No. _____

IN THE
Supreme Court of the United States

K. WENDELL LEWIS, *et al.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title IV of the Employee Retirement Income Security Act ("ERISA") charges the Pension Benefit Guaranty Corporation ("PBGC") with administering a federal insurance program covering certain pension plans. PBGC collects premiums from plan sponsors; deposits the premiums into a revolving fund; and, if a plan terminates with insufficient assets, draws from the fund to pay "guaranteed" benefits.

Separate from its statutory obligations as a guarantor, PBGC may volunteer for a second role: trustee of a terminated plan. As trustee, PBGC becomes a fiduciary and assumes duties from the private "plan administrator." One duty is to distribute, pursuant to 29 U.S.C. §1344(a), the terminated plan's remaining assets among various groups of beneficiaries.

Beneficiaries who disagree with PBGC's asset allocations can sue in federal court after review before the agency's Appeals Board. The Board's decision, which is informal and non-binding on other parties, often turns on the construction of ambiguous language in §1344(a). When there is ambiguity (as here), PBGC insists that the Board's construction deserves deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The question presented—which, for reasons discussed below, can arise only in the D.C. Circuit—is:

> Has the D.C. Circuit improperly extended *Chevron* deference to PBGC's construction of ambiguous statutory provisions in informal, non-binding adjudications undertaken *not* in the agency's congressionally assigned role as insurer (or in any other regulatory capacity) but instead as a plan trustee and fiduciary?

PARTIES TO THE PROCEEDINGS

Petitioners, a group of approximately 1,700 individual participants or their estates in a now-terminated pension plan once sponsored by Delta Airlines, Inc. ("Delta") were the plaintiffs-appellants below. They are listed individually in the Petitioners' Appendix ("Pet. App.") at 120a-177a.

PBGC, respondent on review, is an entity created by federal statute and is within the U.S. Department of Labor. Sued in its capacity as trustee of the terminated pension plan, PBGC was the defendant-appellee below.

LIST OF ALL PROCEEDINGS IN THE TRIAL AND APPELLATE COURTS THAT ARE DIRECTLY RELATED TO THIS CASE

Lewis v. PBGC, No. 14-cv-3838, U.S. District Court for the Northern District of Georgia. Order transferring case to the U.S. District Court for the District of Columbia entered August 11, 2015.

Lewis v. PBGC, No. 15-cv-1328, U.S. District Court for the District of Columbia. Order certifying interlocutory appeal entered January 23, 2017.

Lewis v. PBGC, No. 17-5068, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered August 21, 2018. Amended opinion issued December 21, 2018.

Lewis v. PBGC, No. 18-1279, U.S. Supreme Court. Order denying petition for a writ of certiorari entered June 17, 2019.

Lewis v. PBGC, No. 15-cv-1328, U.S. District Court for the District of Columbia. Summary

judgment entered June 11, 2018. Final judgment entered August 29, 2019.

Lewis v. PBGC, No. 19-5261, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered December 7, 2020. Order denying rehearing *en banc* entered February 4, 2021.

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Petitioners respectfully seek a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

When Congress passed ERISA in 1974, it required PBGC to be a self-supporting pension insurer without the independent ability to increase premiums or deny coverage to anyone. As of 2020, however, the agency reported a growing operating deficit, nearing almost $50 billion, and proclaimed it soon may be unable to honor commitments to pensioners in failed plans, a situation partially alleviated only very recently by passage of the American Rescue Plan Act of 2021.

Perennially worried about resources, the agency has gone about transforming a statutory provision aimed at private plan administrators and trustees, 29 U.S.C. §1344(a), into a powerful tool for it to exercise discretion. After taking over as trustee and fiduciary (which it does for virtually all failed pension plans) and obtaining and investing the plan's assets (often, as in this case, billions), §1344(a) allows PBGC as trustee to distribute the plan's remaining assets among the plan's various groups of beneficiaries.

In interpreting §1344(a), PBGC is inherently conflicted—particularly when the failed plan's assets are adequate to pay certain participants who are immediately entitled to more than PBGC's minimum guarantee. By incorrectly "interpreting" §1344(a), PBGC can earmark some of those assets for other participants who are not yet entitled to payment. And by reducing the amount it needs to pay out right away, PBGC can hold trusteed assets longer; any

investment interest it earns, it is allowed to keep for its own operational coffers. This case is illustrative.

The Delta Pilots Retirement Plan ("Plan") terminated in 2006 without funds sufficient to pay all participants the benefits they had been promised. PBGC asked to become, and was appointed, trustee of the Plan. PBGC thereby became a Plan fiduciary and was entrusted with divvying up billions of dollars in Plan assets according to §1344(a).

PBGC, however, elected to interpret ambiguous provisions of §1344(a) in ways that dramatically cut the benefits of older Plan participants, most of whom had retired years earlier and had already come to rely on their full monthly pension payments. Among the pensioners whose benefits were slashed were Petitioners (the "Retirees"), a group of approximately 1,700 retired pilots (or, now, many years into this litigation, their estates). All told, the Retirees (and others similarly situated in the Plan) will collectively lose tens, if not hundreds, of millions of dollars over their lifetimes because of PBGC's §1344(a) allocations.

Another group of Plan participants benefitted, greatly, from PBGC's statutory interpretations: younger pilots who, at the time of the Plan's termination, were on Delta's roster of active pilots. PBGC's §1344(a) allocations awarded to those active pilots windfall amounts. Plus, PBGC itself gained from its constructions of §1344(a): by prioritizing the benefits of younger pilots who were not yet eligible to draw pension payments, PBGC could hold the Plan's assets over a much greater period of time and could earn for

its own use large sums of investment income—all when PBGC was facing a severe funding crisis.

The D.C. Circuit approved this lopsided result, with the outcome turning on *Chevron*. If a private trustee had been in charge of distributing the Plan's assets, its constructions of §1344(a) would have been entitled to zero deference. And the statutory text makes clear that Congress wished PBGC to be treated the same as any private trustee when it takes over a terminated plan. But, here—even though the Retirees challenged solely PBGC's asset-allocation decisions in PBGC's role as a trustee—the D.C. Circuit reaffirmed its prior holding that *Chevron* deference applies to *all* of PBGC's interpretations of ERISA, regardless of whether PBGC was wearing its statutorily affixed "insurer hat" or its voluntarily donned "fiduciary hat" and regardless of the manner in which PBGC announced its interpretation.

This Court should grant review. The D.C. Circuit effectively has exclusive jurisdiction over cases brought against PBGC with respect to its post-termination fiduciary actions, meaning that no other Circuit will review this important issue of *Chevron* deference. The question is frequently recurring. The stakes are enormous. This petition is an ideal vehicle. And the decision below is wrong.

OPINIONS BELOW

The D.C. Circuit's *per curiam* judgment is available at 831 F. App'x 523 and is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-6a. The District Court's summary judgment order is reported at 314 F. Supp. 3d 135. Pet. App. 7a-91a. The District

Court's final judgment, entered on August 29, 2019, is unreported. *Id.* at 94a-95a.

JURISDICTION

The D.C. Circuit entered judgment on December 7, 2020, *id.* at 1a-6a, and denied a timely petition for rehearing *en banc* on February 4, 2021, *id.* at 96a-97a. On March 19, 2020, this Court by general order 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. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of Title IV of ERISA, 29 U.S.C. §§1301-1461, and its implementing regulations are reproduced at Pet. App. 98a-119a.

STATEMENT

A. Statutory Background

1. ERISA is the landmark federal law enacted to protect the nation's pensioners. Among the central problems ERISA sought to address was the inherent default risk of defined-benefit plans. *See PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (Congress sought "to ensure that employees and their beneficiaries [are] not . . . deprived of anticipated retirement benefits by the termination of pension plans before

sufficient funds have been accumulated in the plans").[1]

Consistent with that goal, Congress created a plan termination insurance program that applies to defined-benefit pension plans. *See generally* 29 U.S.C. §§1301-1371. Congress also created PBGC, a "wholly owned United States Government corporation," *PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990), and charged it with administering the termination insurance program to protect the retirement income of covered pensioners.

Like a private insurance company, PBGC collects premiums for each plan participant and pays out claims to cover the shortfall, within limits, when a plan fails. *See* 29 U.S.C. §§1305, 1322. Congress envisioned the insurance program to be self-financing. *See id.* §1305.

PBGC differs from private insurance companies, however, in critical ways: it cannot refuse to insure exceptionally risky plans, *see id.* §1322(a), depriving it of leverage with which to negotiate more prudent terms; nor can it charge such plans higher premiums. *See id.* §1306. In fact, PBGC cannot raise its premiums at all, as Congress specified the rates to be charged in the text of ERISA itself. *See id.*; *see generally* Congressional Budget Office, *A Guide to Understanding the Pension Benefit Guaranty*

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[1] A defined-benefit pension plan is one "under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Nachman Corp. v. PBGC*, 446 U.S. 359, 363 n.5 (1980).

Corporation at 8 (Sept. 1, 2005), https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/09-23-guidetopbgc.pdf. Thus constrained, PBGC would be destined for insolvency. *See* PBGC, *Annual Report 2013* at 17 (Nov. 15, 2013), https://www.pbgc.gov/sites/default/files/legacy/docs/2013-annual-report.pdf ("The primary reason [for our deficit] is that premiums established by Congress that we are permitted to charge are inadequate to cover the benefits that, by law, we insure.").[2]

2. When an ERISA plan terminates, any remaining assets held by the plan must be distributed among the plan's beneficiaries pursuant to a statutory allocation scheme set forth in Title IV—specifically, at 29 U.S.C. §1344(a). Section 1344(a) establishes six priority categories according to which the terminated plan's assets must be allocated. *Id.* §1344(a)(1)-(6). It is only after those allocations that PBGC draws from its insurance fund.

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[2] The U.S. Government Accountability Office included PBGC on its High Risk List starting in 2003, consistently expressing doubt about "the agency's long-term financial stability." *See*, *e.g.*, U.S. Gov't Accountability Off., *High-Risk Series: An Update* 241 (Feb. 2013), http://www.gao.gov/assets/660/652133.pdf. According to its own estimates, as of fiscal year 2020, PBGC had accumulated a net financial deficit of almost $50 billion, a figure that would have been even higher if not for legislation that deleted certain pension liabilities from PBGC's books. PBGC, *Annual Report 2020* at 8-9 (Dec. 9, 2020), https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf. Very recently, after years of PBGC predicting doom, the American Rescue Plan Act of 2021, Pub. L. No. 117-2, provided substantial additional funds earmarked for multi-employer plans in particularly critical condition.

Congress expressly tasked the "plan administrator," *id.* §1344(a), typically the employer or the employer's delegate, to do the job. *See id.* §§1002(16), 1301(a)(1). Otherwise, a trustee must be appointed. *See id.* §1342(b).

Congress expected that the existing plan administrator would be the "preferred choice" absent evidence of incompetence or self-dealing. *See* Subcomm. on Lab. and Pub. Welfare, Pub. L. No. 93-406, Legis. Hist. of Employee Retirement Income Security Act of 1974, at 5218-19 (Vol. 3 1974). "[I]n special circumstances," PBGC (which in Title IV Congress identified as the "corporation") could request its own appointment as trustee, *id.*, though Congress evidently assumed that such instances would be rare. *See*, *e.g.*, 29 U.S.C. §1342(h)(1) (requiring "the prior approval of the corporation" for trustee compensation); *id.* §1342(d)(1)(A)(vi) (authorizing trustee to take certain actions so long as they do not "increas[e] the potential liability of the corporation").[3]

Nonetheless, under the auspices of the final sentence of 29 U.S.C. §1342(b)(1), which permits PBGC to "request that it be appointed as trustee of a plan," PBGC has become the trustee of first resort for just about every plan that has failed since ERISA was

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[3] *See also*, *e.g.*, H.R. Rep. No. 93-1280, at 373 (1974) (Conf. Rep.) ("A *trustee* with the discretion to commence the final liquidation of the trust must first give the *corporation* at least 10 days' notice. If the *corporation* should oppose the *trustee's* proposal, the court is to resolve the dispute.") (emphasis added); *id.* ("The compensation of the *trustee* is to be approved by the *corporation*, and, in the case of a trustee appointed by the court, with the consent of the court.") (emphasis added).

enacted. *See* Br. of Appellee at 2, *Lewis v. PBCG*, No. 19-5261 (D.C. Cir. Apr. 14, 2020), Doc. No. 1838092 (PBGC asserting that it "has become trustee of virtually every one of the nearly 5,000 underfunded plans that have terminated since 1974").

Whether PBGC or a private party becomes the trustee, the same statutory provisions govern the trustee's actions. Those provisions grant trustees sweeping authority "to do any act authorized by the plan or [Title IV] to be done by the plan administrator," 29 U.S.C. §1342(d)(1)(A)(i), including paying benefits under its interpretation of the plan, *see id.* §1342(d)(1)(B)(i).

Trustees may also "require the transfer of all (or any part) of the assets and records of the plan to [itself] as trustee." *Id.* §1342(d)(1)(A)(ii). And, to be clear, that has become PBGC's standard operating procedure. *See* PBGC Office of Inspector General, *Evaluation Report: PBGC Processing of Terminated United Airlines Pension Plans Was Seriously Deficient* at 7 (Nov. 30, 2011), https://oig.pbgc.gov/pdfs/PA-10-72-1.pdf (acquiring $8 billion in assets from United Airlines plans); Joint App. ("D.C. Cir. Joint App.") Vol. II at JA163, *Lewis v. PBCG*, No. 19-5261 (D.C. Cir. Mar. 4, 2020), Doc. No. 1831860 (acquiring nearly $2 billion in assets from Delta Pilots Plan); PBGC, Press Release, *PBGC to Assume Delphi Pension Plans* (July 22, 2009), https://www.pbgc.gov/news/press/releases/pr09-48 (acquiring $6 billion in assets from Delphi Corporation plans).

In addition to these broad powers, all trustees—including PBGC—"shall be, with respect to the plan, a fiduciary." 29 U.S.C. §1342(d)(3). ERISA mandates

that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Id.* §§1104(a)(1), 1342(d)(3). Further, the fiduciary shall act: (1) "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries"; (2) "with the care, skill, prudence, and diligence [of] . . . a prudent man"; and (3) in accordance with plan documents "insofar as such documents . . . are consistent with the provisions of [Title I] and [Title IV]." *Id.* §1104(a)(1)(A)(i), (B), (D).

Nowhere in these provisions did Congress provide for different rules when PBGC serves as trustee. On the contrary, the statute expressly requires the agency to act like any other private plan administrator and fiduciary.

B. Factual Background

The Retirees were participants in the Plan, which was a pension plan originally sponsored by Delta. *See* Pet. App. 2a. After Delta's bankruptcy in 2005, the airline ceased making contributions to the Plan and, ultimately, Delta and PBGC entered into an agreement to terminate the Plan. *See id.* When the Plan terminated in 2006, PBGC became the Plan's trustee. *Id*.

As trustee, PBGC took custody of the Plan's remaining assets, which PBGC later valued at nearly $2 billion. *Id.* at 3a. Even so, PBGC's final benefit determinations for the Retirees (and subsequent benefit payments to the Retirees) were significantly less than the amounts promised in the Plan. *See* Pet. App. 21a-24a.

The Retirees filed a consolidated appeal in October 2011 with PBGC's Appeals Board, *id.* at 25a, an entity mentioned nowhere in ERISA, but to which adjudicative authority is prescribed under PBGC's regulations. *See* 29 C.F.R. §4003.51. A decision by the Appeals Board "constitutes the final agency action by PBGC with respect to the determination which was the subject of the appeal." *Id.* §4003.59(b).

The Retirees raised more than a dozen issues before the Appeals Board, Pet. App. 25a, which ruled against the Retirees on each of them. *See id.* at 25a-31a. In rejecting the Retirees' challenges, the Appeals Board favored a different group of Plan participants: pilots who were still actively flying for Delta. *See id.* By putting Delta's on-the-job pilots at the head of the line, those pilots, when they retire, will receive *more* than 100% of all benefits promised under the Plan, in stark contrast to the Retirees' enormous losses.

The Retirees sought judicial review. The Retirees did not dispute any decisions PBGC might have made in its role as guarantor of Title IV's pension insurance program. Instead, they challenged several decisions PBGC made with respect to its §1344(a) asset allocations as trustee of the Plan. *See* Pet. App. 2a.

The case was initially filed in the Northern District of Georgia, where Delta is headquartered. *See* Order at 1-3, *Lewis v. PBCG*, No. 14-cv-3838 (N.D. Ga. Aug. 11, 2015), ECF No. 31. That court held, however, that once a pension plan terminates, it no longer has a principle office. *Id.* at 4. The court thus concluded, in unanimity with all other courts to have considered the issue based on the relevant statutory language, that there is only one proper venue for suit against

PBGC with respect to its post-termination fiduciary actions: the United States District Court for the District of Columbia. *Id.* at 4-7; *see* 29 U.S.C. §1303(f)(1)-(2).

After years of post-transfer litigation, the district court granted summary judgment to PBGC. Pet. App. 7a-91a. Perhaps because an ERISA fiduciary's statutory interpretations are normally reviewed *de novo*, *id.* at 31a-32a, the district court spent one-third of its 64-page decision explaining why PBGC's constructions of §1344(a)'s asset-allocation provisions are entitled to maximum deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 32a-61a. The district court further applied the Administrative Procedure Act's arbitrary-and-capricious standard "for all other actions of the Corporation," seemingly meaning any of the Appeals Board's fact-findings or constructions of the terms of the Retirees' Plan. *Id.* at 61a-62a; *see* 5 U.S.C. §706(2).

A panel of the D.C. Circuit affirmed, both as to the merits of the Retirees' claims and as to the application of *Chevron*. The panel held that D.C. Circuit precedent, discussed *infra* pp. 12-13, required deference "to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA," even though the Retirees had not challenged interpretations of Title IV by PBGC qua guarantor, but by PBGC as a voluntary trustee and fiduciary. Pet. App. 2a. Nowhere in its decision did the panel suggest that it would have upheld PBGC's §1344(a) determinations absent *Chevron* deference.

The Retirees timely filed a petition for rehearing *en banc*, *see id.* at 96a, which the court denied. *See id.* This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents an important question that will, without a course correction, impact the pension benefits of millions of American retirees: Whether *Chevron* deference applies to PBGC's constructions of §1344(a)'s asset-allocation scheme, when Congress did not make the distribution of a terminated plan's assets part of PBGC's statutory mandate. The D.C. Circuit, the only federal court of appeals that will ever review this issue, has incorrectly and grossly extended the reach of *Chevron*. This Court's intervention is warranted.

I. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENTS

Certiorari is warranted because the decision below flouts this Court's precedents. The D.C. Circuit felt bound by *Davis v. PBGC*, 571 F.3d 1288 (D.C. Cir. 2009) ("*Davis I*"), *see* Pet. App. 2a-3a, in which the court justified in a single paragraph the application of *Chevron* to PBGC as a trustee:

> The pilots acknowledge the PBGC generally receives *Chevron*-deference for its authoritative interpretations of ambiguous provisions of ERISA. *See PBGC v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989). But deference should not apply, they say, when the PBGC is acting as trustee rather than guarantor, noting that no case or court has addressed the question of

> whether the PBGC receives *Chevron*-deference for decisions it makes as trustee. We see no reason to depart from the usual deference we give to an agency interpreting its organic statute. The pilots point out that a private party serving as trustee would not receive *Chevron*-deference, but this point proves nothing. Unlike a private trustee, the PBGC has unique experience and "practical agency expertise" in interpreting ERISA. *LTV Corp.*, 496 U.S. at 651. The PBGC is therefore "better equipped" to interpret ERISA than courts, *id.*, and it is for this reason we defer to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA.

Davis I, 571 F.3d at 1293.[4]

This entrenched position of the D.C. Circuit contravenes this Court's well-evolved *Chevron* doctrine for two fundamental reasons: (1) because Congress failed to delegate interpretive authority to trustees acting pursuant to §1344(a); and (2) because informal, non-binding Appeals Board decisions are not the type of agency action warranting *Chevron* deference.

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[4] In opposing certiorari in *Davis*, PBGC argued that the *Chevron* holding was not outcome determinative because the D.C. Circuit said it would have reached the same outcome regardless of deference. *See* Br. of PBGC in Opp'n 11, *Davis v. PBGC*, No. 13-1280 (U.S. June 2, 2014). As explained *infra* pp. 26-27, that is not the case here. The question presented was entirely outcome determinative.

A. Congress Did Not Delegate Interpretive Authority to Trustees Under §1344

At the heart of the D.C. Circuit's error was its failure to follow this Court's directives to evaluate whether Congress delegated interpretive authority to PBGC under the actual statutory text at issue in this case. That text makes clear that Congress intended PBGC to be treated like any other trustee of a terminated plan—none of whom is entitled to deference in applying §1344's priority categories.

1. *Chevron* deference is not dispensed in gross. It is warranted only where the statutory text shows that "Congress . . . expect[ed] the agency to . . . speak with the force of law" in a given context. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Courts do not afford deference "merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Rather, Congress must have "delegated authority to the agency" and "the agency interpretation claiming deference" must have been "promulgated in the exercise of *that* authority." *Mead Corp.*, 533 U.S. at 226-27 (emphasis added). Courts accordingly must evaluate the specific statutory text under which the agency seeks deference to determine whether deference is appropriate under the circumstances. *See Gonzales*, 546 U.S. at 258-61 (evaluating the statutory text and determining that, despite Attorney General's delegated authority in some contexts, Congress did not intend courts to defer to Attorney General under specific statutory provisions at issue).

Under that foundational principle, PBGC is not entitled to deference when it acts in its capacity as

trustee of a terminated plan. The text is clear that when PBGC steps in to act as a termination trustee, its allocation decisions under §1344 should be treated just like any other trustee's—where deference plainly would not be warranted.

PBGC is entitled to act as trustee by dint of 29 U.S.C. §1342(b)(1), which says that upon institution of proceedings to terminate a plan and appoint a trustee, the "corporation may request that it be appointed as trustee of [the] plan." Section 1342(d), in turn, defines the powers and duties of such trustees. As relevant here, §1342(d)(3) explicitly states that "a trustee appointed under this section . . . shall be, with respect to the plan, a fiduciary."

Crucially, those provisions put PBGC on equal footing with all other trustees of terminated plans. Congress did not include a special set of rules that govern in those instances when PBGC takes over. Under §1342, PBGC has the same powers and the same fiduciary obligations as any private party that becomes trustee. Congress, in other words, viewed PBGC as essentially performing a private function like any other private party.

2. With that premise in place, the problem with deferring to PBGC's decisions under Section 1344 becomes obvious. Section 1344(a) tasks a terminated plan's private "administrator" with asset-allocation decision-making. 29 U.S.C. §1344(a) ("*the plan administrator* shall allocate the assets of the plan . . . among the participants and beneficiaries of the plan" in accordance with the statute's six priority categories) (emphasis added). The text admits of no distinction when PBGC, appointed trustee, supplants

the administrator of the terminated plan; §1344(a) does not even mention PBGC.

There is simply no basis in the statute to treat the PBGC differently from any other trustee carrying out its fiduciary duties under the statute. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 178 (2011) ("We will apply common-law trust principles [in reviewing the actions of a federal agency] where Congress has indicated it is appropriate to do so."); *see Wilmington Shipping Co. v. New Eng. Life Ins. Co.*, 496 F.3d 326, 337 (4th Cir. 2007) ("[W]e are quite sure Congress did not intend [to apply special rules to the PBGC when it acts as a trustee] given that Congress chose to permit others besides the PBGC to serve as statutory trustee over a terminated plan."). And because no private plan administrator would be entitled to deference in making asset-allocation decisions, nor should PBGC.

In contravention of *Mead* and *Gonzales*, the D.C. Circuit brushed aside the statute's plain distinction between PBGC acting as a lawmaking, administrative agency and PBGC acting as a private trustee. Congress separated the two roles and made clear that when PBGC is acting as a trustee, it must discharge its duties like any other trustee/fiduciary, *i.e.*, in the best interests of the beneficiaries. That is an entirely different role Congress established, yet the D.C. Circuit disregarded those instructions.

Accordingly, although PBGC may be entitled to *Chevron* deference when it engages in rulemaking or other "legislative type of activity" envisioned by Congress, *Mead Corp.*, 533 U.S. at 229, the text of §§1342 and 1344 make clear that Congress did not intend for

the agency to be treated any differently from a private trustee in making asset-allocation decisions. *See Gonzales*, 546 U.S. at 258-61.

B. Informal, Non-Binding Appeals Board Decisions Are Not the Type of Agency Action Warranting *Chevron* Deference

Even if Congress generally delegated interpretive authority to PBGC, the Appeals Board's informal procedures here do not carry the force of law and do not trigger the *Chevron* framework. *Mead* and *Barnhart v. Walton*, 535 U.S. 212 (2002), make clear that not all agency pronouncements deserve deference under *Chevron*. The agency must have exercised authority "to make rules carrying the force of law." *Mead*, 533 U.S. at 226-27. The reviewing court should consider, among other factors, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222.

In this respect, the D.C. Circuit's decision contravenes *Mead* and *Barnhart*. The decision below did not even bother applying that analysis (nor did its predecessor *Davis I*); it should be reversed for that reason alone. Regardless, a proper analysis under those precedents shows that the Appeals Board's informal adjudication does not warrant *Chevron* deference.

1. Although the district court purported to apply *Mead* and *Barnhart* (albeit incorrectly), *see* Pet. App. 35a-38a, 50a-52a, the D.C. Circuit did not so much as go through the motions. As already noted, *see supra*

pp. 12-13, the decision below followed *Davis I*, and *Davis I* skipped this analysis entirely. *Davis I* effectively holds that PBGC is always entitled to *Chevron* deference due to the agency's expertise. But *Mead* and *Barnhart* demand that courts examine the form and manner in which the agency expressed that expertise. The D.C. Circuit wholly failed to conduct that analysis.

2. Had the D.C. Circuit engaged in the proper analysis, it would have been forced to reverse the district court. The Appeals Board's decision here flunks the *Chevron* step-zero analysis for multiple reasons.

First, and most important, the Appeals Board's decision does not carry the force of law. Deference is limited to "legislative type of activity that would naturally bind more than the parties to the ruling." *Mead*, 533 U.S at 232; *see*, *e.g.*, *Miranda Alvardo v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006) (under *Mead*, "the precedential value of an agency action [is] *the* essential factor in determining whether *Chevron* deference is appropriate"). But PBGC itself declares that Appeals Board decisions "are not binding on other parties." PBGC, *Appeals Board Decisions*, https://www.pbgc.gov/prac/appeals-board/appeals-decisions; *see*, *e.g.*, *Sinclair Wyo. Refining Co. v. United States*, 887 F.3d 986, 992 (10th Cir. 2017) (denying *Chevron* deference where, among other factors, "the decisions hold no precedential value for third parties"); *cf. Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013) (denying *Auer* deference to PBGC Appeals Board decision because it "was not the result of public notice and comment, and merely

involved an informal adjudication resolving a dispute between a pension fund and the equity fund").

Second, "the decisions were not made by the head of the [agency] but instead by" the Appeals Board. *Sinclair*, 887 F.3d at 992. The Appeals Board is not even mentioned in ERISA, so Congress cannot possibly have envisioned that entity would pronounce authoritative interpretations. And PBGC's own regulations indicate that the Appeals Board's decisions lack broader policy significance. They vest exclusive authority in PBGC's Board of Directors for "[a]pproval of any policy matter (other than administrative policies) that would have a significant impact on the pension insurance program." 29 C.F.R. §4002.1(a)(3)(v). This point likewise defeats any argument by PBGC invoking "the related expertise of the Agency" or "the importance of the question to administration of the statute." *Barnhart*, 535 U.S. at 222. The heads of PBGC were not even involved in the matter, and the decision is necessarily "[in]significant" under §4002.1.

Third, as PBGC says, Appeals Board decisions merely "resolve specific disputes involving individual parties." PBGC, *Appeals Board Decisions*, https://www.pbgc.gov/prac/appeals-board/appeals-decisions. That kind of fact-bound, one-off decision does not reveal "careful consideration . . . over a long period of time." *Barnhart*, 535 U.S. at 222.

Fourth, the informal nature of the adjudication militates against deference. While formal adjudications trigger *Chevron*, the process here did not use trial-like procedures. Indeed, the Appeals Board denied the Retirees a hearing. *See* D.C. Cir. Joint App.

Vol. II at JA155; *see*, *e.g.*, *Sinclair*, 887 F.3d at 992 ("Sinclair's involvement in the decision-making was limited to submitting petitions and the EPA did not have the benefit of hearing expert testimony on the topic.").

Fifth, deferring to such an informal, non-binding, insignificant interpretation is particularly inappropriate given PBGC's obvious financial self-interest in the outcome of the case. By shifting benefits from the Retirees to pilots who will not be paid, in some cases, for decades, PBGC is able to invest hundreds of millions of dollars and keep the investment income for its own use. In light of that direct and significant conflict of interest, the types of procedural safeguards contemplated by *Mead* are particularly important—to ensure the agency's interpretations reflect its best efforts to fill gaps left by Congress, not its best efforts to protect its own financial interests. *Mead Corp.*, 533 U.S. at 230 ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). One-off, nonbinding decisions allow the agency to resolve ambiguity in its own favor in every case, with no fear that a binding pronouncement today may prevent it from resolving a future case as it would like to. That is even more reason not to grant such decisions deference.[5]

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[5] The Retirees acknowledge that this Court has deferred to other informal PBGC pronouncements. *See Beck v. Pace*, 551 U.S. 96, 104 (2007); *LTV Corp.*, 496 U.S. at 648 (1990); *Tilley*, 490 U.S. at 722. None of those cases, however, involved interpretations

In sum, the Appeals Board's informal decision-making does not bear the hallmarks of "a lawmaking pretense" that would warrant *Chevron* deference. *Mead*, 533 U.S. at 233. The D.C. Circuit's failure even to apply *Mead* and *Barnhart* warrants review.

II. THE QUESTION PRESENTED CAN ONLY ARISE IN THE D.C. CIRCUIT

A provision in Title IV of ERISA sets forth "the exclusive means for bringing actions against [PBGC] under this subchapter, including actions against the corporation in its capacity as a trustee." 29 U.S.C. §1303(f)(4). It authorizes litigation against PBGC in the "appropriate court." *Id.* §1303(f)(1); *see also id.* §1303(f)(2) (defining "appropriate court").

For years, PBGC has successfully argued—including in this case—that once a pension plan has terminated and closed its principal office, the only "appropriate court" in which it can be sued is the U.S. District Court for the District of Columbia. *See*, *e.g.*, *Stephens v. US Airways Grp.*, 555 F. Supp. 2d 112 (D.D.C. 2008) (noting PBGC's successful transfer of venue from Northern District of Ohio to District of Columbia); *United Steelworkers, Int'l, AFL-CIO v. PBGC*, 602 F. Supp. 2d 1115 (D. Minn. 2009) (transferring case to District of Columbia upon PBGC motion); *Carstens v. Mich. Dep't of Treasury*, No. 09-cv-664, 2009 WL 2581504, 48 Emp. Benefits Cas. (BNA) 1060 (W.D. Mich. Aug. 18, 2009) (same); *Deppenbrook v. PBGC*, No. 10-cv-134, 2011 WL 1045765,

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of Appeals Board decisions. Moreover, *LTV* and *Tilley* predated *Barnhart* and *Mead*, so they cast no light on how to determine whether *Chevron* applies now.

50 Emp. Benefits Cas. (BNA) 2981 (W.D. Pa. Mar. 17, 2011) (same).

If permitted to address the question presented, other circuits would surely reject the D.C. Circuit's misguided expansion of *Chevron* deference. *Cf. In re Kaiser Aluminum Corp.*, 456 F.3d 328, 336 (3d Cir. 2006) (holding that *Chevron* deference was "improper because the PBGC has neither the expertise nor the authority to determine when a plan should be terminated under [ERISA's] reorganization test"); *Wilmington Shipping*, 496 F.3d at 337 ("[W]e are quite sure Congress did not intend [to apply special rules to the PBGC when it acts as a trustee] given that Congress chose to permit others besides the PBGC to serve as statutory trustee over a terminated plan.").[6]

Because the question presented can arise only in the D.C. Circuit, however, there is no possibility of a

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[6] It is clear why the District of Columbia is PBGC's forum of choice. Time and again, courts in the D.C. Circuit have adopted a highly deferential stance toward PBGC as a government actor. *See*, *e.g.*, *United Steelworkers, Int'l, AFL-CIO v. PBGC*, 707 F.3d 319, 325 (D.C. Cir. 2013) (declining to independently weigh evidence in reviewing PBGC determination); *Becker v. Weinberg Grp., Inc. Pension Trust*, 473 F. Supp. 2d 48 (D.D.C. 2007) (holding PBGC decision not to halt termination or perform audit unreviewable as exercise of prosecutorial discretion); *Sara Lee Corp. v. Am. Bakers Ass'n Retirement Plan*, 512 F. Supp. 2d 32 (D.D.C. 2007), 252 F.R.D. 31 (D.D.C. 2008), 671 F. Supp. 2d 88 (D.D.C. 2009) (collectively applying deferential "arbitrary and capricious" standard to PBGC reclassification of pension plan and "strong presumption of regularity" to PBGC submission of administrative records); *Deppenbrook v. PBGC*, 950 F. Supp. 2d 68 (D.D.C. June 17, 2003) (reviewing denial of shutdown benefits with "great deference").

circuit split. And there is no other benefit to further percolation because the D.C. Circuit has made clear that it will not reconsider its position. The decision below rejected the argument that the question presented was still open, expressly stating that its holding in *Davis I* "remains binding precedent." Pet. App. 3a. And a petition for rehearing *en banc* on the question presented was denied. *Id.* at 6a.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Currently, PBGC serves as trustee and fiduciary for more than 1.5 million beneficiaries whose plans have terminated, beneficiaries who necessarily were subject to PBGC's asset allocations under §1344(a). *See* PBGC, *Annual Report 2020* at 27, (Dec. 9, 2020), https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf. And because PBGC is appointed trustee for nearly every terminated plan covered by Title IV insurance, multitudes of additional pensioners will become subject to PBGC's unchecked determinations under §1344(a) should their plans terminate. *See* PBGC, *How PBGC Operates*, https://www.pbgc.gov/about/how-pbgc-operates (PBGC "protects the retirement benefits of over 34 million workers and retirees").

In this case alone, PBGC allocated more than $2 billion in Plan assets to thousands of plan participants. And those allocations were not even made by PBGC itself. They were based, rather, on constructions of §1344 by outside contractors hired by PBGC—contractors whose work PBGC's Office of Inspector General previously found "seriously flawed." D.C. Cir. Joint App. Vols. II-III at JA223, JA1179-1222.

That problem, moreover, stretches far beyond this case. Three-fourths of PBGC's budget is allocated to outside contractors, many of whom have been found to be subpar[7] if not outright corrupt.[8] *See* U.S.

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[7] *See* PBGC Office of Inspector General, *Audit Report: PBGC Needs to Improve Incentive Contracting Practices* at 14-15 (Sept. 23, 2020), https://oig.pbgc.gov/pdfs/AUD-2020-11.pdf (PBGC failed to vet key contractor personnel, resulting in "less-qualified personnel [being] assigned to tasks requiring higher qualifications" and risking contract performance); PBGC Office of Inspector General, *Semiannual Report to Congress* at 6 (Apr. 30, 2016), https://oig.pbgc.gov/pdfs/SARC-54.pdf ("PBGC failed to protect the interests of United Airlines workers and retirees when it accepted a series of poor quality and mistake-ridden contracted audits"; PBGC contractor failed to exercise due professional care in conducting plan asset audit and "PBGC's lack of effective oversight resulted in failing to identify the substandard audit work"; determinations for plan participants in the Delphi Retirement Program for Salaried Employees "was delayed, in part, after PBGC initially contracted with a public accounting firm, then terminated the contract over quality problems"); Test. of Rebecca Anne Batts, PBGC Office of Inspector General, at 6 (Dec. 1, 2010), https://oig.pbgc.gov/pdfs/Testimony12110.pdf ("While PBGC places tremendous reliance on its contractors, [it] has experienced serious and costly problems with the quality and utility of some of the contract deliverables for which it paid.").

[8] U.S. Dep't of Justice, Press Release, *Government Official and Contracting Executive Plead Guilty to Bribery Conspiracy* (May 4, 2020), https://www.justice.gov/opa/pr/government-official-and-contracting-executive-plead-guilty-bribery-conspiracy (former PBGC Director of Procurement and the president and chief executive officer of a government contracting firm pled guilty to conspiracy); PBGC Office of Inspector General, *Former PBGC Contractor Sentenced to 32 Months in Prison for Stealing Pension Benefits* (Jan. 22, 2020), https://oig.pbgc.gov/pdfs/ICS_

Government Accountability Office, *Pension Benefit Guaranty Corp.: More Strategic Approach to Contracting Needed* at 25 (June 2011), https://www.gao.gov/assets/gao-11-588.pdf.

Thus, affording *Chevron* deference to PBGC in reality immunizes the decisions of its *consultants* from careful judicial scrutiny. A determination that Congress intended deference in this scenario surely warrants this Court's attention.

The need for review is further compounded by PBGC's financial self-interest. As discussed, *see supra* p. 20, PBGC pockets investment returns on plan assets it holds as termination trustee, giving it ample reason to interpret §1344(a) to limit asset allocations that would be paid out immediately, thereby allowing the agency to hold assets longer and generate interest for its own operational fisc. *See Lewis v. PBGC*, 912 F.3d 605, 612 (D.C. Cir. 2018). In other words, the agency has had every incentive to favor its own interests over the very beneficiaries to whom it owes fiduciary duties. That indeed is exactly what happened here, with PBGC interpreting ERISA, its regulations, and the Plan such that the lion's share of the Plan's assets were earmarked for younger, not-yet-retirement-eligible pilots.

The decision whether to afford *Chevron* deference despite this serious conflict—affecting billions of dollars and millions of retirees—should not be left to the

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20200122.pdf (contractor for PBGC's Miami field office redirected retiree's pension benefits to her own bank account).

D.C. Circuit alone. It should be made by this Court on plenary review.

IV. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

This case is an ideal vehicle for the Court to address the significant legal and practical issues implicated by the question presented. In earlier litigation about PBGC's allocations with respect to a different plan, the D.C. Circuit made clear that it would have reached the same result with or without *Chevron* deference. *See Davis v. PBGC*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) ("*Davis II*") ("[T]he court need not resolve the parties' contentions regarding whether the PBGC is entitled to deference pursuant to *Chevron* . . . when it acts as the trustee in an involuntary retirement plan termination. Regardless of the standard of deference, the Retirees' claims relating to the PBGC's interpretation of the statute and regulations must fail."). Not so here.

In this case, deference underpinned the D.C. Circuit's review of each relevant aspect of PBGC's allocation decisions. Pet. App. 2a-3a (citing *Davis I*, 571 F.3d at 1293); *e.g.*, *id.* at 3a (on Count II of Retirees' operative complaint, deferring to PBGC's interpretation of §1344(a) and permitting PBGC to omit from its asset-allocation calculations nearly $2 billion paid to the active pilots upon their retirements); *id.* at 3a-5a (on Counts III and IV, deferring to PBGC's interpretation of §1344(a)(3) and permitting PBGC to withhold from the Retirees certain statutory benefit and compensation increases); *id.* at 5a (on Count V, deferring to PBGC's interpretation of §1322(c)(3)(C)(i) and permitting PBGC to discount

statutory recoveries by $50 million and thereby decrease asset allocations).

The D.C. Circuit did not say it would have affirmed a single aspect of PBGC's decision-making without the aid of *Chevron* deference. The question presented, in other words, was outcome determinative. The Court accordingly will not find a better vehicle to address the critically important question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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