No.

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

PETITION FOR A WRIT OF CERTIORARI

ANTHONY F. SHELLEY
Counsel of Record
TIMOTHY P. O'TOOLE
MICHAEL N. KHALIL
MILLER & CHEVALIER
CHARTERED
655 15th St. NW, Suite 900
Washington, D.C. 20005
(202) 626-5800
E-mail: ashelley@milchev.com

QUESTIONS PRESENTED

Among the protections in the Employee Retirement Income Security Act ("ERISA") for pensioners such as Petitioners whose plans are terminated in distress, Congress included a requirement that the plan's remaining assets be distributed to beneficiaries in a specified order of priority. Under the pivotal ERISA subsection, 29 U.S.C. § 1344(a)(3), a high priority attaches to a benefit deriving from plan provisions "in effect" during the five years before termination "under which such benefit would be the least." Determinations as to a benefit's priority status are made by the plan's trustee, a role that, contrary to Congressional intent, is invariably assumed by the federal insurer of pension plans – the Pension Benefit Guaranty Corporation ("PBGC"). Here, the PBGC was entrusted with almost $1.2 billion in assets and resolved all relevant ERISA and other legal issues against Petitioners, causing large sums to revert to itself rather than be distributed to Petitioners. The questions presented are:

(1) Whether the Court of Appeals erred in upholding the PBGC's *post hoc* rationalization in litigation that, under § 1344(a)(3), a benefit derives from a plan provision "in effect" five years prior to termination only if the benefit was paid or payable at the start of the five-year period; and

(2) Whether the Court of Appeals erred in upholding the PBGC's determination that, under § 1344(a)(3), the benefit deriving from plan provisions "under which such benefit would be the least" is the mathematically lowest benefit amount existing during any of the five years before termination.

LIST OF PARTIES TO THE PROCEEDING

Petitioners are approximately 1,700 retired or retirement-eligible pilots (or their survivors) of US Airways, Inc. (collectively "the Pilots"). They are individually listed in Appendix H to the Petition (at 91a-150a).

Respondent is the Pension Benefit Guaranty Corporation ("PBGC"), sued in its capacity as trustee of the Pilots' terminated pension plan. The PBGC is an entity created by federal statute and is within the U.S. Department of Labor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations and Other Authorities

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is published at 734 F.3d 1161 (D.C. Cir. 2013) and is reproduced in the Appendix ("Pet. App.") at 1a-26a. The orders of the Court of Appeals denying panel rehearing and rehearing en banc (Pet. App. 76a-77a) are not reported, but appear, respectively, at 2014 U.S. App. LEXIS 1366 (D.C. Cir. Jan. 23, 2014) and 2014 U.S. App. LEXIS 1363 (D.C. Cir. Jan. 23, 2014). The District Court's memorandum decision and order granting summary judgment to Respondent on the claims relevant to this Petition is reported at 864 F. Supp. 2d 148 (D.D.C. 2012) and is reproduced at Pet. App. 27a-74a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on November 1, 2013. Petitioners timely petitioned for panel rehearing and rehearing en banc, which the Court of Appeals denied on January 23, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 1344(a)(3) provides:

(a) In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: . . .

(3) Third, in the case of benefits payable as an annuity –

(A) in 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,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, 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.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.[1]

[1] The full text of 29 U.S.C. § 1344 is included in the Appendix.

STATEMENT OF THE CASE

Forty years ago, in enacting Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301-1461, Congress created Respondent Pension Benefit Guaranty Corporation ("PBGC") as an insurer of last resort for the nation's pensioners in the event their pension plans might face distress. From that benevolent beginning, however, the PBGC has evolved into a much different entity: rather than providing insurance, its principal business now involves voluntarily becoming the trustee of every terminated pension plan, taking over the remaining assets of those plans, investing those assets to the agency's benefit, and running an elaborate, time-consuming administrative apparatus that unsophisticated (and usually unrepresented) pensioners must somehow navigate in order to get the share of the assets to which Congress (also in Title IV of ERISA) entitled them. This regular "trusteeing" of plans by the PBGC is a phenomenon that Congress never anticipated and involves functions the PBGC is ill-equipped to perform, and it serves both to expand the PBGC's operations and to allow the PBGC to accumulate funds for its perceived upcoming needs.

The losers along the way, as this case illustrates, have been pensioners in terminated plans, such as Petitioners, whom Title IV of ERISA was designed to protect. Here, as a procedural matter, the PBGC, once it became the trustee of Petitioners' plan, took more than five years to resolve their claims to the plan's assets, during which time many of those aggrieved died or otherwise might have been inclined to give up. On the substance, the PBGC interpreted the central provision of ERISA concerning a trustee's asset distributions – namely, 29 U.S.C. § 1344(a)(3) – in the manner least favorable to Petitioners, even though a trustee should act with an eye singly toward beneficiary interests. The end result, Petitioners estimate, was the shift of hundreds of millions of dollars from paying their benefits to the PBGC's general needs. On judicial review, the courts below affirmed the PBGC's decision-making, sometimes invoking this Court's precedents that instruct deference to the PBGC, though those precedents nowhere involve the PBGC acting as a trustee.

Having never before addressed the PBGC's actions as a trustee, this Court should grant the Petition in order to establish the governing legal principles concerning the PBGC's trusteeing of terminated plans. Moreover, this case is an ideal vehicle for doing so, because it presents two statutory construction questions involving ERISA's key provision governing a trustee's distribution of assets for terminated plans – § 1344(a)(3) – on which there are pertinent Circuit splits and persuasive arguments on Petitioners' side on the merits.

A. *The PBGC and Its Operations*. The PBGC is a wholly owned federal government corporation established to administer the pension insurance program established by Title IV of ERISA. *See* 29 U.S.C. § 1302. ERISA's insurance program applies to defined benefit pension plans, as opposed to defined contribution plans. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 363 n.5 (1980).

The insurance program receives no federal funding; instead, the PBGC collects insurance premiums from plan sponsors, deposited into a federal revolving fund. *See PBGC v. LTV Corp.*, 496 U.S. 633, 638 (1990); 29 U.S.C. §§ 1305-06. Under ERISA, payment of insurance to plan participants and beneficiaries is triggered when a plan terminates and has insufficient assets to pay all promised benefits. *See* 29 U.S.C. § 1322. In that instance, ERISA requires the PBGC to make up the shortfall, up to legal limits, from the revolving fund. *See id.*

In addition to providing for a pension insurance program, Title IV of ERISA also establishes an asset allocation scheme for single-employer plans (as opposed to plans where multiple employers pool their funds) pursuant to which the assets of the terminated plan shall be distributed among the plan's participants and beneficiaries, prior to the triggering of any PBGC insurance obligation. *See Mead Corp. v. Tilley*, 490 U.S. 714, 717-18 (1989). The allocation scheme, laid out in 29 U.S.C § 1344 (*see supra* p. 2), establishes six priority categories for asset distributions to satisfy benefits owed. Under Title IV, "the *plan administrator* shall allocate the assets of the plan" pursuant to § 1344's priority categories. 29 U.S.C. § 1344(a) (emphasis added). Pursuant to another section of Title IV, a "trustee" can be appointed, if necessary, to oversee the winding down of a terminated plan. *Id.* § 1342(b). In such instances, the trustee "shall have the power . . . to do any act authorized by the plan or [Title IV of ERISA] to be done by the plan administrator." *Id.* § 1342(d)(1)(A)(i). ERISA expressly defines the trustee as a "fiduciary." *Id.* § 1342(d)(3).

While Congress contemplated that the PBGC "may" seek appointment as a statutory trustee, *see* 29 U.S.C.

§ 1342(b)(1), it expected that in the normal case the PBGC and the trustee would be different entities, such that the PBGC could have input into the trustee's level of compensation and would issue regulations regarding the trustee's use of professional services in support. *See id.* § 1342(h). Indeed, Congress anticipated not only that the entities would be distinct, but that they should be expected to disagree; in such cases, Congress looked to the courts to settle their disputes. *See, e.g.*, H.R. Rep. No. 93-1280, at 374 (Conf. Rep.) (1974). Nonetheless, the PBGC has sought to become, and has become, the "trustee of virtually every one of more than 4,000 underfunded plans that have terminated since 1974." PBGC Cross-Mot. for S.J. (D. Ct. Dkt. 74), at 22 of 109.

Over time, the number of plans that the PBGC insures has decreased markedly, as employers have moved away from establishment or continuation of defined benefit plans. In the first decade of its existence, the PBGC insured and monitored (and obtained dues from) more than 95,000 single-employer plans. *See* Congressional Budget Office, *A Guide to Understanding the Pension Benefit Guaranty Corporation*, at 3 (Sept. 2005) (noting figure for 1980) (available at: http://www.cbo.gov/publication/17179). By the end of 2013, that number had shrunk by almost 80%, to approximately 23,000 plans. *See* PBGC 2013 Annual Report, at 34 (Nov. 2013) (available at: http://www.pbgc.gov/res/reports/ar2013.html).

While the PBGC's insurance responsibilities have decreased dramatically, the PBGC's *trusteeship* activities have increased sharply. The PBGC currently trustees over 4,500 plans involving single employers, covering approximately 1.5 *million* beneficiaries. *Id.* at 29. And as of September 30, 2013, the PBGC's trust fund investments (*i.e.*, the investments it makes using the funds of liquidated assets from terminated plans it has trusteed) totaled $60.453 billion, more than three times as much as the $19.143 billion held in its revolving insurance fund. *Id.* at 40.

B. *The Termination and Trusteeing of Petitioners' Plan*. US Airways, Inc. ("US Airways") sponsored the Retirement Income Plan for Pilots of US Airways, Inc. ("Plan" or "US Airways Pilots Plan"), a defined benefit pension plan covered by Title IV of ERISA. On August 11, 2002, US Airways filed a petition for Chapter 11 reorganization in United States bankruptcy court. *See* Joint Appendix in Ct. of Appeals at JA274.[2] On March 28, 2003, US Airways and the PBGC executed a termination and trusteeship agreement, establishing March 31, 2003 as the date of the Plan's termination. *Id.* Pursuant to this same agreement, the PBGC voluntarily assumed the role of the Plan's statutory trustee, *id.*, resulting in the agency wearing "two hats," one as the Plan's fiduciary and one as governmental insurer. Pet. App. 28a.

As of the Plan's termination, the Plan had approximately $1.193 billion in assets available for allocation under § 1344, which were transferred to the PBGC as Plan trustee on behalf of approximately 7,007 participants and beneficiaries. *See* PBGC Admin. Rec. filed in D. Ct. (Dkt. No. 52), at 27 of 50. In August 2006,

[2] Citations of the Joint Appendix in the Court of Appeals hereinafter are to the appropriate page number in the Joint Appendix, which is signified by "JA" followed by a number.

the PBGC completed its actuarial case memorandum for the Plan, memorializing its determinations as to the liabilities in each priority category. *Id.* It determined that all benefits in all priority categories up to and including Priority Category 3 were fully funded and that $40 million of Priority Category 4 would also be funded. *Id.*; JA276.

In the time since termination of the US Airways Pilots Plan, the PBGC volunteered to become, and did become, the trustee of numerous other very large terminated plans, including: several plans for pilots and other employees of United Airlines, Inc., involving the distribution of a reported $8 billion in assets (*see* PBGC Office of Inspector General Evaluation Report, *PBGC Processing of Terminated United Airlines Pension Plans Was Seriously Deficient*, at 7 (Nov. 30, 2011) (available at: http://oig.pbgc.gov/summaries/PA-10-72.html) [hereinafter "GAO Report on United Plans"]); a plan for pilots of Delta Air Lines, Inc., involving the distribution of approximately $2 billion in assets (*see* Consolidated Appeal on Delta Pilots Retirement Plan, PBGC Case No. 205441, at 9 (Sept. 27, 2013) (available at: http://www.pbgc.gov/documents/apbletter/Decision--Delta-Pilots-Retirement-Plan-2013-27-09.pdf) [hereinafter "Delta Pilots Plan Appeal Letter"]; and plans for salaried and hourly employees of Delphi Corporation, involving more than $6 billion in assets. *See* PBGC Press Release (July 27, 2009) (available at: http://www.pbgc.gov/news/press/releases/pr09-8.html).

C. *The PBGC's Administrative Proceedings Concerning the US Airways Pilots Plan*. Following its appointment as trustee for the Plan, the PBGC began paying "estimated" benefits to the Plan's participants –

i.e., the benefits likely to be allowed upon allocation of the Plan's remaining assets and payment of the PBGC insurance guarantee. Because the estimated benefits were significantly less than the vested pension benefits many believed they were entitled to receive under the Plan and ERISA, certain of the Plan's beneficiaries filed a lawsuit in 2003 to challenge the PBGC's estimated benefits determinations. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 151 (D.C. Cir. 2006). The D.C. Circuit affirmed the dismissal of that action without prejudice in 2006 – already 3 years after the Plan's termination – because the Court of Appeals determined that the Pilots needed to await final benefit determinations and then fully to exhaust administrative appeal remedies with the PBGC. *Id.* at 158-59.

After the PBGC issued final benefits determinations, again resulting in payments well below anticipated benefit levels, hundreds of Plan participants appealed administratively, most in a consolidated appeal in March 2007 that the PBGC decided via letters issued by its Appeals Board in February 2008 and September 2008. *See* JA271, JA1002. In those rulings, the Appeals Board rejected the appellants' arguments on all significant legal issues (including on the matters at issue in this Petition, *see, e.g.*, JA276-77, JA289).[3]

---

[3] All told, the PBGC's administrative process took *five* years to exhaust so as to allow judicial review just to begin. But that is not unusual, and the PBGC in fact took seven years to complete proceedings for the Delta pilots' plan (*see* Delta Pilots Plan Appeal Letter at 2). Overall, the PBGC's administration of the plans in which it insists on being trustee – particularly its administration of the largest plans – has been criticized by government watch-

D. <u>*Litigation in the District Court*</u>. The current case commenced in the District Court in June 2008. The plaintiffs there were – and Petitioners here are – 1,700 retired pilots or retirement-eligible pilots (or their survivors) who participated in the Plan (collectively "the Pilots"). In the twelve-count Second Amended Complaint (which was the operative pleading in the case), the Pilots challenged the Appeals Board's exclusion of various benefits from Priority Category 3 under § 1344(a)(3) and thus the PBGC's failure fully to fund those benefits (since Priority Category 3 was 100% funded). *See* JA41.

The District Court litigation had many fits and starts, but ultimately concluded with the District Court granting summary judgment to the PBGC on nearly all of the claims in the Second Amended Complaint (with the one remaining claim later voluntarily dismissed). Pet. App. 27a. Of particular note from the summary judgment ruling, the District Court rejected the Pilots' contention that the PBGC, in distributing assets pursuant to § 1344(a)(3), acts as a fiduciary and should be afforded no deference where a fiduciary otherwise would get none. The District Court held that the "PBGC is a federal agency subject to the provisions of the APA [Administrative Procedure Act]" and accorded deference to the Appeals Board's decision on every claim at issue. Pet. App. 34a.

---

dogs as "seriously flawed," "seriously deficient," and subject to "serious errors and omissions." *See* PBGC Office of Inspector General Evaluation Report, *PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed*, at 1, 10 (Mar. 30, 2011) (available at: http://oig.pbgc.gov/pdfs/PA-09-66-1.pdf); GAO Report on United Plans, at 4.

E. <u>*The Court of Appeals' Decision*</u>. The Pilots appealed the District Court's ruling on nine of the twelve claims in the Second Amended Complaint, and the D.C. Circuit affirmed. In affirming, the Court of Appeals purported not to apply deference to the PBGC's decision-making, finding that the PBGC's decisions were sustainable "[r]egardless of the standard of deference." Pet. App. 8a-9a. It did not address whether the PBGC should be held to fiduciary standards.

In the part of its decision dealing with what is "Claim One" in the Second Amended Complaint, the Court of Appeals construed the term "in effect" in § 1344(a)(3). In pertinent part, § 1344(a)(3) (in subsection (A)) states that Priority Category 3 shall encompass – for participants enjoying a benefit "in pay status as of the beginning of the 3-year period ending on the termination date of the plan" – "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." (Emphasis added.) In turn, the next part of § 1344(a)(3) (in subsection (B)) provides that the same allocation rule shall apply for a benefit "which would have been in pay status as of the beginning of [the] 3-year period [prior to termination] if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced . . . as of the beginning of such period." Essentially, then, § 1344(a)(3) authorizes, for inclusion in Priority Category 3, benefits both for Pilots who retired more than three years prior to the Plan's termination (and thus had benefits in "pay status") and for Pilots who were eligible to retire three years prior to termination, but in both instances only based on the provisions of the Plan as *in effect* during the five years prior to termination.

In Claim One, the Pilots alleged that benefits created by a Plan amendment known as the Early Retirement Incentive Program ("ERIP") belong in Priority Category 3 and thus should be fully paid. The Pilots asserted (at the PBGC, in the District Court, and in the D.C. Circuit) that the ERIP benefit was "in effect" prior to five years preceding termination because the ERIP amendment was adopted on December 4, 1997, the ERIP amendment's effective date as fixed by its drafters (*i.e.*, US Airways and the relevant union) was January 1, 1998, and Pilots were required to make irrevocable elections starting on March 1, 1998, as to whether to receive the benefit and in what form – all dates that were five years prior to the Plan's termination date of March 31, 2003. Pet. App. 9a. But the PBGC Appeals Board excluded the benefit from Priority Category 3 because, in its view, the ERIP provision was not "in effect" until May 1, 1998 – 31 days too late – "since that is the earliest date a participant could *retire and receive* the ERIP benefit increase." JA280 (emphasis added).

The Court of Appeals sided with the Appeals Board, but not on the basis recited by the Appeals Board. The D.C. Circuit said that "[t]he statutory phrase 'in effect' in § 1344(a)(3)(A) is ambiguous" and that the PBGC had purportedly "interpreted it in 29 C.F.R. § 4044.13(b)(3)(i) to mean 'payable,'" though that regulation is *not* the PBGC's regulation defining "in effect." Pet App. 11a; *cf.* 29 C.F.R. § 4044.13(b)(6) (regulation stating that a "plan or amendment is 'in effect' on the later of the date on which it is adopted or the date it becomes effective"). As a result, the Court of Appeals held that, under § 1344(a)(3), a plan provision shall be deemed "in effect" only on "the earliest date the benefit could be paid" or "would be payable," which it said was May 1, 1998 (again, 31 days too late). Pet. App. 9a, 11a (quotation marks omitted).

In dealing with Claim Two of the Second Amended Complaint, the Court of Appeals interpreted the part of § 1344(a)(3) providing that, in distributing the Plan's assets, benefits shall be awarded based on the plan provisions in effect for five years "under which such benefit would be the least." Claim Two challenges the PBGC Appeals Board's rejection of Priority Category 3 status for benefits engendered by Congress's raising of ERISA's pension benefit limits in 2001 and thereafter. Congress has established the maximum benefits amount in Internal Revenue Code ("I.R.C.") § 415(b). A long-standing provision of the Plan authorized payment of benefits at a level not to exceed the amount allowed under § 415(b). *See* Pet. App. 11a.

But the Board and then the Court of Appeals still disallowed benefits at the levels Congress set during the last three years before Plan termination, because of what the panel termed "[t]he 'lowest annuity' rule." *Id.* at 13a. According to the D.C. Circuit, because of the § 1344(a)(3) requirement that benefits are to be based on the Plan's provisions in effect five years prior to termination "under which such benefit would be the least," the Pilots were entitled to only the lowest benefit amount payable during any of the five years prior to termination, meaning that raises in the § 415(b) limits after the start of the five-year period ordinarily do not qualify for Priority Category 3. Pet. App. 13a. The PBGC did, however, honor § 415(b) increases for years prior to 2001, under a phase-in rule it applies. JA290.[4]

On the remaining claims in the Second Amended Complaint that the Pilots appealed, the Court of Appeals affirmed on the merits three more claims (Claims Seven, Eight, and Eleven), and it held the rest to be waived, even though the Pilots challenged on every claim the standard of review that the District Court had applied. Pet. App. 8a.

The Pilots now seek review in this Court on two Questions Presented: first, whether the Court of Appeals erred in holding that, under § 1344(a)(3), a plan provision is "in effect" five years prior to termination only if a benefit under the provision was actually paid or payable at the start of the five-year period; and second, whether the Court of Appeals erred in holding that, under § 1344(a)(3), a benefit based on a plan provision "under which such benefit would be the

---

[4] Approximately 326 Pilots retired under the ERIP. Each one felt the effect of the PBGC's exclusion of those benefits from Priority Category 3 in a unique manner, but for each the exclusion is significant. For example, a pilot who retired under the ERIP in August 1998 at age 58, lost $1,922 per month as a result of the PBGC's exclusion of ERIP benefits from Priority Category 3. This equates to $23,064 lost per year, $250,000 lost since 2003, and a total loss of almost $400,000 over his or her life, assuming he or she were to live to age 80. The effect of the § 415(b) limit on Priority Category 3 benefits affected a larger number of participants, but is similarly variable, with a greater effect in some years than others, and with a larger impact for those with higher earnings. That said, some Pilots have lost as much as $500,000 since trusteeship through the PBGC's exclusion of post-2000 I.R.C. § 415(b) increases from Priority Category 3.

least" is the mathematically lowest amount paid at any time during the five-year pre-termination period.

Were the Court to grant certiorari and reverse the Court of Appeals on both Questions Presented, the Court of Appeals would need to reexamine not only Claims One and Two, but also the conclusions on other claims the Pilots pursued on appeal. For instance, the Court of Appeals' decision on Claim Two infected its analysis on at least one other claim (Claim Eight, *see* Pet. App. 22a-23a), and this Court's consideration of the Questions Presented may call into question the lens through which the Court of Appeals addressed the entire case. *See infra* p. 19.[5]

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because this case presents two important statutory construction issues that have not been, but should be, settled by this Court. *See* S. Ct. R. 10(c). Furthermore, the D.C. Circuit's decision pertaining to these questions conflicts with the decisions of other Courts of Appeals in the same or analogous situations, and even with the D.C. Circuit's own jurisprudence. *See id.* R. 10(a). Finally, the D.C.

---

[5] The Court of Appeals' affirmance on Claim Eight could never have occurred if the Court of Appeals had held the PBGC to fiduciary standards. There, the PBGC selectively investigated the factual issues raised by the Pilots, and then worked mightily to keep the full facts from the reviewing courts when the Pilots sought to supplement the record. *See* Pet. App. 16a-17a. An ERISA fiduciary has its own obligation to raise all issues and evidence on behalf of beneficiaries in an administrative appeal. *See Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 631-33 (9th Cir. 2008).

Circuit's resolution of both questions is dubious on the merits.

I. THE COURT SHOULD GRANT CERTIORARI ON THE FIRST QUESTION PRESENTED

A. The Proper Construction of "In Effect" in § 1344(a)(3) in the Context of the PBGC Acting as Trustee Is an Important Matter that the Court Should Resolve

The first Question Presented concerns the proper interpretation of the term "in effect" in § 1344(a)(3), and that question – in the current context – is a weighty one the Court should resolve. The Court of Appeals held that a benefit derives from a plan provision "in effect" for the five years prior to plan termination (as is required under § 1344(a)(3) for inclusion in Priority Category 3) only if a benefit under that provision was being "paid" or was "payable" at the start of the five-year period; that is, for the Court of Appeals, the benefit's payment status – here, in particular, the ERIP benefit's payment status – was determinative, irrespective of whether the plan provision creating the benefit was extant during the whole five-year period. Pet. App. 10a. The Pilots, on the other hand, take the position that a plan provision is "in effect" if it was adopted and had an effective date before the five-year period began, and certainly if irrevocable elections were being made under the plan provision prior to the advent of the five-year period.

For at least four reasons, the proper interpretation of "in effect" in § 1344(a)(3) is an important issue for the Court to review.

1. The correct interpretation of § 1344(a)(3), as a whole, involves "an important question of federal law" (S. Ct. R. 10(c)), because § 1344(a)(3) is the crucial ERISA provision in situations where a trustee is distributing the remaining assets of a terminated plan. While § 1344(a)(3) sets forth just the third priority category (among six) for asset distributions, the first two categories infrequently come into play following the termination of a defined benefit plan. Those priority categories concern the payment of a "benefit which is derived from the participant's contributions to the plan," and defined benefit pension plans typically comprise principally funds contributed by the employer, not the participants. 29 U.S.C. § 1344(a)(1)-(2); JA275. Thus, Priority Category 3 – in which the benefits honored do not turn on whether the participant made a contribution – becomes the key category in which a participant must seek to place his or her benefit in order to obtain an asset distribution.

With Priority Category 3 being paramount in defined benefit plan termination situations, and § 1344(a)(3) being the ERISA provision that governs the allocation of benefits to this category, the proper construction of § 1344(a)(3) is then necessarily critical to the smooth operation of the asset distribution scheme created by Congress in ERISA. Put differently, if there ever is to be an important legal question for the Court to determine in conjunction with the distribution of a terminated plan's assets, it must come in the context of § 1344(a)(3), since it is the ERISA section usually at issue in such situations.

2. The proper reading of specifically the term "in effect" in § 1344(a)(3) is itself an important matter for

the Court to consider, given that it is a central component of the otherwise decisive subsection. The statutory condition that asset distributions be limited to benefits available under plan terms "in effect" for five years prior to termination has figured prominently not just in the PBGC's decision to limit the Pilots' asset distributions, but also in other instances where the PBGC as trustee has limited pensioner asset distributions. *See* Delta Pilots Plan Appeal Letter at 17-18. And the PBGC has found it necessary to issue a regulation on the meaning of "in effect," albeit a regulation that largely parrots the statutory language. *See* 29 C.F.R. § 4044.13(b)(6). Next, Congress had deliberate purpose in adding the "in effect" clause to § 1344(a)(3): it "prevent[s] 'ballooning' of benefits [by an employer] in anticipation of termination." *Rettig v. PBGC*, 744 F.2d 133, 152 (D.C. Cir. 1984); *see generally* S. Rep. No. 93-383, at 82 (1973). Accordingly, in taking up the first Question Presented, the Court would be clarifying the meaning of language that is determinative in significant PBGC proceedings, is of regulatory importance to the PBGC, and was a focal point for Congressional action.

3. The question of the correct construction of "in effect" in § 1344(a)(3) implicates the doctrinally significant issue of the extent to which the PBGC's decision-making as a trustee should be reviewed similarly to the conduct of a traditional fiduciary, or instead be subject to the discretion and deference sometimes enjoyed by administrative agencies. ERISA provides that the trustee of a terminated plan "shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act [29 U.S.C. § 1002(21)]," which is ERISA's general fiduciary

definition). 29 U.S.C. § 1342(d)(3). And a customary ERISA fiduciary must resolve legal and factual questions with “an eye single to the interests of the partici-participants and beneficiaries.” *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).[6] Further, this Court recently held that traditional trust law principles can apply to a government agency, when “the applicable statutes and regulations establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” *United States v. Jicarilla*, 131 S. Ct. 2313, 2325 (2011) (internal quotation marks omitted).

Yet, in this case, the District Court held the PBGC as trustee to no special obligation to act in the beneficiaries’ favor and instead treated the case as a standard administrative law matter, ultimately applying maximum deference to the PBGC’s decision-making. *See supra* p. 10. The Court of Appeals purported to avoid the question of whether the PBGC should be afforded deference, but at the same time indisputably did not hold the PBGC to any requirement that its determinations singly promote beneficiary interests. *See supra* p. 11; *see also Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) (holding, in interlocutory ruling, that PBGC should be afforded

---

[6] *See also* 29 U.S.C. § 1104(a)(1)(A)(i) (“a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries”); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008) (finding “a benefit determination to be a fiduciary act (*i.e.*, an act in which the administrator owes a special duty of loyalty to the plan beneficiaries)”).

deference). On this score, at various points, the lower courts relied on a trilogy of this Court's precedents, where the Court deferred to the PBGC's decisions or positions, though not in any instance when the PBGC was acting as a trustee. *See Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007); *PBGC v. LTV Corp.*, 496 U.S. 633, 648 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714, 725-26 (1989).[7]

The extent to which the PBGC's decision-making with respect to plan terminations should be treated as an ERISA matter subject to fiduciary standards, as opposed to an administrative law matter subject to deference standards, is a recurring legal issue. *See infra* pp. 26-27 (noting divergent Circuit positions on the issue). Further, the resolution of that preliminary legal issue can, in effect, determine the merits. For instance, the District Court did not disparage the Pilots' position on some claims but also found the PBGC's position to be permissible, and the tie – due to deference – went to the PBGC. *E.g.*, Pet. App. at 39a, 58a. The opposite result would ensue if, in contrast, a court found that a trustee (here, the PBGC) must favor beneficiary interests (where both side's positions had

---

[7] Though an ERISA fiduciary too sometimes will receive deference for its decisions on judicial review, such as where a trust document provides it with discretion to interpret ambiguous terms (*see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)), an ERISA fiduciary gets no deference in its interpretations of *statutes* or *regulations*, as opposed to factual matters or plan terms. *See Hogan v. Raytheon Co.*, 302 F.3d 854, 856 (8th Cir. 2002); *Dial v. NFL Player Supp. Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999). Here, the Questions Presented involve statutory construction.

plausibility) and then reviewed *de novo* whether the trustee properly weighed those interests.

The first Question Presented in the Petition (as well as the second) cannot be resolved without establishing first the parameters for a court's review: Should the PBGC have interpreted § 1344(a)(3) with an eye toward beneficiary interests, with the reviewing court determining *de novo* if the PBGC properly executed its role as a fiduciary; or did the PBGC enjoy administrative latitude in interpreting § 1344(a)(3), with the reviewing court deferring to the PBGC's construction based on *Beck*, *LTV Corp.*, and *Tilley*? This threshold issue potentially besets *every* asset distribution dispute in which the PBGC is the trustee. In granting certiorari in this case, the Court will have the opportunity to settle the threshold issue, to the benefit of the beneficiary community, the PBGC, and reviewing courts.

4. Finally, the proper construction of § 1344(a)(3) – including its "in effect" clause – is an important question for the Court to review because of the staggering sums of money at issue when a terminated plan's remaining assets are distributed. The total amount of assets transferred to the PBGC in connection with the US Airways Pilots Plan for distribution was nearly $1.2 billion. The subsequent terminations of the defined benefit plans associated with United Airlines, Delta Air Lines, and Delphi Corporation total even greater amounts. *See supra* pp. 7-8. In terms of what is at issue among the claims in just this case, even just on Claims One and Two of the Second Amended Complaint, the amounts likewise are very substantial. *See supra* n.4.

And of prime importance, the Pilots' loss was the PBGC's gain. That is, each dollar not awarded, for example, to the Pilots under the ERIP claim (and the § 415(b) claim involved in the second Question Presented) effectively reverts to the PBGC. In this regard, at the start of the asset-distribution process, the trustee must value in the aggregate the terminated plan's overall assets and liabilities, pursuant to actuarial and other global assumptions laid out in PBGC regulatory guidelines. *See* 29 C.F.R. §§ 4044.3, 4044.10, 4044.13, 4044.41-.57. Based on those computations, the trustee calculates the percentage of benefits in each priority category that can be satisfied, with the PBGC having determined in the case of the US Airways Pilots Plan that benefits in Priority Category 3 are 100% funded.

The trustee thereafter sends out final benefit determinations, noting an individual's prospective benefit payments, covering both amounts paid from the asset distribution and any PBGC insurance. *See supra* p. 9. If the trustee has excluded in the final benefit determination a benefit that the pensioner successfully thereafter challenges as encompassed within Priority Category 3, the trustee must then pay that amount, because there is (unlike with PBGC insurance) no maximum level for that benefit if Priority Category 3 is 100% funded. *Cf.* 29 U.S.C. § 1322(b)(7) (noting maximum *insurance* guarantee). Even if the erroneously excluded benefits are, in the aggregate, substantial, there is no provision in the PBGC's regulations for a recalculation of the initial funding levels of the Priority Categories (and, in any event, those funding levels were established, again, pursuant to global parameters and assumptions). *See* PBGC Br. in Ct. of App. (C.A. Dkt. 1429542) at 54 of 71. As a result, for benefits improperly categorized by the PBGC as outside of Priority Category 3 (absent reversal from a reviewing court), the money at issue stays dollar-for-dollar with the PBGC. *Cf. Metro. Life Ins. Co.*, 554 U.S. at 112 (where an employer "both funds the plan and evaluates the claims," "every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the employer's] pocket") (internal quotation marks omitted).

For an agency that has touted – even in this litigation – its need to conserve funds in order to meet its upcoming needs,[8] control as trustee over which benefits fall under § 1344(a)(3) is a powerful tool for saving money, though at the expense of worthy pensioners. In light of the considerable sums that can shift from pensioners to the PBGC via § 1344(a)(3), and the prospect of the PBGC's decision-making being shaded by financial interests (*see generally Metro. Life Ins. Co.*, 554 U.S. at 111), the proper construction of § 1344(a)(3) is "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

---

[8] *See* PBGC Mem. in Opp. to Mot. for Prelim. Inj. (D. Ct. Dkt. 12) at 32; *see also* Mary Williams Walsh, *Thought Secure, Pooled Pensions Teeter and Fall*, New York Times, April 12, 2014 (noting PBGC concern for its insurance funds in the event large-scale multi-employer plans become insolvent).

B. The D.C. Circuit's Construction of "In Effect" in § 1344(a)(3) Conflicts with Its Own and Other Courts of Appeals' Rulings in Analogous Situations

Not only is the question of the meaning of "in effect" in § 1344(a)(3) important to resolve as a jurisprudential and financial matter, the Court of Appeals' construction of "in effect" here conflicts with its own and other Courts of Appeals' interpretations of similar terms in other statutory contexts. As a threshold matter, however, the Court, to grant review here, should not require the Circuit split traditionally necessary. The PBGC appears currently to take the position that, once it becomes trustee, any subsequent court challenges to its final benefit determinations must be venued in the District of Columbia. *See United Steel, Paper, and Forestry, Rubber, Man., Energy, Allied Indus. & Serv. Workers Int'l Union v. PBGC*, 602 F. Supp. 2d 1115, 1119 (D. Minn. 2009). If the PBGC is correct, then there is little prospect of a Circuit split, since relevant cases would all be litigated through the D.C. Circuit. In that instance, this Court could approach the question of whether to grant certiorari as it would in a matter subject to the exclusive jurisdiction of the Federal Circuit, where this Court's "certiorari concerns" might "turn largely on the importance of the questions presented" or on whether the Court of Appeals "departs from its own . . . precedents." Stephen M. Shapiro et al., *Supreme Court Practice*, at 289 (10th ed. 2013).

Nonetheless, there are here relevant conflicts with other Circuit decisions. The term "in effect" (or variations of it) appears in other legal contexts, as well as in

ERISA. In this case, the D.C. Circuit found, in connection with the ERIP benefit, that a plan provision could not be "in effect" for the five years prior to termination, unless benefits under that provision were *paid* or *payable* at the start of the five-year period – even if Pilots were making elections under the provision prior to that time, the provision was adopted prior to that time, and on its face the provision had an effective date prior to that time. In analytically similar settings, the D.C. Circuit and other Courts of Appeals have expressly rejected a paid-or-payable standard for determining when provisions increasing compensation or fringe benefits are effective.

For instance, in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), the D.C. Circuit considered the effective date for cost-of-living adjustments ("COLAs") to Congressional pay. Finding them allowable under the Constitution's Twenty-Seventh Amendment, which provides that no law raising Congressional compensation "*shall take effect* until an election of Representatives shall have intervened" (U.S. Const. amend. XXVII (emphasis added)), the D.C. Circuit expressly rejected the argument that "the phrase 'shall take effect' . . . must refer to the date upon which the *payment* of the [COLA] . . . first occurs, not the effective date of the statute" set by Congress in the relevant legislation. *Boehner*, 30 F.3d at 161 (emphasis added; quotation marks omitted).

Likewise, in *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013), the Federal Circuit considered whether Congress's cancellation of COLAs for federal judges violated Article III's Compensation Clause, which (as interpreted by this Court) prohibits Congress from altering judicial compensation increases once the increases "*take effect*." *United States v. Will*, 449 U.S. 200, 221 (1980). Finding that the COLAs took effect before being paid (and thus that the COLAs were unalterable under Article III), the Federal Circuit noted that the mere enactment of the legislation providing the COLAs "triggered the expectation-related protections of the Compensation Clause. . . . That those compensation adjustments would happen in the future does not eliminate the reasonableness of the expectations created by the protections of the [legislation establishing the COLAs]." *Beer*, 696 F.3d at 1185; *see also id.* at 1197 (O'Malley, J., concurring) (noting that *Boehner*'s holding supports conclusion that judicial COLAs take effect "when the law is first effective, even if not due and payable for years to come"); *see generally Williams v. United States*, 535 U.S. 911, 917 (2002) (Breyer, J., with Scalia and Kennedy, J.J., dissenting from denial of certiorari) (presaging approach adopted in *Beer*, in dissenting from denial of certiorari in earlier Federal Circuit case overruled en banc by *Beer*).

There is also a developing conflict among the Circuits that is implicated in this case (*see supra* p. 18) on the issue of how to treat, for purposes of judicial review, the PBGC's actions in the plan-termination context – whether as fiduciary acts, generic agency action, or some third paradigm. *Compare* Pet. App. 35a (District Court treating case as dispute under the APA and applying deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); Pet. App. 8a-9a (Court of Appeals applying *de novo* standard of review, but nowhere holding PBGC to special duty of loyalty for a fiduciary making decisions on benefits) *with Dycus v. PBGC*, 133 F.3d 1367, 1369 (10th Cir. 1998) (applying to PBGC decision "both" APA and ERISA standards of review); *In re UAL Corp.*, 468 F.3d 444, 450 (7th Cir. 2006) (rejecting PBGC position that "court must defer to the agency's view" and instead requiring PBGC to carry burden of proof in suit challenging PBGC decision to terminate plan); *see also Pineiro v. PBGC*, 318 F. Supp. 2d 67, 103 (S.D.N.Y. 2003) (the "PBGC acts in its capacity as trustee when it issues benefit determinations and pays benefits . . ., and is therefore subject to fiduciary duties of care and loyalty in so doing"). This case offers the Court the opportunity to bring clarity on the overarching issue of the template for review of the PBGC's actions.

C. The D.C. Circuit's Construction of "In Effect" in § 1344(a)(3) Is Seriously Flawed

Adding further to the cert-worthiness of the first Question Presented, there are strong arguments that the Court of Appeals decision is wrong on the merits. At this stage, two points concerning the merits are particularly worth mentioning.

First, in holding that a benefit derives from a plan provision "in effect" for the five-year period only if it was paid or payable, the Court of Appeals violated the cardinal rule – applicable in both the administrative law context and under ERISA – that a decision can be upheld, if at all, only based on the reasons provided by the administrator, not its litigation counsel. *See, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (administrative law); *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1190-91 (10th Cir. 2007) (ERISA).

Here, the Court of Appeals said it was siding with the construction of "in effect" given by PBGC's Appeals Board, which was the agency decision-maker in this instance. *See* Pet. App. 10a-11a. In particular, the Court of Appeals said the Board was correct to use the regulation at 29 C.F.R. § 4044.13(b)(3)(i) – in which the word "payable" appears – to interpret the statutory phrase "in effect." Pet. App. 11a.

The problem is that the Board never invoked this regulation to interpret the term "in effect"; nor did it ever interpret a plan provision creating a benefit to be "in effect" when the benefit is paid or payable. In the entire section of the Board's decision holding that the ERIP benefit was not "in effect" five years prior to termination, the Board nowhere used the words "paid" or "payable." *See* JA279-80 (section of Board's decision entitled "The 'effective date' of the ERIP benefit increase"). Rather, the regulation the Board invoked to construe "in effect" was 29 C.F.R. § 4044.13(b)(6), a provision stating merely that a "plan or amendment is 'in effect' on the later of the date on which it is adopted or the date it becomes effective." Though the ERIP's adoption date and the effective date stated by the drafters were prior to five years before termination, the Board still found the ERIP amendment not "in effect," because it decided that "in effect" should mean "operative" or when "a participant could *retire and receive* the ERIP benefit increase." JA280 (emphasis added).

But these definitions, by the time of litigation, proved problematic to sustain the Board's decision: (1) it was impossible to say that the ERIP was not operative prior to the five-year deadline, when Pilots were making irrevocable elections under it before the deadline; and (2) the retired-and-received construction negated the idea recognized in 29 C.F.R. § 4044.13(b)(6) that the later of an adoption or effective date could be the adoption date. *See* Pls.' Reply Br. in C.A. (C.A. Dkt. 1432056) at 20 of 37. It was then in a reply brief in the District Court that the PBGC's litigation counsel came up with idea that "in effect" means "payable." *See* PBGC Reply in Supp. of Cross-Mot. for S.J. (D. Ct. Dkt. 78), at 21 of 53. Having not limited judicial review to the standard adopted *by the Board* (as opposed to the Board's litigators), the Court of Appeals committed legal error at the very start.[9]

Second, the Court of Appeals' paid-or-payable standard for determining when a benefit increase is "in effect" also makes § 1344(a)(3) internally inconsistent – *i.e.*, it removes from § 1344(a)(3)'s coverage individuals that Congress expressly included. An example shows the problem. Let's assume that a plan's provisions first allow for retirement at age 60. And also assume that, at four years prior to termination, an individual is 60, and then is 61 by the time of the third year prior to termination, though he continues to work until well after the plan's termination date. In that instance, the individual would be exactly the type of person to whom Congress sought in § 1344(a)(3)(B) to ensure benefits – namely, someone whose benefit

---

[9] To be sure, the Board did cite 29 C.F.R. § 4044.13(b)(3)(i) in an alternative holding as to why the Pilots should lose on their claim to the ERIP benefit (there, interpreting the § 1344(a)(3) language at issue under the second Question Presented – *i.e.,* under which such benefit would be the least"). *See* JA280. However, the Court of Appeals did not reach that ground on Claim One.

"would have been in pay status as of the beginning of [the] 3-year period [prior to termination] if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced . . . as of the beginning of such period." Yet, the Court of Appeals' paid-or-payable standard would bar any payment to the individual, because benefits under the plan provisions were first payable for him only four years prior to termination (the date he hit 60). With benefits only payable under the plan terms four years prior to termination, the plan provisions would not be, in the D.C. Circuit's view, "in effect" for the individual five years prior to termination.

II. THE COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESTION PRESENTED

The Court likewise should grant certiorari on the second Question Presented, which focuses on the proper construction of the language in § 1344(a)(3) that a benefit falls within Priority Category 3 if it derives from plan provisions "under which such benefit would be the least." Interpreting that language, the Court of Appeals (on Claim Two of the Second Amended Complaint) upheld the PBGC's disallowance of benefit increases engendered by Congress's post-2000 raise in the maximum benefits amount in I.R.C. § 415(b). For the D.C. Circuit, the mathematically lowest benefit amount – *i.e.*, the "lowest annuity" – being paid at any point during the five years is what governs, and the post-2000 § 415(b) increases were disqualified because they came into being only *during* the five-year period. Pet. App. 13a. The Pilots contest the Court of Appeals' statutory construction, contending that a benefit should be rejected as not based on the plan terms "under which such benefit would be the least" only if there are competing plan terms potentially applicable, with the trustee then being required to choose the least generous available option.

For the same reasons that the proper statutory construction of "in effect" presents an important question of federal law, so too does the correct construction of "under which such benefit would be the least": (1) the phrase is contained in the crucial asset-allocation subsection (*i.e.*, § 1344(a)(3)); (2) the language "under which such benefit would be the least" is a key part of the § 1344(a)(4) that the PBGC has elsewhere invoked to limit asset distributions (*see* Delta Pilots Plan Appeal Letter at 22); (3) the statutory construction issue requires, at the threshold, decision as to the appropriate way to view PBGC determinations as trustee (*i.e.*, as fiduciary determinations, or as agency decisions subject to deference); and (4) very significant sums of money rest on the statutory language's proper interpretation.

In addition, there is Circuit split on the meaning of "under which such benefit would be the least." In *In re Braniff Airways, Inc.*, 729 F.2d 315 (5th Cir. 1984), the Fifth Circuit affirmed the district court's decision "based upon the memorandum opinion and order" of the district court. *Id.* (affirming *McDonald v. Braniff Airways, Inc.*, 37 B.R. 922 (N.D. Tex. 1983)). In question in the district court was the calculation of Priority Category 3 benefits for airline retirees who obtained an increase in their benefits under a plan provision in a 1976 collective bargaining agreement; under the provision, participants retiring after August 1, 1976, obtained a $2,000 increase in June 1978, and a still greater increase in May 1979. The relevant plan's termination date was August 23, 1982 (*see In re Braniff Airways, Inc.*, 24 B.R. 466, 474 (Bankr. N.D. Tex. 1982)), so that the two increases occurred within five years of the plan's termination. In the district court and the Fifth Circuit, the participants retiring after August 1976 asserted that their Priority Category 3 benefits should be based on the increased amounts existing in 1979.

The district court disagreed (with the Fifth Circuit then affirming), but *not* because the least benefit was the amount at the start of the five-year period. Rather, "[t]he increases . . . were only applicable to those persons retiring on or after August 1, 1976, and there were, in fact, persons in pay status as of August 1, 1976 under the Plan who were not entitled to those benefit increases." *McDonald*, 37 B.R. at 925. Because there were dueling benefit formulas under the plan provisions during the five-year period, the one yielding the lowest benefit controlled. *Id.*; *see In re Braniff Airways, Inc.*, 27 B.R. 220, 222 (Bankr. N.D. Tex. 1982) ("Of the various formulas in effect, the [one for pre-1976 retirees] is obviously the lowest and accordingly is the one to be used to determine [Priority Category 3] benefits.").

Had the D.C. Circuit here taken a similar approach, the full § 415(b) amounts would have been included in Priority Category 3, since *all* Pilots were entitled to benefits up to the § 415(b) maximum limit; there were no differing formulas for alternative groups of retirees. Moreover, the Fifth Circuit's approach is the one most consonant with the language of

§ 1344(a)(3). The relevant language in § 1344(a)(3) is that Priority Category 3 encompasses benefits emanating from the "*provisions of the plan* . . . under which such benefit *would be* the least." (Emphasis added.) That language suggests analysis of *the provisions of the plan* (*i.e.*, the formulas stated in a plan) to determine the lowest available benefit, not merely a mathematical comparison of the benefit amounts paid each year. And use of the phrase "*would be* the least," as opposed to "*are* the least," indicates reflection on not just what the plan provisions *are* actually supplying to the participant, but what potentially *would be* available to the participant under available benefit options.

Finally, on the merits, the D.C Circuit's interpretation of "under which such benefit would be the least" creates the same internal inconsistency as with its construction of "in effect." If, as the D.C. Circuit held, the language means the Priority Category 3 benefit is the lowest annuity payable in any of the five years, then (in the example earlier noted where retirement is allowed at age 60) the participant at age 61 three years prior to termination but not in pay status, yet eligible four years prior to termination for benefits because he is at that point age 60, would get zero; that is because the lowest annuity payable to him was zero in the fifth year prior to termination (when he was 59 and ineligible to retire). Nonetheless, Congress expressly stated in § 1344(a)(3)(B) that the individual shall obtain a Priority Category 3 benefit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY F. SHELLEY
Counsel of Record
TIMOTHY P. O'TOOLE
MICHAEL N. KHALIL
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: ashelley@milchev.com

APRIL 2014