No. 02-1419

In the Supreme Court of the United States

SHENANGO INCORPORATED, 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 THIRD 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 petitioners' "related persons" under the Act employed the miners and promised to provide lifetime health benefits to all miners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-49a) is reported at 307 F.3d 174. The opinion of the district court (Pet. App. 50a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2002. A petition for rehearing was denied on December 23, 2002 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 21, 2003. 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), that were 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).

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).

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 required 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).

In the 1980s and early 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 by the termination of many coal operators' contribution obligations as those 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).

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]" that formerly employed the retired miners who (with their

dependents) are beneficiaries of the Combined Fund and by the "related persons" of signatory operators. 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 made under a three-tiered hierarchy based on how long and how recently a miner worked for a particular employer and on whether the employer signed a coal wage agreement in 1978 or thereafter. See 26 U.S.C. 9701(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 person 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 of 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 had 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

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.

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

2. Petitioners are four coal companies that were assigned responsibility for paying Coal Act premiums with respect to approximately 70 miners and qualifying dependents. The Commissioner initially made those assignments pursuant to 26 U.S.C. 9706(a)(3) on the ground that petitioners were "related" to a defunct employer that had signed a pre-1978 NBCWA. See Pet. App. 14a.

After this Court's decision in *Eastern Enterprises*, the Commissioner undertook a comprehensive review of all assignments that were made under 26 U.S.C. 9706(a)(3), including those made to petitioners. The Commissioner concluded that, if neither the original employer of a miner nor a statutory "related person" signed the 1974 NBCWA or a subsequent NBCWA, the assignment could not be distinguished from *Eastern Enterprises* and thus had to be voided. See Pet. App. 20a.

At the same time, however, the Commissioner concluded that an assignment was distinguishable from those in *Eastern Enterprises*, and could be sustained, if the assigned company was a member of "a controlled group of corporations," 26 U.S.C. 9701(c)(2)(A)(1), that contained a signatory to the 1974 NBCWA or a subsequent NBCWA. The Commissioner recognized that no such circumstances were presented in *Eastern Enterprises*. Accordingly, because each petitioner was a member of a controlled group of corporations that contained a signatory to the 1974 NBCWA and subsequent NBCWAs, the Commissioner declined to vacate petitioners' assignments. See Pet. App. 20a-21a.

3. Petitioners filed suit against the Commissioner and the Trustees of the Combined Fund. As relevant here, petitioners contended that the Commissioner's refusal to vacate their assignments violated the Consti-

tution and was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

The district court sustained the Commissioner's decision. Pet. App. 50a-61a. The court noted that petitioners' challenge was "premised on the notion that they are in a position substantially identical to Eastern's." *Id.* at 56a. The court rejected that premise on the ground that each petitioner, unlike Eastern, has a "related person," with the meaning of the Coal Act, that signed the 1974 NBCWA and later NBCWAs. *Id.* at 56a-58a. The court explained that here, in contrast to *Eastern Enterprises*, "a chain of ownership eventually connects the three relevant links: the direct employers of the miners assigned; the promisers of lifetime benefits; and the plaintiffs." *Id.* at 56a. The court then concluded that "the Commissioner's decision to assign the retirees in question to [petitioners] is not constitutionally infirm," *id.* at 58a, and "was not arbitrary, capricious, or contrary to law" under the APA, *id.* at 59a.

4. The court of appeals affirmed. Pet. App. 1a-49a.

The court of appeals, like the district court, noted that petitioners' challenge to their assignments "turns on whether they are in a substantially identical position to Eastern Enterprises with regard to the assignments." Pet. App. 25a (internal quotation marks omitted). The court explained that the "fragmented decision in *Eastern Enterprises*," in which no single rationale commanded the support of five Justices, "mandates judgment for [petitioners] only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Id.* at 23a-24a (quoting *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999)).

The court of appeals concluded that "the circumstances here are not substantially equivalent to the circumstances in *Eastern Enterprises*." Pet. App. 25a. The court observed that *Eastern Enterprises* "did not involve liability under the Coal Act's 'related person' provisions," and that "Eastern was assigned premium liability under the Coal Act solely because it employed the assigned miners." *Ibid.* "In contrast," the court noted, petitioners' "liability here arises from their relationship to 'related person' subsidiaries that signed a NBCWA in 1974 or thereafter." *Id.* at 25a-26a.

The court of appeals rejected petitioners' contention that, because Eastern had a subsidiary that signed the 1974 NBCWA and later NBCWAs, they were in a "substantially equivalent" position to Eastern. Pet. App. 27a. The court explained that, unlike petitioners, Eastern divested itself of that subsidiary before the Coal Act was enacted. Thus, the court stated, Eastern's subsidiary could not be deemed a "related person" for purposes of the Coal Act, and "premium liability could not have been imposed on Eastern as a related person to [the subsidiary]." *Ibid.*

In addition, the court of appeals held that the Coal Act's imposition of retroactive premium liability on petitioners was not otherwise irrational or a denial of due process. Pet. App. 34a-37a. The court noted that, "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 35a (quoting *Unity*, 178 F.3d at 670, 671). The court concluded that the burdens imposed by the Coal Act are reasonably proportional to, and justified by, the coal industry's role in creating reasonable expectations of lifetime benefits and contributing to the deterioration of the preexisting private benefit plans. *Id.* at 34a, 36a. The court also

suggested that the imposition of liability on petitioners was not severely retroactive, given that petitioners' "related persons" signed NBCWAs as recently as 1988, only four years before the Coal Act's enactment. *Id.* at 37a.

ARGUMENT

The petition concededly raises "substantially the same" issues and arguments that were raised in two other recent petitions (Pet. 15), both of which have been denied. *A.T. Massey Coal Co.* v. *Massanari*, 123 S. Ct. 1928 (2003) (No. 02-956); *Berwind Corp.* v. *Barnhart*, 123 S. Ct. 1927 (2003) (No. 02-995). The same reasons that militated against review in *Massey* and *Berwind* also militate against review here.

The court of appeals correctly concluded that this Court's decision in *Eastern Enterprises* does not require invalidation of the assignments at issue here. Petitioners are not in a substantially identical position to the coal operator in *Eastern Enterprises* because, unlike that coal operator, petitioners have statutory "related persons" that employed the coal miners for whom petitioners were assigned responsibility and signed NBCWAs promising lifetime benefits to *all* coal miners. Congress could constitutionally impose Coal Act liability on companies such as petitioners, which can be presumed to have profited from the promises made by members of their corporate group. The court of appeals' decision in this case is consistent with the decisions of other courts of appeals and raises no question of continuing significance.

1. The court of appeals correctly held that petitioners are not similarly situated to the former coal operator in *Eastern Enterprises* so as to require invali-

dation 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 reiterating that promise, 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 NBCWA 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).

In contrast, petitioners could reasonably have anticipated the obligations at issue here. As of the dates that the Coal Act was enacted and "related person" status is determined, see 26 U.S.C. 9701(c)(2)(B), petitioners had "related persons" that had signed the 1974 NBCWA and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees who were "orphaned" by their employers. Petitioners could not, therefore, have had a "reasonable investment-backed expectation," *Eastern Enterprises*, 524 U.S. at 532 (plurality opinion), that they could never be made responsible for providing the very benefits to their own retirees (or those of an affiliate) that their affiliates promised to *all* retired miners.

b. Petitioners contend (Pet. 15-16) that they cannot meaningfully be distinguished from Eastern because

Eastern had a subsidiary, Eastern Associated Coal Corporation (EACC), that signed the 1974 NBCWA and subsequent NBCWAs. See note 2, *supra*. As the plurality explicitly noted in *Eastern Enterprises*, however, Eastern 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. In those circumstances, the plurality recognized that "Eastern's liability under the Act [could] bear[] no relationship to its ownership of EACC." 524 U.S. at 516, 530 (plurality opinion). Accordingly, the Court had no occasion in *Eastern Enterprises* to consider whether the Constitution would bar the assignment of premium liability to a company that, at the time for determining "related person" status, was member of a controlled group of corporations that both employed the miner and signed the 1974 NBCWA or a subsequent NBCWA.

c. Nothing in *Eastern Enterprises* or other decisions of this Court suggests that the Constitution is violated by, in effect, treating all members of a commonly controlled group of corporations as a single entity for purposes of imposing premium liability under the Coal Act. Congress could reasonably presume that all member of the corporate group profited from the services rendered by its employees in return for its promises of lifetime health-care benefits. Congress's choice in the Coal Act to permit liability to be imposed not only on NBCWA signatories but also on "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. Cf. *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 em-

ployee 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).

2. The Third Circuit's decision in this case does not conflict with the decision of any other court of appeals. To the contrary, the Fourth Circuit has held, consistently with the Third Circuit here, that *Eastern Enterprises* does not require the invalidation of assignments to companies that are not themselves signatories of the 1974 NBCWA or a subsequent NBCWA, but that are statutory "related persons" of such signatories. See *A.T. Massey Coal Co.* v. *Massanari*, 305 F.3d 226 (2002), cert. denied, 123 S. Ct. 1928 (2003). More generally, the D.C. Circuit has held that assignments based on participation in the 1974 NBCWA or a subsequent NBCWA are distinguishable from those in *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. See *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1257 (1998). The uniformity of judicial holdings on the scope and application of *Eastern Enterprises* demonstrates that no further review by this Court is necessary or appropriate.

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 challenging the Commissioner's determinations as to which Coal Act assignments fall

within the ambit 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. 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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