No. 21-495

IN THE
Supreme Court of the United States

DENNIS BLACK, *et al.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI (REDACTED FOR PUBLIC RECORD)

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Petitioners respectfully file this Reply in support of their Petition for Certiorari and in response to PBGC's Brief in Opposition.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT

Petitioners' first basis for seeking certiorari is the importance of the Questions Presented. *See* Pet. 16-19. Each of the Questions Presented challenges fundamental aspects of perhaps the most significant action PBGC can take: the termination of a pension plan. PBGC does not dispute that the Questions Presented implicate "important question[s] of federal law" never previously addressed by the Court. S. Ct. R. 10(c).

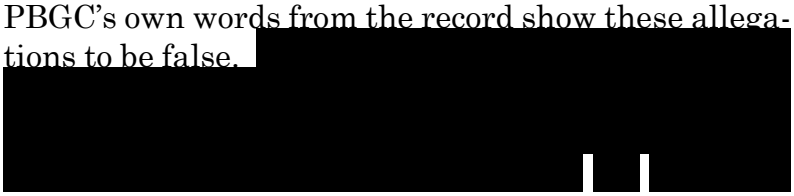
Indeed, PBGC's Opposition actually underscores the importance of the Questions Presented. PBGC notes that it insures "the pensions of tens of millions of American workers and retirees," any and all of whom, as a result, could potentially be subject to PBGC plan-termination procedures at some point. Opp. 4. Moreover, PBGC details that "more than 5,000" plans covering "1.5 million people" have terminated in distress and that the "overwhelming majority of those terminations have occurred by agreement with the plan administrator," not court adjudications. *Id.* at 4-5. And PBGC outlines the many limits on its insurance payments, *see id.* at 5-6, conceding there are "cases in which the nonforfeitable benefits a participant was entitled to under the terms of the terminated plan exceed the PBGC statutory limit." *Id.* at 6. Thus, PBGC itself highlights why the

Questions Presented are important: a vast number of individuals have already been, or may be, subject to plan terminations; terminations are routinely accomplished in summary fashion; and pensioners can lose, and have lost, benefits as a consequence. Little more is necessary to convey the breadth and seriousness of the issues Petitioners raise concerning the legality of and judicial-review standards for PBGC's practice of terminating plans by agreement.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

PBGC does not openly contest that the Petition offers a clean, meaningful opportunity for the Court to consider the Questions Presented. Instead, PBGC tries to persuade the Court more subliminally that the Petition is unworthy of the Court's attention: it weaves into its Opposition a theme painting PBGC as a noble actor that prevented great harm to Petitioners, who, in turn, are portrayed as ungrateful recipients of PBGC's largesse. PBGC's presentation is based on misleading—even demonstrably false—statements.

For instance, PBGC maintains that, absent termination and PBGC having "stepped in," Petitioners faced a "disastrous" scenario—namely, they allegedly would have held "valueless, unfunded benefits" in a "pension plan without a plan sponsor." Opp. 24, 26. PBGC's own words from the record show these allegations to be false.



[redacted]

The reality is that, at the time of termination, the Salaried Plan was more than 85% funded (better than many large plans at the time), PBGC held liens that it could have exacted against Delphi's international subsidiaries for any funding shortfall, and the Salaried Plan—even if Delphi liquidated—could have continued as a going concern through the "appointment of an independent fiduciary" to hold and administer the Plan's assets "in trust." *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 828 (6th Cir. 2007). [redacted][1]

[1] PBGC continues to try to get away with asserting that the Plan was supposedly wildly underfunded. *See* Opp. 23-24. Had PBGC used actuarial assumptions appropriate for an *ongoing* plan, its calculations would have resulted in dramatically better funded-status percentages reflecting a longer-term view accounting for fluctuations in the market. *See* RE 308-129, Page ID# 13102. But PBGC's calculations presupposed termination, assumed the worst-case scenario, and provided no flexibility for reasonable future gains. *See id*. at Page ID# 13101-03. The result was that a respectably funded ongoing plan had fictionally become substantially "underfunded." *Id*. at Page ID# 13102.

PBGC also repeatedly claims that it has contributed enormous sums of its own money just to pay diminished, guaranteed benefits to Plan's participants. The truth, again, is different. As President Trump recognized when he directed PBGC last year to assess whether the Plan should be restored, the Plan's assets in PBGC's hands had likely grown in value (even before 2021's further run up in the stock market) to the point where they could finance the benefits originally promised to the Plan's participants. *See* Pet. 16 n.6; *cf.* Opp. 11 n.6. (noting PBGC's Board of Directors responded to President Trump's directive only *after* the Petition's filing and without disputing Plan's asset expansion). By then paying just guaranteed benefits (not all vested benefits) and retaining for itself the investment gains on the Plan's assets, PBGC in all probability has made money at the expense of the Plan's participants—a cruel inequity that has, in part, prompted the response of the *amici* Congresspersons (bipartisan, from both Chambers) and State Attorneys General (again, bipartisan).[2]

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[2] Similarly attempting unfairly to sully Petitioners, PBGC uses Petitioners' appearance in the Delphi bankruptcy proceedings against them. Petitioners protectively appeared in the bankruptcy court, all along seeking to preserve their right to challenge in a proper federal district court PBGC's impending termination of the Salaried Plan. *See* §1342(e), (f) (giving a federal district court exclusive jurisdiction over termination proceedings). PBGC's efforts to twist Petitioners' filings there as some sort of qualification on their efforts here is belied most notably by the bankruptcy court's express blessing of the filing of the Petitioners' lawsuit in the district court. *See* Appellants' 6th Cir. Br. 19-20 n.5, 41-43 (Docs. 22, 26).

III. THE SIXTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENTS

A. As to the first Question Presented, the Petition establishes that the Sixth Circuit contravened this Court's standards for construing statutes when it found ERISA, particularly §1342(c)(1), to sanction terminations by agreement. PBGC's Opposition on this topic is perhaps most notable for what it does not address. PBGC provides no answer whatsoever on why Congress would have hidden in the mousehole of a sentence in (c)(1) the elephant that PBGC may terminate plans by agreement. *See* Pet. 23. PBGC also never explains how §1342(a)(1)'s authorization for streamlined termination procedures for small plans avoids becoming surplusage if (c)(1) authorizes termination of any distressed plan by agreement. *See id.* at 22-23.

With respect to the arguments to which PBGC has responded, PBGC first stresses that (c)(1) starts by saying PBGC "may" seek a court decree terminating a plan after already initiating termination proceedings, indicating that (c)(1) purportedly "expresses permission, not obligation" to seek a court decree. Opp. 18. It is clear, however, that (c)(1) uses "may" instead of "shall" to avoid the situation where PBGC would be *required* to proceed with seeking a termination decree whenever it has initiated termination proceedings under (a), even if it in the meantime has determined that "circumstances" actually do not warrant termination. 29 U.S.C. §1347; *see* Pet. 24.

Next, PBGC asserts that Sentence Four in (c)(1) affirmatively sets forth a second "path[]" for terminating a plan (*i.e.*, by agreements); this argument is

fraught with problems. Opp. 18. When Congress set up two alternatives associated with the termination process, such as when it allowed trustees either to be appointed by courts or by agreement between PBGC and a plan administrator and when it authorized alternative routes for choosing a termination date, it did so through a well-delineated either/or structure absent from Sentence Four (and, for that matter, absent from the entirety of (c)(1)). *See* §1342(b)(1), (3) & §1348(a)(3), (4).[3] Additionally, PBGC now appears to recognize that its reading of Sentence Four leaves a gaping hole: upon the "if" condition of PBGC and the plan administrator reaching an agreement, the sentence is missing the key "then" follow-on "then the plan shall be terminated." *See* Pet. 21. So, PBGC newly mints an argument that Sentence Four piggybacks off of "[s]ubsection 1342(d)(1)," which supposedly "sets out the authority of the trustee 'to terminate the plan.'" Opp. 20 (providing no cite for source of internal quotation). But this doesn't work either, because (d)(1) only gives the trustee certain powers *after* a court "issues the decree." §1342(d)(1)(B); *see* Pet. 21.

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[3] PBGC conjures up an argument that §1348 "establishes different procedures for setting [a] termination date, depending on whether a plan is terminated by agreement or not," which supposedly evinces Congress's contemplation of two alternative ways to terminate a plan. Opp. 20. The section simply, and straightforwardly, allows PBGC and a plan administrator to agree to a termination date or to have the court set the date if there is no agreement on the date, once a "plan [has been] terminated in accordance with the provisions of section [13]42." §1348(a)(3). It says nothing about agreements *to terminate* being proper under §1342.

PBGC is left to claim that by "persist[ing]" in theorizing that "§1342(c) is limited to appointing a trustee by agreement," Petitioners supposedly make superfluous (b)(3)'s separate allowance for trustee appointments. Opp. 19. But Petitioners never asserted such a theory. Petitioners' point is, instead, that Sentence Four deals with the situation where the court has issued a termination decree (pursuant to the third sentence of (c)(1)), and, in fact, PBGC and the plan administrator previously "agree[d] to the appointment of [the relevant] trustee" through an agreement under (b)(3) and gave the trustee certain "duties" under the agreement; in that event, the trustee may retain those duties only if PBGC and the plan administrator also agree that the "plan should be terminated." §1342(c)(1); *see* Pet. 24-25. As noted in the Petition (and left unrebutted in PBGC's Opposition), Congress logically would have required PBGC and the plan administrator to concur with the court's termination decree before permitting them to impose additional duties on the trustee, such as duties favoring PBGC or the plan administrator, in order reasonably to prevent possible conflict among the trustee's duties. Pet. 25. Far from reading out of the statute "the words 'agree that a plan should be terminated,'" Petitioners' reading gives them full life. Opp. 19.[4]

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[4] Contrary to PBGC's suggestion (*see* Opp. 18), Petitioners' reading also gives meaning to Sentence Four's language "without proceeding in accordance with the requirements of this subsection (other than this sentence)." §1342(c)(1). PBGC and the plan administrator would be *affecting trustee duties* (which is all that Sentence Four actually speaks to) without resorting to (c)(1)'s other sentences authorizing the appointment of a trustee if one

B. On the second Question Presented, PBGC engages in strawman tactics. It starts by insisting that *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980), "in no way suggested that . . . nonforfeitable benefits must be paid in full by PBGC despite the [guarantee] limits set by Congress." Opp. 23. The statement is unremarkable, because Petitioners never said *Nachman* held otherwise. Rather, in Petitioners' view, the Sixth Circuit's due-process ruling violates *Nachman*'s holding that, post-1975 (ERISA's effective date), it is illegal for a plan to provide for the forfeiture of unfunded benefits upon termination. *See* Pet. 28. Yet, the Sixth Circuit credited that exact type of illegal plan provision and held that the Salaried Plan's terms made unfunded benefits forfeitable upon termination, so that Petitioners had no legitimate, constitutionally protected property interest in those amounts. PBGC never once grapples with *that* holding in *Nachman* or the Sixth Circuit's disregard of it.

PBGC even tries to rewrite the due-process issue, pretending that the question is whether "PBGC's adherence to . . . statutory [guarantee] limits . . . violates the Due Process Clause." Opp. 26. In actuality, the issue is whether the Sixth Circuit properly held that Petitioners were not entitled to a pre-termination hearing, on the basis that the lost benefits above PBGC's guarantee limits are properly viewed as forfeited under the Salaried Plan's terms. Nothing about that actual issue stems solely from the Sixth Circuit's "original opinion," rather than its

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has not already been appointed, because their appointment of a trustee and assignment of duties would have come previously, pursuant to (b)(3).

superseding amended opinion. *Id.* at 22. The latter also fully, and wrongly, embraces the *Nachman*-proscribed reasoning that an ERISA plan's terms can make unfunded benefits forfeitable (and therefore not constitutionally protected).

Finally, PBGC spends a great deal of time trying to prove that Petitioners' vested benefits above PBGC's guarantee limit had "no value" and were uncollectable due to Delphi's dire circumstances, meaning Petitioners did not need a hearing because they had nothing "legitimate" to protect. *Id.* at 24, 25. PBGC's efforts are wasted. The Sixth Circuit never decided the case on that basis, and, further, PBGC's argument impermissibly justifies denying a pre-deprivation hearing by assuming the hearing will confirm PBGC's view of the facts (and support termination). Obviously, Petitioners vociferously dispute that there was no scenario under which the Plan could pay their full vested benefits. *See supra* pp. 3-4. The Due Process Clause guaranteed Petitioners a hearing to determine who was right *before* they were relegated to nothing more than what PBGC insurance would pay.[5]

C. On the third Question Presented, PBGC again miscasts the issue. Petitioners do not seek review of any "fact-bound conclusion[s]" tied up in "factual circumstances." Opp. 26. Petitioners present only a

[5] [redacted]

straightforward legal issue: whether the relevant factors for determining the substantive legality of PBGC's termination of the Salaried Plan by agreement are those enumerated in §1342(a) for initiating termination proceedings or the ones in (c)(1) for a court to issue a termination decree. The Sixth Circuit applied only (a)'s standards. If (c)(1)'s standards govern, then the Sixth Circuit must analyze the termination accordingly. *See* Pet. 31 n.9.

PBGC contends that the Sixth Circuit spent "seven pages" on (c)(1) and issued a "clear holding that the Termination Agreement satisfied §1342(c)." Opp. 27, 28 (citing Pet. App. 7a-15a). On those pages, however, the Sixth Circuit (incorrectly) held only that Sentence Four authorizes terminations by agreement. Irrespective of whether an agency allegedly has the authority to enter into a contract, a court may, as to the contract's substance, "compare" the agreement "against the objectives prescribed by law." *Doe v. Devine*, 703 F.2d 1319, 1326 (D.C. Cir. 1983) (Ruth B. Ginsburg, J.). Petitioners ask the Court to clarify exactly which objectives (those in (a) or in (c)(1)) apply.

IV. THE CIRCUITS ARE IN CONFLICT ON THE QUESTIONS PRESENTED

PBGC argues, repeatedly, that there are no circuit splits relevant to the first Question Presented. This assertion requires consigning to dictum (*see* Opp. 17) the Seventh Circuit's unambiguous holding that PBGC's "only authority" under §1342 is "to ask a court for relief." *In re UAL Corp.*, 468 F.3d 444, 449 (7th Cir. 2006); *accord id.* at 450 ("section 1342 . . . requires the PBGC to initiate litigation"). PBGC tries, but fails, to do so. PBGC notes that, in *UAL*, it sought

a termination decree, *see* Opp. 17, and it claims that the dispute in that case concerned the supposedly "'distinct legal issue'" of affixing a termination date. *Id.* at 13 (quoting Pet. App. 14a). But PBGC again fails to address Petitioners' actual point: the Seventh Circuit held as it did, precisely because PBGC insisted it had the ability to set a termination date without a court decree just as it purportedly had the ability to terminate plans under §1342(c)(1) without court decrees. *See* Pet. 33. After *UAL*, no lower court within the Seventh Circuit could reasonably question whether, on any matters associated with termination, including the termination itself, "section 1342(c) gives the resolution . . . to the judiciary." *UAL*, 468 F.3d 451. The Seventh Circuit held that it does.

Yet, PBGC baldly declares that "[e]very court to have considered" the question of "whether termination by agreement . . . is permissible under ERISA" has "agreed that it is," Opp. 14, and PBGC then cites (*see id.* at 16) decisions that the Sixth Circuit acknowledged "did not directly consider the proper interpretation of subsection 1342(c)." Pet. App. 17a. If those decisions are relevant to the circuit-split analysis, then *UAL*, which is much more closely on point, has to be too.

On the second Question Presented (concerning due process), Petitioners showed that, while consistent in result with the Sixth Circuit, the Second Circuit's reasoning in *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987), was confusingly and markedly different than the Sixth Circuit's forfeiture theory (Pet. 34)—something PBGC never addresses. And on the third Question Presented (about the proper substantive standards

for judicial review), PBGC again focuses on the fact that "*UAL* did not involve a termination by agreement," Opp. 28; however, Petitioners' point was that, regardless of the manner of termination, the Sixth Circuit was willing to review deferentially a termination under §1342(a)'s factors, whereas the Seventh Circuit saw *de novo* review of the (c)(1) factors invoked by PBGC itself as the governing rubric.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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