No. 21-495

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

BRIEF OF *AMICUS CURIAE* NATIONAL RETIREE LEGISLATIVE NETWORK IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Retiree Legislative Network ("NRLN"), a non-profit membership association, is the only nationwide organization solely dedicated to representing the interests of retirees and future retirees. Formed in 2002, the NRLN endeavors to secure federal legislation to protect retirees' employer-sponsored pensions and other benefits in addition to keeping Social Security and Medicare strong. The NRLN is a non-partisan, grassroots coalition representing more than 2 million retirees who came to the NRLN from nearly 200 different U.S. corporations and public entities.

The Employee Retirement Income and Security act ("ERISA") is, in this court's words, a "comprehensive and reticulated" statute with respect to the regulation of pension and benefit plans. *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993). This case is important to NLRN members, as it raises significant questions about the ability of a company facing bankruptcy and the Pension Benefit Guaranty Corporation ("PBGC") to enter into an agreement regarding the

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* states that this brief was not written in whole or in part by counsel for a party and that no one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to file this brief was timely sought from petitioners' counsel and the Solicitor General, and written consent was received from counsel for petitioners and the Pension Benefit Guaranty Board.

rights of pension plan beneficiaries that frequently results in the permanent loss of vested and otherwise "non-forfeitable" benefits without judicial oversight.

SUMMARY OF ARGUMENT

The petition should be granted because this case raises important questions about the role of federal courts with respect to the distress termination of corporate pension plans that result in the permanent loss of vested pension benefits by thousands of retirees and other plan participants each year.

Retirees and other plan participants typically receive no notice or opportunity to contest the necessity for, or the timing of, a distress termination that results from an agreement between the PBGC and the plan sponsor. PBGC data shows that the permanent loss of otherwise "non-forfeitable" pension benefits is a widespread and recurring problem that harms more than 10,000 retirees and plan participants *each year*, on average. In a distress termination, the company and the PBGC have their own interests that are distinct from—and often diverge from—preserving the vested benefits of plan participants. As a result, court review of any proposed distress termination is an essential element of ERISA's structure and purpose.

ARGUMENT

I. DISTRESS TERMINATIONS RESULT IN THE PERMANENT LOSS OF VESTED BENEFITS FOR HUNDREDS OF THOUSANDS OF RETIREES.

Many millions of retirees on fixed incomes rely on earned benefits from their former employers for retirement income, for critical medical treatment and, often, for ongoing income to support their surviving spouse. During decades of work, retirees earn pension benefits as part of their "total compensation package" and have typically planned their retirement security on the continuation of these monthly annuity payments. Of course, as this Court observed, "[o]ne 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. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 374 (1980) Unfortunately, retirees and other plan participants at scores of companies have been surprised to learn that a substantial share of these vested benefits are permanently lost when their former employer files for bankruptcy.

Like most landmark reforms, the policy debate that culminated in ERISA and a pension guarantee system was sparked by scandal: in this case the 1963 bankruptcy of Studebaker, the nation's oldest major auto manufacturer. Studebaker's collapse left 11,000 retirees and workers holding an empty bag of pension promises. About 4,500 retirees with an average 23 years of service lost their pension, receiving only 15 cents for each dollar of vested benefits. *Nachman, supra*, 446 U.S. at 374, n. 22 (quoting a primary Senate ERISA co-sponsor)

Reacting to the Studebaker scandal, President John F. Kennedy formed a working group to study pension reform. After many years and much debate, the enactment of ERISA established new requirements governing pension plan participation, vesting, funding, fiduciary duties and financial disclosure. Title IV of ERISA established the Pension Benefit Guaranty Corporation (PBGC) as a government-run pension plan termination insurance program. *Nachman*, 446 U.S. at 362.

As required by ERISA, plan sponsors pay a flat-rate insurance premium to the PBGC for each participant plus a variable premium based on the plan's funded status – a cost paid from plan assets. Retirees and workers typically assume that their benefits will be protected, at least up to the statutory maximum ($72,400 per year for a 65-year-old in 2021, but substantially lower – or higher – for individuals younger or older than 65 at the time of plan termination).[2] Large numbers of workers and retirees learn only after their company's plan has been turned over to the PBGC that owing to a combination of statutory guarantee limits and discretionary PBGC practices, a distress termination can leave them with benefits that are permanently reduced by 30 percent or more.

The PBGC's own data show that the permanent loss of vested and supposedly "non-forfeitable" pension benefits recognized by this Court in *Nachman* is a widespread and recurring problem that harms more than 10,000 retirees and plan participants *each year*, on average. While the majority of retirees are not affected by PBGC guarantee limits, hundreds of thousands of retirees and other plan participants have lost vested benefits. The PBGC's most recent data on vested benefit losses from distress terminations—based on 500 plans trusteed by PBGC between 1988 and 2012 that covered 1,142,700 participants—found that 16 percent suffered permanent benefit reductions.[3] The study reported that 187,000 participants lost vested benefits over that 24-year period.[4] Among

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[2] Pension Benefit Guaranty Corp., "Maximum Monthly Guarantee Tables," available at https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.

[3] Pension Benefit Guaranty Corp., "PBGC's Single-Employer Guarantee Outcomes" (May 2019), available at https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf.

[4] Id. at 5.

participants affected, "the average reduction in the value of plan benefits was 24 percent."[5] Further, the PBGC found that "59 percent of the plans in this study had at least one participant whose benefits were reduced by one or more primary limitation provisions."[6] Moreover, as the Congressional Research Service has noted, while the study on vested benefit losses considered 500 plans trusteed by PBGC between fiscal years 1974 (when ERISA was adopted) and 2020, the "PBGC became the trustee of 5,031 single-employer DB pension plans."[7]

The PBGC's previous study of benefit losses, published in 2008, showed that the proportion of negatively affected participants *tripled* over the decade prior to the 2008 economic downturn that led to the Delphi bankruptcy.[8] At that time, the PBGC study found that 16 percent of participants in plans trusteed by the agency after a distress termination permanently lost vested benefits and that benefits were reduced by 28 percent on average among participants

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[5] Id. The average benefit loss among already-retired participants was 19 percent.

[6] Id. at 8.

[7] Congressional Research Service, "Pension Benefit Guaranty Corporation (PBGC): A Primer" (Jan. 8, 2021) at 6 ("CRS PBGC Primer"), available at https://crsreports.congress.gov/product/pdf/RS/95-118.pdf.

[8] Pension Benefit Guaranty Corp., "PBGC's Guarantee Limits: An Update" (Sept. 2008), available at https://www.pbgc.gov/sites/default/files/legacy/docs/guaranteelimits.pdf.

impacted.[9] The PBGC also found that more than 80 percent of the plans terminated had at least one participant whose benefits were reduced by one or more of the limitation provisions.[10]

In most cases, plan participants receive no notice or opportunity to contest the necessity for, or the timing of, a distress termination agreement. Such an agreement to trustee the plan and transfer its assets to PBGC—effectively locking in the loss of vested benefits for a majority of participants—is the norm rather than an exception. As Petitioners note, the PBGC has attested that roughly *90 percent* of all distress terminations have been *by agreement* between PBGC and the plan administrator, not through court decrees. Pet. at 17, citing 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").

Delphi's bankruptcy and distress termination is just one example of a steady flow of non-adjudicated distress terminations that have resulted in the permanent loss of vested pension benefits considered "nonforfeitable" under this Court's ruling in *Nachman*. In 2013 the NRLN first published the results of a 2010

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[9] *Id.* at 2.

[10] *Id.*

survey of the participants in the Delphi Retirement Program for Salaried Employees. The survey found that 77 percent of the 1,703 respondents reported a 20-to-40 percent permanent reduction in their vested benefits, while only 20 percent lost less than 20 percent. [11]

Nor is Delphi an outlier or unrepresentative of the benefit reductions suffered by relatively well-paid workers and retirees at major U.S. firms declaring bankruptcy. For example, a 2009 study by the Government Accountability Office (GAO) identified seven plan terminations between 2000 and 2008 that *each* resulted in more than $200 million in permanently lost benefits due to PBGC guarantee limitations.[12] The largest losses occurred among the pilots and other airline employees at United, Delta Air Lines and U.S.

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[11] *See* National Retiree Legislative Network, "Pension Guarantees that Work for Retirees" (Sept. 2017), at 8-9, available at https://www.pbgc.gov/sites/default/files/pbgc-whitepaper-sept_2017-update-final-090117.pdf. The report notes that the Delphi Salaried Retirees' Association conducted a 2010 Survey of 6,700 participants. Significantly, 73 percent of the 1,703 respondents were under the age of 65 at the time of plan termination, with 44 percent between age 60 and 64. The PBGC's maximum benefit guarantee is reduced substantially for each year under age 65 at the time of termination. The survey took place prior to the agency's calculation of final benefit amounts, which was substantially delayed.

[12] Government Accountability Office, "Pension Benefit Guarantee Corporation: More Strategic Approach Needed for Processing Complex Plans Prone to Delays and Overpayments" (August 2009), Appendix VI, Table 8, at 69, available at https://www.gao.gov/assets/gao-09-716.pdf.

Airways. At Delta, among pilots, 13,435 plan participants lost $2.96 billion in unfunded benefits.[13] At U.S. Airways, 7,050 participants in the pilots' pension plan lost $1.69 billion of their vested but non-guaranteed benefits.[14] While pilots and other high-wage participants can suffer very large losses, GAO also found very widespread losses at other companies. For example, at Bethlehem Steel Corp. nearly 93,000 participants lost a total of $535.5 million.[15]

The airline industry plan terminations also highlight how the permanent loss of benefits above the PBGC's guarantee limits disproportionately harms more highly-paid retirees and older workers, including pilots and thousands of salaried participants at Delphi. A more recent example is Avaya, which filed for bankruptcy protection in 2017. The company's original reorganization plan proposed to maintain both of the company's pension plans upon emergence from bankruptcy. But the secured creditors ultimately convinced the bankruptcy court that the plan for salaried employees, which was only 58 percent funded, needed to be terminated and taken over by the PBGC.

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[13] Id.

[14] Id.

[15] Id.

As a result, according to the PBGC, a substantial portion of the plan's 8,000 participants lost vested benefits not guaranteed by the agency.[16]

Bankruptcy filings and distress terminations tend to come in waves following a recession. The Great Recession that triggered Delphi's bankruptcy filing highlighted just how vulnerable America's retirees are to the risk of distress pension plan terminations. The pace of plan terminations spiked after the deep recession that began in 2008, with the PBGC taking over 156 failed plans in 2010. Distress terminations fell steadily to 46 in 2019, then increased to 67 distress terminations during fiscal year 2020, a total that may well spike again in the wake of the COVID-19 disruptions.[17] And although a shrinking share of firms are sponsoring defined benefit pension plans, the PBGC continues to insure about 25,000 plans that include more than 34 million retirees and other participants and beneficiaries.[18] A portion of these plan sponsors will declare bankruptcy and distress terminations will

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[16] *See* Pension Benefit Guaranty Corp., "Statement by PBGC on Avaya's Pension Plans and the Company's New Plan to Emerge from Bankruptcy" (Aug. 7, 2017), available at https://www.pbgc.gov/news/press/releases/pr17-05.

[17] *See* CRS PBGC Primer, *supra* note 7, at 7, Table 12; Pension Benefit Guaranty Corp., "2020 Annual Report" (Dec. 9, 2020) at 37, available at https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf.

[18] PBGC, "2020 Annual Report," *supra* note 17, at 23-27.

continue to reduce the vested benefits of many thousands of retirees for years to come. As a result, even if the number of distress terminations remains at the recent average of 71 per year over the past decade,[19] each year thousands of retirees and plan participants will lose a portion of their supposedly "non-forfeitable" benefits.

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[19] *See* CRS PBGC Primer, *supra* note 7, at 7, Table 12.

II. DUE PROCESS FOR PENSION PLAN PARTICIPANTS IS ESSENTIAL BECAUSE PBGC'S INTERESTS IN DISTRESS TERMINATIONS DO NOT ALIGN WITH PARTICIPANTS.

In a distress termination, the company and the PBGC have their own interests that are distinct from—and often diverge from—preserving the earned and vested benefits of retirees and other plan participants, ERISA's intended beneficiaries. This divergence is exacerbated by the fact that not only does an agreement between the PBGC and a plan sponsor in bankruptcy preclude plan participants from challenging the termination and their resulting loss of vested benefits, participants are simultaneously precluded from seeking recovery of those lost benefits in bankruptcy court. It is for this reason that judicial review plays such a key role in ERISA's regulatory scheme, as a means of providing neutral oversight of any distress termination proposal that affects so many parties in such a profound fashion.

There are a number of reasons why denying judicial review and relying solely on a conflicted PBGC to determine if a distress termination is necessary is indefensible considering "the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman*, *supra*, 446 U.S. 359, 374.

First, when the PBGC and the plan sponsor agree that a distress termination is justified, retirees losing vested benefits are afforded no meaningful opportunity to be heard or to recover non-guaranteed benefits. As the court below concluded, ERISA has not been interpreted to require that retirees and other plan participants receive pre-termination notice or an opportunity to be heard prior to the PBGC and plan administrator finalizing an agreement to terminate an under-funded plan. *See, e.g., Jones & Laughlin Hourly Pension Plan v. LTV Corp.,* 824 F.2d 197, 200, 201 (2d Cir. 1987) (upholding PBGC's "termination of the plans without prior notice"). PBGC maintains it has no statutory obligation to give participants pre-termination notice, since a notice obligation is only triggered by the appointment of a trustee "pending the issuance of *a decree* under subsection (c) [of §1342]." 29 U.S.C. §1342(b)(l) (emphasis added); *see Jones & Laughlin Hourly Pension Plan v. LTV Corp., supra*, 824 F.2d at 201. This lack of notice or opportunity to adjudicate the justification for a distress termination stands in sharp contrast to the minimum 60-day notice that a plan administrator must give to plan participants and the PBGC prior to initiating a distress termination. 29 U.S.C. §1341(c)(1)(A).

Second, once the PBGC has agreed with the plan sponsor that a distress termination is justified—typically without notice to or input from plan retirees and participants—the bankruptcy process similarly gives retirees losing vested benefits no meaningful opportunity to recover non-guaranteed benefits. Although a substantial share of retirees and other participants lose vested pension benefits when the PBGC and a plan sponsor in bankruptcy agree to terminate the plan, only the PBGC is authorized to recover unfunded pension benefit claims from a bankrupt company.[20] Courts have agreed that only PBGC has standing in bankruptcy court to recover unfunded pension liabilities even with respect to vested benefits that are not guaranteed by the PBGC, such as monthly annuity payments exceeding the PBGC's annual guarantee limit.[21] If there ultimately is any recovery by the PBGC, the proceeds are split between the agency and participants (to reduce their permanent losses) under a statutory formula.[22] This scheme does not reflect some special status for PBGC as a federal creditor in the bankruptcy process. The PBGC becomes just another unsecured creditor, typically one of the very

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[20] 29 U.S.C. §1362(b).

[21] *See, e.g., United Steelworkers of America v. United Engineering Inc.,* 52 F.3d 1386, 1394 (6th Cir. 1995), holding that a union could not directly sue the employer to recover benefits not guaranteed by the PBGC.

[22] *See* 29 U.S.C. §1322(c)(2); 29 U.S.C. §1344(a)(5). "PBGC also is required to pay participants a portion of their unfunded, nonguaranteed benefits based on a ratio of assets recovered from the employer to the amount of PBGC's claim on employer assets (called Section 4022(c) benefits)." CRS PBGC Primer, *supra* note 7, at 9.

largest; and negotiates with the debtor and the creditors' committee to recover as large a share of the remaining non-pension assets as possible.

Third, the PBGC has insufficient resources – and relatively weak incentives – to pursue the recovery of vested pension benefits that exceed the agency's guarantee limits from companies in bankruptcy. ERISA requires that the PBGC be self-supporting, stating that the "United States is not liable for any obligation or liability incurred by the corporation."[23] It receives no appropriations from general revenues. While the PBGC is authorized to pursue the recovery of non-guaranteed pension benefits on behalf of the participants of terminated plans it trustees, it has no legal obligation and little financial incentive to do so.

As a result, court review of any proposed distress termination is an essential element of ERISA's structure and purpose. Companies facing bankruptcy have an incentive to dump their pension liabilities on PBGC, and PBGC–which has underfunding issues of its own–has an incentive to limit its exposure when taking on new liabilities. This divergence of interests is most pronounced when plan sponsors declare bankruptcy. The company's interest in minimizing its future liabilities, coupled with the lack of due process for retirees and other participants, encourages plan spon-

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[23] *See* 29 U.S.C. §1302(g)(2).

sors seeking reorganization to initiate a distress termination, transfer the plan to the PBGC and, in the process, seek to escape liability for the vested benefits that are above the agency's guarantee limits.

In her book *Pension Dumping*, financial journalist Fran Hawthorne chronicled how an increasing number of companies over the prior decade used bankruptcy – and the unsecured status of pension and other retiree benefit liabilities – to transfer tens of billions of dollars in legacy liabilities to the PBGC, while simultaneously causing many of their retired and older workers to permanently lose billions in benefits not insured by the PBGC. Fran Hawthorne, *Pension Dumping: The Reasons, The Wreckage, The Stakes for Wall Street*, Bloomberg Press (New York, 2008). Hawthorne described this as a double bind: "When a pension plan is terminated after the employer has filed bankruptcy, certain portions of the Bankruptcy Code strip employees and the PBGC of the protections created under ERISA."[24] In bankruptcy proceedings, both retirees and the PBGC begin at a disadvantage: Unlike the other creditor constituencies of suppliers, secured creditors and active employees, retirees are not seen as necessary for the business going forward. The PBGC becomes just another unsecured creditor and

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[24] Fran Hawthorne, *Pension Dumping: The Reasons, the Wreckage, the Stakes for Wall Street*, Bloomberg Press (New York, 2008).

negotiates with the debtor and the creditors' committee to recover as large a share of the remaining non-pension assets as possible.

Fourth, the PBGC's own discretionary policies reduce the share of vested benefits the agency guarantees, thereby worsening the permanent benefit losses suffered by retirees and other plan participants. Some limitations on the vested benefits that PBGC guarantees are imposed specifically by ERISA–such as the maximum monthly benefit guarantee (which varies based on age). But PBGC imposes at least two other discretionary policies that result in substantial reductions in benefit payouts by PBGC for many retirees and beneficiaries.

As the NRLN detailed in a 2017 white paper, "the largest loss of earned benefits after a plan termination is caused by the PBGC's decision to estimate the future cost of benefits using an unrealistically low interest rate assumption."[25] The lower the discount rate, the greater the estimated present value of PBGC's liability for future benefit payments. The PBGC at its discretion uses a much lower discount rate (2.13 percent as of September 2021) than the market-based corporate bond yield that the Treasury Department requires pension plans insured by the PBGC to use to calculate the present value of their

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[25] National Retiree Legislative Network, "Pension Guarantees that Work for Retirees" (Sept. 2017), *supra* note 11 at 12.

long-term liabilities.[26] Because this lower discount rate inflates the present value of benefit liabilities, plan assets are rarely considered sufficient to pay participants' vested but non-guaranteed benefits, such as cost-of-living increases within five years of plan termination. This results in larger losses for participants.

The American Benefits Council, an industry lobby for the nation's largest plan sponsors, has for years lamented that the PBGC's low discount rate has a number of self-serving adverse consequences, one of which is to overstate the future cost of guaranteed benefit obligations. This harms plan participants by reducing the share of a plan's trusteed assets that could cover non-guaranteed benefits.[27]

Finally, it is important to keep in mind that the PBGC is neither an independent regulatory agency

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[26] Discount rates, adjusted quarterly, are posted on the PBGC's website at "ERISA 4044 Annuities," https://wwwpbgc.gov/prac/interest/ida. PBGC derives the rate from a survey of prices charged by private insurance companies for fixed and deferred annuities.

[27] *See* American Benefits Council, "Promises to Keep: The True Nature of the Risks to the Defined Benefit Pension System," economic study prepared by Optimal Benefit Strategies, LLC (Sept. 2005), available at https://www.americanbenefitscoucil.org/pub/?id=E60F337E-01AB-C57A-6768-87B37E25FF41; see also American Benefits Council, "Ten Reasons to Doubt PBGC's Reported Deficit," (Nov. 2012), available at http://admin.americanbenefitscouncil.org/pub/E61378F6-CB64-C972-478A-973FDA2473A7 ("[t]here is no logic for the government to use one rate, and to require private employers to use another.")

nor an independent insurance company with fiduciary obligations that run primarily to pension plan participants. Rather, it is a government-run corporation controlled by the executive branch. The PBGC executive director is appointed by the president and, more significantly, its board is controlled by political appointees: "A three-member board of directors, chaired by the Secretary of Labor, administers the corporation." [28] The Secretaries of the Treasury and Commerce serve as other two board members. The president or the board can remove the executive director, who otherwise serves a five-year term.[29]

The PBGC's lack of independence or fiduciary duty owed solely to plan participants is particularly pronounced in this case, where the White House and Treasury Department had a distinct interest in expediting and reducing the cost of a government bailout that would preserve and restructure the auto industry, including Delphi and General Motors. As the Petition states: "Acquiescing to pressure from the [Treasury Department's] Auto Task Force, PBGC instituted termination proceedings concerning Petitioners' plan in federal court in Michigan." Pet. at 2-3. After Petitioners moved to intervene, seeking an adjudication of the termination, "[Redacted] PBGC then quickly inked an agreement with the administrator of the

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[28] CRS PBGC Primer, *supra* note 7, at 1.

[29] Id.

plan, appointed itself as trustee, and terminated the plan." *Id*. at 3.

Although the majority of distress termination agreements do not involve such a blatant conflict of interest between the PBGC and plan participants, there is in many cases the risk that political pressure will be brought to bear depending on the administration in power, the size and location of the plan sponsor, the importance of the plan sponsor to the economy, or whether the plan is collectively bargained. Basic due process should not hinge on these vicissitudes when the stakes are the vested and "non-forfeitable" pension benefits that are so vital to the lives of older workers, retirees and their surviving dependents.

III. DUE PROCESS FOR RETIREES IN DISTRESS TERMINATIONS COULD AVOID OR AT LEAST DELAY PERMANENT BENEFIT LOSSES.

Judicial review and adjudication are also important due to the subjective nature of the PBGC's decision to agree to a distress terminations, as well as the fact that a termination agreement effectively leads to the immediate forfeiture of non-guaranteed benefits that the pension plan in many cases could arguably continue paying from current assets for years if not indefinitely. In some situations, ERISA commands immediate measures to protect plan participants. Under 29 U.S.C. § 1342(a) PBGC is *required* to initiate a proceeding "as soon as practicable" to terminate a plan that cannot pay benefits currently due.

In contrast, that statute also authorizes PBGC to institute proceedings if, *inter alia*, it concludes that "the possible long-run loss of the corporation with respect to the plan may *reasonably* be expected to increase *unreasonably* if the plan is not terminated." 29 U.S.C. §1342(a) (emphasis added). This is an inherently subjective standard and is the far more common rationale for seeking plan termination. It is also a formulation that puts "the possible long-run loss of the corporation with respect to the plan" at the forefront, presumably ahead of ERISA's overarching goal "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman*, 446 U.S. at 374.

Plans terminated by an agreement between the company and the PBGC are typically underfunded in relation to long-term liabilities, yet have assets enough to continue making monthly benefit payments for many years, depending in large part on equity markets and interest rates. Indeed, each year the PBGC has notable success in avoiding plan terminations. The PBGC states in its most recent annual report: "Although bankruptcy forces tough choices that does not mean that pensions must terminate for companies to succeed."[30] As examples, the PBGC cites a number of large-company plans that continued after the bankruptcy of the plan sponsor, including PG&E (53,150 participants) and FirstEnergy Solutions Corp. (41,600 participants). *Id*.

The potentially divergent interests of the company, the PBGC, and plan participants in the outcome of this high-stakes decision strongly suggests that judicial review, including an opportunity for plan participants to oppose the agreement, comports best with the language and overall intent of ERISA.

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[30] Pension Benefit Guaranty Corp., "2020 Annual Report," *supra* note 17, at 6.

CONCLUSION

For these reasons and those set forth in the petition, National Retiree Legislative Network respectfully submits that the petition should be granted.

Respectfully submitted,

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