No. 11-1342

In the Supreme Court of the United States

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, PETITIONER

v.

ELSIE L. STACY, SURVIVING SPOUSE OF HOWARD W. STACY, 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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QUESTIONS PRESENTED

In addition to disability benefits for coal miners, the Black Lung Benefits Act (BLBA), 30 U.S.C. 901-944 (2006 & Supp. IV 2010), provides survivors' benefits to certain of their dependents. Prior to 1982, the BLBA provided for derivative survivors' benefits through which an eligible dependent of a miner who had been awarded benefits in a lifetime disability claim was automatically entitled to survivors' benefits after the miner's death. Congress amended the BLBA in 1982 to eliminate derivative survivors' benefits for miners' claims filed after January 1, 1982. Subsequently, surviving dependents were generally entitled to benefits only after proving that pneumoconiosis caused the miner's death. In 2010, Congress restored derivative survivors' benefits with respect to pending claims filed after January 1, 2005, in Section 1556 of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, § 1556(c), 124 Stat. 260 (2010).

The questions presented are:

1. Whether Section 1556 applies to a survivor's claim filed after January 1, 2005, even if the related miner's claim was filed before that date.

2. Whether Section 1556's restoration of derivative survivors' benefits violates the Fifth Amendment's Due Process Clause.

3. Whether Section 1556's restoration of derivative survivors' benefits violates the Fifth Amendment's Just Compensation Clause.

4. Whether Section 1556 must be struck down if the Court finds other, unrelated provisions of the Affordable Care Act to be unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 671 F.3d 378. The decision and order of the Benefits Review Board (Pet. App. 29-44) is reported at 24 Black Lung Rep. (Juris) 1-207. The decision and order of the administrative law judge (Pet. App. 45-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2011. A petition for rehearing was denied on February 6, 2012 (Pet. App. 64-65). The petition for a writ of certiorari was filed on May 4, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. "The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969 * * * to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 683-684 (1991). The statute, now known as the Black Lung Benefits Act (BLBA or the Act), see 30 U.S.C. 901(b), has always provided for two types of benefits: disability benefits for miners and survivors' benefits for their dependents. The Act has been substantially amended over the years.[1] As a result, the elements of entitlement, and the availability of various presumptions to establish those elements, have changed over time.

A deceased miner's qualifying dependents have always been able to prove their entitlement to survivors' benefits by showing that the miner's death was caused

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[1] See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150; Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat 11; Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95; Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. The resulting statute has produced "a complex and highly technical regulatory program." *Pauley*, 501 U.S. at 697; accord *B&G Constr. Co.* v. *Director, OWCP*, 662 F.3d 233, 239 & n.4 (3d Cir. 2011) ("As we indicated 20 years ago, '[t]he statutory background we confront could hardly be more complicated[,]' * * * and since then with the enactment of the [Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119] the statutory background has gotten even more complicated.") (quoting *Helen Mining Co.* v. *Director, OWCP*, 924 F.2d 1269, 1271-1273 (3d Cir. 1991) (en banc)).

by pneumoconiosis. See 30 U.S.C. 901, 921 (1970).[2] Prior to 1982, however, that showing was unnecessary if the miner had been awarded total disability benefits during his or her lifetime. The survivors of such miners were derivatively entitled to benefits even if pneumoconiosis played no role in the miner's death. See 30 U.S.C. 901(a), 922(a), 932(*l*) (1976 & Supp. III 1979).[3]

b. In 1981, Congress prospectively eliminated derivative benefits for the survivors of any miner who had not yet filed a claim. That change was effected by appending a limiting clause to, inter alia, 30 U.S.C. 932(*l*), which after being amended provided:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [December 31, 1981].*

30 U.S.C. 932(*l*) (1982) (new clause emphasized).[4] As a result, survivors were generally entitled to benefits only after proving that pneumoconiosis caused the miner's death.

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[2] To qualify for survivors' benefits, a claimant must satisfy the program's various relationship and dependency requirements. See 20 C.F.R. 725.212-725.228.

[3] From 1972 to 1981, survivors could also prove their entitlement to benefits by establishing that the miner was totally disabled by pneumoconiosis at the time of his or her death, even if the miner died from an unrelated cause and had not filed a successful lifetime claim. See 30 U.S.C. 901, 921(a) (1976).

[4] Similar limiting clauses were appended to several other sections of the Act. See 30 U.S.C. 921(a), (c)(2), (c)(4)-(5), 922(a)(2)-(5) (1982).

The 1981 amendments further tightened the BLBA's eligibility requirements by eliminating three statutory presumptions. Under one of those presumptions (known as the 15-year presumption), workers who had spent at least 15 years in underground coal mines and suffered from a totally disabling respiratory or pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis, or, if deceased, to have died due to pneumoconiosis and to have been totally disabled by the disease at the time of death. 30 U.S.C. 921(c)(4) (1982). The 1981 amendments added a sentence to the end of that section providing that "[t]he provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981." 30 U.S.C. 921(c)(4) (2006).

c. In 2010, Congress once again adjusted the BLBA's eligibility requirements by amending 30 U.S.C. 932(*l*) to restore derivative survivors' benefits and by amending 30 U.S.C. 921(c)(4) to restore the 15-year presumption. Those amendments were made by Section 1556 of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA), which provides:

> (a) REBUTTABLE PRESUMPTION.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.
>
> (b) CONTINUATION OF BENEFITS.—Section 422(l) of the Black Lung Benefits Act (30 U.S.C. 932(l)) is amended by striking ", except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981".
>
> (c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to claims filed

> under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.

§ 1556, 124 Stat. 260 (Section 1556); see 30 U.S.C. 921(c)(4), 932(*l*).[5]

2. a. Howard Stacy mined coal in West Virginia for Olga Coal Company (Olga Coal) from 1975 until 1986. Pet. App. 6. The following year, he was found to be totally disabled by pneumoconiosis and awarded federal black lung benefits. *Ibid.* Petitioner, as the insurer for Olga Coal Company, paid BLBA benefits to Mr. Stacy for 20 years until his death in January 2007. *Ibid.*

b. On February 1, 2007, Mr. Stacy's widow, private respondent Elsie Stacy (respondent), filed a claim for survivor's benefits. Pet. App. 6. Petitioner contested the claim, and a formal hearing was held before a Department of Labor administrative law judge (ALJ). Applying the law in effect at the time of his September 2009 decision, which required respondent to prove that pneumoconiosis caused her husband's death, the ALJ denied the claim. *Id.* at 59-60. Respondent appealed to the Department of Labor's Benefits Review Board (Board). See 30 U.S.C. 932(a) (incorporating 33 U.S.C. 921(b)); 20 C.F.R. 725.481, 802.101 *et seq.*

c. On March 23, 2010, while respondent's case was on appeal to the Board, the ACA was enacted. Pub. L. No. 111-148, 124 Stat. 119. Agreeing with respondent and the Director, Office of Workers' Compensation Programs (Director) about the impact of that legislation on this case, the Board vacated the ALJ's denial of benefits

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[5] Unless otherwise noted, all citations in this brief to 30 U.S.C. 932(*l*) refer to the version appearing in U.S. Code Supp. IV (2010).

and remanded the claim for the entry of an award.[6] Pet. App. 29-44. The Board held that the plain language of ACA Section 1556(c) mandates the application of amended Section 932(*l*) to "all 'claims' filed after January 1, 2005, that are pending on or after March 23, 2010," including survivors' claims. *Id.* at 35. It therefore rejected petitioner's argument that amended Section 932(*l*) did not apply to respondent's claim because her husband's disability claim was filed before 2005. *Ibid.* Relying on its own precedent, the Board also concluded that applying the amended provision to this claim did not violate the Fifth Amendment's Due Process Clause or Just Compensation Clause. *Id.* at 41-43.

3. The court of appeals affirmed. Pet. App. 1-28.

a. The court of appeals held that application of amended Section 932(*l*) to survivors' claims filed before enactment of the statute does not violate the Fifth Amendment's Due Process Clause, concluding that the "wholly rational and legitimate purpose for applying amended [Section] 932(*l*) retroactively is to compensate the survivors of deceased miners 'for the effects of disabilities bred in the past.'" Pet. App. 10 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976)). The court favorably examined recent decisions by the Third and Seventh Circuits that likewise relied on *Usery* to uphold the Affordable Care Act's BLBA amendments against due process challenges. *Id.* at 10-12 (citing *B&G Constr. Co.* v. *Director, OWCP*, 662 F.3d 233 (3d Cir.

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[6] The Director administers the BLBA on the Secretary of Labor's behalf. Secretary's Order 10-2009, 74 Fed. Reg. 58,834 (Nov. 13, 2009). As the Secretary's delegatee, the Director is a party to this action. See 30 U.S.C. 932(k) ("The Secretary shall be a party in any proceeding relative to a claim for benefits" under the BLBA filed after December 31, 1973.).

2011), and *Keene* v. *Consolidation Coal Co.*, 645 F.3d 844 (7th Cir. 2011)). The court of appeals also rejected petitioner's argument that Congress's selection of January 1, 2005, as the effective date for the amendment was itself arbitrary, explaining that "Congress's selection of a precise filing date is a classic line-drawing exercise uniquely within the competence of the legislative branch." *Id.* at 12.

b. The court of appeals also held that the Just Compensation Clause "does not apply" to this case, "[b]ecause amended [Section] 932(*l*) merely requires petitioner to pay money—and thus does not infringe a specific, identifiable property interest." Pet. App. 15. The court rejected petitioner's reliance on the four-Justice plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), explaining that the remaining five Justices in that case "rejected the theory that an obligation to pay undifferentiated, fungible money constitutes a taking." Pet. App. 15. In any event, the court of appeals concluded that it "would be compelled to reject petitioner's takings claim" even if the plurality opinion in *Eastern Enterprises* governed. *Id.* at 18. As the court explained, the *Eastern Enterprises* plurality emphasized that the liability imposed on the petitioner in that case implicated "fundamental principles of fairness underlying the Takings Clause" because it was not related to any commitment made or injury caused by that party. *Ibid.* (quoting 524 U.S. at 537). The same logic does not apply to the instant case, the court of appeals reasoned, because "the liability imposed by amended [Section] 932(*l*) is proportional to the occurrence of totally disabling pneumoconiosis among former Olga Coal Company miners." *Id.* at 18-19; see also *id.* at 14.

c. The court of appeals agreed with the Director's interpretation of amended Section 932(*l*)'s effective-date provision, ACA § 1556(c), 124 Stat. 260, holding that the amendment applies to survivors' claims filed after January 1, 2005, even if the related miner's claim was filed before that date. Pet. App. 20-24. According to the court, this interpretation was supported by Section 1556(c)'s plain language "[b]ecause Congress used the term 'claims' without any qualifying language, and because both miners and their survivors may file claims under the BLBA." *Id.* at 22 (citations omitted). The court found further support in the fact that Section 1556(c) also provides the effective date for the amendment restoring the 15-year presumption, which explicitly applies to both miners' and survivors' claims. *Id.* at 23 (citing 30 U.S.C. 921(c)(4) (Supp. IV 2010)). The court of appeals consequently held that amended Section 932(*l*) applied to respondent's claim because it was filed after January 1, 2005, and remained pending on March 23, 2010. *Id.* at 23-24.

d. The court of appeals also rejected petitioner's argument that the Affordable Care Act's BLBA amendments must be struck down if any other portion of the statute is declared to be unconstitutional. Pet. App. 8 n.2. The court concluded, based on petitioner's statements at oral argument, that petitioner had abandoned that argument. *Ibid.* The court went on to explain that "we would uphold the validity of the BLBA amendments" even if other portions of the ACA were struck down because the amendments "have a stand-alone quality and are 'fully operative as a law.'" *Ibid.* (quoting

Free Enterprise Fund v. *PCAOB*, 130 S. Ct. 3138, 3161 (2010)).[7]

4. After the court of appeals' decision in this case, the Director issued a notice of proposed rulemaking seeking public comment on proposed rules that would, among other things, "clarify * * * the application and scope of the derivative-survivor-entitlement provision" of the ACA amendments. 77 Fed. Reg. 19,456 (Mar. 30, 2012). In that notice, the Director explained his view that amended Section 932(*l*) applies to all claims for survivors' benefits filed after January 1, 2005, and pending on or after March 23, 2010, even if the related miner's claim for disability benefits had been filed before 2005. See *id.* at 19,457-19,458. In comments filed in response to the notice, coal mining companies have argued that the Director's understanding of the statute is mistaken and that "the operative date for determining whether the survivor is eligible for benefits under this provision is the date the miner's claim was filed." Comments filed by William S. Mattingly, Jackson Kelly, PLLC, on behalf

[7] The court of appeals also considered and rejected petitioner's argument that derivative survivor's benefits were forbidden by 30 U.S.C. 901, 921(a), and 922(a)(2). The court recognized that those provisions—amended in 1981 but, unlike Section 932(*l*), not amended in the Affordable Care Act—"might be read to conflict" with amended Section 932(*l*)'s restoration of derivative survivors' benefits. Pet. App. 24-25. As an initial matter, the court held that petitioner had waived the issue because it was not raised until oral argument, *id.* at 24, but went on to endorse the Third Circuit's conclusion that amended Section 932(*l*), as Congress's most recent amendment, overrides any conflicting language in the unamended provisions. *Id.* at 24-28 (discussing *B&G Constr. Co.*, *supra*). The court therefore concluded that, "even if petitioner had not waived this argument, [Sections] 901, 921(a), and 922(a)(2) would not prevent Mrs. Stacy from receiving automatic survivors' benefits under amended [Section] 932(*l*)." *Id.* at 28.

of Alpha Natural Resources 2 (May 29, 2012); see Comments filed by William S. Mattingly, Jackson Kelly, PLLC, on behalf of Consolidation Coal Company 2 (May 29, 2012) (same). The notice of proposed rulemaking remains pending.

ARGUMENT

The court of appeals correctly held that the ACA amendment to the derivative survivor benefit provision of the BLBA applies to a survivor's claim that satisfies ACA Section 1556(c)'s effective-date requirements, even if the related miner's claim does not. That decision does not conflict with any decision of this Court or another court of appeals. Review of that question would be premature in any event because there is a pending rulemaking addressing it. The court of appeals also correctly held that the Affordable Care Act's restoration of derivative survivors' benefits does not violate the Fifth Amendment's Due Process or Just Compensation Clauses. Those conclusions likewise do not conflict with any decision of this Court or any other court of appeals. Finally, petitioner's inseverability argument fails in light of *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). Further review is not warranted.

1. The court of appeals correctly held that amended Section 932(*l*) applies to a survivor's claim filed after January 1, 2005, and pending on or after March 23, 2010, even if the related miner's claim was filed at an earlier date. Petitioner's argument that this interpretation creates a conflict between the Third and Fourth Circuits is without merit.

a. ACA Section 1556 made two substantive amendments to the BLBA: Subsection (a) reinstated 30 U.S.C. 921(c)(4)'s 15-year presumption, and Subsection (b) re-

stored derivative survivors' benefits by amending Section 932(*l*). The effective date for both substantive amendments is provided by Subsection (c), which states: "The amendments made by this Section shall apply with respect to *claims* filed under * * * the Black Lung Benefits Act after January 1, 2005, that are pending on or after [March 23, 2010]." § 1556(c), 124 Stat. 260 (emphasis added). Under the BLBA and its implementing regulations, both miners and their survivors may file "claims." See, *e.g.*, 30 U.S.C. 931(a), 20 C.F.R. 718.204(a); 718.205(a). As the court of appeals correctly held, the absence of any limiting language in Section 1556(c) leads to the conclusion that its use of the word "claims" encompasses claims by either miners or their survivors. Pet. App. 21-22 ("[T]he definition of 'claim' is not qualified by Section 1556(c). Instead, the plain language of that section requires that amended [Section] 932(*l*) apply to *all* claims filed after January 1, 2005, that are pending on or after March 23, 2010."). This understanding is reinforced by the fact that the 15-year presumption restored by Section 1556(a) explicitly applies to both categories of claims. 30 U.S.C. 921(c)(4) (Supp. IV 2010).

As the court of appeals explained, this interpretation of the statute is consistent with the operation of its other provisions. While the statute does not "require[]" that "a survivor * * * file a new claim for benefits," "it does not *prohibit* survivors from filing a claim." Pet. App. 22. "Indeed, survivors will need to file some sort of 'claim' in order to notify the Office of Workers' Compensation Programs of the miner's death and the survivor's current status." *Ibid.*; accord *B&G Constr. Co.* v. *Director, OWCP*, 662 F.3d 233, 244 n.12 (3d Cir. 2011).

b. The court of appeals' decision does not create a split between the Fourth and Third Circuits on this question. Cf. Pet. 20-23. To the contrary, the Third Circuit last year considered a case with "facts * * * analogous to those [here], as both miners filed claims prior to January 1, 2005 (the limiting date established in [Section] 1556(c)), and both survivors filed claims after that date." Pet. 22 (citing *B&G Constr. Co.*, 662 F.3d at 245). The Third Circuit in that case concluded that "[t]he amended section applied to claims for survivor's benefits * * * filed after January 1, 2005, and pending on or after March 23, 2010." *B&G Constr. Co.*, 662 F.3d at 244; see *id.* at 245, 246.

Any intra-circuit conflict between *B&G Construction Co.* and the Third Circuit's earlier decision in *Pothering* v. *Parkson Coal Co.*, 861 F.2d 1321 (1988), see Pet. 20-22, would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict between the decision below and *B&G Construction Co.* on the one hand and *Pothering* on the other because they interpreted different statutes. *Pothering* interpreted the text of Section 932(*l*) as amended by the 1981 amendments. 861 F.2d at 1323. Its conclusion that the 1981 amendment preserved derivative benefits for the survivors of miners who had filed disability claims before 1982 was clear from both the text and legislative history of the 1981 amendment. *Id.* at 1327-1328. The court of appeals in this case (and the Third Circuit in *B&G Construction Co.*), by contrast, interpreted the text of Section 1556 of the ACA, as well as the BLBA provisions it amended, to determine the effective date of amended Section 932(*l*). Pet. App. 20-24.

c. In any event, review of this question of statutory construction would be premature given the pendency of agency rulemaking on the amended statute. See pp. 9-10, *supra*. The Director's interpretation, in notice-and-comment rulemaking, of the statute he administers would be entitled to deference, see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and there is no basis for this Court to accept review in a case in which the lower court did not consider that interpretation.[8]

2. There is likewise no basis for review of the court of appeals' correct conclusion that amended Section 932(*l*) does not violate substantive due process. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to this Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Due process is satisfied if the retroactive application of a statute serves "a legitimate legisla-

[8] Absent rulemaking, the Director's interpretation of the statute as expressed administratively and in litigation is entitled to at least *Skidmore* deference. See Pet. App. 20; *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); cf. *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1363 n.12 (2012) (reserving question whether Director's interpretation of statute he administers, as expressed in administrative proceedings but not rules, is entitled to *Chevron* deference); Gov't Br. at 44-47, *Roberts*, *supra* (No. 10-1399).

tive purpose furthered by rational means." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992).

Here, the court of appeals correctly held that the "wholly rational and legitimate purpose for applying amended [Section] 932(*l*) retroactively is to compensate the survivors of deceased miners 'for the effects of disabilities bred in the past.'" Pet. App. 10 (quoting *Usery*, 428 U.S. at 18). The only other court of appeals to address this issue reached the same conclusion. See *B&G Constr. Co.*, *supra*; see also *Keene* v. *Consolidation Coal Co.*, 645 F.3d 844, 849-850 (7th Cir. 2011) (rejecting due process challenge to ACA's restoration of 30 U.S.C. 921(c)(4)'s 15-year presumption). Contrary to petitioner's argument, Pet. 16-20, these holdings are entirely consistent with this Court's decisions in *Usery* and *Eastern Enterprises*, 524 U.S. at 505-508.

a. In *Usery*, this Court rejected the contention that the BLBA, as amended in 1972, violated the Due Process Clause "by requiring [coal mine operators] to compensate former employees who terminated their work in the industry before the Act was passed, and the survivors of such employees." 428 U.S. at 14-15. The Court recognized the retroactive nature of that liability, but held that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor [–] the operators and coal consumers." *Id.* at 18.

Petitioner attempts to distinguish *Usery* on the ground that the BLBA provisions at issue there "imposed no retrospective payment of benefits" and gave the coal mine operators "eighteen months notice of the impending liability." Pet. 18 (emphasis omitted); 428 U.S. at 10, 16. The *Usery* Court's due process analysis,

however, did not turn on the fact that liable operators were not required to begin paying benefits until 1974, and petitioner cites no authority suggesting that this distinction makes a difference.[9] Nor does it change the significantly retroactive character of the employer liability upheld in *Usery*, which extended to former miners (and the survivors of former miners) whose employment had been terminated decades before the BLBA was enacted. See *id.* at 14. Indeed, the *Usery* Court specifically considered the fact that the Act could award benefits to the survivors of miners who died from causes other than pneumoconiosis before enactment of the Act, concluding that such benefits present no distinct retroactivity problems. *Id.* at 25. "In the case of a miner who died with, but not from, pneumoconiosis *before* the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness." *Ibid.*[10] The court of appeals' decision to uphold amended Section 932(*l*)'s revival of derivative survivors' benefits in claims filed after 2004 is entirely consistent with that analysis. Pet. App. 9-13.

Despite petitioner's contentions to the contrary, the liability imposed by amended Section 932(*l*) was both less significant and more foreseeable than the liabilities sustained in *Usery*. Derivative benefits attach only to

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[9] *Cf. General Motors Corp.*, 503 U.S. at 191-192 (rejecting substantive due process challenge to an amended state law directing employers to retroactively repay workers' compensation benefits that had been lawfully withheld under the terms of previous law).

[10] The Court considered unrelated death benefits in the context of 30 U.S.C. 411(c)(3)'s irrebuttable presumption that a deceased miner afflicted by a particular form of pneumoconiosis died due to the disease. *Usery*, 428 U.S. at 24-25. The same reasoning applies, however, to any form of unrelated death benefits, including derivative benefits.

the living survivors of former miners already adjudicated to be totally disabled by pneumoconiosis, and are of practical value only to those survivors unable to prove that the miner's death was caused by pneumoconiosis.[11] And petitioner's claim of unfair surprise is undermined by the fact that derivative survivors' benefits actually existed during much of the federal black lung program's history. See *B&G Constr. Co.*, 662 F.3d at 262. It was hardly unimaginable that Congress would choose to reinstate those benefits; indeed, petitioner itself points out that seven bills proposing to restore derivative survivors' benefits were introduced in the House or Senate from 1999 to 2010. Pet. 37.

b. Petitioner's argument that the court of appeals' decision conflicts with *Eastern Enterprises*, 524 U.S. at 505-508, is also incorrect. Pet. 17. To the extent that *Eastern Enterprises* is relevant to the substantive due process issue, it supports the decision below. *Eastern Enterprises* arose out of a series of private agreements, beginning in 1946, between certain coal mine operators and the United Mine Workers' Association establishing multi-employer health care funds. 524 U.S. at 505-508. Beginning in 1974, those funds provided for lifetime health benefits to retired miners and their dependents. *Id.* at 509, 530. When insolvency threatened the funds, Congress passed the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, which required coal mine operators that had signed the agreements to contribute to a new multi-employer bene-

[11] This burden does not require survivors to show that pneumoconiosis was the sole or even primary cause of death, but only that the disease was a "substantially contributing cause or factor." 20 C.F.R. 718.205(c)(2).

fit plan that would provide the promised lifetime health care coverage. 524 U.S. at 514.

This Court held that the Coal Act was unconstitutional as applied to Eastern Enterprises, which stopped mining coal in 1966 and therefore never signed the post-1974 agreements promising lifetime health benefits to miners and their dependents. *Eastern Enterprises*, 524 U.S. at 530. No one rationale, however, attracted a majority of the Court. Justice O'Connor, writing for a plurality of four, concluded that Eastern's property had been taken without just compensation, but explicitly declined to address the company's due process claim. *Id.* at 537-538. Justice Kennedy, concurring in part, concluded that Eastern's due process rights had been violated but that no taking had occurred. *Id.* at 539. Finally, in a dissenting opinion by Justice Breyer, four justices concluded that neither the Due Process Clause nor the Just Compensation Clause had been violated. *Id.* at 553-554.

The most obvious problem with the petitioner's reliance on *Eastern Enterprises* for its substantive due process claim is that only one Justice in that case found such a violation. *Eastern Enterprises* therefore does not even stand for the proposition that Eastern's due process rights were violated. In any event, the logic underlying *Eastern Enterprises* is entirely consistent with the court of appeals' decision. Neither Justice Kennedy's nor Justice O'Connor's opinion concluded that the Coal Act was unconstitutional merely because it imposed retroactive and expensive liabilities on Eastern. The crux of both opinions was that the significantly retroactive and expensive liabilities were imposed to rectify a problem—the signatory coal mine operators' failure to provide the lifetime benefits they promised after 1974—that

Eastern had no hand in creating. 524 U.S. at 549-550 (Kennedy, J., concurring in the judgment and dissenting in part) ("[T]he remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of that statute," because "Eastern * * * was not responsible for [the miners'] expectation of lifetime health benefits * * * created by promises and agreements made long after Eastern left the coal business."); *id.* at 537 (plurality opinion) (The Coal Act implicates "fundamental principles of fairness underlying the Takings Clause" because it "singles out" Eastern to bear a substantial burden "unrelated to any commitment that [Eastern] made or to any injury [it] caused.").

That key feature present in *Eastern Enterprises* is absent here. As the court of appeals explained, "amended [Section] 932(*l*) imposes liability proportional to the incidence of totally disabling pneumoconiosis among former Olga Coal Company employees, and thus 'spread[s] the costs of the employees' disabilities to those who have profited from the fruits of their labor.'" Pet. App. 14 (quoting *Eastern Enters.*, 524 U.S. at 536).[12] The decision below is therefore entirely consistent with the reasoning of both the plurality and concurring opinions in *Eastern Enterprises*.

3. The court of appeals also correctly held that amended Section 932(*l*) does not implicate the Just

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[12] In his concurring opinion in *Eastern Enterprises*, Justice Kennedy distinguished *Usery* on the same ground: "While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past." 524 U.S. at 549 (brackets in original) (quoting *Usery*, 428 U.S. at 19); *accord Eastern Enterprises*, 524 U.S. at 536 (plurality op.).

Compensation Clause because it merely imposes "an obligation to pay undifferentiated, fungible money." Pet. App. 15. Petitioner's claim that this ruling conflicts with this Court's precedents is incorrect.

a. The imposition of an obligation to pay money, without more, does not trigger analysis under the Just Compensation Clause. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 & n.9 (1989) (rejecting per se just compensation analysis and holding that assessment on awards by an international tribunal "does not qualify as a 'taking'"). Five Justices adhered to that position in *Eastern Enterprises*. See 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("an obligation to perform an act, the payment of benefits," is not a "taking"); *id.* at 554 (Breyer, J., dissenting) ("an ordinary liability to pay money" does not implicate the Just Compensation Clause). As this Court recognized in *Connolly* v. *PBGC*, 475 U.S. 211 (1986), a contrary rule would subject a broad variety of everyday economic legislation—such as taxes, minimum wage laws, and new legal causes of action—to just compensation analysis. *Id.* at 222-223.

b. This Court has subjected requirements to pay money to Just Compensation Clause analysis only when the government has invaded a discrete, identifiable property interest, such as a legal right to collect interest payments from a specific fund of money. See, *e.g.*, *Brown* v. *Legal Found.*, 538 U.S. 216 (2003) (interest income generated by funds in a specific consolidated lawyers' trust account); *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998) (same); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) (interest generated from a specific consolidated interpleader account). Unlike the laws at issue in those cas-

es, amended Section 932(*l*) does not, on its face, impose liability on any identifiable fund of money. It instead obligates coal mine operators to pay BLBA benefits to a specific class of survivors. That Olga Coal's obligations are insured by petitioner, which claims to be a specific fund of money, Pet. 28-29, is a mere happenstance not contemplated or required by amended Section 932(*l*). This fact does not bring the court of appeals' decision into conflict with *Brown*, *Phillips*, and *Webb's Fabulous Pharmacies*. Indeed, the apparently unusual nature of petitioner's finances is an argument against, not for, using this case as a vehicle to consider any takings issue surrounding the BLBA amendments.

c. In any event, the court of appeals correctly observed that petitioner's takings claim would fail even under the terms of the plurality opinion in *Eastern Enterprises*. Pet. App. 18. As discussed previously, see pp. 17-18, *supra*, the key to the plurality's takings analysis was the fact that Eastern was ordered to pay to address a problem that it had no hand in creating. Conversely, the liability imposed by amended Section 932(*l*) is proportional to the occurrence of totally disabling pneumoconiosis among Olga Coal's former miners. Pet. App. 18-19; see *B&G Constr., Inc.*, 662 F.3d at 261 ("B & G's liability under amended section 932(*l*) is not made in a vacuum inasmuch as the amount that the amended section requires B & G to pay is based on the incidence of totally disabling pneumoconiosis among B & G's former employers."). This is therefore not a case where "some people alone" are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

d. Petitioner wrongly contends that this Court's review is warranted because the circuits are split over the precedential effect of this Court's decision in *Eastern Enterprises*.

Several circuits have held that Justice Kennedy's concurrence in *Eastern Enterprises*, combined with Justice Breyer's dissenting opinion for four Justices, provides binding authority for the proposition that general monetary assessments do not present any issue under the Just Compensation Clause. Pet. App. 16-17 (citing *Holland* v. *Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999), cert. denied, 528 U.S. 1117 (2000)); see *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc), cert. denied, 535 U.S. 1096 (2002); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999); *Parella* v. *Retirement Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). Two others have held that *Eastern Enterprises* does not provide a controlling rule that applies beyond the specific facts of that case, but nevertheless held that obligations to pay money were not takings. *McCarthy* v. *City of Cleveland*, 626 F.3d 280, 286 (6th Cir. 2010); *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008), cert. denied, 130 S. Ct. 71 (2009). Because these circuits have all reached the same substantive conclusion, this disagreement has no impact on the outcome of this case.

Petitioner argues that three other circuits have "either expressly or implicitly" interpreted *Eastern Enterprises* to mean that ordinary obligations to pay money can be challenged under the Just Compensation Clause. Pet. 31 (citing *United States Fid. & Guar. Co.* v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000) (*USF&G*), cert. denied, 532 U.S. 922 (2001); *Central States, Se. & Sw.*

Areas Pension Fund v. *Midwest Motor Express*, 181 F.3d 799 (7th Cir.) (*Central States*), cert. denied, 528 U.S. 1004 (1999); *Quarty* v. *United States*, 170 F.3d 961 (9th Cir. 1999)). Only the *USF&G* court, however, actually found a monetary obligation to violate the Just Compensation Clause. 226 F.3d at 420.[13] And it did so after finding that assets had been taken from "an identifiable property interest or fund." *Ibid.* For the reasons discussed above, see pp. 19-20, that kind of exaction is not at issue here.

e. Review of petitioners' constitutional claims would be premature. Similar challenges to Section 1556 are now pending in various courts of appeals. See, *e.g.*, *Eastern Coal Corp.* v. *Abshire*, No. 11-4008 (6th Cir.); *Consolidation Coal Co.* v. *Skorczewski*, No. 12-2197 (7th Cir.); *US Steel Mining Co.* v. *Starks*, No. 11-14468 (11th Cir.). Especially given that there is no conflict in the circuits on the constitutionality of this provision, further percolation is warranted.

4. Finally, petitioner contends that the Affordable Care Act's BLBA amendments should be struck down as non-severable if the Court invalidates the ACA provisions challenged in *NFIB*, *supra*. Pet. 32-38. The Court's decision in *NFIB* disposes of this argument.

In *NFIB*, the Court concluded that the Secretary of Health and Human Services could not "apply" a preexisting provision of the Medicaid Act "to withdraw exist-

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[13] The other two decisions cited by petitioner found that no taking had occurred and did not unambiguously adopt the *Eastern Enterprises* plurality opinion as controlling. *Central States*, 181 F.3d at 808 (applying plurality's analysis without discussing its precedential value); *Quarty*, 170 F.3d at 969 (finding that no taking had occurred "[e]ven under the reasoning of the takings analysis of the *Eastern Enterprises* plurality opinion").

ing Medicaid funds for failure to comply with the requirements set out in the [ACA's] expansion" of Medicaid. 132 S. Ct. at 2607 (plurality op.); see *id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Court further concluded that an order prohibiting such application "fully remedies the constitutional violation we have identified." *Id.* at 2607 (plurality op.); see *id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Explaining that "[w]e are confident that Congress would have wanted to preserve the rest of the Act[,]" the Court held "that the rest of the Act need not fall in light of our constitutional holding." *Id.* at 2608 (plurality op.); accord *id.* at 2630, 2642 (Ginsburg, J, concurring in part, concurring in the judgment in part, and dissenting in part). The Court has thus already rejected arguments, like petitioner's, that other provisions of the ACA should be invalidated on inseverability grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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