

No. 18-1279

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**

BRIEF IN OPPOSITION

JUDITH R. STARR
General Counsel

CHARLES L. FINKE
Deputy General Counsel

PAULA J. CONNELLY
KENNETH J. COOPER

JOSEPH M. KRETTEK (COUNSEL OF RECORD)
Assistant General Counsels

MARK R. SNYDER
Attorney

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W. Washington, D.C. 20005
(202) 326-4020, ext. 6772

E-mail: krettek.joseph@pbgc.gov

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**COUNTERSTATEMENT OF
QUESTION PRESENTED**

The petition does not present a question meriting review by this Court. If the Court were to grant the petition, however, the question should be restated as follows:

When an underfunded pension plan terminates, Respondent Pension Benefit Guaranty Corporation (“PBGC”) must pay benefits up to the limits in Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), regardless of the level of plan assets at the plan’s termination date. In a case where a participant is dissatisfied with PBGC’s determination of his or her statutory benefits, the participant may seek court review of PBGC’s determination. The D.C. Circuit held, however, that a participant may not seek, under a fiduciary breach claim, disgorgement of any post-termination investment gains on plan assets from PBGC, because the express terms of 29 U.S.C. § 1344(c) govern the allocation of post-termination gains or losses and direct that they must be “credited to, or suffered by” PBGC.

The Question Presented is:

Was the court of appeals correct in holding that participants cannot seek, under a fiduciary breach claim, disgorgement of PBGC’s post-termination investment gains, as it is expressly precluded by 29 U.S.C. § 1344(c)?

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**OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

Respondent PBGC opposes certiorari. Petitioners K. Wendell Lewis *et al.* (the “Pilots”) ask this Court to review the D.C. Circuit’s decision addressing whether a participant may seek the remedy of disgorgement of investment gains against PBGC on a claim for fiduciary breach. The Pilots argue that two decisions from other circuits viewed 29 U.S.C. § 1344(c) – the provision governing the allocation of increases and decreases in plan assets for purposes of Title IV of ERISA – differently from the D.C. Circuit. But the circuit split the Pilots suggest is grossly exaggerated: one of those decisions addressed PBGC’s recoveries and the other dealt with § 1344(c) in passing and offered no analysis of the provision. Contrary to Petitioners’ argument, the D.C. Circuit’s decision does not conflict with this Court’s precedents and merely applies a Title IV provision not applicable to private, ongoing plans. Finally, this case is not well suited for this Court’s review because disgorgement is unlikely to result in additional recoveries by the Pilots above their statutory benefits, and portions of PBGC’s interlocutory appeal are on remand.

STATEMENT OF THE CASE

A. Statutory and Factual Background

This case involves the pension benefits owed to a group of about 1,700 mostly retired Delta Airlines pilots under the federal pension insurance program administered by PBGC under Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2017). The Pilots were participants in the underfunded Delta Pilots Retirement Plan (the “Plan”), which terminated in 2006 during its former sponsor’s bankruptcy. PBGC is the U.S. Government corporation, and federal agency, that ensures that plan participants and their beneficiaries are not “completely ‘deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.’” *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990) (citation omitted).

PBGC, as it has for virtually every one of the more than 4,800 underfunded plans terminated since 1974, stepped in to become trustee of the Plan, as expressly authorized by 29 U.S.C. § 1342(b)(1) (PBGC “may request that it be appointed as trustee of a plan in any case”). PBGC has been paying retirement benefits to Plan participants ever since.

Upon PBGC becoming trustee of a terminated plan, PBGC uses the plan’s assets and the agency’s insurance funds to pay benefits to current and future retirees and their beneficiaries. PBGC continues payment of benefits to retirees already in pay status, on an estimated basis and without interruption, and promptly processes benefit applications for those

going into pay. ERISA expressly authorizes PBGC to “pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of [Title IV].” 29 U.S.C. § 1342(a). And the statute further mandates that “[a]ny 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, [PBGC].” 29 U.S.C. § 1344(c).

Title IV provides that PBGC guarantees “nonforfeitable benefits” under a terminated pension plan – those benefits for which a participant has satisfied all conditions – regardless of the level of the terminated plan’s assets but subject to certain statutory limits. 29 U.S.C. §§ 1301(a)(8), 1322(a). A participant always receives at least his or her guaranteed benefit amount, and in many cases PBGC guarantees a participant’s entire plan benefit. A participant may receive a larger benefit depending on the level of plan assets, whether part or all of the participant’s benefit is entitled to priority under the asset-allocation rules, and the amount PBGC recovers from the former sponsor. 29 U.S.C. §§ 1322(c) and 1344(a). In the case of the Plan, PBGC is paying out of its insurance funds nearly \$800 million in guaranteed but unfunded benefits. Joint Appendix (“JA”) 202, No. 17-5068 (D.C. Cir. June 5, 2017).

After PBGC finishes valuing assets and recoveries, reviewing all plan documents and participant information, and calculating each participant’s Title IV benefit, PBGC issues benefit determination letters. A participant may challenge

PBGC's determination by filing an appeal with PBGC's Appeals Board. 29 C.F.R. pt. 4003, subparts A and D (§§ 4003.1-4003.10 and 4003.51-4003.61). The Pilots sought such review here, and, on September 27, 2013, the Appeals Board rendered a final agency decision denying the Pilots' challenge to the agency's determination of their Title IV benefits.

After receiving the final agency decision, a participant can sue PBGC under 29 U.S.C. § 1303(f). *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148 (D.C. Cir. 2006). Section 1303(f) states, in pertinent part:

(1) . . . any person who is . . . adversely affected by any action of [PBGC] with respect to a plan in which such person has an interest . . . may bring an action against [PBGC] for appropriate equitable relief in the appropriate court.

* * *

(4) This subsection shall be the exclusive means for bringing actions against [PBGC] under this subchapter, including actions against [PBGC] in its capacity as a trustee under section 1342 or 1349 of this title.

Title IV does not specifically provide for liability against PBGC for fiduciary breach. Rather, it provides that the statutory trustee of a terminated plan "shall be, with respect to the plan, a fiduciary within the meaning of [Title I] . . . except to the extent

that the provisions of [Title IV] are inconsistent with the requirements applicable under [Title I]” 29 U.S.C. § 1342(d)(3). Title I similarly provides that fiduciary duties are “subject to” Title IV provisions governing PBGC. 29 U.S.C. § 1104(a)(1).

Thus, PBGC may be subject to a fiduciary breach claim in a Title IV suit under section 1303(f), as the Pilots brought here. But unlike a Title I fiduciary, who must act with “an eye single to the interests of participants and beneficiaries” in a plan (*Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)), PBGC’s fiduciary duties are limited by applicable Title IV provisions and its mandate to implement the insurance program for participants in all terminated plans, as well as for the companies that maintain those plans.

B. Procedural History

After the Appeals Board rendered PBGC’s final agency decision on the Pilots’ claims, the Pilots filed a six-count complaint under 29 U.S.C. § 1303(f) in the Northern District of Georgia. The complaint challenged the agency’s calculation of their benefits (especially the amount of benefits assigned to priority category 3 in the § 1344(a) asset allocation) and included a claim for fiduciary breach. Complaint dated Dec. 2, 2014; D.D.C. Doc. 1; JA 27-189.

PBGC moved to transfer the case for improper venue and moved to dismiss the Pilots’ fiduciary breach claim, which was then Claim 5. D.D.C. Doc. 13. On August 11, 2015, the Georgia district court granted PBGC’s motion to transfer the case to the District of Columbia and did not rule on its motion to

dismiss the fiduciary breach claim. D.D.C. Doc. 31; JA189-197.

After transfer to the District of Columbia, the Pilots moved for leave to file an amended complaint, which proposed an expansion of their fiduciary breach claim. D.D.C. Doc. 40. PBGC opposed, but the district court granted the motion to amend. D.D.C. Doc. 41; JA204-05. The Pilots' First Amended Complaint – the current version – seeks relief that includes an award of benefits; an injunction against PBGC; the setting aside of all PBGC regulations applied in circumstances that violate ERISA; an accounting of statutory insurance premiums; a constructive trust for premiums paid to remedy fiduciary breach; monetary relief to redress fiduciary breach; disgorgement and surcharge to redress unjust enrichment from investment income; attorneys' fees; other expenses; and costs. JA329-331.

On December 7, 2015, PBGC moved again to dismiss the Pilots' fiduciary breach claim, which the Pilots had renumbered from Claim 5 to Claim 1. D.D.C. Doc. 46. On July 6, 2016, the district court denied PBGC's motion to dismiss the fiduciary breach claim. Pet. App. 17a-43a.

PBGC moved the district court to reconsider or certify its opinion for interlocutory appeal. D.D.C. Doc. 54. On January 23, 2017, the district court denied the motion to reconsider, but granted the motion to certify, finding that its opinion meets the requirements of 28 U.S.C. § 1292(b). Pet. App. 54a-66a. On April 4, 2017, the court of appeals granted PBGC's petition for permission to appeal. *Id.* at 53a.

While the appeal before the D.C. Circuit was pending, the parties both moved for summary

judgment on the First Amended Complaint's benefits claims. On June 11, 2018, the district court granted summary judgment to PBGC on each of these claims. *Lewis v. PBGC*, 314 F. Supp. 3d 135 (D.D.C. 2018). The district court rejected all of the Pilots' arguments and found reasonable each of PBGC's interpretations, including those on the assignment of benefits within the § 1344(a) asset allocation.

On August 21, 2018, the D.C. Circuit issued its decision, addressing only the last of the four questions PBGC presented. D.C. Cir. Doc. 1746572 (Aug. 21, 2018). On the fourth question, regarding § 1344(c), the court of appeals concluded that the provision prevents the Pilots from seeking disgorgement from PBGC of any post-termination increase in the value of Plan assets. *Id.*

After the Pilots petitioned for rehearing, asserting that the D.C. Circuit's decision was wrong and was overbroad (in dismissing the entire fiduciary breach claim), the D.C. Circuit amended and reissued its opinion on December 21, 2018. Pet. App. 1a. It removed the sentence dismissing the entire fiduciary breach claim and added a footnote that the case was remanded to the district court for a determination as to whether the Pilots sought equitable remedies other than disgorgement on their fiduciary breach claim. Pet. App. 15a-16a.

On April 4, 2019, the Pilots' filed a petition for a writ of certiorari (the "Petition") for review of the D.C. Circuit's decision.

REASONS FOR DENYING THE PETITION**I. There is no genuine conflict among the circuits.**

The Pilots depict a deep division among the circuit courts about whether § 1344(c) precludes participants from seeking post-termination investment gains from PBGC as an equitable remedy. Pet. at 8-11. But the decisions from the Second and Fourth Circuits that purportedly conflict with the D.C. Circuit's decision considered § 1344(c) either in passing or, in the case of the Second Circuit, in a very different context. The D.C. Circuit's decision in this case presents the only full analysis of § 1344(c)'s relation to participants' equitable remedies against PBGC, and that analysis is sound.

After extensive briefing and argument by the parties on §§ 1303(f)(1), 1344(c), and many other provisions of ERISA, the D.C. Circuit provided a thorough explanation why § 1344(c) precludes disgorgement in a fiduciary breach action against PBGC. The court's analysis began with § 1344(c)'s text, which reads—

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 1342(b) of this title 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 [PBGC].

The court acknowledged that § 1344(c), as a whole, was problematic, as “[t]he two halves of this subsection are in tension,” and noted that in 1994, Congress considered amending the provision so that the first sentence would clearly specify the period from the date of appointment of an interim trustee to the plan termination date. Pet. App. 7a-9a. The court concluded, however, that this case – where no interim trustee was ever appointed – involved only the second half of § 1344(c), “which by its express terms governs the allocation of post-termination gains at issue in this case” and directs any investments gains or losses to PBGC exclusively. *Id.* at 9a.

The D.C. Circuit also fully addressed the Pilots’ detailed arguments that § 1344(c) should not be read to constrain the broad wording of § 1303(f)(1) (“appropriate equitable relief”) and prevent participants from seeking the traditional equitable remedy of disgorgement. The court rejected the Pilots’ argument that applying § 1344(c) would upend long-standing interpretations about equitable remedies available to plan participants. The court explained that § 1344(c) is specific to terminated plans and noted that “ERISA repeatedly qualifies the fiduciary status of post-termination trustees ‘to the

extent that the provisions of [Title IV] are inconsistent.” Pet. App. 11a-12a. The court characterized the Pilots’ arguments attempting to differentiate PBGC’s roles as guarantor and statutory trustee as “fundamentally flawed,” explaining that § 1344(c)’s allocation of gains and losses to PBGC is perfectly sensible, because participants’ benefits are calculated as of the plan termination date and shielded from any losses PBGC may suffer. *Id.* at 13a. The court also rejected the district court’s distinction between assets “properly held” and assets held in breach of fiduciary duty, because the express language of the statute provides no reason for an “implied exception’ to those unambiguous terms.” *Id.* at 14a.

The Pilots argue that two circuit courts – the Second and Fourth Circuits – have very different views from the D.C. Circuit on the issue at hand. But these decisions do not present a circuit split warranting this Court’s review. *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503 (2d Cir. 1994), concerned whether a former plan sponsor had to comply with a full funding clause when it spun off a portion of its plan, which was later trustee by PBGC. The bulk of the Second Circuit’s decision examined the former sponsor’s contractual obligation. The last portion considered the prejudgment interest that should apply to PBGC’s recovery, and PBGC’s argument that the interest should match the rate of return on the plan’s assets during the period immediately before the plan terminated. The Second Circuit, noting the tension between the two halves of § 1344(c), declined to adopt PBGC’s argument that

§ 1344(c) was relevant for determining prejudgment interest.

Wilmington Shipping Co. v. New England Life Insurance Co., 496 F.3d 326 (4th Cir. 2007), addressed the liability of a private sector insurance company for alleged failure to properly manage a plan’s assets before the plan terminated. The court, in holding that a participant had standing to sue the private-sector former fiduciary, made several sweeping statements about PBGC’s role as statutory trustee. The court surmised – with no analysis of the text of § 1344(c) or citation to that subsection – that investment gains are credited to PBGC “only after the statutory trustee has satisfied all plan liabilities.” 496 F.3d at 336. The case was decided with no PBGC involvement, and many of its statements are demonstrably wrong (e.g., that PBGC, as statutory trustee, may pay lump sum benefits to participants).

The statements in the *Kinek* and *Wilmington Shipping* decisions – though certainly not consistent with the D.C. Circuit’s careful analysis – do not represent a developed division between the circuits on the issue presented in this case: whether participants in a terminated plan can seek, under a fiduciary breach claim, disgorgement of PBGC’s post-termination investment gains. *Kinek* addressed the determination of prejudgment interest on PBGC’s recoveries and ultimately reached no conclusion on § 1344(c), and *Wilmington Shipping* presented no meaningful analysis of § 1344(c) in reaching the baffling conclusion that PBGC has a host of wide-ranging powers as statutory trustee well beyond its authority as guarantor.

For these reasons, this case does not conflict with the decision of any other circuit court of appeals on the same important issue.

II. The decision of the court of appeals does not conflict with this Court's precedents.

Because this Court has never cited or interpreted §1344(c), the D.C. Circuit decision is not in conflict with any direct precedents of this Court. The Pilots nevertheless contend that certiorari is warranted because the decision of the D.C. Circuit “violates several cardinal rules of statutory construction” emphasized by this Court. Pet. at 11. But the Pilots’ spurious arguments fail to show any flawed statutory analysis requiring this Court’s review. Rather, they demonstrate nothing more than the Pilots’ dissatisfaction with the D.C. Circuit’s conclusion that § 1344(c) has real meaning.

The Pilots first contend that the court of appeals read § 1344(c) too expansively, by not interpreting “credited” as limited to an accounting concept. *Id.* at 12. The Pilots allege that “there is no dispute that entries have been made on the Corporation’s accounts.” *Id.* But as PBGC explained to the D.C. Circuit, PBGC keeps no such accounts for trustee plans. PBGC Reply brief at 14 (PBGC pools the assets of terminated plans). Moreover, the Pilots’ proposed interpretation would render § 1344(c)’s instruction on post-termination gains and losses essentially meaningless. Not surprisingly, the Pilots fail to mention the provision’s additional words “or suffered by,” which unmistakably convey Congress’s intent that participants’ benefits should not depend,

one way or the other, on post-termination investment returns.

The Pilots' second and third arguments – that the D.C. Circuit “engrafted” an exception onto § 1303(f)(1), which unnecessarily creates a conflict between § 1344(c) and § 1303(f)(1) – also have no merit. Pet. at 12-15. The Pilots assert that § 1303(f)(1) must give participants in a PBGC-trusted plan an inalienable right to all of the equitable remedies available with respect to an ongoing plan. As the D.C. Circuit explained, however, “[o]ngoing plans are not subject to the same statutory instructions as terminated plans when it comes to [a]ny increase or decrease in the value of plans assets.” Pet. App. 12a.

The Pilots also maintain that treating § 1344(c) as merely an accounting concept would make its language “capable of co-existence” with the availability of “appropriate equitable relief” in section 1303(f). But these provisions are perfectly capable of co-existence without distorting them in this way. As this Court has said, a specific statutory provision like § 1344(c) governs a general provision like § 1303(f). *RadLAX Gateway Hotel, LCC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Here, the two provisions are both part of the same statutory scheme and the specific mandate in § 1344(c) that post-termination gains and losses go to PBGC governs the general mandate in § 1303(f) that adversely affected persons may seek “appropriate equitable relief.”

The Pilots' fourth and fifth arguments – that the decision below failed to approach an “unusual” and “ambiguous” statutory provision cautiously enough, so as not to do “violence” to the overall

statutory structure – are unconvincing as well. Pet. at 15-16. The Pilots want “appropriate equitable relief” under § 1303(f)(1) to mean all the equitable remedies available with respect to an ongoing plan, with no qualification. But § 1303(f)(1) does not exist in a vacuum, and its meaning must square with the other provisions of Title IV. As the D.C. Circuit explained, the express terms of § 1344(c) allocate all post-termination gains and losses to PBGC, and thus preclude the remedy of disgorgement. Pet. App. 9a.

In sum, the D.C. Circuit’s statutory interpretation of section 1344(c) is not a departure from this Court’s teachings. Nor is it wrong.

III. Review is also not warranted because the Pilots have adequate other remedies and reversal of the court of appeals is unlikely to result in additional recoveries by the Pilots above their statutory benefits.

PBGC agrees with the Pilots that the issue of whether participants can seek disgorgement of PBGC’s investment gains is “of critical concern to the federal pension insurance system.” Pet. at 17. But this is because permitting litigants to seek relief against PBGC for alleged fiduciary breach for more than the amount of their Title IV benefits would have serious long-term consequences for PBGC in other cases. On average, PBGC becomes trustee of more than 100 pension plans a year. The district court’s July 2016 ruling permitting disgorgement of assets “improperly” held, if not overturned, could lead to a flood of litigation by participants seeking discovery

and extra-statutory amounts. Even participants pursuing routine benefit claims would be encouraged to assert fiduciary breach claims seeking additional amounts.

The Pilots assert that not permitting disgorgement would severely curtail the remedial rights of participants. But as the D.C. Circuit explained, in the case of the Pilots “[t]his does not mean [they] lacked possible remedies for their alleged injuries,” as other forms of equitable relief may be available, and they were able to challenge their benefit determinations. Pet. App. 14a-15a. Moreover, where PBGC does underpay a participant, PBGC’s regulations provide for interest (whereas PBGC charges no interest if it overpays a participant). 29 C.F.R. § 4022.81(c)(4)-(5). And the interest payment in the case of underpayment is unaffected by PBGC’s return on assets.

The Pilots’ argument that disgorgement will make a critical difference in their case is further undercut by the district court’s recent grant of summary judgment to PBGC on each of the amended complaint’s benefit claims. 314 F. Supp. 3d at 135. Many of the benefit claims concern interpretations considered – and upheld – by the D.C. Circuit in 2013 in *Davis v. PBGC*. 734 F.3d 1161 (D.C. Cir. 2013). If PBGC’s determination of statutory benefits is correct, then the Pilots’ wide-ranging allegations that PBGC staff perpetrated an elaborate scheme to purposely misinterpret the statutory and regulatory rules and pay benefits later in time, would have no leg to stand on.

Lastly, the Pilots’ contention that the Court should grant their Petition because the D.C. Circuit’s

decision may “serve as the last word” on this issue goes too far. Pet. at 19. By this logic, the Court should review all D.C. Circuit decisions involving PBGC interpretations of Title IV that affect participant benefits.

IV. Any review by the Court would be premature.

This case is in a procedural posture that counsels against this Court’s review. The D.C. Circuit remanded the motion-to-dismiss matter to the district court to determine, in the first instance, whether the Pilots sought any equitable remedies other than disgorgement. Pet. App.15a.

Even if other equitable remedies were available, the district court could conclude that its grant of summary judgment to PBGC on the benefits claims prevents the Pilots from establishing the factual basis for asserting them. That would moot the issue presented in the petition. And if that argument were rejected, the district court would need to determine the availability of other equitable remedies. Ultimately, the D.C. Circuit would likely need to address the other three arguments precluding relief raised by PBGC’s in its interlocutory appeal. Pet. App. 6a. Resolution of those issues would provide additional context for any review of the disgorgement issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JUDITH R. STARR
General Counsel
CHARLES L. FINKE
Deputy General Counsel
PAULA J. CONNELLY
KENNETH J. COOPER
JOSEPH M. KRETTEK (COUNSEL OF RECORD)
Assistant General Counsels
Mark R. Snyder
Attorney
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W. Washington, D.C. 20005
(202) 326-4020, ext. 6772
Email: krettek.joseph@pbgc.gov

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