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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

INTRODUCTION

Perhaps without realizing it, PBGC essentially concedes that the petition checks every box for plenary review. It says the question presented is "critically important." Opp. 21. It agrees that the question can arise only in the D.C. Circuit. *Id.* at 19. And it concedes there are no vehicle problems. *Id.* at 22-23. Indeed, this petition presents a straightforward question that merits this Court's attention: did the D.C. Circuit wrongly extend *Chevron* deference to PBGC's construction of (admittedly) ambiguous statutory provisions in informal, non-binding adjudications, undertaken not in any congressionally assigned regulatory capacity but instead as a plan trustee and fiduciary?

So what *does* PBGC argue? In short, nothing that detracts from the cert-worthiness of the petition. PBGC points out that only one agency is involved. *Id.* at 19. It paints petitioners as "wild" conspiracy theorists. *Id.* at 21-22. It says it's all very complicated. *Id*. at 19. And perhaps most tellingly, it spends *half* of its opposition previewing its arguments in a vociferous defense of the D.C. Circuit's decision below, confirming there really is much to debate on the merits. *Id.* at 8-19. What's more, PBGC spends another quarter of its brief describing the background and history of this litigation, illustrating just how much is at stake here—namely, $2 billion in plan assets, allocated to thousands of plan participants, based on "agency" decisions that are actually made by outside contractors. *Id.* at 2-7.

Ultimately, review by this Court is necessary to set critical limits on *Chevron* deference. Absent the

Court's intervention, many more of the nation's pensioners will become subject to PBGC's skewed decision-making in the event their plans terminate in distress. Even though Congress never assigned PBGC the job and PBGC has a structural conflict in favor of its own fisc, PBGC will invariably take over as a Title IV trustee and task itself with allocating plan assets, leaning on *Chevron* to defend its constructions of Title IV's asset-allocation scheme. And the D.C. Circuit, bound by its own precedent to employ an erroneously expansive view of *Chevron*, is destined to leave PBGC's exercise of discretion unchecked and to reinforce the glaring inconsistency between its deference to PBGC and the *de novo* scrutiny courts ordinarily give to ERISA-trustee statutory constructions. Finally, while the deference issues here play out against the backdrop of PBGC and ERISA, they are part of a broader, disquieting expansion of *Chevron*'s reach endemic within the D.C. Circuit, as this Court's recent grant of certiorari in *American Hospital Association v. Becerra*, No. 20-1114 (cert. granted July 2, 2021), exemplifies.

The Court should grant certiorari and reverse.

ARGUMENT

I. PBGC ADMITS THAT THE QUESTION PRESENTED IS "CRITICALLY IMPORTANT"

A. PBGC expressly states that "[i]t is critically important to correctly pay participants the benefits they are due under Title IV of ERISA." Opp. 21. According to PBGC, it "pays those amounts—nothing more and nothing less." *Id.* But if petitioners are right, then PBGC is paying *far less* than it should based on its improper interpretations of the many

ambiguous statutory provisions that PBGC admits (*id.* at 2 n.1) are relevant here, interpretations the D.C. Circuit upheld based on its misapplication of the *Chevron* doctrine.

In other words, PBGC acknowledges that the question presented is important, but it then spends page after page of its opposition trying to persuade this Court not to get involved because petitioners are simply wrong on the merits. As an argument against plenary review, that thinking is every bit as backwards as it sounds.

B. PBGC's view of the merits is wrong in any event. For instance, PBGC points to *Beck v. Pace International Union*, 551 U.S. 96 (2007), *Mead Corp. v. Tilley*, 490 U.S. 714 (1989), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990), and concludes that this Court "has already rejected the Pilots' argument that PBGC is so 'inherently conflicted' in applying [§1344(a)] that deference cannot apply." Opp. 9-10. But none of those cases had anything to do with the PBGC's interpretations of multiple ambiguous statutory provisions in its role as a Title IV trustee. *See Beck*, 551 U.S. at 103-04; *Tilley*, 490 U.S. at 716; *LTV Corp.*, 496 U.S. at 636. PBGC was not even a party in two of the cases; it appeared as *amicus curiae*. *Beck*, 551 U.S. at 104; *Tilley*, 490 U.S. at 722.

In two other cases, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), and *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), this Court made clear that not all agency pronouncements deserve deference under *Chevron*. PBGC does not even try to distinguish *Barnhardt*, and it says *Mead* actually leans in its favor, because the agency has "precisely the delegated

authority that *Mead* requires." Opp. 15. PBGC, however, never grapples with petitioners' assertion that although PBGC may be entitled to *Chevron* deference when it engages in rulemaking or other "legislative type of activity," *Mead Corp.*, 533 U.S. at 232, the text of §§1342 and 1344 make clear that Congress did not intend for the agency to be treated any differently than a private trustee in making asset-allocation decisions.

Accordingly, PBGC is wrong about *Beck*, *Tilley*, *LTV Corp.*, *Barnhardt*, and *Mead*. Far more can, and would, be said on plenary review. Nonetheless, it is clear that there are two sides to the merits of this "critically important" question—arguments that should be aired before this Court on plenary review.

C. In addition to its premature merits arguments, PBGC re-casts the question presented as a "wild theory" about PBGC's "improper motive," involving a conspiracy in which "entire teams of government employees . . . create a complex arrangement to enrich the federal coffers." Opp. 1, 8, 21. Respectfully, any "wild allegations" of an "elaborate scheme" are the product of PBGC's own imagination. *See id.* at 21.

PBGC tilts at this windmill because it cannot dispute the importance of the true question presented. Though PBGC takes great offense at the suggestion that, as an institution, it has every reason to interpret §1344(a) to allow it to hold assets longer and generate interest for its use, *see* Pet. 25, it never outright disputes that financial incentives can permeate insurance systems, much less that PBGC faces those incentives. *Cf. Metro. Life Ins. Co. v. Glenn*, 554 U.S.

105, 111 (2008) (discussing how ERISA administrators may "operat[e] under a conflict of interest") (emphasis removed; internal quotation marks and citation omitted).

Instead of admitting that billions of dollars in plan assets were allocated in a way that indisputably benefitted its own bottom line, PBGC says no individual employee "gain[ed] a penny." Opp. 21. That, of course, was never petitioners' argument. PBGC's systemic interest in preserving the public fisc may be laudable, but it *also* creates a structural conflict of interest. Next, rather than admit that the work of its consultants has been found to be "'seriously flawed,'" Pet. 23 (quoting statement of PBGC's Office of Inspector General), PBGC says those mistakes were made in different cases. *See* Opp. 21. Never mind that the same consultants divvied up the plan assets in this case too. D.C. Cir. J.A. Vols. II-III at JA223, JA1179-1222. With respect to the criminal convictions of other outside consultants, *see* Pet. 23-24, PBGC says there was no finding of misconduct here. Opp. 21-22. As to fiduciary obligations? PBGC denies having any. *See id.* at 10. And what about holding PBGC to the same standards as all other Title IV trustees (*see* Pet. 9)? Because it has taken over as trustee for virtually all failed pension plans, PBGC declares there are none to which it can be compared. Opp. 12.[1]

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[1] PBGC even says the Court cannot "neatly divide[]" its supposedly singular "benefit determination process," deferring to PBGC's interpretations when it has performed one step as guarantor and conducting *de novo* review of other steps PBGC has taken as trustee. Opp. 11. It is true that PBGC has adopted a

PBGC concedes—as it must—that *all five* of the "Title IV provisions centrally at issue in the litigation" are "ambiguous." *Id.* at 2 n.1. As noted, it admits that it is "critical" to get the answers right. Yet, at root, PBGC insists none of this matters—not the ambiguity, not the importance of the issue, not PBGC's inherently conflicted status, not the flawed work of its actual decision-makers. It declares that it has taken over all of the duties in Title IV and, as a government agency dealing with a complicated statute, it is entitled to maximum deference. *Id.* at 1. But *Chevron* has never attached merely when "an administrative official is involved," *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006), and there is even more reason to withhold deference given the PBGC's trustee role here and the dubious manner in which it has implemented its trustee obligations.

II. PBGC ADMITS THAT THE QUESTION PRESENTED CAN ARISE ONLY IN THE D.C. CIRCUIT, WHOSE POSITION IS FIRMLY ENTRENCHED

The D.C. Circuit has made clear it will apply *Chevron* deference to PBGC's statutory determinations,

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practice in which it provides a single document to each plan participant reflecting the agency's determination of that participant's "statutory benefit," which includes both guaranteed benefits and the participant's share of recovered plan assets. But it is just that—a practice. As demonstrated by PBGC's own description of the post-termination processes, *id.* at 4, there is no singular "Title IV program benefit." *Id.* at 11-12. PBGC calculates guaranteed non-forfeitable benefits under one rubric. *Id.* at 3-4. And it divides recovered plan assets under another set of rules. *Id.* at 4.

regardless of whether PBGC is acting as trustee rather than guarantor. In *Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) ("*Davis I*"), the D.C. Circuit saw "no reason to depart from the usual deference [given] to an agency interpreting its organic statute," and held that *Chevron* applied to PBGC's statutory interpretations as Title IV trustee. The decision below rejected the argument that the question presented was still open, expressly stating that the circuit's holding in *Davis I* "remains binding precedent." Pet. App. 3a. And the D.C. Circuit recently cited *Davis I* in another case in which it deferred to PBGC's statutory interpretations. *See Fisher v. PBGC*, 994 F.3d 664, 670 (D.C. Cir. 2021).

Further debate about the question presented in the petition has been foreclosed by the D.C. Circuit, which is the only circuit in which the question will ever arise. PBGC concedes as much, Opp. 19, but nonetheless tries to obscure this crucial fact by insisting that two Third and Fourth Circuit cases mentioned in the petition (refusing to give *Chevron* deference to PBGC) are "quite different." *Id.* at 19-21. Of course, those cases "say[] absolutely nothing about deference to PBGC's determination of pension benefits," *id.* at 20, because that question will never be heard in those courts. That is precisely the point: the question presented can arise only in the D.C. Circuit, making a circuit split an impossibility.

In case after case, the D.C. Circuit and district courts within the circuit have declined independently to weigh evidence in matters involving PBGC; they have held that PBGC decisions are unreviewable as a matter of prosecutorial discretion; and, when they

actually reach the merits, they apply deferential standards of review. *See* Pet. 22 n.6. PBGC responds by saying that the D.C. Circuit "does not serve as a rubber stamp for PBGC's determinations." Opp. 20. In support, PBGC cites a single case. *Id.* (citing *Stephens v. US Airways Grp., Inc.*, 644 F.3d 437 (D.C. Cir. 2011)).

PBGC has spent more than a decade ensuring that all cases involving its post-termination actions as Title IV trustee are funneled to the D.C. Circuit. *See* Pet. 21-22. Remarkably, PBGC now says this Court should not bother itself with this petition, because it involves "a statutory scheme implemented by a single agency and reviewed in a single circuit." Opp. 19. PBGC's actions should not evade review simply because it has managed to consolidate venue and prevent any prospect of a circuit split.

III. PBGC CONCEDES THERE ARE NO VEHICLE PROBLEMS

This case squarely presents the legal question whether PBGC is entitled to *Chevron* deference when it takes over a role, as a Title IV trustee, that Congress never intended it to have. PBGC's response is to say this case does not serve as a "special" vehicle to resolve that question. *Id.* at 22. "Special" or not, nothing about this case makes it an unsuitable vehicle to address the question.

Compare this case to an earlier one concerning PBGC's asset allocations for a different plan, *Davis v. PBGC*, 734 F.3d 1161 (D.C. Cir. 2013) ("*Davis II*"). In *Davis II*, the D.C. Circuit held that the plaintiffs' claims failed. Although the plaintiffs there made similar arguments against affording *Chevron* deference

to PBGC's allocation decisions, the court made clear it would have reached the same result with or without deference. *Id.* at 1167. That is to say, deference was not outcome determinative.

This case is a different story altogether. Here, 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. Its silence is instructive, given the overtly different approach in *Davis II*.

PBGC retorts that the question presented cannot be outcome determinative because the petition does not affirmatively show that petitioners would win absent deference. Opp. 22-23. This has it exactly backwards: every issue in dispute turns on whether PBGC's allocation decisions are entitled to deference, *see* Pet. 26-27, with PBGC conceding that every key statutory provision at issue is "ambiguous." Opp. 2 n.1. Importantly, PBGC *does not dispute* petitioners' argument that "deference underpinned the D.C. Circuit's review of each relevant aspect of PBGC's allocation decisions." Pet. 26. PBGC, rather, admits that the D.C. Circuit "upheld a *Chevron* review of PBGC's statutory interpretations" and that "the district court stated . . . it was applying the appropriate deference to PBGC in reviewing each of the amended complaint's claims." Opp. 22-23.

PBGC also attempts to manufacture meaning from the fact that the *Davis I* retirees chose not to seek certiorari. *See id.* at 23. However, a strategic decision made in 2009 by an entirely different group of appellants on different footing says nothing about whether, more than a decade later, a case rising and

falling on deference alone is a good vehicle to decide the question presented.

In sum, on remand, once this Court addresses the limitations on *Chevron*, the many ambiguous statutory provisions identified by PBGC will need to be interpreted *de novo*. That is precisely what it means to be a good vehicle in a *Chevron*-oriented petition.

IV. THE COURT'S GRANT OF CERTIORARI IN *AMERICAN HOSPITAL ASSOCIATION* REINFORCES THE CERT-WORTHINESS OF THIS PETITION

The Court recently granted certiorari to review the D.C. Circuit's application of *Chevron*. *See Am. Hosp. Ass'n v. Becerra*, No. 20-1114. The petition in *American Hospital Association* asserts that "the decision below vividly confirms the continuing need for this Court to enforce limits on *Chevron* deference, particularly as it is applied in the D.C. Circuit." *Id.*, Pet. 15. It adds that the D.C. Circuit has engaged in "extreme application of *Chevron*" and that "[i]f left undisturbed, the decision will inevitably exert a strong and unwarranted gravitational pull in the direction of deference to agency interpretations of law in the D.C. Circuit and beyond—exacerbating separation-of-powers concerns." *Id.* at 16.

Just as the *Chevron* question presented in the Medicare context in *American Hospital Association* "fundamentally" implicated the D.C. Circuit's application of *Chevron* at large, *id.* at 15, the *Chevron* issue raised here in the PBGC context cuts to the core of *Chevron*'s viability and extension by the D.C. Circuit. Just as in *American Hospital Association*, the Court should grant certiorari in this case or, at a minimum,

hold the petition in the event the Court realigns the *Chevron* doctrine in *American Hospital Association*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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