No. _____

IN THE

Supreme Court of the United States

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

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

PETITION FOR A WRIT OF CERTIORARI (REDACTED FOR PUBLIC RECORD)

ANTHONY F. SHELLEY
Counsel of Record
DAWN E. MURPHY-JOHNSON
ELIZABETH J. JONAS
MILLER & CHEVALIER CHARTERED
900 Sixteenth St. NW
Black Lives Matter Plaza
Washington, D.C. 20006
Tel.: (202) 626-5800
ashelley@milchev.com

QUESTIONS PRESENTED

The Employee Retirement Income Security Act ("ERISA") carefully spells out the process to terminate a distressed pension plan insured by the Pension Benefit Guaranty Corporation ("PBGC"). Under 29 U.S.C. §1342(a), PBGC may "institute proceedings" to terminate a plan it deems in distress; under §1342(b), a trustee can take charge of the plan while those proceedings are underway; and under §1342(c), PBGC or the trustee ultimately may apply to a district court for a decree terminating the plan, which the court may grant "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund." Here, the Sixth Circuit held that, as an alternative to these procedures, PBGC may terminate a plan through an agreement with the plan's administrator, with no judicial oversight or hearing of any sort for participants who will lose benefits upon termination. The Questions Presented are:

(1) Does ERISA permit the termination of a distressed pension plan through an agreement between PBGC and the plan administrator?

(2) Does termination through such an agreement, which avoids a hearing, violate the participants' constitutional rights to due process?

(3) If ERISA and due process allow for termination by agreement, is the termination's substantive legality to be judged under the standards in §1342(c), or is it enough that the conditions in §1342(a) to "institute" proceedings may exist?

LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings are contained in the caption of the case on the cover.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Delphi Salaried Retiree Association states that it has no parent corporations, is not a publicly owned corporation, and does not issue stock. Therefore, no publicly held company owns 10% or more of the corporation's stock.

LIST OF PROCEEDINGS IN TRIAL AND APPELLATE COURTS

Black v. PBGC, No. 09-cv-13616, U.S. District Court for the Eastern District of Michigan. Judgment entered March 22, 2019.

In re PBGC, No. 14-2072, U.S. Court of Appeals for the Sixth Circuit. Petition for Writ of Mandamus denied September 23, 2014.

Black v. PBGC, No. 19-1419, U.S Court of Appeals for the Sixth Circuit. Opinion and Judgment entered September 1, 2020, Amended Opinion and Judgment entered December 28, 2020, denial of petition for rehearing *en* banc entered February 25, 2021, and mandate issued March 5, 2021.

U.S. Dep't of Treasury v. PBGC v. Black, No. 12-mc-0100, U.S. District Court of the District of Columbia. Opinions entered December 20, 2016, April 13, 2017, and June 7, 2017, and Minute Order entered July 12, 2017.

U.S. Dep't of Treasury v. Black, Nos. 17-5142, 17-5164, U.S. Court of Appeals for the District of

Columbia Circuit. Per Curiam Judgment with Memorandum entered December 8, 2017. Mandate issued January 8, 2018.

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Petitioners respectfully seek a Writ of Certiorari to review the amended judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

For more than forty years, PBGC has terminated ERISA-governed pension plans that it deems in distress through agreements with the administrators of the plans. PBGC is the federal agency that insures defined-benefit private-employer pension plans, in the event a plan terminates with assets insufficient to pay all vested benefits. As PBGC reasons, termination by agreement is expeditious; PBGC can readily extract terms favorable to it (to reimburse it for its insurance costs) from employers whose pension plans are almost certainly among their greatest continuing costs; and participants might not suffer much injury if PBGC insurance payments measure up to the terminated plan's promised benefits. The process might be jarringly quick and summary for an event as momentous as the termination of a plan, but an agreement leads to a result PBGC deigns in the public interest. To PBGC, the ends justify the means.

But here's the initial rub: ERISA does not allow for terminations by agreement. In painstaking fashion—in 29 U.S.C. §1342—ERISA lays out the procedures, step by step, for terminating a pension plan. The process culminates with PBGC (or a trustee appointed for the plan) applying to a federal district court for "a decree adjudicating that the plan must be terminated," a decree the court then may issue "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of [PBGC's insurance] fund." §1342(c)(1). When PBGC and a plan administrator terminate a plan by agreement, they seize for themselves the authority that ERISA gives to a court.

Here's the second rub: the Constitution does not allow for terminations by agreement either. In *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980), this Court held that participants' vested benefits are nonforfeitable, even when a plan is terminated due to underfunding. Because of the participants' rights to their vested benefits, they have property interests that the government cannot—consistent with the Due Process Clause of the Fifth Amendment—strip away without a pre-deprivation hearing, and no hearing occurs where a plan is terminated by agreement. At a minimum, in situations where PBGC's insurance does not cover the entirety of the participants' vested benefits, and PBGC and the plan administrator terminate the plan without court adjudication, the participants are deprived of benefits on which they may long have relied without the necessary constitutional hearing.

This case illustrates the wisdom of ERISA's and the Constitution's requirement of an adjudication to terminate a plan, as well as the harm caused by PBGC's summary process. Petitioners were salaried workers participating in a pension plan sponsored by Delphi Corporation ("Delphi"), a parts supplier to General Motors Corporation ("GM"). In 2009, in the midst of the global financial crisis, the U.S. Treasury Department's Auto Task Force sought the cheapest, most expeditious way to restructure the auto industry, which included Delphi (then in bankruptcy). Acquiescing to pressure from the Auto Task Force, PBGC instituted termination proceedings concerning Petitioners' plan in federal court in Michigan. Petitioners, believing the federal government was impermissibly sacrificing their plan to rescue others in the auto sector, moved to intervene. Abruptly, PBGC aborted the proceedings. [redacted] PBGC then quickly inked an agreement with the administrator of the plan, appointed itself as trustee, and terminated the plan.

The result was that Petitioners and other plan participants lost as much as 70% of their vested benefits. As in many other mature industries, Petitioners' benefits, while still modest, were greater than the maximum PBGC insurance guarantee. In contentious litigation that has now spanned *twelve* years, Petitioners have challenged in federal court PBGC's termination of their plan by agreement.

Ruling for PBGC, the Sixth Circuit upheld the termination. It reasoned that a cryptic sentence buried in §1342(c)(1) implicitly allows terminations by agreement, as an "alternative" to Congress's carefully calibrated court-adjudication regime. Petitioners' Appendix ("Pet. App.") 7a. As to due process, the Court—contrary to *Nachman* and, really, all ERISA norms—held that portions of Petitioners' vested benefits at the time of termination were forfeitable and, therefore, not a property interest deserving of constitutional protection. The Sixth Circuit further held that the termination's substantive legality should be measured against lenient standards (set out in §1342(a)) for *instituting* termination proceedings, not the standards for a court's issuance of a decree terminating a plan. Still, it was not easy for the Sixth Circuit, as it had to issue an amended opinion (after Petitioners sought rehearing) to try to jibe its views with *Nachman*.

The Sixth Circuit got it very wrong, on matters of exceptional importance to the nation's pensioners and in substantial disagreement with other circuits. The Court should grant the Petition and address: (1) whether ERISA permits terminations by agreement between PBGC and plan administrators; (2) whether terminations by agreement violate the participants' constitutional rights to due process; and (3) if terminations by agreement do comport with ERISA and due process, whether courts should review them under ERISA's lesser standards for instituting a termination proceeding. In this significant area of employee-benefits law, the federal agency's ends *and means* do matter.

OPINIONS BELOW

The December 28, 2020 amended opinion of the Sixth Circuit is reported at 983 F.3d 858 (6th Cir. 2020) and is reproduced at Pet. App. 1a-28a. The Sixth Circuit's original opinion, issued on September 1, 2020, is reported at 973 F.3d 576 (6th Cir. 2020) and is reproduced at Pet. App. 29a-55a. The relevant opinion of the U.S. District Court for the Eastern District of Michigan is unreported, appears at 2019 U.S. Dist. LEXIS 47803 (E.D. Mich. Mar. 22, 2019), and is reproduced at Pet. App. 56a-73a.

JURISDICTION

The Sixth Circuit entered its amended judgment on December 28, 2020, *see* Pet. App. 76a, and denied a timely petition for rehearing *en banc* on February 25, 2021. *See id.* at 75a. By general orders entered on March 19, 2020 and July 19, 2021, this Court extended the deadline for filing a petition for a writ of certiorari to 150 days from the date of the lower court's denial of a timely petition for rehearing, where the denial occurred prior to July 19, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of ERISA are set forth at Pet. App. 80a-99a.

STATEMENT

A. Statutory Framework

Enacted in 1974, ERISA—in its Title IV—created "a mandatory Government insurance program that protects the pension benefits of . . . private-sector American workers who participate in [covered] plans." *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990); *see* 29 U.S.C. §§1321-1322a. The insurance program does not ensure that a participant will receive the full benefit the employer promised; rather, ERISA establishes a "maximum guaranteed monthly benefit" indexed to an amount established by statute. §1322(b)(3)(B). The program is administered by PBGC, a government corporation within the Department of Labor whose Board of Directors consists of the Secretaries of Treasury, Labor, and Commerce. *See* 29 U.S.C. §1302(a), (d)(1). In addition to paying insurance, PBGC's mission is "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." §1302(a)(1).[1]

Central to this case is the Title IV provision—§1342—outlining procedures to terminate a plan in distress, with termination then triggering application of the insurance program. A plan is distressed when, for instance, it has not "met the minimum funding standard[s]" or "will be unable to pay benefits when due." §1342(a)(1)-(2). Subsection (a) of §1342 provides that PBGC "may institute proceedings to terminate" a plan if distress conditions exist, which shifts to "shall as soon as practicable institute proceedings" if "the plan does not have assets available to pay benefits which are currently due." *Id.* (flush language).

Subsection (b) of §1342 covers the appointment of a trustee, providing that PBGC "may . . . apply to the appropriate United States district court for the appointment of a trustee to administer the plan . . . pending the issuance of a [termination] decree under subsection (c)." §1342(b)(1). Also under (b), PBGC and the "plan administrator may agree to the appointment of a trustee without" petitioning a federal court. §1342(b)(3); *see generally* 29 U.S.C. §1002(16)(A)(i)-(ii) (defining a plan's "administrator" as "the person

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[1] The insurance program covers defined-benefit pension plans—*i.e.,* plans "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).

specifically so designated by the terms of the instrument under which the plan is operated" or "the plan sponsor").

Subsection (c) of §1342 is entitled "Adjudication That Plan Must Be Terminated." Its key portion is (c)(1). There, the statute provides that PBGC "may":

> apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.

§1342(c)(1). Further, the trustee appointed under (b) may "make application for such decree himself." *Id.* If the district court finds that the conditions for termination exist, it shall "grant[] [the] decree for which [PBGC] or the trustee has applied" and "authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan." *Id.*

Among its terms, (c)(1) also contains a sentence facially addressing additional trustee duties, but the full scope of whose meaning is highly disputed between the parties—a sentence hereafter referred to as "Sentence Four" (since it is the fourth sentence in (c)(1)). Right after the terms empowering the court to authorize the trustee to terminate the plan, Sentence Four of (c)(1) states:

> If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without

> proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3).

Id. PBGC reads Sentence Four as authorizing it to terminate plans without seeking a court decree at all. *See* Pet. App. 7a.

Subsection (d) of §1342 then outlines the powers and duties of a trustee. Powers are listed in (d)(1), with (d)(1)(A) articulating pre-decree powers and (d)(1)(B) listing post-decree powers. Duties come in (d)(2) and (d)(3), including the obligations to provide notice of possible termination to participants and to act as "a fiduciary." §1342(d)(3).

B. Factual Background

Petitioners Dennis Black, Charles Cunningham, and Kenneth Hollis were longtime employees of Delphi and, prior to that, GM. RE 145, PageID# 8069.[2] Delphi was (and, in a different corporate form, remains) an auto-parts manufacturer and supplier; it was originally a division of GM, spun-off as a separate company in 1999. *See id.* Petitioners Black, Cunningham, and Hollis also were participants in the Delphi Retirement Program for Salaried Employees

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[2] "RE" refers to a document's record entry number in the district court (Michigan), to which the Sixth Circuit requires citation in lieu of an appellate appendix.

("Salaried Plan" or "Plan") and, prior to the spin-off, were participants in a pension plan that GM offered to its salaried employees. *See id.* at PageID# 8066, 8069. Delphi's salaried employees were non-unionized. *See id.* at PageID# 8069. Petitioner Delphi Salaried Retiree Association is an association comprising thousands of participants in the Salaried Plan or their beneficiaries. *See id.* at PageID# 8067.

In October 2005, Delphi filed for bankruptcy. *See* Pet. App. 3a. For the next four years during which Delphi sought to emerge from bankruptcy, a key issue was the status and future of the Salaried Plan (as well as Delphi's pension plans for union workers, *see infra* pp. 11-12 n.4). During most of that time, consistent with its statutory obligations to try to preserve plans, PBGC pushed solutions that would maintain the Salaried Plan. PBGC characterized itself as "cheerleading" for a GM re-assumption of the Plan and, as "leverage to get it done," placed statutory liens against Delphi's non-bankrupt foreign subsidiaries for pension contributions Delphi had missed. RE 308-15, PageID# 12692; *see* 29 U.S.C. §§1082-1083, 1362, 1368; 26 U.S.C. §§412, 430.

But things changed in early 2009, in the wake of the 2008 financial crisis and the appointment of an "Auto Taskforce" and "Auto Team" within the "Department of Treasury to evaluate the restructuring plans of automotive companies and to negotiate the terms of any [federal] assistance." Pet. App. 4a. At that point, in Petitioners' view, PBGC flipped to acquiescing to termination of the Plan—[redacted]—in the face of aggressive efforts by the Auto Team to save the auto companies. [redacted]; *see* RE 308-66, PageID# 12856 (PBGC describing itself as becoming a "mouse" trying to avoid getting "stepped on" by the Treasury Department, whose secretary sits on PBGC's Board of Directors).[3] The Auto Team sought quickly to resolve pension issues and to limit the funds infused from the Troubled Asset Relief Program ("TARP"), with the latter being the case if Plan funding obligations ended and benefits were to be paid from separate insurance moneys already available from PBGC. *See* RE 308-4, PageID# 12634 (government TARP auditor stating that Auto Team "specifically" sought "to be less generous in relation to Delphi and pensions").

In a rapid series of events from April to mid-July 2009, the Auto Team and PBGC put in place the groundwork for terminating the Salaried Plan. The PBGC working group responsible for recommending plan terminations met to consider grounds for terminating the Salaried Plan. RE 58, PageID# 1622-24. [redacted] Next, PBGC executed separate settlement agreements with Delphi

[3] Part of the record in the case is sealed because those materials allegedly were privileged and the lower courts, upon finding that PBGC waived any privileges, ordered production pursuant to a protective order. Petitioners have redacted from the public version of this Petition fact statements derived from sealed documents.

and the new GM entity that had emerged (during the same period) from a "quick-rinse" bankruptcy, resolving all of PBGC's liens and claims with respect to the Salaried Plan. Pet. App. 4a; *see* RE 308-119, PageID# 12972.

Then, on July 22, 2009, PBGC filed an action in the U.S. District Court for the Eastern District of Michigan requesting adjudication that the Salaried Plan be terminated pursuant to §1342(c). Pet. App. 5a. On August 6, 2009, Petitioners sought PBGC's consent to their intervention in the case. *Id.* The very next day, [redacted] PBGC voluntarily dismissed its federal court action. [redacted]; *see* Pet. App. 5a. [redacted]

In substitute for the court proceedings, on August 10, 2009, PBGC executed an agreement with Delphi—specifically, with the Salaried Plan's administrator—to terminate the Plan. RE 304-7, PageID# 11610-13. The agreement also appointed PBGC as the Plan's trustee. *Id.* at PageID# 11612. In October 2009, Delphi emerged from bankruptcy. RE 308-4, PageID# 12653 n.39.

As for the Plan's participants, many lost between "30%-70%" of their vested benefits as a result of the termination. RE 145, PageID# 8076.[4]

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[4] PBGC also terminated by agreement the plans covering Delphi's unionized workers. However, whether for commercial or political reasons, the Auto Team authorized GM to "top up" the

C. Proceedings on Petitioners' Lawsuit

Petitioners sued PBGC in the U.S. District Court for the Eastern District of Michigan in September 2009. RE 1, PageID# 1-14. A federal court in a different jurisdiction (Washington, D.C.) that became embroiled in some of the discovery disputes summarized concisely Petitioners' grievance: the lawsuit alleges that "a class of over 20,000 was sold out by the government simply to bail out the corporate interests of the auto industry" and that PBGC—which has been "tasked to ensure that the personal tragedy of pension termination is not considered lightly"—abdicated "that duty for improper reasons, and [engaged in] a conspiracy to cover up these improper actions at all costs." *Dep't of Treasury v. PBGC*, 351 F.Supp.3d 140, 155-56 (D.D.C. 2018).

Petitioners invoked 29 U.S.C. §1303(f), which allows suit against PBGC for "appropriate equitable relief." §1303(f)(1). As relevant here, in the operative pleading, Petitioners alleged, in alternative claims: (1) that the termination was illegal under §1342, because it was accomplished by agreement rather than court decree; (2) that the termination violated the Due Process Clause; and (3) that PBGC's termination of the plan by agreement was "unsupported" by "the

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benefits for union plans as if they had not been terminated at all. *See* RE 308-4, PageID# 12660. Given that no GM plans ever were terminated and Delphi's unionized workers in effect did not lose benefits either, only one group suffered benefit losses as a result of the auto industry's restructuring: Delphi's salaried workers.

relevant statutory criteria" and was otherwise "arbitrary and capricious." RE 145, PageID# 8082-83.

In March 2019, nearly ten years after the case commenced (and after many Plan participants had passed away, with their heirs now in their stead),[5] the district court (in Michigan) issued a brief decision granting summary judgment to PBGC. It held that §1342(c)(1) "clearly" allows for decrees *and* agreements to terminate a pension plan; found no due process violation; and said "Plaintiffs have offered no evidence to support" their claim that "PBGC acted arbitrarily and capriciously," though it discussed none of the more than 140 exhibits Petitioners submitted or deposition testimony. Pet. App. 69a, 72a.

On appeal, the Sixth Circuit, in a lengthier analysis, affirmed. After issuing an initial opinion, the Sixth Circuit issued an amended opinion in response to Petitioners' petition for panel rehearing and rehearing *en banc*. The amended opinion altered the due-process analysis to address *Nachman*. Because the amended opinion is the final, operative appellate decision, Petitioners focus here on it, while also noting where the amended opinion altered the original opinion.

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[5] In the district courts below and in Washington, D.C., the case bogged down for many years due to discovery disputes that *both* courts found to be animated by PBGC's and the Treasury Department's tactics bordering on bad faith. *See* Order, RE 282, PageID# 11176 (Mag. J. Majzoub); May 16, 2017 Hr'g Tr. 4:8-13, *Dep't of Treasury v. Black*, No. 12-mc-100 (D.D.C.), ECF No. 61 (Judge Sullivan).

Regarding Petitioners' claim that ERISA requires terminations through court decrees, the Sixth Circuit held:

> After reviewing the statutory text comprehensively and applying relevant canons of statutory interpretation, we conclude that subsection 1342(c)(1) provides two alternative mechanisms for terminating a distressed pension plan: (1) by application to a United States district court for a decree that the plan must be terminated, or (2) by agreement between PBGC and the plan administrator.

Pet. App. 7a. The court found its interpretation "supported" (*id.* at 14a) by *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 200 (2d Cir. 1987), and declared as *dictum* the Seventh Circuit's opposite conclusion that "[s]ection 1342 . . . *requires* the PBGC to initiate litigation." *In re UAL Corp.*, 468 F.3d 444, 450 (7th Cir. 2006) (emphasis added); *see* Pet. App. 15a.

As to Petitioners' due-process claim, the Sixth Circuit held that Petitioners lacked "a protected property interest in their vested—but unfunded—pension benefits." Pet. App. 18a (citation omitted). Within the Salaried Plan's terms, the Sixth Circuit identified a provision stating "that, in the event of plan termination, the 'right of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date, is nonforfeitable.'" *Id.* at 19a. Based on that Plan provision, the court determined that "*funded* benefits accrued up to the date of plan termination are nonforfeitable," but—"[b]y necessary implication"—"unfunded benefits are forfeitable upon plan termination." *Id.* As a result, the court said that Petitioners, "it would seem[,] . . . have no legal interest in any unfunded yet vested benefits" to which due-process protection could attach. *Id.*

Yet, by the time of the amended opinion (in analysis it added to the original opinion), the Sixth Circuit determined that "precedent and ERISA . . . complicate the matter." *Id.* The court now recognized *Nachman*'s holding that a "'clause limiting an employer's liability does *not* make otherwise vested benefits forfeitable within the meaning of the Act.'" *Id.* at 20a (quoting *Nachman*, 446 U.S. at 372 n.10) (emphasis added). Nevertheless, the Sixth Circuit construed *Nachman* as making nonforfeitable only unfunded benefits that are "'insured by PBGC,'" and, "in fact," PBGC maintained that it "'has been paying those vested benefits up to the guarantee limit for over ten years.'" *Id.* (quoting PBGC rehearing response). As to the "unpaid benefits beyond the ERISA guarantee limit," the court doubled down that Petitioners "do not have a legitimate entitlement" under "contract law based on the plain language in the Salaried Plan document." *Id.* at 20a-21a.

On the last issue of whether PBGC's agreement with Delphi to terminate the Salaried Plan was arbitrary and capricious, the Sixth Circuit found that "there is sufficient . . . evidence to support PBGC's decision to terminate the Salaried Plan under the criteria found *in 29 U.S.C. §1342(a)*." Pet. App. 23a (emphasis added). The court emphasized the §1342(a) criterion that "Delphi had missed minimum funding contributions, which justified plan termination under §1342(a)(1)." *Id.* at 27a.

Upon issuance of the amended opinion, Petitioners—at the court's direction, *see id.* at 78a-79a—supplemented their still-pending petition for rehearing *en banc*. On February 25, 2021, the Sixth Circuit denied the petition for rehearing *en banc*. *See id.* at 75a.[6]

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

Each of the Questions Presented concerns foundational aspects of ERISA's regime for terminating a distressed (*i.e.*, underfunded) pension plan: Can PBGC and a plan administrator simply agree to terminate, as opposed to a court decreeing termination? If so, does ERISA violate the Due Process Clause by authorizing terminations by agreement? And under what statutory criteria should a court review a termination agreement's legality, assuming termination by agreement is allowable at all? Because these questions burden *nearly all* instances in which PBGC

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[6] Petitioners believe that, due to investment gains, the Plan's assets (in PBGC's hands) have grown, such that all vested benefits may now be funded. Recognizing this likely fact, and finding the federal government to have "failed to fully protect the pensions of Delphi's salaried and non-unionized workforce," President Trump in October 2020 ordered PBGC's Board of Directors to "review the Delphi matter" and report "whether the [P]lan may be restored to its pretermination status under section 1347 of title 29, United States Code." White House, *Mem. on the Pensions of Delphi Corp. Retirees and Other Retirees Covered by Vulnerable Pension Plans* §§1(a), 2(a) (Oct. 22, 2020), https://www.presidency.ucsb.edu/node/346069. PBGC appears never to have responded.

seeks to terminate a distressed plan, and terminations by agreement potentially will affect (and have already affected) multitudes of pensioners, the Questions Presented are exceptionally important and warrant this Court's review.

First of all, pension-plan termination is not an uncommon thing. Since 1974 (ERISA's enactment year), 5,031 distressed pension plans have terminated; in just the last ten years, there have been more than 700 distress terminations; and in 2020, 67 plans terminated in distress. *See* Cong. Research Serv., *Pension Benefit Guaranty Corporation (PBGC): A Primer* 7 (Jan. 2021),), https://fas.org/sgp/crs/misc/95-118.pdf; PBGC, *Annual Report 2020*, 27-28 (Dec. 9, 2020), https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf [hereinafter "*PBGC 2020 Annual Report*"]. In turn, PBGC has attested that roughly *90%* of all distress terminations since ERISA's inception have been *by agreement between PBGC and the plan administrator*, not through court decrees. *See* RE 23-3, Page ID# 450 (PBGC affiant stating that, as of November 2009, "PBGC ha[d] trusteed 3,985 defined benefit pension plans, with 3,579, the majority, being terminated by agreements with plan administrators and only 406 being terminated by court decree"). Given PBGC's almost-exclusive practice of termination by agreement, hundreds of distress terminations per decade can be infected with the issues raised by the Questions Presented here.

Moreover, the number of pensioners affected by distress terminations (again, the vast majority of which are by agreement) is immense. As of 2020, in connection with the 5,031 distress-terminated plans, PBGC is paying or owes benefits to more than 1.5 million individuals. *PBGC 2020 Annual Report* at iii, 27-28. More will follow: In 2020, PBGC insured 25,000 pension plans covering 34 million persons, and some of these plans inevitably will terminate in distress. *See id.* at 3.

For these individuals, including Petitioners, their plan's termination is (or will be) indisputably a seminal, and potentially grave, lifetime event. As ERISA itself lays out, "[o]ne of Congress' central purposes in enacting this complex legislation 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 (1980) (quoting 120 Cong. Rec. 29,950 (Aug. 22, 1974) (statement of Sen. Bentsen)). The tragedy is especially acute for pensioners in relatively better-paid areas of business or in unionized workforces, where benefits often outpace PBGC's insurance guarantee. *E.g.*, *In re UAL Corp.*, 468 F.3d 444, 447 (7th Cir. 2006) ("[w]hat the PBGC can pay is limited by 29 U.S.C. §1322(b)(3)," so that retired airline pilots' "vested benefits" were "not fully insured"). For them, their plan's termination may wipe out the majority of their vested benefits and thus the lion's share of the income they expected (and deserved) during their retirement years. If that is to occur, it should happen only after PBGC's adherence to the proper statutory and constitutional rules, which the Court's review in this case would help settle.

Indeed, the Court's intervention is necessary even to ensure that affected pensioners have a voice in the termination of their plan. When PBGC terminates a plan by agreement, it maintains there is no statutory obligation to provide pre-termination notice to participants, as a notice obligation is triggered upon the appointment of a trustee "pending the issuance of *a decree* under subsection (c) [of §1342]." §1342(b)(1) (emphasis added); *see* §1342(d)(2); *e.g.*, *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201 (2d Cir. 1987) (upholding PBGC's "termination of the plans without prior notice"). The upshot is that pensioners might learn of the termination of their plan from "a press release" or some other after-the-fact announcement presenting the termination as a *fait accompli*, with their only recourse being to use their diminished financial resources to pursue costly, years-long litigation to challenge the termination that occurred by agreement. Pet. App. 5a. This state of affairs is intolerable for the legions of pensioners who may be grievously affected by a termination by agreement.

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

Certiorari is warranted because the Sixth Circuit's rulings relating to all three Questions Presented violate this Court's precedents.

A. In Holding That ERISA Authorizes Terminations by Agreement, the Sixth Circuit Disregarded This Court's Norms for Construing Statutes

The Sixth Circuit's decision that ERISA authorizes terminations by agreement, as an alternative to terminations by court decree, flouts this Court's consistent focus on the "plain text" of the statute. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016); *accord Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (ERISA case). It also violates several of this Court's canons of statutory construction, such as against finding implicit authorizations where Congress otherwise has spoken expressly, *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (ERISA case), against rendering statutory language superfluous, *see City of Chi. v. Fulton*, 141 S. Ct. 585, 591 (2021), and against hiding momentous matters in inconspicuous statutory places. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). In contrast, Petitioner's reading of the disputed language suffers none of these infirmities.

1. Sentence Four of §1342(c)(1), which the Sixth Circuit said "allows the parties to terminate a plan without a court adjudication," is the statutory provision "in dispute." Pet. App. 13a, 10a. Again, Sentence Four provides:

> If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3).

§1342(c)(1).

Whatever else can be said about this sentence, it does not, on its face, plainly authorize a plan's termination, whether through agreement or otherwise.

The sentence follows a conditional if/then format: if PBGC and the plan administrator agree that a plan "should" be terminated and to a trustee's appointment, then the trustee will have the "powers" outlined in (d)(1) and various "duties." The "then" part of the sentence, accordingly, only addresses trustee matters. Importantly, none of the "powers" afforded to a trustee in (d)(1) (as incorporated into Sentence Four) include the right actually to terminate a plan. Instead, (d)(1)(A) focuses on matters in preparation for seeking a decree, and (d)(1)(B) on follow-on issues after "the court to which application is made under subsection (c) *issues the decree*." §1342(d)(1)(B) (emphasis added). And the trustee "duties" prescribed in Sentence Four cannot include any powers at all—such as a power to terminate a plan—because §1342 carefully distinguishes *powers* from *duties*. *Compare* §1342(d)(1) (listing "powers") *with* §1342(d)(3) (listing "duties"). Duties *constrain* the trustee's conduct (such as by making him or her a fiduciary) rather than empower the trustee. *See* "Duty," *Black's Law Dictionary* (11th ed. 2019).

If Sentence Four is to be read as a grant of authority to terminate a plan by agreement, it is missing the language essential to the if/then structure Congress employed—namely, language stating "then the plan shall be terminated." That is, the Sixth Circuit read Sentence Four as if the language were: If PBGC and the plan administrator agree that a plan should be terminated and to the appointment a trustee, *then the plan shall be terminated*, and the trustee shall have the powers described in (d)(1) and various duties. "It is unlikely . . . that [the missing language] was an oversight." *Mertens*, 508 U.S. at 254. In the sentence just before Sentence Four, Congress provided that, upon issuing a termination decree, the court "shall *authorize the trustee . . . to terminate the plan.*" §1342(c)(1) (emphasis added). Yet, Sentence Four contains no similar language authorizing anyone to terminate a plan or declaring the plan terminated.

Nor is Sentence Four's text the only basis for rejecting the Sixth Circuit's sanction of terminations by agreement. In another part of §1342—subsection (a)—Congress expressly allowed PBGC to short-circuit some termination procedures, but only for small plans, and then *only if a decree still were sought*:

> The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans *(including the requirement for a court decree under subsection (c)).*

§1342(a) (flush language) (emphasis added). Having spoken clearly in (a) to permit streamlined procedures for small plans, and there having emphasized its high regard for court decrees, Congress would not have used the deficient language of Sentence Four to authorize a form of streamlined procedure (*i.e.*, agreements) for the largest plans and with no court decrees. Additionally, for its part, PBGC has rendered the above provision surplusage, stating that Sentence Four gives it authority to terminate "all plans"—small and large—through "a termination agreement with the plan administrator," so that, "to date, in the 45 years since ERISA was enacted, PBGC has not exercised the discretion given to it by [the above] provision of the statute." PBGC 6th Cir. Br. 30 (Doc. 27).[7]

Next, equally illogical, the Sixth Circuit's reading of Sentence Four as an authorization for terminations by agreement means that Congress buried midway, in a sub-subsection entitled "*Adjudication* That Plan Must Be Terminated," language that could upend all of the detailed procedures for the adjudication described in §1342. §1342(c)(1) (title) (emphasis added). This Court has regularly emphasized that "'Congress . . . does not . . . hide elephants in mouseholes,'" and here Congress would have secreted a rampaging elephant in §1342(c)(1) that has trampled all of the decree procedures surrounding it. *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021) (rejecting a federal agency's effort to read into a statute a remedy for the agency that Congress had elsewhere in the statute expressly afforded only to courts) (quoting *Whitman*, 531 U.S. at 468).

Finally, the Sixth Circuit really did not rely on anything affirmative in Sentence Four to approve of

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[7] Conspicuously, there is no mention of terminations by agreement in ERISA's copious legislative history, which reviews —for small and large plans—nearly every aspect of the termination process. *See, e.g.*, H.R. Rep. No. 93-1280, at 372-74 (1974) (Conf. Rep.); *see generally Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017) (Sotomayor, J., concurring) ("silence" in legislative history should give one "pause" about a particular "interpretation" of ERISA, when the construction "could have the kind of broad effect that is usually thoroughly debated during the legislative process and thus recorded in the legislative record").

PBGC's custom of terminating plans by agreement, so much as it misguidedly hinged its holding on the word "may" appearing in other sentences of (c)(1). *See* Pet. App. 12a-16a (bulk of analysis focusing on alleged problems with Petitioner's reading of (c)(1), not affirmative evidence of PBGC authority). Most notably, the first sentence of (c)(1) provides that if PBGC has begun termination proceedings under (a), "it *may* . . . apply to the appropriate United States district court for a decree" (§1342(c)(1) (emphasis added)), supposedly signaling that "(c)(1) permits—but does not require—court adjudication." *Id.* at 12a. However, the use of "may" in the first sentence is easily explained as a direction that PBGC, after instituting proceedings to terminate a plan, can change its mind and quit the proceedings without seeking a court decree; use of "shall" there would have necessitated that PBGC complete a termination whenever it starts proceedings. *See* 29 U.S.C. §1347 ("the corporation is authorized to cease any activities undertaken to terminate the plan"). Anyway, that (c)(1) incontestably permits court decrees cannot constitute positive authority to terminate them in a different way.

2. Converse to the Sixth Circuit's reading, Sentence Four can be construed in harmony with the remainder of §1342. For instance, Sentence Four can be read as simply referencing a situation where the trustee whom the court has (in the immediately prior sentence) authorized to terminate the plan was appointed by agreement between PBGC and the plan administrator. *See* §1342(b)(3) (authorizing appointment of trustees by agreement). In that event, Sentence Four allows for "duties imposed on the trustee . . . by agreement between the corporation and the

plan administrator" in addition to those outlined in (d)(3), but only if the corporation and the plan administrator also "agree that a plan should be terminated." §1342(c)(1) (sentence four). It makes sense that Congress required PBGC and the plan administrator to be in agreement on the termination the court decrees 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.

Nevertheless, it was not Petitioners' task to prove exactly what Sentence Four means. It should have been enough to show that Sentence Four is, at best for PBGC, a "puzzling measure," which then spurs a "cautious interpretation." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006). Erroneously, the Sixth Circuit adopted the most aggressive interpretation possible, one that has effectively resulted in termination agreements making obsolete Congress's express statutory prescription for decrees.

B. The Sixth Circuit's Due-Process Ruling Is Contrary to *Nachman*

Because the Sixth Circuit held that Sentence Four authorizes terminations by agreement, it was forced to determine whether a termination without a court or other hearing violates due process (in itself, an approach violating still another canon of construction—constitutional avoidance, *see Rust v. Sullivan*, 500 U.S. 173, 191 (1991)). In then finding there to be no constitutional violation, the Sixth Circuit contravened *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).

To recap, the Sixth Circuit said Petitioners "do not have a property interest [protectable under the Due Process Clause] in the full amount of their vested benefits because the Salaried Plan document provides that only *funded* benefits at the time of plan termination are nonforfeitable." Pet. App. 18a. Specifically, the court rested on a provision in the Plan stating "that, in the event of termination, the 'right of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date, is nonforfeitable.'" *Id.* at 19a. "By necessary implication, unfunded benefits are forfeitable upon plan termination." *Id.*

Nachman nullifies the linchpin of the Sixth Circuit's due-process holding. *Nachman* was a case brought by an employer against PBGC, where the employer terminated its ERISA plan in 1975 before certain of ERISA's provisions became effective. The employer also had left vested benefits under the particular plan largely unfunded. If vested benefits under the plan could be "characterized as 'nonforfeitable,'" then PBGC would need to pay insurance to cover them; and PBGC, in turn, would have "a statutory right under [ERISA] to reimbursement from the employer," subject to statutory recovery limits. 446 U.S. at 362, 363 (citation omitted); *see* 29 U.S.C. §1362(b). To avoid liability altogether, the employer in *Nachman* argued that the benefits were forfeitable, relying on a plan provision "limiting [employees'] benefits to the assets in the pension fund." 446 U.S at 362; *see id.* at 364-65 (the plan "specified that upon termination the available funds, after payment of expenses, would be distributed to beneficiaries, classified by age and seniority, *but only to the extent that assets were available*") (emphasis added).

Reviewing the definitions of "nonforfeitable" in ERISA (29 U.S.C. §1002(19)) and PBGC's regulations (29 C.F.R. §2605.6(a) (1979)), the Court concluded that the plan provision concerning "unfunded benefits" did "not make otherwise vested benefits forfeitable within the meaning of the Act." 446 U.S. at 372 n.17. At best, the provision could be deemed an attempt "to provide protection for the employer," not to "qualify the beneficiary's rights against the plan itself." *Id.* at 371-72. As a result, the employees' vested benefits were nonforfeitable and insured by PBGC, and the sponsor could not, by disclaiming funding obligations through a term of the plan, "authorize[] cost-free terminations" for itself. *Id.* at 385.

Of particular significance, *Nachman* added that ERISA's anti-cutback rules counseled in favor of construing the plan provision concerning underfunding as not triggering a forfeiture. In a lengthy footnote—footnote 10—that the Court called attention to repeatedly elsewhere in its decision (*e.g.*, *id.* at 364 n.6, 369, 370, 372, 373 n.19, 384), the Court stated that a "clause render[ing] . . . vested benefits forfeitable . . . *would be invalid* after January 1, 1976." *Id.* at 366 n.10 (emphasis added); *accord id.* at 373 n.19 ("Of course, a provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. *See* n.10, *supra.*"). The clause would become invalid due to 29 U.S.C. §1053(a).

The Court explained that §1053(a) is "a central provision in ERISA." 446 U.S. at 366 n.10. The provision

> requires generally that a plan treat an employee's benefits, to the extent they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § [1053](a)(2), as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date.

Id. Because "[n]one of the listed conditions [in §1053(a)(3)] relates to insufficient funding" (*id.*), and therefore provisions like the one in the plan at issue in *Nachman* would be doomed eventually if construed to "make otherwise vested benefits forfeitable," the Court chose to interpret the plan provision as simply "disclaiming employer liability." *Id.* at 372 n.17.

The Sixth Circuit's conclusion that vested benefits are forfeited runs headlong into *Nachman*. Inescapably, insofar as the Sixth Circuit deemed the Salaried Plan to authorize the forfeiture of vested benefits "merely because the plan provides that they are not payable" in the event of underfunding upon termination (*Nachman*, 446 U.S. at 366 n.10), it adopted an illegal and unenforceable construction (post-1975) of the Salaried Plan, under the unanimous view of this Court. *Id.* at 366 n.10; *see also id.* at 373 n.19; *id.* at 390 n.8 (Stewart, J., dissenting).

To be sure, the Sixth Circuit tried to rehabilitate its determination on rehearing, by declaring that

Nachman protects vested benefits up to, but no more than, the PBGC's guarantee limit (and the amounts here in dispute are above that level). But nothing in *Nachman* allows such cabining. Ultimately, there is no way around the reality that by finding forfeited the "remaining balance" of Petitioners' vested, unfunded benefits, the Sixth Circuit relied on a Plan provision that, if read to prompt a forfeiture, is invalid after 1975 under *Nachman*. Pet. App. 21a.

C. The Sixth Circuit's Holding That the Plan's Termination Was Not Arbitrary and Capricious Violates This Court's Administrative-Law Jurisprudence

The Sixth Circuit's ruling that PBGC's decision to terminate the Plan was not arbitrary and capricious likewise violates this Court's precedents. ERISA itself does not indicate that PBGC's actions should be reviewed deferentially under the arbitrary-and-capricious test that traditionally applies under the Administrative Procedure Act ("APA"), 5 U.S.C. §706(2), and some courts (the Seventh Circuit, particularly) have rejected altogether the APA paradigm when PBGC seeks to terminate a plan. *See infra* pp. 32-33; *cf.* 29 U.S.C. §1303(f)(4) (providing "exclusive means" for suing PBGC). Petitioners, in an alternative claim that assumes the legality of a termination by agreement, have invoked APA concepts to challenge the Salaried Plan's termination. But even simply applying APA standards, the Sixth Circuit badly misjudged the propriety of the termination.[8]

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[8] Petitioners emphasize that this APA-like claim was an *alternative* claim. If ERISA or the Constitution forbid terminations

A bedrock principle of this Court's administrative-law jurisprudence is that—in evaluating agency action—a reviewing court must "assess . . . whether the [agency] decision was 'based on . . . *the relevant factors* and whether there has been a clear error of judgment.'" *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)) (emphasis added). Contrary to that principle, the Sixth Circuit assessed the legality of PBGC's termination decision based on the wrong factors: it found "sufficient countervailing evidence to support PBGC's decision to terminate the Salaried Plan *under the criteria found in 29 U.S.C. § 1342(a)*." Pet. App. 23a (emphasis added). But §1342(a) does not govern plan terminations.

By its text, §1342(a) authorizes PBGC, in delineated circumstances, to "*institute* proceedings . . . to terminate a plan." §1342(a) (emphasis added); *accord* §1342(c)(1) (first sentence) (describing §1342(a) as authorizing PBGC to "commence proceedings"). In the English language, "institute" does not mean "complete." The only provision of §1342 that addresses the *actual termination* of a plan is (c)(1), and the first

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by agreement, Petitioners would not need to prove the substantive invalidity of the agreement at all. In that circumstance, the district court would proceed to determine the "appropriate equitable relief" to remedy PBGC's wrong. §1303(f)(1). In Petitioners' view, they are entitled, at a minimum, to "restitution in equity." *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 143 (2016); *see supra* p. 16, n.6 (noting possibility of restoring the Plan and specific monies held by PBGC from which it appears all vested benefits could be paid).

sentence of (c)(1) sets forth criteria different from those for instituting proceedings under (a).

Consequently, the criteria set forth in (c)(1)—not (a)—govern plan terminations and set forth the "relevant factors" for assessing the legality of a termination. *Overton Park*, 401 U.S. at 416. The Sixth Circuit erroneously judged whether the record supported termination based on matters such as "missed minimum funding contributions," a criterion that appears only in (a). Pet. App. 27a. The court even refused to consider evidence relevant to (c)(1)—such as proof that the Plan "was 85.62% funded"—because "percentage of underfunding is not a factor to be considered under 29 U.S.C. *§1342(a)*." *Id.* (emphasis added).[9]

Furthermore, if the law were that a PBGC decision to terminate a plan shall be evaluated against the standards in (a) rather than (c)(1), the death knell would sound for PBGC ever using the decree route to terminate a distressed plan, and the decree route is already an endangered species. *See supra* p. 17. Where PBGC thinks termination is warranted, it will

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[9] PBGC invoked solely the last criterion of (c)(1)'s first sentence when it notified Delphi it had "determined, under . . . §1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the PBGC insurance fund." RE 53, PageID# 1603. A watered-down variant of that (c)(1) criterion focused more on "*possible* long-run loss" to PBGC does appear in (a). §1342(a)(4) (emphasis added). But the Sixth Circuit did not perform a "searching and careful" inquiry as to whether even this (a) criterion was satisfied, instead taking the easy way out by saying termination was consistent with (a) because Delphi had missed funding payments. *Overton Park*, 401 U.S. at 416.

want the plan to terminate by agreement, since it can then use the easier, more ample criteria under (a) to defend it, whereas indisputably a termination by a court can occur only if the limited grounds in (c)(1) are satisfied. This Court eschews statutory interpretations under which "a small amount of work" is done by "a large amount of text." *City of Chi. v. Fulton*, 141 S. Ct. 585, 591 (2021). Deeming (a)'s criteria, not (c)(1)'s, to be the governing relevant factors for judicial review would, impermissibly, further "reduc[e]" all of §1342's many lines aimed at judicial decrees "to a footnote—even though [they] appear[] on [their] face to be the governing provision." *Id.*

III. THE CIRCUITS CONFLICT ON THE QUESTIONS PRESENTED

Further supporting certiorari, the circuits are in conflict on each of the Questions Presented.[10]

A. The Seventh Circuit has rejected the notion that ERISA allows PBGC to terminate distressed plans without a court decree. In *In re UAL Corp.*, 468 F.3d 444, 449 (7th Cir. 2006), PBGC's "nose [was] out of joint" about a district court's decision to hold a trial *de novo* about matters relevant to a plan's termination, particularly the date to affix to termination. PBGC insisted there should be no trial and that it was entitled to a "deferential" standard of review

[10] Unlike other aspects of Title IV, where there can be no circuit split because actions are exclusively heard in the District of Columbia, *see Lewis v. PBGC*, No. 21-2 (U.S., filed June 30, 2021), actions challenging aspects of a termination (such as here) may be brought where the plan has been administered. §§1303(f)(2)(A)-(B), 1342(g).

regarding "the requirements for a distress termination." *Id.* at 449, 451. The Seventh Circuit, with Judge Easterbrook writing for the court, rejected PBGC's position, concluding instead that all activity associated with termination requires judicial approval under §1342. The court said: "The *only* authority that the PBGC has under §1342 *is to ask a court for relief.*" *Id.* (emphasis added). Holding that PBGC must prove matters in a trial and by a "preponderance of the evidence" like any other plaintiff, the Seventh Circuit reasoned that "*[s]ection 1342(c)* gives resolution . . . to the judiciary; the PBGC participates as a litigant, not as a decision-maker." *Id.* at 451.

The Sixth Circuit relegated to *dictum* the Seventh Circuit's conclusions contrary to its own. *See* Pet. App. 15a. However, in the briefing in *In re UAL Corp.*, PBGC repeatedly asserted that it had the authority to terminate a plan by agreement under §1342(c) and that, in light of that authority, the court should view decrees as just a tool for PBGC to use to enforce, at its discretion, its administrative determinations about terminations (without a trial and with deferential review). *See* PBGC Opening Br., *In re UAL Corp.*, Nos. 06-2662, et al., 2006 WL 2300664, at *7, *23-24, *29 (7th Cir. July 31, 2006); PBGC Reply Br., *In re UAL Corp.*, Nos. 06-2662, et. al., 2006 WL 2617959, at *11-16 (7th Cir. Aug. 30, 2006). It was against *this* backdrop that the Seventh Circuit found PBGC's "only" authority under §1342(c) is to seek judicial relief as a litigant. 468 F.3d at 449. The Seventh Circuit's statements thus were not an "aside unrelated to the subject of the case"; the "question had been briefed by the parties," making the Seventh Circuit's construction of §1342 "informed," not *dictum*.

United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998).

The other circuit decision addressing whether ERISA authorizes terminations by agreement is *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987). Petitioners do not contest that the Second Circuit blessed termination agreements under ERISA, but its reasoning was very different than the Sixth Circuit's. The Second Circuit heavily relied on deference to PBGC under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which even the Sixth Circuit suggested is inconsistent with this Court's now more refined views on *Chevron*. *See* Pet. App. 16a.

B. There is similar inter-circuit tension between the Sixth Circuit's decision and *Jones & Laughlin* on the due-process issue. True, the Second Circuit in *Jones & Laughlin* found no due-process violation when a plan terminates by agreement; but the Sixth Circuit did not even cite *Jones & Laughlin* as support for its own due-process ruling. Almost certainly, that was because, unlike the Sixth Circuit, which rested on a forfeiture theory, the Second Circuit accepted that "plan members have a cognizable interest in receiving their contractually defined benefits." 824 F.2d at 201. Instead, the Second Circuit took a miserly view of when pre-deprivation hearings are mandated—a position that is no longer the law, including in the Sixth Circuit. *See Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 799 (6th Cir. 2018) ("the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest") (internal quotation marks and citation omitted). Certiorari is warranted when, as here, "the lower court decisions are so inconsistent in theory" as to leave the area "in a state of confusion." Stephen M. Shapiro, et al., *Supreme Court Practice* §4.13 (11th ed. 2019).

C. On the factors relevant for judicial review of PBGC's actions terminating a plan, the Sixth Circuit's ruling and the Seventh Circuit's decision in *In re UAL Corp.* are again incompatible. Whereas the Sixth Circuit reviewed the Plan's termination under a deferential standard of review and pursuant to the factors outlined in §1342(a), the Seventh Circuit rejected an APA-like framework altogether for judging the legality of a termination and then upheld a termination solely based on the (c) factor invoked by the PBGC itself. *See* 468 F.3d at 451 (finding "an 'unreasonable increase' in federal liability") (quoting §1342(c)(1)).

* * *

As part of its restructuring of the auto industry, the federal government sought precipitously to terminate Petitioners' pension plan—treating the Plan's participants, in effect, as necessary "roadkill" to achieve benevolent results for others. A court stood empowered by §1342(c)(1) to protect Petitioners from painful losses of vested benefits, if appropriate. But PBGC avoided a court case by relying on its decades-old custom of terminating a plan through an agreement with a plan administrator. For the good of the nation's pensioners, including Petitioners, the Court should grant the Petition to determine if the judicial safeguard detailed in §1342(c)(1) operates at all or, alternatively, to define the role of the courts on review if termination by agreement is legal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANTHONY F. SHELLEY
Counsel of Record
DAWN E. MURPHY-JOHNSON
ELIZABETH J. JONAS
MILLER & CHEVALIER CHARTERED
900 Sixteenth St. NW
Black Lives Matter Plaza
Washington, D.C. 20006
Tel.: (202) 626-5800
ashelley@milchev.com
dmurphyjohnson@milchev.com
ejonas@milchev.com

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