No. 09-356

IN THE

Supreme Court of the United States

THOMAS A. PAULSEN, *et al.*,

Petitioners,

v.

CNF INC., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

GARY S. TELL
(*Counsel of Record*)
JONATHAN D. HACKER
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondents Stephen D. Richards, James R. Tener, Robert E. Wrightson, and The Administrative Committee of the Consolidated Freightways Corporation Pension Plan

QUESTION PRESENTED

The question properly presented is:

Whether the court of appeals correctly applied the settled precedent of this Court to hold that petitioners lack Article III standing where, under the Employee Retirement Income Security Act and established regulations interpreting that Act, the redress they seek would redound to the benefit of only the Pension Benefit Guaranty Corporation and not to petitioners.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

ADMINSTRATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page(s)

SUPREME COURT RULE

OTHER AUTHORITY

INTRODUCTION

Petitioners in this case seek relief no court can provide. Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the assets in petitioners' now-terminated pension plan are subject to the exclusive control of the Pension Benefit Guaranty Corporation ("PBGC"). And as the PBGC has long construed ERISA and the PBGC's own regulations governing the treatment of terminated plan assets under its control, such assets are conclusively valued (including estimating the value of contingent litigation claims) and allocated *as of the date of plan termination*. Any post-termination increase or decrease in the value of the assets (including any realization on contingent claims, whether higher or lower than estimated) is solely credited to or suffered by the PBGC, consistent with its role as public insurer of the nation's private pension system. Outside an administrative claims process conducted by the PBGC—which petitioners here have never invoked—the PBGC does not revalue or reallocate terminated plan assets based on changes in value after the date of plan termination.

What that means for petitioners' claims is this: no matter what the trial court rules in respect to respondents' conduct before termination, any recovery will be credited solely to the PBGC, which is under no statutory or regulatory obligation to transfer the recovery to petitioners and which cannot be compelled by the court to do so. There is thus no form of judicial relief that can by its terms redress petitioners' injury. And because petitioners assert an injury that cannot be redressed by judicial action, petitioners fail to satisfy one of the three irreducible minimum criteria required to establish standing to sue under Article III of the U.S. Constitution.

The foregoing analysis—reflected fully in the Ninth Circuit's decision—is a straightforward application of settled standing principles to a statutory and regulatory framework interpreted and applied consistently by the PBGC for more than 30 years. Petitioners' case for review of the decision below reduces to two basic propositions: (1) the PBGC has misconstrued its authority over the former assets of a terminated plan, and (2) the decision below conflicts with a single decision of another court of appeals.

The first argument is a non-starter: the PBGC has consistently maintained the position it asserts here for more than 30 years, and petitioners do nothing to suggest it is an unreasonable construction of the relevant ERISA provisions.

Nor does the Fourth Circuit decision cited by petitioners justify review. Even on petitioners' account the asserted conflict is as shallow as can be. And it evaporates almost to nothingness upon closer inspection. The PBGC did not participate in the Fourth Circuit case, perhaps leading the court in that case to overlook the basic statutory provision defining the PBGC's authority over the former assets of terminated plans. When presented with the PBGC's position asserted in this case, the court is very likely to defer to that position and thereby reconsider its earlier precedent. And if it does not, this Court can review the decision at that time. There is certainly no reason for this Court to intercede now, rather than allow the Fourth Circuit—and other courts—to digest the PBGC's position that former assets of a plan terminated under the circumstances of this case are subject to the exclusive authority of the PBGC, and that a court cannot compel the PBGC to employ any recovery concerning those assets for the benefit of private plaintiffs.

Certiorari should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. The PBGC is a government-owned corporation responsible for enforcing and administering Title IV of ERISA. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636-37 (1990). The PBGC manages an insurance program for "defined benefit" pension plans sponsored by private employers. *Id.* at 637 & n.1. One of Congress's purposes in enacting ERISA was to ensure that employees would not be "deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). Title IV of ERISA guards against that risk by authorizing the PBGC to assume control of plans in financial distress, terminate those plans, calculate the value of assets and liabilities in those plans, and, in the case of a shortfall, contribute its own funds to pay certain "guaranteed" benefits to participants. *LTV*, 496 U.S. at 638; *see* ERISA §§ 4001(a)(8), 4022, 4044(a), 29 U.S.C. §§ 1301(a)(8), 1322, 1344(a). The program and the shortfall contributions made by the PBGC are funded primarily through mandatory insurance premiums paid by employers. *LTV*, 496 U.S. at 638.

2. The PBGC has adopted a detailed series of regulations interpreting its responsibilities under ERISA and providing procedures for handling the assets of a terminated plan. First, the PBGC must "determin[e] the value of benefits and assets" of the plan, a process that is necessary both "to determine the amount of any plan asset insufficiency" and "to allocate plan assets" as required by statute. 29 C.F.R. § 4044.1(b); *see* 29 U.S.C. § 1344(a). To accomplish this "valuation," the PBGC determines the value of a plan assets based on their fair market value as of a specific "valuation date," which is usually the same date as plan termination. 29 C.F.R. §§ 4044.2(b), 4044.41(b). Included within that valuation is an estimate of the recovery (if any) the PBGC believes it will obtain by pursuing litigation against the plan's fiduciaries for any fiduciary breach. *See infra* at pp.6-7.

After the PBGC's valuation calculations are complete, the PBGC adds the assets from the defunct plan into a pool composed of assets from other terminated plans, as contemplated by ERISA § 4042(a), 29 U.S.C. § 1342(a). Then, based on the plan's estimated value as of the valuation date, the PBGC uses specified mortality assumptions to calculate the benefits to which plan participants are owed and begins making payments according to a priority scheme set forth in ERISA § 4044(a). *See* 29 C.F.R. § 4044.52. That provision establishes a "six-tier allocation scheme" that requires the PBGC to pay the nonforfeitable benefits guaranteed by the PBGC before it provides any other benefits that might be available under a plan. *Mead Corp. v. Tilley*, 490

U.S. 714, 717-18 (1989); *see* 29 U.S.C. § 1344(a)(1)-(6).

Once the PBGC's benefits calculation is complete, the PBGC does not "re-value" plan assets, or recalculate benefits, as of any later date. *See* 29 C.F.R. § 4044.3(b) ("[A]ssets shall be allocated as of the termination date."). Instead, as ERISA requires, "[a]ny increase or decrease in the value of the assets . . . occurring after the date on which the plan is terminated [is] credited to, or suffered by, the [PBGC]." ERISA § 4044(c); 29 U.S.C. § 1344(c).

3. As the PBGC has explained, the system of valuation and allocation provided for in ERISA and the PBGC's regulations is essential to the swift and orderly distribution of participants' benefits. *See* PBGC C.A. En Banc Br. 9 (filed June 4, 2009). Because most assets fluctuate in value after they are added to the PBGC's pool, the process of tracing specific assets to their original plans and revisiting the valuation of those plans and distribution of those benefits would be extremely cumbersome. Additionally, the PBGC's valuation rules are necessary to ensure the stability of benefit determinations on which plan participants rely. If the PBGC were to recalculate benefits every time a plan asset changed in value, participants who depend on fixed pension income in retirement would be vulnerable to unexpected benefit cuts. *See id.*

To provide a concrete example, if a plan terminates while holding real property, the PBGC estimates the fair market value of the property only once, as of the valuation date. *See* 29 C.F.R. §§ 4044.2(b), 4044.41(b). It uses that estimate as the "value" of the property in determining the plan's available assets, calculating the amount of benefits owed, and applying the priority scheme in ERISA § 4044(a). Tr. of Oral Argument, *Paulsen v. CNF, Inc.*, 2008 WL 4193395 (9th Cir. Aug. 11, 2008) (counsel for the PBGC) ("PBGC Oral Arg. Tr."). The PBGC then pools that property asset with the assets of other plans. If a subsequent sale reveals, years later, that the property was actually worth less than the PBGC estimated, plan participants do not suffer any decrease in their benefits. Instead, the decrease in value is "suffered by" the PBGC. ERISA § 4044(c), 29 U.S.C. § 1344(c). Likewise, if a sale reveals that the property was worth more than the PBGC estimated, no plan participant stands to gain. Any increase is "credited to" the PBGC, pooled with other funds, and used to pay guaranteed benefits for all plans and to enforce and administer Title IV of the Act.

Critically for this case, pending claims in litigation—such as claims for breach of fiduciary duty—are governed by the same valuation procedures. PBGC Oral Arg. Tr. When a plan is terminated, the PBGC as a matter of course estimates the market value of pending and potential claims the plan possesses based on the merits of the allegations, the likelihood of success, and the prospects of recovery. PBGC Dist. Ct. Br. 6-7 (filed Aug. 8, 2006); PGBC Dist. Ct. Br. 6-7 (filed Aug. 22, 2006). The PBGC then assigns the claims a dollar value as of the valuation date and uses that figure in determining available plan assets and calculating benefits. PBGC Oral Arg. Tr. ("In order to make statutory framework work, we have to value [potential litigation recoveries] at that time."). If the case proceeds to judgment and the PBGC recovers *less* than the amount it had estimated, plan participants do not suffer any cut in benefits—the PBGC suffers the loss itself. Likewise, if the case proceeds to judgment and the PBGC recovers *more* than the amount it had estimated, plan participants do not accrue any gain—the PBGC adds the unexpected extra recovery to its pooled assets for use in protecting other plans and plan participants against losses in guaranteed benefits. Again, as Congress has provided, "[a]ny increase or decrease in the value of the assets . . . occurring after the date on which the plan is terminated [is] credited to, or suffered by, the [PBGC]." ERISA § 4044(c); 29 U.S.C. § 1344(c).

B. Factual Background

Petitioners are a small group of officers, managers, and other highly-compensated employees that used to work at CNF Inc. ("CNF"), a supply chain management company. *See* 4th Am. Compl. ¶¶ 6-11 (Oct. 28, 2005). In 1996, CNF spun off its subsidiary, Consolidated Freightways Corporation ("CFC"). Pet. App. 3. As part of the spinoff, CNF transferred CFC employees' pension liabilities to a new CFC Pension Plan (the "CFC Plan" or "the Plan"). *Id.* at 3a-4a. CNF engaged the services of Towers, Perrin, Forster & Crosby, Inc. ("Towers Perrin") to value the liabilities transferred to the CFC Plan and certify compliance with 29 U.S.C. § 1058. Pet. App. 3-4. That statute requires certification that "each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled" before the change. 29 U.S.C. § 1058.

CFC enjoyed significant financial successes in the years immediately following the spinoff, but the company eventually encountered financial difficulties. In September 2002, CFC filed petitions for bankruptcy protection. Pet. App. 9. At that time, the Plan was underfunded by $216 million. *Id.* at 4a. The PBGC stepped in and terminated the Plan in a "distress termination," *see* ERISA § 4041(c), 29 U.S.C. § 1341(c), effective March 2003. *See* Pet. App. 9.

C. Proceedings Below

1. Petitioners sued the Administrative Committee of the Plan and its members, CNF, and CNG Service Company (the respondents) for breach of fiduciary duty under ERISA § 502(a), 29 U.S.C. § 1132(a). Petitioners alleged that respondents had breached their fiduciary duties to the Plan, causing it to become underfunded and leading to its insolvency and termination. Pet. App. 11-12. Petitioners received *the full benefits guaranteed by the PBGC under Title IV*, but they did not receive the "non-guaranteed" benefits to which they were otherwise entitled under the terms of the Plan. *See* Pet. 10-11. Petitioners' complaint sought compensation for the Plan, a constructive trust for the benefit of petitioners, and other ostensibly equitable monetary relief. Compl., Prayer for Relief, at 25-28 (Aug. 28, 2003).

2. In June 2003, after petitioners' initial complaint was filed, the PBGC exercised its authority under Title IV and became trustee of the Plan, taking control of its assets. The PBGC thus assumed

responsibility for the benefits payable to Plan participants, and it accordingly estimated the amounts payable under the insurance program and began making the guaranteed payments as required by ERISA and the PBGC's regulations.

As part of this process, the PBGC reviewed the Plan's history, transactions, and fiduciary management, as well as the allegations in petitioners' complaint, and decided not to pursue any claim for breach of fiduciary duty against the defendants. PBGC Dist. Ct. Br. 7 (filed Aug. 8, 2006); PBGC Dist. Ct. Br. 7 (Aug. 22, 2006).

3. Petitioners subsequently filed first, second, and third amended complaints that alleged state-law claims of professional negligence against Towers Perrin. Pet. App. 14-17. They then filed a fourth amended complaint adding an ERISA claim against the PBGC for breach of fiduciary duty in failing to bring suit against the other defendants. *Id.* at 17a. After a series of partial dismissals, the district court dismissed all claims against all defendants and entered final judgment on January 31, 2007. *See id.* at 14-18, 59.

4. The court of appeals affirmed, concluding that petitioners lack Article III standing because they "cannot demonstrate that it is 'likely,' as opposed to merely 'speculative,' that any injury to the CFC Plan participants will be 'redressed by a favorable decision' on their [ERISA] claims" against respondents. Pet. App. 22 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As the court of appeals explained, petitioners cannot directly obtain any relief on their fiduciary-breach claims, because under

this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140-42 (1985), any recovery for a breach of fiduciary duty "inures to the benefit of the plan as a whole," and not to an individual beneficiary. Pet. App. 22. Because the terminated CFC Plan "does not exist post-termination, or only exists as one of many terminated plans pooled under the auspices of PBGC," any recovery on petitioners' claims could go neither to petitioners nor the Plan but "must go to PBGC." *Id.* at 23a.

Nor, the court of appeals explained, could petitioners obtain any relief *indirectly*. The "PBGC pays reduced benefits to plan participants under the complex priority scheme" set forth in ERISA § 4044(a) in an amount that, pursuant to PBGC regulations, "is determined as of the date of termination." *Id.* (citing 29 C.F.R. §§ 4044.3(b), 4044.41(b)). "Any increase or decrease in the value of the assets of a single-employer plan occurring after th[at] date . . . shall," pursuant to ERISA's explicit demand, "be credited to, or suffered by, the [PBGC]," ERISA § 4044(c); 29 U.S.C. § 1344(c). Thus, because petitioners' "post-termination recovery would be paid to PBGC, and PBGC is under no obligation to pay any of [petitioners] any money above the statutory minimum" that they had already been awarded as of the termination date, petitioners "have no stake in the recovery and cannot satisfy the redressability requirement of constitutional standing." Pet. App. 23. In so holding, the court of appeals relied on previous decisions in which it had concluded that "there is no redressability, and thus no standing," where "any prospective benefits depends on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* at 24a (internal quotation marks omitted).

The court of appeals also noted the Fourth Circuit's decision in *Wilmington Shipping Co. v. New England Life Insurance Co.*, 496 F.3d 326 (4th Cir. 2007). Pet. App. 25. In that case, the Fourth Circuit suggested that the PBGC, "acting as trustee," is required to "pay all plan benefits, if possible, in accordance with the statutory order of priorities"—including benefits that become payable only as result of post-termination litigation. *Wilmington Shipping*, 496 F.3d at 336 (citing 29 U.S.C. §§ 1342(d)(1)(A)(ii), 1344). Only later, the Fourth Circuit suggested, "does the PBGC as guarantor 'chip in' from ERISA's funds to cover the . . . unpaid guaranteed benefits." *Id.* (emphasis omitted).

As the court of appeals below explained in declining to follow the approach applied in *Wilmington Shipping*, "the authorities cited by the Fourth Circuit—29 U.S.C. §§ 1342(d)(1)(A)(ii) and 1344—do not compel or direct" the PBGC to make any payment to plan participants that is based on a lawsuit recovery occurring after the PBGC's plan valuation and benefit determinations become final. Pet. App. 26-27. On the contrary, ERISA § 4042(a) provides the PBGC with the authority "to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and other such purposes as it determines to be appropriate." *Id.* at 27a (quoting 29 U.S.C. § 1342(a)). Requiring the PBGC to use subsequent litigation proceeds "pay all non-guaranteed benefits to plan participants in a distress terminated plan would contradict the superior power to pool and dispense assets" that is "given to PBGC in" ERISA § 4042. *Id.* Thus, the court of appeals concluded, "the district court correctly dismissed Employees' ERISA-based claims." Pet. App. 32.

REASONS FOR DENYING THE PETITION

The decision below relies on the PBGC's long-standing interpretation of ERISA and settled principles of agency deference to hold, consistent with this Court's standing jurisprudence, that petitioners lack standing because they cannot demonstrate that a favorable decision would be "likely" to result in redress of their asserted injuries. That decision is correct and does not warrant this Court's review. Petitioners lack Article III standing for the reasons articulated by the court of appeals and also because (1) the PBGC initially was not, and is no longer, a party to this case; and (2) petitioners have not alleged facts establishing that recovery resulting in an increase in the value of plan assets would result in an increase in their benefits, which are non-guaranteed and thus the among the lowest on ERISA's allocation priority scheme.

The Fourth Circuit's decision in *Wilmington Shipping*, which petitioners assert is in conflict with the court of appeals' decision in this case, likewise provides no basis for review. *Wilmington Shipping* involved different regulations and facts than are at issue in this case. Furthermore, the court's decision in *Wilmington Shipping* was issued without any input from the PBGC. The Fourth Circuit may well reconsider its decision in *Wilmington Shipping* on the basis of the considered position articulated by the agency tasked with interpreting Title IV of ERISA. Any review by this Court before the Fourth Circuit has the opportunity to consider those views would be premature.

I. NO CLARIFICATION OF THE COURT'S STANDING PRECEDENT IS NECESSARY

Petitioners argue that this Court should grant the petition in order to "clarify . . . how likely relief must be for a plaintiff to demonstrate [the] redressability" required by Article III. Pet. 17. There is, however, nothing to clarify. The court of appeals properly recognized (Pet. App. 20) that, to satisfy the "irreducible constitutional minimum" of Article III, a plaintiff must adequately establish: (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). There is no question that redressability prong of that mandate requires a plaintiff to demonstrate that it is "likely"—that is, more plausible than not—that a successful lawsuit will redress the plaintiff's injury. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (plaintiff lacks standing where successful lawsuit might redress injury, but it is "just as plausible" that it would not); Pet. 17 (redress must be "likely").

1. In this case, the court of appeals correctly determined that petitioners' lawsuit was not likely to redress their alleged injury. As explained *supra*, at pp. 4-7, under PBGC regulations "the amount of funds available for distribution" to plan participants

"is determined as of the date of termination" of the plan, and any "post-termination increase or decrease in the CFC Plan's assets [must] be credited or suffered by PBGC." Pet. App. 23 (citing ERISA § 4044(c)). As the PBGC explained to the district court below, therefore, there is "no avenue by which further recoveries for the [Plan] in this action . . . could accrue to the benefit of the CFC Plan participants"—those recoveries will go only to the PBGC. PBGC Dist. Ct. Br. 9 (filed Aug. 22, 2006). In short, the redress petitioners seek is at best wholly indirect. And it is exceedingly unlikely, depending as it does upon the PBGC deviating from its standard operating procedures, revaluing the terminated plan's assets, and reallocating the increase in value to plan participants. The judicial power is not available to plaintiffs pursuing such tenuous objectives. *See Simon*, 426 U.S. at 43.

Petitioners nonetheless argue that the court of appeals' decision is in conflict with this Court's precedent because the court of appeals observed that it had no way to "compel" the PBGC "necessarily" to pass along any recovery to plaintiffs. Pet. App. 24. Petitioners contend that the court of appeals thus incorrectly required them to demonstrate a certainty, rather than a "likelihood," that the lawsuit would redress their injury. Pet. 17-19. That assertion is meritless. The court of appeals explicitly invoked and applied *Lujan*'s standard that redress be "'likely,' as opposed to merely 'speculative.'" Pet. App. 17 (quoting *Lujan*, 504 U.S. at 506). And the statements challenged by petitioners simply reflect the context of the case: when predicting the choices of an independent actor like the PBGC, the fact that the law does not "compel" payments to plaintiffs (thereby making those payments "necessary") makes predicting the agency's action an entirely speculative enterprise.

This Court relied on similar reasoning in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), where it concluded that plaintiffs lacked standing because the relief they sought would not redound to their benefit as a "result [of] *automatic* operation of a statutory formula." *Id.* at 350 (emphasis added). In *DaimlerChrysler*, as in this case, any redress depended on the "hypothesis that [a third party would] *choose* to direct the supposed revenue from the" suit as the plaintiffs wished. *Id.* (emphasis added). That hypothesis, the Court explained, is "precisely the sort of conjecture [a court] may not entertain in assessing standing." *Id.* (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (opinion of Kennedy, J.)).

2. Petitioners also lack standing to pursue their claims because the PBGC was not initially, and is not now, a party to petitioners' suit. *See* Pet. App. 13-14, 57-58; Pet. 11 (only claims pending are those against Towers Perrin; petitioners have not challenged decision dismissing claims against the PBGC). A district court can "accord relief only against" "parties to the case." *Lujan*, 504 U.S. at 568-69 (opinion of Scalia, J.); *see Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Thus, even if petitioners were correct in arguing that the PBGC's regulations are unlawful, and ERISA requires it to direct any recovery from their suit to their Plan (which they are not, *see infra* pp. 18-24), the PBGC is not a party to the suit against respondents, and accordingly "there

is no reason [it] should be obliged to honor an incidental legal determination the suit produced" with respect to its regulations in the context of a standing inquiry. *Lujan*, 504 U.S at 570 (opinion of Scalia, J.). "The short of the matter is that redress of the only injury in fact respondents complain of requires action . . . by the [PBGC]; and any relief . . . [that could be] provided in this suit against [respondents] [i]s not likely to produce that action," even "[a]ssuming that it [would be] appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry." *Id.* at 570-71 (opinion of Scalia, J.).

3. Even if the PBGC were party to this suit, and even if the PBGC were required to employ any recovery for the benefit of former plan participants, petitioners still would lack standing because they do not and cannot allege facts establishing that such recovery would be likely to flow down to petitioners, who are at the very bottom of the priority scheme for allocating the assets of a terminated plan. Indeed, petitioners openly concede that, even if they were to prevail and the PBGC were to recalculate plan benefits based upon recovery from this litigation, their own benefits still might not increase, because the recovery could be enough only to "make PBGC whole" for losses it has already incurred in paying guaranteed benefits in accordance with the priority scheme, but not enough "to allow PBGC to pay additional non-guaranteed benefits"—the only benefits petitioners claim. Pet. 18 & n.10.

Petitioners suggest this is not a problem because the fact that they "may not succeed or may not succeed fully on their claims is not a basis to deny constitutional standing." *Id.* Petitioners miss the point. The question is not whether they may succeed fully on their claims; it is whether, assuming they do, they are likely to obtain any *personal* benefit from their success. "The doctrine of standing . . . . requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quotation marks omitted). And petitioners, "as the parties now asserting federal jurisdiction," must "carry the burden of establishing their standing under Article III." *DaimlerChrysler*, 547 U.S. at 342. They must satisfy that burden "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In this case, petitioners have failed to allege "sufficient factual matter" to make "plausible," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), that their claims seeking recovery for the Plan will result in any increase in their own benefits, after the PBGC is made whole, and after other participants with higher priorities receive their additional recoveries.

II. THE COURT OF APPEALS' DECISION IS CORRECT

Petitioners also contend that this Court "should take certiorari to correct the errors" they assert the court of appeals made. Pet. 20. That claim lacks merit. This Court does not sit to correct errors. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); Eugene Gressman *et al.*, *Supreme Court Practice* 239 (9th ed. 2007) ("The Court does not sit simply to correct . . . errors."); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals."). And even assuming it did, there is no error in this case to correct.

1. Petitioners' central claim is that, upon a distress termination, the PBGC holds all plan assets "as trustee" and thus is obligated to administer the plan—including any recovery obtained post-termination—solely in the interest of participants. *See* Pet. 29-34. That duty, petitioners argue, requires the PBGC to recalculate their benefits under § 4044(a) based on any recovery obtained from this litigation. Petitioners are wrong.

It is true that, at a plan's termination, the PBGC initially *receives* the plan's assets as trustee, *see* ERISA § 4042(d)(1)(A)(ii), 29 U.S.C. § 1342(d)(1)(A)(ii), and that the PBGC must then allocate those assets among participants and beneficiaries pursuant to the priority scheme in ERISA § 4044(a). As the PBGC's regulations provide, however, the PBGC fully discharges those duties when it assumes the responsibility for a plan and sets a benefit schedule by valuing those assets and assigning them *as of the termination date*. 29 C.F.R. §§ 4044.3(b), 4044.41(b). And the only ERISA provision that specifically addresses post-termination changes in asset value in these particular circumstances specifically provides that any increase or decrease in funds post-termination "shall be credited to, or suffered by, the corporation." ERISA § 4044(c), 29 U.S.C. § 1344(c).

The PBGC's regulations and procedures interpreting Title IV are entitled to deference so long as they are reasonable. *See LTV*, 496 U.S. at 648; *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). The PBGC's valuation policies easily satisfy that standard. Valuing assets once at termination and crediting all subsequent changes to the PBGC relieves it of the burden of continuously tracing and revaluing assets. Any other approach would make administering the thousands of plans for which the PBGC is trustee and guarantor virtually impossible. *See* PBGC C.A. En Banc Br. 9; *Pension Benefit Guaranty Corporation Annual Management Report* at 97 (Fiscal Year 2009), *available at* http://www.pbgc.gov/docs/2009amr.pdf. It would also put individuals' set pensions at risk should recalculation prove that the PBGC overestimated the assets in a plan. PBGC C.A. En Banc Br. 9.

2. Petitioners nonetheless argue that the PBGC's implementation of its regulatory scheme should be rejected for several reasons. As an initial matter, petitioners failed to make several of these arguments against the PBGC's interpretation of the statute before the panel below, which would put this Court in the inappropriate position of being the first judicial authority to pass upon them. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "a court of review, not of first view").

In any event, none of petitioners' arguments is persuasive. Petitioners first argue that recovery obtained in a post-termination lawsuit for a pre-termination breach should not be considered "a post-termination increase in the value of Plan assets" and thus should not be attributable to the PBGC. Pet. 26-27. The PBGC, however, has already determined to the contrary, *see supra* at pp. 4-7, and petitioners point to nothing in the text of ERISA or the PBGC's regulations interpreting the Act that demands a different conclusion. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force."); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

Next, petitioners challenge the PBGC's reliance on the second sentence of ERISA § 4044(c), the key language providing that "[a]ny increase or decrease in the value of the assets . . . occurring after the date on which the plan is terminated [is] credited to, or suffered by, the [PBGC]." 29 U.S.C. § 1344(c). Petitioners argue in essence that the PBGC is legally required to ignore that sentence, because it can be read as "contradicting" the first sentence of the provision, which they read as "providing for post-termination increases in plan assets to be shared between the plan and PBGC," rather than credited solely to the PBGC, as the second sentence states unambiguously. Pet. 27.[1] But petitioners' proposed solution to the claimed contradiction—to disregard § 4044(c) entirely, or simply to declare that the first sentence is controlling—is obviously unacceptable, because it ignores the mandate to "give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).[2]

What is more, the PBGC itself does not read the provisions as contradicting each other. Rather, for more than 30 years, the PBGC has construed the first sentence of § 4044(c) "in light of other relevant portions of Title IV and the policies underlying that portion of the Act" as establishing a structure for dealing with the assets of "sufficient" plans, where a trustee had been appointed before the plan was terminated. PBGC Opinion Letter 75-30, at *1-2 (Nov.

---

[1] ERISA § 4044(c), 29 U.S.C. § 1344(c), provides in full:

> Any increase or decrease in the value of the assets of a single-employer plan occurring during the period beginning on the later of (1) the date a trustee is appointed under section 1342(b) of this title or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

[2] Additionally, it is unclear how the first sentence would assist petitioners, since it calls for an allocation "as agreed upon by the corporation and the plan administrator"—contemplating discretion and compromise—rather than requiring an allocation that maximizes the payment of benefits to plan participants, as petitioners' claims would require.

13, 1975), *available at* http://www.pbgc.gov/oplet/75-30.pdf ("PBGC Op. Ltr. 75-30").[3] The PBGC construes the second sentence, by contrast, as addressed to the handling of assets of "insufficient" plans, where the plan ordinarily is *first* terminated, and a trustee (typically the PBGC itself) is later appointed solely to dispose of assets as they were valued at the date of termination. *See* PBGC Op. Ltr. 75-30, at *2 (concluding that, "[w]here an insufficient plan is terminated, any increases or decreases in the value of the assets of the plan occurring after the date on which the plan is terminated should be credited to, or suffered by, the Corporation").[4] Petitioners pro-

---

[3] The language of the first sentence supports the PBGC's interpretation because it contemplates two potential valuation dates—first, the date a trustee was appointed, and second, the later date on which the plan was ultimately terminated. 29 U.S.C. § 1344(c).

[4] Petitioners assert that the PBGC "has taken different positions as to [§ 4044(c)'s] meaning in different courts," citing the decision in *Pension Benefit Guaranty Corp. v. Beadle*, 685 F. Supp. 628 (E.D. Mich. 1988). Pet. 27. Petitioners are mistaken. In that case, the court considered whether an at-fault plan administrator or the PBGC would suffer losses caused by a breach of fiduciary duty "after the date of termination and before the appointment of the PBGC as trustee" in the unusual situation in which the PBGC was appointed trustee and the plan was terminated retroactively years after the plan employer directed termination, because the Plan Administrative Agent failed to file the Notice to Terminate as the employer instructed. *Id.* at 630, 632. The district court in *Beadle* rejected the defendant Agent's attempt to escape liability for its failure by arguing that *it* could not be held liable for any post-termination injury because the PBGC must suffer the loss. *Id.* at 632.

vide no basis for rejecting that reasonable interpretation of the statute.[5]

Petitioners also argue that the PBGC's interpretation of the relevant statutes and regulations is inconsistent with 29 U.S.C. § 1305(b)(1)(C), which governs credits issued by the PBGC when the assets of a plan exceed its liabilities. Pet. 31. As the PBGC has explained, however, § 1305 "governs the uses of PBGC's statutory Revolving Funds (which are derived mainly from statutory premiums and earnings thereon), and is unrelated to the separate PBGC fund authorized by section 1342(a) to pool the assets of terminated plans." PBGC C.A. En Banc Br. 12 n.5. Section 1305 thus has no bearing on the validity of the regulations at issue here.

Lastly, petitioners err in suggesting that no provision of Title IV of ERISA can affect the PBGC's duties to administer assets as a trustee under Title I, and thus the PBGC is legally required to use any recovery from this suit to benefit petitioners. *See* Pet. 33-34. To the contrary, ERISA § 4042(d)(3) *abrogates* the PBGC's duties as a trustee "to the extent

[5] Petitioners cite three cases in which they claim (Pet. 28-29) that three other courts have rejected the PBGC's longstanding interpretation of § 4044(c). Petitioners' failure to cite any of these cases in the merits briefs below merely confirms their inapplicability to this case. As explained above, *Beadle* addressed an unusual situation in which the question was whether the PBGC or a negligent plan administrator would be liable for certain losses. The other cases upon which petitioners rely are similarly inapplicable; they address the question of prejudgment interest, not the "plan assets" described in § 4044. *See Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 515 & n.7 (2d Cir. 1994); *Pension Benefit Guaranty Corp. v. Solmsen*, 743 F. Supp. 125, 128 (E.D.N.Y. 1990).

[those duties are] inconsistent with the provisions of this chapter." 29 U.S.C. § 1342(d)(3). And "the provisions of this chapter" expressly authorize the PBGC to pool the assets of a terminated plan to use for the benefit "of all such terminated plans" and for whatever "other purposes as [the PBGC] considers appropriate," "[n]otwithstanding any other provision of this subchapter." ERISA § 4042(a), 29 U.S.C. § 1342(a). As petitioners themselves concede, the PBGC's statutory power "to commingle the assets of plans it trustees" makes the PBGC "[u]nlike a traditional trustee." Pet. 8. And as the Ninth Circuit recognized, the PBGC's "superior power" to pool assets for the benefit of all plans and for whatever other purpose the PBGC deems appropriate necessarily trumps the traditional trustee duties that would otherwise obtain. Pet. App. 27.

III. THE DECISION IN *WILMINGTON SHIPPING* PROVIDES NO BASIS FOR REVIEW

1. Petitioners further assert that review is warranted because the Fourth Circuit in *Wilmington Shipping* disagreed with the court of appeals below over whether "participants lack constitutional standing to bring breach of fiduciary duty claims when a plan is under PBGC trusteeship." Pet. 15. But *Wilmington Shipping* provides no sound basis for review. Although petitioners assert that *Wilmington Shipping* "cannot be distinguished" from the decision below (Pet. 16), they overlook three material differences between the cases.

First, the plaintiffs in each case sought different remedies. In *Wilmington Shipping*, the plaintiff sought a "lump-sum payment" specifically authorized by his plan, and the court concluded that there was no PBGC regulation or procedure specifically governing such a payment. 496 F.3d at 337. Hence, as petitioners explain, the *Wilmington Shipping* court addressed "the right to elect to receive their benefits in the form of a lump sum rather than a monthly payment." Pet. 13. It was that "right," "the Fourth Circuit held, [that] might be restored by the PBGC if the plan became fully funded as a result of the participants' suit." *Id.* Here, by contrast, petitioners seek *increases* in their continuing benefit payments. As explained above, the PBGC's regulations and procedures specifically address that form of relief and make clear that the agency will not recalculate petitioners' benefits upon any recovery in this suit. *See supra* at pp. 4-7.

Second, the PBGC did not participate in *Wilmington Shipping*, as it did below. The Fourth Circuit therefore did not have the benefit of the PBGC's explanation of its regulations and procedures before it. *See* PBGC C.A. Br. 18 n.8 (filed Aug. 17, 2007). Because the task of the court is to predict the "likely" response of an independent actor, *see Lujan*, 504 U.S. at 560, the PBGC's representations to the court of appeals about its intended actions make this case materially different from *Wilmington Shipping*.

Third, and perhaps because the PBGC was not involved, the court in *Wilmington Shipping* apparently misunderstood how the PBGC interprets and applies the relevant regulations and ERISA provisions. The Fourth Circuit's decision did not discuss the second sentence of ERISA § 4044(c), the provision long construed by the PBGC as explicitly governing changes in asset value following the termination of an insufficient plan. *See supra* at pp. 20-22. The court also ignored PBGC regulations providing that assets are valued as of the date of termination. *See supra* at pp. 4-5.

The court of appeals' decision in this case, by contrast, recognizes the controlling force of those provisions, *see* Pet. App. 23, 25, and respects the administrative apparatus the PBGC has created to allow plan participants to challenge asset valuation decisions and to seek recalculation of benefits. ERISA § 4003(f), 29 U.S.C. § 1303(f); 29 C.F.R. §§ 4003.31-61. If petitioners believe that the PBGC's regulations and process in this case contravene ERISA, an administrative action would allow them to press that claim and seek judicial review. PBGC C.A. Br. 23-24. The Fourth Circuit, albeit perhaps by oversight, allowed participants to circumvent that process and proceed directly to federal court. The panel here correctly declined to make the same mistake. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (because ERISA is a "comprehensive and reticulated statute," courts should be "especially reluctant to tamper with [the] enforcement scheme embodied in the statute") (quotation marks omitted).

2. In any event, review of any alleged conflict would be premature at this time. At most, two courts of appeals have considered the question presented in this case, and only one has done so with the benefit of the PBGC's guidance on the issue. Gressman *et al.*, *supra*, at 246 (noting "policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question") (quotation omitted). Petitioners failed to raise

several of the arguments they currently press against the PBGC's interpretation of ERISA and its own regulations before the panel in the court of appeals, which therefore had no occasion to consider them. The issue accordingly would benefit from percolation in the lower courts. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., respecting denial of the petitions for certiorari) (explaining the benefits of "further study" in lower courts).

Furthermore, any conflict created by the decision below could be eliminated if the Fourth Circuit were to reconsider its decision in *Wilmington Shipping*. The decision of the court of appeals in this case furnishes a reason for the Fourth Circuit to do just that. And the interpretation of ERISA proffered by the PBGC itself provides an even more powerful reason for the Fourth Circuit to reconsider its analysis. The Fourth Circuit lacked that crucial information when it reached its decision, and if it were to encounter the question of post-termination standing today, it would likely defer to the PBGC's interpretation, as this Court's precedents require. *LTV*, 496 U.S. at 648; *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). It would be premature for this Court to grant review before that court of appeals (or others) has the opportunity to consider the position of the PBGC.

3. Petitioners also err in suggesting that review is warranted because the alleged conflict concerns an issue of "national importance." Pet. 20; *see* Gressman *et al.*, *supra*, at 244 (explaining that "unimportant conflicts" are not cert-worthy). The decision below does not, as petitioners contend, hold that fiduciary breaches that render a plan insolvent "simul-

taneously render the injury [caused by that breach] unredressable." Pet. 12; *see id.* at 22 (arguing that decision "creates a perverse incentive for breaching fiduciaries to do as much harm as possible" so that plan becomes insolvent). For every terminated plan the PBGC administers, the PBGC can—and in many instances the PBGC does—prosecute litigation against fiduciaries whose breaches may have resulted in a plan's unfunded termination. *See, e.g., Pension Benefit Guaranty Corp. v. Beverley*, 404 F.3d 243, 250 (4th Cir. 2005). The more serious the harm caused by the breach, the greater the incentive the PBGC has to pursue the offenders, and where there is harm worth litigating, the PBGC can and will pursue it. That the Corporation has not done so in this case demonstrates only that there was no breach worth pursuing.

Petitioners likewise err in their assertion that review is warranted because the holding of the court of appeals "will undermine PBGC's interests." Pet. 21 (emphasis added). The PBGC is obviously the best judge of "its own best interests," *Pension Benefit Guaranty Corp. v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993), and it has expressed no such concern with the court of appeals' decision. To the contrary, the PBGC's brief at the en banc stage below conspicuously did *not* support petitioners' request for review. Instead the PBGC emphasized that the process set forth in its regulations, which petitioners have attacked below and here, is "essential to [its] timely determination of participants' benefits," and that petitioners' proposed methodology of "revisiting valuations again and again" would "be extremely burdensome." PBGC C.A. En Banc Br. 9.[6]

The PBGC below also specifically described as "[p]erhaps most misleading" petitioners' assertion that the Ninth Circuit's decision harms plan participants by permitting the PBGC "to favor some participants over others by using commingled assets to pay nonguaranteed benefits, without regard to the amount of assets attributable to a particular plan." PBGC C.A. En Banc Br. 13; Pet. 32. The PBGC in fact "has no discretion to ignore the allocation scheme in section 1344 and the regulations promulgated thereunder" when the PBGC values plan assets and determines participant benefits. PBGC C.A. En Banc Br. 13. Under those regulations, as discussed above, the PBGC does *not* revisit its calculations in light of post-termination litigation recovery, whether it be to benefit the members of the recovering plan or any other plan administered by the Corporation. *Cf. Storey v. United States*, 370 F.2d 255, 259 (9th Cir. 1966) ("The presumption is, of course, that the appeal board acted regularly and in accordance with the regulations."). Contrary to petitioners' claims, that standard practice generally *benefits* participants by ensuring that the fixed pensions upon which they may rely will not be decreased by events that occur post-termination. PBGC C.A. En Banc Br. 9.

[6] The PBGC took "no position on th[e] ultimate issue" of standing but "submit[ted] [its brief] to clarify that [its] treatment of post-termination recoveries for pre-termination fiduciary breaches provides no basis for disturbing the panel's unanimous decision." PBGC C.A. En Banc Br. 1.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

GARY S. TELL
(*Counsel of Record*)
JONATHAN D. HACKER
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondents Stephen D. Richards, James R. Tener, Robert E. Wrightson and The Administrative Committee of the Consolidated Freightways Corporation Pension Plan

November 25, 2009