

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**

**MOTION FOR LEAVE TO FILE BRIEF *AMICI*
CURIAE AND BRIEF FOR THE COALITION OF
AIRLINE PILOTS ASSOCIATIONS AND US AIRLINE
PILOTS ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO
FILE BRIEF *AMICI CURIAE***

Pursuant to Supreme Court Rule 37.2(b), the Coalition of Airline Pilots Associations (“CAPA”), and the US Airline Pilots Association (“USAPA”) (collectively, the proposed *amici*) respectfully request leave to submit the accompanying brief as *amici curiae* in support of petitioners. Proposed *amici* provided timely notice of intent to file this brief to counsel for all parties. Counsel for petitioners consented to the filing of this brief, and that letter of consent has been lodged with the Clerk of this Court. Counsel for respondent Pension Benefit Guaranty Corporation (“PBGC”) declined to grant such consent.

Petitioners ask this Court to, *inter alia*, apply a *de novo* standard of review to the PBGC’s construction of a statutory provision in Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The highly deferential standard of review applied by courts to PBGC actions taken as statutory trustee of terminated pension plans, such as the plan at issue in this case, allows the PBGC to manipulate ERISA provisions to the detriment of plan participants and beneficiaries despite its fiduciary duty as trustee to act in the best interests of said plan participants and beneficiaries.

As detailed fully in the accompanying brief, proposed *amici* have a direct and substantial interest in the aforementioned issue. Proposed *amici* represent over 25,000 active professional airline pilots employed by leading commercial airlines, many of whom are participants in at least one terminated ERISA pension plan to which the

PBGC was appointed as trustee. An important function of proposed *amici* is to protect and represent the common interests of its members by seeking active involvement in matters of importance to the aviation industry and individual pilots. As such, proposed *amici* have a strong interest in protecting the rights of individual pilots to retain their pension benefits. The issues presented in this case are of pressing national concern and of individual concern to the many pilots represented by proposed *amici* who have lost their pensions as a result of PBGC takeovers.

As organizations representing pilots, proposed *amici* and the accompanying brief bring a discerning analysis to the issues presented in this case. Specifically, proposed *amici* present in detail the direct conflict of interest arising from the PBGC's dual roles as guarantor and trustee, especially when interpreting ERISA statutory and regulatory language, and explain how the Court's ruling on this issue will provide necessary guidance and clarity to interested parties (such as plan participants), the PBGC, and lower courts regarding whether the PBGC is fit to be appointed as trustee to a terminated pension plan.

For the foregoing reasons, proposed *amici* respectfully request that their motion for leave to file the accompanying brief be granted.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*

Amicus curiae Coalition of Airline Pilots Associations (“CAPA”) is a trade association comprised of five labor organizations, which represent over 25,000 professional airline pilots employed by American Airlines, UPS Airlines, US Airways, Atlas Air, and Republic Airlines, among other airlines.¹ CAPA protects and represents the common interests of its member organizations in cases involving matters of importance to the aviation industry and individual airline pilots.

Amicus curiae US Airline Pilots Association (“USAPA”) is a labor organization and the certified representative of approximately 5,200 commercial airline pilots employed by US Airways. USAPA is also a member of fellow *amicus curiae* CAPA. USAPA represents its pilots with respect to terms and conditions of employment, including pension and retirement benefits provided by US Airways.

Amici have a substantial and direct interest in the petition, as cases that have a significant effect on the provision of benefits of a terminated pension plan are of particular concern to *amici* and the pilots they represent. This is especially true given the significant number of Pension Benefit Guaranty Corporation (“PBGC”) takeovers and plan

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to the filing of this brief and written consent has been filed with the Clerk. Respondent PBGC has withheld its consent. Counsel of record for petitioners and respondent received notice of *amici*’s intent to file this brief more than ten days before the due date.

terminations that have occurred in the commercial airline industry over the last two decades due to numerous corporate restructurings and bankruptcies. Indeed, pilots represented by *amici* have lost two or more airline industry pensions in PBGC takeovers over the course of their careers, and other pilots represented by *amici* still participate in single employer defined benefit plans at risk of PBGC takeover. The D.C. Circuit's decision in this case provides the PBGC with *carte blanche* to manipulate provisions of ERISA to detrimentally effect the benefits provided to participants and beneficiaries of terminated plans, and then hide behind a highly deferential standard of review, all while the PBGC is bound by a fiduciary duty to act in the sole and exclusive interests of plan participants and beneficiaries. *Davis v. PBGC*, 734 F.3d 1161 (D.C. Cir. 2013) ("D.C. Circuit decision"). *Amici* have a strong interest in protecting the rights of individual pilots to obtain the pension benefits that they worked for and are entitled to under ERISA and the terms of their plans. These rights are clearly jeopardized by the D.C. Circuit decision.

SUMMARY OF ARGUMENT

Review of the D.C. Circuit's decision is warranted for the following reasons in addition to those presented in the petition for a writ of certiorari.

First, the petition raises an important question for the Court to settle. The Court has never addressed the question of the appropriate standard of review of the PBGC's interpretation of a statutory term under 29 U.S.C. § 1344, made in its role as statutory trustee under 29 U.S.C. § 1342. The

inherent conflicts of interest arising from the PBGC's assumption of dual roles as trustee and guarantor of a terminated plan have been acknowledged by the lower courts. Despite these conflicts, the lower courts have generally made short shrift of the PBGC's fiduciary obligations to plan participants and beneficiaries as statutory trustee. The D.C. Circuit's decision, like many of the lower court decisions, has created a vacuum of oversight not anticipated by Congress by affording the PBGC wide deference in areas that traditionally are afforded greater review. This undermines the legislative intent behind Title IV of ERISA and will ensure limited oversight of PBGC decisions in an area that will affect an increasing number of Americans. Applying a *de novo* standard of review is consistent with established trust law principles, and would uphold the spirit of Title IV and its mandate to protect the pension benefits of private-sector workers who participate in ERISA-covered pension plans.

Second, it is important for the Court to provide definitive and uniform guidance on the issue of the standard of review so that plan participants and beneficiaries of plans subject to PBGC takeover can make informed decisions in exercising or foregoing their rights to oppose applications by the PBGC to be appointed as statutory trustee to act in their interests. It is equally important for this issue to be settled to enable reviewing courts to weigh all relevant considerations as to the fitness of the PBGC to act as statutory trustee.

Accordingly, the petition for writ of certiorari should be granted.

ARGUMENT

I. The Petition Should Be Granted in That The PBGC's Insistence on Being Both Guarantor and Statutory Trustee Inevitably Leads to Conflicts of Interest That Must Be Afforded Greater Scrutiny

The D.C. Circuit decision undermines the salutary effects of Title IV by engrafting a standard of deference not expressly provided for in the statute. Such a result is inconsistent with and undermines the standard of the highest degree of punctiliousness required of ERISA fiduciaries. If undisturbed, the door will be left open for the PBGC, in its capacity as statutory trustee, to interpret ERISA in ways detrimental to the interest of plan participants and beneficiaries under a standard of review not afforded to any other ERISA fiduciaries.

Congress enacted the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, in an effort to improve the American pension system. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). Congress was concerned that too many workers were losing promised retirement benefits because their pension plans lacked adequate participation and vesting standards, and were all too often underfunded. *See* 29 U.S.C. § 1001(a). Congress addressed these problems in Title I of ERISA by mandating minimum participation, vesting, and funding standards for all covered plans.

The minimum standards set forth in ERISA Title I proved inadequate to protect participants whose employers promised them specific benefits but failed to fund them. Congress was inundated with tragic

stories of thousands of employees who lost their retirement savings and security when their employers terminated their pension plans, leaving them only with empty promises of financial security. *Rettig v. PBGC*, 744 F.2d 133, 137 (D.C. Cir. 1984), *see also Nachman Corp.*, 446 U.S. at 374-75 (noting that “[o]ne of Congress’ central purposes in enacting this complex legislation was to prevent the ‘great personal tragedy’ suffered by employees whose vested benefits are not paid when pension plans are terminated.”). Recognizing the harmful, reverse-alchemical consequences of a private retirement system that threatened to turn an entire generation of workers’ promised golden years of retirement security into leaden insecurity, Congress included in Title IV of ERISA a program of pension plan termination insurance.

In relevant part, ERISA Title IV provides for a mandatory government insurance program designed to protect the pension benefits of private-sector workers who participate in ERISA-covered pension plans. 29 U.S.C. §§ 1321-1322a; *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990). In enacting Title IV, Congress sought to ensure that employees and their beneficiaries would not be completely deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plan. *LTV Corp.*, 496 U.S. at 637.

The PBGC administers ERISA Title IV’s insurance program. It is a wholly-owned corporation of the United States Government and is modeled after the Federal Deposit Insurance Corporation. *LTV Corp.*, 496 U.S. at 636-37. The PBGC is

authorized to institute termination proceedings against an ERISA-covered plan whenever the plan has insufficient assets to satisfy its pension benefit obligations or the possible long-run loss of the PBGC's insurance program with respect to the plan will increase unreasonably if the plan is not terminated. 29 U.S.C. § 1342(a).

Once a plan is terminated, Title IV provides for the appointment of a statutory trustee to administer the terminated plan. The PBGC may either: (1) apply to the appropriate district court for the appointment of the trustee; or (2) consult with the plan administrator and agree upon a trustee. 29 U.S.C. § 1342(b)(2)-(3). ERISA grants the statutory trustee of a terminated plan all the powers held by the plan administrator. 29 U.S.C. § 1342(d)(1)(A)(I). In addition, the trustee has the power to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan; collect amounts due the plan; pay benefits under the plan; liquidate the plan assets; and limit payments of benefits under the plan to basic benefits or continue payment of some or all of the benefits which were being paid prior to its appointment as trustee. 29 U.S.C. § 1342(d)(1).

Although the PBGC may request that it be appointed as trustee of a plan in any case, *id.* § 1342(b)(1)-(2), and in fact does so in the lion's share of cases, *see LTV Corp.*, 496 U.S. at 637, the statute does not mandate that the PBGC be appointed as trustee. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 150 (D.C. Cir. 2006) (noting that, although ERISA does not require the PBGC to be appointed as the successor trustee, "[i]n practice, the PBGC has

always applied to serve as successor trustee for distress-terminated defined-benefit plans.”); *PBGC v. Beverley*, 404 F.3d 243, 249 (4th Cir. 2005) (“Although PBGC may request and often does request that it be appointed as statutory plan trustee . . . a third party may also be appointed as statutory plan trustee.”).

In enacting Title IV’s insurance program, Congress did not intend that the program would serve “as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it.” S. Rep. No. 93-383, 93d Cong., 2d Sess. (Aug. 21, 1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4890, 4965. Accordingly, 29 U.S.C. § 1322 establishes and limits the amount of benefits that can be paid when a pension plan terminates. In this regard, Section 1322(a) requires the PBGC to guarantee only certain nonforfeitable benefits beginning on the date of plan termination. In turn, Section 1322(b) limits the PBGC’s guarantee to benefit amounts that are less than the benefits to which plan participants were entitled under the terms of the plan prior to termination.

Moreover, Congress enacted 29 U.S.C. § 1344 “to protect against evasion of the ... limits on insurance benefits by use of pension fund assets to first pay uninsured benefits”. S. Rep. No. 93-383, 93d Cong., 2d Sess. (Aug. 21, 1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4890, 4968. Section 1344 governs the allocation of plan assets to plan benefits under a terminated plan. It does so by prioritizing plan benefits into six categories, the first four of which include the benefits guaranteed by the PBGC under Section 1322. 29 U.S.C. § 1344(a)(1). The

plan administrator (in practice, the PBGC as statutory trustee) allocates the plan assets to fund those plan benefits in priority order, starting with priority category one (“PC1”) and then working its way through priority category 6 (“PC6”), or until the plan assets run out, whichever occurs first. 29 U.S.C. § 1344(a)(1)-(6). In the priority category in which the assets run out, the assets are divided among the benefits included in that category. Based on this allocation process, the trustee determines how much of a participant's plan benefit can be paid from the plan's assets. The trustee then compares the amount of benefit payable to the participant from plan assets to the amount of the participant's guaranteed benefit and pays the larger of the two.

Pursuant to Section 1344(a)(3)(B), priority category 3 (“PC3”)² may include some benefits that are in excess of the benefits guaranteed under Section 1322. In this regard, the PBGC pays non-guaranteed benefits assigned to PC3 if those benefits are funded by plan assets on the date of plan termination. This means, in other words, that if the PBGC determines that a terminated plan's PC3 benefits are fully funded by plan assets, then the participants entitled to PC3 benefits will receive the full amount of such PC3 benefits even if they are greater than the amount of guaranteed benefit they would receive from the PBGC.

Priority category 4 (“PC4”) provides benefits guaranteed by the PBGC. 29 U.S.C. § 1344(a)(4). A

² Section 1344's priority categories 1 and 2 deal with benefits provided by employee contributions. 29 U.S.C. § 1344(a)(1)-(2). This case does not involve employee contributions.

participant whose guaranteed benefits do not fall within PC3 will collect a benefit up to the PBGC guarantee in PC4.

The interplay between PC3 and PC4 benefits is significant. Both categories provide for the payment of guaranteed benefits. With respect to PC3 benefits, some participants' benefits will be lower than the amount of benefit they had accrued and were entitled to under the terminated plan. This arises when the statutory trustee ignores service and pay increases earned close to plan termination, uses early retirement factors based on ages three years before plan termination, and rolls back benefit increases to five years before plan termination. However, if a participant's PC3 benefit is greater than the ERISA-mandated guarantee limit, then any PC3 reduction in the benefit that the participant would have received from the pension plan will not fall into PC4. This is because the PBGC pays the greater of a participant's plan benefit that is funded by the terminated plan's assets and the ERISA-guaranteed benefit. If, therefore, a participant's PC3 benefits are reduced from the amount that he or she would have received from the pension plan but are still greater than the statutory cap on the amount of guaranteed benefits paid by the PBGC, then he or she will not receive any benefits under PC4, even if PC4 benefits are fully or partially funded by the terminated plan's assets. That participant instead would have to collect his or her remaining benefit from priority category 5 ("PC5"), to the extent that

there are any remaining plan assets available to pay such benefits from that category.³

The roll-back of PC3 benefits is at issue in this case. Specifically, the PBGC, as statutory trustee, determined that not all of the US Airways pension plan assets belonged in PC3. As a result, the affected pilots are receiving only the amount of PC3 benefit that the PBGC says belongs in that category. The rest of their plan benefits were stripped out and earmarked for use in PC4. However, because the affected pilots' remaining PC3 benefits are still greater than the PBGC's statutory guarantee, they are receiving only the smaller amount that is included in the PC3 benefit, and have been deprived of the remainder of their retirement benefits earned under their pension plan. That remainder was used in PC4 to pay some or all of other participants' plan benefits that fall within that category. At the same time, while the affected PC3 pilots' benefits are being used to pay for some or all of other participants' benefits, those benefits are also defraying on a dollar-for-dollar basis the costs that the PBGC would otherwise have to pay to affected participants to cover its statutory guarantee to them.

The determination of the value of each priority category is susceptible to manipulation by the PBGC when it assumes the role of statutory trustee. In this

³ PC5 provides for the payment not of guaranteed benefits but what are sometimes referred to as "guaranteeable benefits." 29 U.S.C. § 1344(a)(5). In this regard, PC5 comprises all vested benefits over the PBGC guarantee. To round out the description of priority categories, should the terminated plans assets cover all priorities through PC5, then individuals with PC6 benefits will be paid to participants with non-vested benefits at the time the plan was terminated.

regard, it is well recognized by the courts that the PBGC places itself in an inherent conflict of interest when it serves as the trustee of a terminated pension plan while also performing its role as government insurer of certain plan benefits. *Pineiro v. PBGC*, 318 F. Supp. 2d 67, 79-80 (S.D.N.Y. 2003); *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. PBGC*, 778 F. Supp. 1020, 1028 (D. Minn. 1991), *aff'd*, 991 F.2d 1415 (8th Cir. 1993). Specifically, on the one hand, while acting as a statutory trustee of the plan the PBGC has the duty to act solely in the interests of the plan participants, including by ensuring they receive the full amount of benefits to which they are legally entitled, on the other hand, it also serves as the plan guarantor or insurer. See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 616 (1993) (“[Title 29 U.S.C. § 1104(a)(1)] requires a trustee to ‘discharge his duties ... solely in the interest of the participants [*i.e.*, covered employees] and beneficiaries.”) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-32 (1981)). In this latter role, the PBGC is required to cover any protected benefit shortfalls (subject to a statutory maximum) not paid out of plan assets. 29 U.S.C. § 1322(a); see *LTV Corp.*, 496 U.S. at 637-38 (explaining that after “[t]he PBGC ... uses the plan's assets to cover what it can of the benefit obligations ... [t]he PBGC then must add its own funds to ensure payment of most of the remaining ‘nonforfeitable’ benefits”). In its role as guarantor, therefore, the PBGC has every interest in minimizing the benefits due under the plan, an interest that is antithetical to its duties as the plan trustee. *Pineiro*, 318 F. Supp. 2d at 88

(“PBGC does act under an inherent conflict of interest, since PBGC-as-trustee, acting with participants’ interests in mind, presumably seeks the highest allowed benefits for each, while PBGC-as-guarantor must closely scrutinize the plan in light of the statute in order to determine which benefits are guaranteed, and to what extent.”). Because the PBGC pays guaranteed benefits using its own funds only after it exhausts the terminated pension plan’s assets to pay protected benefits, it has a strong incentive to stretch the terminated plan’s assets as far as possible so that it can avoid having to use its own funds.

The PBGC’s dual roles and responsibilities collide when it acts as both guarantor and trustee.⁴ Assume, for example, that an underfunded pension plan is terminated in a distress termination and the PBGC appoints itself as the statutory trustee of the plan. The plan provides for pension benefits to participants, the total value (*i.e.*, liability) of which is \$1 billion. When the plan is terminated, it has assets valued at \$600 million. The PBGC: (1) takes control of those assets; (2) determines the amount of guaranteed benefits that it potentially is required to pay out to the affected participants; (3) decides what

⁴ See, e.g., *Burstein v. Ret. Account Plan for Employees of Allegheny Health Ed. & Res. Found.*, 334 F.3d 365, 381-82 & n. 23 (3d Cir. 2003) (holding that PBGC acts as trustee for plans subject to termination except when it calculates guaranteed amounts under 29 U.S.C. § 1322); *Pineiro*, 318 F. Supp. 2d at 85 (stating that “PBGC in its capacity as guarantor is not specifically given any powers of plan administration or benefits calculation. Rather, these powers are given to the ‘trustee,’ ... Accordingly, when PBGC calculates and pays benefits, it does so as trustee.”).

portion of the plan's benefits belong in each of the six benefit priority categories; and (4) determines how much of the \$600 million in plan assets needs to be and is available to distribute to each of those priority categories. None of the plan benefits fall within PC1 or PC2 because none of the plan benefits are attributable to participant contributions. The plan's benefit provisions and ERISA's PC3 provisions can be construed such that PC3 benefits are valued at \$600 million. Moreover, the value of each participant's PC3 benefit is greater than the PBGC's ERISA-guaranteed amount. Furthermore, because the PBGC has \$600 million in plan assets, it has enough to fully pay PC3 benefits, such that those participants will not suffer cuts in their accrued pensions.

Under this scenario, the PBGC will not have any remaining plan assets to pay guaranteed benefits under PC4, such that the PBGC will have to dig into its own insurance account to pay guaranteed benefits to affected participants. However, by interpreting the plan's benefit provisions and the PC3 rules differently, the PBGC can defray some of the costs that it would incur under this scenario. Specifically, the PBGC can interpret the plan's benefit provisions and ERISA's PC3 asset rules such that certain plan benefits are stripped out of PC3 and re-characterized as PC4 or PC5 benefits. In so doing, the PBGC determines that the value of the PC3 benefits is now \$500 million. Because it has \$600 million in plan assets, the revised PC3 benefits are fully funded. The participants' PC3 benefits are still greater than the PBGC's statutory guarantee under this scenario and so the reductions to their

accrued pension plan benefits fall into PC5. As a result, the PBGC now has another \$100 million available to pay PC4 benefits before it has to use its own funds to make up the difference between the value of the PC4 benefits and the statutorily guaranteed benefit.

The PBGC's incentive to manipulate the asset allocation rules under Section 1344, similar to the above-described example, is quite strong given its distressed financial situation. Over the last several years, the PBGC has set record deficits that further contribute to an already strained, if not broken, private retirement system.⁵

Like any seriously distressed corporate entity, the PBGC has few choices to avoid its own demise. Traditional corporate measures to aggressively cut costs and avoid additional liabilities, protect its existing assets and seek new sources of funding, however, do not square well with the needs and interests of participants whose plans have been terminated or are at risk for termination in the future. This is especially the case in the airline industry, where nearly every United States registered air carrier that had maintained its own pension plan underfunded those plans and dumped their liabilities onto the PBGC. Having first suffered the effects of their employers' broken pension commitments, airline industry workers have, over the last several years, suffered the additional effects

⁵ In its 2013 annual report, the PBGC announced that it had set a new record deficit of nearly \$36 billion, of which more than \$27 billion is attributable to its single employer insurance guarantee program.

of a broken government institution seemingly more focused on its own self-preservation than protecting them and other terminated plan participants.

Particularly during the last several years in which it has served in the dual capacities of government insurer and statutory trustee, financial pressures on the PBGC have exacerbated its inherent conflict of interest. The more financially distressed it is, the more likely the PBGC will not serve the best interests of plan participants to whom it owes a fiduciary duty by maximizing their benefits and mitigating the cuts and pain associated with the loss of their retirement benefits. Indeed, the PBGC's administration of the US Airways pilots' terminated pension plan is a telling case in point: the PBGC's administration of the plan has generated a torrent of claims against it on account of its conflicts of interest and alleged breaches of fiduciary duty. These claims are well documented in Government Accounting Office reports, private investigative reports, and several civil suits, including one that is still pending in the federal courts in Washington, D.C. seeking the removal of the PBGC as the statutory trustee in favor of an independent trustee. *See, e.g., Pension Benefit Guaranty Corporation: Appearance of Improper Influence in Certain Contract Awards* (GAO/T-OSI-00-17); *Fiduciary Breach Investigation of US Airways Pilots Pension Plan*, Benchmark Financial Services, Inc., May 5, 2012, www.benchmarkalert.com/US_Airways.pdf. *US Airline Pilots Assoc. v. PBGC*, U.S.D.C., 1:09-cv-01675 (FJS-JMF).

These reports allege numerous acts and omissions by the PBGC in its administration of the

US Airways pilots' pension plan, supporting the claim that the PBGC breached its fiduciary duties. These alleged breaches include improper and inappropriate influence in the selection of, and oversight over, the contractor hired to conduct the pilots' plan asset audit on termination, as well as failures to investigate suspicious and substantial plan asset transfers by US Airways to hard-to-trace and hard-to-value offshore hedge fund accounts, including one located in the Cayman Islands named "Lighthouse V," shortly before the plan was terminated. These reports reflect an increasingly troubling picture of an agency mired in debt, unable to perform its core function as pension benefit guarantor, and lacking the confidence of the pension plan participants whom it is charged to protect.

That confidence is further eroded by the highly deferential standard of review given by courts in reviewing PBGC trustee actions. Not subject to the standard of review traditionally afforded to trustees performing the same or similar fiduciary duties, the PBGC is able to seek refuge behind the Administrative Procedures Act's ("APA") deferential standards to avoid scrutiny of its fiduciary functions when it acts as a statutory trustee. Review of this issue by the Court is important in order to further the purposes of ERISA Title IV and protect the integrity of the statutory scheme provided therein.

II. The PBGC's Statutory Construction of "In Effect" in Section 1344(a)(3) in the Context of the PBGC Acting as Trustee Should be Afforded *De Novo* Review

When the PBGC acts as both guarantor and trustee of a terminated plan, as was the case here, conflicts of interest inevitably arise that can be detrimental to the interests of plan participants and beneficiaries. In upholding the PBGC's decisions, the lower courts did not resolve the issue regarding the appropriate standard by which the PBGC's decisions should be reviewed.⁶

The present case arises in the context of an all too typical scenario: a pension plan with insufficient assets to pay promised pension benefits is terminated; the extant assets are transferred to the PBGC in its capacity as regulatory guarantor/insurer of a portion of the affected participants' benefits; the PBGC is appointed the statutory trustee of the plan and, in that capacity, decides how to allocate the plan's assets and benefits within the statutory priority categories set forth in Section 1344; as statutory trustee, the PBGC renders benefit decisions affecting participants, many of whom are greatly disappointed and distressed to learn that those benefit decisions translate into substantial reductions in the amount

⁶ *Davis v. PBGC*, 571 F.3d 1288, 1292-94 (D.C. Cir. 2009). The DC Circuit saw "no reason to depart from the usual deference we give to an agency interpreting its organic statute" and gave the PBGC *Chevron* deference in interpreting ambiguous ERISA provisions even where acting as a trustee of a terminated plan. *Id.*, at 1293.

of benefits that they had been promised and earned under the plan; the disappointed participants challenge the PBGC benefits decisions before the PBGC Appeals Board, 29 C.F.R. §§ 4003.21, 4003.51; the PBGC Appeals Board renders decisions that constitute final agency action, 29 C.F.R. § 4003.59(b), and from which plan participants may then seek judicial review, 29 U.S.C. § 1303(f); and finally, the PBGC defends its benefit decisions in federal court on the basis that its Appeals Board decisions are entitled to the high degree of deference generally afforded to all federal agencies pursuant to the APA, such that the participants must demonstrate that the Appeals Board's decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §§ 555, 706(2)(A).

In making benefit decisions, the PBGC acts as a trustee with ERISA fiduciary responsibilities. *Dycus v. PBGC*, 133 F.3d 1367, 1369 (10th Cir. 1998); *United Steel v. PBGC*, 839 F. Supp. 2d 232, 235 (D.D.C. 2012). As such, its benefit determinations should be reviewed according to traditional fiduciary standards, not the highly deferential standard generally afforded to government agencies. Indeed, if it was an employer or private insurance company deciding benefits claims, the PBGC's benefit decisions would have been subject to *de novo* review unless the plan gave it the discretionary authority to determine eligibility for benefits or to construe the terms of the plan, in which case its decisions would have been entitled to review under the arbitrary and

capricious standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).⁷

Moreover, to the extent the PBGC's benefit calculations were based on its construction of the "in effect" language in Section 1344(a)(3), its interpretation would be subject to *de novo* review. *Hogan v. Raytheon, Co.*, 302 F.3d 854, 856-57 (8th Cir. 2002) (finding that because the plan administrator was interpreting a judicial decree, and not the plan's terms, *de novo* review was appropriate.); *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606 (5th Cir. 1999) (stating a court reviews a plan administrator's statutory and legal conclusions *de novo*.).

But although it stepped into the role of an ERISA trustee subject to ERISA fiduciary responsibilities, the PBGC's benefits decisions do not trigger *Firestone* review any more than they should trigger APA deferential review. The *Firestone* standards apply only in situations where participants challenge benefits decisions by private plan administrators and trustees under 29 U.S.C. § 1132(a)(1)(B). *Firestone*, 489 U.S. at 108 (noting that its holding "is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations" and "express[ing] no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.").

⁷ To the extent that the plan administrator or other private-party fiduciary's benefit claims decisions were made while operating under a conflict of interest, *e.g.*, where it both funds the plan and evaluates the claims, its conflict of interest would be weighed as a factor by a reviewing court. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112 (2008).

Accordingly, the *Firestone* standard of review only applies in actions under Section 1132(a)(1)(B) challenging benefit denials made by the plan administrator of an ongoing, *i.e.*, non-terminated, plan. Moreover, the aforementioned deference only applies to a plan administrator's interpretation of plan documents, not statutes or regulations.

As challenges to PBGC benefits decisions arise under 29 U.S.C. § 1303(f), the *Firestone* deferential standard of review does not apply. Moreover, because the particular challenge in this case was based on the PBGC's construction of statutory and regulatory language, the *Firestone* standard of review would be inapplicable even if it was imputed to challenges under Section 1303(f).

While Section 1303(f) allows plaintiffs to assert their claims in federal court, it does not specifically identify an appropriate standard of judicial review for PBGC decisions. And that fact "creates a tension between the standards of review under the APA with that set forth in *Firestone*", that needs to be resolved by this Court. *United Steel*, 839 F. Supp. 2d at 241.

Inasmuch as the PBGC, in its financial distress, intentionally assumed conflicted dual roles as trustee and guarantor, its benefit decisions based upon statutory and regulatory interpretation require *de novo* review. *De novo* review ensures that the PBGC's decisions fairly comport not only with its regulatory fiscal obligations, but also with its fiduciary obligations to the universe of terminated plan participants who depend on it to protect their interests and ensure the full payment of the remnants of their lost pensions. If the PBGC is allowed to shelter these types of benefit decisions

behind a highly deferential standard of review, its decisions will not only be perceived by participants as unfair but also implicate considerations of due process. *See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 139 (3d Cir. 1986) (finding that ERISA's multiemployer withdrawal liability provision requiring an arbitrator to defer to the decision of a board of trustee's determinations of liability deprived withdrawing employers of their right to constitutional due process because the trustees making such decisions operate under a significant financial conflict of interest.), *aff'd per curiam by an equally divided court sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

III. The Court's Guidance on the Standard of Review Issue Will Have Widespread Beneficial Effects

It is vital that the Court provide definitive guidance on the issue of the appropriate standard of review to be applied to the PBGC when, in its capacity as trustee, it engages in statutory construction.

While the PBGC is generally appointed as statutory trustee with respect to a terminated plan either by agreement or judicial appointment, that decision is discretionary, not mandatory. 29 U.S.C. § 1342 ("The corporation may request that it be appointed as trustee of a plan in any case."); *see LTV Corp.*, 496 U.S. at 637. In fact both the statute and case law contemplate the appointment of an

independent trustee. *See Beverley*, 404 F.3d at 249. ERISA permits interested parties (e.g. plan participants, labor unions) to challenge the PBGC's appointment as statutory trustee to a terminated plan. *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees*, 778 F. Supp. at 1028-29.

In view of the foregoing, the Court's guidance on the standard of review issue presented in the petition will have clarifying and beneficial effects, in that (1) plan participants and other interested parties will be provided with clear guidance in advance of the PBGC's appointment as statutory trustee so that they may intelligently determine whether to challenge such appointment in the district court and the substantive grounds on which to base their challenges, and (2) in deciding whether or not to appoint the PBGC as statutory trustee, district courts will be better able to determine whether the appointment of the PBGC or an independent fiduciary "would best serve the interests of the participants, the PBGC and ERISA," while also avoiding potential due process concerns. *Yahn & McDonnell, Inc.*, 787 F.2d at 139 (quoting *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees*, 778 F. Supp. at 1028).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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