No. 11-4008

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EASTERN COAL CORPORATION and
WELLS FARGO DISABILITY MANAGEMENT,

Petitioners

v.

AUDREY H. ABSHIRE (widow of HOWARD R. ABSHIRE)

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises issues concerning the constitutionality and applicability of Section 932(*l*) of the Black Lung Benefits Act, 30 U.S.C. § 932(*l*), as amended by Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). Because these are issues of first impression in this Court, the decisional process may be aided by oral argument.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a claim filed by Audrey H. Abshire, widow of Howard R. Abshire, for survivors' benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010)

(Affordable Care Act or ACA). On May 13, 2010, Administrative Law Judge Richard T. Stansell-Gann (the ALJ) issued a decision awarding survivors' benefits to Mrs. Abshire and ordering petitioner Eastern Coal Corporation, the miner's former coal mine employer, to pay them. Eastern Coal sought reconsideration of this decision on June 9, 2010, within the thirty-day time limitation prescribed by 20 C.F.R. § 725.479(b). The ALJ denied reconsideration on July 1, 2010.

Eastern Coal appealed the ALJ's decisions to the United States Department of Labor Benefits Review Board (Board) on July 29, 2010, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a); *see also* 20 C.F.R. § 725.479(c) (timely motion for reconsideration to the ALJ suspends the thirty-day appeal period). The Board had jurisdiction to review the ALJ's decisions pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the ALJ's decisions on July 27, 2011, and Eastern Coal petitioned this Court for review on September 22, 2011, within the sixty-day period prescribed by 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury

occurred. The relevant injury, Howard Abshire's occupational exposure to coal mine dust, occurred in Kentucky.

STATEMENT OF THE ISSUES

In addition to disability benefits for coal miners, the Black Lung Benefits Act (BLBA) provides survivors' benefits to certain of their dependents. Prior to 1982, the BLBA provided for derivative survivors' benefits, through which the eligible dependents of a miner who had been awarded benefits in a lifetime disability claim were automatically entitled to survivors' benefits after the miner's death. Congress amended the BLBA to eliminate derivative benefits in 1982, after which survivors were generally eligible for benefits only after proving that pneumoconiosis caused the miner's death. In 2010, Congress restored derivative survivors' benefits for all pending claims filed after January 1, 2005, through Section 1556 of the Affordable Care Act. The ALJ and Board ruled that this amendment applies to Mrs. Abshire's claim, which was filed in May 2005 and remains pending. 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 Takings Clause.

(4) Whether Section 1556 must be struck down if other, unrelated provisions of the Affordable Care Act are found to be unconstitutional.

STATEMENT OF THE CASE

Howard Abshire, a former coal miner, filed a claim for BLBA benefits in 1994, Director's Exhibit No. (DX) 1 at 482.[1] His claim was awarded by an administrative law judge in 1996, and affirmed by the Board the following year. DX 1 at 18, 66. After his death in April 2005, his widow, respondent Audrey Abshire, filed this claim for survivors' benefits. DX 2. The ALJ denied the claim on February 28, 2008. A.41. Mrs. Abshire appealed to the Board, which remanded the case for further proceedings in a decision dated January 30, 2009. A.34.

While the case was pending before the ALJ on remand, Congress restored derivative survivors' benefits with respect to pending claims filed after January 1, 2005, through Section 1556 of the ACA. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see* 30 U.S.C. § 932(*l*) (2006 & Supp. IV 2010). Applying this recent amendment, the ALJ awarded derivative survivors' benefits to Mrs. Abshire

[1] The Director's Exhibits are included in the Board's Index of Documents at Appendix (A.) 6, but are not paginated. The DX citation is employed for the reader's convenience.

in May 2010, A.19, and denied Eastern Coal's request for reconsideration of that decision in July 2010, A.15. In July 2011, the Board affirmed the ALJ's award. A.9. This appeal followed. A.1.

STATEMENT OF THE FACTS

Statutory Background

"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, 683-84 (1991). The statute, now known as the Black Lung Benefits Act, *see* 30 U.S.C. § 901(b), has been substantially amended over the years.[2] As a result of these amendments, the requirements to secure survivors' benefits have changed over time.

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[2] In addition to the 2010 amendments at issue in this case, the BLBA was significantly amended in 1972, 1977, and 1981. *See* Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150 (1972); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978); Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981). 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 [ACA] the statutory background has gotten even more complicated.") (quoting *Helen Mining Co. v. Director, OWCP*, 924 F.2d 1269, 1271-73 (3d Cir. 1991) (en banc)).

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 by pneumoconiosis. *See*, *e.g.*, 30 U.S.C. §§ 901, 921 (1970).[3] 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 awarded miners were derivatively entitled to benefits even if pneumoconiosis played no role in the miners' death. *See* 30 U.S.C. § 922(a)(2) (1970) ("In the case of death . . . of *a miner receiving benefits under this part*, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.") (emphasis added).[4]

The right to derivative survivors' benefits was reinforced in the 1972 and 1977 amendments. *See* 30 U.S.C. §§ 901(a), 922(a)(2), 932(*l*) (1976 & Supp. III 1979).[5] Of particular relevance to this case is Section 932(*l*), which originally provided: "In no case shall the eligible survivors of a miner who was determined

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[3] To qualify for survivors' benefits, a claimant also must satisfy the program's various relationship and dependency requirements. *See* 20 C.F.R. §§ 725.212-725.228. There is no dispute that Mrs. Abshire has satisfied these requirements.

[4] Derivative benefits are also referred to as "automatic benefits" or "unrelated death benefits."

[5] From 1972 to 1981, survivors could also prove their entitlement to benefits by establishing that a 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).

to be eligible to receive benefits under this title at the time of his death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979).

In 1981, Congress prospectively eliminated derivative benefits for the survivors of any miner who had not yet filed a claim. This change was effected by appending a limiting clause to, *inter alia*, 30 U.S.C. § 932(*l*), which then 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).[6] Consequently, unless a miner was awarded benefits in a disability claim filed before December 31, 1981, his or her dependents were not entitled to derivative benefits. *See* 20 C.F.R. § 725.201(a)(2)(ii) (1984); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328 (3d Cir. 1988). Such dependents were generally entitled to survivors' benefits only after proving that pneumoconiosis actually contributed to the miner's death. *See Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 520 (6th Cir. 2002).

The 1981 amendments further tightened the BLBA's eligibility requirements by eliminating three statutory presumptions. Under one of those presumptions,

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

known as the fifteen-year presumption, deceased workers who had spent at least fifteen years in underground coal mines and suffered from a totally disabling respiratory or pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis, 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) (1976). As with Section 932(*l*), the 1981 amendments limited Section 921(c)(4) to claims filed before December 31, 1981. 30 U.S.C. § 921(c)(4) (1982).

In 2010, Congress once again recalibrated the BLBA's eligibility requirements by reversing the 1981 amendments to Section 932(*l*) (thereby restoring derivative survivors' benefits) and Section 921(c)(4) (thereby restoring the fifteen-year presumption). Those amendments were made by Section 1556 of the Affordable Care Act, which provides:

> SEC. 1556. EQUITY FOR CERTAIN ELIGIBLE SURVIVORS
>
> (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.[7]

Pub. L. No. 111-148, § 1556 (2010).

As a result of this amendment, for all claims filed after January 1, 2005, and pending on or after the ACA's March 23, 2010, enactment date, Section 932(*l*) now reads, as it did before 1981:

> Filing new claims or refiling or revalidation of claims of miners already determined eligible at time of death
>
> 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,. [sic]

30 U.S.C. § 932(*l*) (2006 & Supp. IV 2010) (amended Section 932(*l*)).

Eastern Coal appears to agree with the Director that amended Section 932(*l*) restores derivative survivors' benefits. *See* Petitioner's Brief (Pet. Br.) at 3 ("30 U.S.C. § 932(*l*) . . . provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to

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[7] "Generally, 'Part B' claims are those that were filed before July 1, 1973 and processed by the Social Security Administration[.]" *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 946-47 (6th Cir. 1999). "'Part C' claims, in contrast, are those filed on or after July 1, 1973, and processed by the Office of Workers' Compensation Programs pursuant to regulations promulgated by the Secretary of Labor[.]" *Id.*

pneumoconiosis.”).[8] Eastern Coal disagrees, however, with the Director’s view that amended Section 932(*l*) applies to pending survivors’ claims filed after 2004, even if the related miner’s claim was filed before that date. *See* Pet. Br. at 10-18.

Procedural History

Howard Abshire, who worked as a coal miner in Kentucky for over thirty years, DX 1 at 67, filed a claim for BLBA benefits in 1994. DX 1 at 482. Finding the miner to be totally disabled by pneumoconiosis, an administrative law judge awarded the claim in 1996, and the Board affirmed the following year. DX 1 at 18, 66. Mr. Abshire received benefits, augmented by one dependent (his spouse, respondent Audrey Abshire), until his death in April 2005. DX 1 at 12; *see* 20 C.F.R. § 725.520(c).[9]

Mrs. Abshire filed this claim for survivors’ benefits in May 2005. DX 2. The ALJ denied her claim in 2008, finding that Mrs. Abshire had not proved that pneumoconiosis caused or hastened her husband’s death (as required at the time). A.41, 54-55. Mrs. Abshire appealed to the Board, which remanded the case

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[8] *Accord*, Pet. Br. at 5, 6-7, 11, 17; *but see id.* at 14 (discussed *infra* at 22 n.16).

[9] The basic benefit rate for a totally disabled miner or surviving spouse is currently $625 per month, which is 37.5% of the monthly pay rate for a GS-2, step 1 federal employee. 30 U.S.C. § 922(a)(1)-(2); 20 C.F.R. § 725.520(a); http:// www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm. This basic benefit rate is increased by 50, 75, or 100 percent if the claimant has one, two, or three or more eligible dependents, respectively. 30 U.S.C. § 922(a)(4).

because the ALJ had improperly weighed the medical evidence on that issue. A.37-39.

While Mrs. Abshire's claim was pending before the ALJ on remand, the Affordable Care Act restored derivative survivors' benefits by amending Section 932(*l*). Pub. L. No. 111-148, § 1556 (2010); *see* 30 U.S.C. § 932(*l*) (2006 & Supp. IV 2010). Finding that Mrs. Abshire's claim was filed after January 1, 2005, was pending on and after March 23, 2010, and that her husband had been awarded benefits on a lifetime disability claim, the ALJ awarded survivors' benefits under amended Section 932(*l*). A.23. The Board affirmed. A.9.

SUMMARY OF THE ARGUMENT

The ALJ and Board properly applied amended Section 932(*l*) to award derivative survivors' benefits to Mrs. Abshire. Eastern Coal's primary argument is that amended Section 932(*l*) does not apply to Mrs. Abshire's claim because her husband's disability claim was filed before January 1, 2005, and therefore does not satisfy the amendment's effective-date clause, ACA Section 1556(c). But the plain language of Section 1556(c) applies to "claims" filed after 2004 without limitation, not merely to claims by miners. As a result, "amended § 932(*l*) applies to survivors' claims that comply with Section 1556(c)'s effective date requirements[.]" *West Virginia Coal Workers' Pneumoconiosis Fund v. Stacy*, 617 F.3d 378, 389 (4th Cir. 2011). There is no dispute that Mrs. Abshire's claim

satisfies those requirements, or that she is an eligible survivor of a miner who was awarded disability benefits during his lifetime. She is therefore entitled to survivors' benefits without needing to prove that pneumoconiosis caused her husband's death.

Eastern Coal also raises a trio of constitutional arguments, claiming that the 2010 amendment to Section 932(*l*) violates the Due Process Clause, takes the company's property without just compensation, and is not severable from other, allegedly unconstitutional sections of the Affordable Care Act. None of these arguments are persuasive. Petitioner's due process argument is wholly undermined by *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which squarely held that Congress may retroactively require coal mine operators to pay survivors' benefits to the dependents of disabled miners, even if the miners did not die from pneumoconiosis. The Takings Clause simply does not apply to laws, like amended Section 932(*l*), that impose an obligation to pay money without appropriating any specific or identifiable property interest. *McCarthy v. City of Cleveland*, 626 F.3d 280, 286 (6th Cir. 2010). And Eastern Coal's inseverability argument is moot in light of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). Mrs. Abshire's award should be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

This Court exercises *de novo* review over questions of law. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). As the administrator of the BLBA, the Director's reasonable interpretation of its ambiguous provisions as expressed in litigation is entitled to at least *Skidmore* deference. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997).

ARGUMENT

A. Amended Section 932(l) applies in survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, even if the related miner's claim was filed before 2005.

Eastern Coal's primary argument – that ACA Section 1556's revival of derivative survivors' benefits does not apply to Mrs. Abshire's claim because her husband filed his lifetime claim for disability benefits before January 1, 2005 – presents a question of statutory construction. Pet. Br. at 15. The analysis therefore begins with a consideration of Section 1556's text, which provides:

> SEC. 1556. EQUITY FOR CERTAIN ELIGIBLE SURVIVORS
>
> (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 [March 23, 2010].

Pub. L. No. 111-148, § 1556 (2010).

Subsection (c) provides the effective date for both subsections (a) and (b). That date is tied to the filing of "claims." Eastern Coal argues that the word "claims" in subsection (c) means only "miners' claims" when considering subsection (b)'s restoration of derivative survivors' benefits. Pet. Br. at 15. But Section 1556(c) uses the word "claims" without any additional qualifying or limiting language. 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). There is no dispute that Mrs. Abshire filed this claim for survivors' benefits in May 2005, or that it was pending on and after March 23, 2010. DX 2; A.19; Pet. Br. at 2-3.

The plain language of the statute thus supports the ALJ's conclusion that Mrs. Abshire is entitled to derivative benefits because her claim meets Section 1556(c)'s effective-date requirements, regardless of the date her late husband filed his claim. The Fourth Circuit, rejecting a similar attempt to limit the term "claims" in Section 1556(c) to "miners' claims," agreed: "[B]ecause Congress used the term 'claims' without any qualifying language, and because both miners and their

survivors can file claims under the BLBA, the plain language [of Section 1556] therefore supports the Director's position that amended § 932(*l*) applies to survivors' claims that comply with Section 1556(c)'s effective-date requirements." *Stacy*, 671 F.3d at 388.[10]

This straightforward reading is reinforced by the fact that Section 1556(c) also provides the effective date for Section 1556(a)'s revival of the fifteen-year presumption. That presumption explicitly applies to claims by both miners and survivors:

> if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, *his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim* under this title and . . . if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.

30 U.S.C. § 921(c)(4) (Supp. IV 2010) (emphasis added). "[T]he Director's interpretation," therefore, allows the word 'claims' to mean the same thing – *all* claims – throughout Section 1556." *Stacy*, 671 F.3d at 389. In contrast, Eastern

[10] While it did not explicitly address the issue, the Third Circuit also affirmed an award of derivative survivors' benefits in a case where, as here, the related miner's claim was filed before 2005. *See B&G Contr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 245 (3d Cir. 2011).

Coal's interpretation would lead to two meanings for the word "claims" in Section 1556(c): "miners' and survivors' claims" when considering entitlement to the fifteen-year presumption under subsection (a), but only "miners' claims" when considering entitlement to derivative benefits under subsection (b).[11] This incongruous result violates the "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). It was properly rejected by the Fourth Circuit as "tortured." *Stacy*, 671 F.3d at 389.

Eastern Coal offers two arguments in favor of its construction of Section 1556(c)'s effective-date clause. The first is based on Section 932(*l*)'s history. Section 932(*l*) originally 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." 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979). The 1981 amendments inserted a final limiting clause: "except with respect to a *claim filed* under this part on or after the effective date of the

[11] Eastern Coal's interpretation would thus have the curious consequence of entitling Mrs. Abshire to the fifteen-year presumption (based upon the qualifying date of her survivor's claim) but not to derivative benefits (based upon the non-qualifying date of Mr. Abshire's miner's claim), despite the fact that Section 1556(c) provides the effective date for the restoration of both derivative benefits and the fifteen-year presumption.

Black Lung Benefits Amendments of 1981." 30 U.S.C. § 932(*l*) (1982) (emphasis added). As correctly noted by Eastern Coal, the "claim" that had to be filed by December 31, 1981, was interpreted to be the miner's claim. *See Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988); 20 C.F.R. § 725.201(a)(2)(ii) (1984).

The lesson Eastern Coal attempts to draw from this interpretation of the 1981 amendment to Section 932(*l*) – that the word "claims" in Section 1556(c) must also mean "miner's claim" – simply does not follow. The interpretation of the 1981 amendment was compelled by its particular text and history, which are inapplicable to Section 1556. Textually, the clause added by the 1981 amendment ("except with respect to a *claim* filed . . . ") was inserted immediately following the phrase " . . . or refile or otherwise revalidate the *claim of such miner*[.]" 30 U.S.C. § 932(*l*) (1982) (emphasis added). It was therefore natural to conclude that the word "claim" in the 1981 limiting clause referred only to a miner's claim.[12]

Moreover, this natural reading was strongly supported by the 1981 amendment's legislative history. Congress assured survivors prior to passage of the 1981 amendments that the "[s]urvivors of those miners who are curently [sic] receiving benefits, o*r who have filed for them*, will not be affected by this change.

[12] Consistent with the last antecedent rule, "courts ordinarily assume that a limiting clause or phrase . . . modifies only the noun or phrase that it immediately follows." *See In re Sanders*, 551 F.3d 397, 399 (6th Cir. 2008) (internal quotation marks omitted) (discussing rule).

These survivors will receive benefits even if the miner eventually dies from causes unrelated to black lung." 127 Cong. Rec. 29932, *quoted in Pothering*, 861 F.2d at 1327 (emphasis added). Given this history, and the amended provision's text, it was surely correct to interpret the 1981 amendments as eliminating derivative survivors' benefits only where the miner had not yet filed a disability benefits claim.

Section 1556, however, is quite different in both text and context. Section 1556 does not insert the word "claims" – or any other word – into either Section 932(*l*) or Section 921(c)(4). Instead, it merely deletes the limiting language that was inserted into those sections in 1981. Consequently, no rule of grammar forbids the broad, natural meaning of the word "claims" in 1556(c). And Section 1556 has no legislative history suggesting that the word "claims" in Section 1556(c) should be interpreted to include only "miners' claims."[13]

Indeed, the 1981 amendments provide a clear model of what Congress could have done – but chose not to do – in Section 1556. If Congress had wished to

[13] To the contrary, the closest thing Section 1556 has to a legislative history – remarks by its sponsor, the late Senator Robert Byrd, shortly after the ACA was passed – points in the opposite direction. The Affordable Care Act's BLBA amendments are "intended to apply to *all claims* filed after January 1, 2005, that are pending on or after the date of enactment[.]" 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (emphasis added). *See B&G Constr.*, 662 F.3d at 251 (considering Senator Byrd's statements in interpreting Section 1556); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847-48 (7th Cir. 2011) (same).

reinstate derivative survivors' benefits only where a miner had been awarded disability benefits in a claim filed after 2004, the most natural thing would have been to follow its 1981 model. Section 932(*l*) easily could have been amended to read ". . . 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 and on or before January 1, 2005." But Congress did not choose that option, instead deciding to write one single effective date clause, Section 1556(c), applicable to the reinstatement of both the fifteen-year presumption and derivative survivors' benefits. The Director's interpretation gives meaning to this choice; Eastern Coal's does not.

Eastern Coal presses a second, closely-related argument based on the text of Section 932(*l*). Because Section 932(*l*) ostensibly relieves the survivors of miners who were awarded disability benefits of the obligation to file their own claims, the company reasons that Congress could not have meant to key its effective date to the time a survivor's claim is filed. Pet. Br. at 15. But this argument fails to acknowledge that, at the time Section 1556 was enacted, both miners and survivors filed claims. Indeed, except for the survivors of miners who had filed successful claims before 1982, the only way survivors could obtain benefits was to file an independent claim, even if the miner had been awarded lifetime disability benefits.

See, e.g., *Hill v. Peabody Coal Co.*, 94 Fed.Appx. 298, 299 (6th Cir. 2004).[14] Congress is presumed to know the law, and to know how it has been interpreted. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995). Congress therefore knew that independent survivors' claims were common when it restored derivative benefits in 2010. Section 1556(c) should be interpreted with reference to the federal black lung program as it existed in 2010 rather than 1981, particularly in light of Congress's decision not to follow the example of the 1981 amendments.

Finally, nothing in Section 1556 or amended Section 932(*l*) can change the fact that Mrs. Abshire actually filed this claim in May 2005. DX 2. "Amended § 932(*l*) relieves eligible survivors of the obligation of proving that a miner died from pneumoconiosis; it does not *prohibit* survivors from filing a claim." *Stacy*, 671 F.3d at 389. To the contrary, Section 932(*l*)'s limitation of derivative benefits to "eligible" survivors suggests that survivor claimants must prove – and responsible operators must have an opportunity to contest – their eligibility as a miner's survivor. *See B&G Constr.*, 662 F.3d at 244 n.12 ("[B]ut surely a widow seeking benefits must file something in order to receive them. After all,

[14] A survivor is required to file a claim even where the miner was awarded lifetime benefits because he or she suffered from complicated pneumoconiosis, a diagnosis that carries with it an irrebuttable presumption that the miner's eligible survivors are entitled to benefits. *See* 30 U.S.C. § 921(c)(3).

notwithstanding section 1556 a claimant might not be the miner's real widow."). Disputes over these issues could only be resolved in the claims process or something functionally identical to it. It therefore "does not contravene the plain language of amended § 932(*l*) to determine the applicability of Section 1556(c) based on the date of a survivor's claim." *Stacy*, 671 F.3d at 389.

In sum, Eastern Coal has failed to prove that the word "claim" in Section 1556(c) should be interpreted differently than its plain language suggests: any BLBA claim. Even if Section 1556(c) were ambiguous in this respect, the Director's interpretation of it is entitled to deference. *See Metropolitan Stevedores Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). While the Director's position is presented to this Court in the form of a legal brief, it reflects his consistent and considered view on the subject. He has expressed this same view to the Board below and to other courts of appeals. *See, e.g.*, *Stacy*, 671 F.3d at 388-89.[15] Moreover, the Director has issued a notice of proposed rulemaking implementing the 2010 amendments. 77 Fed. Reg. 19,456 (Mar. 30, 2010). Among the proposals is a revised version of 20 C.F.R. § 725.212(a)(3)(ii), which would provide that surviving spouses are entitled to benefits if the miner "[f]iled a claim for benefits . . . which results or resulted in a final award . . . and the surviving

[15] The Director's view is also consistent with the Act's remedial purpose. *See Adams v. Director, OWCP*, 886 F.2d, 818, 825 (6th Cir. 1989) ("This court has often repeated that the Act is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions.").

spouse . . . filed a claim for benefits after January 1, 2005, which was pending on or after March 23, 2010." *Id.* at 19,478. Thus, even if this Court believes that Section 1556(c) is susceptible to Eastern Coal's interpretation, it should reject that interpretation in favor of the Director's view.[16]

B. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Due Process Clause.

Congress's decision to restore derivative survivors' benefits in all pending claims filed after 2004 does not violate the Fifth Amendment's Due Process Clause. As explained by the Supreme Court, "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the

[16] In the course of its argument that the operative claim for purposes of Section 1556(c)'s effective-date clause is the miner's claim, Eastern Coal suggests that interpreting Section 1556(b) as restoring derivative survivors' benefits creates a conflict with Sections 921(a) and 922(a)(2). Pet. Br. at 14. It is unclear how, if it all, this suggestion relates to the question at hand. To the extent that Eastern Coal is attempting to raise a separate argument that amended Section 932(*l*) does not actually restore derivative survivors' benefits, that argument is both fatally underdeveloped and undermined by petitioner's repeated concessions that amended Section 932(*l*) does exactly that. *See* Pet. Br. at 3, 5, 6-7, 11, 17. In any event, it is true that Sections 921(a) and 922(a)(2) were not amended in 2010, and therefore still contain language stating that post-1981 survivors are not entitled to derivative benefits. *See* 30 U.S.C. §§ 921(a), 922 (a)(2) (2006 & Supp. IV 2010). But, as the Third and Fourth Circuits have explained, Section 1556(b)'s restoration of derivative survivors' benefits, as Congress's most recent enactment, trumps conflicting language in those un-amended provisions. *See B&G Constr.*, 662 F.3d at 252 ("[W]e are constrained to hold section 1556, as Congress' latest legislation on the subject of survivors' benefits, negates any language suggesting that an eligible survivor of a miner who was eligible to receive benefits at the time of his death must file a new claim in order to prove that the miner's death was due to the effects of pneumoconiosis."); *Stacy*, 671 F.3d at 391 (same).

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). The fact that Congress elected to restore derivative survivors' benefits retroactively does not substantially alter Eastern Coal's heavy burden to prove a substantive due process violation. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively."). Due process is satisfied if the retroactive application of a statute serves "a legitimate legislative purpose furthered by rational means." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

Eastern Coal has fallen far short of demonstrating that Congress acted arbitrarily or irrationally in enacting Section 1556. To the contrary, Congress's power to reinstate derivative survivors' benefits for BLBA claimants, and to do so retroactively, is clear from *Usery*. In that case, the Supreme Court rejected an argument that the BLBA itself 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.

Eastern Coal acknowledges "that Congress can enact legislation designed to compensate miners totally disabled by coal workers' pneumoconiosis," but claims that this case is distinguishable because "the survivor has been automatically awarded benefits without the necessity of proving the miner's death was hastened by" the disease. Pet. Br. at 20. But the *Usery* Court specifically considered the fact that, in some circumstances, the BLBA awards benefits to the survivors of miners who died from causes other than pneumoconiosis before the Act was passed. 428 U.S. at 25-26.[17] The Court recognized that unrelated death benefits could not be justified as an attempt to spread the costs of a mine operator's business. *Id.* at 25. It nevertheless held that such benefits passed constitutional muster because they furthered a separate legitimate purpose: "In the case of a miner who died with, but not from, pneumoconiosis before the Act was passed, the

[17] *Usery* considered unrelated death benefits in the context of 30 U.S.C. § 921(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. But the Court explicitly acknowledged that its analysis of the issue "is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis." *Id.* at 27 n.25 (citing, *inter alia*, 30 U.S.C. § 922(a)(2) (1970 & Supp. IV 1974), which provided that, "[i]n the case of death . . . of a miner receiving benefits under this part, benefits shall be paid to his widow (if any)").

benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness." *Id.* at 25. The Court went on to hold that unrelated death benefits were a rational means to achieve that goal. *Id.* at 25-26 ("[W]e cannot say that the scheme is wholly unreasonable in providing benefits for those who were most likely to have shared the miner's suffering.").

As the Third and Fourth Circuits – the only courts of appeals to consider the issue – have concluded, the same logic applies to Congress's decision to reinstate derivative survivors' benefits in 2010. *B&G Constr.*, 662 F.3d at 258 ("[B]ased on the Court's rationale in [*Usery*], we cannot say that it is irrational or arbitrary for Congress to extend survivors' benefits to the dependents of miners who are receiving black lung benefits at the time of their death regardless of the cause of death."); *Stacy*, 671 F.3d at 383-84 ("Indeed, the wholly rational and legitimate purpose for applying amended § 932(*l*) retroactively is to compensate the survivors of deceased miners 'for the effects of disabilities bred in the past.'") (quoting *Usery*, 428 U.S. at 18).[18] Similarly, this Court relied on *Usery* in rejecting a due process challenge to a now-defunct BLBA provision allowing "a deceased miner's survivors to file claims on behalf of employees who died many years before the statute's effective date." *North American Coal Corp. v. Campbell*, 748 F.2d 1124,

[18] *Accord Keene*, 645 F.3d at 849-50 (relying on *Usery* to reject due process challenge to ACA's restoration of 30 U.S.C. § 921(c)(4)'s fifteen-year presumption).

1128 (6th Cir. 1984) ("Because retroactive application of this statute operates only to make mine operators responsible for compensating the families of employees injured by their conditions of employment, we cannot find that it is particularly harsh and oppressive.").[19]

Eastern Coal rests its substantive due process argument (as well as its Takings Clause argument) on *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Pet. Br. at 21-22. But an examination of that fractured decision reveals that it actually undermines Eastern Coal's constitutional claims. *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 505-08. Beginning in 1974, these 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), which required coal mine operators that had signed the agreements to contribute to a new multi-employer

[19] The provision at issue in *North American Coal* provides that the eligible survivors of miners who were employed for at least twenty-five years before June 30, 1971, and died before March 1, 1978, are entitled to benefits "unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis[.]" 30 U.S.C. § 921(c)(5). It does not apply to claims filed after July 1, 1982. *Id.*

benefit plan that would provide the promised lifetime health care coverage. *Id.* at 514.

The Court held that the Coal Act was unconstitutional as applied to Eastern Enterprises, which had stopped mining coal in 1966 and therefore had never signed the post-1974 agreements promising lifetime health benefits to miners and their dependents. *Id*. at 530. No one theory, however, attracted a majority of the Court. Justice O'Connor, writing for a plurality of four, concluded that Eastern Enterprises' property had been taken without compensation, but explicitly declined to address the company's due process claim. *Id*. at 537-38. Justice Kennedy, concurring in part, concluded that Eastern Enterprises' 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 Takings Clause had been violated. *Id.* at 553-54.

The most obvious problem with Eastern Coal's reliance on *Eastern Enterprises* is that only Justice Kennedy found that a due process violation had occurred. The decision therefore does not even stand for the proposition that Eastern Enterprises' due process rights were violated. *See Franklin County Convention Facilities Auth. v. Amer. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("We conclude that *Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court."); *see*

also A.T. Massey Coal Co., Inc. v. Massanari, 305 F.3d at 237 n.17 ("Nor can *Eastern* stand for the proposition that the Eastern assignments are unconstitutional under the Due Process Clause, because only Justice Kennedy arrived at such a conclusion."); *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998) ("Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises'* fragmented parts.").

More importantly, the logic underlying both Justice Kennedy's concurrence and Justice O'Connor's plurality opinion in *Eastern Enterprises* entirely undermines petitioner's due process argument.[20] Neither Justice Kennedy nor Justice O'Connor concluded that the Coal Act was unconstitutional as applied to Eastern Enterprises merely because it imposed substantial retroactive liabilities on that employer. The lynchpin of both opinions was the fact that those substantial retroactive 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. *Id*. at 449-50 ("[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']

[20] While Justice O'Connor's plurality opinion does not address the Due Process Clause, her Takings analysis closely tracks Justice Kennedy's due process analysis in this respect. *See Stacy*, 671 F.3d at 385.

expectation of lifetime health benefits . . . created by promises and agreements made long after Eastern left the coal business.") (Kennedy, J. concurring in the judgment and dissenting in part); *id* at 537 (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[.]"). *See Franklin County Convention*, 240 F.3d at 551 ("[B]oth opinions supporting the judgment emphasized that Eastern had left the coal industry before any collective bargaining agreement gave miners an expectation of guaranteed health benefits.").

This key consideration is utterly absent from this case. The relationship between Mr. Abshire's totally disabling illness and his work for Eastern Coal is clear, and "the liability imposed by amended § 932(*l*) is proportional to the occurrence of totally disabling pneumoconiosis among former [Eastern Coal] miners." *Stacy*, 671 F.3d at 387. Indeed, the *Eastern Enterprises* plurality distinguished the Coal Act assessment struck down in that case from the retroactive imposition of BLBA liabilities affirmed in *Usery* on this ground:

> Eastern's liability . . . differs from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed 'liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from their labor.' Likewise, Eastern might be responsible for employment-related health problems

> of all former employees whether or not the cost was foreseen at the time of employment[.]

Id. at 536 (quoting *Usery*, 438 U.S. at 18) (second alteration added). 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." *Id.* at 549 (quoting *Usery*, 438 U.S. at 19). Thus, even if Justice Kennedy had been writing for a majority of the Court (or if Justice O'Connor's analysis had found a due process violation), *Eastern Enterprises* would still provide no support for Eastern Coal's constitutional claims.

In sum, derivative survivors' benefits under the BLBA are wholly justified by a purpose that has already been identified and found permissible by the Supreme Court in *Usery*: to compensate "for the suffering endured by [the miner's] dependents by virtue of his illness." 428 U.S. at 26. Amended Section 932(*l*) rationally furthers that goal because the liabilities it imposes are directly proportional to the incidence of totally disabling pneumoconiosis among former Eastern Coal miners. Eastern Coal's substantive due process argument should be

rejected.[21]

C. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Takings Clause.

While Eastern Coal's constitutional arguments focus on the Due Process Clause, it also claims that amended Section 932(*l*) violates the Takings Clause. Pet. Br. at 21. But the only case it cites in support is *Eastern Enterprises*, where a majority of the Court – Justice Kennedy and all four dissenters – agreed that the Coal Act assessment on Eastern Enterprises did *not* implicate the Takings Clause because it simply imposed an obligation to pay money without targeting any specific property interest. 524 U.S. at 543-44 (Kennedy, J. concurring in the judgment), 554-55 (Breyer, J. dissenting). This Court has accordingly held that "the Takings Clause 'is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest.'" *McCarthy v. City of Cleveland*, 626 F.3d 280, 286 (6th Cir.

[21] Eastern Coal's appeal to the presumption against retroactivity is misguided. Pet. Br. at 22 (citing *Landgraf v. USI Films Productions*, 511 U.S. 244, 264 (1994)). This canon of construction applies only where Congress has not clearly expressed its intention to apply a statute retroactively. *Landgraf*, 511 U.S. at 280. It has no bearing on this case, where Congress has unequivocally stated that the 2010 amendments apply to BLBA claims filed "after January 1, 2005, that are pending on or after the date of enactment of this Act." 124 Stat. 260, § 1556(c). As the *Landgraf* Court explained, "the *constitutional* impediments to retroactive civil legislation are now modest[.]" 511 U.S. at 272. The decision whether or not to apply a new law retroactively primarily rests with the legislature, and "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for countervailing benefits." *Id.* at 272-73.

2010) (quoting *Swisher Int'l v. Schaefer*, 550 F.3d 1046, 1057 (11th Cir. 2008)). Like the ordinance at issue in *McCarthy*, amended Section 932(*l*) does not "seize funds from [Petitioner's] bank accounts" or any other "specific fund" but "merely impose[s] an obligation on a party to pay money on the happening of a contingency." *Id.* at 284-85. The Takings Clause is therefore inapplicable. *See Stacy*, 671 F.3d 378, 387 ("Because amended § 932(*l*) merely requires petitioner to pay money – and thus does not infringe on a specific, identifiable property interest – the Takings Clause does not apply here.").[22]

D. Petitioner's severability argument is moot.

Finally, Eastern Coal argues that Section 1556 should be struck down as non-severable if the Affordable Care Act "is found unconstitutional." Pet. Br. at 23-25. While the petitioner does not specify what other ACA provisions it believes are unconstitutional, it is presumably referring to the provisions addressed in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (*NFIB*). Pet. Br. at 35-38. The Court's decision in *NFIB*, issued after Eastern Coal's brief was filed, disposes of this argument.

[22] Even if obligations to pay money were cognizable under the Takings Clause, Eastern Coal's takings claim would fail. Amended Section 932(*l*) does not unfairly single out petitioner to shoulder a burden that should be borne by the public as a whole; it obligates Eastern Coal to pay benefits only to the survivors of its own totally disabled former miners. *See Stacy*, 671 F.3d at 386-88; *B&G Constr.*, 62 F.3d at 259-63.

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 existing Medicaid funds for failure to comply with the requirements set out in the [ACA's'] expansion" of Medicaid. *Id.* at 2607 (plurality op.); see *id.* at 2630 (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 2630 (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 2607-08; accord *id.* at 2630-31 (Ginsburg, J, concurring in part, concurring in the judgment in part, and dissenting in part). The Court has thus already rejected arguments, like Eastern Coal's, that other provisions of the ACA should be invalidated on inseverability grounds.

CONCLUSION

The Court should affirm the ALJ's award of derivative benefits to Mrs. Abshire.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 8488 words, as counted by Microsoft Office Word 2010.

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I hereby certify that on October 16, 2012, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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