No. 10-101020

Supreme Court of the United States

CONSOLIDATION COAL COMPANY ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an otherwise unconstitutional tax imposed upon the sale of goods in the stream of export commerce saved from invalidation under the Export Clause by recharacterizing it as a deferred tax on manufacturing?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Consolidation Coal Company, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Ninevah Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing, Sidney Coal Company, Inc., Stone Mining Company, Jim Walter Resources, Inc., Eastern Associated Coal Corporation, Kingston Resources, Inc., Pioneer Fuel Corporation, Powder River Coal Company, Apogee Coal Company, Arch Western Resources, LLC, Canyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Inc., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Co., Paynter Branch Mining, Inc., Plateau Mining Corporation, RAG Cumberland Resources, L.P., RAG Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC, Coastal Coal-West Virginia, LLC, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company, Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier Elkhorn Coal Company, Perry County Coal Corporation,

Glamorgan Coal Company, LLC, Terry Eagle, L.P., Nicholas-Clay Land & Mineral, Inc., Nicholas-Clay Company, LLC, Andalex Resources, Inc., Genwal Resources, Inc., Pacific Coast Coal Company, Usibelli Coal Mine, Inc., West Ridge Resources, Inc., United States Steel Mining Company, LLC, and Covenant Coal Corporation, and Wellmore Energy Company, LLC (formerly known as Rapoca Energy Company, LLC), and were the plaintiffs-appellants below.

The United States is respondent and was the defendant-appellee below.

RULE 29.6 STATEMENT

All parent corporations and any publicly held companies that own 10 percent or more of the stock of petitioners are (*italics* indicate publicly held):

Named Party	**Parent Corporations and any Publicly Held Company that Owns 10 Percent or More of the Named Party**
Consolidation Coal Company	*Consol Energy Inc.*
Consol of Pennsylvania Coal Company (n/k/a CONSOL Pennsylvania Coal Company LLC)	*Consol Energy Inc.*
Consol of Kentucky Inc.	*Consol Energy Inc.*
Eighty Four Mining Company	CONSOL Financial Inc. *Consol Energy Inc.*
Helvetia Coal Company	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Island Creek Coal Company	Consolidation Coal Company *Consol Energy Inc.*

Kent Coal Mining Company	(merged in 2001 into co-plaintiff Keystone Coal Mining Corporation) Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Keystone Coal Mining Corporation	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Laurel Run Mining Company	Island Creek Coal Company Consolidation Coal Company *Consol Energy Inc.*
McElroy Coal Company	Consolidation Coal Company *Consol Energy Inc.*
Nineveh Coal Company	(merged in 2002 into co-plaintiff Consol of Pennsylvania Coal Company n/k/a CONSOL Pennsylvania Coal Company LLC) *Consol Energy Inc.*

Quarto Mining Company	(merged in 2005 into co-plaintiff Consolidation Coal Company) *Consol Energy Inc.*
Eagle Energy, Inc.	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*
Elk Run Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Goals Coal Company	Performance Coal Company Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Green Valley Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Independence Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*

Knox Creek Coal Corporation	Martin County Coal Corporation A.T. Massey Coal Company, Inc. *Massey Energy Company*
Marfork Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Martin County Coal Corporation	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Peerless Eagle Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Rawl Sales & Processing Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Sidney Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Stone Mining Company	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*

Apogee Coal Company n/k/a Apogee Coal Company, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Arch Western Resources, LLC	Arch Western Acquisition Corporation *Arch Coal, Inc. owns 99% of Arch Western* Delta Housing, Inc. (1% partner) BP America, Inc. (1% partner thru Delta Housing) *BP PLC*
Canyon Fuel Company, LLC	Arch Western Resources, LLC owns 65% of Canyon Fuel Arch Western Acquisition Corporation *Arch Coal, Inc. owns 35% of Canyon Fuel* Delta Housing, Inc. (1% partner) BP America, Inc. (less than 1% partner thru Delta Housing) of Arch Western's 65% ownership *BP PLC*

Catenary Coal Company n/k/a Catenary Coal Company, LLC	Viper LLC New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Coal-Mac, Inc.	*Arch Coal, Inc.*
Dal-Tex Coal Corporation	(merged in 1996 into co-plaintiff Hobet Mining, Inc.)
Hobet Mining, Inc. n/k/a Hobet Mining, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Mingo Logan Coal Co.	*Arch Coal, Inc.*
Kingston Resources, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Paynter Branch Mining, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

Pioneer Fuel Corporation	Pioneer Mining, Inc. Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Plateau Mining Corporation	Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
RAG Cumberland Resources, LP n/k/a Cumberland Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

RAG Emerald Resources, LP n/k/a Emerald Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Twentymile Coal Company n/k/a Twentymile Coal, LLC	*Peabody Colorado Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Coastal Coal Company, LLC n/k/a Enterprise Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*

Coastal Coal-West Virginia, LLC n/k/a Brooks Run Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*
Eastern Associated Coal Corporation n/k/a Eastern Associated Coal, LLC	Coal Properties, LLC Heritage Coal Company LLC Interior Holdings, LLC Eastern Coal Company, LLC *Patriot Coal Corporation*
Evergreen Mining Company	Newcoal, LLC *International Coal Group, Inc.*
Mid-Vol Leasing, Inc. n/k/a Mid-Vol Coal Sales Inc.	Mid-Vol Coal Sales Inc. *ArcelorMittal*
Mountaineer Coal Development Company	Newcoal, LLC *International Coal Group, Inc.*
Old Ben Coal Company	Newcoal, LLC *International Coal Group, Inc.*
Shipyard River Coal Terminal Company	Newcoal, LLC *International Coal Group, Inc.*

Riverside Energy, Inc. (merged into AMCI Holdings, Inc. in 2005)	AMCI Holdings, Inc.
Virginia Crews Coal Company	AMCI Holdings, Inc.
Clintwood Elkhorn Mining Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Gatliff Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Premier Elkhorn Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Perry County Coal Corporation	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Glamorgan Coal Company, LLC	AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*

Terry Eagle L.P.	TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Land & Mineral, Inc.	AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Company, LLC n/k/a AMVEST West Virginia Coal, LLC	Nicholas-Clay Land & Mineral, Inc. Terry Eagle L.P. TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Andalex Resources, Inc.	UtahAmerican Energy, Inc.

Genwal Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.
Jim Walter Resources, Inc.	*Walter Energy, Inc.*
Pacific Coast Coal Company	Pacific Coast Coal Co., Inc.
Usibelli Coal Mine, Inc.	N/A
Powder River Coal Company n/k/a Powder River Coal, LLC	*Peabody Powder River Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Covenant Coal Corporation	N/A
United States Steel Mining Company LLC	*United States Steel Corporation*
West Ridge Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Consolidation Coal Company et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 615 F.3d 1378. The decision of the United States Court of Federal Claims (Pet. App. 10a-24a) is reported at 86 Fed. Cl. 384. Prior decisions of the court of appeals (Pet. App. 25a-31a) and the Court of Federal Claims (Pet. App. 32a-39a) are reported at 528 F.3d 1344 and 75 Fed. Cl. 537, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2010. Pet. App. 2a. The court denied a petition for panel rehearing and rehearing en banc on October 12, 2010. Pet. App. 70a-72a. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2011. App. No. 10A631. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Export Clause of the United States Constitution, Art. I, § 9, cl. 5, provides: "No Tax or Duty shall be laid on Articles exported from any State."

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq*, provides in relevant part:

> All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 31.5 cents per ton of coal produced by surface coal mining and 13.5 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 9 cents per ton, whichever is less.

Id. § 1232(a).

The regulations implementing the SMCRA provide in relevant part:

> The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> (1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.
>
> (2) The value of the coal shall be determined F.O.B. mine.
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.

> (i) Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight.
>
> (ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.
>
> (iii) Insufficient records shall subject the operator to fees based on raw tonnage data.

30 C.F.R. § 870.12(b).

STATEMENT OF THE CASE

For decades, the Government has imposed a tax upon the sale of domestically produced coal, which is assessed on the date of sale and determined based on the coal's weight and value at the time of sale. Petitioners filed this suit alleging that the tax violates the Constitution's Export Clause when applied to the sale of coal in the export stream, seeking a declaration of the tax's invalidity and a refund of previously paid assessments. U.S. Const. art. I, § 9, cl. 5. The Court of Federal Claims granted petitioners summary judgment. The Federal Circuit reversed, holding that because it would violate the Export Clause to impose a tax on the sale of coal in the stream of export commerce, the doctrine of constitutional avoidance compelled recharacterizing the tax as a deferred tax on the extraction of coal.

1. The Export Clause of the U.S. Constitution prohibits every "Tax or Duty . . . on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. This categorical provision "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). Congress may tax the manufacturing of goods, including goods destined for export, but those goods become immune from federal taxation once they "enter[] the course of exportation." *Id.* at 849.

Whether a tax permissibly falls on goods prior to exportation, or instead unconstitutionally is imposed during exportation, depends on the "taxable event." *Id.* When a tax is imposed upon the *sale* of a good for export, that tax is unconstitutional because "the taxable event, the transfer of title, occur[s] at the same moment the goods entered the course of exportation." *Id.* (citing *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923)).

2. Federal law imposes a wide array of taxes and fees on American-made and -produced goods. Among these is a tax on coal. Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, in 1977. The statute authorizes the Department of the Interior's Office of Surface Mining (OSM) to impose a reclamation fee on "coal produced" by covered coal mining operations. *Id.* § 1232(a). The tax is the lesser of a specified amount per ton or "10 per centum of the value of the coal at the mine." *Id.* The SMCRA does not compel OSM to impose the tax at any particular point in the process of the coal's extraction, sale, processing, and delivery.

Pursuant to the statutory authorization to impose the tax, OSM in 1977 specified by regulation issued after notice and comment that the tax would be determined by the "weight and value *at the time* of initial bona fide *sale*, transfer of ownership, or use by the operator." 30 C.F.R. § 870.12(b)(1) (emphases added).

OSM revisited the issue in 1982 "to clarify the point in time of fee determination." 47 Fed. Reg. 28,574, 28,577 (June 30, 1982). OSM specified that the requirement that the "fee shall be determined . . . at the time of the initial bona fide sale, transfer of ownership, or use" referred to the "first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit," 30 C.F.R. § 870.12(b), (b)(1) (1983). Only "the actual gross weight" of the processed coal that is sold—at the time of its sale—matters for purposes of imposing the tax. *Id.* § 870.12(b)(3).

The distinction between imposing the tax upon sale rather than the initial extraction of the coal makes a considerable practical difference. The tax depends on the coal's weight and value, 30 U.S.C. § 1232(a), both of which can change between extraction and sale. If the weight of the coal is reduced during processing by the removal of impurities, the tax is lower than if it had been imposed at extraction. Conversely, if the coal increases in weight when exposed to the elements or during processing, the tax imposed at sale may be higher than it would have been if imposed during mining or processing. OSM's regulations thus specify that "[i]mpurities, including water, that have not been removed prior to the time of initial bona fide

sale, transfer of ownership, or use by the operator shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i).

The market price for coal also can shift between the time the coal is first extracted from the ground and when it is later sold for export. OSM has consistently measured the value of the processed coal as of the time of its sale, rather than of raw coal as of the time of extraction. Pet. App. 53a-56a. Unless and until the coal is sold, no tax is imposed. *Id.*

Several coal companies filed suit against OSM's determination to impose the tax upon sale. The companies argued that by specifying that OSM should impose a fee on "coal produced," 30 U.S.C. § 1232(a), Congress had left OSM with no choice but to impose the tax on the coal at the time of extraction. OSM argued that its authority was not so limited, and that the statute could permissibly be construed to allow it to impose the tax upon sale. The D.C. Circuit accepted OSM's position, concluding that "we do not find the ordinary meaning of ['coal produced'] unambiguous." *See Drummond Coal Co. v. Hodel,* 796 F.2d 503, 505 (D.C. Cir. 1986). Hence, OSM acted within its discretion in adopting regulations that construe the statute to impose the tax at the time of sale. *Id.* at 505-08.

3. Petitioners in this case are sixty-seven domestic coal companies, which regularly enter into contracts to export coal to foreign customers. Petitioners mine the coal, move it to raw coal storage areas for temporary storage, and then feed it into a preparation plant for processing in accordance with the purchaser's specifications. *See Consolidation Coal Co. v. United States,* 54 Fed. Cl. 15, 16 (2002).

The coal is then loaded directly onto rail cars bound for the export terminal, sometimes after being stored temporarily. *Id.* The contracts specify that title passes, and thus the sale occurs, either upon loading of the coal onto the rail car at the mine for delivery to its transporting ship or at a later point in the export stream, such as upon loading onto the ocean vessel.

In 2001, petitioners filed this suit in the Court of Federal Claims. Petitioners sought a prospective declaration that the tax violates the Export Clause as applied to coal in the stream of export commerce, as well as reimbursement of taxes that had been unconstitutionally imposed.[1]

The court granted summary judgment in petitioners' favor. Pet. App. 69a. It observed that "[b]oth sides agree that the fee would be constitutional if imposed solely on extraction." Pet. App. 46a. Conversely, "given defendant's concession that the sale occurs in the export process, the fee . . . would be unconstitutional . . . if imposed at the time the coal is sold." *Id.*

Turning to the dispositive question of when the tax was assessed, the court rejected the Government's assertion that it was entitled to prevail on the ground that the statute gave OSM no choice but to impose the fee on coal when first extracted, rather than when later sold. In reality, the court recognized, the Government had previously

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[1] The Court of Federal Claims initially dismissed the suit for lack of jurisdiction. *Consolidation Coal Co.*, 54 Fed. Cl. at 20. The Federal Circuit reversed and remanded. *Consolidation Coal Co. v. United States*, 351 F.3d 1374 (Fed. Cir. 2003).

persuaded the D.C. Circuit to uphold OSM's imposition of the tax upon sale by taking precisely the opposite position that the statutory language was ambiguous. Pet. App. 49a-51a. The Government's present arguments were accordingly unpersuasive and "directly contradicted" by the law of the D.C. Circuit. Pet. App. 49a.

The Court of Federal Claims further explained that OSM's position that the tax accrues upon extraction could not be reconciled with OSM's failure to tax unsold coal. In a prior case, the Government had "acknowledged that it 'does not now claim, and never has claimed, that an operator which mines coal . . . and places the coal in a coal stockpile prior to sale, should pay a reclamation fee . . . on that coal.'" Pet. App. 53a-54a (quoting *United States v. Consolidated Coal Co.*, No. 82-1077, slip op. at 3 (S.D.W. Va. Nov. 7, 1985)). That concession, the court concluded, was well-founded, as other courts had expressed the same understanding. *See* Pet. App. 54a-56a (citing *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir. 1987); *United States v. Consolidated Coal Co.*, 1987 WL 36307, at *1 (4th Cir. 1987) (unpublished); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992)).

Accordingly, because OSM imposed the tax "upon the sale of coal," and because (as the Government conceded) that sale occurred while the coal was in the export stream, the tax was unconstitutional. Pet. App. 56a, 69a.

4. On the Government's appeal, the Federal Circuit reversed. Preliminarily, the court of appeals accepted the central premise of petitioners'

argument: that a tax on the sale of coal bound for export would violate the Export Clause. Pet. App. 28a. The Federal Circuit also recognized that OSM determined the taxable weight and value of the coal at the time of sale, not extraction. Pet. App. 28a, 29a.

The Federal Circuit nonetheless deemed OSM's actual application of the tax irrelevant as a matter of law. Precisely because such a tax on the sale of coal bound for export would violate the Export Clause, the Federal Circuit asked instead whether the statute should be construed to contemplate that OSM would impose the tax upon initial extraction. Applying the doctrine of constitutional avoidance, the court construed the statute to tax only "coal extracted." *Id.* 29a.

The Federal Circuit recognized that in *Drummond Coal*, OSM had successfully taken the opposite position that it permissibly had imposed the tax upon the sale of coal. The D.C. Circuit had thus determined in *Drummond Coal* that the SMCRA was ambiguous and could reasonably be read by OSM to "include the entire process of extracting and selling coal," rather than "solely . . . the process of extraction." 796 F.2d at 505. The Federal Circuit, by contrast, concluded that the D.C. Circuit's interpretation would render the tax unconstitutional: if SMCRA encompassed the "entire process of extracting and selling coal – if it is a tax on extraction *and* sale – then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause." Pet. App. 28a.

The Federal Circuit believed that OSM's interpretation of the tax was overridden by the court's obligation to interpret the statute in a

constitutional manner. The Federal Circuit deemed *Drummond Coal* to be irrelevant because the D.C. Circuit "did not itself independently determine the meaning of the statutory term 'coal produced,' but instead gave *Chevron* deference to the regulatory definition of that term, which included post-extraction moisture and other impurities as part of the 'coal produced.'" Pet. App. 30a. In the view of the Federal Circuit, the courts are not "bound by any contrary assertions by the government regarding the statutory interpretation of 'coal produced' where the canon of constitutional avoidance mandates that we adopt the reasonable construction that as applied to the SMCRA reclamation fee 'coal produced' is limited to 'coal extracted.'" Pet. App. 30a.

5. The Federal Circuit remanded the case to the Court of Federal Claims for further proceedings. Pet. App. 31a. On remand, petitioners argued that the court of appeals' decision resolved only the prospective construction of the SMCRA, and did not preclude petitioners' right to reimbursement of taxes that OSM had in fact imposed on the sale of coal in export commerce. The court disagreed, holding that the Federal Circuit's decision entirely precluded petitioners' claim under the Export Clause. The court accordingly entered judgment in favor of the Government. Pet. App. 22a-23a.

6. On petitioners' appeal, the Federal Circuit affirmed. The court of appeals again invoked the doctrine of constitutional avoidance, deeming OSM's regulations implementing the SMCRA to apply only to the extraction of coal in order to avoid their invalidation under the Export Clause. Pet. App. 7a-8a. "The regulations, like the statute, use the term

'coal produced,' and we conclude that this term in the regulation must be construed consistent with the identical term in the statute. 'Coal produced' applies to 'coal extracted' rather than coal sold.'" *Id.*

The Federal Circuit concluded that OSM's actual practice of imposing the tax upon the sale of exported coal was no barrier to the court's recharacterization of the tax as a deferred assessment on the production of coal. In support, it relied on this Court's analysis of the constitutional principle that states are immune from federal taxation in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). *See* Pet. App. 6a-8a. *Liggett* held that a federal tax on tobacco manufacturing did not violate the rule against federal taxation of state instrumentalities when applied to tobacco sold to a state institution. The Court reasoned that the fact that the tax was not payable until the tobacco left the factory or was sold (whichever came first) did not turn an otherwise unobjectionable manufacturing tax into an impermissible sales tax upon state purchases. 299 U.S. at 386. By analogy, the Federal Circuit concluded in this case, the reclamation fee could be characterized as a delayed tax on coal extraction, rather than a tax on coal sales. Pet. App. 7a-8a.

The Federal Circuit acknowledged that the timing of the tax liability in *Liggett* made no practical difference: unlike the application of the SMCRA fee to coal, which varies in weight and value between extraction and sale, the tax on the tobacco remained the same whether imposed at the moment of manufacturing or when the product left the factory. Pet. App. 7a. But the court of appeals nonetheless concluded that OSM's actual practice of charging a

tax based on the weight and value of the coal at sale could be ignored because the court had an obligation to construe the regulations to avoid constitutional doubt, even though OSM's regulations were unambiguous. Pet. App. 7a-9a.

REASONS FOR GRANTING THE WRIT

This Court has carefully drawn and rigorously enforced a bright line distinguishing lawful taxes imposed during manufacturing from unconstitutional taxes imposed upon sale for export. Taking care to forbid the Government's efforts to evade this foundational restriction on its taxing powers, this Court has "strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit." *United States v. IBM*, 517 U.S. 843, 849 (1996).

The Federal Circuit's decision in this case represents a significant departure from that vigilance, which this Court must correct. The Government assessed a tax on the sale of exported coal – the fee is not assessed unless and until the *sale*, and the amount of the tax depends solely on the weight and value of the coal *at sale* rather than at the time of its extraction. As the lower courts both recognized, OSM previously succeeded in defending the lawfulness of this very tax scheme before the D.C. Circuit only by insisting that it had permissibly construed the SMCRA to impose a tax at the time of sale. OSM maintained that position, and uniformly imposed the tax upon sale, until this litigation. The Federal Circuit was able to deny the inevitable conclusion that the tax violates the Export Clause when applied to sales in export commerce only by

overriding OSM's own longstanding position, blinking reality, and retroactively recharacterizing the tax's imposition.

Review is also warranted because the decision below provides a ready roadmap for the Government to evade the clear and strict terms of the Constitution. The Federal Circuit's methodology can readily be employed to render the Export Clause all but toothless by recharacterizing virtually any export sales tax as a deferred tax on manufacturing.

The Federal Circuit's decision equally conflicts with this Court's precedent because it turns the canon of constitutional avoidance on its head. The court of appeals converted a mechanism to *prevent* future unlawful action into a tool to *excuse* past constitutional violations.

Finally, certiorari should be granted because the court of appeals' decision gives rise to a two-to-two circuit conflict over whether the canon of constitutional avoidance takes precedence over the deference owed to an agency's settled interpretation of a statute that it implements under a direct delegation from Congress. Here, the Federal Circuit invoked the canon to reject OSM's longstanding determination to impose the tax upon the sale of exported coal. That ruling is consistent with the precedent of the Tenth Circuit, but the Second and Ninth Circuits would hold that a court has no authority to reject the agency's prior interpretation of the statute, particularly in light of the D.C. Circuit's determination to defer to OSM's interpretation in *Drummond Coal*. The circuit split implicates challenges to virtually every unconstitutional

implementation of an ambiguous federal statute. This Court's intervention is accordingly required.

I. The Ruling Below Conflicts With This Court's Established Export Clause Jurisprudence In Upholding The Reclamation Fee As Applied By The Government To The Sale Of Exported Coal.

A. The Export Clause Prohibits A Tax On The Sale Of A Good For Export.

The imposition of a tax on the sale of coal bound for export violates the Constitution's Export Clause. The Constitution "categorically bars Congress from imposing any tax on exports." *United States v. United States Shoe Corp.*, 523 U.S. 360, 363 (1998). Unusual in its strictness and the vigor of its application, the Export Clause "allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." *Id.* at 367.

This Court has long held that this prohibition precludes taxes on the sale of goods in the stream of export commerce. In *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923), for example, the Court considered a tax on the sale of baseball bats, as applied to sales for export. The Court explained that although the Export Clause permits Congress to tax goods during manufacturing even if the goods are destined for export, "[a]rticles in course of transportation cannot be taxed." *Id.* at 69. "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant," the Court explained, so long as the goods

were in the process of being exported at the time the tax was imposed. *Id.*

With respect to a sales tax, then, the "question is whether the sale was a step in exportation." *Id.* at 68. To answer that question, the Court observed, "we have to fix a point at which, in view of the purposes of the Constitution, the export must be said to begin." *Id* at 69. The Court held that the sale marks the beginning of exportation, and therefore cannot be taxed. *Id.* "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea." *Id.*

B. The Government Has Administered The Reclamation Fee As A Tax On The Sale Of Coal In Export Commerce.

1. The SMCRA directs the OSM to impose a tax to be calculated "per ton of coal produced" or as "a per centum of the value of the coal at the mine." 30 U.S.C. § 1232(a). Because the weight and value of coal predictably change between the initial extraction of raw coal and the sale of processed coal, OSM in implementing this Congressional directive was required to choose the point in time at which the tax would be imposed. OSM chose the point of sale, rendering the application of the tax in plain violation of the Export Clause. *See A.G. Spalding*, 262 U.S. at 69.

First, OSM's regulations say so unambiguously: "The fee shall be determined by the weight and value *at the time of initial bona fide sale . . . .*" 30 C.F.R. § 870.12(b) (emphasis added).

Second, OSM specifically revised its regulations to "clarify the point in time of fee determination" by reaffirming "OSM policy in effect since initial implementation of the fee collection program": that the tax was imposed on the coal at the time of sale, not extraction. 47 Fed. Reg. 28,574, 28,577 (1982). It added to the regulations the statement that the "initial bona fide sale . . . shall be determined by the first *transaction* or use of the coal by the operator." 30 C.F.R. § 870.12(b)(1) (emphasis added). The revised regulations further provided that the "[i]mpurities that have not been removed prior to the time of the *initial bona fide sale* . . . shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i) (emphasis added). Accordingly, the regulations made clear that the tax was *not* to be based on the weight of the coal at the time of extraction; so long as impurities are removed "prior to the time of the initial bona fide sale," they do not contribute to the taxable weight of the coal. Likewise, the revised regulations provided that the weight of any water or other impurities accumulating in or added to the coal during processing between extraction and sale would be taxed. *Id.* § 870.12(b)(3)(i) (1983).[2]

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[2] The Secretary subsequently amended the regulations to allow a deduction in weight for "excess moisture," to bring the fee methodology into accord with that used by the Internal Revenue Service in assessing the Black Lung tax. *See* 53 Fed. Reg. 19718 (May 27, 1988). The Secretary did not, however, alter his position that the value of the coal will be determined as of the time of sale, and that the coal's taxable weight will not include any impurities present at the time of extraction, so long as they are removed by the time of sale. Likewise, any

Third, consistent with its treatment of the sale as the taxable event, when OSM amended the rate of the tax in 2004, it applied the new rate to coal that was subsequently sold, even if that coal had been extracted before the new rate became effective. *See* 69 Fed. Reg. 56,122, 56,127-128 (Sept. 17, 2004).

Fourth, OSM has assessed the tax only if and when a sale takes place. In those instances in which producers have stockpiled coal for later sale, the Government has neither required payment of the tax at that time, nor calculated the value and weight of the coal as of the time of extraction. *See, e.g., United States v. Tri-No Enters., Inc.*, 819 F.2d 154 (7th Cir. 1987) (Government imposed tax when previously stockpiled coal was sold); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (same); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (same). The Federal Circuit did not deny OSM's actual practice, but merely recognized that under OSM's interpretation of the statute liability would arise without regard to whether a sale occurred. Pet. App. 8a.

Fifth, in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), the D.C. Circuit deferred to and upheld OSM's decision to tax coal according to its weight and value at the time of sale, rather than extraction. OSM cannot have it both ways, construing the statute to mean one thing when its

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impurities adhering or added after extraction will be included in the taxable weight. *See* 30 C.F.R. § 870.12(b)(3)(i).

taxing methodology is challenged as unauthorized by the statute, and the opposite when the tax so administered is challenged under the Export Clause.

C. An Unconstitutional Tax On Sales For Export Is Not Saved By Recharacterizing That Tax As A "Deferred" Manufacturing Tax.

1. The Government cannot avoid the restrictions of the Export Clause through simple verbal maneuvering. Nearly every sales tax could be characterized as a "tax on manufacturing, collected at the time of sale." If that were sufficient to evade the Export Clause, then this Court would have reached the opposite result in *A.G. Spalding*, *supra*. The sales on baseball bats could just as easily have been characterized as a tax that accrued when the baseball bats were produced but was collected when the bats were sold. To be sure, the sales tax in that case was assessed as a percentage of the sales price. But the tax would have been no less unconstitutional if imposed as a flat, one-dollar charge on every sale. This Court specified that the determinative consideration was not the formula for the amount of the tax, but rather the *timing* of its application – *i.e.*, whether the goods were in the stream of export when the tax accrued. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. at 69.

The Federal Circuit's decision thus provides a roadmap for broad-scale evasion of the Export Clause, one foreseen (and forbidden) by this Court's prior cases. The Court has warned that the "obstructions to exportation which it was the purpose [of the Clause] to prevent could readily be set up by

legislation nominally conforming to the constitutional restriction, but in effect overriding it." *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). Accordingly, courts reviewing Export Clause challenges "'must regard things rather than names,' in determining whether an imposition on exports ranks as a tax." *United States Shoe Corp.*, 523 U.S. at 367 (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)). "The crucial question is whether the [tax] is a tax on exports in operation" as opposed to "nomenclature." *Id.* And here, there is no escaping that in operation, OSM imposed the reclamation fee as a tax on sales.

2. The Federal Circuit nonetheless purported to find precedent for its recharacterization in this Court's decision in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). But that case is both doctrinally irrelevant and factually inapposite.

Liggett concerned the principle of state immunity from federal taxation, which has no textual or structural relationship to the Export Clause. The plaintiff in that case, Liggett & Myers, contended that a tax imposed upon certain tobacco products, which it sold to Massachusetts state hospitals, amounted to a "direct burden imposed upon the state." *Id.* at 386. This Court rejected that argument, finding that the tax was properly considered a "tax [ ] upon the manufacture of the tobacco," the effect of which upon the State was "indirect and imposed no prohibited burden." *Id.* The court based that conclusion principally on the fact that the "tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." *Id.*

Liggett does not overrule this Court's unambiguous holding that the question whether a tax violates the Export Clause turns on the "taxable event" – here, the "sale" of the good. *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). The Federal Circuit's contrary decision renders this Court's precedent a nullity.

This Court has repeatedly cautioned that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe*, 523 U.S. at 368. The Court has thus rejected attempts to impose onto the Export Clause doctrines involving even the Import-Export Clause, *see id.* at 857, the Dormant Commerce Clause, *see IBM*, 517 U.S. at 851, and the Takings Clause, *see U.S. Shoe*, 523 U.S. at 368-69. If the Court has "hesitate[d] before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence," *IBM*, 517 U.S. at 857 – despite the fact that the two provisions are "textually similar," *id.* at 852, and "frequently interpreted . . . together," *id.* at 857 – it has even greater reason to resist reliance on cases implementing an implied restriction on federal burdens placed on state instrumentalities. *Cf. IBM*, 515 U.S. at 851 (concluding that the "meaning of the nontextual negative command of the dormant Commerce Clause" was uninformative of the meaning of the textual prohibition of the Export Clause). Accordingly, "decisions [that] involved constitutional provisions other than the Export Clause . . . do not govern here." *U.S. Shoe*, 523 U.S. at 368.

The structural command at issue in *Liggett* bears no relationship to the Export Clause. The central question under the Export Clause is one of *timing*: was the tax imposed on the item while it was in the export stream? The federalism question in *Liggett*, by contrast, turns on the degree and directness of the burden imposed on a state instrumentality. 299 U.S. at 386 (question is whether the tax imposed a "direct burden" on the state or instead "the effect was incidental, indirect, and [therefore] permissible").

Thus, the dispositive fact in *Liggett* – that the amount of the tax was measured as a percentage of the sale price, *id.* at 386 – is not important (much less determinative) in this challenge under the Export Clause. Because the Export Clause prohibits *any* "Tax or Duty" on exported articles, so long as the tax accrues while the item is in the export stream, it is unconstitutional no matter whether it is properly classified as a sales tax or not. *See, e.g.*, *Fairbank v. United States*, 181 U.S. 283, 283, 289-90 (1901) (flat ten-cent stamp tax on bills of lading held unconstitutional).

In any event, even if *Liggett* were useful precedent, it is factually distinguishable. The decision in *Liggett* turned critically on the fact that the tobacco tax at issue there did not depend "on the intrinsic value or price obtained upon sale." 299 U.S. at 386. But the reclamation fee in this case depends directly on the "intrinsic value" of petitioners' coal, being set at "10 per centum of the value of the coal," up to a capped amount per ton. 30 U.S.C. § 1232(a).

D. The Canon Of Constitutional Avoidance Does Not Authorize A Court To Displace An Agency's Interpretation Of The Statute Or To Ignore The Way In Which A Statute Has Actually Been Applied.

The decision below finds no more support in the canon of constitutional avoidance. In fact, the Federal Circuit's dramatic misapplication of that doctrine gives rise to a circuit conflict and provides an independent ground for certiorari.

1. The Federal Circuit erred first in invoking the canon of constitutional avoidance to construe the SMCRA in direct conflict with OSM's regulations and the agency's consistent practice.

The court of appeals did not dispute that the statutory language of the SMCRA was ambiguous as to whether the tax it imposed accrued at sale or extraction. Pet. App. 29a-30a. It acknowledged that in *Drummond Coal*, the D.C. Circuit had faced that same ambiguity and upheld OSM's regulations measuring the reclamation fee as of the time of sale. *Id.* The Federal Circuit's resort to the canon of constitutional avoidance is consistent with the precedent of the Tenth Circuit. *Hernandez-Carrera v. Carlson,* 547 F.3d 1237, 1249 (10th Cir. 2008).

But in direct conflict with the ruling below and the Tenth Circuit's precedent, the Second and Ninth Circuits would hold that a court of appeals does not have authority to reject OSM's reasonable interpretation of the statute. In *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008), an immigrant challenged the validity of a regulation authorizing an immigration officer to remove an

alien, without holding a hearing, if the officer determined that the alien had unlawfully re-entered the country after having been previously removed. "Invoking the doctrine of constitutional avoidance," the immigrant argued that "the regulation [was] an impermissible interpretation of the statute," which should be construed to require a hearing in order to avoid a serious question under the Due Process Clause. *Id.* at 149. But the Second Circuit held that the doctrine was inapplicable. "[O]nce an ambiguous statute has been interpreted by the agency in charge of its implementation, [courts] lack the 'authority to re-construe the statute, even to avoid constitutional problems.'" *Id.* (citation omitted). In reaching this conclusion, the Second Circuit quoted and relied on the en banc Ninth Circuit's identical holding in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc).

In this case, the Secretary has, through his regulations, authoritatively interpreted the SMCRA as imposing a tax on sales. *See Drummond Coal*, 796 F.2d at 505. In these circumstances, the Second and Ninth Circuits would refuse to apply the canon of constitutional avoidance to adopt a contrary construction. As this Court squarely held in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the agency's reasonable construction of an ambiguous statute precludes a federal court from overriding that reading under principles of statutory construction.

An agency is, of course, free to change its interpretation, so long as it has a reasonable basis for the change and complies with the procedural requirements of the Administrative Procedure Act for

amending its regulations. *See id.* at 981-82. But in this case, OSM has not altered its regulations. It is has merely reversed course in litigation. Such strategic shifting of positions is not entitled to any deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). In such circumstances, the agency's construction is the one that must be measured against the requirements of the Constitution. *See Garcia-Villeda*, 531 F.3d at 149-50 (reviewing constitutionality of statute as construed by agency, rather than applying doctrine of constitutional avoidance); *Morales-Izquierdo*, 486 F.3d at 495-98 (same).

2. The Federal Circuit compounded its error by inexplicably applying the constitutional avoidance canon to recharacterize OSM's regulations and *conduct* as consistent with the Export Clause.

Even if the Federal Circuit had the authority to construe the SMCRA as imposing a tax on extraction rather than sale, that holding was insufficient to decide petitioners' refund claims, which turned not on any alleged facial invalidity of the statute or regulations, but rather on the fact that OSM had implemented the reclamation fee as a tax on coal export sales (whether that implementation was authorized by the statute or not). The court of appeals rejected petitioners' claim by conclusively presuming, in the name of constitutional avoidance, that OSM had in fact administered the tax in accordance with the Federal Circuit's narrowing construction of the statute, deeming irrelevant as a

matter of the law the uncontested facts of OSM's actual practice. Pet. App. 7a-8a.

That decision turned the Court's constitutional avoidance canon on its head. The canon generally operates to restrict agency authority in the face of constitutional doubt. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 542 (2003). It is not uncommon, therefore, that when viewed in light of the Court's narrowing construction, *prior* agency action will be deemed in violation of a statute or regulation (thereby avoiding the separate constitutional challenge). For example, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), this Court considered whether a regulation authorized the Attorney General to deny a hearing to a lawful permanent resident prior to denying him re-entry into the country. Because that construction of the regulation raised substantial due process questions, the Court construed the regulation as not permitting the denial of a hearing. *Id.* at 598-99. In light of that restrictive reading of the regulation, the Court held that the Attorney General's denial of a hearing was unlawful and awarded the petitioner relief. *Id.* at 603.

Notably, the Court in *Kwong Hai Chew* did not apply the canon of constitutional avoidance to avoid the conclusion that the Attorney General had acted illegally. The Court did not, in other words, conclude that because the regulations were properly construed to require a hearing, the Attorney General must have

given one to Chew. Yet that is exactly what the court of appeals did in this case – after concluding that the statute and regulations required OSM to implement a tax on extraction rather than sales, it conclusively assumed that the tax OSM actually imposed must have conformed to that interpretation.

Although the canon of constitutional avoidance aids a court in choosing between reasonable constructions of a statute when parties seek *prospective* relief, it does not allow a court to rewrite history to conclude that an agency acted lawfully *in the past* and may accordingly retain the fruits of its unconstitutional conduct. The canon of constitutional avoidance has no application to whether OSM in fact ran afoul of the Export Clause.

3. Review is also warranted to resolve the circuit conflict over whether, under the SMCRA and OSM's implementing regulations, the tax is properly imposed upon extraction or instead upon sale of coal. Currently, different taxes would be imposed on the identical sale based on the coincidence of the court that considered the question. Although *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), did not involve a direct challenge under the Export Clause, the central question in both that case and this is the same – whether OSM has construed and implemented the reclamation fee as a tax on extraction or sale of coal. The D.C. Circuit upheld OSM's decision to assess the tax based on the weight of coal at time of sale – including the weight of post-extraction moisture gain, and excluding the weight of pre-sale removal of impurities – only because that court accepted the Secretary's interpretation of the statute as taxing the "entire process of extracting and

selling coal." 796 F.2d at 505. In this case, the Federal Circuit looked at the same regulations and reached the opposite conclusion.

Likewise, the Fourth Circuit has addressed the same core issue, and concluded that the "critical date for the application of the" SMCRA was "not the date on which the coal was originally extracted from the ground, but the date on which the economic advantage is gained," namely, when the company "sold the coal." *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished). *See also United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (tax is not calculated and imposed "until [the coal] ha[s] been cleaned, processed and sold").

II. The Federal Circuit's Decision Has Nationwide Implications And Warrants This Court's Review.

Certiorari is warranted for the further reason that the ruling below has broad implications both for the administration of an important tax and for the proper application of the constitutional avoidance canon.

The constitutionality of the reclamation fee as applied to exported coal has obvious importance for an important sector of our economy, at a time when the need to improve the nation's balance of trade is paramount. *See, e.g.*, Zachary A. Goldfarb & Perry Bacon Jr., *Obama Brings Industry To Table*, WASH. POST., Jan. 22, 2011, at A1 (quoting President as explaining that "[f]or America to compete around the world, we need to export more goods around the world").

In addition, the Federal Circuit's maneuvering to avoid the plain import of this Court's cases, if left unreviewed, provides a roadmap for evasion of the Export Clause whenever the Government chooses to argue that an export sale is merely the point of deferred collection rather than the imposition of a tax. The Government has required repeated reminders from this Court of the constitutional limits on its power to tax exports. *See, e.g., United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998); *United States v. IBM Corp.*, 517 U.S. 843 (1996); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923); *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). The Court's lessons have once again been forgotten, and the time has come again for the Court to reestablish that the unambiguous constitutional command of the Export Clause cannot be circumvented.

Moreover, a question at the core of this case – when the reclamation tax accrues – has broad significance not only for the constitutionality of the tax as applied by OSM, but also to how the tax applies in non-export contexts. *See, e.g., Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986) (timing of tax affects when weight and value of coal should be measured); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished) (timing affects taxation of reclaimed coal extracted prior to effective date of statute); *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158 (7th Cir. 1987) (noting issue affects "economic incentive to remove otherwise abandoned (and possibly environmentally harmful) stockpiles").

Review is warranted now because of the outsized role the Federal Circuit plays in the administration

of the nation's tax laws. Tax refund claims are frequently litigated in the Court of Federal Claims, over which the Federal Circuit has exclusive appellate jurisdiction. *See* 28 U.S.C. § 1295(a)(3); *see also, e.g., United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008); Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For The Court Of Federal Claims*, 71 GEO. WASH. L. REV. 714, 720 (2003) (noting that "[a]pproximately one-quarter of the cases before the Court [of Federal Claims] involve tax refund suits") (citation omitted).

Finally, the Federal Circuit's application of the canon of constitutional avoidance – in conflict with the decisions of this Court and other circuits – has broad implications far beyond this particular taxation scheme. Its assertion of authority to displace an agency's construction of an ambiguous federal statute in the name of constitutional avoidance applies to any statute, including the immigration provisions addressed by the Second and Ninth Circuits. Significantly, although the Federal Circuit exercised that power in this case to save an otherwise unconstitutional statute, in other cases the doctrine could be used to overturn an entirely reasonable agency construction that, in the end, *would* withstand constitutional scrutiny. *See, e.g., Morales-Izquierdo*, 486 F.3d at 504-05 (Thompson, J., dissenting) (arguing that majority should have applied canon of constitutional avoidance to adopt a more alien-friendly interpretation of statute even if regulation was otherwise reasonable and would not violate the Constitution). At the same time, the Federal Circuit's inversion of the canon to counter-factually presume that OSM had administered the

reclamation tax in accordance with the court's saving construction creates a model for immunizing clearly unconstitutional agency action whenever the Government is alleged to have violated the Constitution in the course of administering an arguably ambiguous federal statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 2011