No. 10-1020

IN THE

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A quarter-century ago, the D.C. Circuit upheld the Office of Surface Mining's regulation taxing the "sale" of processed, clean coal. But because the Export Clause forbids taxing the sale of goods bound for export, the Federal Circuit in this case expressly rejected that decision. It recharacterized OSM's regulation as constitutionally taxing petitioners' "extraction" of raw coal. The court then invoked the "canon of constitutional avoidance" to apply its new characterization retroactively – which, it held, saved OSM's previous taxation of petitioners' past coal "sales."

The petition and *amicus* briefs demonstrated that the Federal Circuit's decision conflicts with this Court's precedents and decisions of other circuits. The government has previously argued that Federal Circuit decisions resolving a large number of claims "seeking the recovery of coal excise taxes and related interest" (here consolidated in a single suit) are so important as to merit certiorari, relying on the Court's practice of reviewing similar decisions. Pet. for Cert. 25, *United States v. Clintwood Elkhorn Mining Co.*, *cert. granted*, 128 S. Ct. 710 (2007). The Brief in Opposition offers no persuasive reason to abandon that practice here. Instead, it contradicts the Solicitor General's previous representation to this Court that OSM taxed the "sale" of processed coal rather than the raw coal's extraction, as well as that Office's request that this Court decide whether the lower courts have jurisdiction to decide such a claim.

Certiorari accordingly should be granted, and the parties should be directed to brief and argue the jurisdictional issue.

I. The Ruling Below Conflicts With Decisions Of This Court And Of Other Circuits.

OSM explicitly taxes the "sale" of petitioners' coal. 30 C.F.R. § 870.12(b). It imposes that tax at the time of sale, based on the tax rate prevailing on the date of sale, and measured by the weight of the coal that petitioners sell, which generally is materially different from the weight of the raw coal they extract. *Id.*; Pet. 5-6. So this should be an easy case: this Court's precedents hold that the Export Clause forbids taxing the "sale" of a product in the stream of export commerce. *E.g.*, *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *see* Pet. 14-15. The Federal Circuit's contrary ruling merits this Court's review.

A. The government cannot deny that "OSM offered a different interpretation of its regulations in *Drummond Coal* [*v. Hodel*] and the D.C. Circuit adopted that interpretation." BIO 13. In *Drummond Coal*, the D.C. Circuit held – not "suggested," *contra id.* 14 – that OSM's taxation of non-combustible "post-extraction added impurities, such as rainwater or debris" was lawful. 796 F.2d 503, 505 (D.C. Cir. 1986), *cert denied*, 480 U.S. 941 (1987). The Court found "coal produced," 30 U.S.C. § 1233(a), to be sufficiently "ambiguous" to permit OSM to tax the end product's sale, not merely the raw coal's extraction. 796 F.2d at 505-06.

This long-settled "interpretation of OSM's regulation[]" was not "mistaken," *contra* BIO 15, but

if it was, then OSM asked the D.C. Circuit to make the "mistake[]," the Solicitor General vigorously defended it in this Court, and for twenty-five years the agency happily collected the revenues generated by the sweeping taxing power that resulted. Solicitor General Fried successfully opposed certiorari in *Drummond Coal* on the ground that OSM had correctly "stressed that the *crucial* factor was *not* the specific composition of the coal produced but, rather, the point in the mining operation at which the *first sale* or transfer occurred." BIO 2 n.1, *Drummond Coal v. Hodel* (No. 86-1057) (emphases added). He forcefully asserted that the contrary position now pressed by OSM, adopted by the Federal Circuit, and endorsed by that Office "has no basis in the statute, its legislative history, or in the consistent interpretation of the relevant term by [OSM]." *Id.* 5.

Faced with the obvious conclusion that it had violated the Export Clause by applying the tax to the sale of coal bound for export, OSM's lawyers did a one-hundred-eighty-degree turn and labeled the regulation and its past application as a tax on "extraction." The Federal Circuit blessed that reversal. It parroted *Drummond Coal*'s holding verbatim, 796 F.2d at 505, and rejected it: "if 'coal produced' is interpreted to include 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 government's assertion that the circuits' decisions are nonetheless "consistent" because both circuits "[defer] to the agency[]," BIO 13, is – to borrow a phrase – "mistaken," *id.* 15. The courts

"defer" to doppelgangers, so they reach irreconcilable results. That conflict is also intolerable: the Federal Circuit holds that OSM may tax only the extraction of combustible material, Pet. App. 8a n.3, 30a, yet recognizes that OSM follows the D.C. Circuit's conflicting holding that OSM may tax significant materials that producers add "post-extraction," 796 F.2d at 505, including "oil and antifreeze," Pet. App. 7a. *Contra* BIO 14 (asserting that amendment excluding post-extraction water weight deprives the conflict of importance).

Further, the Federal Circuit's holding that this exaction is saved by labeling it an "extraction tax" contradicts this Court's holding that courts "must regard things rather than names, in determining whether an imposition on exports ranks as a tax" that violates the Export Clause. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998). The Solicitor General notably does not deny that the decision below underrules *A.G. Spalding*, *supra*. Pet. 18. This Court struck down the tax on baseball bat sales in that case, but the Federal Circuit's decision would deem it a constitutional "deferred" tax on the bats' manufacturing. *Cf.* U.S. Br. 17*, A.G. Spalding & Bros. v. Edwards* (No. 710) ("the primary purpose of the Act . . . was to tax manufacturers"). The Federal Circuit's nullification of this Court's precedents sweeps far beyond hard fuel and sports gear: if this "sales" tax is properly recharacterized as a "deferred-payment scheme" for a manufacturing tax, BIO 6, so is every other, *see generally* Exporter *Amicus* Br., rendering the Constitution's prohibition against export taxes not "strict" but instead essentially meaningless.

B. The Federal Circuit's further holding that the "canon of constitutional" avoidance required it to retroactively deem OSM's *previous* taxation of petitioners' "sales" an "extraction" tax merits this Court's review too. *See* Pet. 24-26; Profs. *Amicus* Br. Part I. The Federal Circuit's reasoning is *ipse dixit* – *viz.*, because the Export Clause forbade OSM from taxing export sales, it must not have done so, all appearances notwithstanding. The court of appeals explained that this fiction was "the only reasonable construction which preserves the constitutionality" of OSM's prior exactions. Pet. App. 30a; *id.* 8a (applying the court's statutory analysis to OSM's past imposition of the tax).

After the petition made a big deal of the fact that this holding conflicts with this Court's precedents, the Solicitor General says not a word in response. That is no surprise; there is nothing to be said. The canon of constitutional avoidance is prescriptive, not descriptive. It orders the government's future conduct to conform to the Constitution; it does not erase a history of constitutional violations. *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Federal Circuit's contrary decision is not "constitutional avoidance," it is "reality avoidance."

II. The Alternative Rulings Hypothesized By The Solicitor General Are Irrelevant And Wrong.

Faced with these conflicts, the government argues that "both the Federal Circuit and the D.C. Circuit," BIO 13, "could have" used different rationales, *id.* 14. Supposedly, the courts – rather than applying the canon of constitutional avoidance

retroactively (Federal Circuit) and holding that OSM validly taxed the coal's "sale" (D.C. Circuit) – instead "could have" held that OSM actually taxed the coal's extraction while merely delaying the ministerial act of the tax's collection, because "weight at the time of sale is the soundest and most administrable proxy for weight at the time of extraction." *Id.* That assertion is legally irrelevant and factually wrong.

A. The alternative opinions hypothesized by the government are irrelevant because the petition for certiorari arises in the real world – a world in which the lower courts' actual rulings conflict with this Court's precedents and are the subject of recognized circuit splits. The Solicitor General's plea that the government can imagine different, consistent legal rulings does not undermine the petition's showing that certiorari should be granted, because denying review would leave the law in intolerable conflict while OSM continues to exploit the D.C. Circuit's decision that it may tax the sale of "post-extraction" additives.

Also, the Solicitor General's assertion that OSM collected the tax at the point of sale for "convenience" begs the question presented by this case. Even if true, the upshot is that the agency found it most convenient to impose a sales tax, which is unconstitutional. Whatever OSM's motive, the dispositive point is that it made the "sale," 30 C.F.R. § 870.12(b), the "taxable event," *A.G. Spalding*, 262 U.S. at 69-70. The argument that although the Constitution imposes a "strict[]" bar to a tax "that falls on exports during the course of exportation," *United States v. IBM*, 517 U.S. 843, 849 (1996), there should be an implied exception for any agency that

finds it "convenient" to adopt such a sales tax answers itself. "[A]lthough efficacious administration of governmental programs is not without some importance," this is one of those instances in which "the Constitution recognizes higher values than speed and efficiency." *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

The government's specific assertion that the "prevailing industry practice" is to first weigh clean coal upon sale rather than "run-of-mine" coal at extraction, BIO 8, is false too. Producers weigh the raw coal – for example, to determine royalties owed to landowners and reserve holders, as well as fees owed to shippers for transporting the coal to processing plants. The Solicitor General's citation to a 1977 comment by OSM, *id.*, fails to recognize that OSM in 1982 adopted a regulation requiring operators to "retain records that show run-of-mine tonnage," 30 C.F.R. § 870.12(b)(3)(ii), and that OSM's official guidance reinforces that "[t]he importance of maintaining records that show run-of-mine or raw tonnage calculations that substantiate the basis of clean coal transactions cannot be overemphasized," OSM Payer Handbook 41, *available at* http://sscr.osmre.gov/handbook/documents/payer_handbook.htm.

B. In any event, four features prove this cannot be a deferred tax on coal extraction. Posed as a question, if OSM had actually *tried* to tax coal in violation of the Export Clause, what would it have done differently? The answer: nothing.

First, and most obviously, OSM has never taxed raw coal that operators extracted but then stored rather than sold. The Solicitor General acknowledges

now – just as OSM has always recognized before, Pet. 17 (citing cases) – the agency's firm policy of "assessing" the tax only if and "when a producer disposes of its stockpiled coal." BIO 10. The Federal Circuit's statement that it believes a tax liability on stored coal should arise, *id.* 9 (citing Pet. App. 8a), proves petitioners' point: the court improperly rewrote the history of OSM's *actual* administration of the tax to conform to the fiction of the court's *post hoc*, counter-factual understanding of how OSM *should* administer the tax to avoid violating the Export Clause.

Second, OSM measures the *ad valorem* tax based on the coal's market value, measured by sales price, on the date of sale, not "extraction." Pet. 15.

Third, when tax rates change, OSM consistently applies the rate in force on the date of sale, not the date of extraction. The petition gave one example. Pet. 17. Here is another: OSM in 2007 applied newly adopted tax rates to sales of previously mined coal. *See* OSM Payer Handbook, *supra*, at 9.

Fourth, OSM assesses the tax based on the "weight" of the product that is sold, including when (as is often true) the coal's processing makes the weight quite different from the "raw" extracted coal. 30 C.F.R. § 870.12(b)(3)(i); 42 Fed. Reg. 62,713, 62,714 (Dec. 8, 1977).[1]

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[1] The taxes in the three cases cited by the Solicitor General, BIO 9, 11, lacked each of these four features. For example, in stark contrast to OSM's coal tax, the tobacco tax in *Liggett & Myers Tobacco Co. v. United States* – which in any event did not involve a challenge under the stringent provisions

C. There is no merit to the Solicitor General's related suggestion that "coal produced" refers only to the *combustible* material, the weight of which supposedly is best measured at sale after impurities – "*e.g.*, dirt, rocks, and tree stumps" – are removed. BIO 8; Pet. App. 8a n.3. OSM's regulation rejects that reading: it taxes material that is added after extraction (except water), as well as the significant non-combustible material that is not removed. In defending its regulation as consistent with the statute, OSM argues (contrary to the BIO) "that tonnage of 'coal produced' *includes* the weight of rock, clay, dirt and other debris mined with the 'coal' that was delivered by the companies to a coal washing and sizing plant." *United States v. Brook Contracting*, 759 F.2d 320, 321 (3d Cir. 1985) (emphasis added).

If anything, the Solicitor General's flip flop on the meaning of the phrase "coal produced" highlights another reason to grant certiorari. The Third Circuit held that "coal" means only the combustible material, so it ruled that OSM's regulation taxing non-removed impurities "exceeds the scope of [the statute] and is therefore invalid." *Brook Contracting*, 759 F.2d at 326-27. But the D.C. Circuit elected "respectfully to disagree with the Third Circuit" and to defer to OSM's position that the phrase "coal produced" is

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of the Export Clause – was imposed "irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary." 299 U.S. 383, 386 (1937). *See also Rogan v. Contero*, 132 F.2d 726, 727 (9th Cir. 1942) ("[t]he statutes for tobacco [in *Liggett*] and still wines are basically the same"); *R.J. Reynolds Tobacco Co. v. Robertson*, 94 F.2d 167 (4th Cir. 1938).

ambiguous and "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door." *Drummond Coal Co. v. Hodel*, 796 F.2d at 505-06. By granting certiorari, this Court would resolve which of those interpretations is correct.

III. The Government's Jurisdictional Argument Warrants Certiorari.

Petitioners filed this suit under the Tucker Act alleging that OSM had violated the Export Clause. The government tried to recharacterize the suit as if petitioners argue that OSM's "regulations exceed the bounds of the statute or are otherwise *ultra vires*." BIO 16. But it recognized that the circuits were split on whether 30 U.S.C. § 1276(a)(1) required petitioners to file such a suit in the U.S. District Court for the District of Columbia upon the regulations' enactment. U.S. C.A. Br. 19 n.3.

The Federal Circuit panel correctly found jurisdiction. Reply App. 15a. Section 1276(a)(1) says that a challenge to OSM's "promulgat[ion]" of "national rules" is "subject to judicial review" under its provisions. That statute does not say (or imply) much more broadly that every other jurisdictional basis for a suit that implicates a regulation's validity is withdrawn. Congress rejected a provision that would have made the statute's jurisdiction "exclusive." *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 737 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982). The Federal Circuit therefore correctly concluded that Section 1276(a)(1) does not displace the separate jurisdiction conferred by the Tucker Act. *Accord Indep. Cmty. Bankers v. Bd. of Govs.*, 195 F.3d

28, 34 (D.C. Cir. 1999) ("We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits.").

The government's broad reading of Section 1276(a)(1) must also be rejected because it would render that statute unconstitutional. It would strip any court of jurisdiction to decide petitioners' Export Clause claim because sixty days after the promulgation of OSM's regulation, no producer – even those petitioners that did not *exist* in 1977 – could contest ongoing taxation by OSM that is indisputably forbidden. Constitutional avoidance cuts both ways. *See Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 134-35 (1974) (refusing to construe statute as stripping Tucker Act jurisdiction over Fifth Amendment claims when no other remedy was available).

But the jurisdictional issue is the subject of a circuit split that merits this Court's review. *Compare* Reply App. 15a (Section 1276(a)(1) is not exclusive) *and Holmes Limestone Co.*, *supra* (same) *with United States v. Troup*, 821 F.2d 194, 198-99 (3d Cir. 1987) (because Section 1276(a)(1) is exclusive, that court's invalidation of OSM's regulation in *Brook Contracting* is ineffective; acknowledging the circuit conflict), *Drummond Coal Co. v. Watt*, 735 F.2d 469, 472-76 (11th Cir. 1984) (exclusive), *and Tug Valley Recovery Ctr. v. Watt*, 703 F.2d 796, 799-800 (4th Cir. 1983) (same).

The BIO's contrary assertion that the jurisdictional issue renders certiorari "not warranted," BIO 16, is just another unexplained *volte face*: the Solicitor General previously urged this Court to grant certiorari to decide this exact question. Pet. for Cert., *Watt v. Holmes Limestone Co.* (No. 81-1585). No circuit conflict existed at that time, and review was denied over two published dissenting votes. 456 U.S. 995 (1982). With the conflict now firmly established, certiorari should be granted, and the parties should be directed to brief and argue an additional question: "Did the lower courts have jurisdiction notwithstanding 30 U.S.C. § 1276(a)(1)?" *Cf. Osborn v. Haley*, 547 U.S. 1126 (2006).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

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