

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*

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF OF DELTA PILOTS'
PENSION PRESERVATION ORGANIZATION
(DP3, INC.) IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Delta Pilots Pension Preservation Organization (DP3, Inc.) (“DP3”) hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* supporting the Petition for a Writ of Certiorari (“Petition”) in this case. Timely notice under Rule 37.1(a) of the intent to file this brief was provided to Petitioners and Respondent. Petitioners Thomas G. Davis *et al.*, have consented to the filing of this brief. Respondent Pension Benefit Guaranty Corporation (“PBGC”) has declined to consent.

DP3 is a non-profit corporation formed to protect the earned retirement benefits of retired Delta Air Lines, Inc. (“Delta”) pilots. It has a strong interest in the issues presented in the Petition because nearly eighteen hundred retired or retirement-eligible Delta pilots (or their survivors) are currently involved in a dispute that, in the words of the PBGC, “essentially raise[s] the same issues that previously were raised in the US Airways Pilots Plan Appeal.” Consolidated Appeal on Delta Pilots Retirement Plan, PBGC Case No. 205441, at 10 (Sept. 27, 2013), *available at* <http://www.pbgc.gov/documents/apbletter/Decision--Delta-Pilots-Retirement-Plan-2013-27-09.pdf> (“Delta Pilots Plan Appeal Letter”).

As in this case, the dispute between the Delta pilots and the PBGC largely turns on the manner in which “the PBGC interpreted the central provision of ERISA concerning a trustee’s asset distributions—namely,

29 U.S.C. § 1344(a)(3).” Pet. 4.¹ And judicial resolution of the dispute between the Delta pilots and the PBGC will largely turn—as did this case—on the standard of review adopted by the court of appeals.

DP3 believes that the attached brief sheds additional light on various considerations regarding the propriety of further review. In particular, it provides a useful perspective on the important standard of review issue, which is fairly subsumed within each of the two questions presented by the Petition. Counsel for DP3 is qualified to address these issues having represented parties in several ERISA cases before this Court including *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S.Ct. 604 (2013), *US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537 (2013), *Conkright v. Frommert*, 559 U.S. 506 (2010) (argued); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) (argued), and *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (argued).

¹ In the words of the PBGC: the Delta pilots—like Petitioners—“are a unique class of individuals because they all were in pay status (retired) or eligible to enter pay status (eligible to retire) three years before the Pilots Plan terminated.” Delta Pilots Plan Appeal Letter at 3. For that reason, the Delta pilots—like Petitioners—“are eligible for benefits in Priority Category 3 . . . under the asset allocation provisions in [29 U.S.C. § 1344(a)(3)].” *Id.*

For these reasons, DP3 requests that the Court grant it leave to participate as *amicus curiae* by filing the accompanying brief in support of the Petition.

Respectfully submitted,

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SUMMARY OF ARGUMENT¹

In 1974, Congress created the Pension Benefit Guaranty Corporation (“PBGC”) to insure pensioners against plan default. To prevent avoidable defaults, Congress authorized the PBGC to seek court appointment of a trustee to replace incompetent or self-dealing administrators of plans nearing insolvency. Congress intended the trustee to be a private actor who faced market incentives to act efficiently and in the best interests of pensioners. And in the rare event the PBGC became trustee, it would be held to strict fiduciary standards to ensure it served plan participants effectively and did not improve its balance sheet at their expense.

Today, contrary to Congressional intent, the PBGC is the trustee of first resort whenever a defined benefit pension plan terminates. It has persuaded courts around the country that it can only be sued in the District of Columbia, and it has persuaded courts in the District of Columbia that it deserves extraordinary deference when managing private property. Not surprisingly, under the circumstances, the PBGC’s tenure as trustee has been plagued with incompetence and self-serving decision-making. It routinely delays benefits determinations for years, makes basic errors, and incurs exorbitant administrative costs in the process. And, perhaps more

¹ No counsel for a party authored this brief in whole or in part. No person or entity other than DP3, its counsel, or its members made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of DP3’s intent to file this brief at least ten days before its due date. Petitioners consented to its filing, but counsel for Respondent did not. Consequently, DP3 has filed a motion for leave to file as *amicus curiae*. The letter of Petitioners consenting to the filing of this brief has been filed with the Court.

troubling, the PBGC “as trustee” consistently and unmistakably prioritizes its own interests as an insurer over those of pensioners. In the PBGC’s hands, the trustee mechanism has multiplied the problems that Congress hoped it would fix.

DP3 files this brief to explain why this case presents an ideal (and rare) opportunity for the Court to clarify that the PBGC is subject to meaningful judicial oversight in its capacity as trustee for every terminated defined benefit pension plan. Unless the Court intervenes, a vast and unintended administrative apparatus will continue to freely disregard the interests of pensioners despite express Congressional intent to the contrary.

INTEREST OF *AMICUS CURIAE*

Delta Pilots Pension Preservation Organization (DP3, Inc.) (“DP3”) is a non-profit corporation formed to protect the earned retirement benefits of retired Delta Air Lines, Inc. (“Delta”) pilots. It is an active, board-represented member of the National Retiree Legislative Network, an organization representing over two million retirees from 135 major American corporations. It was incorporated in 2002 in anticipation of Delta’s bankruptcy (which occurred in 2005). Its founders firmly believed that no other organization or entity would continue to adequately protect the retirement benefits earned by Delta pilots during their careers.²

DP3 has an unmistakable, direct, and immediate interest in the outcome of the Petition. After the Delta Pilots Pension Plan was terminated and taken over by

² Pilots are prohibited from commercial flying after they reach mandatory retirement age. As such, vested benefits are crucial to sustain them and their dependents through their retirement years.

the PBGC, legal action against the PBGC was coordinated by DP3. Indeed, nearly eighteen hundred retired or retirement-eligible Delta pilots (or their survivors) are currently involved in a dispute that, in the words of the PBGC, “essentially raise[s] the same issues that previously were raised in the US Airways Pilots Plan Appeal.” Consolidated Appeal on Delta Pilots Retirement Plan, PBGC Case No. 205441, at 10 (Sept. 27, 2013), *available at* <http://www.pbgc.gov/documents/apbletter/Decision--Delta-Pilots-Retirement-Plan-2013-27-09.pdf> (“Delta Pilots Plan Appeal Letter”).

STATEMENT OF THE CASE

The Retirement Income Plan for Pilots of US Airways, Inc. (“Plan” or “US Airways Pilots Plan”) was a defined benefit pension plan covered by Title IV of ERISA.³ US Airways filed a petition for Chapter 11 relief in United States Bankruptcy Court in 2002. *See* Joint Appendix in Ct. of Appeals at JA274. In 2003, US Airways and the PBGC entered into an agreement terminating the Plan and establishing the PBGC as statutory trustee. *Id.*⁴

³ The Delta Pilots Plan was also a defined benefit pension plan covered by Title IV. *See* Delta Pilots Plan Appeal Letter at 1, 6–7. Unlike defined contribution plans (such as 401k plans), defined benefit plans promise a specified monthly benefit in retirement according to a formula based on salary history and years of service. *See* Congressional Budget Office, *A Guide to Understanding the Pension Benefit Guaranty Corporation*, at 1 (Sept. 2005), *available at* <http://www.cbo.gov/publication/17179> (“CBO Guide”).

⁴ Delta and numerous subsidiaries filed petitions for relief under Chapter 11 in 2005. Delta Pilots Plan Appeal Letter at 6. The Delta Pilots Plan administrator and the PBGC executed an agreement providing for the termination of the Delta Pilots Plan and appointing the PBGC as statutory trustee in 2006. *Id.* at 7.

As of the Plan's termination, it had approximately \$1.193 billion in assets, which were transferred to the PBGC on behalf of the plan's participants and beneficiaries. PBGC Admin. Rec. filed in D. Ct. (Dkt. No. 52), at 27.⁵ In 2006, the PBGC determined that these assets covered 100% of the benefits in Priority Category 3 and \$40 million of the benefits in Priority Category 4. *Id.*; JA276.⁶ Yet the PBGC's final benefits determinations resulted in payments that were well below the level of vested pension benefits that many participants believed they were entitled to receive under the Plan and ERISA. Hundreds of Plan participants appealed administratively to the PBGC, which rejected their legal arguments in letters issued by its Appeals Board in 2008. *See* JA271, JA276-77, JA289, JA1002.⁷

In June 2008, approximately 1,700 Plan participants and beneficiaries challenged the PBGC's benefits determinations in the District Court for the District of

⁵ As of its termination, the Delta Pilots Plan had approximately \$2 billion in assets, which were transferred to the PBGC as trustee. Delta Pilots Plan Appeal Letter at 5 (citing PBGC's Actuarial Case Memo for Delta Pilots Retirement Plan).

⁶ The PBGC determined that the Delta Pilots Plan's \$2 billion in assets and recoveries for unfunded benefit liabilities covered 100% of the benefits in Priority Category 3 and a portion of the benefits in Priority Category 5. Delta Pilots Plan Appeal Letter at 9.

⁷ The PBGC sent initial (formal) Benefit Determination letters to the majority of Delta Pilots Plan participants or their survivors *five years* after its appointment as trustee. *See* Delta Pilots Plan Appeal Letter at 2. Many of the Benefit Determination letters sent to Delta Pilots Plan participants also reflected pension amounts that were well below what their recipients expected to receive under the plan and ERISA. In late 2011, nearly eighteen hundred retired or retirement-eligible Delta pilots (or their survivors) appealed administratively to the PBGC. *Id.*

Columbia, which granted summary judgment to the PBGC. *See* Pet. App. 27a. After the Court of Appeals affirmed, plaintiffs filed the instant Petition, which presents two important questions about the construction of ERISA’s central provision governing a trustee’s distribution of plan assets.

In this brief, DP3 focuses on the broader context that gives these interpretive questions special urgency. Contrary to Congressional intent, the PBGC now voluntarily assumes the role of trustee for virtually all terminated pension plans. In this capacity, it consistently prioritizes its own interests as insurer over the interests of pensioners, further undermining the purposes of Title IV. And despite clear statutory language defining a trustee as a “fiduciary,” the PBGC has persuaded courts in the D.C. Circuit that it deserves great deference in making benefits determinations.

This case presents an ideal (and rare) opportunity for the Court to address the standard of review that applies whenever the PBGC acts as the trustee of a terminated plan. DP3 respectfully urges the Court to take up this question now: as the termination proceedings for the US Airways Pilots Plan enter their second decade, the proceedings for the Delta Pilots Plan are following the same blueprint.

ARGUMENT

I. The PBGC Has Subverted the Purpose of Title IV of ERISA by Transforming Itself from a Tightly Regulated Insurer into an Unbridled “Trustee” with an Agenda Directly Adverse to Pensioners.

When Congress enacted Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1301 et seq., it required the Pension Benefit Guaranty Corporation (“PBGC”) do two things: first, to

be a self-supporting insurer for pensioners and second, to do so without ever raising rates or denying coverage to anyone. Forty years later, the PBGC has an operating deficit of \$36+ billion and will soon be unable to honor commitments to pensioners in failed plans.

With insolvency looming, the PBGC latched onto a minor provision of ERISA and transformed it into a powerful tool to exercise the discretion that Congress expressly withheld from it. By voluntarily becoming the trustee for virtually all failed pension plans, the PBGC qua trustee (“PBGC Trustee”) assumes control of billions of dollars of plan assets and becomes the arbiter between pensioners and the PBGC qua insurance company (“PBGC Insurance Co.”). PBGC Trustee wields extraordinary discretionary authority in allocating both plan assets and PBGC Insurance Co. funds. And every dollar that PBGC Trustee denies to beneficiaries above the minimum guarantee is a dollar more for the depleted coffers of PBGC Insurance Co.

The repercussions of PBGC Trustee’s conflict of interest are especially stark where, as in this case, the assets of the failed plan are adequate to cover the benefits owed to certain participants. When PBGC Trustee exercises its discretion to withhold fully funded benefits from participants in failed plans, it is not allocating limited government resources among competing claimants, or plan assets among participants, but taking private property to satisfy its own liability to other plan participants. Under these circumstances, some participants in failed plans are actually worse off than they would have been absent Title IV altogether—a perversion of Congressional intent.

PBGC Insurance Co. Despite the shift away from defined benefit pension plans over the last thirty years,

millions of American workers still participate in such plans, and tens of thousands of private employers continue to offer them. *See* PBGC 2013 Annual Report at 34 (Nov. 2013), *available at* <http://www.pbgc.gov/res/reports/ar2013.html> (insurance programs cover 42 million workers in 24,400 plans). Nationwide, plan sponsors have promised retirees hundreds of billions of dollars in benefits. Unfortunately, the difference between funds actually available to pay retirees and benefits promised can be vast. *See* S&P Dow Jones Indices, *S&P 500 2012 Pensions and Other Post Employment Benefits (OPEB): The Final Frontier* (July 2013) (pension liabilities underfunded by \$452 billion among S&P 500 companies).

Congress created the PBGC to backstop pensioners in the event of sponsor default. 29 U.S.C. § 1302. Like a private insurance company, PBGC Insurance Co. collects premiums for each plan participant and pays out claims to cover the shortfall, within limits, when plans fail. 29 U.S.C. §§ 1305, 1322. It is supposed to be self-financing. 29 U.S.C. § 1305. But PBGC Insurance Co. differs from private insurance companies in important ways: it cannot refuse to insure exceptionally risky plans, *see* 29 U.S.C. § 1322(a), depriving it of leverage with which to negotiate more prudent terms, nor can it charge such plans higher premiums, *see* 29 U.S.C. § 1306. In fact, PBGC Insurance Co. cannot raise its premiums at all, as Congress specified the prices to be charged in the text of ERISA itself. 29 U.S.C. § 1306; *see generally* CBO Guide at 8.

Thus constrained, PBGC Insurance Co. was destined for insolvency. *See* PBGC Annual Report at 17 (“The primary reason [for our deficit] is that premiums established by Congress that we are permitted to charge

are inadequate to cover the benefits that, by law, we insure.”). The Government Accountability Office (“GAO”) has included PBGC on High Risk List since 2003, consistently expressing doubt about “the agency’s long-term financial stability.” *See, e.g.*, Government Accountability Office, *High-Risk Series: An Update*, at 241 (Feb. 2013), *available at* <http://www.gao.gov/assets/660/652133.pdf> (“GAO Update”). According to its own estimates, PBGC had accumulated a net financial deficit of \$36 billion by fiscal year 2013, and “[a]bsent changes, eventually [] will have insufficient funds to pay benefits.” PBGC 2013 Annual Report at 17. There is every reason to believe that PBGC Insurance Co.’s finances will continue to deteriorate, as PBGC expects a significant number of plans to terminate in the near future—triggering payment obligations—and few if any new plans to begin paying premiums. *See id.* at 27. Absent Congressional action—unlikely given the recent *easing* of regulations intended to shore up the PBGC’s finances, *see* GAO Update at 241—PBGC Insurance Co. will have more liabilities and fewer assets with which to satisfy them.

PBGC Trustee. When Congress enacted ERISA, it authorized the PBGC to seek court appointment of a trustee to administer insolvent plans. *See* 29 U.S.C. § 1342(b). Congress expected that the existing plan administrator would be the “preferred choice” to serve as trustee absent evidence of incompetence or self-dealing. *See* Vol. 3, ERISA Leg. Hist. at 5218–19. “[I]n special circumstances,” the PBGC could request its own appointment as trustee, *id.*, though Congress evidently assumed that such instances would be rare, *see, e.g.*, 29 U.S.C. § 1342(h)(1) (authorizing appointed trustee to intervene upon disagreement with PBGC determination and requiring “the prior approval of the corporation” for

trustee compensation); 29 U.S.C. § 1342(d)(1)(A)(vi) (authorizing trustee to take actions “without increasing the potential liability of the corporation”). Consistent with the overall purpose of Title IV, this provision is expressly intended to facilitate the appointment of a trustee “if the interests of the plan participants would be better served” by that arrangement. 29 U.S.C. § 1342(b)(2)(A); *see also* 29 U.S.C. § 1342(d)(1)(B)(viii) (authorizing trustee to act as necessary “to protect the interests of plan participants and beneficiaries”). It also specifies that a trustee is a fiduciary of the plan. 29 U.S.C. § 1342(d)(3).

Under the auspices of the final sentence of 29 U.S.C. § 1342(b)(1), PBGC has become the trustee of first resort for virtually all terminated plans. *See* PBGC’s Memorandum in Support of Its Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, *US Airline Pilots Ass’n v. PBGC*, No. 1:09-cv-01675, at 3 (D.D.C. July 8, 2011) (boasting that “PBGC serves its mission with respect to a terminated plan as federal guarantor . . . and as statutory trustee of the plan.”); Delta Pilots Plan Appeal Letter at 2 (“If a plan sponsor is unable to support its pension plan, PBGC becomes trustee of the plan”). In this capacity, PBGC Trustee has sweeping authority “to do any act authorized by the plan or [Title IV] to be done by the plan administrator,” 29 U.S.C. § 1342(d)(1)(A)(i), including paying benefits under its interpretation of the plan, *see* 29 U.S.C. § 1342(d)(1)(B)(i). PBGC Trustee may also “require the transfer of all (or any part) of the assets and records of the plan to [itself] as trustee.” 29 U.S.C. § 1342(d)(1)(A)(ii). And, to be clear, that has become the PBGC’s standard operating procedure. *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> (acquiring \$8 billion in assets from United plans); Delta Pilots Plan Appeal Letter at 9 (acquiring \$2 billion in assets from Delta Pilots Plan); PBGC Press Release (July 27, 2009), available at <http://www.pbgc.gov/news/press/releases/pr-09-8.html> (acquiring \$6 billion in assets from Delphi Corporation plans).⁸

PBGC Trustee enjoys almost unfettered discretion in carrying out these functions because they frequently involve interpreting ambiguous plan and statutory provisions. Although ERISA lays out six priority categories and generally describes the benefits that belong in each, see 29 U.S.C. § 1344, it is often unclear what benefits belong in which category, even after applying PBGC guidance.⁹ Indeed, in this case, applying

⁸ PBGC invests the assets it acquires from terminated plans and keeps any profits for itself. See 29 C.F.R. § 1344(c)(2) (“Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.”); CBO Guide at 11. Government watchdogs have criticized the PBGC’s investment program as incoherent and wasteful. See generally Government Accountability Office, *Pension Benefit Guaranty Corporation: Asset Management Needs Better Stewardship* (June 2011), available at <http://www.gao.gov/new.items/d11271.pdf>.

⁹ The correct interpretation of ambiguous plan or statutory provisions is frequently the subject of litigation. See, e.g., *Firestone Tire & Rubber Co. v. PBGC*, 892 F.2d 105 (D.C. Cir. 1989) (deferring to PBGC interpretation of ERISA section 4044(d)(2)); *Caskey v. PBGC*, No. 97-cv-4240, 1999 U.S. Dist. LEXIS 21448 (E.D. Pa. Jan. 14, 1999) (upholding PBGC determination that participant not entitled to benefits based on interpretation of compensation offset provision); *Adey v. PBGC*, No. 5:07-cv-18, 2010 WL 892229 (N.D. W. Va. Mar. 9, 2010) (granting PBGC summary judgment based on interpretation and application of plan service requirements).

one or the other of the PBGC's two regulations interpreting the statutory term "in effect" yields opposite outcomes for the inclusion of the pilots' Early Retirement Incentive Program ("ERIP") benefits in the highest effective priority category. Tremendous sums of money hang in the balance of PBGC Trustee's interpretive choices. Here, PBGC Trustee's interpretations with respect to the ERIP program alone cost retired pilots an expected tens of millions of dollars in lifetime payments, see Petition at 14 n.4—which inured to PBGC Insurance Co.¹⁰

Precisely because there is such scope for the exercise of discretion in plan administration, ERISA requires plan administrators and appointed trustees—both expressly defined as fiduciaries—to act exclusively in the interests of plan participants and their beneficiaries. 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"); see *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (ERISA fiduciary must resolve issues with "an eye single to the interests of the participants and beneficiaries"). To insure against

¹⁰ The PBGC maintains two kinds of accounts: (1) revolving funds (mostly consisting of premiums collected from participating plans) and (2) a trust fund (consisting of the commingled assets of terminated plans). See CBO Guide at 9. PBGC Insurance Co. pays pensioners in terminated plans out of its revolving funds, which are periodically reimbursed by the trust fund based on the aggregate funding level for all plans that PBGC Trustee has taken over. *Id.* at 12. As a result, there is no real distinction between obligations paid out of plan assets and obligations paid from insurance company assets—there is only a total liability.

conflicts of interest, both ERISA and the PBGC's own ethical guidelines forbid individual decision makers from participating in matters in which they have a financial stake. *See* 29 U.S.C. § 1002(21); PBGC, *Public Service is a Public Trust: Ethics Handbook*, at 7 (Sept. 2007).

Yet PBGC Trustee *institutionally* wields the extensive discretion afforded plan administrators and independent trustees *even though* it has a financial interest that is opposite to the interests of pensioners. Every dollar that PBGC Trustee finds must be paid to a beneficiary (under its interpretation of ERISA or the terminated plan) is a dollar that cannot be added to PBGC Insurance Co.'s otherwise dwindling coffers. Not only does PBGC Trustee have a direct financial conflict of interest, but also it is required by statute to take its own interest—in the viability of the pension system writ large—into account. PBGC Trustee must act to promote “the continuation and maintenance of voluntary private pension plans” and “to provide the timely and uninterrupted payment of pension benefits.” 29 U.S.C. § 1302(a). Thus, instead of the dedicated fiduciary that Congress envisioned would act on behalf of participants in failed pension plans, pensioners are now saddled with an adversary in the guise of “trustee.”

Moreover, in displacing private plan administrators and trustees, PBGC Trustee has also deprived pensioners of the market power necessary to promote efficient and responsive plan administration. The PBGC admits that it now averages four years to issue a final benefit determination—a pace that it “eased . . . to address weaknesses in our process.” PBGC 2013 Annual Report at 14. PBGC Trustee took five years to finalize the benefits determinations at issue here, and it took *seven* years in the case of the Delta pilots, see Delta

Pilots Plan Appeal Letter at 2. Yet PBGC Trustee's benefits determinations are often riddled with errors because it mismanages the contractors it hires to make them. *See, e.g.,* PBGC Office of Inspector General, *PBGC Lawfully Terminated the National Steel Plans, but Accepted Poor Quality Work from Contractors*, at 1 (Oct. 23, 2013), available at <http://oig.pbgc.gov/pdfs/PA-09-66-2.pdf>. In the course of its lackluster plan administration, PBGC Trustee routinely incurs enormous and often unnecessary costs. *See, e.g.,* GAO, *Pension Benefit Guaranty Corporation: Asset Management Needs Better Stewardship*, at 1 (June 2011), available at <http://www.gao.gov/new.items/d11271.pdf> (finding gratuitous incursion of \$75 million in transaction costs in 2008 alone).¹¹

Taking Private Property. As mentioned above, Congress created the PBGC to insure pensioners in the event that plans could not satisfy their obligations. *See generally* 29 U.S.C. § 1302. But pensioners in terminated plans do not necessarily receive government insurance money. PBGC Insurance Co. only contributes

¹¹ PBGC Trustee's inefficacy is not merely a matter of mismanagement. As a policy matter, PBGC Trustee only chooses to act on its authority to further the interests of plan beneficiaries when doing so would not burden the resources of PBGC Insurance Co. *See, e.g.,* PBGC's Reply in Support of its Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, *US Airlines Pilots Ass'n v. PBGC*, No. 1:09-cv-01675, at 8–9 (D.D.C. Aug. 31, 2011) (requiring PBGC to perform forensic audits would exacerbate “the problem of scarce resources” and “disrupt the agency's operations”); *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1087 (9th Cir. 2009) (PBGC not required to initiate lawsuit because “PBGC must balance its statutory duties to all stakeholders, including premium payers, participants and beneficiaries in ongoing plans, and those in all of its terminated plans”).

funds when the plan assets allocated to pay benefits under the relevant priority category do not cover the benefits guaranteed under ERISA. *See generally* PBGC, *PC3 Benefits – Q&As* (last visited May 22, 2014), <http://www.pbgc.gov/wr/other/pg/pc3-benefits-qa.html>.

If plan assets are sufficient to cover *all* benefits payable under a given priority category, recipients are paid with the plan's money alone. Such benefits are private property.

Determinations about which benefits should be included in fully funded priority categories are therefore not about allocating scarce government resources. They are not even about allocating plan resources among participants: after PBGC Trustee determines the funding levels for each priority category, any surplus assets not paid out in benefits revert to PBGC Insurance Co. When PBGC Trustee interprets a plan or ERISA to exclude a benefit from a fully funded priority category, it takes pensioners' private property for itself.¹²

¹² Although the PBGC denies that such a tradeoff exists, in fact every dollar that PBGC Insurance Co. pays out above the statutory minimum benefit increases its institutional liability to other pensioners. In the Delta case, the PBGC has claimed that the result of changes to benefits determinations "would be that some Pilots Plan participants and beneficiaries would be entitled to larger PBGC-payable benefit amounts and others would be entitled to smaller benefit amounts," creating "winners" and "losers" among pensioners. Delta Pilots Plan Appeal Letter at 5-6. That is wrong: changes to benefits determinations in the Pilots' favor would instead deplete the plan assets available to satisfy PBGC Insurance Co.'s fixed obligations to pay other pensioners the statutory minimum benefit. Although "[t]he values of the Pilots Plan's assets and PBGC's recoveries [] are fixed," *id.* at 5, what PBGC Insurance Co. must pay from its own funds depends on how many plan assets PBGC Trustee diverts to pay some participants more.

II. The Court Should Grant the Petition to Clarify that the PBGC Acts as an ERISA Fiduciary When It Makes Benefit Determinations as the Trustee of a Terminated Plan.

This case is a paradigmatic example of the PBGC's use of its newfound discretion as "trustee"—a discretion that Congress expressly withheld from the insurance company—to advance its own interests at the expense of pensioners. When PBGC Trustee took over the US Airways Pilots Plan ("Plan"), it acquired nearly \$1.2 billion in Plan assets. *See* PBGC Admin. Rec. filed in D. Ct. (Dkt. No. 52), at 27 of 50. After determining that benefits in Priority Category 3 were 100% funded, *id.*, PBGC Trustee made a series of choices to limit the benefits that PBGC Insurance Co. would have to pay—from Plan assets—under that category. Among other similar decisions, PBGC Trustee excluded from Priority Category 3 ERIP benefits (on the grounds that they were "in effect" 31 days too late) and benefits that Congress had authorized in raising ERISA's limits (on the grounds that they were not payable each of the five years before determination). Each determination required PBGC Trustee to construe ambiguous statutory language, and in each instance PBGC Trustee adopted the interpretation that effectively transferred Plan assets to PBGC Insurance Co.¹³

This litigation is also a paradigmatic example of how PBGC Trustee has insulated its self-serving decision making from meaningful judicial scrutiny. In a string of

¹³ With respect to the ERIP benefits, PBGC Trustee did not articulate a plausible interpretation of "in effect" in support of its decision against its beneficiaries until after this litigation began. *See* Pet. 27-29.

cases—including one involving the Plan—the PBGC has successfully argued that under section 4003(f) of ERISA, once a pension plan has terminated and closed its principal office, the only court in which actions may be brought against the PBGC is the District of Columbia.¹⁴ *See, e.g., Stephens v. US Airways Grp.*, 555 F. Supp. 2d 112 (D.D.C. 2008) (noting PBGC’s successful transfer of venue from Northern District of Ohio to District of Columbia); *United Steelworkers, Int’l, AFL-CIO v. PBGC*, 602 F. Supp. 2d 1115 (D. Minn. 2009) (transferring case to District of Columbia upon PBGC motion); *Carstens v. Michigan Dep’t of Treasury*, 2009 WL 2581504, No. 1:09-cv-664, 48 Emp. Benefits Cas. (BNA) 1060 (W.D. Mich. Aug. 18, 2009) (same); *Deppenbrook v. PBGC*, No. 2:10-cv-134, 2011 WL 1045765, 50 Emp. Benefits Cas. (BNA) 2981 (W.D. Pa. Mar. 17, 2011) (same).

It is clear why the District of Columbia is the PBGC’s forum of choice. Time and again, courts in the D.C. Circuit have adopted a highly deferential stance toward the PBGC as a government actor. *See, e.g., United Steelworkers, Int’l, AFL-CIO v. PBGC*, 707 F.3d 319, 325 (D.C. Cir. 2013) (declining to independently weigh evidence in reviewing PBGC determination); *Becker v. Weinberg Grp., Inc. Pension Trust*, 473 F. Supp. 2d 48 (D.D.C. 2007) (holding PBGC decision not to halt termination or perform audit unreviewable as exercise of

¹⁴ To be clear: DP3 does not agree that the District of Columbia is the only permissible venue for litigation against the PBGC that postdates plan termination. *Cf. Adey v. PBGC*, No. 2:06-cv-1421, 2007 WL 433176, at *2 (W.D. Pa. Feb. 2, 2007) (holding that “interests of justice” favored pensioners’ chosen forum over District of Columbia).

prosecutorial discretion); *Sara Lee Corp. v. Am. Bakers Ass'n*, 512 F. Supp. 2d 32 (D.D.C. 2007), 252 F.R.D. 31 (D.D.C. 2008), 671 F. Supp. 2d 88 (D.D.C. 2009) (collectively applying deferential “arbitrary and capricious” standard to PBGC reclassification of pension plan and “strong presumption of regularity” to PBGC submission of administrative records); *Deppenbrook v. PBGC*, 950 F. Supp. 2d 68 (D.D.C. June 17, 2003) (reviewing denial of shutdown benefits with “great deference”).

In this case, the District of Columbia’s courts were true to form. The district court held twice that PBGC Trustee’s benefits determinations are entitled to *Chevron* deference. See *Davis v. PBGC*, 864 F. Supp. 2d 148, 155 (D.D.C. 2012) (“[T]o the extent that Plaintiffs’ claims challenge PBGC’s interpretations of ambiguous provisions of ERISA, those interpretations are entitled to *Chevron* deference.”); Mem. Op. and Order (Dkt. No. 27), at 4–5 (similar). In an interlocutory opinion, the Court of Appeals explicitly adopted the same position, explaining:

We see no reason to depart from the usual deference we give to an agency interpreting its organic statute. The pilots point out that a private party serving as trustee would not receive *Chevron* deference, but this proves nothing. Unlike a private trustee, the PBGC has unique experience and ‘practical agency’ experience in interpreting ERISA. . . . The PBGC is therefore ‘better equipped’ to interpret ERISA than courts, [] and it is for this reason we defer to the PBGC’s authoritative and reasonable interpretations of ambiguous provisions of ERISA.

Davis v. PBGC, 571 F.3d 1288, 1293 (D.C. Cir. 2009) (internal citations omitted). Although the Court of Appeals later purported to sidestep the question of the standard of review (without disavowing the Circuit’s precedents applying *Chevron* deference), its perfunctory explanation in support of the PBGC’s interpretation of “in effect” makes evident that the appellate court implicitly deferred to the PBGC. *Cf. Davis v. PBGC*, 734 F.3d 1161, 1168 (D.C. Cir. 2013) (“[PBGC’s] choice is the better interpretation of the regulatory scheme and there is no question that the court defers to the regulations’ interpretation of the statute because the regulation was issued in the PBCG’s [sic] role as an agency (and not as a fiduciary), *see PBGC v. LTV Corp.*, 496 U.S. 638, 648 (1990).”).

This Court should not permit the Court of Appeals for the District of Columbia Circuit to immunize its deferential standard of review of PBGC Trustee’s benefits determinations by failing to acknowledge it. This case presents an ideal opportunity for the Court to clarify the appropriate standard of review when PBGC Trustee makes self-interested decisions that Congress intended to fall to private fiduciaries. The substantive questions presented implicate Priority Category 3, the highest operative priority category under ERISA, and two of its most ambiguous and consequential provisions. PBGC Trustee repeatedly decides these close questions of statutory interpretations—which courts have resolved differently in analogous contexts, *see, e.g., Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994) (“effective” date of cost-of-living adjustments not necessarily when “payable”)—against pensioners and in the interests of PBGC Insurance Co.

This case also presents a rare opportunity. Despite its extraordinary salience, the question of the appropriate standard of review of PBGC Trustee's benefits determinations will seldom reach this Court. Most plaintiffs will lose in both the district court and the Court of Appeals, especially when forced into the deferential District of Columbia. And pensioners will almost never have the wherewithal to pursue unsuccessful litigation to the Supreme Court of the United States.

In this case, PBGC Trustee took five years to make final benefits determinations before the retired pilots could even begin the process of challenging those determinations in court. For participants in the Delta Pilots Plan, seven years have already elapsed. This Court's review is urgently needed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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