No. 13-1280

IN THE

Supreme Court of the United States

THOMAS G. DAVIS, *ET AL.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of counsel:

JONATHAN A. COHEN
ELIZABETH KOBY
Legal Department
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 Massachusetts Ave. NW
Washington, DC 20036
(202) 797-4000
jonathan.cohen@alpa.org
elizabeth.koby@alpa.org

MICHAEL E. ABRAM
Counsel of Record
ZACHARY N. LEEDS
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, NY 10036-6979
(212) 563-4100
mabram@cwsny.com

Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICUS CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL[1]

The Air Line Pilots Association, International ("ALPA") is the largest union of airline pilots in the world and serves as collective bargaining representative for more than 51,000 airline pilots employed by 32 air carriers in the United States and Canada. For generations, many ALPA pilots have relied on their defined benefit plans for a secure retirement. Over 6,000 active ALPA pilots continue to accrue benefits in active defined benefit plans.

Defined benefit plans have been particularly important to pilots because pilots typically must earn their retirement benefits over a shorter period of time, and with more frequent interruptions, than others. Commercial pilots possess highly specialized job skills that require years of training and development and previous aviation experience. They typically start their careers later than other workers and, at the same time, are subject to a federal mandatory retirement age. 14 C.F.R. § 121.383(e). In addition, pilots face a greater risk of job interruption due to disability than other workers. Pilots are subject to periodic medical certification, and medical conditions that might not affect other workers can ground a pilot temporarily or permanently. Pilot defined benefit plans are structured to take account of these factors.

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[1] The parties were notified ten (10) days prior to the filing of this brief of ALPA's intent to file this brief and have consented to its filing. Letters of consent to the filing of this brief have been filed with the Clerk of Court. This brief was not written in whole or in part by a party or by counsel for a party. No party to this action or its counsel made a monetary contribution to the preparation or submission of the brief. Only ALPA made a monetary contribution to the preparation or submission of the brief.

While defined benefit plans have played a vital role in securing pilots' retirement, recent upheaval in the airline industry has caused enormous losses to pilots' retirement income. In addition to the US Airways pilot plan, at issue in this case, the United and Delta Airlines pilot defined benefit plans were also terminated, causing pilots to lose up to seventy-five percent of the retirement income they had earned over the course of their careers. *See* Statement of Captain John Prater, President Air Line Pilots Association, International, before the Health, Employment, Labor and Pension Subcommittee of the Education and Labor Committee of the US House of Representatives Washington, DC (May 3, 2007), http://www.alpa.org/portals/alpa/pressroom/testimony/2007/TM_5-3-07_written.htm; *see also* Testimony of Bradley D. Belt, Executive Director, Pension Benefit Guaranty Corporation ("PBGC"), Before the Subcommittee on Aviation, Committee on Transportation & Infrastructure, United States House of Representatives (June 22, 2005), http://www.pbgc.gov/news/testimony/page/tm062205.html (noting that as a result of the pilots' defined benefit plan termination at United Airlines, "[s]ome participants or their survivors may see benefits reduced by half or more because of statutory limits" on the PBGC pension guarantees). In addition, the Continental and Northwest Airlines defined benefit plans have been frozen. *See* Statement of Captain Duane E. Worth, ALPA President, Before the Aviation Subcommittee, Transportation and Infrastructure Committee on Airline Pensions: Avoiding Further Collapse (June 22, 2005), https://www.alpa.org/portals/alpa/pressroom/testimony/2005/2005-6-22_Woerth-Written.htm. In addition to the over 6,000 ALPA pilots in active plans, almost 7,000 pilots participate in these two frozen plans.

With thousands of pilots still in defined benefit pension plans, ALPA has a critical interest in ensuring that the plan termination insurance regime is governed fairly and in accordance with the statute.

In addition, the issues presented in the petition for certiorari are particularly critical in the pilot collective bargaining context. The first question presented involves a dispute over the effective date of the pilots' Early Retirement Incentive Plan ("ERIP"), which amended the US Airways pilots' defined benefit pension plan at a time when ALPA was the US Airways pilots' collective bargaining representative. Petitioners contend that the ERIP was effective as of the effective date set forth in the ERIP itself (January 1, 1998), which was the effective date of the collective bargaining agreement between US Airways and ALPA. The PBGC claims the ERIP was effective only as of the date it became "payable" on May 1, 1998. The Appeals Court upheld the PBGC's interpretation. *See* Petitioners' Appendix ("Pet. App.") at 9a-11a.

The difference is material because under the relevant statute, assets from the pilots' plan will cover benefits for certain participants based on the plan provisions that were "in effect" more than five years before plan termination. If the ERIP was in effect when it was made effective, benefits under that plan will be covered; if it was in effect when it was payable, they will not be.

A collective bargaining agreement is generally bargained with respect to the so-called "total economic package," where the parties weigh total costs and benefits over the life of the agreement. To the extent the parties agree to make a particular provision effective on a certain date, its costs have been weighed against other benefits in the agreement *when the* *agreement goes into effect*. The ERIP became effective on January 1, 1998, when the new pilots' collective bargaining agreement went into effect. Benefits under it were not payable until May 1, 1998, but the pilots as a group would have given up other elements of pay or benefits that might have been available to them from the effective date of the new agreement in order to pay for the ERIP benefit. Since the pilots paid for the ERIP as of its effective date, ALPA has a strong interest in ensuring that the pilots receive the benefit of the ERIP as of its effective date—in particular when the statute dictates that they should, as discussed below.

ALPA also has a particular interest in the second question presented, which involves whether a benefit provision was "in effect" under the same statutory provision. The PBGC claims that a statutory amendment to the tax code created a new plan provision, which would mean that a benefit provision was not in effect before the date of the amendment. As more fully set out below, the pilots' plan calculated a pilot's benefit based on his or her salary and years of service. In order for the plan to maintain its tax-qualified status, if the resulting benefit exceeded certain income tax limitations, a pilot's benefit from the plan was capped at that limit. In 2001, Congress increased the tax limitation and pilots at the cap were thereafter permitted to receive a greater portion of their benefit from the plan. The PBGC considered this an increase in the benefit, which it claims limits how large a portion of the pilots' benefits may be paid from the terminated pension plan. The Appeals Court upheld the PBGC's interpretation. Pet. App. at 11a-13a.

The increased benefit payment, however, was not a benefit increase, but an increase in the portion of the earned benefit that the plan could provide to a pilot without causing plan disqualification. For various reasons, including that pilots are forced into retirement by law, pension plans often include provisions, like the one here, that account for these income tax limitations, and any increases in the limit. Accordingly, ALPA has a strong interest in correct resolution of the second question presented.

For the foregoing reasons, ALPA respectfully submits this brief urging the Court to grant certiorari to reverse the Appeals Court's reliance on PBGC's erroneous interpretation of the defined benefit pension plan insurance rules.

SUMMARY OF THE ARGUMENT

The Court should grant certiorari to resolve the two questions presented, both of which involve the PBGC's incorrect interpretation of Section 4044(a)(3) of the Employee Retirement Income Security Act ("ERISA"). The interpretation of the provision could affect millions of workers and thousands of pilots currently and in the future represented by ALPA.

The questions involve when benefit provisions are "in effect" and what benefit "would be the least," for purposes of Section 4044(a)(3). In question one, Petitioners seek review of the Appeals Court's reliance on the PBGC's interpretation of "in effect" as meaning "payable." The PBGC's interpretation is contrary to the statute's plain meaning and, in fact, contrary to Congress' and the PBGC's understanding of the term as reflected in a recent amendment to a related provision in ERISA.

In question two, Petitioners seek review of the Appeals Court's reliance on the PBGC's conclusion that increasing the portion of an earned benefit that the plan could pay to participants—due to a Congressional amendment to the tax code—was a "benefit increase" under the PBGC's regulation. Again, the PBGC's conclusion is contrary to the statute, which requires a terminated plan to pay benefits based on the plan provisions in effect during the relevant period. The pilots' benefit was in effect for the full time period, and therefore should have been fully paid.

ARGUMENT

I. Statutory Framework

The two issues presented in the petition for certiorari relate to the PBGC's application of ERISA Section 4044(a)(3). *See* Pet. App. at 80a-81a (statutory text). That section assigns the so-called priority category 3 —"PC3"— designation as follows:

> [I]n the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least . . . .

29 U.S.C. § 1344(a)(3)(A); *see also* 29 U.S.C. § 1344(a)(3)(B) (same, with respect to a participant who could have been in pay status during 3-year period). There are two periods relating to timing, the 3-year and the 5-year periods before plan termination. An individual must have been in pay status (or qualified to have been in pay status) for the 3-year period to be eligible for any PC3 benefit. And a

particular plan provision must have been "in effect" for the 5-year period.

II. Question One

The first question presented turns on the meaning of the phrase "in effect" in Section 4044(a)(3). "Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Bilski v. Kappos*, 561 U.S. 593 (2010) (internal quotation omitted). The ERISA statute and regulations use the term "effect," as "in effect" or "effective," dozens if not hundreds of times with respect to benefit plan provisions. *E.g.*, 29 U.S.C. § 1054(b)(1)(B)(i) ("any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years"); 29 U.S.C. § 1341a(b) (date of multiemployer plan termination is later of date on which a triggering amendment is adopted or the date on which it "takes effect").

In this case, the statute simply says that whether a benefit is in PC3 is "based on the provisions of the plan (as in effect during the 5-year period ending on such date) . . . ." 29 U.S.C. § 1344(a)(3). There is no question that the ERIP was a plan provision in effect five years before termination.

To avoid this result, the PBGC has advanced an unusual definition of "in effect," which conflicts with the plain meaning of this term, the PBGC's apparent understanding of the term, and its own regulations. It has defined "provisions . . . in effect" to mean "benefits payable," the date as of when a participant could actually receive the benefit.[2] *See* Pet. App. 9a-11a.

[2] As the Petitioners have pointed out below, the PBGC's interpretation of the term "in effect" has evolved in this matter.

The benefit provision at issue, the ERIP, was included in the pension plan as of January 1998, more than five years before the plan termination in March 2003. The benefit was not payable until May 1998, however, less than five years before termination. If "provisions . . . in effect" means "benefit payable," as the PBGC claims in this instance, the ERIP would be excluded from PC3.

In the context of employee benefits, there is rarely a discrepancy between the two dates. Generally, once a benefit is included within a plan, it is payable to eligible participants. Here, there was a short time lag between the effective date and the payable date.

Congress recently amended ERISA Section 4022, a related plan insurance provision, and PBGC adopted regulations thereunder, to account for one of the other rare circumstances where the date a benefit provision is included in a plan, and therefore effective, differs from the date the benefit is payable. In fact, the amendment to Section 4022 and the PBGC's regulations were adopted *precisely because* the two dates are not identical.

Under Section 4022, as under Section 4044(a)(3), benefits are included if they are "in effect" more than five years before termination. 29 U.S.C. § 1322(b)(1) and (b)(7); *see also* regulations thereunder, 29 C.F.R. § 4022.24-26. By amending Section 4022, Congress sought to protect the PBGC from a particular type of benefit called an unpredictable contingent event benefit ("UCEB") that is generally adopted and

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Prior to the lawsuit, the PBGC interpreted it to mean "the earliest date a participant could retire and receive" the benefit. Joint Appendix to the Court of Appeals at 280. In litigation, it interpreted it to mean "payable." Pet. App. at 11a.

effective long before it becomes payable. In its regulations implementing the statutory amendment, the PBGC explicitly recognized that a benefit's effective date and its payable date are two different dates—inexplicably contrary to the agency's position in this case.

Section 4022 establishes the amount of benefit the PBGC guarantees from its own insurance funds (as opposed to Section 4044, which establishes the allocation of assets remaining in the terminated plan). The Section 4022 guarantee provision, like Section 4044, determines benefit eligibility based on the date a benefit was "in effect." The PBGC regulations under both Sections 4022 and 4044 use the same timing language—benefits are considered "in effect" from the later of the date the benefit is "adopted" or "effective." *Compare* 29 CFR § 4022.24(e) and § 4044.13(b)(6). (Here, of course, the benefit was "adopted" before it was "effective" on January 1, 1998.) The PBGC presumably uses this "later of" formulation to prevent plans from adopting retroactively effective benefits to slip recently adopted benefits within the five-year coverage period. In amending ERISA Section 4022, Congress sought to further protect the PBGC from UCEBs, which provide a benefit to participants upon the occurrence of some future event, such as a factory shutdown. *See* 29 U.S.C. § 1056(g)(1) (UCEBs defined); *see generally* 79 Fed. Reg. 25667 (May 6, 2014) (to be codified at 29 C.F.R. pt. 4022) (PBGC UCEB final regulation and preamble).

As the PBGC explained, "[a] UCEB provision typically has *been in a plan* many years before the occurrence of the event that eventually triggers the benefit, such as a plant shutdown." 79 Fed. Reg. at 25668 (emphasis added). However, the benefit is not payable until the occurrence of the event. In other words, as the PBGC explained, the UCEB is "payable" on a different date from the date it became a provision of the plan, and in effect—the two dates are not the same.

Under the prior Section 4022 statutory and regulatory structure, the PBGC was forced to fully guarantee a benefit that had been effective for more than five years even if it had not become payable until much closer to plan termination when the unpredictable event occurred. Accordingly, Congress added ERISA Section 4022(b)(8): "If [a UCEB] is payable by reason of the occurrence of any event, this section shall be applied as if a plan amendment had been adopted on the date such event occurred." The PBGC explained in the preamble to its implementing regulation that "[t]his statutory change provides the PBGC insurance program a greater measure of protection than prior law from losses due to unfunded UCEBs—most notably, benefits that become payable by reason of a plant shutdown or similar event such as a permanent layoff." 79 Fed. Reg. at 25668-69. As noted above, before the amendment, the PBGC guarantee timeframe ran from the later of the effective or adopted date. If "payable" and "effective" meant the same thing, the guarantee timeframe would already have run from the payable date and Congress would not have needed to redefine "adopted" to mean "payable."

The PBGC regulations under the new 4022(b)(8) put an even finer point on the distinctions among the three dates: the adoption date, the effective date, and the date the benefit becomes payable. "[A] UCEB is deemed to be in effect as of the latest of—(i) The adoption date of the plan provision that provides for the UCEB, (ii) The effective date of the UCEB, or (iii) The date the UCEB occurs [and the benefit is payable]." 29 C.F.R. § 4044.27(c)(1).[3] A UCEB might have been adopted in 2002, effective 2003, and payable when the factory shut down in 2012. The PBGC would guarantee the benefit based on the latest of the three different dates, the 2012 payable date.

Congress and the PBGC's understanding of the relationship between "effective" and "payable" could not be plainer—they are different dates. In sum, with respect to UCEBs, Congress and the PBGC sought to address the discrepancy by amending ERISA so that the PBGC guarantee timeframe would run from the later of the two dates. The PBGC has sought to address the discrepancy between the effective and payable date in this case by pretending the two dates are actually the same.

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[3] The PBGC explained its reference to three dates as follows, further clarifying the distinction between the effective date and the payable date. "Section 4022(b)(8) could be read to produce an incongruous result in an unusual situation—where the UCE [unpredictable contingent event] occurs first and a UCEB is adopted later, effective retroactive to the UCE. Because the date of the UCE would be treated under section 4022(b)(8) as the adoption date of the UCEB, in this situation the phase-in arguably would begin on the date of the UCE (the later of the adoption date or effective date of the UCEB), rather than on the actual adoption date of the plan amendment, as under pre-PPA 2006 law. The result would be a more generous—and more costly—guarantee of UCEBs than under pre-PPA 2006 law. To avoid this incongruous result, proposed § 4022.27(c) provides that a benefit increase due solely to a UCEB would be "in effect" as of the latest of the adoption date of the plan provision that provides for the UCEB, the effective date of the UCEB, or the date the UCE occurs." 76 Fed. Reg. 13304, 13307 (Mar. 11, 2011) (to be codified at 29 C.F.R. pt. 4022).

The PBGC's interpretation in this case, in fact, is novel in relation to this very same regulation. If "effective" meant "payable" in Section 4044.13(b)(6), the PBGC would have used the word "payable," as it did in an earlier provision in the same regulation, Section 4044.13(b)(3). Under that section,

> the benefit assigned to priority category 3 . . . is limited to the lesser of the lowest annuity benefit in pay status during the 3–year period ending on the termination date and the lowest annuity benefit payable under the plan provisions at any time during the 5–year period ending on the termination date.

29 C.F.R. § 4044.13(b)(3)(i); *see also* 4044.13 (a)(3)(B)(ii) (same, with respect to a participant who could have been in pay status during 3-year period). In (b)(6), PBGC defined "in effect" to mean the later of the "adoption" or "effective" date. In (b)(3), the PBGC refers to benefits that are "payable." If "in effect" means "payable," PBGC would have used that word in (b)(6).[4]

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[4] To the extent the PBGC argues that the term "payable" in section 4044.13(b)(3) means that the ERIP should not be included in PC3, Section (b)(3) is plainly contrary to the statutory language. As cited above, under the governing statute, "the provisions of the plan (as in effect during the 5-year period ending on such date)" are included in PC3. As shown, "in effect" or "effective" are understood—including by the PBGC—to mean when a provision becomes part of a plan, not when it is payable. In fact, however, (b)(3) need not be read in a way that contradicts the statute. It describes the amount of a benefit that is payable, and therefore uses the word "payable." In light of the explicit statutory language (4044(a)(3)) and adjacent regulatory provision (4044.13(b)(6)) governing the time during which a plan provision must be "in effect," there is no reason to read (b)(3), which

In all, the first question presents a relatively straightforward issue. The ERIP was in effect as of January 1998, more than five years before the plan terminated. The statute assigns benefits to PC3 where the benefit provisions were "in effect" for at least five years. Whether the benefit was payable at a later date is not relevant for PC3 purposes.

III. Question Two

With respect to the second question presented, the PBGC similarly advanced a novel interpretation of the PC3 provision, ERISA Section 4044(a)(3). The PBGC argued that because the tax-qualified amount of the benefit to which a pilot was entitled under the plan increased each year, only a portion of the benefit—that would produce the least benefit—should be included in PC3, under the PBGC's regulation at 29 C.F.R. § 4044.13(b)(5). Pet. App. 11a-13a.

As quoted above, an individual's PC3 benefit is based on the plan provisions in effect at least five years before termination. For all relevant times, the benefit formula provision in the plan—Section 4 of the plan—set a pilot's benefit based on his or her salary and years of service. Joint Appendix to the Court of Appeals ("JA") at 655. The benefit to which the pilot was entitled under Section 4 did not change during the relevant period. Accordingly, under the plain language of the statute, the provision "in effect," and the benefits due under that provision, should be included in PC3 for all five years through termination. It is true that the portion of the earned benefit that the plan would pay to a pilot might increase—but it was

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describes the amount of benefit payable, not the relevant timeframe, as imposing some different timeframe.

because of a 2001 statutory amendment that increased the limit on the amount of benefit that could be paid under the pilots' plan.

Notwithstanding the benefit formula set forth in Section 4 of the plan, the proportion of the benefit that the pilot was entitled to receive from the plan was limited by Section 415(b) of the Internal Revenue Code. That section sets a limit on the amount of tax-qualified benefit that can be payable to a participant. If a plan exceeds the limit, it will lose its tax-qualified status, with enormous possible consequences. Accordingly, as is typical, the pilots' plan imposed a cap on the portion of a pilot's benefit that could be paid from the plan so as not to exceed the Section 415(b) limit. JA661 (Section 7).

In 2001, Congress amended Section 415(b) to increase the limit. Pet App. at 39a-40a. The benefit amount never changed—after the amendment, the tax code simply permitted the pilots to obtain a greater portion of it from the plan.[5] Indeed, if a pilot's benefit did not exceed the Section 415(b) limitations, he or she would be entitled to receive from the plan the full earned benefit without any limitation.

In all, any change in the benefit amount paid from the plan was simply the result of an amendment to the statute. The benefit provision itself had been in effect for the five-year period, and the full amount should therefore be included in PC3.

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[5] The Appeals Court references "cost-of-living" adjustments and the 415(d) statutory annual cost-of-living adjustment to the 415(b) limit. Pet. App. at 11a-13a. The second question presented relates to a Congressional amendment to section 415(b), not to cost-of-living adjustments such as under 415(d).

CONCLUSION

For the foregoing reasons, ALPA respectfully urges the Court to grant certiorari to reverse the Court of Appeals' affirmation of the PBGC's erroneous interpretations of the defined benefit pension plan insurance guarantees.

Respectfully submitted,

MICHAEL E. ABRAM
Counsel of Record
ZACHARY N. LEEDS
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, NY 10036-6979
(212) 563-4100
mabram@cwsny.com

Of counsel:

JONATHAN A. COHEN
ELIZABETH KOBY
Legal Department
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 Massachusetts Ave. NW
Washington, DC 20036
(202) 797-4000
jonathan.cohen@alpa.org
elizabeth.koby@alpa.org

Counsel for Amicus Curiae

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