No. 13-1280

IN THE

Supreme Court of the United States

THOMAS G. DAVIS, *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

Office of the Chief Counsel
ISRAEL GOLDOWITZ
Chief Counsel
CHARLES L. FINKE
Deputy Chief Counsel
JAMES J. ARMBRUSTER
PAULA J. CONNELLY
GARTH D. WILSON
JOSEPH M. KRETTEK
Asst. Chief Counsels

Office of the Gen. Counsel
JUDITH R. STARR
General Counsel
Counsel of Record
PHILIP R. HERTZ
Deputy General Counsel
KENNETH J. COOPER
Asst. General Counsel
KIMBERLY J. DUPLECHAIN
Attorney

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W. Washington, D.C. 20005
(202) 326-4400, ext. 3083
E-mail: starr.judith@pbgc.gov

June 2, 2014

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The petition presents no questions meriting review by this Court. If the Court were to grant the petition, however, the questions should be restated as follows:

When an underfunded pension plan terminates, the Employee Retirement Income Security Act of 1974 ("ERISA") requires the assets of the plan to be allocated to participants' benefits in a certain order. In particular, 29 U.S.C. § 1344(a) establishes six priority categories. The provision at issue here, 29 U.S.C. § 1344(a)(3), excludes from the third priority category any benefit increase based on provisions of the plan that were "in effect" less than five years before the plan terminated. A regulation of Respondent Pension Benefit Guaranty Corporation ("PBGC") interprets section 1344(a)(3) to mean that a benefit increase is "in effect" no earlier than the date that it is first "payable" to retirees under the plan provisions.

1. Was the court of appeals correct in holding that PBGC's regulation was entitled to deference and was a reasonable construction of the statute?

2. Was the court of appeals correct in upholding PBGC's determinations that declined to give priority to certain benefit increases because they were not payable more than five years before the plan terminated?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent PBGC opposes certiorari. Petitioners Thomas G. Davis *et al*. (the "Pilots") ask this Court to review the sole court of appeals decision interpreting a highly technical provision of ERISA. The provision at issue, part of 29 U.S.C. § 1344(a)(3), addresses when benefit increases are "in effect" for purposes of allocating assets in a terminated pension plan. A PBGC regulation interprets that provision to mean that a benefit increase is "in effect" no earlier than the date it is first "payable" to retirees under the plan provisions. PBGC applied its regulation here. The court of appeals affirmed PBGC's interpretation and its application. The petition should be denied because the Pilots do not show any conflict in the circuits or any important question of federal law that this Court should settle. And a "flawed" construction by a court of appeals, without more, provides no basis for certiorari; even if it did, there was no such flaw below.

OPINIONS BELOW

The court of appeals filed its opinion on November 1, 2013. Shortly thereafter the court revised its opinion to correct an error in an important date.[1] The corrected opinion is reported at 734 F.3d 1161 (D.C. Cir. 2013).

---

[1] The last sentence of the only full paragraph on page 9a of the Petitioners' Appendix ("Pet. App.") should read as follows: "Those who elected to receive the benefit could not

STATEMENT OF THE CASE

A. Statutory and Factual Background

This case involves the pension benefits owed to a group of about 1,700 mostly retired US Airways pilots under the federal pension insurance program administered by PBGC under Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (2012). The Pilots were participants in an underfunded pension plan sponsored by US Airways (the "Plan") that terminated in 2003 during the company's bankruptcy. PBGC is the U.S. Government corporation that ensures that employees and their beneficiaries 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). PBGC, as it has for virtually every one of the 4,500 underfunded plans terminated since 1974, stepped in to become trustee of the Plan, as expressly authorized by 29 U.S.C. § 1342(b)(1) (PBGC "may request that it be appointed as trustee of a plan in any case"). PBGC has been paying retirement benefits ever since.

Title IV provides that PBGC guarantees "nonforfeitable benefits" under a terminated pension plan regardless of the level of the terminated plan's assets, but subject to certain statutory limits. 29 U.S.C. § 1322(a). One of those limits places a

---

receive it before May 1, *1998*, less than five years prior to the Plan's date of termination." (Emphasis added.)

ceiling on the amount PBGC guarantees. *See* 29 U.S.C. § 1322(b)(3); 29 C.F.R. §§ 4022.22, 4022.23.

In some cases, PBGC pays a participant more than the guaranteed amount, depending on the level of the plan's assets and whether the participant's benefit has priority in the statutory allocation scheme. Title IV provides that the assets of a terminated plan are allocated, in order, to six "priority categories" of benefits. 29 U.S.C. § 1344(a). If the assets are sufficient to provide all benefits in priority category 1 ("PC1"), then the remaining assets are allocated to benefits in priority category 2 ("PC2"), and so on until the assets are exhausted. *Id.* In the category in which they are exhausted, the assets are generally allocated pro rata among all benefits in that category. *See* 29 U.S.C. § 1344(b)(2); 29 C.F.R. § 4044.10(e); *see generally Mead Corp. v. Tilley*, 490 U.S. 714, 717-18 (1989).

Section 1344(a) accords highest priority to benefits attributable to a participant's own contributions to the plan. 29 U.S.C. § 1344(a)(1)-(2). Next highest priority – and the one relevant here because there were no significant benefits in PC1 or PC2 – is for benefits in priority category 3 ("PC3"). These are benefits of participants who retired, or could have retired, more than three years before the pension plan terminated. 29 U.S.C. § 1344(a)(3). But – and this is the provision at issue here – a participant's benefit in PC3 is limited to the "least" benefit under the plan provisions "in effect" during the five-year period ending on the plan's termination date. *Id.*

After PC3, the next priority category ("PC4") is for benefits guaranteed by PBGC. *See* 29 U.S.C. § 1344(a)(4). Finally, the two lowest priorities are for benefits not guaranteed by PBGC. *See* 29 U.S.C. § 1344(a)(5)-(6).

Benefits are included in PC3 regardless of whether they are guaranteed. Thus, a participant with a large benefit that exceeds the guarantee cap might receive more than the guaranteed amount if all (or a large part) of his or her benefit is in PC3 and the plan had enough assets to fund all (or a high percentage) of PC3 benefits. But the greater the amount of benefits included in PC3, the less likely it is that there will be enough assets to cover them all. If the assets do not cover all PC3 benefits, participants receive only a percentage of their PC3 benefits. For example, if assets cover only 80% of PC3 benefits, participants receive only 80% of their PC3 benefits. *See* 29 U.S.C. § 1344(b)(2); 29 C.F.R. § 4044.10(e). Therefore, including a particular benefit in PC3 is not necessarily advantageous to all participants; it can create winners and losers.

At termination, the Plan was greatly underfunded. PBGC became responsible for paying benefits of $1.74 billion (in present value). *See* District Court docket #52 at AR 1209, No. 08-01064 (D.D.C. Apr. 27, 2010) (PBGC's determination of "Title IV benefits"). This amount included all guaranteed benefits plus nonguaranteed benefits in PC3. *See* 29 C.F.R. § 4001.2 (defining "Title IV benefits"). In contrast, the Plan had assets of only $1.19 billion. District Court docket #52 at AR 1209, 1221. That was barely enough to cover the $1.15 billion of benefits that PBGC determined were in PC3. *Id.* at AR 1222. Thus, Plan assets covered all PC3 benefits, and the remainder of about $40 million was allocated to guaranteed benefits in PC4. That $40 million of assets thus reduced PBGC's obligation for guaranteed benefits by $40 million. But because of the overall shortfall between assets and liabilities, PBGC will pay approximately half a billion dollars (in present value) of its insurance funds to cover the remaining guaranteed benefits. *Id.* at AR 1221.

B. Procedural History

PBGC provided "initial determinations" to the Pilots of their benefit entitlements under Title IV. See 29 C.F.R. § 4003.21. Each Pilot's benefit included the guaranteed benefit plus any nonguaranteed benefits in PC3. The Pilots filed a group appeal to PBGC's Appeals Board, asserting a number of errors. Joint Appendix ("JA") 490-638, No. 12-5274 (D.C. Cir. Feb. 6, 2013). The Appeals Board rejected most of the Pilots' claims, JA 271-312, but increased some benefits based on an error discovered by the Board that the Pilots had not asserted, JA 293-96, 316-22.

The Pilots then sued in district court. They argued that PBGC had made benefit determinations in its capacity as statutory trustee of the terminated Plan rather than as federal guarantor, and therefore PBGC's determinations were not entitled to deference. District Court docket #71 at 11-12 (Pilots' Mem. in supp. of mot. for summ. j.). The district court rejected the Pilots' arguments, holding that PBGC was entitled to deferential review under

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), and the Administrative Procedure Act. Pet. App. 33a-35a. The district court granted summary judgment to PBGC on all claims (except one, later dismissed voluntarily by the Pilots).

On appeal, the Pilots reiterated their argument that PBGC's determinations were not entitled to deference because PBGC allegedly was acting as trustee. *See* Corrected Brief of Appellants at 12-23, No. 12-5274 (D.C. Cir. Feb. 21, 2013). The D.C. Circuit found it unnecessary to resolve that issue, holding that PBGC's interpretations of the statute and regulations should be upheld "[r]egardless of the standard of deference." Pet. App. 8a-9a.

On Claim One (the claim in the Pilots' first question presented), the Pilots challenged PBGC's interpretation of the "least benefit" rule in 29 U.S.C. § 1344(a)(3). That provision states that a participant's benefit in PC3 is limited to the benefit "based on the provisions of the plan (as in effect during the 5-year period ending on [the plan's termination] date) under which such benefit would be the least." *Id.*

The D.C. Circuit held that it must defer to PBGC's interpretation of this provision, as it was set forth in a duly promulgated agency regulation: "[T]here is no question that the court defers to the regulation's interpretation of the statute because the regulation was issued in the PBGC's role as an agency (and not as a fiduciary)." Pet. App. 10a-11a (citing *PBGC v. LTV Corp.*, 496 U.S. at 648).

That regulation, the court found, is dispositive of when the benefit increase was "in effect" under

29 U.S.C. § 1344(a)(3). The regulation provides that a participant's benefit in PC3 is limited to "the lowest annuity benefit payable under the plan provisions at any time during the 5-year period ending on the termination date." Pet. App. 10a (quoting 29 C.F.R. § 4044.13(b)(3)(i)). The five-year period in this case ran from April 1, 1998, to March 31, 2003, the latter being the Plan termination date. It is undisputed that the increase the Pilots sought to include in PC3 (enhanced benefits under a US Airways Early Retirement Incentive Program) was not payable until May 1, 1998. PBGC's Appeals Board thus found – and the court of appeals agreed – that the lowest annuity benefit "payable under the plan provisions at any time during the 5-year period" was the benefit payable in April 1998, the first month of that period. Pet. App. 9a-10a. Because the benefit payable in April 1998 was the benefit without the early retirement increase, the early retirement increase could not be included in PC3. *Id.*

On Claim Two (the claim in the Pilots' second question presented), the D.C. Circuit found that "PBGC's analysis tracks the statute." Pet. App. 13a. Claim Two involved cost-of-living adjustments ("COLAs") to the Pilots' Plan benefits. The Plan's COLA provisions increased the Pilots' benefits whenever the maximum benefit payable under a tax-qualified pension plan under 26 U.S.C. § 415(b) increased. Like Claim One, Claim Two asserted that PBGC should have included these increases in PC3. But the court of appeals found that the same PBGC "lowest annuity" regulation that controlled Claim One, 29 C.F.R. § 4044.13(b)(3)(i), also controlled

Claim Two. As the court explained, "Because the COLAs were not 'payable' until after the five-year period began, a lesser annuity benefit was payable during that time period, and it is that lesser benefit that should be included in priority category three." Pet. App. 13a. Thus, the court concluded, PBGC's is "the better interpretation of the statute." *Id.*

The court of appeals rejected the Pilots' petition for panel rehearing or rehearing en banc. Pet. App. 76a-77a. This petition followed.

REASONS FOR DENYING THE PETITION

I. There is no conflict among the circuits.

On their first question presented, the Pilots effectively concede that the D.C. Circuit's decision does not directly conflict with the decision of any other circuit; they argue only that it conflicts with other court rulings "in analogous situations." Pet. at 24. But those situations plainly are not analogous.

The Pilots point to *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), and *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013), two cases they did not mention in the court of appeals (except in their petition for rehearing). *See* Corrected Brief of Appellants, No. 12-5274 (D.C. Cir. Feb. 21, 2013); Appellants' Reply Brief, No. 12-5274 (D.C. Cir. Apr. 22, 2013). *Boehner* and *Beer* are inapposite. Although each involves when certain pay increases take effect, they do so in the context of unique statutory and constitutional provisions. *Boehner* interprets a provision in the Twenty-Seventh Amendment that no law varying the compensation of members of Congress "shall take effect" until after an election of Representatives. *Beer* construes a provision in the Compensation Clause, U.S. Const. art. III, § 1, that compensation for federal judges "shall not be diminished during their Continuance in Office." Those holdings shed no light on the statutory and regulatory issues in this case and certainly do not conflict with the court of appeals' decision here. Indeed, the Federal Circuit in *Beer* emphasized that its holding was limited to the "unique context" of the statute in question, the Ethics Reform Act of 1989. *See* 696 F.3d at 1177, 1181-85.[2]

As to their second question presented, the Pilots assert that the decision here conflicts with *In re Braniff Airways, Inc.*, 729 F.2d 315 (5th Cir. 1984). This assertion is meritless. As with *Boehner* and *Beer*, the Pilots never cited *Braniff* in the court of appeals (except in their rehearing petition). *Braniff* is a one-sentence per curiam ruling that affirmed "based upon the memorandum opinion and

[2] The Pilots also contend that this Court should not require a split in the circuits, because under Title IV's venue provision, 29 U.S.C. § 1303(f)(1)-(2), challenges to PBGC's determinations are likely to occur in the District of Columbia. Pet. at 24. They argue that this Court therefore should approach whether to grant review based on the "importance of the questions presented" or on whether the D.C. Circuit "departs from its own . . . precedents." *Id.* But the only D.C. Circuit case the Pilots cite for alleged inconsistency is *Boehner*, 30 F.3d 156, which as explained above addressed completely different provisions of law. And, as explained in the next section, the petition presents no important questions.

order" of the district court in *McDonald v. Braniff Airways, Inc.*, 37 B.R. 922 (N.D. Tex. 1983). In any event, the Pilots' argument relies on a misreading of the district court's decision in *Braniff*.

Although *Braniff* addressed a PBGC regulation involved in this case, its holding was based entirely on a portion of that regulation that was *not* at issue here. The regulation was 29 C.F.R. § 2618.13(b)(5) (1982), currently codified at 29 C.F.R. § 4044.13(b)(5). That regulation ameliorates, for certain "automatic benefit increases," the otherwise-applicable PC3 five-year "lowest annuity" rule. *See* Brief of Appellee at 40-42, No. 12-5274 (D.C. Cir. Apr. 8, 2013); *see also* Pet. App. 12a. The regulation includes in PC3 automatic increases (such as COLAs) previously scheduled to go into effect during the fourth or fifth year before termination – *provided* that they are given to retirees as well as active participants. 29 C.F.R. § 4044.13(b)(5).

The *Braniff* case turned on that last proviso – that the increases must be given to retirees as well as active participants. In *Braniff*, the court assumed that the benefit increases were automatic increases within the meaning of the regulation, but held that the regulation did not apply (and thus the increases were not in PC3) because the increases were given to some, but not all, retirees. *See* 37 B.R. at 925. By contrast, under the Plan, the COLAs were given to both retirees and active participants, and – unlike in *Braniff* – participants received the benefit of the ameliorative rule in 29 C.F.R. § 4044.13(b)(5). *See* Pet. App. 12a. Accordingly, *Braniff* presents no conflict.

The Pilots also argue that there is a "developing conflict" among the circuits that is "implicated" in this case on "how to treat, for purposes of judicial review, the PBGC's actions in the plan-termination context – whether as fiduciary acts, generic agency action, or some third paradigm." Pet. at 26. But this case presents no such "developing conflict." Although the Pilots argued below that PBGC was not entitled to deference because it allegedly was acting as a trustee (not a federal agency) when it made determinations under 29 U.S.C. § 1344(a)(3), the court of appeals expressly declined to rule on that issue. It held: "[T]he court need not resolve the parties' contentions regarding whether the PBGC is entitled to deference pursuant to *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), when it acts as the trustee in an involuntary retirement plan termination." Pet. App. 8a. The court's reason for not resolving the issue was that, "[r]egardless of the standard of deference, the Pilots' claims relating to the PBGC's interpretation of the statute and regulations must fail." Pet. App. 8a-9a. They fail because PBGC's is "the better interpretation" of the statute and regulatory scheme. Pet. App. 10a, 13a.

Thus, not only do the Pilots fail to identify any conflict, they ask the Court to address a question not ruled on below. As this Court has repeatedly declared, "Ordinarily, 'we do not decide in the first instance issues not decided below.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)); *accord Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 260 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007). There is no reason to depart from that practice here.[3]

II. The petition presents no important question of federal law that should be settled by this Court.

The Pilots ask the Court to address what they term the "doctrinally significant issue" of the proper standard of review for PBGC's actions as trustee of a terminated pension plan. Pet. at 18. But, as explained above, the court of appeals expressly found it unnecessary to address that issue. *See* Pet. App. 8a. Instead, the court limited itself to the unremarkable holdings that (1) the court must defer to PBGC's statutory interpretation because it was set forth in a regulation "issued in the PBGC's role as an agency," and (2) under a straightforward reading of that regulation, PBGC's determinations of when the benefit increases were "in effect" were the better interpretations. Pet. App. 9a-13a. Thus,

---

[3] Like the Pilots' brief, the amicus briefs of the Delta Pilots' Pension Preservation Organization ("Delta Pilots") and of the Coalition of Airline Pilots Associations and US Airline Pilots Association ("CAPA/USAPA") largely argue that this Court should grant certiorari to decide the standard of review applicable when PBGC acts (as the Pilots assert it did here) as trustee of a terminated plan. But as explained above, the court of appeals explicitly declined to rule on that issue. The Delta Pilots acknowledge this, but attempt to get around it by arguing that the court of appeals "implicitly deferred" to PBGC. Delta Pilots' Brief at 18. There is no basis for this bald assertion.

there is *no* issue – important or otherwise – relating to PBGC's role as trustee for this Court to review.[4]

The Pilots also assert that when the benefit increases in Claims One and Two became "in effect" under 29 U.S.C. § 1344(a)(3) presents important questions that this Court ought to resolve. *See* Pet. at 16-23, 31. Although the questions may be important to some individual Pilots, they are fact-bound determinations presenting no issue of major significance to the Title IV insurance program, let alone to the nation as a whole. The Pilots' first question presented boils down to whether the early retirement increase under their Plan was in effect a little more than five years before the Plan's termination date (as the Pilots assert) or a little less than five years before termination (as PBGC determined). Whenever the law draws a bright line, disputes may arise over which side of the line a

---

[4] Two amici suggest that PBGC has an institutional conflict of interest that makes this case worthy of review. Delta Pilots' Brief at 12; CAPA/USAPA Brief at 3. This conflict of interest, they assert, arises from PBGC's dual role as trustee and guarantor of terminated plans. *Id.* Again, the court of appeals did not address that issue. Moreover, PBGC's dual role is inherent in the statutory structure, as this Court recognized in *PBGC v. LTV Corp.*, 496 U.S. at 637-38. Notwithstanding any potential conflict of interest, this Court deferred to PBGC's statutory interpretation. *Id.* at 647-52. In addition, although ERISA provides that a Title IV trustee is a fiduciary, it qualifies those obligations. It states that the trustee is a fiduciary "[e]xcept to the extent that the provisions of [Title IV] are inconsistent with the requirements" under ERISA's fiduciary provisions. 29 U.S.C. § 1342(d)(3).

given event falls. Such run-of-the-mill applications of law to facts do not merit a grant of certiorari.

Indeed, PBGC's straightforward resolution of the PC3 issues raises no significant questions for this Court. PBGC's regulation provides that the test for whether a benefit increase was in effect more than five years before termination is whether it was "payable under the plan provisions" before the five-year mark. 29 C.F.R. § 4044.13(b)(3)(i). The court of appeals held that PBGC's regulation was a reasonable interpretation of the statute. *See* Pet. App. 10a-11a. Applying that regulation to Claim One, the court concluded that PBGC correctly excluded the early retirement benefit from PC3, because the benefit indisputably could not be paid more than five years before the March 31, 2003 Plan termination date. Pet. App. 9a-11a. Similarly, on Claim Two the court held that the "lowest annuity" rule in 29 U.S.C. § 1344(a)(3) and 29 C.F.R. § 4044.13(b)(3)(i) "favors the PBGC's view because the COLAs were not payable throughout the five-year period prior to Plan termination." Pet. App. 13a.

III. A "flawed" court of appeals decision presents no grounds for certiorari.

The Pilots also argue that this Court should grant review because the D.C. Circuit's decision is "seriously flawed." Pet. at 27. But it is well established that "error correction . . . is outside the mainstream of the Court's functions and, generally speaking, not among the 'compelling reasons'

(Rule 10) that govern the grant of certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013); *accord Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Alito, J., concurring) ("Unlike the courts of appeals, we are not a court of error correction, and thus I do not disagree with the Court's refusal to review the singular policy at issue here."); *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) ("error correction is a disfavored basis for granting review, particularly in noncapital cases").

In any event, the Pilots are wrong about the supposed "flaws" they cite. First, the Pilots assert that the court upheld PBGC's decision based on a rationale the Appeals Board "never invoked" – that the benefit increases failed the test in 29 C.F.R. § 4044.13(b)(3)(i) because they were not "payable" more than five years before termination. Pet. at 28. According to the Pilots, the Board never invoked that regulation to interpret "in effect," nor did it use the words "paid" or "payable" in "the entire section" of its decision on this issue. *Id.* But the Pilots cite only a two-page excerpt, JA 279-80, of the eight pages that the Board devoted to this issue, JA 276-83. The Board discussed that regulation in detail and assuredly did rely on the "payable" language. *See* JA 281-82 (29 C.F.R. § 4044.13(b)(3) "implement[s] the language in [29 U.S.C. § 1344(a)(3)] that the PC3 benefit is the 'least' benefit payable under the 5-year-old plan provisions").

Second, the Pilots assert that the "paid-or-payable standard" makes 29 U.S.C. § 1344(a)(3) "internally inconsistent." Pet. at 29-30. This is so, they assert, because it would result in *no* PC3 benefit for a hypothetical participant who could have retired more than three years before plan termination (but did not), even though that participant clearly should receive a PC3 benefit under section 1344(a)(3)(B). *Id.*

This argument misconstrues PBGC's regulatory scheme, under which determining PC3 benefits is a two-step process. In the first step, PBGC determines whether the participant is *eligible* for a PC3 benefit, based on whether the participant retired, or could have retired, more than three years before plan termination. 29 C.F.R. § 4044.13(b)(1). Eligibility for a PC3 benefit is "determined using the plan provisions in effect on the day before the beginning of the *3-year period* [ending on the termination date]." 29 C.F.R. § 4044.13(b)(1)(ii) (emphasis added). The five-year "lowest annuity" rule, which the Pilots cite out of context, applies only in the second step, to determine the *amount* of the PC3 benefit. *See* 29 C.F.R. § 4044.13(b)(2), (b)(3). It excludes from PC3 any benefit *increase* that first became payable less than five years before termination.

The Pilots' hypothetical assumes an age-60-retirement provision both adopted and effective more than five years before termination, and a participant who turned age 60 between three and five years before termination. Contrary to the Pilots' argument, under PBGC's two-step rule, the hypothetical participant definitely would receive a PC3 benefit, because the participant was eligible to retire more than three years before termination. But the participant's PC3 benefit would not include any increase in the amount of the benefit from any plan amendment that went into effect less than five years before termination.[5]

---

[5] Amicus Air Line Pilots Association ("ALPA") makes no attempt to explain why the petition is worthy of this Court's review. It argues only that PBGC's interpretation of the five-year lookback in 29 U.S.C. § 1344(a)(3) is "erroneous" and that the court of appeals was wrong to uphold it. ALPA Brief at 5, 15. But as explained above, error correction is not a basis for certiorari. This is especially true where, as here, the argument advanced by the amicus was not presented to the courts below.

In any event, no error occurred. According to ALPA (brief at 8-11), a 2006 statute shows that PBGC's interpretation of "in effect" in 29 U.S.C. § 1344(a)(3) is contrary to congressional intent. But the 2006 statute amended a different provision, 29 U.S.C. § 1322, which governs PBGC's guarantee, not the determination of PC3 benefits. Section 1322, unlike section 1344(a)(3), does not contain any "least" benefit language. *See* 29 U.S.C. § 1322(b)(1), (7). Moreover, by enacting the 2006 amendment, Congress largely obviated the need to interpret the term "in effect" in section 1322(b)(1) and (b)(7) for a certain kind of benefit by specifying the precise date from which the guarantee would be measured. The amendment, which added paragraph (b)(8) to section 1322, specifies that the guarantee of an "unpredictable contingent event benefit" is to be measured by reference to the date the unpredictable event – such as a plant shutdown – "occurred." *See* 29 U.S.C. § 1322(b)(8) (added by the Pension Protection Act of 2006, § 403(a), Pub. L. No. 109-280, 120 Stat. 780, 928). The 2006 amendment in no way demonstrates error in PBGC's longstanding interpretation, which the amendment did not purport to change or override. *See* 46 Fed. Reg. 9480, 9489 (Jan. 28, 1981) (substantially the same as PBGC's existing PC3 regulation).

IV. The Pilots' misleading accusations about PBGC provide no basis for review.

The Pilots' petition brims with baseless accusations that PBGC sought to become trustee of the Pilots' Plan and other plans so that it could minimize payments to retirees and use the money thereby saved for its own purposes. For example, the petition alleges that PBGC "caus[ed] large sums to revert to itself rather than be distributed to Petitioners." Pet. at i; *see also id.* at 3 (PBGC's "regular 'trusteeing' of plans . . . serves both to expand the PBGC's operations and to allow the PBGC to accumulate funds for its perceived upcoming needs"); *id.* at 22 ("of prime importance, the Pilots' loss was the PBGC's gain"). The Pilots cite nothing in the record to support the rash allegation that Plan assets disappeared into PBGC's pockets. To the contrary, PBGC used all Plan assets to provide benefits to participants and their beneficiaries (as it does in all underfunded plans for which it becomes trustee). Because the Plan was greatly underfunded at termination, PBGC had to use a half billion dollars of insurance funds (provided by PBGC premium payers) to pay the guaranteed benefits not covered by the Plan assets.

These attacks underscore the weakness of the Pilots' petition. PBGC is responsible for paying benefits in more than 4,500 underfunded plans that have terminated in the past 40 years. *See* PBGC 2013 Annual Report at 28, *available at* http://www.pbgc.gov/documents/2013-annual-report.pdf.

PBGC steps in when an employer is unable to fund its plan due to bankruptcy or financial distress. *See* 29 U.S.C. §§ 1341(c)(2)(B), 1342(a), (c). The Pilots' characterization of PBGC's "principal business" as trusteeing plans and "investing those assets to the agency's benefit" (Pet. at 3) ignores PBGC's true "business": paying statutory pension benefits to participants who otherwise might receive none. *See* 29 U.S.C. §§ 1302(a)(2), 1322(a). As this Court noted more than 30 years ago, PBGC's insurance program ameliorates the "'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (citation omitted). Moreover, if PBGC were regularly making "hundreds of millions of dollars" in profits from taking over underfunded pension plans, as the Pilots assert (Pet. at 4), PBGC would not have a $35.6 billion deficit. *See* PBGC 2013 Annual Report at 26.

Finally, preferring to spin a story about a rogue agency, the Pilots largely ignore the inconvenient fact that including a benefit in PC3 is not necessarily advantageous to all participants. The interpretations the Pilots seek may help some participants at the expense of others. As explained above (*supra* p. 4), the greater the amount of benefits included in PC3, the less likely it is that there will be enough assets to cover them all. If the assets do not cover all PC3 benefits, participants receive only a percentage of their PC3 benefits. Here, the Plan's assets exceeded the PC3 liabilities by $40 million. District Court docket #52 at AR 1222, No. 08-01064 (D.D.C. April 27, 2010). If PBGC had included an additional, say, $300 million of benefits in PC3, the assets would have provided only 82% of PC3 benefits.[6]

The Pilots try to overcome this flaw in their narrative by suggesting that if PBGC improperly excluded benefits from PC3, it would have to pay those benefits from its insurance funds. *See* Pet. at 22. This is simply incorrect. If additional benefits were included in PC3 so that Plan assets did not cover all of them, the assets would be allocated among all PC3 benefits pro rata. *See* 29 U.S.C. § 1344(b)(2); 29 C.F.R. § 4044.10(e). As they have done throughout this litigation, the Pilots refuse to acknowledge this reality. Instead, they make unsupported accusations that provide no basis for review.

---

[6] PBGC determined that PC3 liabilities were about $1,150,000,000 and Plan assets about $1,190,000,000. *See supra* pp. 4-5. Adding $300,000,000 to the liabilities would have increased them to $1,450,000,000, and $1,190,000,000 divided by $1,450,000,000 equals 82%.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ISRAEL GOLDOWITZ
Chief Counsel
CHARLES L. FINKE
Deputy Chief Counsel
JAMES J. ARMBRUSTER
PAULA J. CONNELLY
GARTH D. WILSON
JOSEPH M. KRETTEK
Asst. Chief Counsels

JUDITH R. STARR
General Counsel
Counsel of Record
PHILIP R. HERTZ
Deputy Gen. Counsel
KENNETH J. COOPER
Asst. General Counsel
KIMBERLY J. DUPLECHAIN
Attorney

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W. Washington, D.C. 20005
(202) 326-4400, ext. 3083

June 2, 2014

APPENDIX

The Appendix to the petition includes the text of 29 U.S.C. § 1344, the principal statutory provision at issue in this case, so it is not reprinted here.

29 C.F.R. § 4044.13

§ 4044.13 Priority category 3 benefits.

(a) Definition. The benefits in priority category 3 are those annuity benefits that were in pay status before the beginning of the 3–year period ending on the termination date, and those annuity benefits that could have been in pay status (then or as of the next payment date under the plan's rules for starting benefit payments) for participants who, before the beginning of the 3–year period ending on the termination date, had reached their Earliest PBGC Retirement Date (as determined under § 4022.10 of this chapter) based on plan provisions in effect on the day before the beginning of the 3–year period ending on the termination date. For example, in a plan with a termination date of September 1, 2012, the benefits in priority category 3 are those annuity benefits that were in pay status on or before September 1, 2009, and those annuity benefits that could have been in pay status for participants who, on or before September 1, 2009, had reached their Earliest PBGC Retirement Date based on plan provisions in effect on September 1, 2009. Benefit increases, as defined in § 4022.2, that were in effect throughout the 5–year period ending on the termination date, including automatic benefit increases during that period to the extent provided in paragraph (b)(5) of this section, shall be included in determining the priority category 3 benefit. For example, in a plan with a termination date of September 1, 2012, a benefit increase that was in effect throughout the 5–year period from September 2, 2007, to September 1, 2012, is included in priority category 3. Benefits are primarily basic-type benefits, although nonbasic-type benefits will be included if any portion of a participant's priority category 3 benefit is not guaranteeable under the provisions of subpart A of part 4022 and § 4022.21 of this chapter.

(b) Assigning benefits. The annuity benefit that is assigned to priority category 3 with respect to each participant is the lowest annuity that was paid or payable under the rules in paragraphs (b)(2) through (b)(6) of this section.

(1) Eligibility of participants and beneficiaries. A participant or beneficiary is eligible for a priority category 3 benefit if either of the following applies:

(i) The participant's (or beneficiary's) benefit was in pay status before the beginning of the 3–year period ending on the termination date.

(ii) Before the beginning of the 3–year period ending on the termination date, the participant was eligible for an annuity benefit that could have been in pay status and had reached his or her Earliest PBGC Retirement Date (as determined in § 4022.10 of this chapter, based on plan provisions in effect on the day before the beginning of the 3–year period ending on the termination date). Whether a participant was eligible to receive an annuity before the beginning of the 3–year period shall be determined using the plan provisions in effect on the day before the beginning of the 3–year period.

(iii) If a participant described in either of the preceding two paragraphs died during the 3–year period ending on the date of the plan termination and his or her beneficiary is entitled to an annuity, the beneficiary is eligible for a priority category 3 benefit.

(2) Plan provisions governing determination of benefit. In determining the amount of the priority category 3 annuity with respect to a participant, the plan administrator shall use the participant's age, service, actual or expected retirement age, and other relevant facts as of the following dates:

(i) Except as provided in paragraph (b)(3), for a participant or beneficiary whose benefit was in pay status before the beginning of the 3–year period ending on the termination date, the priority category 3 benefit shall be determined according to plan provisions in effect on the date the benefit commenced. The form of annuity elected by a retiree is considered the normal form of annuity for that participant.

(ii) Except as provided in paragraph (b)(3), for a participant who was eligible to receive an annuity before the beginning of the 3–year period ending on the termination date but whose benefit was not in pay status, the priority category 3 benefit and the normal form of annuity shall be determined according to plan provisions in effect on the day before the beginning of the 3–year period ending on the termination date as if the benefit had commenced at that time.

(3) General benefit limitations. The general benefit limitation is determined as follows:

(i) If a participant's benefit was in pay status before the beginning of the 3–year period, the benefit assigned to priority category 3 with respect to that participant is limited to the lesser of the lowest annuity benefit in pay status during the 3–year period ending on the termination date and the lowest annuity benefit payable under the plan provisions at any time during the 5–year period ending on the termination date.

(ii) Unless a benefit was in pay status before the beginning of the 3–year period ending on the termination date, the benefit assigned to priority category 3 with respect to a participant is limited to the lowest annuity benefit payable under the plan provisions, including any reduction for early retirement, at any time during the 5–year period ending on the termination date. If the annuity form of benefit under a formula that appears to produce the lowest benefit differs from the normal annuity form for the participant under paragraph (b)(2)(ii) of this section, the benefits shall be compared after the differing form is converted to the normal annuity form, using plan factors. In the absence of plan factors, the factors in subpart B of part 4022 of this chapter shall be used.

(iii) For purposes of this paragraph, if a terminating plan has been in effect less than five years on the termination date, computed in accordance with paragraph (b)(6) of this section, the lowest annuity benefit under the plan during the 5–year period ending on the termination date is zero. If the plan is a successor to a previously established defined benefit plan within the meaning of section 4021(a) of ERISA, the time it has been in effect will include the time the predecessor plan was in effect.

(4) Determination of beneficiary's benefit. If a beneficiary is eligible for a priority category 3 benefit because of the death of a participant during the 3–year period ending on the termination date, the benefit assigned to priority category 3 for the beneficiary shall be determined as if the participant had died the day before the 3–year period began.

(5) Automatic benefit increases. If plan

provisions adopted and effective on or before the first day of the 5–year period ending on the termination date provided for automatic increases in the benefit formula for both active participants and those in pay status or for participants in pay status only, the lowest annuity benefit payable during the 5–year period ending on the termination date determined under paragraph (b)(3) of this section includes the automatic increases scheduled during the fourth and fifth years preceding termination, subject to the restriction that benefit increases for active participants in excess of the increases for retirees shall not be taken into account.

(6) Computation of time periods. For purposes of this section, a plan or amendment is “in effect” on the later of the date on which it is adopted or the date it becomes effective.

(c) PPA 2006 bankruptcy termination. In a PPA 2006 bankruptcy termination:

(1) For purposes of this paragraph (c), “applicable pre-termination period” means the period--

(i) Beginning on the first day of the 5–year period ending on the bankruptcy filing date; and

(ii) Ending on the termination date. For example, if the bankruptcy filing date is January 15, 2008, and the termination date is March 22, 2009, the applicable pre-termination period is the period beginning on January 16, 2003, and ending on March 22, 2009.

(2) “Applicable pre-termination period” is substituted for “5–year period ending on the termination date” each place that “5–year period ending on the termination date” appears in paragraphs (a) and (b) of this section.

(3) Except as provided in paragraph (a)(2) of this section, “bankruptcy filing date” is substituted for “termination date” and “date of the plan termination” each place that “termination date” and “date of the plan termination” appear in paragraphs (a) and (b) of this section. In paragraph (b)(5) of this section, “the bankruptcy filing date” is substituted for “termination” in the phrase “during the fourth and fifth years preceding termination.”

(4) Example: A plan provides for normal retirement at age 65 and has only one early retirement benefit: a subsidized early retirement benefit for participants who terminate employment on or after age 60 with 20 years of service. These plan provisions have been unchanged since 1990. The contributing sponsor of the plan files a bankruptcy petition in June 2008, and the plan terminates during the bankruptcy with a termination date in

September 2010. A participant retired in July 2007, at which time he was age 60 and had 20 years of service, and began receiving the subsidized early retirement benefit. The participant has no benefit in priority category 3, because he was not eligible to retire three or more years before the June 2008 bankruptcy filing date.