No. 21-2

IN THE

Supreme Court of the United States

K. WENDELL LEWIS, *et al.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

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

When an underfunded pension plan that is covered by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") terminates, Respondent Pension Benefit Guaranty Corporation ("PBGC") must pay benefits up to the statutory limit, regardless of the level of plan assets. PBGC determines those benefits according to ERISA's complex provisions governing the guarantee and the allocation of plan assets and recoveries. If a participant is dissatisfied with PBGC's initial determination of his or her statutory benefit, the participant may file an appeal with PBGC's Appeals Board ("Appeals Board"), an independent adjudicatory body within the agency. *See* 29 C.F.R. §§ 4003.1, 4003.2, 4003.55, 4003.58. The Appeals Board will then reach a decision after considering PBGC's file and all material submitted by the participant and any third parties. 29 C.F.R. § 4003.59. The Appeals Board's decision constitutes the final agency action, after which the participant may seek judicial review of PBGC's determination. *Id.*

Was the court of appeals correct in applying deference to PBGC's interpretations of ambiguous provisions in Title IV of ERISA regarding the allocation of assets and recoveries in determining participants' statutory benefits?

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The Pilots ask this Court to review the D.C. Circuit's decision applying *Chevron* deference to PBGC's interpretations of ERISA in determining statutory pension benefits. The Pilots argue that PBGC is not entitled to deference because it is "inherently conflicted," and purposely "incorrectly 'interpret[s]'" the statute in order to "hold trusteed assets longer" and keep the "investment interest it earns." Pet. at 1-2. In an effort to support this wild theory, the Pilots argue that PBGC was acting in the capacity as a statutory trustee of their pension plan (rather than as government guarantor) when it performed a portion of the Pilots' benefit determinations. But as the courts below found, the Pilots' theory of an elaborate scheme by PBGC is entirely groundless. And as the agency that implements and administers Title IV of ERISA, PBGC's statutory interpretations are entitled to deference – regardless of its capacity when performing a particular step in the determination of a participant's Title IV program benefit.

The D.C. Circuit's decision does not conflict with this Court's precedents and merely applies well-

established principles of deference to PBGC's interpretations of Title IV.[1] Accordingly, there is no important question of federal law for this Court to settle. And the fact that the District of Columbia is the only jurisdiction for a suit against PBGC by participants in a terminated plan provides no independent basis for granting certiorari.

STATEMENT OF THE CASE

A. Statutory and Factual Background

This case involves the pension benefits owed to a group of about 1,700 retired Delta Airlines pilots and their estates under the federal pension insurance program administered by PBGC under Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (2018). The Pilots are participants in the underfunded Delta Pilots Retirement Plan (the "Plan"), which terminated in 2006 during its former sponsor's bankruptcy. PBGC is the U.S. Government corporation and federal agency that ensures that plan participants and their beneficiaries

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[1] The ambiguous Title IV provisions centrally at issue in the litigation are as follows: 29 U.S.C. § 1344(a) (Claim Two – whether to include, in the asset allocation, the payments made to the active pilots in the Delta Airlines bankruptcy); 29 U.S.C. § 1344(a)(3) (Claims Three and Four – whether to include certain Internal Revenue Code-permitted benefit increases in priority category 3 of the asset allocation); 29 U.S.C. § 1322(c) (Claim Five, subpart a – how to calculate the value of PBGC recoveries distributable to participants); and 29 U.S.C. §§ 1344(a)(5) and 1344(b)(4) (Claim Five, subpart b – whether to include certain Internal Revenue Code-permitted benefit increases in priority category 5 of the asset allocation).

are not "completely 'deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.'" *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990) (citation omitted).

Upon termination of the Plan, PBGC became statutory trustee of the Plan, as authorized by 29 U.S.C. § 1342(b)(1) (PBGC "may request that it be appointed as trustee of a plan in any case"). As required by 29 U.S.C. § 1361, PBGC has been paying retirement benefits to Plan participants ever since.

After termination of an underfunded plan, PBGC uses the plan's assets and the agency's insurance funds to pay benefits to current and future retirees and their beneficiaries. PBGC continues payment of benefits to retirees already in pay status, on an estimated basis and without interruption, and promptly processes benefit applications for those going into pay status. ERISA expressly authorizes PBGC to "pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of [Title IV]." 29 U.S.C. § 1342(a). And the statute further mandates that "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, [PBGC]." 29 U.S.C. § 1344(c).

Title IV provides that PBGC guarantees "nonforfeitable benefits" under a terminated pension plan – those benefits for which a participant has satisfied the conditions for entitlement – regardless of the level of the terminated plan's assets, but subject to certain statutory limits. 29 U.S.C. §§ 1301(a)(8), 1322(a).

One of those limits places a ceiling on the amount that PBGC guarantees. *See* 29 U.S.C. § 1322(b)(3); 29 C.F.R. §§ 4022.22, 4022.23. In most cases, however, the guarantee covers a participant's entire benefit. In the case of the Plan, PBGC is paying out of its insurance funds nearly $800 million in guaranteed but unfunded benefits. No. 15-cv-01328-RBW (D.D.C.), Doc. 71 (AR-848) (actuarial case memorandum showing the Plan's "Unfunded Guaranteed Benefits").

In cases where a participant's benefit exceeds the statutory guarantee, the participant may receive more than the guaranteed amount depending on the level of plan assets, whether part or all of the participant's benefit is entitled to priority under the asset-allocation rules, and the amount PBGC recovers from the former sponsor. 29 U.S.C. §§ 1322(c), 1344(a). The agency values benefits and the plan's assets, then distributes or "allocates" those assets to each category of benefit in the order specified in 29 U.S.C. § 1344(a). This valuation and allocation determines participants' entitlement to amounts in excess of guaranteed benefits. Title IV of ERISA and PBGC's regulations prescribe this asset-allocation process in detail. *See* 29 U.S.C. § 1344(a); 29 C.F.R. pt. 4044, subpart A (§§ 4044.1-4044.17); *see also Mead Corp. v. Tilley*, 490 U.S. 714, 717-18 (1989).

After PBGC finishes valuing assets and recoveries, reviewing all plan documents and participant information, and calculating each participant's Title IV benefit, the agency issues benefit determinations. A participant may challenge PBGC's determination by filing an appeal with PBGC's Appeals Board. 29 C.F.R. pt. 4003, subparts A and D (§§ 4003.1-4003.10 and 4003.51-4003.61).

After a thorough review of the facts and law, the Appeals Board issues a final agency determination. A participant whose appeal is denied may sue PBGC under 29 U.S.C. § 1303(f).

The Pilots filed a consolidated appeal challenging their benefit determinations. Joint Appx, D.C. Cir. Doc. 70 ("JA 714"). On September 27, 2013, the Appeals Board rendered a final agency decision denying the appeal. JA 155.

B. Procedural History

After the Appeals Board rendered PBGC's final agency decision, the Pilots filed a six-count complaint under 29 U.S.C. § 1303(f) in the Northern District of Georgia. *Lewis v. Pension Benefit Guaranty Corp.*, Case No. 1:15-cv-01328 (D.D.C.) Doc. 1. The complaint challenged the agency's determination of their benefits (especially the amount of benefits assigned to priority category 3 in the § 1344(a) asset allocation) and included a claim for fiduciary breach. *Id.* On August 11, 2015, the Georgia district court granted PBGC's motion to transfer the case to the District of Columbia.

The Pilots' First Amended Complaint – the current version – seeks relief that includes an award of benefits; an injunction against PBGC; the setting aside of all PBGC regulations applied in circumstances that violate ERISA; an accounting of statutory insurance premiums; a constructive trust for premiums paid to remedy fiduciary breach; monetary relief to redress fiduciary breach; disgorgement and surcharge to redress unjust enrichment from investment income; attorneys' fees; other expenses; and costs. D.D.C. Doc. 45, JA 152-53.

PBGC moved to dismiss the fiduciary breach claim, but the district court denied that motion. D.D.C. Doc. 46, 52, 53. On January 23, 2017, the district court granted PBGC's motion to certify, finding that its opinion meets the requirements of 28 U.S.C. § 1292(b). D.D.C. Doc. 54, 61, 62. On April 4, 2017, the court of appeals granted PBGC's petition for permission to appeal. *Lewis v. PBGC*, No. 17-5068 (D.C. Cir.).

On August 21, 2018, the D.C. Circuit reversed the district court's denial of PBGC's motion to dismiss the claim for fiduciary breach. *Lewis v. PBGC*, No. 17-5068, Doc. 1746572 (D.C. Cir. 2018). After the Pilots petitioned for rehearing, the D.C. Circuit amended and reissued its opinion on December 21, 2018. No. 17-5068, Doc. 1765615, 912 F.3d 605 (D.C. Cir. 2018), removing the sentence dismissing the entire fiduciary breach claim and limiting the opinion to only the disgorgement remedy.

On April 4, 2019, the Pilots filed a petition for a writ of certiorari for review of the D.C. Circuit's 2018 decision on the fiduciary breach claim. PBGC opposed. On June 17, 2019, this Court denied the petition. U.S. No. 18-1279; 139 S. Ct. 2717 (2019).

While the appeal on the fiduciary breach claim was pending, the parties filed cross-motions for summary judgment on the Pilots' benefit claims. On June 11, 2018, the district court granted summary judgment to PBGC on each of these claims. Pet. App. at 7a, 314 F. Supp. 3d 135 (D.D.C. 2018). The district court rejected the Pilots' arguments and found reasonable each of PBGC's interpretations, including those on the assignment of benefits within the § 1344(a) asset allocation.

On July 24, 2019, the Pilots filed a consent motion to dismiss the claim for fiduciary breach and for entry of final judgment. D.D.C. Doc. 114. On August 29, 2019, the district court granted the motion and entered final judgment. D.D.C. Doc. 116. On March 4, 2020, the Pilots filed a Notice of Appeal to the D.C. Circuit. D.D.C. Doc. 117.

On December 7, 2020, the D.C. Circuit affirmed the district court's judgment on the Pilots' benefit claims. *Lewis v. PBGC*, No. 19-5261, Doc. 1874579; 831 F. App'x 523 (D.C. Cir. 2020). The panel agreed with the district court's "well-reasoned approach to the merits of the Pilots' claims." *Id.* at 524. The panel "disagree[d] with the Pilots' argument against deferring to how PBGC interprets ERISA's ambiguous provisions." *Id.* It noted that in *Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) ("*Davis I*"), the D.C. Circuit deferred "to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA." *Lewis*, 831 F. App'x at 524. The panel concluded that "*Davis I* remains binding precedent." *Id.* The Pilots filed a petition for rehearing *en banc*, which was denied on February 4, 2021. No. 19-5261, Doc. 1883750 (D.C. Cir.). On June 30, 2021, the Pilots filed the current petition for a writ of certiorari seeking review of the judgment of the D.C. Circuit on the Pilots' benefits claims. U.S. No. 21-2.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

Throughout this case, the Pilots have baldly alleged that PBGC employees purposely steered the assets of the terminated Delta Pilots' Retirement Plan to active pilots, rather than retired pilots, so that PBGC could hold the plan assets longer and gain more investment income. Pet. at 1-2, 20. They say that PBGC employees are so "[p]erennially worried about [the agency's] resources" that they used PBGC's governing statute as a "powerful tool" to generate extra "investment interest" for PBGC's "own operational coffers." Pet. at 1, 2. As the district court found, there is no evidence whatsoever of any such scheme, and no explanation of what would cause entire teams of government employees to create a complex arrangement to enrich the federal coffers. Pet. App. at 49a-50a. Moreover, 29 U.S.C. § 1344(c) provides that PBGC must suffer all *losses* in the value of plan assets that occur after plan termination – not just benefit from any gains – while PBGC's future payment obligations are absolute. Thus, retaining a particular plan's assets longer may not inure to the agency's "financial self-interest." Pet. at 20.

The Pilots nevertheless cite this purported improper motive as grounds for the courts to ignore bedrock principles of judicial review and delve into the intricacies of statutory benefits under Title IV. This Court has repeatedly refused to do that, and the district and circuit courts' similar refusal is completely consistent with this Court's precedents.

A. The Courts Below Correctly Applied *Chevron* Deference to PBGC's Interpretation of ERISA in its Benefit Determination.

It is well established that PBGC is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it interprets its governing statute, Title IV of ERISA. The Court has so held repeatedly, most recently in *Beck v. Pace International Union*, 551 U.S. 96, 104 (2007). In *Beck*, the Court unanimously deferred to PBGC's interpretation:

> We have traditionally deferred to the PBGC when interpreting ERISA, for "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass." * * * In reviewing the judgment below, we thus must examine "whether the PBGC's policy is based upon a permissible construction of the statute."

551 U.S. at 104. The *Beck* Court cited two other landmark PBGC deference cases*: PBGC v. LTV Corp.*, 496 U.S. 633 (1990), and *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). In *LTV*, the Court upheld PBGC's interpretation of Title IV, issued during informal adjudication, finding that PBGC's construction was "assuredly a permissible one" under *Chevron*. 496 U.S. at 651 (citation omitted). And in *Tilley*, the Court applied *Chevron* to PBGC's interpretation of 29 U.S.C. § 1344(a)—the same asset-allocation provision at

issue in claims in this case. 490 U.S. at 722, 726. Accordingly, the Court has already rejected the Pilots' argument that PBGC is so "inherently conflicted" in applying this provision that deference cannot apply. Pet. at 1.

The Pilots nevertheless argue that deference cannot apply in this case because PBGC does not have "delegated authority" within the meaning of *United States v. Mead Corp*. to allocate terminated plans' assets. Pet. at 14-15; 533 U.S. 218, 226-27 (2001). They claim that they sued PBGC in its "role as trustee" of a terminated pension plan, and ask for *de novo* review of certain portions of PBGC's benefit determinations—those the agency purportedly made in a "fiduciary" capacity. Pet. at 3, 15-16. But PBGC is not a fiduciary when determining statutory pension benefits (including those payable when allocating assets), nor could it be.

Title IV explicitly limits the fiduciary duties that apply to the statutory trustee of a terminated plan. The statute provides that such a trustee "shall be, with respect to the plan, a fiduciary within the meaning of [Title I of ERISA] . . . *except to the extent that the provisions of [Title IV] are inconsistent with the requirements applicable under [Title I*] . . ." 29 U.S.C. § 1342(d)(3) (emphasis added).[2] Congress recognized that implementing the asset allocations and benefit limitations required by the statute could

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[2] Title I of ERISA contains a similar limitation on PBGC having fiduciary responsibilities when allocating assets under section 1344. *See* 29 U.S.C. § 1104(a)(1) ("*Subject to sections 1103(c) and (d), 1342, and 1344 of this title*, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.") (Emphasis added).

not be a fiduciary act performed with an "eye single" to the interests of participants, *see Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), and correspondingly limited the applicable fiduciary duties.[3]

Moreover, Congress assuredly did delegate to PBGC the authority to determine Title IV pension benefits, and determining those benefits—including the asset-allocation process—constitutes an exercise of that authority. Title IV benefits are a creature of statute, and ERISA expressly provides that PBGC "shall" guarantee and pay them (whether or not it was also the statutory trustee). 29 U.S.C. §§ 1322(a), 1361. When PBGC interprets ERISA in determining those benefit amounts, it does so as the federal agency administering the Title IV program, even if it is also serving as statutory trustee, which it invariably is. But even if, hypothetically, PBGC were not the statutory trustee of a terminated plan, its interpretation of the statutory provisions would apply and would warrant deference.

Contrary to the Pilots' theory, PBGC's benefit determination process cannot be neatly divided into portions, with some performed by PBGC as "guarantor" and receiving deference, and some performed by PBGC as "trustee" and receiving *de novo* review. Pet. at 11. PBGC's allocation of plan assets (and recoveries) to those benefits assigned priority status under

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[3] In arguing to the contrary, the Pilots cite *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 178 (2011). Pet. at 16. But *Jicarilla* has nothing to do with deference. The issue there was whether the attorney-client privilege applies to communications between government officials and their lawyers in trust matters relating to Native American tribes. *Jicarilla* in no way alters the law about deference to an agency's interpretations of its governing statute.

the statute is part and parcel of the determination of a participant's Title IV program benefit.

In arguing to the contrary, the Pilots focus on the statute's provision of allocation authority to the "plan administrator." Pet. at 15. But there is no "plan administrator" of a terminated, underfunded plan; PBGC performs that function as the statutory trustee. As the statutory trustee of virtually every terminated underfunded plan, PBGC must interpret Title IV, including the asset-allocation provisions. *See* 29 U.S.C. § 1344(a); 29 C.F.R. part 4044, subpart A. Thus, although the Pilots assert that PBGC is "on equal footing with all other trustees of terminated plans" for purposes of deference (Pet. at 15), there are no other such trustees. As the D.C. Circuit explained in *Davis I*, "[regardless of whether] the PBGC is acting as acting as trustee rather than guarantor . . . 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." 571 F.3d at 1293.

And as the Supreme Court recently held in reviewing an agency adjudication:

> This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration

> law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

Scialabba v. Cuellar de Osorio, 573 U.S. 41, 75 (2014). The decision of the court below is completely consistent with this and the Court's other precedents.

B. The Courts Below Correctly Applied *Chevron* Deference to the PBGC Appeals Board's Determination.

The Pilots blithely label the PBGC Appeals Board's 79-page determination of the statutory benefits of over 1,700 pilots an "informal, non-binding, insignificant interpretation." Pet. at 20. They assert that the Board's "informal procedures" do not "trigger the *Chevron* framework." Pet. at 17. This is not so. Courts routinely apply *Chevron* deference to PBGC's interpretations of Title IV, and are loathe to delve "without a compass" into the intricacies of complex pension plan provisions and the corresponding statutory guarantees. *Tilley*, 490 U.S. at 726 (citation omitted).[4] Applying the Pilots' logic to this agency

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[4] *See*, *e.g.*, *Fisher v. PBGC*, 994 F.3d 664, 670 (D.C. Cir. 2021); *Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009); *Royal Oak Enters. v. PBGC*, 78 F. Supp. 3d 431, 439-40 (D.D.C. 2015); *PBGC v. Kentucky Bancshares, Inc.*, 7 F. Supp. 3d 689, 697-98 (E.D. Ken. 2014), *aff'd*, 597 F. App'x 841 (6th Cir. 2015); *PBGC v. Asahi Tec Corp.*, 979 F. Supp. 2d 46, 66-67 (D.D.C. 2013); *Quality Auto. Servs. v. PBGC*, 960 F. Supp. 2d 211, 215-16 (D.D.C. 2013); *Vanderkam v. PBGC*, 943 F. Supp. 2d 130, 145 (D.D.C. 2013); *PBGC v. Bendix Commercial Vehicle Sys.*, No. 11-1961, 2012 WL 629928, at *6 (N.D. Ohio Feb. 24, 2012).

adjudication would stand decades of jurisprudence on its head. This is particularly so where the Pilots submitted a 50-page brief with 42 exhibits to the Appeals Board, and the Board considered over 5,000 pages of materials and issued the final agency action that is binding on both the agency and the Pilots.[5]

The Pilots recite a list of grounds that purportedly justify *de novo* review. They complain that the court below did not analyze the five factors the Court discussed in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), although they discuss only three of those factors themselves. Pet. at 17-18. Tellingly, they leave out the "interstitial nature of the legal question," and "the complexity of [the] administration" of the statute, both of which weigh heavily in favor of deference. Pet. at 17-20.[6] Instead, the Pilots create their own five-part "proper analysis," and conclude that the Appeals Board decision "flunks." Pet. at 17, 18. This is assuredly not the case, even if the Pilots' test did apply.

First, the Pilots claim that deference applies only when the agency has exercised authority to make "rules carrying the force of law." Pet. at 17, quoting

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[5] The Pilots' submissions to the Appeals Board are found in the administrative record (filed in the district court) at No. 15-cv-01328-RBW (D.D.C.) Docs. 70 to 78 (AR-560 to 2848). The complete administrative record is over 5,000 pages. *Id.*, Docs 70 to 86.

[6] The statutory issues here are interstitial—the agency's actuarial case memorandum alone constitutes 67 pages of detailed analysis of the Plan, participants' benefits, and statutory and regulatory issues. No. 15-cv-01328-RBW (D.D.C.) Doc. 71 (AR-848 to 914). The legal questions are important and complex, as shown by the comprehensive administrative record.

part of a sentence in *Mead*. But *Mead*'s very next sentence makes clear that an "agency's power to engage in adjudication"—like PBGC's—constitutes precisely the delegated authority that *Mead* requires:

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. **Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication** or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

533 U.S. at 226-27 (emphasis added).

As the Court reiterated in *City of Arlington v. FCC*, a general conferral of adjudicative authority, and an exercise of that authority within the agency's substantive field, is entirely sufficient to support *Chevron* deference. 569 U.S. 290, 306 (2013). What Justice Scalia described in *City of Arlington* is precisely the case here: PBGC has general adjudicative authority to carry out "[t]he purposes of [Title IV of ERISA]," including the payment of statutory benefits. 29 U.S.C. § 1302(a); 29 U.S.C. § 1322(a) (PBGC "shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits . . ."); 29 U.S.C. § 1361 (PBGC "shall pay benefits under a single-employer plan terminated under this subchapter subject to the limitations and requirements of subtitle

B of this subchapter"). PBGC exercised that authority within its substantive field in determining the Pilots' entitlement to those statutory benefits. Thus, *Chevron* deference applies to PBGC's statutory interpretations in reaching that determination.

Accordingly, the Pilots' assertion that PBGC's determination does not "carry the force of law" (Pet. at 17, 18) is specious. PBGC's Appeals Board is an independent adjudicatory body within the agency that reviews initial determinations made by the agency's operating units. *See* 29 C.F.R. §§ 4003.1, 4003.2, 4003.55, 4003.58. The Board's decisions constitute "final agency action by the PBGC." 29 C.F.R. § 4003.59(b). Those determinations are routinely challenged and reviewed in federal court.[7] And the Board's precedential decisions have been published on PBGC's website since October 2002. *See* https://www.pbgc.gov/prac/appeals-board/appeals-decisions.[8] It is certainly true that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of

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[7] *See, e.g., Fisher v. PBGC*, 468 F. Supp. 3d 7 (D.D.C. 2020), *aff'd*, 994 F.3d 664 (D.C. Cir. 2021); *Davis v. PBGC*, 864 F. Supp. 2d 148 (D.D.C. 2012), *aff'd*, 734 F.3d 1161 (D.C. Cir. 2013); *Smith v. PBGC*, 281 F. Supp. 3d 1 (D.D.C. 2017); *Vanderkam v. PBGC*, 943 F. Supp. 2d 130 (D.D.C. 2013); *Deppenbrook v. PBGC*, 950 F. Supp. 2d 68 (D.D.C. 2013), *aff'd*, 778 F.3d 166 (D.C. Cir. 2015); *USW v. PBGC*, 839 F. Supp. 2d 232 (D.D.C. 2012), *aff'd*, 707 F.3d 319 (D.C. Cir. 2013); *Adey v. PBGC*, No. 07-18, 2010 WL 892229 (N.D. W. Va. Mar. 9, 2010).

[8] Appeals Board decisions (like the one at issue here) that may raise a "precedent-setting issue" are decided by a three-member panel and published on PBGC's website. *See id.*; 29 C.F.R. §§ 4003.2; 4003.61(b).

law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). But PBGC's final determination of the Pilots' statutory pension benefits is nothing akin to that. And courts certainly have applied deference in cases where the determination is not binding on other parties.[9]

The Pilots next observe that PBGC's determination was not issued by the "head of the [agency]" or the agency's Board of Directors. Pet. at 19. This is hardly surprising, since PBGC has an independent adjudicatory body that is specifically authorized to complete this determination, and has done so for decades. But the Pilots say that this "defeats any argument by PBGC invoking 'the related expertise of the agency' or 'the importance of the question to administration of the statute,'" showing instead that the decision is "necessarily '[in]significant.'" Pet. at 19. To the contrary, the agency's painstaking final determination of the statutory benefits of over 1,700 participants is important, significant, and worthy of deference. And PBGC's nearly fifty years of expertise in this complex area cannot be disputed.

The Pilots then assert that PBGC could not have employed careful consideration over a long period of time in determining the Pilots' benefits because this was a "fact-bound, one-off decision." Pet. at 19. Again, this is not so. In addressing part of the Pilots' appeal, the Appeals Board "applied its prior precedent" from a 2009 appeal by a different group of

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[9] *See, e.g., Texas v. EPA*, 983 F.3d 826 (5th Cir. 2020); *North Carolina v. FERC*, 913 F.3d 148 (D.C. Cir. 2019); *Fredericks v. U.S. Dep't of Interior*, No. 20-2458, 2021 WL 2778575, at *10-17 (D.D.C. Jul. 2, 2021); *Vanderkam*, 943 F. Supp. 2d at 145.

pilots making the same argument. JA 160, 209-10. Even had it not, the Appeals Board's careful consideration is evident in its 79-page decision with three appendices and 22 enclosures. JA155 to 713.

The Pilots next assert that deference should not apply because PBGC does not employ formal, "trial-like procedures" in determining benefits. Pet. at 19. But the *Mead* Court held just the opposite: "the want of [formal] procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . ." 533 U.S. at 231. Moreover, such a requirement would subject every PBGC determination to *de novo* review, because no provision of Title IV requires formal procedures, and this is untenable.

Finally, the Pilots return to the refrain that PBGC has "obvious financial self-interest," making deference "particularly inappropriate." Pet. at 20. The district court dismissed this succinctly:

> Although it may be true that any assets that the Corporation [PBGC] retained instead of allocating to the plaintiffs could yield a return to the Corporation, that is true in every case in which the Corporation is appointed as trustee. . . . And because the plaintiffs do not provide any specific evidence of self-interested bias or misconduct that influenced the benefits determinations about which they disagree, see Pls.' Mem. at 13-14, the Court finds that the plaintiffs have not plausibly alleged any misconduct by the Corporation that would warrant the Court's departure

> from its conclusion that the *Chevron* framework applies in this case.

Pet. App. at 49a-50a.

This Court should do the same. The Pilots provide no reason for the Court to review the decisions below.

II. THE FACT THAT OTHER CIRCUITS MIGHT NOT ADDRESS THE QUESTION PRESENTED DOES NOT ELEVATE ITS SIGNIFICANCE.

The Pilots contend that certiorari is warranted here even though there is no circuit split, because other circuits may never review the question presented and, according to the Pilots, there are signs they would disagree. Pet. at 21-23. But the D.C. Circuit's application of *Chevron* in this case was straightforward, and the Pilots' suggestion that other circuits would disagree is unfounded. Moreover, the lack of a split in the circuits illustrates the narrowness of this issue: a statutory scheme implemented by a single agency and reviewed in a single circuit, applying complex law to intensely fact-bound situations. There is simply no reason for this Court's review.

The Pilots note that Title IV limits venue for an action against PBGC to the U.S. District Court for the District of Columbia when a plan is terminated and no longer has a "principal office." *Id.* at 21-22. They speculate that, if other circuits had an opportunity to review the issue, they would disagree with the D.C. Circuit about deference. *Id*. at 22. But the circumstances of the two cases they cite were quite different

from those here, and do not support the Pilots' assertion.

In re Kaiser Aluminum Corp., 456 F.3d 328 (3d Cir. 2006), addressed how a bankruptcy court should apply the statutory "reorganization test" in deciding whether to approve a pension plan termination. The Third Circuit declined to afford *Chevron* deference to PBGC's interpretation because "[i]ssues relating to an employer's bankruptcy and reorganization are within the expertise of bankruptcy courts, not the PBGC." 456 F.3d at 344. That case says nothing about deference to PBGC's determination of pension benefits.

Wilmington Shipping Co. v. New England Life Insurance Co., 496 F.3d 326 (4th Cir. 2007), addressed the liability of a private sector insurance company for alleged failure to manage plan assets. The case was decided with no PBGC involvement, and it did not even mention *Chevron*, much less issue a holding about it. And many of its statements are demonstrably wrong (e.g., that PBGC, as statutory trustee, may pay lump sum benefits to participants). Again, this case says absolutely nothing about deference to PBGC's determination of pension benefits.

The Pilots also assert in a footnote that the District of Columbia is PBGC's forum of choice due to that court's "highly deferential stance toward PBGC as a government actor." Pet. at 22, fn. 6. But it is Title IV that expressly mandates this venue. And the D.C. Circuit reviews each matter on its merits and does not serve as a rubber stamp for PBGC's determinations. *See, e.g., Stephens v. US Airways Group, Inc.*, 644 F.3d 437 (D.C. Cir. 2011) (holding against PBGC on whether interest was due on lump sums paid 45 days after a participant's retirement date).

In sum, the D.C. Circuit's application of *Chevron* in this case was straightforward and the Pilots' assertions about other circuits are unfounded.

III. THIS CASE DOES NOT PRESENT AN "EXCEPTIONALLY IMPORTANT" QUESTION ABOUT PBGC'S PURPORTED SELF-INTEREST.

It is critically important to correctly pay participants the benefits they are due under Title IV of ERISA, and PBGC pays those amounts – nothing more and nothing less. But the Pilots' assertion that this Court must step in to curb PBGC's "self-interest" and ensure that PBGC and its contractors are not "immunize[d]" from "careful judicial scrutiny" is entirely unfounded. Pet. at 23-26. The district court found no support whatsoever for the Pilots' wild allegations, Pet App. at 49a-50a, and PBGC's determinations here are no different than those it must make in all other cases.

The Pilots allege that PBGC – through its "consultants" – perpetrated an elaborate scheme to purposely misinterpret the statutory and regulatory rules in order to pay benefits to the Pilots later in time and earn greater returns by holding the plan's assets longer. Pet. at 25. They cite reports by PBGC's office of inspector general and the Government Accountability Office on matters unrelated to this case, critical of PBGC's contractors. *Id.* at 23-25. But neither PBGC's staff nor its contractors would gain a penny by inventing ways to pay less generous benefits to some participants and more generous benefits to others. As the district court held, "plaintiffs have not plausibly alleged any misconduct by the Corporation

that would warrant the Court's departure" from prevailing deference standards. Pet. App. at 49a-50a.

As described above, at pp. 2-5, PBGC determines benefits based on the applicable guarantee level and, in cases where plan assets and PBGC recoveries permit, additional benefits (to the extent the benefit is not fully guaranteed). If PBGC were in fact determining benefits to advance its financial self-interest, all of PBGC's benefit determinations (not just those made by PBGC purportedly in its capacity as statutory trustee) would be suspect, as PBGC would gain financially just as well by paying lower guaranteed benefits.

In summary, the Pilots' allegations of PBGC self-interest merit no further review.

IV. THIS CASE SERVES AS NO SPECIAL VEHICLE FOR THIS COURT'S REVIEW.

The Pilots argue that "[t]his case is an ideal vehicle for the Court to address the significant legal and practical issues implicated by the question presented" and assert that the earlier *Davis* litigation did not present such an opportunity. Pet. at 26-27. But the Pilots' characterizations of *Davis* and this case are exaggerations, and there is no special reason why this Court need review the matter. The Court's denial of certiorari in another case does not enhance the certworthiness of this case.

The Pilots assert that "deference underpinned the D.C. Circuit's review of each relevant aspect of PBGC's allocation decisions." Pet. at 26. The court of appeals' decision certainly upheld a *Chevron* review of PBGC's statutory interpretations, but it did not say

that without such deference PBGC would lose. Pet. App. at 1a-6a. And while the district court stated that it was applying the appropriate deference to PBGC in reviewing each of the amended complaint's claims, it never said PBGC would lose without such deference. Pet. App. at 63a-89a.

The Pilots correctly point out that the D.C. Circuit in *Davis II* declined to reconsider the *Chevron* issue, considering PBGC's arguments stronger regardless of any deference. Pet. at 26. But earlier, when the D.C. Circuit in *Davis I* did address *Chevron* deference for PBGC's benefit determinations (in deciding whether the plaintiffs' arguments were strong enough for a preliminary injunction), the plaintiffs could have sought certiorari but chose not to do so.

In summary, this case serves as no special vehicle for reviewing the Pilots' question presented, and they fail to show the question presented to be outcome-determinative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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