No. 21-495

IN THE

Supreme Court of the United States

DENNIS BLACK, *et al.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1342(c), permits the Pension Benefit Guaranty Corporation ("PBGC") to terminate an underfunded pension plan by agreement with the plan administrator, as every court to have considered the issue has held.

2. Whether termination of an underfunded pension plan by agreement between PBGC and the plan administrator is consistent with the Due Process Clause, as every court to have considered the issue has held.

3. Whether the district court and court of appeals correctly held on the facts of this case that PBGC did not act arbitrarily and capriciously in concluding that termination of the underfunded pension plan at issue was necessary and appropriate under the governing statutory criteria.

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BRIEF IN OPPOSITION

INTRODUCTION

Congress created the Pension Benefit Guaranty Corporation ("PBGC") in 1974 as a government insurance corporation to mitigate the personal financial catastrophes pension plan participants suffer when companies that sponsor underfunded pension plans go out of business. The termination of a pension plan is the insurable event that allows PBGC to use its funds to pay pension plan participants vested benefits that would otherwise go unpaid.

As petitioners concede (at 1), for 47 years and counting, PBGC has put this insurance program into effect by reaching agreements with plan administrators to terminate underfunded pension plans. The Employ-

ee Retirement Income Security Act ("ERISA") provides that PBGC "may" seek to terminate a plan through adjudication, but it alternatively provides that PBGC and the plan administrator may "agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with" those litigation procedures. 29 U.S.C. § 1342(c)(1). PBGC has exercised this latter authority to terminate distressed plans by agreement in thousands of cases since ERISA's enactment. No court has ever held or even suggested that these terminations violate ERISA or the Due Process Clause. Indeed, the law is so well settled in this regard that petitioners themselves took the position during their employer's bankruptcy proceedings—even while vehemently opposing the proposed termination of their pension plan—that ERISA "permits the plan administrator to negotiate and reach an agreement with the PBGC" to terminate a distressed plan without an adjudication. Objection to Modifications of First Am. Plan ¶ 22, *In re Delphi Corp.*, No. 05-44481, Dkt. 18277 (Bankr. S.D.N.Y. July 15, 2009).

This case does not warrant the Court's review. The court of appeals correctly held—in agreement with every other court to have considered the issue—that ERISA expressly permits terminations by agreement. Petitioners assert a circuit split on that issue, but the sole case they rely on did not involve a termination by agreement at all and had no occasion to consider the issue.

Likewise, the court of appeals' rejection of petitioners' due process claim does not conflict with any other court of appeals decision or decision of this Court. Petitioners were not deprived of any property interest protected by the Due Process Clause when their

pension plan was terminated, and no court has held otherwise. As in any termination of an underfunded pension plan, when the plan here was terminated, PBGC provided funds to pay a large portion of the plan participants' unfunded vested benefits, up to the statutory limits of PBGC's guarantee—benefits that otherwise would have had no value at all in the absence of PBGC's insurance coverage. Petitioners assert that the termination deprived them of their vested benefits in excess of the amounts that were funded in the plan or covered by PBGC's insurance, but they cite no law giving them any legitimate claim of entitlement to those excess amounts. Nor could they: Those additional vested benefits have no value because the plan sponsor failed to fund them and, under ERISA's insurance caps, PBGC is not permitted to pay them. Again, no court, including this Court, has concluded that PBGC deprives plan participants of any protected property interest when it terminates a plan and thereby provides funds to cover benefits that otherwise would have gone unpaid.

Finally, petitioners seek to relitigate in this Court their claim that PBGC's decision to terminate the plan was arbitrary and capricious. That fact-bound argument likewise does not warrant review. The district court and court of appeals carefully considered petitioners' arguments and rejected them based on a comprehensive factual review of the circumstances surrounding the termination. In doing so, the courts considered all of the applicable statutory requirements, including petitioners' arguments under § 1342(c). The petition should be denied.

STATEMENT

A. PBGC's Termination Insurance Program

PBGC is the wholly owned United States government corporation responsible for administering the pension insurance program created by Title IV of ERISA, 29 U.S.C. §§ 1301-1461. The PBGC insurance program protects participants in private-sector defined-benefit pension plans by ensuring that participants and their beneficiaries are not "completely deprived of anticipated retirement benefits" if their pension plans are terminated "before sufficient funds have been accumulated" in the plan to cover their vested benefits. *PBGC* v. *LTV Corp.*, 496 U.S. 633, 637 (1990) (quotation marks omitted). PBGC's termination insurance protects the pensions of tens of millions of American workers and retirees. *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 & n.1 (1980); *PBGC Annual Report 2020*, at 4 (Dec. 9, 2020).[1]

ERISA authorizes PBGC to initiate the termination of an underfunded pension plan, thereby triggering the availability of insurance coverage, when certain criteria are met indicating that the viability of the pension plan is in doubt. 29 U.S.C. § 1342(a). When PBGC determines that termination is required, it "may" apply to the district court for an order terminating the plan. *Id.* § 1342(c)(1). Alternatively, ERISA provides that PBGC and the plan administrator may "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." *Id.* Since ERISA's enactment, PBGC has terminated more than

[1] https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf.

5,000 plans and assumed responsibility through its insurance program for the benefits of nearly 1.5 million people.[2] The overwhelming majority of those terminations have occurred by agreement with the plan administrator. Dist. Ct. Dkt. 23-3, PageID.450 (Campbell Aff. ¶ 3).

When an underfunded pension plan is terminated, PBGC uses whatever assets the plan had, along with the agency's own insurance funds, to pay benefits to participants and their beneficiaries. For participants who have already retired and begun receiving benefits at the time of termination, PBGC continues those payments without interruption. And PBGC promptly processes benefit applications for participants going into retirement.

In particular, Title IV of ERISA provides that PBGC insurance will guarantee each participant's "nonforfeitable benefits" under the terminated plan—*i.e.*, those benefits for which the participant has satisfied the conditions for entitlement—up to a statutory limit. 29 U.S.C. §§ 1301(a)(8), 1322(a). The guarantee is unaffected by the amount of assets in the terminated plan: Regardless of how underfunded the terminated plan might have been, participants will receive coverage up to the amount of the PBGC guarantee. *Id.* But the statute caps the amount of those guaranteed benefits. For example, the maximum guaranteeable benefit, or maximum benefit cap, places a ceiling on the amount that PBGC is authorized to guarantee. *See* 29 U.S.C. § 1322(b)(3); 29 C.F.R. §§ 4022.22, 4022.23. For plans terminated in 2009, the maximum cap was equal to an

[2] *PBGC Annual Report 2020*, at iii; *see generally PBGC* v. *LTV Corp.*, 496 U.S. 633 (1990).

annual annuity of $54,000, payable starting at age 65—that is, a maximum monthly annuity of $4,500. *See Maximum Monthly Guarantee Tables*, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee. A second limit, known as the phase-in limit, applies when a plan has been amended to increase benefits five years or less before termination. *See* 29 U.S.C. §1322(b)(7); 29 C.F.R. §§ 4022.24, 4022.25. In such cases, PBGC's guarantee covers only a portion of the increased benefit amount. A third limit, which principally affects only plan participants who retire early (before the age of 62), provides that a participant's benefit is guaranteed only up to the amount they would have received as a single life annuity had they retired at the plan's normal retirement age. *See* 29 C.F.R. § 4022.21(a)(1).

In most cases, notwithstanding these caps, the PBGC guarantee covers a participant's entire nonforfeitable benefit. But there may be cases in which the nonforfeitable benefits a participant was entitled to under the terms of the terminated plan exceed the PBGC statutory guarantee. In those cases, whether the participant receives any amounts in excess of the insurance guarantee depends on whether and to what extent the assets in the terminated plan were sufficient to fund the benefits. PBGC recovers the assets of the terminated plan from the plan sponsor and distributes them in accordance with asset-allocation rules set forth in the statute. *See* 29 U.S.C. §§ 1322(c), 1344(a); 29 C.F.R. §§ 4044.1-4044.17; *see also Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989). If the plan assets are sufficient, a participant might receive benefits beyond the statutorily limited insurance payment, depending on the priority assigned to the participant's benefits under the asset-allocation rules. If the plan assets are insuffi-

cient, the participant will receive the guaranteed insurance coverage (up to the statutory cap) but might not receive any amounts in excess of the guarantee—even if the participant would otherwise have been entitled to more under the plan terms had the plan been fully funded.

When PBGC determines the value of recovered plan assets and calculates each participant's Title IV benefit, the agency issues a benefit determination to each participant. A participant may challenge PBGC's determination by filing an appeal with PBGC's Appeals Board. *See* 29 C.F.R. §§ 4003.1-4003.10, 4003.51-4003.61. A participant whose appeal is denied may seek judicial review under 29 U.S.C. § 1303(f).

B. The Delphi Bankruptcy And Termination Of The Salaried Plan

Petitioners were employees of Delphi Corporation and are participants in a defined-benefit pension plan referred to as the Salaried Plan, of which Delphi was the plan administrator and contributing sponsor. Delphi was an automotive parts supplier and former subsidiary of General Motors Corporation. AR 119-319.[3] In 2005, Delphi filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. *See In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. Oct. 8, 2005). Upon filing the voluntary petition, Delphi ceased paying the legally required contributions to its pension plans, including the Salaried Plan. AR 34, 934, 1006-1007.

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[3] "AR" refers to the administrative record filed in the district court, *Black* v. *PBGC*, No. 09-cv-13616, Dkts. 52-91 (E.D. Mich.).

Delphi struggled unsuccessfully for years to reorganize its business under Chapter 11 bankruptcy protection. Delphi's first Plan of Reorganization (the "2008 POR") was confirmed by the bankruptcy court on January 25, 2008. It provided that all six Delphi-sponsored plans, including the Salaried Plan, would be frozen but would continue with the reorganized Delphi. AR 934, 1006-1008.[4] But the 2008 POR failed because, on April 2, 2008, Delphi's post-emergence investors declined to fund their investment agreement with Delphi. AR 4091-4095. It was therefore impossible for Delphi to reorganize under the 2008 POR. *Id.*

While Delphi remained in bankruptcy, it suffered significant financial losses as auto sales collapsed in late 2008 and 2009. AR 4091-4095. And in the face of the 2008 economic crisis and recession, Delphi's efforts to emerge as a reorganized company with its pension plans intact failed, as did its attempts to have another entity assume the Salaried Plan. *Id.* No other entity—whether it be GM, which was facing its own financial struggles, or the newly formed company that purchased the remaining productive Delphi assets in the Delphi bankruptcy proceedings—agreed to assume sponsorship of the Salaried Plan. *See, e.g.*, Dist. Ct. Dkt. 304-3 PageID.11345 (Menke Decl. Ex. 1) (sealed). Delphi was forced to liquidate in bankruptcy, which would have left its pension plans, including the Salaried Plan, without a sponsor. Therefore, on June 1, 2009, Delphi filed modifications to its First Amended Plan of Reorganization (the "Modified Chapter 11 Plan"), pursuant to which Delphi intended to, and ultimately did,

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[4] In a frozen plan, employees retain all benefits that they have earned prior to the "freeze date," but earn no additional benefits going forward.

liquidate and terminate all its pension plans, including the Salaried Plan. *See In re Delphi Corp.*, No. 05-44481, Dkt. 16646 (Bankr. S.D.N.Y. June 1, 2009); *see also id.*, Dkt. 17030 (Bankr. S.D.N.Y. June 16, 2009).

Subsequently, on July 22, 2009, PBGC notified Delphi of PBGC's determination under 29 U.S.C. § 1342(a) that the Salaried Plan had not met the minimum funding standard required under the Internal Revenue Code; that the Salaried Plan would be unable to pay benefits when due; and that PBGC's possible long-run loss with respect to the Salaried Plan would be expected to increase unreasonably if the Salaried Plan were not terminated. *See* AR 3 (citing 29 U.S.C. § 1342(a)(1)-(2), (4)). PBGC also determined, in accordance with § 1342(c), that the Salaried Plan had to be terminated and PBGC appointed as statutory trustee to avoid an unreasonable increase in the liability of the PBGC insurance fund. AR 3, 8. Based on those determinations, PBGC initiated an action against Delphi in the district court seeking a decree for the termination of the Plan and notified participants by publication in the *Detroit Free Press*, the *Detroit News*, and *USA Today*, as well as by posting notice on its website.[5]

Petitioners challenged Delphi's Modified Chapter 11 Plan in the bankruptcy court, contending in written objections and at oral argument that termination of the

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[5] *See PBGC* v. *Delphi Corp.*, No. 09-12876 (E.D. Mich. July 22, 2009); *see also U.S. to Cover Pensions for Delphi Workers*, Detroit Free Press, 2009 WLNR 14044763 (July 22, 2009); *Delphi to Cancel Pension Plans; Government to Assume $6.25B in Costs*, The Detroit News, 2009 WLNR 15680454 (July 23, 2009); *PBGC to Assume Responsibility for Delphi Pension Plans*, USA Today (July 22, 2009), https://abcnews.go.com/Business/story?id=8147784&page=1; *PBGC To Assume Delphi Pension Plans* (July 22, 2009), http://www.pbgc.gov/news/press/releases/pr09-48.html.

Salaried Plan was improper. Objection to Modifications of First Am. Plan, *In re Delphi Corp.*, No. 05-44481, Dkt. 18277 (Bankr. S.D.N.Y. July 15, 2009). Petitioners acknowledged that 29 U.S.C. § 1342(c) permits terminations by agreement, "outside of a formal district court adjudication and adversarial process," so long as "PBGC and the plan administrator agree between themselves to terminate the plan, and … agree on the appointment of a trustee." *Id.* ¶ 35; *see id.* ¶ 6 (conceding that district court adjudication of termination "can be bypassed in the event of an agreement between the Plan Administrator … and the PBGC"). They contended, however, that such an agreement was improper in Delphi's case on the ground that Delphi had a conflict of interest and was violating its fiduciary duties by entering into the agreement. *Id.* ¶¶ 15-42.

The bankruptcy court rejected petitioners' objections and those of numerous other parties and confirmed Delphi's Modified Chapter 11 Plan. Plan Modification Order, *In re Delphi Corp.*, No. 05-44481, Dkt. 18707 (Bankr. S.D.N.Y. July 30, 2009). With respect to termination of the Salaried Plan, the bankruptcy court found that "clear grounds exist under Section 4042 of ERISA, 29 U.S.C. § 1342, for the PBGC to initiate involuntary terminations of the Pension Plans, [and] for the Debtors to enter into termination and trusteeship agreements with the PBGC," and that "PBGC has determined to seek involuntary terminations to reduce the PBGC's risk of loss of recovery relating to own exposure under the Pension Plans." *Id.* at 37-38. The bankruptcy court also approved Delphi's request for authorization to enter into termination and trusteeship agreements for all six of its terminating pension plans, including the Salaried Plan, and held—as petitioners conceded—that PBGC and the plan administrator could

agree to termination of a plan without adjudication. *Id.* PBGC and Delphi subsequently executed a termination and trusteeship agreement, terminating the Salaried Plan effective July 31, 2009. Dist. Ct. Dkt. 304-7 (Menke Decl. Ex. 5) ("Termination Agreement").

Upon termination, PBGC became statutory trustee of the Salaried Plan. *See* 29 U.S.C. § 1342(b)(1). As required by 29 U.S.C. § 1361, PBGC has been paying retirement benefits to Plan participants ever since—paying out of its insurance funds nearly $1.5 billion in benefits that were unfunded in the plan. *See Actuarial Case Memo for Delphi Retirement Program for Salaried Employees* 1 (Sept. 30, 2015), https://www.pbgc.gov/sites/default/files/legacy/docs/Redacted-Delphi-Salary-Actuarial-Case-Memo.pdf. All plan participants have received at least the statutorily guaranteed insurance; and more than one thousand participants in the Salaried Plan have received or will receive benefits in excess of the statutory guarantee based on the allocation of remaining plan assets. *See id.* at 56; *supra* p. 6.[6]

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[6] As petitioners note, in October 2020, President Trump directed PBGC's Board of Directors—*i.e.*, the Secretaries of Treasury, Commerce, and Labor—to determine whether the Salaried Plan could be "restored to its pretermination status." Pet. 16 n.6 (quotation marks omitted). Petitioners are correct that PBGC did not respond, because the order was not directed to PBGC, and PBGC cannot speak on behalf of the Cabinet secretaries who serve on its board. Although the officials to whom President Trump's order was directed did not respond, their successors did address the matter after the change in Administrations, concluding that "Congressional action would be required to restore those lost pension benefits." App. 1a.

C. Proceedings Below

In September 2009, petitioners filed this action in the district court against PBGC challenging the termination of the Salaried Plan and seeking unspecified equitable relief under 29 U.S.C. § 1303(f).[7] As relevant here, petitioners alleged that PBGC violated ERISA by terminating the Plan through an agreement, that PBGC's termination of the Salaried Plan violated the Due Process Clause of the Fifth Amendment, and that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious. *See* Dist. Ct. Dkt. 145, PageID.8078-8083 (Second Am. Compl. ¶¶ 39-56). After more than seven years of discovery, the district court granted summary judgment to PBGC. Pet. App. 56a-73a. The court held that 29 U.S.C. § 1342(c) does not require a court adjudication prior to termination of a pension plan and that PBGC acted in accordance with § 1342 when it terminated the Salaried Plan by agreement with Delphi. Pet. App. 67a-69a. The court further held that the termination of the Salaried Plan did not deprive petitioners of due process and that petitioners failed to demonstrate that termination of the Salaried Plan was arbitrary and capricious. Pet. App. 71a-73a.[8]

The court of appeals affirmed. Pet. App. 1a-28a. The court concluded that ERISA's "plain text ... permits—but does not require—court adjudication before termination of a distressed pension plan." Pet. App.

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[7] Petitioners initially named several U.S. Treasury Department defendants as well, but the district court dismissed the claims against those defendants.

[8] The district court additionally rejected petitioners' allegation that PBGC violated any fiduciary duty by terminating the plan. Pet. App. 70a-71a. Petitioners did not appeal that ruling.

12a (citing 29 U.S.C. § 1342(c)(1)). Rather, the language of § 1342(c)(1) alternatively "allows the parties to terminate a plan without a court adjudication so long as the parties agree that a plan should be terminated and agree to appointment of a trustee." Pet. App. 13a. The court noted that this conclusion was consistent with "persuasive authority from other circuits" and rejected petitioners' reliance on the Seventh Circuit's decision in *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), which addressed a "distinct legal issue." Pet. App. 14a.

The court further rejected petitioners' due process argument, concluding that they had no protected property interest in vested pension benefits that were neither funded in the plan nor covered by the PBGC insurance guarantee. Pet. App. 18a-23a. As amended on rehearing, the panel opinion acknowledged this Court's holding in *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980), that the terms of a plan cannot limit a participant's recovery of vested benefits to the amount that can be paid from plan assets because ERISA insurance covers any shortfall between funded benefits and vested-yet-unfunded benefits. Pet. App. 19a-20a (citing *Nachman*, 446 U.S. at 382). But this "simply mean[t] that [participants] are entitled to PBGC coverage up to the statutory guarantee," which PBGC had been paying for years. Pet. App. 20a. Petitioners have no "legitimate entitlement," the court held, to benefits beyond what is paid for by the plan or guaranteed by ERISA. Pet. App. 21a.

Finally, the court held that petitioners failed to demonstrate that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious. Pet. App. 23a. Considering and rejecting each of petitioners' arguments, the court found sufficient evidence in the

record to support termination of the Salaried Plan. Pet. App. 25a-28a.

Petitioners sought rehearing. The panel amended its opinion but denied the petition. Pet. App. 75a.

REASONS FOR DENYING THE PETITION

None of the three questions presented warrants review. As to each issue, the court of appeals' decision is consistent with every circuit court decision that has been called upon to review the propriety of plan termination by agreement. Moreover, the court of appeals' decision is correct and does not conflict with this Court's precedent. PBGC's termination of the Delphi Salaried Plan was carried out by agreement in the same manner that PBGC has conducted thousands of terminations in the decades since ERISA's enactment, and no court has ever suggested that those terminations were unlawful. To the contrary, the termination here enabled PBGC to begin using its insurance funds to fulfill ERISA's promise by making statutorily guaranteed payments to plan participants—payments the Salaried Plan participants have now been receiving for more than a decade that would otherwise have been lost if PBGC had not stepped in. Petitioners ultimately seek to relitigate the lower courts' thorough and careful review of the facts and proper application of this Court's precedent and ERISA's plain text in this hard-fought litigation. The petition should be denied.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners first seek this Court's review of whether termination by agreement, without any district court adjudication, is permissible under ERISA. Every court to have considered that question has agreed that it is,

and ERISA's plain text supports that unanimous conclusion.

A. Courts Agree That ERISA Permits Termination By Agreement

As petitioners concede (at 34), the court of appeals' decision that 29 U.S.C. § 1342(c) permits pension plan termination by agreement is fully aligned with the only other decision squarely addressing the issue. *See Jones & Laughlin Hourly Pension Plan* v. *LTV Corp.*, 824 F.2d 197 (2d Cir. 1987). In *Jones & Laughlin*, PBGC and the plan administrator had agreed to terminate a distressed plan, and a union representing plan participants objected that the participants were entitled under ERISA and the Due Process Clause to "notice and an adjudication prior to the district court's approval of the termination." *Id.* at 198. The Second Circuit affirmed the district court's approval of the termination, concluding that ERISA does not require a court adjudication under § 1342(c) when the plan administrator and PBGC reach agreement to terminate a plan. *Id.* at 199-201. Like the decision below, the Second Circuit relied on the fourth sentence of § 1342(c), construing it to provide that "where ... PBGC and the plan administrator agree to terminate a plan, PBGC need not comply with the other requirements of 'this subsection'"—including a "court adjudication." *Id.* at 200. The statute thus "expressly dispensed with the necessity of a court adjudication in these cases." *Id.* "Having concluded that no pre-termination court adjudication is required when PBGC and the plan administrator agree to terminate," the court "reject[ed] the Union's claimed statutory right to pre-termination notice." *Id.*

Other courts have recognized that § 1342(c) permits termination either by adjudication before the district

court or by agreement between PBGC and the plan administrator. As the D.C. Circuit put it, PBGC has two options for termination: either "district court enforcement or voluntary settlement." *Allied Pilots Ass'n* v. *PBGC*, 334 F.3d 93, 97-98 (D.C. Cir. 2003); *see also PBGC* v. *Durango Georgia Paper Co.*, 251 F. App'x 664 (11th Cir. 2007) (per curiam) (affirming dismissal of complaint seeking adjudication of plan termination and setting of termination date after parties agreed upon termination and termination date); *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees* v. *PBGC*, 991 F.2d 1415 (8th Cir. 1993) (affirming district court decision setting date for plan termination following agreement between PBGC and plan administrator); *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983) ("Despite the so-called involuntary nature of a [§] 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court.").

Petitioners cite (at 32-34) only one decision in support of the asserted conflict, but that case did not address the question at issue here or reach an outcome contrary to the decision below. *See In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006). In *UAL*, the court did not resolve the lawfulness of a termination by agreement—indeed, there was no termination agreement between the plan administrator and PBGC in that case at all. *See id.* at 447-448. To the contrary, there, United Airlines and its unionized pilots sought to temporarily extend the pilots' pension plan during United's bankruptcy on terms that PBGC found objectionable, and PBGC accordingly "filed an adversary action in the bankruptcy proposing to terminate the plan" on PBGC's preferred terms. *Id.* The district court ruled in PBGC's

favor. *Id.* at 449. In the portion of the opinion relied on by petitioners, the Seventh Circuit considered only the standard a district court should apply in reviewing PBGC's application to terminate a plan in a case where PBGC has opted to proceed by adjudication and the parties have not reached agreement. *Id.* at 449-450. The court held that, in such a proceeding, a reviewing court owes no deference to PBGC's position because PBGC's only role in the case is to "commence litigation." *Id.* at 450. The court's dictum that PBGC's "only authority" under § 1342 is to "ask a court for relief" thus related only to the Court's conclusion that PBGC had not engaged in any formal determination (such as a rulemaking or adjudication) to which a court owed deference. *Id.* at 449-450. The court did not address, and had no occasion to address, PBGC's separate authority to terminate distressed plans by agreement. Accordingly, *UAL* presents no conflict.

B. ERISA's Plain Text Supports The Decision Below

The unanimous view of the courts of appeals that ERISA permits terminations by agreement is also correct on the merits. Petitioners' contrary argument (at 19-25) ignores the clear language of 29 U.S.C. § 1342(c) and the court of appeals' proper application of this Court's statutory-interpretation principles.

Consistent with this Court's precedent, the court of appeals began with the plain language of 29 U.S.C. § 1342(c)(1). *See* Pet. App. 7a. That provision states that PBGC "*may*, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c)(1) (emphasis added). It then provides that if the court grants such an

application, it shall appoint a trustee and "authorize the trustee … to terminate the plan." *Id.* In its fourth sentence, § 1342(c)(1) then alternatively provides that:

> If [PBGC] 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).

Section § 1342(c) thus describes two paths to termination, depending upon whether or not the plan administrator opposes the termination. The statute provides that PBGC "*may* … apply" to the district court for a decree adjudicating that the plan must be terminated, 29 U.S.C. § 1342(c)(1) (emphasis added)—language that expresses permission, not obligation.[9] And it alternatively recognizes that "[i]f [PBGC] 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 certain powers including the power to terminate the pension plan. *Id.* (emphasis added). In other words, the express language of the statute provides that if, as in this case, the plan administrator and PBGC agree to terminate the plan, none of the other

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[9] *See Garner's Dictionary of Legal Usage* 568 (3d ed. 2011); *Black's Law Dictionary* 1127 (10th ed. 2014).

requirements under § 1342(c)—*i.e.*, those in the three preceding sentences—is applicable.

Despite this clear language, petitioners persist in arguing (at 19-25) that the authority conferred by the fourth sentence of § 1342(c) is limited to appointing a trustee by agreement. On petitioners' view, PBGC and a plan administrator can agree that a pension plan should be terminated and agree that a trustee should be appointed who has the power to terminate the plan, but the trustee appointed through that agreement has no power to terminate the plan without a court order. Pet. 24-25.

That argument violates the cardinal principle that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)); *see also United States* v. *Alaska*, 521 U.S. 1, 59 (1997) (a court should "avoid an interpretation of a statute that renders some words altogether redundant") (quotation marks omitted). It does so in two ways. First, another provision of the statute already provides that "[PBGC] and [the] plan administrator may agree to the appointment of a trustee" if necessary to oversee the plan during termination proceedings. 29 U.S.C. § 1342(b)(3). The fourth sentence of § 1342(c)(1) would be superfluous if it authorized only the appointment of a trustee by agreement, as petitioners posit. Second, petitioners' interpretation would read the words "agree that a plan should be terminated" out of § 1342(c)(1) altogether. Under petitioners' interpretation—the sentence would mean the same thing whether or not those words are included.

Furthermore, even if, as petitioners suggest, the fourth sentence of § 1342(c)(1) dealt solely with the powers of the trustee, those powers include the power to terminate the plan. As stated in the third sentence of § 1342(c)(1), a court that determines in an adjudication that a plan must be terminated shall appoint a trustee "to terminate the plan in accordance with the provisions of this subtitle." Subsection 1342(d)(1) in turn sets out the authority of the trustee "to terminate the plan." Thus, under the fourth sentence of § 1342(c)(1), when PBGC and a plan administrator agree that the plan should be terminated and agree to appoint a trustee, the trustee appointed under that agreement is granted the same power to terminate the plan as a trustee appointed by a court.

Title IV's broader structure confirms that reading. Section 1348 establishes different procedures for setting the termination date, depending on whether a plan is terminated by agreement or not: (1) for cases with a termination and trusteeship agreement, the termination date is the agreed-upon date, and (2) for cases where there is no termination and trusteeship agreement, the termination date is set by the court. This is also paralleled by the language in § 1342(b), where a trustee can be appointed either by a court decree, or by agreement between PBGC and the plan administrator.

ERISA's text and structure thus support the unanimous view of the courts of appeals. No further review is warranted.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners next seek review of their claim that termination of the Salaried Plan without a court

adjudication violated their rights under the Due Process Clause. As an initial matter, petitioners overlook that they both had and availed themselves of the opportunity to object to the termination in the Delphi bankruptcy proceeding and indeed vigorously opposed it there. In any event, petitioners nowhere explain how they could have any "legitimate claim of entitlement" to their lost pension benefits. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972); *see* Pet. App. 20a. Petitioners have received the benefits that were vested and funded under the plan, and they have additionally received the benefits that were vested yet unfunded by the plan but covered by ERISA's termination insurance. They have been deprived only of vested pension benefits that were neither funded by the plan nor promised by ERISA, and they make no argument that they have a property interest protected by the Due Process Clause in those amounts. Pet. 25-29.

The court of appeals' decision denying petitioners' due process claim on that basis does not warrant review. No court has endorsed the due process theory petitioners now advance. Petitioners strain to assert (at 34) that the decision below is in "tension" with the Second Circuit's decision in *Jones & Laughlin*, but as explained above, the Second Circuit in that case upheld the termination by agreement. *Supra* p. 15. In doing so, the court specifically considered a due process objection and concluded that the termination by agreement "comport[ed] with due process." 824 F.2d at 202. Petitioners contend that the Second Circuit, in conflict with the decision below, "accepted" that plan participants have a protected property interest in vested-but-unfunded benefits. Pet. 34. That is incorrect: The Second Circuit expressly declined to address whether plan participants "have a cognizable interest in receiving

their contractually defined benefits," finding it unnecessary to decide that question because "any claimed right to continuing contractual benefits was not taken away without due process." 824 F.2d at 201.

Petitioners contend that the decision below conflicts with this Court's decision in *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980), arguing that the court of appeals found a protected interest only in funded benefits, contrary to *Nachman*'s holding that ERISA's insurance provisions cover vested benefits beyond those that are funded in the plan. Pet. 25-29. As petitioners acknowledge (at 28), this argument largely attacks the panel's original opinion—an opinion that was superseded on rehearing and amended to make more clear the court of appeals' understanding that plan terms limiting a participant's recovery to *funded* benefits cannot defeat a participant's interest in ERISA's coverage of vested yet unfunded benefits. Pet. App. 19a-20a. This Court does not grant review to reconsider panel opinions that have been superseded.

In any event, there is no conflict with *Nachman*, which nowhere addressed whether termination by agreement between PBGC and a plan administrator violates due process. In *Nachman*, an employer sued PBGC, arguing that a provision in its pension plan limiting benefits to the amounts that were funded by plan assets prevented the unfunded benefits from being covered by PBGC and thus the company was not liable to PBGC for the asset deficiency. 446 U.S. at 363-366. This Court held that such a provision limiting benefits to the amount funded by the pension plan could not prevent the plan from being insurable by PBGC or limit the employer's liability for unfunded benefits, which would be covered by PBGC insurance. *Id.* at 378-379. The Court interpreted ERISA to ensure that,

notwithstanding such provisions, if a plan terminates without sufficient assets to pay all vested benefits, PBGC would cover "the difference between the employee's vested benefits under the terms of the plan … and the amount that could be paid from the terminated plan's assets." *Id.* at 382. The Court specifically acknowledged, however, that PBGC's insurance coverage was "subject to the dollar limitations" set forth in the statute. *Id.*

The issue in *Nachman* was thus whether a plan provision purporting to limit the employer's liability to funded benefits rendered vested-but-unfunded benefits forfeitable for purposes of calculating the amounts payable by PBGC. In holding that it did not, this Court in no way suggested that those nonforfeitable benefits must be paid in full by PBGC despite the limits set by Congress. To the contrary, this Court noted that, with respect to nonforfeitable benefits, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.' It is self-evident that a claim may remain valid and legally enforceable even though, as a practical matter, it may not be collectible from the assets of the obligor." *Nachman*, 446 U.S. at 371.

Consistent with *Nachman*, both the court of appeals and PBGC agreed that the Salaried Plan participants had vested, nonforfeitable benefits, as defined in ERISA. But *Nachman* addressed a very different situation and did not consider a plan termination, at which point the amount of those benefits—and plan participants' protected property interests—are limited by the assets available in the plan and the statutory limits of PBGC's insurance guarantee. In the Delphi Salaried Plan, for instance, as of the effective date of termination on July 31, 2009, the Plan had promised to pay

some $4.5 billion in vested benefits to the Plan's participants, but only $2.5 billion of those vested benefits had been funded. In normal circumstances, where a pension plan has an economically profitable and vibrant company as plan sponsor, the existence of unfunded vested benefits need not unduly concern the participants, as ERISA requires the plan sponsor to provide additional funds to its pension plan so that the benefits are actually funded when the time comes to pay them out as monthly cash pension payments.

But the circumstances were definitely not normal for the Delphi Salaried Plan in July 2009, as its plan sponsor, Delphi, had announced in its bankruptcy plan that it was imminently selling all its assets and liquidating. If one thing was certain at that time, it was that Delphi would not then, nor ever in the future, contribute any additional funds to the Salaried Plan. In the absence of PBGC and the federal pension insurance program in Title IV of ERISA, the result would have been disastrous. The Salaried Plan assets would have been allocated to the benefit categories described in ERISA and the plan document, and participants who had retired or were eligible to retire before August 2006 would have received a portion of their benefits. All other participants would still have their vested benefits, but they would have received nothing for them because the money had run out and there was none left to pay them and, most importantly, no ability to obtain any additional money from any source. In other words, the *unfunded* vested benefits had no value, no matter how strong or sincere the promises to pay them and no matter how much the participants may have relied upon those promises. *See Nachman*, 446 U.S. at 378 (recognizing that "the actual realization" of

vested benefits "might depend on the sufficiency of plan assets").

Therefore, the fundamental question for the due process analysis in this case, which *Nachman* does not address, is not whether petitioners lost vested, nonforfeitable benefits, but rather, whether they lost *payments* for those vested, nonforfeitable benefits to which they had a legitimate claim of entitlement. *Roth*, 408 U.S. at 577. While petitioners may have expected or strongly desired to receive the full value of their vested, nonforfeitable benefits, that expectation could only be enforceable and support a legitimate claim of entitlement if there were assets available to make those payments or statutory insurance available to cover them.

Fortunately for the participants in the Delphi Salaried Plan, PBGC was created to provide insurance to cover unfunded—and therefore valueless—vested benefits. But that insurance is subject to statutory limits, as *Nachman* recognized. *See* 446 U.S. at 374-375; *supra* pp. 5-6. Policy limits are a feature of all insurance, including other federal governmental insurance programs, such as programs covering bank and savings and loan deposits, flood losses, and crop losses. For example, when the Federal Deposit Insurance Corporation ("FDIC") takes over an insolvent bank, it insures the bank's depositors' accounts up to a limit of $250,000. 12 U.S.C. § 1821(a)(1)(E). Amounts over that limit are simply lost—an unpaid and therefore worthless debt owed by a former bank that has no money to pay it. No court has ever suggested that FDIC's failure to pay the full amount of a debt beyond the $250,000 limit deprives account holders of a protected property interest under the Due Process Clause. Similarly here, upon the occurrence of an insurable event—the termination of an

underfunded pension plan without a plan sponsor capable of paying the unfunded benefits—PBGC stepped in and did what it was created to do. It has paid to participants the otherwise valueless, unfunded benefits that Delphi was liable for but unable to pay, up to the guaranteed amount as provided by ERISA. The court of appeals correctly concluded that PBGC's adherence to those statutory limits did not violate the Due Process Clause, and no court has held to the contrary.

III. THE THIRD QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners finally seek this Court's review of the lower courts' fact-bound conclusion that PBGC's decision to terminate the Delphi Salaried Plan was not arbitrary and capricious based on all the factual circumstances. But the lower courts carefully considered petitioners' arguments based on a comprehensive review of the record, and no further review is warranted.

The court of appeals, like the district court (and the Delphi bankruptcy court before them), carefully considered and rejected each of petitioners' arguments that PBGC's termination decision was arbitrary and capricious, finding sufficient evidence in the record to refute every objection petitioners raised. *Compare* Pet. App. 23a-28a, *with* Pet. C.A. Principal Br. 45-50. For example, the Administrative Record clearly supports that termination was necessary to avoid an unreasonable increase in the liability of PBGC's funds and preserve the value of PBGC's liens and claims against the remaining assets of Delphi—value that would have been lost and unavailable to PBGC and the plan participants if PBGC had waited to terminate. *See* AR 36 (sealed). The court of appeals carefully reviewed the facts and arguments on the issue and noted the various

interests and circumstances PBGC "had to consider" in its termination decision, including the fact that "a delayed termination decision might affect the GM negotiations and could endanger PBGC's ability to recover funds from statutory liens that had been put into place." Pet. App. 27a. Upon that review, the court concluded that "[a]t bottom, it is inappropriate for this court to play armchair administrative agency with the benefit of hindsight. Even if we would have reached a different conclusion in the first instance, PBGC's decision to terminate the Salaried Plan was supported by sufficient evidence." Pet. App. 28a.

Petitioners take issue with the court of appeals' resolution of those factual questions. For example, petitioners contend the court of appeals erred by failing to consider petitioners' evidence regarding specific funding percentages of the Plan. *See* Pet. 31. *But see* Pet. App. 27a (rejecting petitioners' reliance on the Salaried Plan's asserted funding level in light of "countervailing evidence demonstrat[ing] that the Salaried Plan was severely underfunded"). But this Court "do[es] not grant ... certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *see* Sup. Ct. R. 10.

Petitioners attempt to manufacture a legal issue out of their plea for fact-bound error correction, contending that the court of appeals erred by citing only 29 U.S.C. § 1342(a) in its opinion rather than the termination criteria set out at § 1342(c). Pet. 29-32. That effort fails. The court of appeals clearly determined the legality of the termination and found that it satisfied 29 U.S.C. § 1342(c)(1). Spanning more than seven pages of the opinion, the court of appeals' extensive analysis thoroughly considered the statutory language and the relevant case law interpreting it and concluded that the

Termination Agreement satisfied the fourth sentence of 29 U.S.C. § 1342(c)(1), and then stated that the Termination Agreement "obviates all other requirements found in subsection (c), including any requirement for an adjudication." Pet. App. 11a; *see* Pet. App. 7a-15a. Petitioners' illogical contention that the court should have considered whether the termination decision was arbitrary and capricious under § 1342(c)(1) is meritless. They state in their own petition that, for purposes of this question, they assume the legality of a termination by agreement and the court had already decided that § 1342(c)(1) was satisfied by the Termination Agreement.

Petitioners also suggest that by reviewing PBGC's determination under a deferential "APA-like" standard of review, the decision below is "incompatible" with the Seventh Circuit's rejected of deference in *UAL*. As explained, however, *UAL* did not involve a termination by agreement. Moreover, petitioners themselves contended below that the APA's "arbitrary and capricious" standard was the appropriate standard of review. Dist. Ct. Dkt. 145, PageID.8083 (Second Am. Compl. ¶ 56); Pet. C.A. Principal Br. 2, 43-50.

Thus, after careful consideration of the facts, the court of appeals correctly decided that PBGC's termination decision was not arbitrary and capricious. Pet. App. 28a. Petitioners' argument that the court applied the wrong standard simply seeks to revisit the § 1342(c) issue and ignores the lower courts' clear holding that the Termination Agreement satisfied § 1342(c). Petitioners offer no reason for this Court to review the lower courts' correct and thoughtful decision that PBGC's termination decision was not arbitrary and capricious.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

August 23, 2021

The Honorable Tim Ryan
U.S. House of Representatives
Washington, DC 20515

Dear Representative Ryan:

I write in reply to your July 20, 2021, letter to the Secretaries of the Treasury, Labor, and Commerce inquiring about the status of the information requested by the Presidential Memorandum issued by President Donald J. Trump on October 22, 2020. I am responding on behalf of all three Secretaries.

The Presidential Memorandum calls for the Secretaries of Treasury, Labor, and Commerce to conduct a review of issues related to the termination of the pension plans plans sponsored by the Delphi Corporation. The Pension Benefit Guaranty Corporation reviewed the potential to restore the lost pension benefits for the approximately 6,000 salaried, non-unionized Delphi employees who incurred benefit reductions when their single-employer plans were terminated by the Pension Benefit Guaranty Corporation in 2009. The Departments of Treasury, Labor, and Commerce concluded that Congressional action would be required to restore these lost pension benefits. Therefore, we have not taken further steps on this issue.

We appreciate your commitment to these issues and share the goal of ensuring a safe and secure retirement for American workers and their families.

If you have further questions, please direct your staff to contact the Office of Legislative Affairs.

Sincerely,

<u>*/s/ Crag Radcliffe*</u>
Craig Radcliffe
Deputy Assistant
Secretary for Banking and Finance
Office of Legislative Affairs

cc:

The Honorable Michael R. Turner
The Honorable Dan Kildee
The Honorable Joyce Beatty
The Honorable Ralph Norman
The Honorable Vincente Gonzalez
The Honorable Austin Scott
The Honorable Brian Higgins
The Honorable Steve Chabot
The Honorable Chris Jacobs
The Honorable Bill Johnson
The Honorable Elissa Slotkin
The Honorable Joseph D. Morelle
The Honorable Bryan Steil
The Honorable Warren Davidson
The Honorable Bill Huizenga
The Honorable Lisa C. McClain
The Honorable John R. Moolenaar
The Honorable John Katko
The Honorable Mary Kaptur
The Honorable Victoria Spartz
The Honorable Debbie Lesko
The Honorable Jack Bergman
The Honorable Debbie Dingell
The Honorable Salud Carbajal
The Honorable Andy Levin
The Honorable James R. Baird
The Honorable David P. Joyce
The Honorable Martin J. Walsh
The Honorable Gina M. Raimondo