No. 13-941

IN THE

Supreme Court of the United States

ARACOMA 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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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, a corporate disclosure statement was included in the petition for a writ of certiorari. That disclosure remains current, except for the following changes, which supersede the corresponding entries in the petition. Below is an updated listing of petitioners' parent corporations, as well as publicly held companies that hold 10 percent or more of the stock of a petitioner (*italics* indicate public ownership):

Petitioner	**Parent Corporations and Any Publicly Held Company that Owns 10 Percent or More of Petitioner**
Alex Energy, Inc.	Elk Run Coal Company, Inc. Appalachia Holding Company Alpha Appalachia Holdings, Inc. *Alpha Natural Resources, Inc.*
Andalex Resources, Inc.	UtahAmerican Energy, Inc. Murray Energy Corporation Murray Energy Holdings Company

Colony Bay Coal Company n/k/a Colony Bay Coal Company, LLC	Eastern Associated Coal, LLC Coal Properties, LLC Heritage Coal Company LLC Interior Holdings, LLC Eastern Coal Company, LLC *Patriot Coal Corporation*
CONSOL Energy, Inc.	Southeastern Asset Management, Inc. T. Rowe Price Associates, Inc.
Consolidation Coal Company	Ohio Valley Resources, Inc. Murray Energy Corporation Murray Energy Holdings Company
Eighty Four Mining Company	Consolidation Coal Company Ohio Valley Resources, Inc. Murray Energy Corporation Murray Energy Holdings Company
Genwal Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc. Murray Energy Corporation Murray Energy Holdings Company
Helvetia Coal Company	R&PCC LLC CONSOL Mining Holding Company LLC

Island Creek Coal Company	CONSOL Mining Holding Company LLC *CONSOL Energy Inc.*
Kent Coal Mining Company (merged in 2001 into co-plaintiff Keystone Coal Mining Corporation)	Consolidation Coal Company Ohio Valley Resources, Inc. Murray Energy Corporation Murray Energy Holdings Company
Keystone Coal Mining Corporation	Consolidation Coal Company Ohio Valley Resources, Inc. Murray Energy Corporation Murray Energy Holdings Company
Kingston Resources, Inc. n/k/a Kingston Mining, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
McElroy Coal Company	Consolidation Coal Company Ohio Valley Resources, Inc. Murray Energy Corporation Murray Energy Holdings Company

Pioneer Fuel Corporation	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Quarto Mining Company	CONSOL Mining Holding Company LLC *CONSOL Energy Inc.*
Rivers Edge Mining, Inc. n/k/a Rivers Edge Mining, LLC	Eastern Coal Company, LLC *Patriot Coal Corporation*
Stone Mining Company n/k/a Duchess Coal Company	Long Fork Coal Company Appalachia Holding Company Alpha Appalachia Holdings, Inc. *Alpha Natural Resources, Inc.*
Wildcat, LLC n/k/a Wildcat Energy LLC	Brook Trout Coal, LLC Trout Coal Holdings, LLC Magnum Coal Company LLC *Patriot Coal Corporation*

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REPLY BRIEF FOR THE PETITIONERS

The Export Clause of the Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I § 9, cl. 5. This case presents the question whether the government may evade this requirement by characterizing a fee that operates as a sales tax[1] upon coal—including coal sold into the stream of export—as a tax upon the extraction of that coal before it enters the stream of export. In its brief in opposition, the government never disputes the exceptional importance of the question presented to exporters in general, and to the coal industry in particular, which has already seen its export revenues shrink dramatically of late. Certiorari is warranted to address this substantial constitutional question.

1. Even though the Surface Mining Control and Reclamation Act's (SMCRA) reclamation fee has all the indicia of a sales tax—*e.g.*, that the weight of the coal, the value of the coal, and even the tax rate are all determined at the time of the sale, transfer, or use of the coal, and not at the point of extraction—the government argues that the fee is, in fact, a tax upon the extraction of coal. The government's position is pure *ipse dixit*: it identifies no nexus between the tax and extraction, but instead argues that notwithstanding the absence of such a nexus, the government may characterize the tax as it sees fit.

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[1] A sale is the most common disposition of coal, but of course, the tax also applies if the coal is transferred or used. And indeed, a transfer or use tax would not differ materially from a sales tax.

Thus, the government argues that even though the amount of the tax depends on the attributes of the coal at sale, the "taxable event" is nevertheless the extraction of the coal. U.S. Br. 8. According to the government, "[t]he statutory obligation to pay the fee arises when the coal is 'produced' [*i.e.*, extracted]; Section 870.12(a) merely specifies the point in time at which the fee must be paid." *Id*.

The government's characterization of its regulations as a deferred payment scheme blinks reality. This Court has cautioned that the "obstructions to exportation which it was the purpose [of the Export 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). And it has also admonished courts to examine "things rather than names" in determining compliance with the Clause. *United States v. U.S. Shoe Corp*., 523 U.S. 360, 367 (1998) (internal quotation marks and citation omitted).

Here, the tax is, in "substance and effect," a tax on exports, *Fairbank v. United States*, 181 U.S. 283, 300 (1901), because at the moment in time when coal is extracted, a producer cannot even calculate how much it owes. The tax depends not on the weight and value of the raw coal at extraction—but on the weight and value of the processed coal at sale, which cannot be known until the coal is processed and blended with other coal to create a final product conforming to customer specifications. The government also applies the tax rate applicable on the date of the sale, and not

the rate on the date the coal was extracted. Thus, it cannot be the case that the obligation to pay has arisen, while collection is deferred; the amount of any "obligation" is indefinite at the time the coal is extracted. And of course, if the coal is stockpiled instead of being sold, transferred, or used, the obligation may *never* accrue.

Most importantly, the government has no answer to the contention that its logic—endorsed by the Federal Circuit in this case—would justify recharacterizing *any* unconstitutional tax on any export as a deferred tax on manufacturing, thus rendering the Export Clause a dead letter. Instead, the government attempts to assure the Court that its view of the tax is legitimate.

The government principally argues that it makes sense to weigh coal at sale instead of at extraction because doing so permits producers to remove impurities before weighing, and because prevailing industry practice is to weigh the coal at sale. U.S. Br. 8-9. The government argues that "[t]he agency was not faced with a binary choice between imposing a fee on the gross material extracted from the ground and imposing a fee on the sale of coal," and that it was entitled to adopt some methodology to determine the weight of coal. *Id*. 9-10.

This argument is unpersuasive first because even if it is more convenient or efficient to tax coal at sale, and even if the SMCRA permits that approach, it is unconstitutional to apply it to exports.

The government's argument is also flawed on its own terms. Although some coal is sold unprocessed,

most coal is weighed at extraction, cleaned, and then weighed again. Thus, while the government is correct that the agency should not adopt a methodology that includes rocks, debris, tree stumps, and impurities in its calculation of coal weight, that does not mean that the agency may calculate the tax at the time of sale—especially when the weight at sale may include additives such as antifreeze and dust-allaying substances. Instead, the obvious way for the government to comply with its obligation to weigh coal (and only coal) is to either estimate the weight of the coal at extraction using a clean coal methodology that accounts for the presence of other materials, or to use the weight of the coal after cleaning, before the application of any additives.

Even if all of the government's arguments about relying on weight-at-sale as a proxy for weight-at-extraction are relevant and sensible, there is no reason to rely on the coal's value-at-sale, or to apply the tax rate effective on the date of the sale. These additional factors prove petitioners' argument—that the tax is, in substance, a sales tax, and not a tax on extraction.

The government responds that the value of the coal is irrelevant because the fees in this case were assessed using a per-ton method, not ad valorem. U.S. Br. 13 & n.2. But that obscures the point, which is that in every case (including this one), the tax amount depends on the sales price. *See* OFFICE OF SURFACE MINING PAYER HANDBOOK 16 (Oct. 2011) (explaining that coal "value" is calculated using sales price). The tax is an ad valorem tax with a cap—it is calculated as a percentage of the value of the coal, unless the value

exceeds a specified amount per ton. *See* 30 C.F.R. § 870.13 (specifying rates and caps). Thus, even when a per-ton method is used, that is only because the sales price of the coal is relatively high—not because the sales price is irrelevant. The government's decision to key the value to the sales price belies its assertion that the tax is truly a tax on extraction—were that the case, then the regulations would rely on the value of the raw coal at extraction. They do no such thing.

This is important because between the time that coal is extracted and the time it is sold, its value is likely to change, whether in response to market fluctuations in the price of coal, or because the coal itself is modified—*e.g.*, with additives, or by blending. Indeed, at extraction there is no computable price for a ton of raw coal destined for export in the form of processed coal, because each ton must be blended with other coal of varying quality characteristics and processed into a finished product meeting the purchaser's specifications. Thus, at extraction, a coal producer cannot compute the amount of the tax. In the face of such uncertainty at the time of extraction, it is implausible to describe extraction as the "taxable event."

The tax rate is similarly revealing. The government does not dispute that if tax rates change, it applies the rate effective at the time of sale, not the rate effective at the time of extraction. *See* Pet. 15. The government argues that rates have not recently changed. *See* U.S. Br. 11 n.2. But again, that is irrelevant because the question is whether the reclamation fee, in substance, is truly a tax on

extraction. If it were, then one would expect that the tax rate would be determined at extraction, not later.

The government is similarly dismissive of the point that if the coal is stockpiled indefinitely, the tax never accrues. The government argues that this "indicates a possible enforcement problem for the agency, not a constitutional infirmity in the regulatory scheme." U.S. Br. 10. That might be plausible if any other facet of the tax was determined at extraction. But when combined with the government's decision to assess weight, value, and tax rate at the time of sale, its attempt at characterization rings hollow. This fact also distinguishes *Cornell v. Coyne*, 192 U.S. 418 (1904), where the relevant statute provided for a tax "upon all filled cheese which shall be manufactured," *id.* at 433 (Harlan, J. dissenting), and also *Rogan v. Conterno*, 132 F.2d 726, 728 (9th Cir. 1942), where "[r]egulations of the Treasury Department over many years indicate[d] an interpretation consistent with the theory that the tax was a producer's tax" and not a tax on sales. Here, the relevant regulations support the contrary conclusion.

The government is also wrong to rely on *Reynolds Tobacco Co. v. Robertson*, 94 F.2d 167, 169 (4th Cir. 1938), which held that tobacco taxes did not violate the Export Clause or a statutory provision regarding taxation of exports. That case applied this Court's decision in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). As explained in the petition, *Liggett & Myers* is inapposite. *See* Pet. 19-22. The government nevertheless relies on it, arguing that in *Liggett & Myers*, the fact that the tax was collected

at the time of sale did not make it a sales tax, and further arguing that the taxes are similar because the tobacco tax in *Liggett & Myers* did not turn on the sale price of the tobacco, but instead imposed a fee per pound. U.S. Br. 12-13. But the comparison is inapt, and the government does not address the distinctions raised in the petition—indeed, it acknowledges that *Liggett & Myers* was not an Export Clause case, and the analysis turned on entirely different considerations, because the Export Clause bars any export tax, ad valorem or otherwise. Moreover, as explained above (and in the petition at 21-22), the reclamation fee is an ad valorem tax with a cap, while the tax in *Liggett & Myers* did not depend at all on the value of the tobacco.

Additionally, the government's new claim that the tax applies only to extraction conflicts with the position it took in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), and in *Wyodak Resources Development Corp. v. United States*, 637 F.3d 1127 (10th Cir. 2011)—two cases in which the government emphasized its right to impose the fee at the time of sale because its interpretation of the phrase "coal produced" includes not only extraction, but also processing of coal up to the point of sale. *See* Pet. 7-9. The government's only response is to flatly state that its positions have been consistent, but that strains credulity. Simply put, one cannot say that a tax on coal extracted from the ground can also apply to materials that were never extracted from the ground (such as antifreeze, dust-allaying chemicals, or the excess moisture in *Drummond*) that were added or adhered after the coal was extracted. The raw coal

extracted is a different commercial product from the processed coal that is ultimately sold, and the reclamation fee taxes only the latter.

Perhaps the simplest way to determine the character of the tax is to ask whether, if one was attempting to impose a sales tax on coal, the tax would look any different from the tax that the government in fact imposes. The answer is "no."

2. The contrast between the government's position in this case and the government's position in *Drummond Coal* also highlights the circuit split between the Federal Circuit's holding in this case and the D.C. Circuit's prior holding. In *Drummond Coal*, the D.C. Circuit, deferring to the Secretary of the Interior's expertise, agreed that the statutory phrase "coal produced" referred not to coal "immediately after extraction," but instead to "coal as it is offered for initial sale." Br. for the Secretary of the Interior 13, *Drummond Coal*, 796 F.2d 503 (D.C. Cir. 1986); *Drummond Coal*, 796 F.2d at 505 (explaining that "'Production' could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction," and deferring to the Secretary's interpretation of that ambiguous language). The Federal Circuit, by contrast, concluded that such a broad interpretation would be unconstitutional as applied to exports, and therefore applied its version of the canon of constitutional avoidance to hold that the tax should be regarded as applying to coal extracted. *See Consolidation Coal Co. v. United States*, 615 F.3d 1378, 1382 & n.2 (Fed. Cir.

2010). That divergence in approach creates a split over the meaning of the phrase "coal produced."

The government argues now that its position in *Drummond Coal* "need not be understood" to have embraced a broad definition of coal production. *See* U.S. Br. 15. It argues instead that "the agency could have concluded that weight at the time of sale is the soundest and most administrable proxy for weight at the time of extraction." *Id*. That appeal to revisionist history should fail because the Secretary's own words refute it: petitioners have cited the Secretary's briefs, which expressly and emphatically urged the Court to adopt a broader reading of the statutory language. The government also notes that the regulations have changed since the D.C. Circuit decided *Drummond Coal*, but that change is not relevant to this case: the fact of the matter remains that the D.C. Circuit has taken a broad view of the meaning of "coal produced," which is unconstitutional as applied to exports, and the Federal Circuit has taken a narrow view in an attempt to save the Secretary's regulation.

The Federal Circuit's application of the doctrine of constitutional avoidance to retroactively validate the government's characterization of the tax, criticized in the Brief of Constitutional Law Professors, *Consolidation Coal Co. v. United States*, No. 10-1020, 2011 WL 970475 (2011), also widens a circuit split regarding the relationship between constitutional avoidance and deference to an agency. The government's only answer is to argue that it has never taken the position that the tax applies to sales. But as

explained in the previous section, that is the substance and effect of the regulations.

3. The government argues next that because it is possible for it to collect the reclamation fee—even on coal bound for export—in a constitutional manner, and because the methodology it uses has so far resulted in lower fees for coal producers, review should be denied. U.S. Br. 17.[2] But if the government violates the Constitution, the fact that it could have achieved the same result without doing so does not excuse the violation. For example, a warrantless search is not excused because the police could have obtained a warrant. The government cites no authority for its argument that it can retroactively pretend that it applied a constitutional methodology to determine petitioners' taxes, because none exists.

This argument is of a piece with the government's claim (U.S. Br. 19-20) that the regulatory features petitioners criticize were intended as accommodations to the coal industry. That intent is beside the point. As explained in Section 1, *supra*, there are ways to impose the reclamation fee that are both equitable to the industry and constitutional. The Office of Surface Mining's regulations, however, do not enact those methods. Instead, they impose an unconstitutional tax upon exports. The fact that the government previously

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[2] This argument is incorrect on its own terms because the government's methodology results in higher fees, attributable to the weight of non-extracted substances, than if the clean-coal calculation were applied at the time of extraction.

imposed a less equitable tax regime—permitting the taxation of moisture, for example—is irrelevant.

4. The government also argues that this case raises the antecedent jurisdictional question whether petitioners may bring their claims under the Tucker Act, or whether they must instead sue in the district court for the District of Columbia, under the procedure that the SMCRA prescribes for challenges to the validity of regulations under the statute. If anything, this jurisdictional argument provides an independent basis for granting certiorari.

As the government notes, this Court's decision in *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), calls into question whether the Federal Circuit has jurisdiction over cases like this one. In this case, the Court of Federal Claims concluded that the holding of *Clintwood Elkhorn*, which interprets the Internal Revenue Code, "does not specifically apply to the statute in this case," and so it decided not to "depart from the binding precedent" of the Federal Circuit finding jurisdiction. Pet. App. 22a-23a. The Federal Circuit, of course, affirmed in all respects. *Id.* 7a. Consequently, to the extent the United States raises a valid jurisdictional concern, this Court should grant certiorari to determine whether the Tucker Act or the Export Clause creates jurisdiction.

In this regard, it is notable that the government has sought dismissal of parallel litigation in the D.C. Circuit, arguing that the plaintiff "has an adequate avenue of relief by filing a complaint for money damages, pursuant to the Tucker Act, in the United States Court of Federal Claims, premised upon the

Export Clause being a money-mandating provision of the Constitution." Br. of Appellees 18, *Coal River Energy, LLC v. Jewell*, No. 13-5119 (D.C. Cir.). In that brief, the government acknowledges its jurisdictional argument here, but notes that Federal Circuit precedent "expressly permits" claims like petitioners'. *Id*. 18 n.2.

In sum, none of the government's arguments against review have merit. Indeed, they only reinforce the case for certiorari.

CONCLUSION

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

Respectfully submitted,

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