No. 02-956

In the Supreme Court of the United States

A.T. MASSEY COAL COMPANY, INC., ET AL.,
PETITIONERS

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Commissioner of Social Security was constitutionally required under *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), to void assignments to petitioners of liability for retired miners' benefits under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, even though, when that Act was passed, petitioners were members of a commonly controlled group of corporations that both employed the miners and promised to provide them lifetime health benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 305 F.3d 226. The opinion of the district court (Pet. App. B1-B42) is reported at 153 F. Supp. 2d 813. The order of the district court amending its judgment (Pet. App. C1-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. The petition for a writ of certiorari was filed on December 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, in response to a financial crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits. Those benefits had been promised to retired coal miners in a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements (NBCWAs) negotiated between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators' Association (BCOA), a multi-employer bargaining association. See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion); Pet. App. A6-A9.

In the 1930s, as the UMWA organized workers in the coal industry, heath-care benefits became an important issue in collective bargaining. In 1947, the UMWA and several coal operators entered into a NBCWA in which the operators agreed to provide health-care benefits to miners and their dependents. The 1947 NBCWA did not, however, promise specific benefits or guarantee lifetime benefits. The UMWA and the BCOA entered into similar agreements in subsequent years. See *Eastern Enterprises*, 524 U.S. at 504-509 (plurality opinion); Pet. App. A7.

In 1974, the UMWA and the BCOA entered into a NBCWA that, for the first time, explicitly promised lifetime health benefits to miners and their dependents. In 1978, the UMWA and the BCOA entered into a new NBCWA in which signatory operators agreed to provide lifetime benefits for their own active and retired employees as well as for "orphaned" miners whose employers had ceased coal operations or withdrawn from the NBCWAs. Signatory employers were re-

quired to contribute enough to pay for the promised benefits and to remain liable as long as they remained in the coal industry. See *Eastern Enterprises*, 524 U.S. at 509-511 (plurality opinion); Pet. App. A7-A9.

In the 1980s and 1990s, the financial stability of the private multi-employer plans that had been established to finance those benefits was undermined by increasing health-care costs and the termination of coal operators' contribution obligations as operators switched to non-union employees or left the coal industry altogether. As more coal operators withdrew from the plans, the remaining operators were forced to bear more of the costs, which in turn led to even more defections and created a downward spiral. See *Eastern Enterprises*, 524 U.S. at 511-514 (plurality opinion); Pet. App. A9.

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to * * * retirees," to "allow for sufficient operating assets for such plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, Title XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund). The Combined Fund provides health-care benefits to individuals who, at the time that the Coal Act was enacted, were receiving benefits from the multi-employer plans. See 26 U.S.C. 9702, 9703(f).

The Combined Fund is financed principally by premiums paid by the "signatory operator[s]"—or "related person[s]" of those operators—that formerly employed

the retired miners who are beneficiaries of the Combined Fund. 26 U.S.C. 9704, 9706(a). The Coal Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1).

b. The Coal Act vests the Commissioner of Social Security (Commissioner) with the task of assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). The Coal Act provides for assignments to be based on how long and how recently a miner worked for a particular employer and on whether the employer signed a NBCWA in 1978 or thereafter. See 26 U.S.C. 9701(b)(1) and (c)(1), 9706(a). Any signatory operator that receives business revenue, "whether or not in the coal industry," may be assigned beneficiaries under the Coal Act. 26 U.S.C. 9701(c)(7), 9706(a).

The Coal Act also imposes shared responsibility on a signatory operator's "related persons," which are defined to include members of a commonly controlled group of corporations that includes the signatory operator, businesses under common control with the signatory operator, and successors in interest to a related person. 26 U.S.C. 9701(c)(2)(A). Related persons may be directly assigned liability for premiums for a retired miner and his dependents. See 26 U.S.C. 9706(a). In addition, related persons are jointly and severally liable for the premiums of the assigned operator. See 26 U.S.C. 9704(a). For assignment purposes, "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. 9706(b)(1)(A).

If a retired miner cannot be assigned to any coal operator or related person that remains in business, the miner is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). The Coal Act provides several sources of funding for the benefits of unassigned beneficiaries, including transfers from the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund) and, if necessary, assessments of an "unassigned beneficiary premium" from coal operators and related persons that have been assigned retired miners. See 26 U.S.C. 9704(a), 9705(a) and (b).[1]

c. In *Eastern Enterprises*, this Court invalidated the Commissioner's assignment to Eastern of responsibility for the Combined Fund premiums of more than 1000 retired miners and their beneficiaries that were estimated to total between $50 million and $100 million. The Commissioner had made those assignments under 26 U.S.C. 9706(a)(3), the third tier of the Coal Act's assignment hierarchy, because Eastern had employed the miners and had signed NBCWAs in the 1960s.[2]

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[1] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, for the purpose or reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a). To date, AML Fund transfers have been sufficient to avoid the assessment of an unassigned beneficiary premium.

[2] Although Eastern had a subsidiary, Eastern Associated Coal Corporation (EACC), that had signed NBCWAs in 1974 and thereafter, Eastern sold all of its interest in EACC in 1987. 524 U.S. at 516 (plurality opinion); see 26 U.S.C. 9701(c)(2)(B) (related person status is determined as of July 20, 1992, unless coal operator went out of business earlier). Because EACC was not a "related person" to Eastern within the meaning of the Coal Act, the Commissioner

A plurality of the Court concluded that the challenged assignments violated the Just Compensation Clause of the Fifth Amendment. The plurality reasoned that the Coal Act "place[d] a severe, disproportionate, and extremely retroactive burden on Eastern." 524 U.S. at 538. The plurality emphasized that Eastern had not engaged in coal mining since 1965, had employed the assigned miners "some 30 to 50 years before" the enactment of the Coal Act, and had not signed "the 1974, 1978, or subsequent NBCWA's," which the plurality described as the "agreements that first suggest an industry commitment to the funding of lifetime health benefits." *Id.* at 530-531. The plurality noted that, under the earlier NBCWAs that Eastern had signed, a coal operator's obligation was limited to a fixed royalty, withdrawal was permitted, and miners were provided with "far less extensive" benefits that "were fully subject to alteration or termination." *Id.* at 531; see *id.* at 535-536.

Justice Kennedy concurred in the judgment. 524 U.S. at 539-550. Justice Kennedy disagreed with the plurality's takings analysis, but concluded that the challenged assignments violated the Due Process Clause. Justice Kennedy reasoned that the Commissioner's assignments to Eastern based on "events which occurred 35 years ago" had "a retroactive effect of unprecedented scope" that could not be justified as "remedial," because those assignments were designed to satisfy a promise to provide lifetime health benefits "made long after Eastern left the coal business." *Id.* at 549-550.

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had not made assignments to Eastern based on its relationship to EACC. See 524 U.S. at 530 (plurality opinion).

3. Petitioner A.T. Massey Coal Company, Inc. (Massey) is a holding company that has numerous wholly owned subsidiaries, many of which have engaged or are engaging in coal mining operations. C.A. App. 24, 26-28, 161-162. Massey and its affiliates "function[] as a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters." *A.T. Massey Coal Co.* v. *International Union*, 799 F.2d 142, 144 (4th Cir. 1986), cert. denied, 481 U.S. 1033 (1987). Massey and three of its subsidiaries, petitioners here, have stipulated that they are members of a "controlled group of corporations" within the meaning of the Coal Act. Pet. App. A12, B22.

a. The Commissioner assigned petitioners responsibility under the Coal Act for the health-care premiums of 333 retired miners and their dependents. After *Eastern Enterprises*, petitioners asked the Commissioner to void their assignments, arguing that they did not themselves sign NBCWAs in 1974 or thereafter, and thus were similarly situated to Eastern. The Commissioner declined to void petitioners' assignments because other wholly owned Massey subsidiaries, which are petitioners' "related persons" under the Coal Act, signed the 1974 NBCWA or subsequent NBCWAs promising to provide lifetime health-care benefits to all retired miners. C.A. App. 523-525.[3]

b. Petitioners brought suit against the Commissioner and the trustees of the Combined Fund, contending that their assignments were invalid under *Eastern Enterprises*. The district court granted sum-

[3] The Commissioner voided assignments to other coal operators and related persons that were determined to be similarly situated to Eastern. See Pet. App. A16.

mary judgment in favor of the Commissioner. Pet. App. B1-B42.

The district court observed that other courts presented with such challenges have "unanimously" concluded that the "splintered decision in *Eastern Enterprises*," in which no single rationale commanded the support of five Justices, "mandates judgment for the plaintiffs only if they stand in a *substantially identical* position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." Pet. App. B28 (quoting *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999)). The court found that standard was not satisfied here. The court explained that petitioners, unlike Eastern, were "related persons" to coal operators that signed the 1974 NBCWA or subsequent NBCWAs that explicitly promised lifetime health-care benefits. See *id.* at B29. The court concluded that "a company that is assigned liability for premiums under the Coal Act based on its status as a 'related person' to a 1974 or subsequent NBCWA signatory is not substantially identical to Eastern because *Eastern Enterprises* did not address related person liability." *Id.* at B38.

c. The court of appeals affirmed. Pet. App. A1-A26.

The court of appeals identified the "single issue" raised by petitioners on appeal as "whether [their] assignments are unconstitutional under *Eastern Enterprises*." Pet. App. A18. The court of appeals, like the district court, held that *Eastern Enterprises* would require the invalidation of the challenged assignments only if petitioners are in a "substantially identical" position to that of Eastern. *Id.* at A19. The court observed that both the plurality opinion and the concurring opinion in *Eastern Enterprises* treated as

critical the fact that Eastern had not signed the 1974 NBCWA or any subsequent NBCWA promising lifetime health-care benefits. *Id.* at A20. Accordingly, the court concluded that "a coal operator stands in a position 'substantially identical' to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs." *Ibid.*

The court of appeals held that petitioners were not "substantially identical" to Eastern in that critical respect. Pet. App. A23-A26. The court explained that, although petitioners themselves had not signed the 1974 NBCWA or subsequent NBCWAs, they are part of a controlled group of corporations that had done so. The court noted that the Coal Act treats employment by any member of a controlled group as employment by all members of the group. *Id.* at A23 (citing 26 U.S.C. 9706(b)(1)(A)). The court also observed that treating all members of a controlled group as "a single entity" is consistent with the statutory purpose of assuring that benefit obligations would not be affected by changes in corporate form. *Id.* at A24.

The court of appeals rejected the argument that petitioners are in a "substantially identical" position to Eastern because Eastern had a wholly owned subsidiary, Eastern Associated Coal Corporation (EACC), that signed NBCWAs in 1974 and thereafter. The court explained that Eastern and EACC were not "related persons" within the meaning of the Coal Act because Eastern had sold EACC before July 20, 1992, the date on which the Coal Act was passed and the date as of which "related person" status is determined under 26 U.S.C. 9701(c)(2)(B). Accordingly, Eastern's liability for Coal Act premiums could not have been based on its relationship to EACC. Pet. App. A24-A25. The court, "tak[ing] the parties as the Act defines them," recog-

nized that Eastern, by virtue of its pre-Act sale of EACC, was "a discrete entity," whereas petitioners, by virtue of their continuing relationship, are "gather[ed] * * * together with the other members of the Massey Group for purposes of determining Combined Fund liability." *Id.* at A25.

Judge Niemeyer concurred in part in the judgment and dissented in part, expressing the view that the Coal Act assignments to three of the four petitioners "are unconstitutional by virtue of the Supreme Court's holding in *Eastern Enterprises*." Pet. App. A27.

ARGUMENT

Petitioners contend that the Commissioner was required to void their Coal Act assignments in light of *Eastern Enterprises* because "[t]he facts here are substantially identical to Eastern's in all material respects." Pet. 17. The court of appeals rejected that contention on the ground that petitioners' liability for Coal Act premiums, unlike Eastern's, was justified by their membership, at the time that the Coal Act was passed, in a commonly controlled group of corporations that both employed the particular retirees assigned to petitioners and promised lifetime health benefits to all retirees. That decision is correct, is consistent with the decisions of other courts of appeals, and presents no question of continuing importance. This Court's review is, therefore, not warranted.

1. Petitioners do not dispute that the court of appeals articulated the proper standard for determining whether *Eastern Enterprises* requires that their assignments be voided—namely, whether petitioners are in a "substantially identical" position to Eastern with respect to "the critical facts the plurality and Justice Kennedy relied on in reaching their respective

conclusions." Pet. 15, 16. They merely contend that the court of appeals misapplied that standard in this case. This Court ordinarily does not grant certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, the court of appeals correctly held that petitioners are not similarly situated to the former coal operator in *Eastern Enterprises* so as to require invalidation of their assignments under the holding of that case.

a. In concluding that the assignments in *Eastern Enterprises* were unconstitutional, the plurality and concurring opinions emphasized that Eastern had not signed the 1974 NBCWA, which was the first to make an explicit promise of lifetime health-care benefits, or any subsequent NBCWA, and thus could not reasonably have contemplated being held responsible for providing such benefits. See 524 U.S. at 530 (plurality opinion) (explaining that Eastern had not "participated in negotiations nor agreed to make contributions" to satisfy the "industry commitment to the funding of lifetime health benefits" made in the 1974 and later NBCWAs); *id.* at 550 (Kennedy, J., concurring in the judgment) (reasoning that Eastern was "not responsible for [retired miners'] expectation of lifetime health benefits" because it did not sign NBCWAs in 1974 or thereafter).

Here, in contrast, petitioners could reasonably have anticipated that they would be required to provide lifetime health-care benefits for their retirees. That is because petitioners are (and at all relevant times have been) members of a commonly controlled group of corporations, other members of which signed the 1974 and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees

who were "orphaned" by their employers. See Pet. App. A14 (identifying three such related companies); *id.* at B24 (identifying additional related companies). To be sure, petitioners might have hoped to avoid ever having to share in the obligations that their subsidiaries (in the case of petitioner Massey) or affiliates (in the case of the other petitioners) assumed by signing those NBCWAs. Petitioners could not, however, have had a "reasonable investment-backed expectation," *Eastern Enterprises*, 524 U.S. at 532 (plurality opinion), that they would never be required to provide the very benefits to their own retirees that their related companies had promised to *all* retirees.

b. Petitioners contend that they cannot meaningfully be distinguished from Eastern because, like petitioners, Eastern had an affiliate, EACC, that signed the 1974 and subsequent NBCWAs. See Pet. 20-24. As the plurality explicitly recognized in *Eastern Enterprises*, Eastern had sold EACC in 1987, five years before the enactment of the Coal Act and the date as of which the Coal Act determines "related person" status, so that "Eastern's liability under the Act [could] bear[] no relationship to its ownership of EACC." 524 U.S. at 516, 530; see 26 U.S.C. 9701(c)(2)(B). Accordingly, the Court had no occasion in *Eastern Enterprises* to consider whether the Constitution would bar assignment of responsibility to one member of a group of corporations that remained under common control on the date that the Coal Act was passed—and the date as of which "related person" status is determined—where other members of the group had promised lifetime benefits to all retired miners. See Pet. App. A25 (observing that "the *Eastern Enterprises* plurality expressly deferred to the delineation of entities that Congress chose to make in the Coal Act" and thus "examined Eastern's

experience in isolation" from EACC's). Here, in contrast, petitioners remain affiliated with the numerous "related persons" that promised lifetime health benefits to coal miners. The Coal Act permitted the Commissioner to take those "related persons" into account in ascertaining petitioners' liability.[4]

Nor is there anything unfair about treating all members of a commonly controlled group of corporations—indeed, one whose members operate as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters" (Pet. App. A12)—as a single entity for purposes of imposing liability for retirees' benefits under the Coal Act. It is reasonable to presume that the entire controlled group profited from the services

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[4] Petitioners dispute that their Coal Act liability is based in part on their membership in a controlled group of corporations that signed the 1974 NBCWA or later NBCWAs. See Pet. 19 & n.10. As the court of appeals recognized, however, the Commissioner sustained petitioners' assignments after *Eastern Enterprises* on that basis. See Pet. App. A16.

Petitioners also contend that the Commissioner lacked authority to maintain their assignments based on whether the controlled group, as a whole, employed the miners at issue and signed 1974 or later NBCWAs. See Pet. 22. That contention was not addressed by the court of appeals. It is, in any event, incorrect. The Coal Act repeatedly provides that formal distinctions among related companies may be disregarded. See 26 U.S.C. 9706(b)(1)(A) (coal miner's employment is attributable not only to the coal operator that directly employed him but also to any "related persons"); 26 U.S.C. 9704(a) (providing for assignment not only to the coal operator that employed a miner but also to related persons); 26 U.S.C. 9706(a) (providing that related persons are jointly and severally liable). The Commissioner's approach in this case constitutes a reasonable application of a statute that she is charged with implementing, and thus is entitled to judicial deference. See, *e.g.*, *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1271-1272 (2002).

rendered by its employees in return for its promises of lifetime benefits. That may well be why petitioner Massey allowed its subsidiaries to continue to make those promises throughout the 1970s and into the 1980s. Moreover, Congress's choice in the Coal Act to permit liability to be imposed not only on the direct employer but also on all sufficiently "related persons" was particularly justified given the evidence before it that coal operators' use of nominally separate companies had contributed substantially to the funding crisis that the Coal Act was intended to solve. See C.A. App. 408-409, 423, 431; see generally *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729-730 (1984) (recognizing that Congress ordinarily may impose retroactive liability on employers to fund employee benefits in pursuit of "a rational legislative purpose," such as to spread the cost of those benefits among all those "who have profited from the fruits of [the employees'] labors") (citation omitted); accord, *e.g.*, *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646 (1993); *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

In sum, petitioners are not, as they claim, "substantially identical" to the former coal operator in *Eastern Enterprises* with respect to the "critical facts the plurality and Justice Kennedy relied on in reaching their respective conclusions." Pet. 15, 16. Accordingly, even if petitioners had some other basis on which to challenge their assignments, petitioners cannot validly challenge their assignments on the basis of *Eastern Enterprises* alone, and that is the only challenge they have preserved in this case.[5]

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[5] As the court of appeals recognized, the "single issue" raised by petitioners on appeal was "whether [their] assignments are

2. The Fourth Circuit's decision in this case does not conflict with the decision of any other circuit. Nor do petitioners contend otherwise.

Indeed, the Third Circuit has held, consistently with the Fourth Circuit here, that *Eastern Enterprises* does not require the invalidation of assignments to employers that are not themselves signatories of the 1974 NBCWA or a subsequent NBCWA, but that are the "related persons" of such signatories. See *Berwind Corp.* v. *Commissioner*, 307 F.3d 222, 235-236 (2002) (concluding that an employer's position "is materially different" from Eastern's when the employer's related person signed the 1974 NBCWA or a later NBCWA), petition for cert. pending, No. 02-995 (filed Dec. 24, 2002); *Shenango Inc.* v. *Apfel*, 307 F.3d 174, 186-187 (2002) (same). More generally, the D.C. Circuit has held that assignments based on participation in the 1974 NBCWA or a subsequent NBCWA distinguish a case from *Eastern Enterprises*, without attributing any significance to whether the NBCWA was signed by the party to which the assignment was made or by a related person. *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1257 (1998); accord *Unity Real*

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unconstitutional under *Eastern Enterprises*." Pet. App. A18. The court of appeals thus did not consider any other constitutional or statutory challenge to those assignments. See *id.* at B25 (district court characterizes "[t]he dispositive question" in the case as whether petitioners "are in a substantially identical position to the plaintiff in *Eastern Enterprises* such that the decision in *Eastern Enterprises* necessitates the conclusion that the Coal Act is unconstitutional as applied to [petitioners]"); *id.* at B26 (district court observes that petitioners could not prevail on any independent takings claim given that five Justices had rejected such a claim in *Eastern Enterprises*); *id.* at B39 n.17 (district court notes that petitioners had not raised any due process claim aside from reliance on *Eastern Enterprises*).

Estate Co. v. *Hudson*, 178 F.3d 649, 654-655, 658-674 (3d Cir.), cert. denied, 528 U.S. 963 (1999); *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 166-167, 169-174 (3d Cir.), cert. denied, 528 U.S. 1003 (1999).

The consistency of appellate decisions refutes petitioners' assertion that this Court's guidance is needed with respect to how *Eastern Enterprises* and "other similarly fragmented decisions" are to be applied. Pet. 16.

3. This Court issued its decision in *Eastern Enterprises* nearly five years ago. The Commissioner has long since decided which assignments should and should not be vacated based on the holding in that case. It is thus unlikely that cases such as this one challenging the Commissioner's implementation of *Eastern Enterprises* will continue to arise in the future. Moreover, as the elderly beneficiary population continues to decline as a result of mortality, petitioners and other assigned companies will have to pay premiums for fewer beneficiaries with each passing year. See Pet. App. A13 n.11 (noting that petitioners were responsible for the premiums of only 134 beneficiaries by the 1999 plan year). For these reasons as well, this case presents no question of continuing importance that warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2003