No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs-Appellants

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan (Judge Arthur J. Tarnow)

APPELLANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE PANEL'S DUE-PROCESS HOLDING REMAINS CONTRARY TO *NACHMAN* 1

II. THE PANEL'S HOLDING THAT THE PLAN'S TERMINATION WAS NOT ARBITRARY AND CAPRICIOUS REMAINS ERRONEOUS 11

CONCLUSION 16

CERTIFICATE OF WORD COUNT .... *Post*

CERTIFICATE OF SERVICE .... *Post*

TABLE OF AUTHORITIES

Page(s)

Cases

Nachman Corp. v. PBGC,
446 U.S. 359 (1980) .... *passim*

Pfahler v. Nat'l Latex Prods. Co.,
517 F.3d 816 (6th Cir. 2007) 9

In re UAL Corp.,
468 F.3d 444 (7th Cir. 2006) 14, 15

Wilmington Shipping Co. v. New Eng. Life Ins. Co.,
496 F.3d 326 (4th Cir. 2007) 8, 9

Statutes

29 U.S.C. § 1002 7

29 U.S.C. § 1053 .... 5, 6, 7

29 U.S.C. § 1054 7

29 U.S.C. § 1302 .... 9, 10

29 U.S.C. § 1322 3

29 U.S.C. § 1342 .... *passim*

29 U.S.C. § 1347 .... 8, 9, 10

29 U.S.C. § 1362 3

Other Authorities

White House, *Memorandum from the President on Pensions of Delphi Corporation Retirees and Other Retirees Covered by Vulnerable Pension Plans* (Oct. 22, 2020), https://www.whitehouse.gov/presidential-actions/memorandum-president-pensions-delphi-corporation-retirees-retirees-covered-vulnerable-pension-plans/ 10, 15

INTRODUCTION

Pursuant to the Clerk's letter of December 29, 2020, Appellants respectfully file this supplemental memorandum of law in further support of their petition for rehearing *en banc*. While the panel now, in the context of its due-process ruling, did acknowledge *Nachman Corp. v. PBGC,* 446 U.S. 359 (1980), its amended opinion failed fully to follow *Nachman*'s holdings. As a result, the panel's continued determination that the Due Process Clause allows for the termination of an ERISA plan without a hearing remains contrary to *Nachman* and its progeny in this Circuit. Additionally, the panel failed to adjust its analysis at all to address Appellants' second basis for seeking rehearing *en banc*, which was that the panel wrongly judged the substantive lawfulness of the PBGC's decision to terminate the Salaried Plan under criteria established in subsection (a) of 29 U.S.C. § 1342, rather than subsection (c), and also upheld the PBGC's termination of the Plan on grounds never invoked for termination by the agency itself. No less than the original opinion, the panel's amended opinion – as to both its due-process holding and its holding that the Salaried Plan's termination was not arbitrary and capricious – should be reheard and corrected by the Court *en banc*.

ARGUMENT

I. THE PANEL'S DUE-PROCESS HOLDING REMAINS CONTRARY TO *NACHMAN*

In its original opinion, the panel held that Appellants had no "legitimate"

property interest in the unfunded portions of their pensions at the time of termination, and therefore no associated due-process rights protecting against deprivation of the amounts, because a provision in the Salaried Plan supposedly made vested, but unfunded, benefits "forfeitable." Original Slip Op. 14, 13 (Sept. 1, 2020) (Doc. No. 42-2). The Salaried Plan provision cited by the panel states "that, in the event of termination, the 'right of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date, is nonforfeitable.'" *Id.* at 13. Based on this Plan provision, the panel determined that "*funded* benefits accrued up to the date of plan termination are nonforfeitable," but that – "[b]y necessary implication" – "unfunded benefits, regardless of whether they are vested, are forfeitable if a plan is terminated." *Id.* (emphasis in original).

In their rehearing petition, Appellants explained that *Nachman* forecloses the view that vested, unfunded benefits are forfeitable. *Nachman* was a case brought by an employer against the PBGC, where the employer terminated its ERISA plan in 1975 before certain of ERISA's statutory provisions became effective and when the employer had left vested benefits under the particular plan largely unfunded. If vested benefits under the plan could be "characterized as 'nonforfeitable,'" then the PBGC would need to pay insurance to cover them; and the PBGC, in turn, would have "a statutory right under [ERISA] to reimbursement from the employer," subject to statutory recovery limits based on a percentage of the

employer's net worth. *Nachman*, 446 U.S. at 362, 363; *see* 29 U.S.C. § 1362(b). To avoid liability altogether, the employer in *Nachman* argued that the benefits were forfeitable, relying on a plan provision "limiting [employees'] benefits to the assets in the pension fund." *Nachman*, 446 U.S at 362; *see id.* at 364-65 (the plan "specified that upon termination the available funds, after payment of expenses, would be distributed to beneficiaries, classified by age and seniority, *but only to the extent that assets were available*") (emphasis added). The Supreme Court rejected the employer's argument, concluding that the plan provision concerning "unfunded benefits" did "not make otherwise vested benefits forfeitable within the meaning of the Act." *Id.* at 372 n.17. Rather, the provision properly should be deemed "only an employer liability disclaimer clause." *Id.* at 369.

Though now recognizing, in light of the rehearing petition, that *Nachman* "complicate[s] the matter," the panel in its amended opinion nonetheless reiterated its original conclusion that Appellants had no legitimate property interest in the unfunded benefits at issue in this case. Amended Opinion 13 (Dec. 28, 2020) (Doc. 47-2) [hereinafter "Am. Op."]. The panel saw *Nachman* as prescribing that a beneficiary's vested benefits are nonforfeitable up to the maximum "statutor[ily] guarantee[d]" amount insured by the PBGC, as opposed to the nonforfeitable amount being "the full amount of the unfunded benefits." *Id.* at 14 (citing 29 U.S.C. § 1322(b)(3)). As the panel saw it, because the PBGC stated (in its

rehearing response) that, "in fact, 'PBGC has been paying these vested benefits up to the guarantee limit,'" Appellants' challenge concerned solely vested, unfunded amounts "*beyond* the ERISA guarantee limit" and thus fell outside of *Nachman*'s purview. *Id.* (emphasis added). Unprotected under *Nachman* and ERISA's "guarantee limits," the panel believed the "remaining balance" was forfeitable under "contract law based on the plain language in the Salaried Plan document." *Id.* On this basis, Appellants had no "legitimate claim of entitlement to the entire amount of their vested, but unfunded, pension benefits." *Id.* at 16.

The panel's nuanced way of cabining *Nachman* is indefensible. The panel cherry-picked from *Nachman*, ignoring the most important aspect of the decision for present purposes: a central tenet of *Nachman* is that *any* plan provision attempting to make vested benefits forfeitable based on underfunding is illegal after ERISA's effective date of January 1, 1976. The Court detailed that proposition in *Nachman*'s lengthy footnote 10, which the Court then referenced repeatedly elsewhere in its decision. *See Nachman*, 446 U.S. at 366 n.10 (a "clause render[ing] . . . vested benefits forfeitable . . . would be invalid after January 1, 1976"); *see also id*. at 373 n.19 ("Of course, a provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. See n.10, *supra*."); *id.* at 364 n.6, 369, 370, 372,

384; *see generally* Appellant's Pet. for Panel Reh'g & Reh'g *En Banc* 7-8 (Oct. 15, 2020) (Doc. 44) [hereinafter "Reh'g Pet."].

As explained in *Nachman*, the invalidity of a plan provision triggering forfeiture due to underfunding follows from ERISA § 203(a), 29 U.S.C. § 1053(a), which the Court described as "a central provision in ERISA." *Nachman*, 446 U.S. at 366 n.10. Section 203(a)

> requires generally that a plan treat an employee's benefits, to the extent they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § 203(a)(2), as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date.

Id. Because "[n]one of the listed conditions [in § 203(a)(3)] relates to insufficient funding," a plan provision sanctioning forfeiture on the basis of underfunding is "invalid" post-January 1, 1976. *Id.*[1]

Nor can these statements in *Nachman* be consigned to mere *dictum*. Among the Supreme Court's tasks in *Nachman* was construing the scope and effect of the disputed clause in the relevant ERISA plan; it chose to interpret the clause simply as one "disclaiming employer liability" for vested benefits owed when a plan

[1] Provisions of ERISA are sometimes referenced by their section in the original Public Law (thus, § 203(a)), and sometimes by their official cite in the U.S. Code (thus, 29 U.S.C. § 1053(a)).

terminates without full funding, not as a provision seeking to make the benefits forfeitable. *Id.* at 372 n.17. Interpreting the clause as "mak[ing] otherwise vested benefits forfeitable" (*id.*) would have foreclosed employers from including similar clauses in plans after January 1, 1976 (as a result of ERISA § 203(a), 29 U.S.C. § 1053(a)), even if they wished to limit employer liability in termination situations to the recovery limits applicable to the PBGC under ERISA. The Court thought Congress "plainly did not intend to prevent employers from limiting their potential *direct* liability to their employees," because that would subvert Congress's establishment of proscriptions (based on a percentage of the employer's net worth) on the PBGC-imposed remedies. *Nachman*, 446 U.S. 384-85 (emphasis added). Hence, the Court necessarily explained the illegality of forfeiture provisions after January 1, 1976 as part of its analysis adopting the saving construction it gave to the relevant ERISA-plan clause.[2]

[2] The dissent in *Nachman* further substantiates that a central part of the majority's opinion was the finding of illegality as to plan provisions causing forfeiture of vested, unfunded benefits. Justice Stewart dissented because he believed the ERISA-plan clause could not credibly be read as simply "purport[ing] to limit the *employer's* liability" but must be construed as intending the forfeiture of unfunded benefits; however, he also believed that the ERISA plan at issue could utilize a forfeiture provision, since the termination occurred before ERISA's effective date. 446 U.S. at 391 (Stewart, J., dissenting) (emphasis in original). Importantly, Justice Stewart nevertheless agreed with the majority that "[t]he Nachman plan . . . could not, after January 1, 1976, have continued to promise its fully vested participants a 'nonforfeitable' right only to that part of their 'accrued benefit'

Respectfully, when one reads the panel's amended opinion, it is as if this lengthy, key portion of *Nachman* is non-existent – *i.e.*, that *Nachman* does not even address the illegality of plan provisions purporting to cause the forfeiture of vested, unfunded benefits at the time of termination. The panel does not mention it, credits the "plain language" of the Salaried Plan provision as making all vested, unfunded benefits above the PBGC guarantee amount forfeitable upon termination, and concludes that – because of the alleged forfeiture – Appellants have no legitimate interest in the "remaining balance" of their vested, unfunded benefits. Am. Op. 14. To make matters worse, the panel addressed (and, even then, incorrectly, *see* Reh'g Pet. 10-11) only part of ERISA's anti-cutback regime (just ERISA § 204(g), 29 U.S.C. § 1054(g)), not the whole thing, as if § 203(a) too was non-existent. *See* Am. Op. 15. Opposite to the amended opinion, a proper reading of *Nachman* necessitates that the Salaried Plan provision cited by the panel – if read as prompting a forfeiture of any vested benefits – be deemed illegal and thus unenforceable, resulting in all vested, unfunded benefits being nonforfeitable and therefore subject to legitimate property expectations and due-process rights.

Perhaps the panel believed Appellants could have no legitimate expectation to any vested, unfunded benefits above the PBGC insurance guarantee because

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which could be funded by the plan." *Id.* at 390 n.8 (quoting and citing 29 U.S.C. §§ 1002(23), (34), (35), 1053, 1054).

Nachman recognized the employer's right to foreswear direct liability after termination through a provision like the one included in the Salaried Plan. In that sense, the remaining balance was not "collect[able]" from the employer due to any valid employer-liability-disclaimer terms in the Salaried Plan. *Nachman*, 446 U.S. at 366. And if the amounts were not collectable from the employer, and the PBGC is paying all benefits covered by insurance, the panel may have thought the remaining vested, unfunded amounts are properly characterized as forfeited, since there might be no legitimate means for claiming the amounts.

If that was the panel's belief, it was mistaken, as the non-forfeitability of the remainder (and thus the illegality of Plan provisions that would enable a forfeiture of those amounts) continues to have great consequence. An employer-liability-disclaimer clause "merely" affects collectability against the employer, "without qualifying the employees' rights *against the plan*." *Id.* (emphasis added). Post-termination, vis-à-vis *the Salaried Plan*, Appellants enjoy the right to eventual "[r]estoration" of the Salaried Plan, a right that – once it accrues – covers all vested benefits. 29 U.S.C. § 1347 (section title).

For instance, after termination, the PBGC "must hold plan assets in trust for the benefit of plan participants and pay *all* plan benefits, if possible." *Wilmington Shipping Co. v. New Eng. Life Ins. Co.*, 496 F.3d 326, 336 (4th Cir. 2007) (emphasis in original). If asset accretions through investment gains (or from other

sources, *see id.*) ultimately result in the Salaried Plan becoming fully funded, then "the PBGC, acting pursuant to its administrative powers under ERISA, could restore the fully-funded Plan pursuant to 29 U.S.C.[] § 1347." *Id.* at 335. In that situation, the PBGC could order the Salaried Plan's assets transferred to "a plan administrator" or segregated for administration by itself to pay "remaining . . . liabilities of the [P]lan." 29 U.S.C. § 1347; *see Wilmington Shipping*, 496 F.3d at 336 (noting that, post-termination, plan continues to have the obligation to "satisf[y] *all* plan liabilities") (emphasis added); *see also Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 828 (6th Cir. 2007) (relying on *Wilmington Shipping* and sanctioning "appointment of an independent fiduciary" to hold assets "in trust" for plan's administration when, because of termination, "there is no plan to receive" funds). Or the Plan can be restored under any other circumstances that the PBGC deems "appropriate and consistent with its duties." 29 U.S.C. § 1347.

Indeed, pursuant to this restoration power, President Trump issued a Presidential Memorandum on October 22, 2020, ordering the Cabinet officials who sit on the PBGC's Board of Directors, *see* 29 U.S.C. § 1302(d), to:

> review the Delphi [Salaried Plan] matter . . . and inform the President within 90 days of the date of th[e] memorandum of any appropriate action that may be taken, consistent with applicable law, to (i) address affected Delphi retirees' lost pension benefits, and (ii) bring additional transparency to the decision to terminate the plan, consistent with appropriate protections for privileged and confidential material. This review shall include an evaluation of the feasibility of enacting

> legislation *and whether the plan may be restored to its pretermination status under section 1347 of title 29, United States Code*.

White House, *Memorandum from the President on Pensions of Delphi Corporation Retirees and Other Retirees Covered by Vulnerable Pension Plans* § 2(a) (Oct. 22, 2020) (emphasis added) [hereinafter "Pres. Mem."].[3] It would be nonsensical to contemplate restoration of the Salaried Plan if Appellants had forfeited unfunded benefits above the PBGC insurance amount, for there would then remain no benefits to pay. In reality, if the panel's view prevailed, then § 1347's restoration remedy would become a dead letter: after *Nachman*'s blessing of employers limiting their direct liability, every sophisticated employer (like Delphi here) should include an employer-liability-disclaimer clause in its plan, which would then (under the panel's reasoning and contrary to *Nachman*'s instruction as to the illegality of forfeiture provisions after January 1, 1976) wipe out the balance of unfunded benefits whose payment would have been the very reason for a post-termination restoration of the plan.

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[3] Available at https://www.whitehouse.gov/presidential-actions/memorandum-president-pensions-delphi-corporation-retirees-retirees-covered-vulnerable-pension-plans/. Apropos of its stonewalling throughout these proceedings, the PBGC has not responded, at least publicly, to the President's Memorandum. In fact, there has been no indication that the PBGC has even taken the Memorandum seriously, notwithstanding that the President oversees the PBGC. *See* 29 U.S.C. § 1302(a).

In sum, Appellants' benefits above the PBGC insurance guarantee had, prior to the termination, vested under the Salaried Plan; in turn, *Nachman* holds that any Plan provision signaling the forfeiture of vested benefits due to underfunding at the time of termination is illegal; and Appellants have continuing rights post-termination from avenues other than the employer to the full vested, unfunded amounts. Against that backdrop, the panel's determination in the amended opinion that Appellants' vested, unfunded benefits above the PBGC insurance limits were forfeited and that Appellants therefore had no legitimate property interest in them remains contrary to *Nachman* and ERISA's anti-cutback rules. The Court should correct the panel's due-process ruling *en banc*.[4]

II. THE PANEL'S HOLDING THAT THE PLAN'S TERMINATION WAS NOT ARBITRARY AND CAPRICIOUS REMAINS ERRONEOUS

Not only does the panel's amended opinion remain erroneous on the due-process issue, the panel in the amended opinion likewise continued wrongly to hold that the Plan's termination was not arbitrary and capricious. In fact, on the

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[4] It should be noted that the due-process problem could have been avoided had the panel held that Congress in ERISA, 29 U.S.C. § 1342(c), authorized terminations only pursuant to a court adjudication. Notwithstanding the usual rule that a statute should be read to avoid a serious constitutional question, the panel did not follow that route here. Though Appellants have not sought rehearing *en banc* of the panel's holding that ERISA authorizes adjudication-free terminations, they of course reserve their right to seek Supreme Court review on each of the panel's holdings.

latter front, the panel's amended opinion did not deviate whatsoever from its original opinion, despite Appellants' showing in their rehearing petition both that the panel had incorrectly used the lenient criteria under 29 U.S.C. § 1342(a) for *instituting* a termination proceeding, rather than § 1342(c)'s limited criteria for *actually terminating* a plan, to review the substantive legality of the PBGC's termination of the Salaried Plan and that the panel had upheld the termination for reasons different than the PBGC itself invoked.

In its rehearing response, the PBGC contends that, for termination, "the PBGC decisionmaker considered the grounds under 29 U.S.C. § 1342(a)," which – if true – should alone be enough to prompt rehearing *en banc* concerning the panel's amended opinion, insofar as a majority of the Court's members agree with Appellants that § 1342(c)'s grounds solely should govern terminations. PBGC Resp. to Reh'g Pet. 9 (Nov. 10, 2020) (Doc. 46). Nonetheless, as to the veracity of the PBGC's assertion that the PBGC decisionmaker did rest on § 1342(a) – so that the panel then did review the termination on the grounds supposedly invoked by the decisionmaker itself – the PBGC has engaged in revisionist history. Though the PBGC cites "the Notice of Determination that the PBGC issued to Delphi," *id.*, a careful reading of that document shows that the PBGC cited the § 1342(a) criteria "to *proceed* under ERISA . . . to have the Plan terminated" (Notice of Determination, RE 53, PageID# 1603 (emphasis added)) – *i.e.*, to *institute*

termination proceedings, which no one contests that the PBGC then did institute (but subsequently aborted) in the District Court. *See* Am. Op. 4. It is the other part of the Notice of Determination that is dispositive as to the decisionmaker's grounds for actual termination: "PBGC has *further* determined, *under ERISA § 4042(c), 29 U.S.C. § 1342(c)*, that *the Plan must be terminated* in order to avoid any unreasonable increase in the liability of the PBGC insurance fund." Notice of Determination, RE 53, PageID# 1603 (emphasis added); *accord id.* at PageID# 1605 (PBGC's agreement with Delphi indicating that Notice of Determination had found "the Plan should be terminated *under 29 U.S.C. § 1342(c)*") (emphasis added).

Furthermore, the panel's allowance for terminations by agreement under § 1342(a)'s criteria (instead of § 1342(c)'s criteria) likely eliminates the possibility of terminations by court adjudication henceforth, with all terminations occurring via a simple agreement between the PBGC and the sponsor wishing to terminate its plan (without any beneficiary input). Where the PBGC thinks termination is warranted, it will want the plan to terminate by agreement, since it can then use the easier criteria under § 1342(a) to defend it, whereas indisputably a termination by a court can occur only if the limited grounds in § 1342(c) are satisfied. The PBGC will further be incentivized exclusively to use the termination-by-agreement route because it will enjoy the deferential arbitrary-and-capricious standard of review

upon judicial review of a termination agreement (like the panel here applied), while a *de novo* proceeding with the PBGC having the "burden of persuasion" would need to occur for the PBGC to accomplish a termination in a court. *In re UAL Corp.*, 468 F.3d 444, 450 (7th Cir. 2006) (Easterbrook, J.).

As a practical matter, administrative terminations already dominate over judicial ones. The PBGC has admitted, even boasted, that "[t]he overwhelming majority of plan terminations have occurred by agreement with the plan administrator," Appellee's Br. 6 (Sept. 27, 2019) (Doc. 27), and the PBGC has stated that it "prefer[s]" terminations "by agreement in order to avoid the expense and delay of litigation." Notice of Determination, RE 53, PageID# 1601. The panel's adoption of § 1342(a) criteria as the guidepost for administrative terminations, in light of the easier satisfaction of those criteria (than § 1342(c)'s grounds) and the accompanying deferential standard of judicial review, will clinch the triumph of administrative terminations over the judiciary's role under § 1342(c).

The irony in all of this is that Congress never saw it coming. No one reasonably can maintain that Congress expected terminations by agreement to occur to the exclusion of judicial adjudications, given the painstaking manner in which Congress laid out the procedures for judicial proceedings on terminations throughout § 1342, in contrast to the cryptic few terms in the fourth sentence of

§ 1342(c) that the panel found to authorize terminations by agreement. *See* Am. Op. 7; *cf. In re UAL Corp.*, 468 F.3d at 449 ("The only authority that the PBGC has under § 1342 is to ask a court for relief."). Yet, Congress's many words in § 1342 to delineate court procedures will go unutilized as a result of the impetus that the panel's espousal § 1342(a) standards for review of a termination agreement gives for further PBGC renunciation of court adjudications under § 1342(c). What is even more demoralizing is that the PBGC will have accomplished its goal of neutering § 1342(c) in the context of the Salaried Plan's termination, an instance in which the President himself (to whom the PBGC should be answering) has said the federal government "failed fully to protect the pensions of Delphi's salaried and non-unionized workforce" and a court adjudication would have ensured their protection. Pres. Mem. § 1.

CONCLUSION

Rehearing *en banc* should be granted.

January 12, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the foregoing **APPELLANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING *EN BANC*** contains 3,587 words, exclusive of the cover page, tables, signature block, and certificates, as calculated by Microsoft Word Office 365, the word processing system used to prepare this document.

January 12, 2021

/s/ Anthony F. Shelley
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2021, I electronically filed the foregoing **APPELLANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING *EN BANC*** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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