No. 13-1280

IN THE
Supreme Court of the United States

THOMAS G. DAVIS, et al.,

Petitioners,

v.

PENSION BENEFIT GUARANTY COMPANY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Petition and the three *amici curiae* briefs supporting it demonstrate that this case presents two important, recurring questions of federal law regarding the proper construction of 29 U.S.C. § 1344(a)(3). As Petitioners and their *amici* show, both issues provide the Court with the opportunity to construe, for the first time, the most crucial provision of ERISA related to the distribution of assets by a trustee of a terminated pension plan. Both questions, moreover, are dispositive as to the correct distribution of millions of dollars of retirement funds for the 1700 Petitioners in this case, and billions of dollars of retirement funds for tens of thousands of individuals nationally. And both questions implicate a threshold issue of extreme importance relating to the PBGC's decision-making as an ERISA fiduciary, and whether any review of its decisions should account for the inherent conflict of interest that arises when the PBGC voluntarily assumes the dual role of trustee and insurer of a terminated plan.

The PBGC's brief in opposition ("Opp.") effectively concedes: (1) the critical importance of § 1344(a)(3) in the statutory scheme; (2) the huge sums of retirement funds at stake in cases involving § 1344(a)(3); (3) the lack of any prior precedent from the Court on how to construe § 1344(a)(3); (4) the inherent conflict created by its dual functions; and (5) the fact that its construction of the statute as trustee directly affects its financial bottom line as insurer. And yet, despite all of these concessions, the PBGC urges the Court to deny review.

Its grounds for doing so are basically twofold. First, while the PBGC essentially agrees that the extent to which its decision-making as trustee should be treated as an ERISA matter subject to fiduciary standards as opposed to an agency matter subject to administrative deference is an important question, it asserts that the question is not properly raised here. The PBGC emphasizes that the court of appeals assumed away the issue, even as the court of appeals affirmed a district court decision that overtly found ERISA fiduciary standards to be irrelevant and administrative deference to the PBGC under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) instead to be in order. But as Petitioner and *amicus* DP3 have pointed out (Pet. at 18-23; *Amicus Curiae* Br. of DP3, Inc. at 5-13), the Circuit's one-sentence examination of this important issue bore no resemblance to any *de novo* parsing of the statutory terms, and its decision certainly did not contain any assessment of whether to review the PBGC's trustee activities through ERISA's traditional lens that fiduciary determinations singly promote beneficiary interests.

Thus, while the court of appeals purported to assume away the fiduciary/agency threshold issue, its sparse analysis of the statutory interpretation questions mimicked both the district court's *Chevron* deference and the Circuit's interlocutory precedent in this case affording that same *Chevron* deference to the PBGC. *See* Pet. 19-20. In reviewing those same statutory construction issues on the merits, therefore, this Court will inevitably need to decide whether the PBGC's decision-making as trustee of a terminated plan should be treated as an ERISA matter subject to fiduciary standards or an administrative agency matter subject to *Chevron* deference.

But even setting aside that important issue, the statutory construction questions presented are cert-worthy in their own right. According to the PBGC, stripped away from the fiduciary/agency issue, the statutory construction questions presented by the Petition are "highly technical" ones, not worthy of this Court's resources, and supposedly best left to the PBGC's expertise and regulations. Opp. at 1. At the same time, however, the PBGC seeks to justify its construction of § 1344(a)(3) without virtually any reference to how the statute's actual text – commanding priority treatment for those "provisions of the plan" that are "in effect" more than five years before plan termination – supports its decision to deny millions of dollars' worth of retirement benefits to Petitioners.

This failing is alone telling, as is the PBGC's half-hearted defense of its merits position; according to the PBGC, the merits of this case are largely beside the point because, regardless of whether the court of appeals' construction of the statute was correct, this Court should not engage in mere error correction. *See* Opp. at 14-17 (section entitled "A 'flawed' court of appeals decision presents no grounds for certiorari"). While there are some cases in which such an argument might hold sway – because this Court's role is most definitely *not* to correct every erroneous ruling in the federal system – the Petition is not solely, or even mostly, about redressing any errors committed below. As the Petition and the three *amicus* briefs supporting it make clear, the issues presented here are worthy of review not simply because the court of appeals' resolution of them was dubious, but also because the issues of statutory construction are indisputably important, recurring, and control the distribution of huge sums of retirement funds for tens of thousands of pensioners. The Court should grant the Petition.

ARGUMENT

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

Question One of the Petition involves the interpretation of § 1344(a)(3)'s requirement that, for a benefit to receive Priority Category 3 treatment in Congress' asset allocation scheme, it must be "based on the provisions of the plan" that were "in effect during the 5-year period ending on" the plan's termination date. The question arises from a simple set of facts in which the disputed benefit was based on the provision of a pension plan that indisputably was adopted more than five years before plan termination, that had a stated "effective date" more than five years before plan termination, and under which participants began making irrevocable elections as to the form and level of benefits more than five years before plan termination. But because the first payments under that provision would not be made until four years and eleven months before Plan termination (conveniently, for the PBGC, 30 days too late), the PBGC found that the provision was not "in effect" until the first benefit payments could be received, and both the district court and the court of appeals upheld that decision, albeit on very different grounds.

The Petition therefore incontestably presents this Court with a ripe dispute over how to resolve a pure question of statutory interpretation. And as already noted, it does so in a setting where the PBGC has effectively conceded the importance of the statutory provision, the frequency with which disputes over its proper construction recur, and the staggering sums at stake in construing both § 1344(a)(3) in general, and the "in effect" language in particular. In addition, although the PBGC takes pains to defend the court of appeals' attempt to write the issue out of the case, for the reasons discussed above, resolution of Question One will compel this Court to examine the threshold issue of whether the PBGC acts as a true fiduciary when it voluntarily assumes the mantle of trustee, or whether it acts as a "coach class" fiduciary, whose decision-making is subject to some form of lesser scrutiny. These questions are inevitably linked because, if this Court takes on the question of when a plan provision is "in effect" under § 1344(a)(3), it will need to determine, as a preliminary matter, how much weight, if any, should be afforded to the PBGC's views.

Indeed, the PBGC's argument as to why the fiduciary/agency issue can be avoided relies entirely on its claim that § 1344(a)(3)'s language about when a plan provision is "in effect" is susceptible to only one conceivable interpretation – namely, that a plan provision is supposedly "in effect" only when benefits under that provision are "payable." If the PBGC is wrong about that, then it essentially has no real arguments against review, since it has already conceded the importance of the issue and the huge stakes involved for pensioners around the country.[1]

And the PBGC *is* wrong about the one-sided nature of the statutory question, since there are a host of problems with its "payable" analysis. First, as the brief of *amicus* Air Line Pilots Association, International ("ALPA") demonstrates at length (*see* ALPA Br. at 8-9), the PBGC itself has, in other related

[1] The PBGC argues that its failures as a fiduciary are somehow minimized because, *in this case*, the PBGC only escheated about $40 million of the participants' assets to itself; thus, were the Pilots' gains in the litigation to exceed that amount, other participants *might* see their benefit payments lowered as their pro-rata share of plan assets was diminished. Opp. at 19-20. Even assuming, *arguendo*, that only $40 million were on the line in this case, it is puzzling how the PBGC could suggest that a $40 million misappropriation of funds from retirees is not worth the Court's time. But the PBGC's premise about what is at stake in this case is also faulty. Should the Pilots succeed on their claims and thereby be entitled to tens of millions in additional monies, the PBGC has no license to undo the past eleven years of benefits payments (since the termination date) to everyone else in the Plan in order to make up the difference; and it cites no precedent or statutory or regulatory provisions allowing for such a dislocating revision. More important, as noted in the Petition (at 22-23), the PBGC (or a court's) determination that a benefit in an individual case falls within a Priority Category does not affect the PBGC's overarching determination of how much of that Priority Category is funded, particularly because the two determinations are based on different assumptions (which the PBGC has not contested). Finally, it is worth noting that, since the PBGC assumed trusteeship of the Plan in 2003, it has invested all of the Plan's remaining assets, even though it pays out asset distributions only over a retiree's lifetime, with no increases to account for inflation. The net effect is that the PBGC has a vast windfall at its disposal to pay asset distributions, making specious any claim that it would need to "rob Peter to pay Paul."

contexts, carefully distinguished between the time when a plan provision is "in effect" and when benefits under that plan provision are "payable." Second, contrary to the arguments in its brief, the PBGC did not even formulate this supposedly iron-clad construction of the statutory language until midway through this litigation.[2] Third, both the PBGC's construction of "in effect" and the court of appeals' adoption of that position conflict with other federal decisions construing substantively identical terms, including a previous D.C. Circuit decision.[3] Fourth, and perhaps most important, the PBGC's construction of the term "in effect" entirely ignores both the

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[2] The DC Circuit's ruling on Claim One rested on its belief that the PBGC had the "better interpretation of the regulatory scheme" in concluding that "the relevant regulation interpreting the phrase 'in effect' in 29 U.S.C. § 1344(a)(3)(A) *is 29 C.F.R. § 4044.13(b)(3)(i).*" Pet. App. 10a (emphasis added). However, the PBGC Appeals Board never made such a conclusion. The Appeals Board's analysis of the ERIP's effective date is confined to two pages of the decision, occurring at JA279-80 under the heading "[t]he 'effective date' of the ERIP benefit increase." The PBGC concedes that its Appeals Board did not cite the disputed regulation in *this* analysis, but attempts to sidestep this infirmity by conflating the Appeals Board's "in effect" analysis (JA279-80) with its "'lowest annuity benefit payable'" analysis (JA280-82). Opp. at 15. However, these analyses raised what even the Appeals Board called "independent" issues (JA280) involving different statutory terms, and it was only in the latter that the Appeals Board cited the PBGC's disputed regulation.

[3] The PBGC makes the conclusory argument that these decisions are not in tension because they occur "in the context of unique statutory and constitutional provisions," Opp. at 8, but never offers any argument as to how those different "contexts" can harmonize the plainly conflicting analyses of the courts.

statutory language and the PBGC regulation expressly defining when a plan amendment is "in effect," *see* 29 C.F.R. § 4044.13(b)(6), relying instead on a different portion of § 1344(a)(3) and the regulation construing *that* portion of the statute.

The last point is worth considering further since the argument features so prominently in the PBGC's opposition brief. According to the PBGC, the reason that "provisions of the plan" are "in effect" only when benefits under them are *payable* is because, otherwise, those new benefits would flunk the "under which such benefit would be the least" portion of the statutory language, which supposedly permits the PBGC to pay only the "least" benefit that was "payable" during the five-year period before termination. Opp. at 14. The initial problem with this argument is that the term "payable" – on which the PBGC's entire argument relies – is not found in the statute either. To find that term, the PBGC looks to its regulation construing "under which such benefit would be the least," 29 C.F.R. § 4044.13.(b)(3)(i), and this regulation purports to interpret the statutory language by including in Priority Category 3 "the lowest annuity benefit *payable* under the plan provisions at any time during the 5-year period ending on the termination date." (Emphasis added.) According to the PBGC, *this* regulatory use of the term "payable," is where the real definition of "in effect" can be found and its supposed equation of the two terms negates any other conceivable interpretation of the statute.[4]

[4] The PBGC acknowledges that the D.C. Circuit did provide it with some deference as to this interpretation of its regulation,

The fact that the PBGC's arguments hinge on such convoluted logic should rightly engender skepticism. It is safe to say that the "definitive" con-construction of statutory terms is rarely found in regulations construing *different* statutory terms. In any event, the fact that the PBGC's "in effect" argument turns entirely on the proper construction of a regulation construing "under which such benefit would be the least" should suffice to show that the question of statutory construction is not cut and dried, and thus is worthy of this Court's review. Indeed, the fact that the PBGC invokes this portion of § 1344(a)(3) so heavily even in its analysis of Question One itself demonstrates the importance of Question Two, where that language is again front and center.

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

Question Two also involves interpretation of § 1344(a)(3)'s language relating to the requirement that, for a benefit to receive Priority Category 3

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but suggests that its entitlement to deference is incontrovertible. Opp. at 14. Yet, even in a standard administrative situation, the entitlement of an agency to this sort of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), is a matter on which the Court has invited inquiry. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring). This case therefore could offer the Court a serious opportunity to consider the continuing vitality of *Auer*, assuming the PBGC could persuade the Court in the first instance that its regulatory interpretations here should be treated as standard agency action, as opposed to fiduciary conduct subject to ERISA standards of review.

treatment, it must be based on plan provisions in effect during the five-year termination period "under which such benefit would be the least." 29 U.S.C. § 1344(a)(3)(B). In Question Two, the dispute over how to interpret this language arises from the PBGC's disallowance of benefit increases engendered by Congress' post-2000 raise in the maximum benefits amount in I.R.C. § 415(b).

These benefits belong in Priority Category 3 because the statutory language does not create a mathematical limit on benefits but rather provides a guide to the trustee as to which benefits should be paid when competing plan provisions are "in effect" during the five-year period before Plan termination. The PBGC's position is that the statute does in fact create a mathematical limit such that even benefit increases that require no change in plan terms, but instead result directly from Congressional action, are excluded from Priority Category 3.

Once again the importance of this issue is not meaningfully in dispute. The PBGC never once contests the assertions of both Petitioners and their *amici* that Question Two is cert-worthy for many of the same reasons that Question One is – the critical nature of this statutory provision, the frequency with which the issue arises, and the enormous sums at money at stake when it does arise.

Furthermore, there can be no real dispute about the seriousness of the competing arguments as to the proper construction of this provision. On its face, the statutory language does not establish the mathematical limit championed by the PBGC. To the contrary, that language directs the trustee only to make priority determinations "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." Such language thus looks to competing "plan provisions" – not benefit amounts – and seems to tell the trustee to examine which "provisions of the plan" were in effect "during" the five-year period if competing provisions are "in effect" during that timeframe, in order to discern the controlling provisions for asset-distribution purposes. This is likely why the Fifth Circuit, in conflict with the D.C. Circuit here, construed the statutory language as Petitioners do here. *See* Pet. at 31-32.

The PBGC's contrary view – that the correct construction of the statute looks only to the lowest mathematical amount paid during the five-year period – fails to account for Congress' express linking of the "least" benefit to whatever "plan provisions" were "in effect" during the five-year period. As a result, the PBGC's position, and that of the court of appeals, is highly dubious. While Congress certainly could have created such a scheme, the plain statutory language indicates that it did not.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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