

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DENNIS BLACK, et al.,

Plaintiffs,

v.

Case No. 2:09-cv-13616

Hon. Denise P. Hood

Magistrate Judge Mark A. Randon

**THE PENSION BENEFIT GUARANTY
CORPORATION, et al.,**

Defendants.

**MOTION OF OHIO ATTORNEY GENERAL RICHARD CORDRAY FOR LEAVE TO
FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS DENNIS BLACK,
CHARLES CUNNINGHAM, KENNETH HOLLIS, AND THE DELPHI SALARIED
RETIREE ASSOCIATION**

Ohio Attorney General Richard Cordray respectfully moves for leave to file a brief as *amicus curiae* in support of Plaintiffs Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association in their motion for a preliminary injunction for the reasons set forth in the accompanying brief.

Respectfully submitted,

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IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION AGAINST ACTIONS TO BE TAKEN BY DEFENDANT
PENSION BENEFIT GUARANTY CORPORATION**

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INTRODUCTION

Defendant Pension Benefit Guaranty Corporation (the “PBGC”) intends to impose severe reductions in the pension benefits earned by 20,000 former Delphi and General Motors employees before this Court reviews the facts in this case and evaluates whether such a drastic move must occur. As Plaintiffs Dennis Black, et al. (“Plaintiffs”) have demonstrated, this unilateral action will violate the due process rights that the United States Constitution affords to the affected retirees and will contradict procedures that Congress has prescribed for such circumstances through the Employee Retirement Income Security Act (“ERISA”). Those rights and procedures alone warrant a preliminary injunction in this case, which would protect this Court’s jurisdiction by allowing it to conduct the necessary impartial review of the pertinent law and facts before the PBGC moves forward with its plan (if it must do so at all).

In addition, this Court should consider the momentous implications of the preliminary injunction motion for affected retirees, their communities, and the State of Ohio. If a PBGC bypass of due process and ERISA is *ever* proper, this is not the case. Defendant PBGC’s plans would deliver a crushing blow: such drastic reductions of hard-earned pension benefits will devastate not only thousands of Ohio retirees and their dependents who continue to depend on fulfillment of the commitments made by their former employers, but also a state and region that are already facing grave economic circumstances. Constitutional due process rights and the protections set forth in Congress’ prescribed statutory procedures are critical in all circumstances, and especially so when the stakes are this high.

What makes a preliminary injunction particularly needed here is that some of the injury that Defendant PBGC could cause during the course of this litigation can never be undone. If Plaintiffs prevail on the merits, then of course this Court may later overturn the process by which Defendant PBGC summarily terminated Plaintiffs' pension plan and cut the affected retirees' pension benefits. At that point, the Court will be able to require the PBGC to compensate Plaintiffs for any income which Defendant PBGC unjustifiably denied to them. Yet at that later point it will be impossible to repair the emotional suffering of Plaintiffs, the denial of justice for thousands of Ohio residents, the consequences for them and their families as they are forced to make choices about how to cope with a period of sharply reduced income at a time when other economic avenues are severely constrained, and finally the damaging ripple effects on Ohio's already-suffering economy that will have occurred during the course of this litigation. A preliminary injunction is critical here to prevent such unnecessary harm unless or until this Court determines that it is indeed unavoidable.

In light of these dire circumstances, the Ohio Attorney General respectfully urges this court to grant Plaintiffs' motion for a preliminary injunction. The court should protect its jurisdiction by preserving its opportunity to review the facts and law at issue in a more deliberate manner before Defendant PBGC acts unilaterally to strip Plaintiffs of their hard-earned pension benefits, causing immeasurable and irreversible injury to them, to their dependents, and to so many communities.

STATEMENT OF *AMICUS* INTEREST

Ohio Attorney General Richard Cordray serves as chief law officer for the State of Ohio. Ohio Rev. Code Ann. § 109.02. In this capacity, the Ohio Attorney General asserts and defends numerous legal interests held by the State of Ohio and its people. When litigation arises concerning the constitutional rights and economic well-being of thousands of Ohioans, the Ohio Attorney General bears a duty to exercise the powers of his office to protect the interests of Ohio and its citizens.

This case requires the Ohio Attorney General's attention for several reasons. First, Defendant PBGC is attempting to deprive thousands of Ohio residents of their constitutional right to due process. Second, the effect of that deprivation is to allow Defendant PBGC, in contravention of a judicial process prescribed by Congress for such situations, to drastically reduce pension benefits earned by the affected Ohioans. Finally, Defendant PBGC's actions will cause a widespread ripple effect through Ohio's already-suffering communities and do harm to the State's economy while further straining its social services budget. The PBGC cannot be allowed to give short shrift to constitutional rights, and the Ohio Attorney General cannot stand by while such wrongs occur. As such, the Ohio Attorney General supports the Plaintiffs in their pursuit of a just resolution in this case that comports with the Plaintiffs' constitutional rights to due process under the law and to the statutory protections conferred by ERISA.¹

¹ This *amicus* brief offers support only for Plaintiffs' motion for a preliminary injunction as sought against Defendant PBGC. The Ohio Attorney General, through this *amicus* brief, takes no position regarding other pleadings or claims in this case.

STATEMENT OF THE CASE AND FACTS

For the purposes of this *amicus* brief, the Ohio Attorney General adopts the statement of the case and facts presented in Plaintiffs' Brief in Support of Motion for Preliminary Injunction. That brief sets forth the nature and degree of Defendant PBGC's contravention of federal law. The Ohio Attorney General here asserts that not only is Defendant PBGC attempting to bypass federal law and the courts by legally dubious means, but it is doing so in the worst possible circumstances for the victims affected – the thousands of Delphi retirees and the communities they support. From the standpoint of the Ohio Attorney General, the public interest here lies heavily in favor of this Court granting Plaintiffs' motion so that a deliberate review of the facts and law at issue may occur before Plaintiffs and the State of Ohio suffer irreparable harm.

Plaintiffs estimate that their lawsuit affects the interests of approximately 20,000 former salaried employees of Delphi and General Motors. In recent months, at least 6,000 of those former employees joined Plaintiffs' grassroots organization, the Delphi Salaried Retiree Association ("DSRA"). Plaintiffs report that more than 1,400 members of the DSRA currently live in Ohio, which was home to several Delphi manufacturing plants. Many others who have not yet joined the group undoubtedly also reside in the state.

Plaintiffs forecast that Defendant PBGC's termination of the plan, if allowed to take effect, will result in cuts of 30-70% to the pension benefits earned by each of these salaried retirees. *See* Compl. ¶ 22. These reductions will occur pursuant to three federally imposed limits on pension benefits administered by the PBGC. U.S. Gov't Accountability Office, *Pension Benefit Guaranty Corporation: More Strategic Approach Needed for Processing*

Complex Plans Prone to Delay and Overpayments, No. GAO-09-716, at 7 (2009) (describing the maximum, phase-in, and accrued-at-normal limits required by the Employee Retirement Income Security Act (“ERISA”)) (Exhibit G – Plaintiffs’ Brief).

The maximum insurance limitation of ERISA caps the benefits that Defendant PBGC will offer retirees, depending on a retiree’s age when the PBGC terminates her pension. For example, in 2009 the maximum payment to a retiree who is 65 on the plan termination date is \$54,000; the maximum payment to a retiree who is 55 on the plan termination date is \$24,300. 29 U.S.C. § 1322(b)(3); 29 C.F.R. § 4022.23 (2009); Pension Benefit Guaranty Corp., *Maximum Monthly Guarantee Tables* (2009). The phase-in limitation restricts the proportion of recent plan benefit improvements that Defendant PBGC will guarantee. 29 U.S.C. § 1322(b)(1), (7); 29 C.F.R. § 4022.25 (2009); *see also* Pension Benefit Guaranty Corp., *PBGC’s Guarantee Limits—an Update* 4 (September 2008). And the accrued-at-normal limitation constrains the amount that a retiree can be paid by capping benefits to the maximum monthly payment that a retiree could receive at normal retirement age and thereby reducing any supplemental benefits or bridge benefits that the employer promised the retiree as an incentive for early retirement. 29 C.F.R. § 4022.21 (2009); *see also* Pension Benefit Guaranty Corp., *PBGC’s Guarantee Limits—an Update* 3 (September 2008).

Of course, these limits frequently injure retirees when their pension plans are terminated and assumed by the PBGC.² But the harm threatened here is different and worse than the norm.

² Recently, members of the United States Congress introduced legislation recognizing that the ERISA-imposed guarantee limits provide insufficient protection to plan beneficiaries and

These limits are especially problematic to affected Delphi retirees for at least two reasons. First, the PBGC's age-based payment schedule penalizes certain workers who retire at a young age, regardless of whether they worked 30 years (or more) before retiring. Pension Benefit Guaranty Corp., *PBGC's Guarantee Limits—an Update*,² (September 2008). Second, the PBGC payment schedule fails to appropriately compensate retirees who choose to participate in early retirement programs in exchange for supplemental benefits. *Id.* at 21. Unfortunately, many Delphi salaried retirees participated in company retirement programs that leave them especially vulnerable to these ERISA limitations: they participated in defined early employee retirement plans, retired before the age of 62, and were awarded “bridge” or early retirement supplements payable until they become eligible for Social Security benefits. Frank Akpadock, *Measuring the Economic Impact of Pension Reductions and Health Care Cuts on the Salaried Retirees of Delphi Packard Electric Systems Resident in the Mahoning Valley, Ohio* (September 2009).³ Consequently, many of Delphi's salaried retirees will suffer far more from their pension plan's termination than do retirees from other companies whose plans must be terminated and assumed by the PBGC.

To be clear, the benefits at issue here were not mere perquisites of employment – they were commitments of compensation that Delphi promised to employees in exchange for decades of dedication to the company. Packages of this nature enable companies like Delphi to attract

providing a mechanism for beneficiaries to attempt to recover lost benefits on their own, directly from previous sponsors of their previous plans. *See* H.R. 3652, 110th Cong. (2007) (providing an independent right for workers and retirees who lose pension benefits during the transfer of a pension plan to the PBGC to file a claim against the plan's previous sponsor in bankruptcy court).

³ http://cfweb.cc.yosu.edu/psi/pdf%20files/publications/Packard_Electric_Retirement_Cuts_Impact_Study_Final%209-21-09.pdf.

and retain hard-working employees such as the engineers, managers, and other professionals represented by the DSRA. Fran Hawthorne, *Pension Dumping: The Reasons, The Wreckage, The Stakes for Wall Street* 27 (2008). They also induce long-term loyalty and commitment from valued employees, generating additional benefits for the company. See Richard Ippolito, *The Economics of Pension Insurance* 18–19 (1989) (outlining evidence that workers accept lower cash wages in return for pensions); The American Benefits Council, *Pension at the Precipice: The Multiple Threats Facing Our Nation's Defined Benefit Pension System* 5 (2004). Delphi's salaried retirees performed their part of the bargain, committing decades of labor to Delphi in exchange for the promise of a comfortable retirement. Yet the PBGC's termination, if allowed to stand, will permit Delphi to break these promises.

Sadly, what transpired here is part of a larger trend in bankruptcy proceedings. Rather than honoring pension benefit commitments to their workers, troubled companies increasingly attempt to disavow those commitments through the bankruptcy process. Hawthorne, *supra*, at 14–15 (citing Deirdre A. Martini, a former U.S. Trustee for the Justice Department whose role was to oversee bankruptcy cases); see also Bradley D. Belt, Executive Dir. of the Pension Benefit Guaranty Corp., Remarks to the American Bankruptcy Institute, April 22, 2006 (explaining that “all too often bankruptcy judges . . . seemingly ignore or give scant consideration to the public policy considerations embodied in [ERISA].”).⁴ Such “shedding,” apparently, is more attractive to distressed companies than other forms of debt reduction because unlike other creditors, retired employees generally hold no sway over the future success of the

⁴ Available at <http://www.pbgc.gov/media/news-archive/speeches/sp15734.html>.

company. Hawthorne, *supra*, at 14–15 (explaining that certain troubled companies view retiree benefits as more disposable than other debts because the companies are not awaiting any future performance by, or negotiation with, the affected retirees).

Recently, Congress acted to help workers and retirees prepare for such problems. The Pension Protection Act of 2006 requires employers to provide annual notice to pension plan beneficiaries of the value of plan assets and liabilities, funding status, and investment allocation of a pension plan. Pension Protection Act of 2006, Pub. L. No. 109-280. The changes to ERISA under the Pension Protection Act also require employers to explain to beneficiaries the rules governing plan termination. *Id.* Unfortunately, however, and unlike retirees of companies whose pension plans are terminated in the future, retirees affected by Defendant PBGC's actions here did not enjoy such protections when Delphi's pension plan began to struggle financially. That lack of notice makes the potential denial of due process here especially egregious.

Former salaried employees of Delphi are the most obvious victims of Defendant PBGC's actions, but the PBGC's plans would injure many others, as well.⁵ Delphi salaried retirees form an important foundation for Ohio's communities and, when they suffer, so do all those who rely upon them. A study conducted at Youngstown State University calculated the likely economic impact of Defendant PBGC's planned reduction of benefits on Ohio's Mahoning Valley region,

⁵ See Remarks by Bradley D. Belt to the American Bankruptcy Institute, April 22, 2006 (noting that when underfunded pension plans are terminated "there are a lot of losers – workers and retirees who may get a cutback in promised benefits; responsible companies that face having to pay higher premiums to the insurance system [and] business rivals, who must now compete against a company whose labor costs are being effectively subsidized by the federal pension insurance program").

home to a major Delphi plant and approximately 1,056 affected retirees. The findings were staggering. *See Akpadock, supra*, at 2–3 (summarizing the conclusions). On top of the estimated \$17.9 million annual loss in pension income to area residents, the Mahoning Valley economy would contract by an additional \$21.7 million through immediate ripple effects. *See id.* By removing so much spending from the Mahoning Valley economy, the study concluded, the PBGC's actions would cause the elimination of 1,740 area jobs. *Id.* at 21. And the Mahoning Valley is just one of the communities that would be devastated by the PBGC's plans.

All this harm is imminent if the PBGC is allowed to bypass the judicial system and implement its plan immediately. By granting Plaintiffs' motion for a preliminary injunction, however, this Court can preserve its jurisdiction to review the claims presented in this case in an orderly manner by ensuring that no sweeping injury occurs here until the appropriate process has been followed and the Court has considered all of the possible alternatives. The Ohio Attorney General respectfully urges this Court to consider the substantial import of this case not only to the parties but also to the public at large, including many Ohio communities, as it weighs the factors involved in determining whether to grant Plaintiffs' motion.

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law:

A preliminary injunction here would serve the public interest by preserving Plaintiffs' pension benefits until this Court can conduct a deliberate review of whether Defendant PBGC's termination and assumption of Plaintiffs' pension plan is proper.

A district court considers four factors when reviewing a motion for preliminary injunction, including whether: (i) the movant has a strong likelihood of success on the merits; (ii)

the movant would suffer irreparable injury without the injunction; (iii) issuance of the injunction would cause substantial harm to others; and (iv) the public interest would be served by the issuance of the injunction. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). These are “factors to be balanced, not prerequisites that must be met.” *Id.* (quoting *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003)). This *amicus* brief supports the arguments advanced by Plaintiffs as to each of these four factors, but it focuses specifically on the public interest to be served by a preliminary injunction, as the Ohio Attorney General is best able to speak persuasively to that factor.

The circumstances here weigh heavily in favor of this Court granting a preliminary injunction. In short, enjoining Defendant PBGC from reducing retiree pension benefits is critical to ensuring that retirees are not unnecessarily deprived of pension benefits while this matter remains pending on consideration of the constitutionality and legality of summary plan termination. *See* Compl. Section IV Claims for Relief (asserting that the summary reduction of retiree benefits violates both the retirees’ Fifth Amendment due process rights and ERISA’s requirements of adjudication before plan termination).

I. Procedural Due Process Jurisprudence Indicates a Strong Likelihood of Success of the Plaintiffs’ Due Process Claim

The Fifth Amendment of the United States Constitution ensures procedural due process: the federal government must provide an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing prior to depriving a person’s significant property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Logan v. Zimmerman Brush*

Co., 455 U.S. 422, 437 (1982). Plaintiffs' hard-earned pension benefits constitute one such significant property interest protected by the Fifth Amendment. See *McDarby v. Dinkins*, 907 F.2d 1334, 336 (2d Cir. 1990); *Flannelly v. Bd. of Trs. of N.Y. City Police Pension Fund*, 6 F. Supp. 2d 266, 268 (S.D.N.Y. 1998); *Ginaitt v. Haronian*, 806 F. Supp. 311 (D.R.I. 1992). Yet, as described in Plaintiffs' brief, no constitutionally-guaranteed hearing has occurred prior to planned actions by Defendant PBGC, a federal agency, that threaten to deprive Plaintiffs of their property interest in pension benefits.

The Constitution requires such a hearing unless the government must act urgently, necessitating the immediate deprivation of property rights. *Logan*, 455 U.S. at 436 (noting the exception is inapplicable "absent the necessity of quick action by the [government] or the impracticality of providing any predeprivation process."). Nothing about this case creates such urgency. Defendant PBGC waited four years after Delphi declared bankruptcy before it then belatedly decided summarily to terminate the plan at issue, and nothing new has happened in the interim to justify the exigency of this action. It cannot now plausibly claim that the summary termination itself is so urgent that it justifies denying the due process guaranteed by the Constitution as well as the other statutory protections conferred by ERISA.

Because Defendant PBGC intends to deprive Plaintiffs of a substantial property right without a constitutionally-required hearing, Plaintiffs' claim of a due process violation carries a strong likelihood of success.

II. Plaintiffs Will Suffer Irreparable Injury in the Absence of Preliminary Relief

This Court also should grant Plaintiffs' motion for a preliminary injunction because doing so is necessary to prevent Plaintiffs from suffering irreparable injury. As described above, Defendant PBGC's actions threaten not just Plaintiffs' financial stability, but also their constitutional rights. A constitutional violation constitutes such a damaging irreparable injury that upon its identification, courts must grant a preliminary injunction. *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). This Court, therefore, should grant Plaintiffs' motion to ensure that their Fifth Amendment right to procedural due process is preserved. Furthermore, as described above, absent a preliminary injunction here, Plaintiffs, their dependents, their communities, and the State of Ohio will suffer serious injury that no court can remedy satisfactorily at a later point. A preliminary injunction is necessary to ensure that this irreparable harm does not occur unless and until this Court concludes, after a deliberate determination, that Defendant PBGC's planned action is proper.

III. Preliminary Relief Will Not Cause Substantial Harm to Others' Interests

The third factor in the Court's inquiry also supports a preliminary injunction in this case. Plainly, the granting of preliminary relief here cannot harm Defendant PBGC because federal law protects the organization from any injury that might occur. Should this Court enjoin Defendant PBGC from cutting Plaintiffs' pension benefits, then subsequently determine that Plaintiffs are not entitled to their full pension benefits, Plaintiffs will be required to repay any difference to Defendant PBGC through deductions made from their future payments. *See* 29 C.F.R. § 4022.82(a) (2009). Thus, the PBGC stands to suffer no harm from the grant of a

preliminary injunction in the Plaintiffs' favor.⁶ Neither will any other party or interest yet identified by Defendant PBGC.

IV. The Public Interest Requires the Requested Relief

As Plaintiffs' brief states, the public interest always opposes violations of a party's constitutional rights. *Déjà vu of Nashville, Inc. v. Metro Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (citing *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Those impending violations alone justify a decision by this Court to enjoin Defendant PBGC from cutting Plaintiffs' pension benefits while this case develops. As described above, however, the public interest in this case lies not only in the preservation of Plaintiffs' constitutional rights, but also in ensuring that appropriate legal procedures are followed before substantial – and avoidable – economic devastation occurs to Plaintiffs, their dependents, their communities, and the State of Ohio as a whole.

Plaintiffs will suffer obvious and immediate harm if Defendant PBGC cuts their benefits. The action will jeopardize Plaintiffs' payment of mortgages, medical bills, and other basic necessities. *See, e.g.*, Ed Runyan, *Salaried Packard retirees express betrayal over transfer of pensions*, *Youngstown Vindicator*, July 24, 2009 (describing the struggle of one Delphi salaried retiree facing a 50% reduction in her pension benefits who worries about her ability to live on the

⁶ This conclusion is consistent with the general principle, as outlined in Plaintiffs' brief, that the determination by a court that a party is substantially likely to succeed on the merits of a constitutional claim makes likely the conclusion that all other factors also weigh in favor of the grant of a preliminary injunction. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

reduced pension benefit); Mary Williams Walsh, *For Delphi Pensioners, the Union Label Helps*, New York Times, October 27, 2009, B1 (detailing the struggle of certain affected retirees, including one woman who retired expecting a monthly pension of \$2,925 a month, yet recently learned that under Defendant PBGC's administration of her pension, her payment will be cut to \$390 per month).

Making matters worse, the Ohio regions most affected by Defendant PBGC's plans already have suffered mightily during recent years. According to Plaintiffs' research, the greatest concentrations of affected retirees live in the Dayton and Youngstown areas of Ohio. Between 2000 and October 2009, nonagricultural employment growth in the metropolitan areas encompassing those cities was negative – negative 12.3% for Dayton, and negative 13.3% for Youngstown, respectively. Ohio Department of Job and Family Services, *Average Employment by Industry for Selected Periods* (December 2009). Data for the goods-producing sector in these regions were even worse – negative 43.9% for Dayton, and negative 44.3% for Youngstown. *Id.* The unemployment numbers for those regions also were bleak: in October 2009, the unemployment rate was 11.0% in Dayton and 12.5% in Youngstown. Bureau of Labor Statistics, U.S. Dept. of Labor, *Metropolitan Area Employment and Unemployment – October 2009* (December 2009).

Many of the affected individuals represented by Plaintiffs survive on a fixed income that will decrease substantially as a result of the PBGC's intended actions. As a direct result, and with the employment situation so bleak in their communities, Plaintiffs will have little choice but to reduce their spending dramatically. That reduction will further damage the hard-hit

communities where many of the affected retirees live. Akpadock, *supra*, at 15–16 (describing the downstream effects of retiree pension reduction on the economy in the Mahoning Valley). In other words, the PBGC’s planned cuts to Plaintiffs’ pension benefits will create a widespread ripple effect on these damaged regional economies. And even if Plaintiffs ultimately prevail in this litigation, no compensation by this Court can undo the consequences of that effect on Plaintiffs’ families and on Ohio’s already suffering economy.

In addition, Defendant PBGC’s actions will injure the financial well-being of the State of Ohio, which the current nationwide economic recession has already struck especially hard. *See* Ohio Governor Ted Strickland, Budget Message for Am. Sub. HB 1, July 17, 2009. In an account that will hardly be foreign to a court located in the State of Michigan, the current economic downturn has caused many Ohio citizens to lose their jobs and Ohio businesses to decrease their operations in the State. Ohio Office of Budget and Management, *Monthly Financial Report*, November 10, 2009. Lost jobs and business in Ohio have, in turn, resulted in decreased tax revenue. *Id.* at 12 (highlighting that on a year-over-year basis, FY 2010 tax receipts are \$695.5 million, or 12.0%, below their level at the same point in FY 2009); *see also* Ohio Governor, Budget Message for Am. Sub. HB 1, July 17, 2009 (conveying that Ohio General Revenue Fund tax receipts declined by \$2.3 billion in fiscal year 2009, or 12% compared to the previous fiscal year). This lost tax revenue caused a budget shortfall and has posed a challenge for crafting a balanced budget for the next biennium. Jim Siegel, *OHIO BUDGET; Senate GOP OK with tax delay?; Plan might fly if Republicans get to add proposals*, *The Columbus Dispatch*, December 2, 2009.

At this same time, because Ohioans are out of work, the demand for social services provided by the State and local governments such as unemployment compensation, health care benefits, cash assistance, food assistance, child care, child support enforcement, and employment and training assistance continues to rise significantly. *See* Ohio Department of Job and Family Services, *Public Assistance Monthly Statistics Report*, August 2009 (documenting a 24.1% increase in recipients of cash assistance through the Ohio Temporary Assistance to Needy Families program from August 2008-August 2009 and a 66.9% increase in total Food Stamp coupons issued between August 2008-August 2009); *see also* Ohio Office of Budget and Management, *Monthly Financial Report*, November 10, 2009 (noting that Temporary Assistance for Needy Families subsidy payments exceeded the monthly estimate for October 2009 by \$10.8 million, partly because of increased caseloads). Families throughout Ohio need these social services badly. *See* Catherine Candisky and Alan Johnson, *Getting personal; State budget cuts are more than numbers on a spreadsheet: They are devastating the most vulnerable Ohioans*, *The Columbus Dispatch*, November 22, 2009 (detailing the effect of budget cuts in Ohio, where 1 in 5 residents qualify for Medicaid and more than 600,000 households struggle daily to put food on the table).

Because tax revenues have declined as the demand for social services has increased, the State already faces an extremely difficult financial picture. *See* State of Ohio, *Executive Budget for FYs 2010 and 2011* (February 2009) (providing a line-by-line analysis of budget cuts for fiscal years 2010 and 2011 and listing substantial cuts in the Ohio Department of Job and Family Services, the State agency charged with providing countless social services). Even without the

threatened PBGC action and its substantial ripple effect, State support for county Job and Family Services departments, the critical local agencies that distribute Medicaid, food stamp, and financial assistance to needy residents, has fallen \$77 million, or 31.5%, in the current biennium. Center for Community Solutions State Budgeting Matters, *New State Budget Puts Severe Burden on Local Partners and the Services They Deliver* (August 2009).

In sum, it has already been difficult for Ohio to meet the challenges of increased caseloads stemming from increased unemployment. A sharp and immediate decrease in pension benefits to all of the Delphi salaried retirees threatens to disrupt the delicate balance that the State has worked to strike in these hard times. If the PBGC causes thousands of additional retirees and surrounding community members to require already-scarce social services, the result for the State of Ohio could be devastating. The widespread ripple effect of the reduction of Plaintiffs' pension benefits will inevitably strain the State of Ohio's budget even further than it can now bear.

In light of these urgent circumstances, judicial review of the facts and law at issue in this case is critical. Again, that applicable law includes not only the statutory protections conferred by ERISA, but also the constitutional due process requirements imposed by the Fifth Amendment of the United States Constitution. Until that review occurs and, importantly, until the retirees enjoy their constitutionally-guaranteed right to challenge the summary termination of their pension benefit plans, this Court should enjoin Defendant PBGC from cutting the benefits of all the retirees represented by the Plaintiffs. These struggling retirees, their dependents, their communities, and the State of Ohio must experience no more harm than is absolutely necessary

while the Court exercises its jurisdiction to make an orderly and definitive determination on the constitutionality and legality of Defendant PBGC's actions challenged here.

CONCLUSION

The public interest will be served by the continued payment of pension benefits at their full value until this Court may exercise its jurisdiction to determine whether the summary termination of the Plaintiffs' pension plan was lawful.

Plaintiffs represent hard-working Ohioans who planned their lives based on promises by Delphi. For years, they were assured that in exchange for hard work, they could count on a decent retirement. Then Delphi filed for bankruptcy, and their lives changed. After Delphi had spent years battling through bankruptcy, the company's salaried retirees now have learned the horrible news that Defendant PBGC has summarily terminated their pension plan. This wrong will take effect on an expedited schedule allowing for no meaningful review, let alone judicial process – despite constitutional guarantees and statutory provisions to the contrary.

These Ohioans dedicated their working years to building what became Delphi. They also helped build up their own communities, which depend heavily on their economic health as assured through the pension commitments made to them. Now the PBGC intends to ignore all of that, with a unilateral and summary action that will exact untold harm on the retirees and the State of Ohio. The Ohio Attorney General respectfully submits that the hard-working retirees of Delphi deserve better and are entitled to fairer and more respectful treatment under the law. This Court should grant Plaintiffs' motion for a preliminary injunction to ensure that it can exercise its

jurisdiction to consider whether Defendant PBGC's destructive termination of pension benefits is justified and absolutely necessary before it is permitted to occur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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