No. 25-701

In the Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,
PETITIONER

v.

BOARD OF TRUSTEES OF THE BAKERY DRIVERS
LOCAL 550 AND INDUSTRY PENSION FUND

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, established the Special Financial Assistance program to provide funding for certain severely underfunded multiemployer pension plans. A plan is eligible for such assistance if it satisfies one of four alternative sets of criteria, 29 U.S.C. 1432(b)(1)(A)-(D). As relevant here, subsection (A) says that a plan is eligible if it "is in critical and declining status (within the meaning of [29 U.S.C. 1085(b)(6)]) in any plan year beginning in 2020 through 2022." 29 U.S.C. 1432(b)(1)(A) (Supp. III 2021).

Nothing in Section 1432(b)(1)(A) excludes multiemployer plans that terminated via mass withdrawal, and nothing prohibits a plan that had terminated from ceasing to be a terminated plan if it no longer satisfies the definitional requirements for being a terminated plan. Section 1085(b)(6) in turn defines "critical and declining status" by referencing objective criteria that do not exclude a multiemployer plan terminated by mass withdrawal. In contrast, another alternative eligibility category, Section 1432(b)(1)(D), *does* explicitly exclude certain terminated plans.

The question presented is:

Whether a multiemployer pension plan, which terminated through mass withdrawal before 2020, then ceased to be a terminated plan in 2022, is eligible for Special Financial Assistance under 29 U.S.C. 1432(b)(1)(A) if it is in critical and declining status.

CORPORATE DISCLOSURE STATEMENT

Board of Trustees of the Bakery Drivers Local 550 and Industry Pension Fund states that it is not a corporation, does not have a parent corporation, does not issue securities to the public, and no publicly held corporation owns more than 10% of its stock.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

Board of Trustees of the Bakery Drivers Local 550 & Industry Pension Fund v. *Pension Benefit Guaranty Corp.*, No. 23-cv-1595 (Oct. 26, 2023)

United States Court of Appeals (2d Cir.):

Board of Trustees of the Bakery Drivers Local 550 & Industry Pension Fund v. *Pension Benefit Guaranty Corp.*, No. 23-7868 (Apr. 29, 2025)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

INTRODUCTION

Congress established the Special Financial Assistance (SFA) program to address a problem: multiemployer pension plans with insufficient assets to pay full benefits to the pensioners who bargained for and earned those benefits. The statute specifies that PBGC *shall* award SFA to plans that fall within four categories of eligibility. One of those categories is 29 U.S.C. 1432(b)(1)(A), which renders a plan eligible for SFA if:

> the plan is in critical and declining status (within the meaning of section 1085(b)(6) of this title) in any plan year beginning in 2020 through 2022.

The Fund is exactly such a plan. It is severely underfunded and was projected to be insolvent under the timeline set forth in 29 U.S.C. 1085(b)(6).

Yet, PBGC denied the Fund's application for SFA because of considerations that appear nowhere in Section 1432(b)(1)(A) *or* Section 1085(b)(6). PBGC argues that, because the Fund terminated in 2016, the Fund will never again have "zone status" under Section 1081(c) and therefore cannot be in "critical and declining status" within the meaning of Section 1432(b)(1)(A). And PBGC makes that argument even though the Fund ceased to be a terminated plan when a new contributing employer and new participants were added in 2022.

The Court of Appeals disagreed with PBGC's view, based on a straightforward reading of the statutory text. The Court of Appeals reasoned that neither Section 1432(b)(1)(A) nor Section 1085(b)(6) "by their

terms, exclude a plan that was terminated by mass withdrawal (that is, a plan that had at one time stopped receiving employer contributions)." And it rejected PBGC's argument that Section 1081(c)'s limitation on the applicability of certain funding standards affects the meaning of Section 1085(b)(6), such that those requirements are picked up by Section 1432(b).

PBGC's petition for certiorari presents none of the considerations that typically warrant review by this Court. There is no split of authority, as the Court of Appeals is the only circuit that has addressed the issue. And to the Fund's knowledge, it is in a category by itself; there are no other multiemployer plans that have been terminated at one point in time but later restored through new employer contributions and benefit accruals.

Nor does the petition present a broadly important issue of federal law. Section 1432(c) has no applicability outside of SFA, and the window for applying for SFA is now closed. PBGC's attempt to portray the Court of Appeals as articulating a new principle for interpreting statutory cross-references is unavailing. The Court of Appeals correctly interpreted the cross-reference in Section 1432(b)(1)(A) based on the text of that section and the statute as a whole, and PBGC's reliance on cases involving differently worded cross-references only confuses the clarity of its ruling.

PBGC's argument that the Court of Appeals' decision could cost it up to $6 billion is wildly speculative and contradicted by all available evidence. To date, PBGC has granted exactly zero SFA applications as a result of the Court of Appeals' decision (including the Fund's). PBGC's exaggerated estimate assumes

PBGC will grant SFA to *every* multiemployer plan that has ever been terminated, yet many plans did not apply before the deadline, and most are located outside of the Second Circuit. There are many additional reasons that PBGC will likely deny applications from plans even in the Second Circuit, including PBGC's own observation that funds terminated prior to 2008 have never been certified by an actuary to be in critical and declining status. And even assuming PBGC implausibly granted SFA to every terminated fund that applied (and the ones that didn't), the total spent on the SFA program would still be less than Congress estimated.

Indeed, resolving the question presented would not necessarily change whether even the Fund receives SFA. Even if this Court were to conclude that terminated plans are ineligible for SFA, the Fund's position is that it would nonetheless be eligible as a restored plan—a question the Second Circuit explicitly left open. Conversely, PBGC argues that the Fund is not eligible for SFA *even under the Court of Appeals' decision*. PBGC recently denied the Fund's resubmitted SFA application and then argued in the district court that the Court of Appeals' decision does not require it to award SFA to the Fund.

In addition to those prudential reasons to deny certiorari, the Court of Appeals' decision was correct. The Second Circuit properly interpreted Section 1432(b)(1)(A) not to contain an implicit requirement that a plan was never terminated, particularly in light of Congress's decision to *explicitly* proscribe terminated plans from qualifying under another of the four alternative eligibility categories. The Second Circuit

also properly rejected PBGC's argument that the zone status requirements of Section 1081(a) must be read into the SFA eligibility criteria. It persuasively reasoned—based on the text and structure of Section 1432(b)(1)(A)—that all plans "within the meaning" of Section 1085(b)(6) are covered. Section 1432(b)(1)(A)'s cross-reference explicitly picks up "only the definition contained in § 1085(b)(6)" and not "external limitations on § 1085's operation," such as Section 1081. Those conclusions are further bolstered by other statutory context, including Section 1085(e)(4)(B)'s delineation of the circumstances in which a fund can cease to be in critical status and the statute's fundamental goal of ensuring that participants in struggling pension funds do not have their benefits cut.

PBGC's petition should be denied. The limited ERISA question presented is not the type of issue that requires this Court's review. And to the extent the Court has any doubt about whether certiorari might be warranted in the future, such review would be enhanced by waiting for the issues to percolate further in the lower courts—particularly the many different issues that will arise with respect to the still-terminated plans that are differently situated than the Fund.

STATEMENT

A. Legal Background

Under ERISA, defined benefit plans may be categorized as single-employer or multiemployer plans. Relevant here, a multiemployer defined benefit pen-

sion plan is established as part of a collective bargaining agreement (CBA) and typically involves one or more unions and more than one employer in the same industry and region. 29 U.S.C. 1002(37). Each plan is required to use an actuary to calculate and monitor the funded status of the plan in accordance with specific statutory requirements.

A multiemployer plan can be "terminated" by amendment or mass withdrawal. 29 U.S.C. 1341a(a). Termination of a multiemployer plan, however, does not cause the plan to cease to exist. Instead, the plan trustees continue to sponsor and administer the plan, manage the plan's assets, and pay benefits.

In 2021, Congress created the SFA Program to help underfunded multiemployer pension plans as part of the American Rescue Plan Act (ARPA). SFA is designed to protect the retirement security of millions of Americans participating in struggling multiemployer pension plans. ARPA provides that PBGC "shall" award financial assistance to multiemployer plans that meet any one of four alternative eligibility criteria provided in the statute. 29 U.S.C. 1432(a)(1), (b)(1)(A)–(D). Specifically, a multiemployer plan is eligible for SFA if:

> (A) the plan is in critical and declining status (within the meaning of section 1085(b)(6) of this title) in any plan year beginning in 2020 through 2022;
>
> (B) a suspension of benefits has been approved with respect to the plan under section 1085(e)(9) of this title as of March 11, 2021;

> (C) in any plan year beginning in 2020 through 2022, the plan is certified by the plan actuary to be in critical status (within the meaning of section 1085(b)(2) of this title), has a modified funded percentage of less than 40 percent, and has a ratio of active to inactive participants which is less than 2 to 3; or
>
> (D) the plan became insolvent for purposes of section 418E of title 26 after December 16, 2014, and has remained so insolvent and has not been terminated as of March 11, 2021.

The Fund here claimed eligibility under Subsection (A). Section 1085(b)(6), cross-referenced in Subsection (A), requires that a plan be (1) "described in one or more of subparagraphs (A), (B), (C), and (D) of [section 1085(b)(2)]" and (2) "projected to become insolvent within the meaning of section 1426 of this title during the current plan year or any of the 14 succeeding plan years."

Neither subparagraph (A), (B), (C), or (D) of Section 1085(b)(2) or Section 1426 mention "termination." Instead, subparagraphs (A), (B), (C), and (D) of Section 1085(b)(2) are actuarial assumptions that generally show struggling financial performance. Similarly, Section 1426 provides that a plan is insolvent if a "plan's available resources are not sufficient to pay benefits under the plan when due for the plan year."

In the district court and Court of Appeals, PBGC contended that another statutory provision, 29 U.S.C. 1081(c), not mentioned in either Section 1432 or Section 1085(b)(6) limited a terminated plan's ability to

be in critical and declining status. Section 1081(c) provides:

> This part applies, with respect to a terminated multiemployer plan to which section 1321 of this title applies, until the last day of the plan year in which the plan terminates, within the meaning of section 1341a(a)(2) of this title.

Section 1432, the SFA provision, is not part of "this part" referenced in Section 1081(c).

B. Factual and Procedural Background

The Fund is a multiemployer plan that provides pension benefits to approximately 1,100 eligible participants and beneficiaries. C.A. JA335 (2020 Form 5500, AR-0290); *id.* at 10–11 (Compl. ¶ 13). The Fund's participants are bakery drivers who worked for decades to earn their benefits. In the mid-2010's, the fund began experiencing significant financial distress as a result of the bankruptcy of Hostess, the Fund's largest participating employer. Despite efforts of the Fund's trustees to extend the length of time for which the Fund could continue to pay full benefits, its funding continued to decline. *Id.* at 20.

Due to its critical financial condition, the Fund can no longer pay participants and beneficiaries the benefits to which they are entitled. On September 1, 2023, the Fund ran out of sufficient assets and became insolvent. At that time, and through no fault of participants or of the Fund, 665 participants and beneficiaries had their benefits significantly cut. 2:23-

cv-1595 Docket entry No. 26 at 1 (E.D.N.Y May 26, 2023).

The Fund took multiple steps to avoid this scenario, including taking measures to cut costs and protect benefits. C.A. JA20 (Compl. ¶46). One such measure was a process in early 2017 (the Fund's plan year 2016) through which the Fund spun off certain participants into a new plan and then terminated via mass withdrawal. As a result, the Fund's solvency was extended. *Id.* at 21 (Compl. ¶48).

Fortunately, Congress established the SFA program as part of the American Rescue Plan in 2021 to help multiemployer plans exactly like the Fund. In August 2022, the Fund installed a new bargaining employer that agreed to participate in the Fund (C.A. JA633 (Spinelli Decl. ¶ 13), *id.* at 22 (Compl. ¶ 54)) and new participants began accruing benefits. Shortly thereafter, on September 28, 2022, the Fund filed an application for SFA demonstrating eligibility under ERISA. *Id.* at 64–600 (Application, AR-0023–0555). Specifically, the Fund demonstrated that it satisfied eligibility criteria in Subsection (b)(1)(A), which states that a multiemployer plan is eligible for SFA if "the plan is in critical and declining status (within the meaning of section 1085(b)(6) of this title) in any plan year beginning in 2020 through 2022." C.A. JA546 (Application Checklist at item No. 24, AR-0501); see also 29 U.S.C. 1432(b)(1)(A).

On January 20, 2023, PBGC denied the Fund's application but did not dispute the asset and liability calculations in the Fund's application leading to the certification of "critical and declining status." Specifically, PBGC reasoned that:

> [t]he Plan terminated by mass withdrawal in plan year 2016. The zone-status rules *under section 432 of the Internal Revenue Code* do not apply to a multiemployer plan terminated by mass withdrawal after the plan year of termination. Such a plan has no zone status in subsequent plan years. Therefore, the Plan was not in critical and declining status in plan year 2021 and has had no zone status since plan year 2016, when the Plan terminated by mass withdrawal.

C.A. JA42 (Determination AR-0001) (emphasis added).

The Fund filed this suit on March 1, 2023, seeking, among other things, an order setting aside PBGC's denial of its SFA application. See C.A. JA8. After the parties cross-moved for summary judgment, the district court granted summary judgment to PBGC on October 26, 2023. The district court first held that "a terminated plan does not have a zone status and, as such, cannot qualify for SFA under Section 1432(b)(1)(A)" and therefore, "unless ERISA allow[ed] the Fund to restore itself (and exit 'terminated' status), it cannot qualify under Section 1432(b)(1)(A)." C.A. SA8 (statutory citations corrected). The district court then concluded that the Fund could not restore itself, because 29 U.S.C. 1347 only allowed PBGC—not a plan sponsor or administrator—to restore a plan. C.A. SA16. In doing so, it relied heavily on the now-overturned *Chevron* framework in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984) to defer to PBGC's interpretation of the statutory provisions. *Ibid*. On November 27, 2023, the Fund timely filed its notice of appeal. C.A. JA648.

On appeal, the Court of Appeals reversed. The Court of Appeals held that neither Section 1432 (b)(1)(A) nor Section 1085(b)(6), "by their terms, exclude a plan that was terminated by mass withdrawal (that is, a plan that had at one time stopped receiving employer contributions)." Pet. App. 7a. The court rejected PBGC's argument that Section 1081(c) required excluding terminated plans because "the SFA statute incorporates by reference only the definition contained in § 1085(b)(6)" and not "external limitations on § 1085's operation, such as the limitation contained in § 1081(c)." Pet. App. 8a. Because the court held that the Fund could qualify for SFA under Section 1432(b)(1)(A) even if it were terminated, the Court of Appeals did "not decide whether ERISA permits a terminated multiemployer plan to be restored." Pet. App. 10a. After the Court of Appeals' opinion was issued, PBGC sought a stay of the mandate and was quickly denied.

The Court of Appeals' opinion has not, however, resulted in award of SFA for the Fund. On September 11, 2025, PBGC again denied the Fund's application. PBGC did not identify any new issues that were not present when the Fund initially applied. Instead, PBGC's denial letter stated that: (1) "the Second Circuit opinion did not change the District Court's ruling that the Fund had not been restored and that it was not restorable under ERISA" and that; (2) the Fund's

certification statement "include[d] inaccurate information and creates a material inconsistency that renders the Revised Application incomplete" because it "contradicts the District Court ruling that the Fund cannot be restored to ongoing status under ERISA."

The Fund subsequently filed a motion asking the district court to enforce its judgment by vacating PBGC's most recent denial letter and compelling it to award SFA. The district court has asked for briefing on the motion. PBGC has also requested a stay of the district court proceedings pending resolution of its petition for certiorari, though it has not sought a stay from this Court.

REASONS FOR DENYING THE PETITION

I. Review Is Not Warranted, and This Case is Not a Suitable Vehicle.

A. There Is No Disagreement Among Courts of Appeals.

PBGC concedes that the issues in its petition have neither "percolated" nor "generated a disagreement in the courts of appeals." Pet. 26. The absence of conflict among courts of appeals (or indeed any lower court) weighs particularly against granting review here because the negative consequences PBGC predicts would be, if they materialize, the result of the applications of *other* terminated plans. PBGC has yet to resolve any of those applications. If it denies those applications, the applicants may challenge in court the denials based on whatever reasons PBGC may (or may not) offer. And, if litigated, those cases would present an opportunity for lower courts to deal, in the

first instance, with the unique factual issues faced by terminated plans that are dissimilar from the Fund. Those cases would almost certainly be a better vehicle for resolving the question presented in the petition, because the Fund is unique—it is the *only* formerly terminated multiemployer plan that has been restored. See Section I.D, *infra*.

B. There Is No Important Question of Federal Law.

There is likewise no "important question of federal law" that would warrant this Court's review. Rule 10(c). Of course, this issue is important to the Fund and its participants. But the specific issue of SFA eligibility under Section 1432(b)(1)(A) of ERISA has limited applicability to a fixed universe of potential multiemployer plans. The application window for SFA closed at the end of 2025. So, after PBGC resolves the remaining pending SFA applications, the decision will have no future impact. PBGC does not contend—because it cannot—that the issue of SFA eligibility for terminated plans has any spillover impacts on ERISA's other benefit guarantees or other programs.

PBGC instead attempts to infer a "conflict[] with basic principles of statutory interpretation and this Court's precedents" by manufacturing a broad rule about interpreting cross-references out of the Second Circuit's opinion. But as explained in Section II, *infra*, interpreting cross-references is a context- and statute-specific exercise, and PBGC simply disagrees with the Second Circuit's specific interpretation of text of Section 1432(b)(1)(A) of ERISA. Tellingly, PBGC did not claim to the Second Circuit before the decision—in-

cluding in supplemental briefing specifically requested on this question—that any of this Court's precedents compelled PBGC's reading of the cross-reference language in 1432(b)(1)(A). 23-7868 Docket entry No. 62 (2d Cir. Jan. 21, 2025).

C. The Fiscal Consequences PBGC Predicts are Entirely Speculative.

PBGC posits that review is needed because of the "importance of [the] issue to the federal fisc." Pet. 25. PBGC's central argument is that the Court of Appeals' decision could theoretically force it to pay SFA to *other* terminated plans, which, according to PBGC, "implicates about $6 billion in potential SFA payments." Pet. 3. But the Government has not yet granted *any* such applications—even the Fund's—and it has indicated that it will deny most or all of them. Particularly because other terminated plans are fundamentally different than the Fund in multiple ways, a number of issues regarding the eligibility of those other funds will not be resolved until further action by PBGC, and then potential litigation in federal district courts and courts of appeal. If and when those issues are resolved, the economic consequences are likely to be dramatically less severe than PBGC suggests, for several reasons.

First, many terminated plans will not apply for SFA or are located in jurisdictions other than the Second Circuit. PBGC's $6 billion figure comes from a PBGC inspector general report that estimated the value of SFA that could be claimed by any multiemployer plan that has ever been terminated. Pet. 24 (citing Nicholas J. Novak, Inspector General, PBGC, *Risk Advisory: Recent Court of Appeals Ruling May*

Cost Taxpayers Approximately $6 Billion *More in Special Financial Assistance Than Originally Projected* (June 16, 2025)) ("Risk Advisory"). As PBGC acknowledges, only a subset of those plans actually applied for SFA or are on the waiting list to apply, and only 21 are located in the Second Circuit. *Id.* at 25. Because PBGC has indicated that it does not consider itself bound by the Court of Appeals' decision with respect to any plan located in any other jurisdiction, that alone eliminates over 80 percent of the theoretical $6 billion in SFA that PBGC identifies. See *ibid.*

Second, there is a currently unknowable number of other reasons why PBGC might find plans ineligible for SFA. PBGC can deny SFA based on disagreements about the assumptions plans use in calculating their SFA amount, disagreements about other statements in plans' applications, or other threshold issues. Indeed, PBGC's petition to this Court identifies one such issue—plans that were terminated prior to 2008 "have *never* certified their zone status" because the zone status rules did not yet exist. Pet. 18 (emphasis in original). PBGC presents that as a "problem with the Second Circuit's approach," but the Court of Appeals in no way addressed the issue of whether such plans could be eligible—its holding was limited to ruling that the fact of a plan's termination does not disqualify it from eligibility as long as it is in "critical and declining" status. See Section II.C., *infra.* So, PBGC could (and almost certainly will) deny those applications, and those plans may ask district courts to resolve the question of whether plans that terminated before 2008 are eligible. The existence of those differently situated plans only further demonstrates that

this Court should allow such issues to percolate before granting certiorari.

PBGC is particularly likely to have bases for denial of other multiemployer plans' applications because those plans are differently situated than the Fund in important ways. The Fund is the only formerly terminated plan that underwent a restoration in which it entered a new collective bargaining agreement and began new benefit accruals. 2:23-cv-1595 Docket entry No. 26 at 9 (E.D.N.Y May 26, 2023). That is an important difference—unlike terminated funds, the Fund has filed a certification of zone status with the IRS and therefore has documentation that it was in critical and declining status during the time period for SFA eligibility. If other plans have not done that, PBGC may deny their applications for SFA on those grounds. That may or may not be correct in those cases, but it confirms that the PBGC's current sky-is-falling argument is misguided.[1]

Third, even if PBGC ends up granting some additional amount of SFA, it is wrong when it suggests that any such amount would be "taxpayer funds that Congress did not intend to be paid." Pet. 23. Not only is the Court of Appeals' reading more consistent with

[1] PBGC also briefly asserts without explanation that immediate review is needed because of "the deadlines for submission of SFA applications and PBGC's review process." Pet. 26. To the extent PBGC is referring to its 120-day deadline for action on SFA applications, that deadline applies to every SFA application PBGC receives, and it has developed administrative mechanisms to deal with processing them, including waitlisting plans and asking plans to withdraw and resubmit. It is in no way a reason for granting certiorari.

the text and overall objectives of the SFA statute (see Section II, *infra*); the total SFA granted over the life of the program would still be *less* than Congress projected when the statute was passed. Prior to the passage of SFA in the American Rescue Plan of 2021, the Congressional Budget Office estimated that the cost of the program would be $86 billion. CBO, *Reconciliation Recommendations of the House Committee on Ways and Means* (Feb. 17, 2021), *available at* https://www.cbo.gov/system/files/2021-02/hwaysandmeansreconciliation.pdf.[2] PBGC has to date granted $68.6 billion in SFA, and the applications from non-terminated plans that are currently in review or on PBGC's waitlist total $3.1 billion. Risk Advisory at 3. No additional plans can file now because the deadline to apply for SFA expired at the end of 2025. Pet. 25. So, even assuming (incorrectly) that PBGC would grant all $6 billion that could theoretically be claimed by every terminated multiemployer plan *and* every single other application it has received, the total cost of the program would be under $78 billion. That would be about $8 billion less than the CBO estimate available to Congress when it passed the American Rescue Plan.

All of these distinctions demonstrate that review is neither needed nor appropriate now. The consequences of the Court of Appeals' decision for PBGC are not dire. And, if it is ever necessary, review by this Court would only be appropriate after lower courts

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[2] In 2022, the CBO revised this estimate *upwards* to $90.4 billion, based on PBGC's promulgation of the final SFA regulations. CBO, *Effect of the Pension Benefit Guaranty Corporation's Final Rule on Special Financial Assistance* (Sep. 30, 2022), *available at* https://www.cbo.gov/system/files/2022-09/58540-PBGC.pdf

have had further opportunity to wrestle with the unique issues faced by other pension plans that are dissimilar to the Fund.

D. The Question Presented Is Not Even Determinative of Whether the *Fund* is Eligible for SFA.

PBGC contends that certiorari is needed because, at a minimum, the Court of Appeals' decision means that it "will likely be compelled to pay out more than $100 million" to the Fund. Pet. 23. But it is not at all clear that answering the question presented will resolve whether the Fund is eligible for SFA, for two reasons. First, the Fund contends that it is eligible for SFA regardless of whether terminated plans are eligible because it is no longer terminated following its restoration in 2022. Second, PBGC argues that the Fund is *ineligible* for SFA *even after the Court of Appeals' decision*.

Taking the former first, the Court of Appeals explicitly left open the issue of whether the Fund has been restored. Pet. App. 10a n.5 ("[W]e need not decide whether ERISA permits a terminated multiemployer plan to be restored."). The Fund's position, that it has been restored, is correct. The Fund has in fact been restored—a new contributing employer was added in 2022 and the Fund currently has participants who are accruing benefits. It was able to do so in part because termination via mass withdrawal under ERISA is not a cessation of operations or a wind-down; while the Fund was terminated, it continued to pay benefits, invest assets, and perform many of the same administrative tasks. PBGC argues that Section 1347 of ERISA—which provides a procedure by which PBGC

can restore single-employer plans—*implies* that *multiemployer* plans cannot be restored. But no such implication is warranted because Section 1347 covers only the circumstances under which *PBGC* may restore plans, not the conditions under which it can be restored through other means, i.e., adding a bargaining unit and resuming benefit accruals. Tellingly, Section 1347 also applies to PBGC's ability to halt the termination of a plan that "is in the process of being terminated," but PBGC does not dispute that a multiemployer plan that in the process of being terminated can halt its termination on its own.

On the flip side, PBGC is currently arguing in the district court that the Court of Appeals' decision *does not* require it to issue *any* SFA to the Fund. That dispute stems from a letter PBGC issued on September 11, 2025—months before it petitioned for certiorari—denying the Fund's resubmitted SFA application. The Fund filed a motion asking the district court to enforce its judgment, and PBGC opposed. The crux of that dispute is about statements the Fund made in its application reflecting its understanding that it is restored, which should be irrelevant to its SFA eligibility under the Court of Appeals' decision. But despite PBGC's plea to this Court about the cost of awarding SFA to the Fund, PBGC has argued in the district court that the Fund is ineligible unless the district court were to "change its October 26, 2023, Order and expand the Second Circuit's mandate to make it SFA eligible." 2:23-cv-1595 Docket entry No. 57 at 3 (E.D.N.Y May 26, 2023).

PBGC relegates those uncomfortable contradictions to a footnote in its petition. It argues that its denial of the Fund's re-submitted application is "immaterial" for two reasons: (1) the Fund "can correct and resubmit the application," and (2) the Fund "has asked the district court to order the PBGC to grant the existing application." Pet. 23 n.2. PBGC's first argument is belied by its own actions. The Fund has repeatedly attempted to meet with PBGC to determine how it could "correct" its application in a way that satisfies PBGC. But for more than six months, PBGC has continually refused to meet, has been unwilling to provide responses in any correspondence, and has provided no other guidance about how the Fund could do so.

PBGC's second point—that the district court might determine it is wrong—is even more baffling. That PBGC's position likely violates court orders does not change the fact that it is PBGC's position. And it only further demonstrates why review in this Court is not appropriate now—further litigation is needed to determine how the Court of Appeals' decision will impact even the Fund itself. At the very least, the pendency of further proceedings in the district court weighs against immediate review.

E. This Case Is Not Analogous to Cases in Which Certiorari Has Been Granted.

None of PBGC's citations of cases that have been reviewed absent a circuit split move the needle. PBGC's star case is *PBGC* v. *LTV Corp.*, 496 U.S. 633 (1990), which it claims is analogous because PBGC could have "los[t], at the least, approximately half a

billion dollars" and "other companies in financial trouble [we]re sure to attempt to follow [the sponsor's] lead." Pet. 27 (quoting U.S. Cert. Amicus Br. at 18–19). But PBGC is quoting an *amicus brief the Government submitted*. The fiscal consequences of the case were not identified by this Court as a reason for granting review. Rather, this Court granted review "[b]ecause of the significant administrative law questions raised by th[e] case" and "the importance of the PBGC's insurance program." *LTV Corp.*, 496 U.S. at 644. PBGC's insurance program is not at issue in this case. Nor are the type of "general principle[s] of administrative law" identified in *LTV Corp.*—there, this Court held that agencies' duty to consider all relevant factors does not require them "to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act" and explained that, under the Court of Appeals' interpretation, "a very large number of agency decisions might [have been] open to judicial invalidation." *Id.* at 646.

The "other ERISA cases" PBGC cites are also inapposite, as none of them involved a decision by a single court of appeals that presented no broadly applicable issues of federal law. See *Advoc. Health Care Network* v. *Stapleton*, 581 U.S. 468, 473 (2017) (reviewing case in which three different courts of appeal had each interpreted a church plan exemption restrictively after a "wave of litigation"); *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U.S. 312, 324–25 (2016) (addressing the inherently broad question of whether ERISA preempts state laws regarding plan reporting, disclosure, and recordkeeping); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (reviewing a court of appeals decision that was "in tension" with *five* other

court of appeals decisions and a Supreme Court precedent on the same issue). Here, nothing warrants departing from this Court's "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019).

Finally, PBGC points to several cases in which this Court has referenced fiscal implications when granting certiorari. Pet. 25 (citing *United States* v. *Hill*, 506 U.S. 546, 549 (1993) and other cases). Those precedents are all inapposite because, as explained in Section I.C, the fiscal implications of the Court of Appeals' decision cannot be determined until PBGC makes decisions on dozens of other applications and potentially until outstanding questions of law with respect to those other applications are litigated. Speculative implications to the federal fisc are not a compelling ground for certiorari when they are currently unknowable and could turn out to be minimal or zero.

II. The Court of Appeals' Decision Is Correct.

The Court of Appeals correctly interpreted the text of the Section 1432(b)(1)(A) in concluding that the Fund's prior termination did not prevent it from being eligible for SFA. While the petition inaccurately construes the Court of Appeals' opinion as turning on broad principles of statutory cross-references, the Court of Appeals based its opinion on the particular words Congress used in the SFA eligibility criteria and Section 1085(b)(6). In doing so, it acted consistently with this Court's precedents applying statutory

cross-references. The PBGC's arguments to the contrary require overlooking the text-specific nature of the Court of Appeals' opinion.

A. The Court of Appeals Properly Interpreted Section 1432(b)(1)(A) as Not Excluding Terminated Plans.

Statutory interpretation starts "with the text of the statute." *Van Buren* v. *United States*, 593 U.S. 374, 381 (2021). Here, the Court of Appeals properly examined the text of 29 U.S.C. 1432(b)(1)(A) to determine that it does not exclude terminated plans that otherwise meet its criteria. It reached this conclusion because nothing in Section 1432(b)(1)(A) or in the cross-referenced 29 U.S.C. 1085(b)(6) either expressly or implicitly exclude terminated plans (though Congress did so in other parts of the SFA statute). The court also correctly declined to read Section 29 U.S.C. 1081(c)'s limitation on when provisions in that Section of the statute operate into the definitional reference in Section 1432(b)(1)(A).

1. Both Section 1432(b)(1)(A) and Section 1085(b)(6) say nothing about termination.

The Court of Appeals properly concluded that Congress did not restrict terminated multiemployer plans in critical and declining status from being eligible for SFA under Section 1432(b)(1)(A). As the Court of Appeals recognized, Section 1432(b)(1)(A) does not expressly "exclude a plan that was terminated by mass withdrawal (that is, a plan that had at one time stopped receiving employer contributions)." Pet. App. 7a. Instead, all that is required under Section

1432(b)(1)(A) is that a plan be "in critical and declining status (*within the meaning* of section 1085(b)(6) of this title) in any plan year beginning in 2020 through 2022." Pet. App. 6a (emphasis added).

It cannot be overstressed that Section 1432(b)(1)(A) does not cross-reference Section 1085(b)(6) wholesale. Rather, Section 1432(b)(1)(A) cross-references Section 1085(b)(6) solely for "the meaning of" the phrase "critical and declining status." It's a semantic cross-reference that links "the meaning" of a phrase used in two different statutes. The scopes of those different statutes, and their purposes, are ultimately irrelevant to the particular cross-reference at issue here. All that matters is whether formerly terminated plans are within or without "the meaning of" Section 1085(b)(6).

Section 1085(b)(6)'s definition of "critical and declining status" is not restricted to active plans. That section requires that a plan be (1) "described in one or more of subparagraphs (A), (B), (C), and (D) of paragraph (2)," and (2) "projected to become insolvent within the meaning of section 1426 of this title during the current plan year or any of the 14 succeeding plan years." Nothing prevents a terminated plan from meeting those criteria.

First, a terminated plan could be "described in subparagraphs (A), (B), (C), [or] (D)" of Section 1085(b)(2). Those portions of Section 1085(b)(2) include several actuarial assumptions which generally show struggling financial performance. A terminated plan could satisfy one or more of those assumptions. For example, the Court of Appeals quoted 29 U.S.C. 1085(b)(2)(D), which provides:

> A plan is described in this subparagraph if the sum of—(i) the fair market value of plan assets, plus (ii) the present value of the reasonably anticipated employer contributions for the current plan year and each of the 4 succeeding plan years, assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years, is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the 4 succeeding plan years (plus administrative expenses for such plan years).

A terminated multiemployer plan could meet those criteria because, even after termination, it continues to function in many ways like an active plan. For example, the plan trustees continue to sponsor and administer the plan, manage the plan's assets, and pay benefits.

Second, Section 1426's definition of insolvency does not exclude terminated plans. All that is required is that a "plan's available resources are not sufficient to pay benefits under the plan when due for the plan year." Because a terminated plan still retains resources and pays benefits, it can very well be insolvent.

Because neither Section 1432(b)(1)(A) nor Section 1085(b)(6) exclude terminated multiemployer plans, the Court of Appeals was right to reject reading in such a limitation. Adding a provision to a statute that

is not there "is not a construction of a statute, but, in effect, an enlargement of it by the court." *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019) (quoting *Nichols* v. *United States*, 578 U.S. 104, 110 (2016)).

As the Court of Appeals recognized, that conclusion is buttressed by the fact that when Congress wanted to exclude terminated plans from SFA, it did so expressly. Specifically, under 1432(b)(1)(D) a plan is eligible for SFA if "the plan became insolvent for purposes of section 418E of title 26 after December 16, 2014, and has remained so insolvent and *has not been terminated* as of March 11, 2021." (emphasis added). Where, as here, "Congress includes particular language in one [sub]section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner* v. *United State*s, 598 U.S. 85, 94 (2023). This expressio unius canon of construction applies with full force here and indicates that Congress did not intend to exclude terminated plans from the other eligibility categories.

Taken together these textual indications demonstrate that the Court of Appeals properly declined to read a termination limitation into Section 1432(b)(1)(A).

2. Section 1081's elimination of minimum funding standards for terminated plans does not render them ineligible for SFA.

The Court of Appeals properly rejected PBGC's invitation to rely on Section 1081(c), a statute referenced in neither Section 1432(b)(1)(A) nor Section 1085(b)(6). That statutory section states that:

> This part applies, with respect to a terminated multiemployer plan to which section 1321 of this title applies, until the last day of the plan year in which the plan terminates, within the meaning of section 1341a(a)(2) of this title.

PBGC contends that because Section 1085 is in the "part" referenced in Section 1081 and therefore only "applies" to terminated plans up until the last year of their termination, that this means terminated plans cannot receive SFA under Section 1432(b)(1)(A). Put differently, PBGC contends that terminated plans cease to have a "zone status," such as "critical and declining status." Pet. 12. The Court of Appeals properly rejected PBGC's arguments.

The court did so consistently with this Court's direction that it look to the "[t]he language of the cross-reference" to determine its scope. *Bowe* v. *United States*, 607 U.S. —, 146 S. Ct. 447, 458 (2026). Section 1432(b)(1)(A) refers to a plan in "critical and declining status," "within the meaning of" Section 1085(b)(6). The Court of Appeals properly held that this qualification in the statutory text, "incorporates by reference only the definition contained in § 1085(b)(6)" and not "external limitations on § 1085's operation, such as the limitation contained in § 1081(c)." Pet. App. 8a. In other words, even if Section 1081(c) prescribes when the zone status provisions operate, it does not define when a plan is in "critical and declining" status "within the meaning" of Section 1085(b)(6). That is also consistent with the text of 1081(c), which applies only to "this part," a reference to Title 29, Chapter 18, Subchapter I, Subtitle B, part 3 of the U.S. Code,

which *does not* include Section 1432. So, nothing about the text of Section 1081(c) indicates that its limitation on the applicability of certain funding rules to terminated plans modifies Section 1432(b)(1)(A).

The Court of Appeals also correctly contrasted the text of Section 1432(b)(1)(A) with the other cross references in Section 1432. These include cross references qualified by "for the purposes of" another section or to which another section "applies." In contrast to the definitional qualifier "within the meaning of," the Court of Appeals properly recognized that these cross references were more susceptible to a meaning that would incorporate provisions impacting their operation. PBGC incorrectly characterizes this part of the Court of Appeals' holding as pointing to "the mere possibility of clearer phrasing." Pet. 21 (quoting *Caraco Pharm. Lab'ys, Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012)). In reality, the Court of Appeals was simply recognizing that in statutes "different terms usually have different meanings." *Pulsifer* v. *United States*, 601 U.S. 124, 149 (2024).

Additionally, the text of the statutory provisions and their structure collectively show that Section 1081 does not prevent a terminated plan from being in critical and declining status. To be in "critical and declining status," Section 1085(b)(6) requires that a plan meet several objective criteria, including (1) projected insolvency, (2) a funded percentage of less than 65 percent, and (3) assets and contributions below nonforfeitable benefits for the next six years. The Fund's actuary has certified that the Fund meets those objective criteria. The fact that Section 1081 says "this Part applies" with respect to terminated

multiemployer plans only until the last day of the plan year in which they terminate does not change whether a plan meets these criteria.[3]

Indeed, 29 U.S.C. 1085(e)(4)(B) confirms this. That provision states that a "plan in critical status *shall remain in such status* until a plan year for which the plan actuary certifies" several financial indications of improvement in the plan's finances. (emphasis added). Put differently, once a plan is in critical status, it stays that way absent financial improvement. It follows that the same would be the case for a plan in "critical and declining" status because that depends in part on a plan being in critical status. Nothing in Section 1081 negates this.

Instead, what does not "apply" for terminated plans under Section 1081(c) are the minimum funding standards that are the subject of the "Part" referenced in Section 1085—Part 3 of Chapter 18, Subchapter 1, Subtitle B of Title 29 of the U.S. Code. Those minimum funding standards are substantive obligations that plans must follow, including: (1) creating and maintaining a funding standard account; (2) annually certifying whether the plan is in endangered, critical, or critical and declining status; and (3) using certain

[3] PBGC contends that a plan can only meet these criteria if an actuary certifies this at the time. Pet. 17. But Congress knew how to require contemporaneous actuarial certifications in the SFA provision and conspicuously did not do so in Section 1432(b)(1)(A). Specifically, a plan is eligible under Section 1432(b)(1)(C) if "in any plan year beginning in 2020 through 2022, *the plan is certified by the plan actuary* to be in critical status (within the meaning of section 1085(b)(2) of this title)."

actuarial assumptions and methods. See generally 29 U.S.C. 1081–1085a.

Specifying that those standards do not "apply" to terminated plans removes those obligations for plans that terminate, in order to conserve their resources. It does not change what it means to be in "critical status" or "critical and declining status." A plan that is in critical and declining status that terminates no longer needs to comply with the certain requirements for such plans but does not magically cease being in critical and declining status.

It makes sense that a multiemployer plan that is terminated is no longer subject to the minimum funding requirements, because one of the few distinctions between terminated and non-terminated multiemployer plans is that terminated ones no longer have ongoing employer contributions. Likewise, it makes sense that SFA eligibility would not turn on whether a plan is terminated—there is no reason why a terminated plan is in any less need of financial assistance to help continue providing benefits to pensioners and other beneficiaries.

Struggling terminated plans, just as much as active plans, could use the financial assistance from the SFA Program. So too for their participants and beneficiaries. The end result under the PBGC's view is that pensioners and beneficiaries of struggling plans that responsibly chose to terminate in order to preserve benefits for existing pensioners and beneficiaries receive only the limited benefits under PBGC's traditional financial assistance, while pensioners and beneficiaries of struggling plans that remained active and

went insolvent will receive ample SFA benefits. It is highly unlikely Congress wanted such a result.

Moreover, the Court of Appeals properly declined to reach a different interpretation based on the Congressional Budget Office's report of the number of plans would be eligible for SFA (contra Pet. 22). CBO reports are not the law and get "no rote deference." *Feliciano* v. *Dep't of Transp.*, 605 U.S. 38, 48 (2025). Regardless, as discussed in Section I.C, *supra*, the total dollar value of SFA that the CBO projected was *more* than would be awarded over the course of the program even if PBGC granted SFA to every single terminated plan.

B. The Court of Appeals' Decision Applied the Statutory Cross-Reference in Section 1432(b)(1)(A) Consistently with This Court's Precedents.

PBGC claims that the Court of Appeals applied a rule that a statutory cross-reference is limited "to the bare terms of the incorporated provision." Pet. 13. Not so. Because Section 1432(b)(1)(A) contains a specific cross-reference, one that "refers to another statute by specific title or section number," the Court of Appeals applied this Court's instruction that such a cross-reference "in effect cuts and pastes the referenced statute." Pet. App. 8a (quoting *Jam* v. *Int'l Fin. Corp.*, 586 U.S. 199 (2019)).

In doing so, the court did not limit itself to the "bare terms of" Section 1085(b)(6). Contrary to PBGC's assertion, the Court of Appeals also looked at the criteria referenced in Section 1085(b)(6) contained in other subsections of Section 1085, as well as in Section 1426. Those sections are explicitly referenced in

the cross-referenced provision and pertain to what it means for something to be "within the meaning of" Section 1085(b)(6). The Court of Appeals did not incorporate Section 1081 because the text of the cross-reference did not "incorporate the various limitations on § 1085's applicability, along with its definition." Pet. App. 9a.

This is in keeping with how this Court treats specific cross references. For example, in *Bowe* v. *United States*, 146 S. Ct. at 458, the Court declined to read a jurisdictional limitation on habeas petitions brought by state prisoners under 28 U.S.C. 2244 into a cross reference to that statute in the federal habeas provision, 28 U.S.C. 2255. The cross reference in 28 U.S.C. 2255 was "narrow and specific"—it said "that a second or successive [§ 2255] motion 'must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain.'" *Bowe*, 146 S. Ct. at 458. The Court interpreted this to "incorporate only the provisions in § 2244 that 'provid[e]' for how a 'panel of the appropriate court of appeals' 'certifie[s]' a second or successive filing." *Ibid.* Because the jurisdictional provision did not do so, even though it was contained in 28 U.S.C. 2244, it was not fairly covered by the cross-reference. *Ibid.*

The Court has frequently declined to incorporate other statutory provisions, though they are part of the statutory context of a cross-referenced provision, into narrow cross-references. See, *e.g.*, *Azar* v. *Allina Health Servs.*, 587 U.S. 566, 576–577 (2019) ("Congress's choice to include a cross-reference to one but not the other of the APA's neighboring exemptions

strongly suggests it acted intentionally and purposefully in the disparate decisions."); *Sebelius* v. *Cloer*, 569 U.S. 369, 377 (2013) ("[T]here is no cross-reference to the Act's limitations provision in its fees provision, § 300aa–15(e), or the other section it references, § 300aa–11(a)(1)."); *Hui* v. *Castaneda*, 559 U.S. 799, 809 (2010) ("As petitioners observe, that provision refers only to '[t]he remedy against the United States provided by sections 1346(b) and 2672.' § 233(a) . . . Thus, only those portions of chapter 171 that establish the FTCA remedy are incorporated by § 233(a)'s reference to § 1346."). As this Court did in those cases, the Court of Appeals applied the plain language of Section 1432(b)(1)(A) to conclude that Section 1081 was not incorporated, even if it was a limitation on Section 1085(b)(6).

The cases relied on by PBGC—which it did not cite in any of its briefs to the Second Circuit—either involved materially different statutes or are entirely consistent with the Court of Appeals' approach. In *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93, 102–103 (2012) the three "interlocking" statutory provisions were in the same statutory section, and all applied to the same benefit program. Here by contrast, Section 1081 is not part of the section or "part" that includes the SFA statute or even in the same section as Section 1085(b)(6).

United States Department of Energy v. *Ohio*, 503 U.S. 607, 618 (1992), *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 73–74 (2000), and *United States Venture, Inc.* v. *United States*, 2 F.4th 1034, 1041–1042 (7th Cir. 2021), each involved the application of

statutory definitions to terms used in the cross-reference. The Court of Appeals did just that here. It analyzed all of the statutory definitions referenced in Section 1085(b)(6) including the definition of insolvency contained in Section 1426. Section 1081(c) is not a statutory definition. It neither defines "critical and declining status" nor any of the terms relevant to the definition of "critical and declining status" in Section 1085(b)(6).

PBGC's "no vehicles in the park" hypothetical also does not undermine the Court of Appeals' opinion. In that hypo, "Section 1 of an ordinance provides that 'no vehicles (within the meaning of Section 2) are allowed in the park'; Section 2 defines 'vehicle' as any wheeled means of transport; and Section 3 states that Section 2 does not apply to bicycles." Pet. 14. That hypothetical bears no resemblance to the statutory scheme here. Unlike the provisions in the ordinance that are all part of the same ordinance, Section 1432(b)(1)(A) and Section 1085(b)(6) are part of distinct statutory schemes. And unlike Section 3 of the hypothetical ordinance, which plainly concerns the meaning of Section 2, Section 1081(c) does not describe what it means to be in "critical and declining status" under Section 1085(b)(6).

A more accurate hypothetical would be a statute providing tax benefits to "owners of vehicles (within the meaning of Section 1 of the Park Ordinance)," with the cross reference being to an ordinance with three sections: Section 1 provides that "no vehicles (as defined in Section 2) are allowed in the park"; Section 2 defines vehicle as "any wheeled means of transport"; and Section 3 says "the requirements of this ordinance

only apply to bicycles until they are over a year old." Reading the limitation of Park Ordinance's application contained in Section 3 into the tax benefit statute's cross reference would be wrong because that section does not say what is "within the meaning of" Section 2. Similarly, the Court of Appeals was correct to reject reading Section 1081(c)'s delineation of the scope of that part of ERISA into Section 1432(b)(1)(A)'s cross reference.

C. The Court of Appeals' Decision Does Not Create Anomalies with Other SFA Provisions.

Finally, PBGC argues that the Court of Appeals' interpretation should be rejected because it creates anomalies with other SFA provisions. PBGC is wrong.

First, PBGC contends that because "29 U.S.C. 1432(e) . . . requires a plan to establish its eligibility for SFA and the amount of SFA to be paid using the same actuarial assumptions that the plan used in a prior certification of zone status" and because "the zone-status rules and the requirement to annually certify zone status first took effect" in 2008, that the Court of Appeals' ruling "render[s] Section 1432(e) . . . inoperative for those plans." Pet. 18. But nothing in the Court of Appeals' opinion deals with whether a plan terminated prior to 2008 is eligible for SFA under Section 1432(b)(1)(A) or otherwise. The Fund undisputedly was terminated in 2016 and has zone status certifications. The Court of Appeals simply held that the Fund's prior termination did not make it ineligible to receive SFA. This further demonstrates why this case is not a good vehicle for review because the issue

whether a pre-2008 terminated multiemployer fund could be eligible for SFA is not presented.

Second, the Court of Appeals opinion does not, contrary to PBGC (Pet. 18), "nullif[y] part of Section 1432(b)(1)(D)." Recall that this provision provides that a "plan is eligible for SFA if it 'became insolvent for purposes of section 418E of title 26 after December 16, 2014, and has remained so insolvent and has not been terminated as of March 11, 2021.'" PBGC argues that such plans would already be eligible under Section 1432(b)(1)(A) because an insolvent plan "is necessarily" also a plan in "critical and declining" status. But "this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Here, a plan that was in critical and declining status in the 2020 and 2021 plan years but never insolvent could qualify, under Section 1432(b)(1)(A) but that same plan would not qualify under Section 1432(b)(1)(D).

Put differently, under the Court of Appeals' interpretation, these separate SFA requirements still serve validly different purposes, even if the plans that qualify under one or the other may overlap in part. And, as discussed above, Section 1432(b)(1)(D)'s explicit reference to "termination," which is not found in Section 1432(b)(1)(A), is further support for the Court of Appeal's conclusion.

Finally, contrary to the PBGC's assertion, the fact that the tandem IRS provision to Section 1432(b)(1)(A), 26 U.S.C. 432(k), excludes the specific cross-reference to Section 1085(b)(6) *supports* the Court of Appeals interpretation. The only conceivable

basis for incorporating Section 1081(c) into Section 1432(b)(1)(A) is that Section 1085(b)(6) is in the "part" referenced in Section 1081(c). It makes even less sense to incorporate Section 1081(c) into a general reference to "critical and declining status" when Section 1081(c) says nothing about what it means for a plan to be in critical and declining status.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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