No. _____

IN THE

Supreme Court of the United States

K. WENDELL LEWIS, *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 District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY F. SHELLEY
Counsel of Record
TIMOTHY P. O'TOOLE
MICHAEL N. KHALIL
MILLER & CHEVALIER CHARTERED
900 Sixteenth St. NW
Washington, D.C. 20006
Tel.: (202) 626-5800
E-mail: ashelley@milchev.com

QUESTION PRESENTED

Title IV of the Employee Retirement Income Security Act ("ERISA") covers pension plans terminated when distressed and establishes the Pension Benefit Guaranty Corporation ("the Corporation") as insurer of such plans. Title IV's enforcement provision for suits against the Corporation – 29 U.S.C. § 1303(f) – provides, without qualification, for "appropriate equitable relief" against the Corporation, including in instances where the Corporation serves as a fiduciary with respect to a terminated plan's remaining assets. In their case law on the meaning of "appropriate equitable relief" in the remedial section of Title I of ERISA, 29 U.S.C. § 1132(a)(3), this Court and the lower courts have indicated that monetary compensation, such as disgorgement of ill-gotten profits, is available against breaching fiduciaries. But the D.C. Circuit below held that disgorgement is *not* "appropriate equitable relief" against the Corporation because of a separate section of Title IV: 29 U.S.C. § 1344(c). Section 1344(c) addresses who shall be "credited" with gains on pension-plan assets after a plan is terminated. Contrary to the Second and Fourth Circuits' view of § 1344(c), but in line with the Ninth Circuit's, the D.C. Circuit read § 1344(c) to require that, in all instances, a gain in value on a terminated plan's assets must go to the Corporation, even where – as here – those gains result from serious fiduciary breaches by the Corporation. The Question Presented is:

> Does § 1344(c) preclude disgorgement of profits from the Corporation as an appropriate equitable remedy under § 1303(f) for the Corporation's breaches of fiduciary duties?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are approximately 1,700 retired pilots of Delta Airlines Inc. or their heirs who participated in a now-terminated pension plan sponsored by Delta Airlines Inc. They are individually listed in the Appendix to the Petition (at 71a-117a).

Respondent is the Pension Benefit Guaranty Corporation, sued in its capacity as trustee of the terminated pension plan. It is an entity created by federal statute and is within the U.S. Department of Labor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS......... ii

TABLE OF AUTHORITIES v

OPINIONS BELOW...1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE...................................2

REASONS FOR GRANTING THE PETITION 8

I. CERTIORARI IS WARRANTED BECAUSE THE CIRCUITS ARE SPLIT ON THE MEANING AND EFFECT OF 29 U.S.C. § 1344(c) 8

II. CERTIORARI IS WARRANTED BECAUSE THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS 11

III. CERTIORARI IS MERITED IN LIGHT OF THE IMPORTANCE OF THE QUESTION PRESENTED 17

CONCLUSION..21

Appendix A – Opinion Reversing District Court Opinion and Remanding (D.C. Cir. Dec. 21, 2018) 1a

Appendix B – Memorandum Opinion Denying Motion to Dismiss Claim One and Granting

Motion to Strike Attorney's Fees and Jury Trial Demands (D.D.C. July 6, 2016) 17a

Appendix C – Order Issued in Conjunction with Memorandum Opinion (D.D.C. July 6, 2016) 44a

Appendix D – Order Granting Petition for Panel Rehearing as to the Final Sentence of the August 21, 2018 Opinion (D.C. Cir. Dec. 21, 2018) 46a

Appendix E – Order Denying Petition for Rehearing *En Banc* (D.C. Cir. Dec. 21, 2018) 49a

Appendix F – Judgment (D.C. Cir. Aug. 21, 2018) 51a

Appendix G – Order Granting Petition for Permission to Appeal (D.C. Cir. Apr. 4, 2017) 53a

Appendix H – Order Certifying Interlocutory Order (D.D.C. Jan. 23, 2017) 54a

Appendix I – Order Certifying Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) (D.D.C. Jan. 23, 2017) 65a

Appendix J – Excerpts of Statutes Involved in the Case 67a

Appendix K – List of Parties 71a

TABLE OF AUTHORITIES

Page(s)

Cases

Ala. Power Co. v. Davis,
431 U.S. 581 (1977)..2

Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988)..19

CIGNA Corp. v. Amara,
563 U.S. 421 (2011)..5, 19

Davis v. PBGC,
571 F.3d 1288 (D.C. Cir. 2009)..............................3

Edmonson v. Lincoln Nat'l Life Ins. Co.,
725 F.3d 406 (3d Cir. 2013) 5

Empire HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006) 15

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).......................11, 19

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019) 12

Kinek v. Paramount Commc'ns, Inc.,
22 F.3d 503 (2d Cir. 1994) 9, 11, 15

King v. Burwell,
135 S. Ct. 2480 (2015)..16

Lopez v. Gonzales,
549 U.S. 47 (2006)..12

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)...19

Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016) 19

Morton v. Mancari, 417 U.S. 535 (1974) 13

Nachman Corp. v. PBGC, 446 U.S. 359 (1980) 2, 16

Paulsen v. CNF Inc., 559 F.3d 1061 (9th Cir. 2009) 10, 11

PBGC v. Beadle, 685 F. Supp. 628 (E.D. Mich. 1988) 9

Pender v. Bank of Am. Corp., 788 F.3d 354 (4th Cir. 2015) 5

Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006) 19

US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) 19

Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326 (4th Cir. 2007) .... *passim*

Statutes

28 U.S.C. § 1254 1

29 U.S.C. § 1001 16

29 U.S.C. § 1002 15

29 U.S.C. § 1132 .... 5, 15

29 U.S.C. § 1302 2

29 U.S.C. § 1303 .... *passim*

29 U.S.C. § 1305 .... 9, 10

29 U.S.C. § 1322 .... 2, 3

29 U.S.C. § 1342 .... *passim*

29 U.S.C. § 1344 .... *passim*

Other Authorities

29 C.F.R. pt. 4003... 4

G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543 (2d ed. 1978) 19

Merriam-Webster's Collegiate Dictionary (11th ed. 2014) 12

PBGC Office of Inspector General Evaluation Report, *PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed* (Mar. 30, 2011), http://oig.pbgc.gov/pdfs/PA-09-66-1.pdf 20

PBGC Office of Inspector General Evaluation Report, *PBGC Processing of Terminated United Airlines Pension Plans Was Seriously Deficient* (Nov. 30, 2011), https://oig.pbgc.gov/pdfs/PA-10-72-1.pdf.. 20

PBGC, *Annual Report 2018* (Nov. 15, 2018), https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf.............................. 17

OPINIONS BELOW

The December 21, 2018 opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 901 F.3d 406 (D.C. Cir. 2018) and reproduced in the Petitioners' Appendix ("Pet. App.") at 1a-16a. Of the two relevant opinions of the U.S. District Court for the District of Columbia, one is reported at 197 F. Supp. 3d 16 (D.D.C. 2016) and is reproduced at Pet. App. 17a-43a; the other is unreported (but appears at 2017 U.S. Dist. LEXIS 221641 (D.D.C. Jan. 23, 2017)) and is reproduced at Pet. App. 54a-64a.

STATEMENT OF JURISDICTION

Petitioners seek review of the D.C. Circuit's December 21, 2018 decision that reversed, in part, the district court's decision denying Respondent's motion to dismiss a claim in the amended complaint. The D.C. Circuit's December 21, 2018 decision amended and reissued its decision entered on August 21, 2018. Petitioners had timely sought panel rehearing and rehearing *en banc* of the August 21, 2018 decision. The panel granted rehearing on December 21, 2018, resulting in the reissued and amended decision of December 21, 2018. The order granting panel rehearing appears at Pet. App. 46a-48a. Also on December 21, 2018, the D.C. Circuit denied rehearing *en banc*. *See* Pet. App. 49a-50a.

Upon timely application filed by Petitioners, the Chief Justice extended the time for filing a petition for certiorari to and including April 4, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

Relevant provisions of Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301-1461, are set forth in the Petitioners' Appendix at 67a-70a.

STATEMENT OF THE CASE

Petitioners – collectively referred to in the D.C. Circuit's decision and here as "the pilots" – are approximately 1,700 participants in the Delta Pilots Retirement Plan ("Plan" or "Delta Plan"), a defined-benefit pension plan terminated in 2006 in connection with the bankruptcy of Delta Airlines, Inc. ("Delta"). A defined-benefit pension plan is one "'under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits.'" *Nachman Corp. v. PBGC*, 446 U.S. 359, 363 n.5 (1980) (quoting *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n.18 (1977)).

The Plan's termination occurred pursuant to a provision in Title IV of ERISA, 29 U.S.C. § 1342(c), at the behest of Respondent Pension Benefit Guaranty Corporation ("the Corporation"). *See* Pet App. 2a. The Corporation is the entity created in Title IV that insures the nation's defined-benefit pension plans (*see* 29 U.S.C. §§ 1302(a), 1322(a)) and that, under separate provisions in Title IV, customarily becomes trustee for a terminated plan. *See id.* § 1342(b)(1). Title IV, on its face, does not provide for solely the Corporation to serve as trustee for a terminated plan, but instead authorizes private parties or the Corporation to become the trustee, through either appointment by a district court or an agreement between the terminated

plan's administrator and the Corporation. *See id.* § 1342(c). Nonetheless, the Corporation has invariably become the trustee for most terminated plans throughout ERISA's history. *See* Pet. App. 3a.

As relevant to this case, the trustee's principal function is to divide up a terminated plan's remaining assets among the plan's participants. *See* 29 U.S.C. § 1344. Only after the trustee allocates the remaining assets does the Corporation in its insurer function pay funds to a participant through its insurance guaranty (and even then, only if the trustee's allotment has not resulted in a particular participant already receiving the statutory minimum guaranteed through insurance). *See* Pet App. 3a; *see also* 29 U.S.C. § 1322(b)(3); *Davis v. PBGC*, 571 F.3d 1288, 1294 (D.C. Cir. 2009).

In this instance, the Corporation did, as usual, become the trustee upon termination. *See* Pet. App. 3a. But it then took *six years* to divvy up the Plan's remaining assets, in what are known as final benefit determinations. *See id.* Additionally, the Corporation allegedly committed many serious misdeeds in the allocation process, including, as listed by the district court:

> (1) seeking to withhold or delay the production of information critical to the understanding of the [Corporation's] benefit determination and asset allocation choices, (2) denying the [pilots] an opportunity to lodge an informed appeal of the Corporation's final determination, (3) allowing its agency litigation counsel to advise its appeals board, and refusing to disclose the contacts between the two groups, (4) outsourcing many of its trus-

> tee responsibilities to independent contractors who lack[ed] the requisite competence or experience to perform those duties adequately, then failing to monitor and remedy their inadequate performance, and (5) manipulat[ing] the asset allocation process in such a manner as to create hundreds of millions of dollars of investment returns to itself, at [the pilots'] expense.

Id. at 25a-26a (internal quotation marks and citations omitted). As then noted by the D.C. Circuit: "All of this, the pilots claim, allowed the Corporation to control Delta Plan assets for a longer period and collect 'massive investment returns' rather than timely paying the pilots what they were owed." Pet. App. 4a (quoting Am. Compl. ¶ 72 (D.D.C. ECF #45, at 98)).

After exhaustion of available administrative remedies (*see* 29 C.F.R. pt. 4003), the pilots brought suit in federal court in 2016 (originally in the Northern District of Georgia, where Delta is headquartered, but later transferred to the District of Columbia at the Corporation's request) to challenge the Corporation's allocation of the Plan's assets. In the amended complaint, which is the operative pleading, the pilots included a claim under ERISA for breach of fiduciary duty, contending that the Corporation's above-described offenses constituted breaches of the Corporation's fiduciary obligations as a trustee. *See* D.D.C. ECF #45, at 95-98. ERISA provides that the Corporation is *a fiduciary* when it acts as a trustee allocating a terminated plan's assets among a plan's participants. *See* 29 U.S.C. § 1342(c)(1), (d)(3). The pilots also brought additional claims (not at issue here) alleging

that the Corporation had calculated asset allocations (*i.e.*, issued final benefit determinations) contrary to various statutory directives in ERISA.

The pilots pursued all of the claims – the fiduciary-breach claim and the others – under 29 U.S.C. § 1303(f). Section 1303(f) authorizes "aggrieved persons" to obtain "appropriate equitable relief" against the Corporation, including "against the corporation in its capacity as a trustee." *Id.* § 1303(f)(1), (4). Among the forms of equitable relief they requested, the pilots sought "disgorgement and surcharge (concerning, for instance investment income earned on the Plan's assets held by the [Corporation] as trustee)," as well as "[a]ny other equitable relief that is available and appropriate." D.D.C. ECF #45, at 125-26. Interpreting the same term (*i.e.*, "appropriate equitable relief") in the enforcement provision in Title I of ERISA as addressed to existing plans run by private employers, 29 U.S.C. § 1132(a)(3), this Court has indicated, and lower courts have held, that disgorgement of ill-gotten profits is an available remedy against a breaching fiduciary. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 441-42 (2011); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 364-65 (4th Cir. 2015); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 419-20 (3d Cir. 2013).

The Corporation moved to dismiss the fiduciary-breach claim, asserting that the Corporation could not be sued for fiduciary breaches and that, in any event, disgorgement by it of gains on the Plan's assets is barred by 29 U.S.C. § 1344(c). In its entirety, § 1344(c) states:

> Any increase or decrease in the value of the assets of a single-employer plan occurring during

> the period beginning on the later of (1) the date a trustee is appointed under section 4042(b) [29 U.S.C. § 1342(b)] or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. 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.

29 U.S.C. § 1344(c).

The district court denied in all respects the Corporation's dismissal motion with regard to the fiduciary-breach claim; on the disgorgement issue, it held that § 1344(c) permits the Corporation to keep "any gains (or losses) from assets *properly* held in the Plan," not "alleged ill-gotten investment returns" on assets that the pilots averred should have been distributed to them or, at least, distributed to them sooner than they were. Pet. App. 35a. In response, arguing that the district court's determinations were of "critical concern to the federal pension insurance program," the Corporation requested the certification of four issues for interlocutory review. D.D.C. ECF #54, at 16 (July 19, 2016). The first three questions concerned, in one way or another, whether the pilots could at all sue the Corporation for fiduciary breaches; the fourth question was "[w]hether 29 U.S.C. § 1344 precludes the remedy of disgorgement of investment gains derived as a result of the alleged fiduciary breach." Pet. App. 66a.

The district court certified each of the questions (*see id.* at 65a-66a), and the D.C. Circuit accepted them for review. Pet. App. 53a.

On appeal, in a decision issued on August 21, 2018, the D.C. Circuit answered the fourth question and did "not address the other questions." *Id.* at 6a. On the fourth question, the panel "conclude[d] that § 1344(c) prevents the pilots from recovering any post-termination increase in the value of Delta Plan assets" and, therefore, that "disgorgement is not an available remedy in this case." *Id.* Though answering just the fourth question as to an available remedy, the last sentence of the panel's August 21, 2018 opinion read as follows: "We reverse the district court's denial of the motion to dismiss the fiduciary breach claim." D.C. Cir. ECF #1746572, at 14 (Aug. 21, 2018).

After the pilots timely filed a petition for panel rehearing and rehearing *en banc*, asserting (among other things) that the last sentence of the August 21, 2018 opinion was overbroad, the D.C. Circuit amended and reissued its opinion (on December 21, 2018). It removed the earlier last sentence and added a new final sentence and accompanying footnote, explaining that it was remanding the case to the district court for a determination as to whether equitable remedies other than disgorgement (such as surcharge or a constructive trust over segregated funds) might be available on the fiduciary-breach claim. *See* Pet. App. 15a-16a, 46a-48a. The full D.C. Circuit denied rehearing *en banc*. *See id.* at 49a.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS WARRANTED BECAUSE THE CIRCUITS ARE SPLIT ON THE MEANING AND EFFECT OF 29 U.S.C. § 1344(c)

The D.C. Circuit held that 29 U.S.C. § 1344(c) implicitly modifies Title IV's remedial provision, 29 U.S.C. § 1303(f), so as to prohibit plan participants from recovering post-termination gains the Corporation has made on a terminated plan's trusteed assets, even in instances where the gains resulted from the Corporation's fiduciary breaches. While consistent with the Ninth Circuit's view of § 1344(c), the D.C. Circuit's opinion conflicts with decisions of the Second and Fourth Circuits. Because of the Circuit split – one that the Circuits have already acknowledged (*see infra* p. 10) – the Court should grant certiorari to resolve the correct meaning and effect of § 1344(c).

Before turning to the other Courts of Appeals' views, some initial discussion of § 1344(c) is necessary. As the D.C. Circuit recognized (*see* Pet. App. 7a), § 1344(c) is a problematic provision, because it is internally inconsistent. The provision's first sentence outlines situations where the gains on plan assets can be allocated "between the plan and the corporation," beginning on the "later of" the "date a trustee is appointed" by a court or the "date on which the plan is terminated"; the second sentence then indicates unqualifiedly that gains are to be credited to the Corporation "after the date on which the plan is terminated." 29 U.S.C. § 1344(c). Hence, under the first sentence, if the later date is the plan's termination date, then the asset gains – starting on the date of the termination – do *not* inexorably go to the Corporation;

but under the second sentence, the asset gains are to be credited to the Corporation after termination.

The Second Circuit was the first Court of Appeals to construe § 1344(c), in *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 515 (2d Cir. 1994). It there said that, because the two sentences in § 1344(c) are "contradictory," the provision could not be read as a "broad right [for the Corporation] to collect all excess funding that may develop after a plan's termination due to an increase in the value of plan assets," "even if the second sentence governed." *Id.* Instead, it held that, in the particular circumstances there involved, the district court had "discretion" to determine who should benefit from an "increase . . . in the value of plan assets in the post-termination period." *Id.* In so concluding, the Second Circuit emphasized that the Corporation had "been inconsistent in its interpretation of section [13]44(c)," with the Corporation in an earlier case "'observ[ing]'" that § 1344(c) "'allocates post-termination gains or losses between the [Corporation] and the plan sponsor/employer or participants.'" *Id.* at 515 n.7 (quoting *PBGC v. Beadle*, 685 F. Supp. 628, 632 (E.D. Mich. 1988)).

The next pertinent Circuit decision is *Wilmington Shipping Co. v. New England Life Insurance Co.*, 496 F.3d 326 (4th Cir. 2007). There, the Fourth Circuit insisted that the entirety of § 1344 had to be read against the backdrop of: (1) the "otherwise absolute duty that ERISA imposes on fiduciaries, including statutory trustees [like the Corporation], to hold plan assets in trust for the benefit of plan participants" (*id.* at 336); and (2) a related provision in Title IV of ERISA, now 29 U.S.C. § 1305(b)(1)(B), that controls

when trusteed assets can be utilized by the Corporation for other purposes. Section 1305(b)(1)(B) provides that the "revolving funds" used by the Corporation to pay guaranteed benefits pursuant to its insurance function (not its trustee function) "shall be credited" with "the value of the assets of a plan administered under section [13]42 by a trustee [*i.e.* a terminated plan] *to the extent that they exceed the liabilities of such plan*." (Emphasis added.)[1]

Given these two background principles, the Fourth Circuit said that the Corporation "may be credited with the value of a terminated plan's assets . . . *only* to the extent that plan assets exceed plan liabilities (not to the extent they exceed guaranteed benefits), and *only* after the statutory trustee has satisfied all plan liabilities." 496 F.3d at 336. In effect, the Fourth Circuit read § 1344(c) to authorize the Corporation to be credited with the fruits of a trusteed plan only if there remained excess after all benefits promised by the original sponsor were satisfied.

Finally, the Ninth Circuit in *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1075 (9th Cir. 2009), held that § 1344(c), without qualification, "mandates that a post-termination increase or decrease in the [plan] assets be credited or suffered by [the Corporation]." *Id.* at 1073. The Ninth Circuit overtly disagreed with the Fourth Circuit and "decline[d] to adopt the rule from *Wilmington Shipping*." *Id.* at 1075.

---

[1] At the time of *Wilmington Shipping*, current § 1305(b)(1)(B) was codified at § 1305(b)(1)(C), but was in 2012 moved up one subsection.

The D.C. Circuit cited and followed *Paulsen* (*see* Pet. App. 10a), and rejected *Wilmington Shipping*. *See id.* at 12a-13a. Whether it was right or wrong to do so, the D.C. Circuit's decision deepens the division among the Circuits as to whether § 1344(c) should be read to, and has the effect of, destroying a participant's right to gains earned on a terminated plan's assets after termination. In this instance, the D.C. Circuit said § 1344(c) precludes the Plan's participants from recovering the gains, even if earned as a result of the Corporation's fiduciary breaches; its ruling was consistent with the Ninth Circuit's decision in *Paulsen*, but not with *Kinek* and *Wilmington Shipping*, since the Second and Fourth Circuits do not deem § 1344(c) to make gains unreachable. The Court should resolve the Circuits' division.

II. CERTIORARI IS WARRANTED BECAUSE THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

Certiorari likewise is warranted because the D.C. Circuit's decision diverges from this Court's precedents. In particular, it violates several cardinal rules of statutory construction the Court has emphasized in the ERISA setting and elsewhere.

First, the D.C. Circuit flouted the rule that statutory text, especially in a "highly reticulated" statute like ERISA, should be interpreted as "specifically" written, not by adding terms that Congress "forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks and citations omitted). Here, the key phrase on which the D.C. Circuit relied to preclude disgorgement of profits to the pilots comes in the sec-

ond sentence of § 1344(c) and states that asset gains "shall be credited to" the Corporation post-termination. 29 U.S.C. § 1344(c). The term "credit" is not defined in ERISA; in ordinary usage, it is an accounting term that means "an entry on the right-hand side of an account constituting an addition to a revenue, net worth, or liability account." "Credit," *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); *see generally Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (resorting to term's "regular usage" where statute lacks a definition).

Given that meaning, the Corporation all along has been "credited" with asset gains, because there is no dispute that entries have been made on the Corporation's accounts (and no one else's) reflecting the gains. But the D.C. Circuit then implicitly added terms to § 1344(c) in order to prohibit disgorgement: not only must the Corporation be credited with the gains, but § 1344(c) should be read – the D.C. Circuit thought – to mandate that the Corporation also *forever keep* those gains. Yet, there is nothing in § 1344(c)'s text suggesting in any instance eternal possession by the Corporation, let alone when the gains were the result of misconduct.

Second, the D.C. Circuit violated that same rule (*i.e.*, to interpret ERISA as written, without adding new terms), as well as the canon against courts "engraft[ing] [their] own exceptions onto the statutory text" (*Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)), when it used § 1344(c) to create an exception to 29 U.S.C. § 1303(f). Section 1303(f) is the relevant enforcement provision in ERISA's Title IV. It is a broadly-worded measure that,

again, authorizes awards of "appropriate equitable relief" against the Corporation. On its face, the provision contains only one exception, noting it shall apply "[e]xcept with respect to withdrawal liability disputes," which this case does not involve. 29 U.S.C. § 1303(f)(1).

The D.C. Circuit engrafted an additional exception onto § 1303(f), not for a category of disputes (like withdrawal-liability cases), but based on the *type* of equitable relief the plaintiff seeks. Under the D.C. Circuit's decision, disgorgement of ill-gotten gains is off limits, though such relief is (as the Corporation admits) typically part of the equity courts' repertoire of remedies against a breaching fiduciary. *See supra* p. 5. Certainly, if Congress wanted to foreclose a type of equitable relief, it could have done so in § 1303(f) specifically, and one would expect Congress to have done so *there* if that was its intent, rather than through an obtuse (and internally inconsistent) provision thirty sections away dealing with "credits" to Corporation accounts. At the least, if Congress expected § 1344(c) to be an exception to § 1303(f), Congress would have cross-referenced § 1303(f) in § 1344(c); but it did not.

Third, the D.C. Circuit's decision breaches the well-established rule that if two statutory provisions "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Assuming there is any tension between § 1303(f)'s terms authorizing "appropriate equitable relief" and § 1344(c), the conflict is easily resolved by construing § 1344(c) as actually written. That is, if § 1344(c) is treated as an

accounting measure facilitating where gains on a terminated plan's assets shall be credited, rather than a provision signaling eternal ownership of those gains, there is no conflict at all between the two statutory sections. The Corporation will have been credited with the gains as they occurred, and plaintiffs suing the Corporation would obtain the traditional equitable remedy of disgorgement where warranted under § 1303(f). That was, essentially, the approach adopted by the district court, finding no problem under § 1344(c) with ordering under § 1303(f) disgorgement of gains credited but not "*properly*" retained. Pet. App. 35a. The D.C. Circuit rejected that easy reconciliation, instead opting to read § 1344(c) beyond its actual terms *to negate* an aspect of § 1303(f).

Wilmington Shipping outlines another easy way in which the D.C. Circuit could have reconciled §§ 1344(c) and 1303(f): like the Fourth Circuit in *Wilmington Shipping*, the D.C. Circuit could have read § 1344(c) as authorizing the crediting of gains to the Corporation *after* all benefits promised under the terms of the terminated plan have been paid to the relevant pensioners. *See supra* p. 12. No one contends that the pilots have received all that Delta originally promised them, as opposed to the amounts limited by Title IV of ERISA. Under *Wilmington Shipping*, then, § 1344(c)'s operation has not yet even been triggered, thereby precluding a conflict with § 1303(f). Once more, the D.C. Circuit rejected that readily-available avenue of reconciliation in favor of nullifying a remedy otherwise available under § 1303(f).

The D.C. Circuit believed another Title IV provision – 29 U.S.C. § 1342(d)(3) – signaled priority for

§ 1344(c) over § 1303(f). *See* Pet. App. 12a. Section 1342(d)(3) states that a Title IV trustee "shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act [29 U.S.C. § 1002(21)] . . . (except to the extent that the provisions of this title are inconsistent with the requirements applicable under *part 4 of subtitle B of title I* of this Act . . .)." (Emphasis added.) Again, there is no inconsistency between § 1344(c) and § 1303(f), since both (as explained) have force under the pilots' and *Wilmington Shipping*'s approaches. In any event, § 1342(d)(3) is a red herring, most obviously because any conflict here (assuming conflict) would be between two provisions *in Title IV* of ERISA (*i.e.*, §§ 1303(f) and 1344(c)). While the types of relief that can constitute "appropriate equitable relief" under § 1303(f)(1) can be informed by the courts' copious case law interpreting the same term in 29 U.S.C. § 1132(a)(3), which, by the way, is in *part 5* of subtitle B of Title I, any rivalry in this instance in reality does not implicate § 1132(a)(3) itself.

Fourth, the D.C. Circuit transgressed the rule of construction that a "puzzling" or "unusual" statutory provision "warrants cautious interpretation." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006). Section 1344(c) is problematic – even "defect[ive]" – because its two sentences contradict one another, so much so that the D.C. Circuit surmised the provision "contains a drafting error." Pet. App. 9a. Under such circumstances, a court should accept the construction of § 1344(c) that does as little violence to other parts of the statute as possible (whether via the *Wilmington Shipping* route, or another). *See Kinek*, 22 F.3d at 515 (refusing to interpret § 1344(c) "broad[ly]," given its contradictory sentences). Yet, the D.C. Cir-

cuit construed § 1344(c) in the most aggressive manner possible – *i.e.*, to restrict another provision of Title IV that contains no restriction on its face and that even overtly invites customary fiduciary-related remedies. *See* 29 U.S.C. § 1303(f)(4) ("This subsection shall be the exclusive means for bringing actions against the corporation under this title, *including actions against the corporation in its capacity as a trustee* under section [13]42 or [13]49.") (emphasis added).

Fifth, the D.C. Circuit disregarded the rule of statutory construction that, if there is doubt about the meaning and effect of a statutory term (and, to be clear, the pilots do not think there is ambiguity here), the courts should interpret the term in sync with the statute's overall structure, context, and purposes. *See King v. Burwell*,135 S. Ct. 2480, 2492-96 (2015). "One of Congress' central purposes in enacting [ERISA] was to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374-75 (1980) (internal quotation marks and citation omitted). ERISA protects employees not only through the Title IV insurance program, but through "establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). In a nutshell, the statute, including Title IV and ERISA's remedial provisions, was enacted for the benefit of *participants* in terminated plans, not the Corporation. The D.C. Circuit should have interpreted § 1344(c) with an eye toward protecting participants and furthering remedies available to them, not thwart-

ing potential relief and limiting fiduciary liability. *See Wilmington Shipping*, 496 F.3d at 336.

III. CERTIORARI IS MERITED IN LIGHT OF THE IMPORTANCE OF THE QUESTION PRESENTED

Rounding out the reasons for granting certiorari is the vital importance of the question whether § 1344(c) negates a participant's right under § 1303(f) to obtain disgorgement when the Corporation acts as a trustee and breaches its fiduciary obligations. Indeed, the Corporation has already conceded that the Question Presented is momentous, arguing (successfully) when seeking interlocutory appellate review that the issue is "important to the administration of federal law" and "of critical concern to the federal pension insurance program." *See* D.D.C. ECF #54, at 16 (July 19, 2016).

And the Corporation was, on this one point, exactly right – *i.e.*, the issue *is* important. Currently, there are over 1.4 million participants in terminated plans already trusteed by the Corporation. *See* PBGC, *Annual Report 2018*, at 9 (Nov. 15, 2018), https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf. As of September 2018, the Corporation held *more than $70 billion* in funds in trust for those 1.4 million pensioners. *See id.* at 45. Additionally, there are another roughly 26 million workers who are in single-employer pension plans that have not terminated but who could be subject to the Corporation's trusteeship if their plans terminate in the future. *See id.* at 36. The remedial rights of these millions of persons currently in terminated pension plans or subject to the Corporation's trusteeship in the future potentially are implicated by the Question Pre-

sented, as is the Corporation's ability to keep the multi-billions in assets it holds in trust when it engages in serious wrongdoing against those entrusted to it for protection.

Furthermore, the issue of disgorgement and the Corporation's immunity from it can arise in some of the most substantial cases reaching the federal courts, when measured by the amount in controversy. In this case alone, the Corporation trusteed more than $2 billion in Delta Plan assets in 2006, and the Corporation's gains on those assets are now more than the original amount it trusteed. The pilots estimate that the amount in disgorgement they could be awarded, if that remedy is allowed and they succeeded on the merits of their case, is approximately $600 million. Similar large financial gains on assets accompany other recently-terminated plans that the Corporation trustees, including plans terminated in conjunction with bankruptcies among other major airlines and in the automotive industry; and any misconduct by the Corporation in its trustee capacity in those situations could equally lead to huge amounts being at issue in disgorgement.

In fact, it is the pilots view that the Corporation fails to act with alacrity as trustee in making its final benefit determinations precisely in these very large matters because it has the ability to profit from delay. It enjoys substantial investment gains from holding the assets and then pays only very minimal interest to participants for any loss of use of monies ultimately awarded – a big net "win" financially for the Corporation. Thus, while the Question Presented might not arise every day in the federal courts, when it does it

has enormous financial consequences for both participants and the Corporation.

Last but not least, the D.C. Circuit's decision is of great import because it will, absent this Court's intervention, serve as the last word on whether the crucial remedy of disgorgement is available against the Corporation in terminated-plan situations. This Court has carefully honed the contours of "appropriate equitable relief" under ERISA in twenty-five years' worth of precedents, leading to the situation today where disgorgement of profits can be available against a breaching fiduciary. *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). When it is available, disgorgement serves a significant prophylactic purpose: "to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach." *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1411 (9th Cir. 1988) (citing G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543, at 218 (2d ed. 1978)). There is no dearth of evidence that, notwithstanding the Corporation being a government entity, necessity exists for subjecting the Corporation when it administers a terminated plan's assets – like any other fiduciary handling ERISA-plan assets – to remedies that deter bad conduct.[2]

---

[2] *See* PBGC Office of Inspector General Evaluation Report, *PBGC's Plan Asset Audit of National Steel Pension Plans Was*

But unless this Court holds otherwise, the disgorgement remedy against the Corporation will not exist for terminated-plan participants, simply because the D.C. Circuit has said so. The D.C. Circuit would have the final say because of the venue provision in § 1303(f), which the Corporation insists (and was successful in arguing here) funnels all claims against the Corporation after a plan's termination to "the United States District Court for the District of Columbia." 29 U.S.C. § 1303(f)(2)(C). While the proper construction and effect of § 1344(c) can arise in any number of contexts (as the Circuit split on the issue attests), the particulars of the venue provision potentially result in courts within the D.C. Circuit alone determining § 1344(c)'s consequences for participants in terminated plans who sue the Corporation. On this "important" and "critical" issue (to use, again, the Corporation's own words, *see supra* p. 17), the D.C. Circuit should not be supreme.

Seriously Flawed, at 1, 10 (Mar. 30, 2011), http://oig.pbgc.gov/pdfs/PA-09-66-1.pdf (describing Corporation's administration of terminated plan as "seriously flawed," "seriously deficient," and subject to "serious errors and omissions"); PBGC Office of Inspector General Evaluation Report, *PBGC Processing of Terminated United Airlines Pension Plans Was Seriously Deficient*, at 4 (Nov. 30, 2011), https://oig.pbgc.gov/pdfs/PA-10-72-1.pdf (same).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANTHONY F. SHELLEY
Counsel of Record
TIMOTHY P. O'TOOLE
MICHAEL N. KHALIL
MILLER & CHEVALIER CHARTERED
900 Sixteenth St. NW
Washington, D.C. 20006
Tel.: (202) 626-5800
E-mail: ashelley@milchev.com
E-mail: totoole@milchev.com
E-mail: mkhalil@milchev.com

APRIL 2019