actually affects the "bottom-line conclusion." *Incoal, Inc. v. Director, OWCP*, 123 F.4th 808, 833 (6th Cir. 2024) (Thapar, J., concurring). The lower courts mostly agree on the practical aspects of how *Chenery* should be understood alongside the APA's prejudicial error rule.

A.2. The Concerns Underlying *Chenery* Do Not Apply to Judicial Review of the Benefits Review Board's Decisions.

Although Arch claims difficulty discerning the justification for the Sixth Circuit's squaring of *Chenery* and its practice of affirming black lung cases on grounds different from the Board's, *see* Petition 18, the rationale was clearly (and correctly) explained by Judge John M. Rogers's concurring opinion in *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 357 (6th Cir. 2007).

Judge Rogers explained that while affirming black lung decisions on different grounds than the Board

"appears on the surface to conflict with" *Chenery*, the remand rule "does not apply in this case . . . because the narrow, quasi-judicial function of the B[oard] distinguishes B[oard] orders from the ordinary instance of agency decision making." *Id.* at 357–58. The Board is not a traditional agency head (e.g., the SEC) that exercises both policymaking and adjudicative roles. Instead, Congress formed the Board to "exercise[] the appellate review authority formerly exercised by the United States District Courts," *id.* at 358 (citing House Rep. No. 92-1441, 1972 U.S.C.C.A.N. 4698, 4709), and has a narrow scope of review over ALJ decisions that is the same as that of the Court of Appeals. *Id.* (citing 33 U.S.C. § 921). "Accordingly, the B[oard] does not possess any unique authority to make the kinds of judgments it is authorized to make; rather, when reviewing the B[oard]'s orders, the courts of appeals are called upon to do exactly the same thing (and the only thing) that the B[oard] is empowered to do, namely determine whether the underlying ALJ's decision is supported by substantial evidence." *Id.* That is, the Board "functions just like the district courts it replaced." *Id.*

In this statutory context, "the ordinary *Chenery* concerns melt away." *Id.* "Because the B[oard] functions like a district court reviewing agency decisions for substantial evidence rather than like the typical administrative agency empowered to exercise independent administrative judgment, it would be . . . wasteful and unnecessary for this court to remand a case to the B[oard] when it is apparent that alternative legal grounds exist to support the Board's order." *Id.*

The Sixth Circuit's approach to *Chenery* in cases involving the Benefits Review Board is the majority view. *See Consolidation Coal Co. v. Director, OWCP*, 129 F.4th 409, 418 (7th Cir. 2025);[13] *Shea v. Director, OWCP*, 929 F.2d 736, 739 n.4 (D.C. Cir. 1991); *Lauderdale v. Director, OWCP*, 940 F.2d 618, 622 (11th Cir. 1991); *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 127 n.3 (9th Cir. 1988); *United Brands Co. v. Melson*, 594 F.2d 1068, 1072 n.10 (5th Cir. 1979), *superseded on other grounds by* 33 U.S.C. § 903(e).

While, to date, the Fourth Circuit has taken a stricter view than its sister circuits of *Chenery* in the Benefits Review Board context, there are reasons to think that could change. *First*, the Fourth Circuit's most recent black lung decision applying *Chenery* expressed doubts that their court's precedent "makes sense here." *American Energy v. Director, OWCP*, 106 F.4th 319, 335 (4th Cir. 2024). There, the Fourth Circuit discussed Judge Rogers's concurrence from *Crockett Colleries v. Barrett* approvingly but felt bound by circuit precedent. *Id.* at 335–36. It makes more sense for the Fourth Circuit to take up that issue en banc in one of the circuit's many black lung and longshore cases than for this Court to grant certiorari. *Second*, this Court's recent decision in *FDA v. Wages & White Lion Investments*, 145 S. Ct. at 928–931, shows that *Chenery* is not as simple as older Fourth Circuit precedent holds and provides the Fourth Circuit

13. Mrs. Howard recognizes that the Seventh Circuit's decision in *Apogee Coal Co. v. Director, OWCP [Grimes]*, 113 F.4th 751 (7th Cir. 2024), takes a stricter view of *Chenery*, but *Consolidation Coal* is more recent. The Seventh Circuit's decision in *Grimes* is not on review here, so Mrs. Howard will not detail that decision's mistakes at this time.

with an opportunity to harmonize their *Chenery* doctrine with other circuits' without further action by this Court.

* * *

The differences among the circuits on the application of *Chenery* in the black lung context are not as significant as Arch's petition makes it sound. All courts recognize that *Chenery*'s remand rule is subject to a harmless-error exception consistent with 5 U.S.C. § 706(2). Further, all but the Fourth Circuit recognize that affirming on grounds different from the Board's is consistent with *Chenery*—and even the Fourth Circuit seems to now recognize that the reasons underlying *Chenery* are mitigated in the black lung context due to the Benefits Review Board's narrow, quasi-judicial role that does not involve agency policymaking. This case does not present an important circuit split.

B. Arch Will Have an Opportunity to Better Develop an Evidentiary Record in Other Claims that Would Be Preferable Vehicles for Future-Looking Decisions.

This case is not an appropriate vehicle to decide the difficult merits issues involving self-insurance liability in the black lung context due to Arch's violation of evidentiary deadlines before the U.S. Department of Labor. 20 C.F.R. § 725.408(b)(1) says, "Within 90 days of the date on which it receives notification under § 725.407, an operator may submit documentary evidence in support of its position." The regulation also warns, "No documentary evidence relevant to [an operator's liability] may be admitted in any further proceedings unless it is submitted within the time

limits set forth in this section." *Id.* at § 725.408(b)(2). Here, much of the agency's and Sixth Circuit's decisions flowed from Arch's failure back in 2016 to submit documentary evidence during that 90-day period that Arch was specifically warned about. *See* App. 193a.[14]

Arch says that it has "over 500 cases" involving the underlying liability issue here. Petition 15. Future cases will not contain this evidentiary defect. For example, in Mrs. Howard's survivor's claim that the parties here are currently litigating before the agency, Arch has submitted hundreds of pages of documentary evidence regarding its liability that are not in the record of this claim. Consideration of such evidence will allow adjudicators to address the underlying issues with better accuracy and either bolster OWCP's liability decision or better support Arch's position that the agency is mistaken. Whichever way the evidence points, a future case will more squarely present the substantive issues that make a real difference for how the government and industry assess risks and make future decisions.

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14. "**Absent extraordinary circumstances, no documentary evidence relevant to the assertions set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim) may be admitted in any further proceedings unless it is submitted within 90 days of your receipt of this notice or an extended period authorized by the District Director**." App. 193a (emphasis in original).

C. New Regulations About Self-Insurance Went Into Effect After the Sixth Circuit's Decision.

Another reason that this case is not suitable for granting review is that the Department of Labor finalized changes to its self-insurance regulations after the Sixth and Seventh Circuit decisions that Arch's petition focuses on. *See* Final Rule, *Black Lung Benefits Act: Authorization of Self-Insurers*, 89 Fed. Reg. 100,304 (Dec. 12, 2024). Those new rules only started going into effect on January 13, 2025. *Id.* at 100,304. They change how self-insurance works in black lung benefits claims and clarify that "an operator's liability following a change or sale is governed by 20 CFR 725.490 through 725.497." *Id.* at 100,320 (amending 20 C.F.R. § 726.110(c)).

The changes to the regulations include the primary provision that the Sixth Circuit cited, 20 C.F.R. § 726.110. *See* App. 16a. Indeed, the text of § 726.110 that Arch provides in its petition as the "pertinent" provision, is the *former* version of the regulation. *Compare* Petition 6–7, *with* 89 Fed. Reg. at 100,320. Accordingly, the relevant substantive law is evolving, and it would be improvident for this Court to grant review in a case turning on outdated regulations.

CONCLUSION

At this stage, it is not necessary to detail the best way to understand the Department of Labor's prior or current regulations governing black lung liability in a parent-subsidiary relationship including self-insurance. The more crucial point from Mrs. Howard's perspective is that she is owed nearly $60,000 that remains unpaid while this case is pending before this Court. Due to corporate transactions postdating David Howard's career as a coal miner for Arch and its subsidiary, he never got to see all the benefits that he was owed before his July 2023 death due to black lung.

Arch presents *Chenery*'s remand rule as mechanical, but as this Court recently held, the remand rule must be understood against more flexible norms governing judicial review of agency action including the Administrative Procedure Act's harmless-error rule. *See FDA v. Wages & White Lion Investments*, 145 S. Ct. at 928–31 (citing 5 U.S.C. § 706(2)). And here, *Chenery* has an especially limited application due to the Benefits Review Board's substitution for U.S. District Courts, without any policymaking role. The narrow role of *Chenery* in the black lung context is one that even the Fourth Circuit is coming around to join the other circuits on. *See American Energy v. Director, OWCP*, 106 F.4th 319, 335 (4th Cir. 2024) (citing *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 357 (6th Cir. 2007) (Rogers, J., concurring)).

And lastly, even if Arch's question presented were worth granting certriorari on, this case is not an appropriate vehicle. The award here largely turned on evidentiary issues that future cases will not contain. In

addition, updates to the self-insurance regulations went into effect earlier this year and were thus not applied in this case from last year.

For the foregoing reasons, Mrs. Howard asks this Court to deny certiorari.

Respectfully submitted,

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