No. 12-35227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALD C. ARENDT and DAVID D. BROWN
Plaintiffs-Appellants,

v.
HILDA L. SOLIS, Secretary, United States
Department of Labor,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Washington
Case No. 2: 11-cv-05135
The Honorable Judge Lonny R. Suko

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

For the reasons discussed more fully in Part I of the Argument section of this brief, the district court lacked federal jurisdiction over this suit challenging the constitutionality of a provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1082. Before a court "may exercise jurisdiction over any suit against the government, [it] must have 'a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver.'" Jachetta v. U.S., 653

F.3d 898, 903 (9th Cir. 2011) (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Although "29 U.S.C. § 1331 grants district courts original jurisdiction over all 'civil actions arising under the Constitution, laws or treaties of the United States,' [] it does not waive sovereign immunity." U.S. v. Park Place Assocs., Ltd., 563 F.3d 907, 924 (9th Cir. 2009) (citing Hughes v. United States, 953 F.3d 531, 539 n.5 (9th Cir. 1992). The only waiver of federal sovereign immunity which allows suit against the Secretary of Labor under ERISA, is in ERISA section 502(k), 29 U.S.C. § 1132(k), the terms of which are inapplicable to this suit. Moreover, Appellants have failed to show any state action by the Secretary that could have violated their fundamental rights or taken an identifiable property interest in violation of the Due Process Clause of the United States Constitution. See Cox v. Hellerstein, 685 F.2d 1098, 1098-99 (9th Cir. 1982) (finding no federal subject matter jurisdiction where there was no state action for purposes of suit under 42 U.S.C. § 1983). The district court correctly granted the Secretary's motion to dismiss the suit with prejudice on these bases, and this court therefore lacks jurisdiction over this appeal.

Appellants' jurisdictional statement is correct in claiming that the district court's order of March 9, 2012, granting the Secretary's 12(b)(6) Motion to Dismiss with prejudice is a final order. V1.ER3. Appellants also

correctly state that they filed their Notice of Civil Appeal on March 26, 2012, which was within the 60 days permitted by Federal Rule of Appellate Procedure 4(a)(1)(B). V1.ER1.

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed the suit based on Appellants' failure to demonstrate a statutory basis to sue the Secretary under ERISA, and failure to demonstrate the state action predicate for their constitutional challenge.

2. Whether the district court correctly held that Appellants failed to establish that they had a constitutionally protected fundamental right to early retirement benefits, or an identifiable property interest that was taken as a regulatory matter by section 202 of the Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, 120 Stat. 780 (Aug. 17, 2006) (codified as ERISA section 305, 29 U.S.C. § 1082).

STATEMENT OF THE CASE

This is an appeal from a March 9, 2012 order of the U.S. District Court for the Eastern District of Washington (Suko, L.), granting the Secretary's motion to dismiss the suit filed by Appellants Gerald Arendt and David Brown. Volume 1, Excerpts of Record (V1.ER) 4-11. Appellants challenged the constitutionality of section 202 of the PPA, and argued that

its provision allowing underfunded pension plans in critical status to eliminate adjustable benefits violates the Due Process and Equal Protection Clauses of the U.S. Constitution. V2.ER 57-84.

The Secretary moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Appellants lacked a statutory basis under ERISA to sue the Secretary and failed to assert any state action on the part of the Secretary that would support a due process or equal protection claim. V2.ER 1-10, 34-54. The Secretary also argued that Appellants had no fundamental right to subsidized early retirement benefits, and that the PPA easily met the rational basis test applicable to national economic regulation that adjusts the benefits and burdens of economic life. V2.ER 1-10. Finally, the Secretary argued that section 202 of the PPA did not cause a "taking" of Appellants' "property" because the United States has taken nothing for its own use and has only imposed an obligation, the requirement that critical status plans adopt rehabilitation plans, as part of ERISA's comprehensive regulation of employer-provided pension plans. V2.ER 1-10. The district court dismissed the case with prejudice on March 9, 2012. V1.ER 4-11.

STATEMENT OF THE FACTS

Appellants are active participants in the Washington-Idaho-Montana Carpenters-Employers Retirement Trust ("Plan"), a collectively bargained

multiemployer pension plan.[1] In addition to offering defined pension benefits payable at the normal retirement age of 65, the Plan offered an early retirement benefit known as the "Rule of 80 Early Retirement Pension," which Appellants expected to obtain. This early retirement benefit allowed participants to retire before age 65 without reducing their basic retirement benefit. In order to be eligible for the "Rule of 80" benefits, participants had to reach a total of 80 when combining their age, and the number of years in which they participated in the plan and contributed 400 or more working hours. V2.ER 36. An early retirement benefit such as the Rule of 80 is a subsidized early retirement benefit or subsidy under Treasury Regulations. Treas. Reg. § 1.411(d)-3(g)(6)(v), 26 C.F.R. § 1.411(d)-3(g)(6)(v).

In August of 2009, the Plan notified its participants that it had suffered severe investment losses in the stock market decline of 2008 and early 2009, and was underfunded and in "critical status." V2.ER 35. The notice explained that the Plan was less than 65 percent funded and that the Plan was projected to have an accumulated funding deficiency for the plan

[1] A "multiemployer plan" means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements. ERISA § 3(37)(A)(i), (ii), 29 U.S.C. § 1002(37). All references to plans refer to multiemployer plans.

year beginning July 1, 2013.[2] V2.ER 35. As a result, the Plan was required, under the PPA, to take steps to resolve its funding crisis so that it could continue to fund normal benefits for current and future retirees. ERISA section 305, 29 U.S.C. § 1085.

The Plan sponsor and the Plan's Board of Trustees agreed to a rehabilitation of the Plan that, as permitted by the PPA, eliminated all of the adjustable benefits offered by the Plan, including subsidized early retirement. V2.ER 92-93. The Plan did not, and under the PPA could not, reduce accrued benefits payable at normal retirement age or cut any benefits of participants who had retired and entered "pay status" (as defined in 29 U.S.C. § 1085(i)(6)) before they were notified that the Plan was in critical status. ERISA § 305(e)(8)(A)(ii), (B), 29 U.S.C. § 1085(e)(8)(A)(ii), (B).

Prior to these amendments to the Plan, Appellants had earned service credits toward eligibility for the Rule of 80 benefit, which they are now

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[2] Under the PPA, a multiemployer plan is considered to be in critical status if: (1) it is less than 65% funded and is projected to have a funding deficiency within five years or to be unable to pay benefits within seven years; (2) it is projected to have a funding deficiency within four years or to be unable to pay benefits within five years, regardless of its funding percentage; or (3) it has liabilities for inactive participants that exceed its liabilities for active participants, its contributions are less than carrying costs, and a funding deficiency is projected within five years. ERISA § 305(b)(2), 29 U.S.C. § 1085(b)(2). See also CRS Report for Congress, Summary of the Pension Protection Act of 2006, October 23, 2006.

unable to apply toward a subsidized early retirement benefit.[3] V2.64. They filed a complaint against the Secretary of Labor alleging that the elimination of the subsidized early retirement benefit constituted a taking of a property interest or a violation of a fundamental right in violation of the Due Process Clause of the Fifth Amendment, and that the distinction between early retirees already in "pay status" and those not yet retired also violated the equal protection component of the Due Process Clause. V2. 57-81.

The district court dismissed the suit with prejudice, finding that Appellants failed to demonstrate a statutory basis for their suit against the Secretary, or to establish the state action that is a necessary predicate to their constitutional claims. V1.ER 4-11. The court also found that because Appellants did not have a fundamental, constitutionally protected right to subsidized early retirement benefits, they failed to establish that they suffered a taking in violation of the Due Process Clause. V1.ER 9. In this regard, the court found that "the United States had taken nothing for its own use but has only imposed an obligation, the requirement that critical status plans adopt rehabilitation plans, which is within its power to impose as part

[3] Paragraph 39 of the complaint states that Appellants paid for benefits with payroll deductions, but Plaintiff's Exhibit 2 cites to § 3.08 of the Plan, which clearly provides that the Rule of 80 benefit shall be funded through employer contributions.

of ERISA's comprehensive regulation of employer-provided pension plans" and which was "designed to protect normal retirement benefits from the problems caused by defaulting defined benefit pension plans." V1.ER 10.

SUMMARY OF THE ARGUMENT

The Secretary of Labor is not a proper defendant in this constitutional challenge to section 202 of the PPA. ERISA does not provide any statutory basis for Appellants to sue the Secretary in this case. The only waiver of sovereign immunity found in ERISA is section 502(k), 29 U.S.C. § 1132(k), the terms of which do not apply to this suit. Moreover, although Appellants challenge the elimination of the "Rule of 80" early retirement benefits toward which they had earned credits, it was the Plan's sponsors – not the Secretary of Labor – who decided that it was necessary to eliminate these benefits in order to rehabilitate their critically-underfunded Plan. And the collective bargaining parties (the local unions and contributing employers) agreed to these changes without any participation or even knowledge by the Secretary. Thus, Appellants fail to allege any state action by the Secretary, which is a necessary predicate to a due process or equal protection claim.

For similar reasons, the Plan's elimination of the Rule of 80 early retirement benefit did not amount to a retroactive regulatory taking of private property by the government. Here, the Secretary has neither taken

anything for her own use, nor has she imposed any liability on any party. The Secretary simply enforces a law which imposes an obligation on plans in critical status to adopt rehabilitation plans, which may eliminate early retirement benefits for employees not in pay status in order to ensure the Plan's ability to continue to pay for normal retirement benefits in the future as well as any benefits of those employees who have already retired. This enforcement power, which is part of ERISA's comprehensive regulation of employer-provided pension plans, but which the Secretary has not exercised here, does not constitute an improper regulatory taking or otherwise violate the constitution in any way.

Nor does Appellants' interest in their Plan's Rule of 80 early retirement option amount to a fundamental right that would give rise to the heightened review of strict scrutiny. As economic legislation that requires critically-underfunded pension plans to rehabilitate themselves, including by eliminating benefits other than normal retirement benefits, the PPA is designed to protect plan participants, the Pension Benefit Guaranty Corporation (PBGC),[4] and the American taxpayer from the costs and

[4] The PBGC, which guarantees some of the benefits provided under defined benefit pension plans, recorded a record-high deficit of $26 billion at the end of fiscal year 2011, with $107 billion in liabilities and $81 billion in assets to cover those liabilities. PBGC News Release on Annual Report (Nov. 15, 2011), www.pbgc.gov/news/press/releases/pr12-06.html.

disruptions caused by defaulting defined benefit pension plans. V2.ER 38-41. Such legislation adjusting the benefits and burdens of economic life is subject to rational basis review, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 (1980), under which section 202 of the PPA easily passes muster.

ARGUMENT

I. THE SECRETARY IS NOT A PROPER DEFENDANT IN THIS CASE

It is well settled that "the United States, as sovereign, 'is immune from suit, save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). See also FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Moreover, "[s]uch a waiver must also be 'unequivocally expressed' in the statutory text." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (quoting Lane v. Peña, 518 U.S. 187, 192 (1996)).

By its terms ERISA allows suit against the Secretary in only one of three situations: (1) where the parties seek review of a final action by the Secretary; (2) where the parties seek to restrict the Secretary from taking

action contrary to ERISA; or (3) where the parties seek to compel the Secretary to take action required by ERISA. 29 U.S.C. § 1132(k). Appellants' suit does not seek any of these things but instead seeks to have the provision of ERISA which allowed an amendment of their Plan declared unconstitutional. The Secretary plainly has not consented to any such suit under ERISA either in section 502(k) of ERISA or in any other subsection of ERISA's civil enforcement provision. See Shanbaum v. U.S., 32 F.3d 180, 182 n.2 (5th Cir. 1994) ("[t]he only waiver of sovereign immunity found in 29 U.S.C. §1132 is found in § 1132(k), allowing specific actions against the Secretary of Labor of which this action clearly is not one"). The Secretary played no role in the deliberations leading to the elimination of early retirement benefits in this case, issued no final order, threatened to take no action contrary to the provisions of ERISA, and has no authority to compel private non-parties to provide Appellants the benefits that they seek. Appellants thus miss the mark in relying on language in this Court's en banc decision in Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202 (9th Cir. 2011), broadly stating that "there are no limits stated anywhere in § 1132(a) about who can be sued," id. at 1205, because it is equally true that no part of

Section 502 waives the Secretary's immunity as sovereign to this suit and without such a waiver she may not be sued.[5]

Appellants also fail to demonstrate any state action, which is a necessary predicate to a suit alleging due process and equal protection claims against the Secretary. As the district court correctly concluded, "the mere existence of the provisions in the PPA allowing the elimination of adjustable benefits does not amount to state action necessary to sue the United States." V1.ER 8 (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 (1978)). Private acts can be treated as governmental only where "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." Single Moms, Inc. v. Montana Power Co., 331 F.3d 743, 747 (9th Cir. 2003) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001)). There must be "overt, significant assistance of state officials." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 54 (1999) (quoting Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).

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[5] Nor can 28 U.S.C. § 2403(a), which allows the United States at its option to intervene in any suit challenging a federal law as unconstitutional, plausibly be read to provide a private right of action for parties wishing to sue a government agency based on a constitutional challenge to a statute, much less to constitute an express waiver of sovereign immunity.

Under section 202 of the PPA, there is no "overt official involvement" sufficient to constitute state action when a plan in endangered or critical status reduces or eliminates adjustable benefits pursuant to a rehabilitation plan. While it is true that the Secretary may impose a penalty of up to $1100 per day if a plan in critical status fails to adopt a rehabilitation plan within the 240 day deadline, see 29 U.S.C. §§ 1132(c)(8)(A), 1085(c)(8)(A), the ability to do so is not tantamount to eliminating early retirement benefits. Under the statutory scheme, the Secretary does not select or create the rehabilitation plan for the plan sponsor. Instead, the plan sponsors, here the Board of Trustees, must provide the bargaining parties with schedules showing revised benefits structures consistent with the statute, and must designate one of those schedules as a default schedule should the parties fail to adopt a rehabilitation plan. 29 U.S.C. § 1085(e)(1)(B). There is simply no role "overt" or otherwise for the Secretary in this statutorily-mandated process of selecting and adopting a rehabilitation plan and the Secretary played no such role here. Thus, there is no state action that Appellants are challenging here and their constitutional challenges fail as a matter of law.

II. APPELLANTS HAVE NO IDENTIFIABLE PROPERTY INTEREST IN OR FUNDAMENTAL RIGHT TO SUBSIDIZED EARLY RETIREMENT BENEFITS

Even if Appellants had a statutory or constitutional basis to sue the Secretary, their suit would fail, as the district court held. Appellants erroneously argue that, by amending ERISA to allow the elimination of their early retirement plan as part of a rehabilitation plan for their critically underfunded plan, section 202 of the PPA caused an unconstitutional retroactive taking of their vested and accrued pension benefits. Appellants also argue that this impinges on their fundamental right to these benefits and that, as a consequence, the constitutionality of section 202 must be evaluated under a strict scrutiny test, under which it cannot be upheld. This is simply not the case.

Appellants are correct that ERISA section 204(g), 29 U.S.C. § 1054(g), generally protects a participant's interest in contractually-provided early retirement benefits. However, it is also true that this contractually-created claim to early retirement benefits was always subject to Congress' power to further regulate. FHA v. The Darlington Inc., 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendment to achieve the legislative end."). As the legislative history shows, the PPA was an

amendment to ERISA's comprehensive regulatory regime designed to protect normal retirement benefits, as well as the PBGC and the American taxpayer from the fall-out caused by defaulting defined benefit pension plans. 152 Cong. Rec. S8747 (daily ed. Aug. 3, 2006) (statement of Sen. Enzi), 2006 WL 2224796, available at http://www/gpo.gov, CRS Report for Congress, Summary of the Pension Protection Act of 2006 (Oct. 23, 2006). Thus, Congress permissibly provided a limited exception to the protection of section 204(g) for multiemployer pension plans facing critical funding shortfalls, whose sponsors are authorized to eliminate early retirement benefits for participants who have not yet retired and entered pay status as part of adopting a plan to improve the funding status of the plan.

In Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 223 (1986), a multiemployer pension fund alleged that the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) violated the Takings Clause. The Court held that "if the regulatory statute is otherwise within the powers of Congress, . . . its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." Connolly, 475 U.S. 211, 224, citing Bowles v. Willingham, 321

U.S. 503, 517 (1944); Omnia Commercial Co. v. United States, 261 U.S. 502, 508-510 (1923). Furthermore, the Court found that in requiring withdrawing employers to pay the multiemployer plan a debt proportionate to the employer's share of the plan's unfunded vested benefits, the "United States has taken nothing for its own use, and has only nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." Id. at 224.

Here too, as the district court correctly found, V1.ER 10, the United States has taken nothing for its own use. Instead, in seeking to protect normal retirement benefits for plans in critical funding status, Congress, as part of ERISA's comprehensive regulation of employer-provided pension plans, has simply allowed certain contractual promises for early retirees to be curtailed or eliminated in limited circumstances as part of a plan to improve the funding status of pension plans that appear likely to fail altogether. Thus, Congress has simply and permissibly "adjust[ed] the benefits and burdens of economic life to promote the common good." Connolly, 475 U.S. at 225.

A. Section 202 Of The PPA Does Not Cause A "Regulatory Taking" By Allowing A Plan Sponsor To Eliminate Early Retirement Benefits For Critically Underfunded Plans

Appellants now argue for the first time that section 202 of the PPA amounts to a regulatory taking of their property in violation of the Takings Clause of the Fifth Amendment under the factors used by the Supreme Court in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).[6] The general rule is that an issue will not be considered for the first time on appeal unless a party shows exceptional circumstances why the issue was not raised below. Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 655–56 (9th Cir.1984). In their filings before the district court, Appellants claimed a violation of the Due Process Clause of the Fifth Amendment, not the Takings Clause. Appellants have not set forth any reason why they did not raise the Takings Clause argument before the district court or set forth any exceptional circumstances explaining why they are raising the Takings Clause for the first time on appeal. Accordingly, the court should not consider this issue, but to the extent that it may, we address the argument here.

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[6] As the district court correctly noted, in their papers in the district court, Appellants did not "allege a violation of the Takings Clause of the Fifth Amendment, but they [did] argue that the PPA impermissibly allowed a 'taking' of their 'property' in violation of the Due Process Clause." V1.ER 9 n.1.

The regulatory takings doctrine has its genesis in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), where the Supreme Court first recognized that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415.[7] See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992), ("Prior to Justice Holmes's exposition in Pennsylvania Coal Co. v. Mahon, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a practical ouster of [the owner's] possession."). After the decision in Mahon, the Supreme Court has considered three factors – "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action," Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986) – and has only found regulatory takings in limited cases in which the challenged legislation had a substantial negative effect on specific property. Lucas, 505 U.S. 1003, 1015 (land-use regulation that deprived owner of all economically beneficial use

[7] In a dissenting opinion in Dolan v. City of Togard, 512 U.S. 374, 406-407 (1994), Justice Stevens cautioned that "the so-called regulatory takings doctrine" which emerged from Justice Holmes' dictum in Mahon, was a potentially open-ended source of judicial power to invalidate state economic regulations that members of the Court viewed as unwise or unfair.

constituted taking); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigational servitude upon private marina amounted to a taking requiring just compensation).

The Court applied these same three factors in evaluating a regulatory takings claim in the Eastern Enterprises v. Apfel case cited by Appellants, Br. at 25, which involved an employer's challenge to the assignment of $50-$100 million in retroactive liability by the Commissioner of Social Security for retired coal miners' health care costs under the Coal Act. 524 U.S. 529-537. There, a plurality of the Court found that this allocation scheme as applied to the employer amounted to an unconstitutional taking. See Director of Office of Workers Compensation Programs opp. cert. in W.Va CWP Fund v. Stacy, No. 11-1346, 2012 WL 3229392 (filed Aug. 8, 2012), for a discussion of due process and taking issues.[8] The Court explained that its decisions in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, (Black

[8] As Appellants point out, Justice Kennedy provided the fifth vote finding the Coal Act unconstitutional, but he disagreed with the application of the Takings Clause, finding it incorrect and quite unnecessary for decision. Eastern, 524 U.S. at 539. Kennedy cautioned against expanding "an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause," and opined that it was unwise to call the Coal Act legislation a taking. Id. at 540. Justice Kennedy argued that the constitutionality of the Coal Act turned on the legitimacy of Congress' judgment rather than on securing compensation from the government, and that the more appropriate constitutional analysis arose under general due process principles rather than under the Takings Clause. Id. at 545.

Lung Benefits Act of 1972), Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (Multiemployer Pension Plan Amendments Act of 1980), and Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, (same), made "clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties; and that it may impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation.'" Id. (quoting Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 731 (1984)). However, the Court concluded that those decisions "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience." Eastern, 524 U.S. at 528-529.

The Eastern opinion thus addresses a narrow set of circumstances. The test applied in Eastern Enterprises for legislation that imposes severe retroactive liability is not applicable here. Unlike Eastern, where the Social Security Administrator assigned liability for an estimated $50- $100 million in health care costs to a former coal mine employer, id. at 500, there is no

assignment of liability here. Instead, the PPA is national economic legislation that imposes an obligation that critical status plans adopt rehabilitation plans, which may, but are not required to reduce or eliminate a range of adjustable benefits, ERISA section 305(e)(8)(A), 29 U.S.C. §1085(e)(8)(A).

In his opinion in Eastern, Justice Kennedy, concurring in part, dissenting in part, distinguished the Coal Act provision from laws where "specific and identified properties or property rights were alleged to come within the regulatory takings prohibition," id. at 540-542, including laws that: (1) limited air rights for high-rise buildings, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137-138 (1978); (2) imposed substantial restrictions on specific parcels of real estates, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); (3) limited the right to transfer property by devise or intestacy, e.g., Hodel v. Irving, 481 U.S. 704 (1987); and (4) created an easement, Dolan v. City of Tigard, 512 U.S. 374 (1994). Appellants argue that their takings claim "satisfies Justice Kennedy's 'identified property interest'" criteria. Appellants' BR 30. However, as explained infra at 23, Appellants' interest in employer-subsidized early retirement benefits was never absolute; rather, it was always subject to elimination in the event of plan termination under ERISA section 4041A, 29

U.S.C. § 1341a. And Appellants' interest in employer-subsidized early retirement benefits for which they had not yet qualified is quite different from the type of specific property rights that have come within the regulatory takings prohibition. Furthermore, the problem here is that, as a result of private actions with respect to funding, there is a grave danger that the Plan will have insufficient funds to pay normal retirement benefits. The Plan has a limited pool of assets with which to pay benefits. The Government is not taking any of the assets away, but it is insisting that the private parties adjust their contractual commitments so that they can continue to pay normal retirement benefits without defaulting.

Although Appellants will suffer no economic loss with respect to their normal retirement benefits, the elimination of early retirement benefits certainly upsets Appellants' expectation that they would be able to retire early with full benefits. However, as the Court reasoned in Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993), when it held that withdrawal liability under MPPAA did not violate the Takings Clause, "pension plans have long been subject to federal regulation," and the withdrawing employer's reliance on ERISA's original limitation of contingent withdrawal liability was misplaced because there was "no reasonable basis to expect that" this limitation "would

never be lifted." Id. at 646, citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). The same is true here of Appellants' expectations.

B. Because Appellants Do Not Have A Fundamental Right To Early Retirement Benefits, Their Constitutional Challenge To The PPA Is Subject To, And Easily Survives, Rational Basis Review

Appellants are simply incorrect that they have a fundamental right to subsidized early retirement benefits and that, as a consequence, the statutory provision allowing elimination is subject to strict scrutiny. First, the right to an early retirement benefit is quite different from the right to marry, Loving v. Virginia, 388 U.S. 1 (1967), to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923), to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), or the other types of constitutionally protected fundamental rights or liberty interests that demand strict scrutiny when the United States regulates them.

Second, Appellants' claim that the PPA impinges on their fundamental right to the Rule of 80 benefits under their Plan overstates their interest in these benefits, and ignores the reality of this highly regulated area. Indeed, even before the enactment of the PPA, although Congress protected early

retirement benefits through the anti-cutback provisions of ERISA section 204(g), that protection was always limited. For instance, Congress always permitted the elimination of early retirement benefits in the case of a plan termination for plan participants who, like Appellants, were not yet qualified to receive those benefits. 29 U.S.C. §§ 1341a, 1301(a)(8). Through the PPA, Congress likewise allowed the elimination of early retirement benefits for such employees in order to avoid plan default, thereby preserving normal retirement benefits for plan participants and protecting the PBGC and the American taxpayer. In light of these statutory limitations, it is impossible to credit Appellants' claim that they have an unqualified and inalterable right to these benefits under ERISA and that section 202 is therefore subject to strict scrutiny. Instead, like the many other varieties of economic regulation that do not impinge on a fundamental right (or regulate a suspect class), a due process challenge to section 202 of the PPA is clearly subject to rational basis review. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1985); Fritz, 449 U.S. at 177.

To establish that a statute subject to rational basis review violates substantive due process, a plaintiff faces the burden of establishing that "the legislature acted in an arbitrary and irrational way." Gray & Co., 467 U.S. at 729 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

Here, it was certainly reasonable for Congress to conclude that it would often be impossible to restore a substantially underfunded plan to sound financial footing without requiring some parties to make financial sacrifices in order to preserve normal retirement benefits and to protect the PBGC and the American taxpayer from defaulting pension plans. Given that reality, Congress reasonably gave private parties considerable freedom to adopt the best approach from the range of options described in ERISA section 305(e), including by allowing but not requiring them to eliminate early retirement benefits in order to preserve all participants' entitlement to their normal retirement benefits. See 29 U.S.C. § 1085(e)(8)(A), (B). Furthermore, it generally conditioned the elimination of the adjustable benefits at issue here on the outcome of collective bargaining. 29 U.S.C. 1085(e)(8)(A). Finally, Congress preserved Appellants' entitlement to their normal retirement benefits. 29 U.S.C. 1085(e)(8)(B).

Because section 202 of the PPA so plainly serves legitimate government purposes and utilizes means that are rationally related to those purposes, Appellants cannot meet the "extremely high" burden, Richardson v. City and County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997), of "negating every conceivable basis that might support" the legislation. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

Appellants have failed to allege grounds to sue the Secretary under ERISA, and they have failed to demonstrate any state action, which is a necessary predicate to a suit alleging due process and equal protection claims against the Secretary. The statutory provision allowing the Plan to eliminate Appellants' early retirement benefits does not amount to a taking in violation of due process or an uncompensated regulatory taking. Finally, Appellants do not have a fundamental right to employer-subsidized early retirement benefits for which they have not yet even qualified, and section 202 of the PPA easily meets the applicable rational basis test for challenges to the constitutionality of national economic legislation.

CONCLUSION

For the foregoing reasons, the order of the district court dismissing Appellants' complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(5), (6), and (7), I hereby certify that the brief for the Appellee, Hilda L. Solis, Secretary of Labor, complies with the typeface, style, and volume requirements because it was prepared using Microsoft Office Word 2003 utilizing Times New Roman 14 point font and contains 5,758 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). The brief has been scanned and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF systems.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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