No. 09-______ 09-356 SEP 23 2009

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In The
Supreme Court of the United States

THOMAS A. PAULSEN; EDWARD L. FRAZEE; CHESTER MADISON; LLOYD MICHAEL O'CONNELL, III; ROBERT M. BOWDEN; ROBERT J. NEWELL, Individually and on Behalf of a Class of All Other Persons Similarly Situated,

Petitioners,

v.

CNF INC.; CNF SERVICE COMPANY INC.; ADMINISTRATIVE COMMITTEE OF THE CONSOLIDATED FREIGHTWAYS CORPORATION PENSION PLAN; STEPHEN D. RICHARDS; JAMES R. TENER; ROBERT E. WRIGHTSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do participants in a pension plan trusteed by the Pension Benefit Guaranty Corporation, whose pension benefits have been reduced due to underfunding of the plan, have Article III standing to sue prior plan fiduciaries for breach of fiduciary duty under ERISA,[1] as the Fourth Circuit held in *Wilmington Shipping Co. v. New England Life Insurance Co.*, 496 F.3d 326, 332 (4th Cir. 2007), or do they lack such standing, as the Ninth Circuit held below?

[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

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Petitioners Thomas A. Paulsen, Edward L. Frazee, Chester Madison, Lloyd Michael O'Connell, III, Robert M. Bowden, and Robert J. Newell, individually and on behalf of a class of all other persons similarly situated ("Petitioners" or "Plaintiffs"), respectfully petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion and order of the U.S. Court of Appeals for the Ninth Circuit (App. 1) is found at *Paulsen v. CNF, Inc.*, 559 F.3d 1061 (9th Cir. 2009). Opinions of the District Court are found at *Paulsen v. CNF, Inc.*, No. C 03-03960 JW, 2003 WL 22971080 (N.D. Cal. Nov. 24, 2003); 2005 WL 1936286 (N.D. Cal. Jan. 19, 2005); 391 F. Supp. 2d 804 (N.D. Cal. 2005); and 2006 WL 4094289 (N.D. Cal. Dec. 22, 2006).

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its order denying the petition for panel rehearing or in the alternative for rehearing en banc on June 25, 2009 (App. 62). The district court had jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Plaintiffs' claim arises under the civil enforcement provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), which provides as follows:

> (a) A civil action may be brought—
>
> * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

ERISA § 409(a), 29 U.S.C. § 1109(a), in turn, provides for relief against breaching fiduciaries, as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA § 4042(b)(1), 29 U.S.C. § 1342(b)(1), provides in pertinent part as follows:

> Notwithstanding any other provision of [ERISA Title IV], the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of [ERISA Title IV].

ERISA § 4042(d)(1)(A), 29 U.S.C. § 1342(d)(1)(A), provides in pertinent part as follows:

> A trustee appointed under [29 U.S.C. § 1342(b)] shall have the power—
>
> * * *
>
> (ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;
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> * * *
>
> (iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment.

ERISA § 4044(c), 29 U.S.C. § 1344(c), provides as follows:

> Increase or Decrease in Value of Assets—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 4042(b) 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.

STATEMENT OF THE CASE

1. This case presents a question with important implications for our nation's retirement system: whether pension plan participants have constitutional standing to bring breach of fiduciary duty claims under ERISA when their pension plan has been terminated and placed under the trusteeship of the Pension Benefit Guaranty Corporation ("PBGC"). Petitioners are retired participants in a defined benefit pension plan (the "Plan") formerly sponsored by the bankrupt Consolidated Freightways Corporation ("CFC") whose pensions were reduced when the Plan was terminated because its assets were insufficient to satisfy its accrued benefit obligations. Petitioners seek to sue the Plan's former fiduciaries to recover losses to the Plan that Petitioners allege resulted from breaches of fiduciary duty in the period leading up to the Plan's insolvency. The Fourth Circuit has held that such participants have suffered

a redressable injury sufficient for constitutional standing. *Wilmington Shipping Co. v. New England Life Insurance Co.*, 496 F.3d 326, 332 (4th Cir. 2007). The Ninth Circuit in this case disagreed, App. 22-27, holding that Plaintiffs lacked constitutional standing on the theory that discretionary authority of PBGC under ERISA Title IV made their claims unredressable. Consequently, the former fiduciaries have been relieved of potential liability for the alleged breaches, and Petitioners and PBGC have been deprived of the possibility that losses from the alleged breaches may be recovered for the Plan.[2]

2. A defined benefit pension plan "is one that promises to pay employees, upon retirement, a fixed benefit under a formula that takes into account factors such as final salary and years of service with the employer." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990).[3] As of the end of

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[2] This Court has never considered the precise question presented here, but has considered the availability of remedies under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), in a similar situation, in which participants sued both the plan's actuaries and its former fiduciaries for breach of fiduciary duty when a plan became insolvent and was taken over by PBGC. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 249-63 (1993); *see also Mertens v. Hewitt Assocs.*, 948 F.2d 607, 609 (9th Cir. 1991) (describing allegation that actuarial assumptions failed to account for early retirements, causing plan insolvency).

[3] A defined benefit plan "is distinguished from a 'defined contribution' plan (also known as an 'individual account' plan), under which the employer typically contributes a percentage of an employee's compensation to an account, and the employee is

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2007, defined benefit plans in the United States covered some 20 million active participants and paid benefits to millions of retirees. *See* Alicia H. Munnell et al., *The Financial Crisis and Private Defined Benefit Plans*, Ctr. for Retirement Research at Boston College, Brief No. 8-18, at 2 (Nov. 2008), *available at* http://crr.bc.edu/images/stories/Briefs/ib_8-18.pdf.

ERISA aims to protect the interests of participants in a defined benefit pension plan by four principal means: (1) requiring that such a plan meet minimum standards of funding, allowing it to pay future benefits even if the sponsoring employer is no longer able to contribute money to the plan; (2) establishing a termination insurance system to pay limited benefits in the event that a plan becomes underfunded and providing for ongoing trusteeship of terminated plans; (3) imposing strict duties on the fiduciaries who run the plan; and (4) providing "ready access to the Federal courts" if fiduciaries fail to fulfill those duties. 29 U.S.C. § 1001(b), (c).[4] The

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entitled to the account upon retirement." *LTV Corp.*, 496 U.S. at 637 n.1; *see* 29 U.S.C. § 1002(34), (35).

[4] *See* Steven J. Sacher et al., Employee Benefits Law (2d ed. 2000), at lxxxiii (noting that at the time of ERISA's enactment, "the prototypical reform issue was that of underfunded plan terminations"); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (stating that "one of Congress' central purposes in enacting [Title IV of ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated," quoting Senator Bentsen, reprinted in 3 Leg. Hist. 4793); *Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989) ("Congress enacted ERISA in

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question in this case pertains to the interrelationship of these four protections and whether they are, contrary to the intent of Congress, self-defeating.

Because a defined benefit plan promises to pay a monthly benefit commencing at retirement and extending for the lifetime of the retiree and his or her surviving spouse, calculating such a plan's liabilities and evaluating the sufficiency of its assets to meet those liabilities requires the use of actuarial assumptions regarding such matters as the average age at which participants will begin drawing their pensions and the rate of future earnings on the plan's investments. *See Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989). ERISA requires that the present value of a plan's assets and liabilities be determined annually to ensure that the plan meets minimum funding standards imposed by ERISA Title I. 29 U.S.C. §§ 1082, 1083 (minimum funding standards), 1023(a)(4), (d) (actuarial statement requirement).

To enhance pension security in the event that a plan lacks sufficient assets to pay accrued benefits, Congress established the pension insurance system set forth in ERISA Title IV, including establishing PBGC. *See LTV Corp.*, 496 U.S. at 637; 29 U.S.C. § 1302. PBGC insures more than 29,000 defined benefit pension plans covering nearly 44 million American

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1974 in part to prevent plan terminations from depriving employees and their beneficiaries of anticipated benefits.").

workers.[5] With respect to a terminated plan, PBGC may play either of the following two roles, or both, as in this case: (1) trustee and (2) guarantor of benefits up to prescribed limits. 29 U.S.C. §§ 1322, 1342(b); *see Wilmington*, 496 F.3d at 332. ERISA states that "[e]xcept to the extent inconsistent with the provisions of [Title IV], or as may be otherwise ordered by the court [in appointing the trustee of a terminated plan]," PBGC in its trustee role is a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21). 29 U.S.C. § 1342(d)(3); *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 72 (S.D.N.Y. 2003). Unlike a traditional trustee, however, PBGC is authorized to commingle the assets of plans it trustees. 29 U.S.C. § 1342(a). ERISA also requires PBGC to follow a statutory order of priority when allocating assets of the plan among the plan's participants, with "guaranteed benefits"—those insured by PBGC—receiving priority over non-guaranteed benefits—those in excess of PBGC's insurance limits. 29 U.S.C. § 1344(a); *see* 29 U.S.C. § 1322 (limits on guaranteed benefits).

An ERISA fiduciary must administer the plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying costs of administration. *See* 29 U.S.C. § 1104(a); *Varity Corp. v. Howe*, 516 U.S. 489,

[5] Pension Benefit Guar. Corp., *2008 Annual Report*, at 11, *available at* http://www.pbgc.gov/docs/2008_annual_report.pdf.

524 (1996). ERISA authorizes a plan participant to file suit on behalf of his or her plan to hold a breaching fiduciary personally liable to make good losses to a plan occasioned by the breach. 29 U.S.C. §§ 1132(a), 1109(a).

3. Petitioners allege that the Plan at issue in this case became underfunded because the Plan's fiduciaries failed to ensure that reasonable actuarial assumptions were used to value the Plan at its inception and annually thereafter. The Plan was created in December 1996 by "spinning off" certain assets and liabilities of a pension plan sponsored by Respondent CNF, Inc. ("CNF"), Petitioners' former employer. In that transaction, benefit rights that each Petitioner had accrued over more than 20 years of service with CNF were transferred from CNF's defined benefit plan to the newly-created CFC Plan, along with assets that CNF claimed were minimally sufficient to pay the transferred benefit obligations based on certain actuarial assumptions. Specifically, these assumptions included that participants would retire, on average, at age 64 and that the Plan's investments would return at least 7.08 percent annually.

Petitioners allege that these assumptions were unreasonable because the Plan's terms allowed participants to retire with full pensions as early as age 55 and because the interest assumption exceeded PBGC's "safe harbor" assumption for plan spinoffs by more than a percentage point.[6] Likewise, Petitioners allege that unreasonable actuarial assumptions, including an expected annual rate of investment return as high as 8.5 percent, were used to value the Plan annually until its distress termination in 2003, following CFC's bankruptcy. Petitioners allege that based on these unreasonable assumptions, CFC never contributed money to the Plan, despite the fact that participants continued to accrue additional benefits. At termination, PBGC estimated that the Plan had approximately $228 million in assets and approximately $504 million in benefit liabilities—that is, the Plan was underfunded by more than 50 percent.

In May 2003, PBGC took over as trustee of the terminated Plan, as provided for by 29 U.S.C. §§ 1322, 1342(b). By that time, all Petitioners had retired and had begun receiving their pensions, based on more than 30 years of service each. Because ERISA limits the benefits that PBGC guarantees based on each participant's age at plan termination,[7] Petitioners' pensions were reduced. For example, when Petitioner

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[6] Because an earlier retirement age means that benefits will be paid for a longer period, it increases the plan's liabilities. *See* Dan M. McGill et al., *Fundamentals of Private Pensions*, at 510 (7th ed. 1996). Likewise, because the present value of future benefits is a function of the rate of investment return, "the higher the interest assumption, the smaller the present value." *Id.* at 515. Therefore, a higher assumed retirement age or a higher investment return assumption will result in lower cost to the plan sponsor.

[7] *See* 29 C.F.R. § 4011 (App. B).

Madison retired, he had worked for 33 years for CNF and CFC, and was receiving his full pension of $4,100 per month. Once the plan terminated, however, PBGC reduced Mr. Madison's pension by nearly 60% to $1,700 per month, the maximum benefit for a participant his age at plan termination.

4. Plaintiffs filed suit pursuant to 29 U.S.C. § 1132(a)(2) against CNF and its affiliate CNF Services Co., as well as the Administrative Committee of the CFC Plan and its individual members, asserting that these defendants breached their fiduciary duties in providing information to the Plan's actuaries and monitoring the actuaries' work.[8] Plaintiffs' § 1132(a)(2) claim alleges that the Plan's fiduciaries breached their duties by selecting, or by allowing the Plan's actuaries to select, the unreasonable assumptions that led to their Plan's underfunding, and to its ultimate termination and trusteeship by PBGC. The district court dismissed the § 1132(a)(2) claim on various grounds, and Plaintiffs appealed.

5. The Ninth Circuit affirmed the district court's dismissal of Plaintiffs' § 1132(a)(2) claim solely on the ground that Plaintiffs lacked Article III standing. App. 22-27. Citing *Lujan v. Defenders of Wildlife*, 504

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[8] Plaintiffs also brought state law professional negligence claims against the actuaries hired to value the plan assets, Towers, Perrin, Forster & Crosby, Inc., and an ERISA claim against PBGC as trustee for not pursuing claims against the other defendants. These claims are not at issue on this petition and the state law claims are proceeding in the district court.

U.S. 555, 560 (1992), the Ninth Circuit panel held that Plaintiffs could not satisfy the redressability requirement of constitutional standing. App. 22-23. Although it recognized that Plaintiffs had brought suit seeking recovery for the Plan as a whole, the court held that Plaintiffs lacked standing on the theory that because the Plan is under PBGC control, any Plan recovery would be paid to PBGC, which would have unfettered discretion over the use of the money. *Id.* Although it did not explicitly reject that PBGC could use any funds recovered for the benefit of participants, the court interpreted 29 U.S.C. § 1344(c) to provide that PBGC was not statutorily required to share any recovery with the plan participants. App. 23. In effect, the Ninth Circuit held that the very event that caused Plaintiffs' injury—the Plan's insolvency—simultaneously rendered the injury unredressable by inserting PBGC as an independent actor entitled to the benefit of any recovery that Plaintiffs obtain for the breach. In the Ninth Circuit's view, by dealing the Plan an injury so severe that it could not survive, its fiduciaries placed themselves out of reach of liability.

6. As the Ninth Circuit recognized, its decision in *Paulsen* directly conflicts with *Wilmington*, in which the Fourth Circuit held that a participant in a terminated underfunded plan under PBGC trusteeship had constitutional standing to pursue a breach of fiduciary duty claim on behalf of that plan. *See Wilmington*, 496 F.3d at 334-37. The Fourth Circuit reasoned that the statutory requirement that PBGC

hold plan assets in trust for plan participants made it likely, not merely speculative, that PBGC would use assets recovered on the fiduciary breach claims to provide additional benefits to the plan's participants. *Id.* at 335-37. Specifically, in *Wilmington*, the court held that although plan participants were receiving their full benefits—none had accrued benefits above the guaranteed level—they had lost the right to elect to receive their benefits in the form of a lump sum rather than a monthly payment. This right, the Fourth Circuit held, might be restored by PBGC if the plan became fully funded as a result of the participants' suit. Accordingly, the *Wilmington* participants had standing.

The Ninth Circuit rejected the Fourth Circuit's analysis on two grounds, stated in one sentence each: (1) two ERISA provisions cited by the Fourth Circuit, 29 U.S.C. §§ 1342(d)(1)(A)(ii) and 1344, "do not compel or direct" PBGC to pay recovered funds to participants as additional benefits; and (2) a "requirement" to make such a payment that the Ninth Circuit supposed to have been established by the Fourth Circuit's decision would conflict with a third ERISA provision, 29 U.S.C. § 1342(a). App. 26-27. The Ninth Circuit analogized Petitioners' situation to that of welfare plan participants in *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.,* 465 F.3d 1123, 1125 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 126 (2007), whom the court had held lacked constitutional standing because their benefits—unlike pension benefits—were not vested.[9] App. 24; *see Glanton*, 465 F.3d at 1127; *cf. Mead Corp.*, 490 U.S. at 723 (holding that ERISA Title IV "simply provides for insurance for benefits created elsewhere" and was not designed to modify rights, such as vesting and accrual rights, created by Title I).

In rejecting *Wilmington*, the Ninth Circuit did not consider the Fourth Circuit's analysis of the distinct roles played by PBGC as both guarantor of benefits and trustee of terminated pension plans. *See Wilmington*, 496 F.3d at 333. Essential to the Fourth Circuit's analysis, and not mentioned by the Ninth Circuit, is that the power to pay benefits under the plan and to collect amounts due to the plan belongs to PBGC in its role as trustee, not as guarantor. *See* 29 U.S.C. § 1342(d); *see also Wilmington*, 496 F.3d at 333. Nor did the Ninth Circuit consider the fiduciary duties incumbent on PBGC in its role as trustee. *See* 29 U.S.C. § 1342(d)(3) (providing that a trustee under Title IV is a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21)); *Pineiro*, 318 F. Supp. 2d at 72.

Following the panel's opinion, Plaintiffs petitioned for panel rehearing or, in the alternative, for

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[9] ERISA does not require vesting of welfare benefits, unlike pension benefits. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

rehearing en banc, which the Ninth Circuit denied. App. 62-64. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Whether Participants Have Constitutional Standing to Bring ERISA Claims on Behalf of a PBGC-Trusteed Plan Is an Issue of National Importance and Application, on Which the Fourth Circuit and the Ninth Circuit Disagree.

Ensuring the financial stability of pension plans is a matter of "overarching national interest." *Wilmington*, 496 F.3d at 340; *see* 29 U.S.C. § 1001(a); *Boggs v. Boggs*, 520 U.S. 833, 840 (1997); *Johnson v. Couturier*, 572 F.3d 1067, 1082 (9th Cir. 2009). For this reason, ERISA confers on plan participants, as well as on fiduciaries and the Secretary of Labor, the ability to recover for their plan assets lost due to breaches of fiduciary duty. *See Johnson*, 572 F.3d at 1082. Participants' constitutional standing to bring such claims on behalf of terminated plans under PBGC trusteeship—the most severely underfunded plans—is a rule of national application on which there is a pressing need for national uniformity. The Ninth Circuit has ruled in direct conflict with the Fourth Circuit that participants lack constitutional standing to bring breach of fiduciary duty claims when a plan is under PBGC trusteeship. *Compare* App. 22-27 *with Wilmington*, 496 F.3d at 335-36. Additionally, *Paulsen* is in conflict with the Second

Circuit's decision in *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 515 (2d Cir. 1994), pertaining to the disposition of assets recovered on behalf of a plan after termination. This Court should grant the writ to resolve this intercircuit conflict and confirm participants' right to recover on behalf of underfunded plans without regard to the identity of the plans' current trustees.

1. *Paulsen* and *Wilmington* are squarely in opposition to each other. The cases cannot be distinguished in any meaningful way other than their opposite holdings: Plaintiffs in both cases lost pension benefits when their pension plans became insolvent and consequently came under PBGC control; plan participants whose benefits had been reduced sued to recover losses alleged to have been caused by prior fiduciaries in managing the plans' assets; PBGC declined to be joined as a plaintiff during the course of the litigation; and defendants made the same argument that the plan participants lacked constitutional standing because any relief they obtained from the fiduciaries would disappear into PBGC's coffers rather than redressing the participants' injury by wholly or partially restoring their pension benefits. App. 9-11, 25; *Wilmington*, 496 F.3d at 330, 336.

Wilmington rejected the defendant fiduciaries' argument, while *Paulsen* accepted it. In *Wilmington*, the Fourth Circuit held that the plaintiff had standing because the statutory requirement that PBGC hold plan assets in trust for plan participants made it likely, not merely speculative, that PBGC would use assets recovered on the fiduciary breach claims to provide additional benefits. 496 F.3d at 336-37. In rejecting *Wilmington*, the Ninth Circuit made numerous errors of law, including (1) holding that relief must be compelled, directed, or required—rather than merely likely—for an injury to be redressable, *see Lujan*, 504 U.S. at 560; (2) conflating PBGC's separate roles as guarantor and trustee; and (3) misinterpreting the provisions of ERISA governing PBGC's administration of a post-termination plan.

2. This Court should take certiorari to clarify the important issue of how likely relief must be for a plaintiff to demonstrate redressability sufficient to meet the requirements for constitutional standing. *Wilmington* held that the plaintiff had constitutional standing because his injury was likely to be redressed by relief to the plan, not because it was certain to be redressed. *See* 496 F.3d at 335 (citing *Lujan*, 504 U.S. at 560); *see also Lujan,* 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976)). The plaintiff's injury in *Wilmington* was not certain to be redressed, because although Title IV prescribes the order of priority for payment of plan liabilities in 29 U.S.C. § 1344(a), it does not prescribe the form of payment. There was no requirement that PBGC restore the lump-sum form of benefit. *See Wilmington*, 496 F.3d at 337. The plaintiff had standing because a recovery by the plan would make it likely that PBGC would

exercise its discretion to either pay lump sums pursuant to the plan terms or, if the plan became solvent, to restore the plan in its entirety. *Id.*

By contrast, *Paulsen* cited *Lujan* for the proposition that Plaintiffs' injury was not redressable because no provision of the statute "compell[ed] or direct[ed]" PBGC to provide benefits to Plaintiffs in the event of a recovery to the Plan. App. 23. Admittedly, redress is not certain, because Plaintiffs could receive a favorable decision on their breach claim and still not recover enough money to fund the Plan to the level necessary to pay their non-guaranteed benefits under 29 U.S.C. § 1344(a)'s order of priority. If, however, as a result of the lawsuit the Plan becomes fully funded, Plaintiffs' injury will be redressed, because the priority scheme of § 1344(a) requires that their full benefits be paid. *See* 29 U.S.C. § 1344(a).[10] PBGC is not an independent actor "'whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). The action PBGC would take if the Plan were to recover is not

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[10] Plaintiffs might recover sufficient funds to make PBGC whole for any insurance funds it has expended to pay benefits that are guaranteed under 29 U.S.C. § 1344(a), but not recover sufficient funds to allow PBGC to pay additional non-guaranteed benefits. However, that Plaintiffs may not succeed or may not succeed fully on their claims is not a basis to deny constitutional standing.

"speculative." *Id.* Thus, a greater likelihood of redress exists in this case than in *Wilmington*.

This Court should grant the writ to clarify that likely, not certain, redress is required to establish standing, even where action by a third party is required to provide that redress. *See Lujan*, 504 U.S. at 560-62; *see also Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (holding that plaintiff Utah had standing to sue Census Bureau to issue new census report, where there was a "significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," although action by Congress, which was not before the court, would be required to provide the ultimate relief sought: an additional congressional Representative); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (holding that plaintiff had standing to seek a determination that an organization was a "political committee" where that determination would make agency more likely to require reporting, despite agency's power not to order reporting).[11]

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[11] There is no doubt in this case that Plaintiffs have suffered an injury in fact, and that Plaintiffs' harm is "fairly traceable" to the Defendants sued for breach of their fiduciary duties in causing the Plan to be underfunded. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). Furthermore, there is a sufficient "personal stake" in the outcome to ensure concrete adverseness. *See Sprint Communic'ns Co. v. APCC Services, Inc.*, 128 S. Ct. 2531, 2543 (2008) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). If Plaintiffs' case is successful, Plaintiffs will obtain a recovery for the Plan, on whose behalf

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3. The Supreme Court should take certiorari to correct the errors in *Paulsen* because they involve matters of national importance, including preserving the security of our nation's pension system. This case directly implicates the purposes behind ERISA, including the reasons that Congress established PBGC. As this Court has explained,

> As a predicate for this comprehensive and reticulated statute, Congress made detailed findings which recited, in part, "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits."

Nachman, 446 U.S. at 361-62 (quoting ERISA § 2(a), 29 U.S.C. § 1001(a) (alteration in original)). Furthermore, ERISA was designed to ensure "ready access to the courts." 29 U.S.C. § 1001(b). In this case, participants have been deprived both of anticipated benefits, and of their access to the courts to rectify that deprivation.

The overarching question presented regarding the ability of defined benefit plan participants to seek redress in the federal courts for a breach of fiduciary

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they are pursuing a claim under 29 U.S.C. §§ 1109, 1132(a)(2). Indeed, the greater the recovery Plaintiffs obtain here, the greater likelihood that their benefits will be fully funded.

duty that led to a deprivation of their benefits is one that is likely to recur, given the numbers of underfunded plans and the continuing acuity of the present economic crisis. According to PBGC, some 1,152,000 workers and retirees of 3,860 underfunded plans that have been terminated, as well as 122,000 participating in multiemployer plans receiving financial assistance, depend on PBGC for their retirement income.[12] Mercer Consulting has estimated that, as of December 31, 2008, the 772 companies that offer traditional defined benefit pensions in Standard and Poor's index of 1,500 large corporations hold enough assets in their plans to cover only 75 percent of their obligations, down from 104 percent at the end of 2007.[13]

4. Perversely, the Ninth Circuit's holding will undermine PBGC's interests in coping with its substantial deficit and preparing itself for future challenges to its own funding status. The Ninth Circuit noted PBGC's statement in its appellate brief that its deficit was then $18 billion. App. 55, n.24. Ironically, by denying participants the ability to pursue ERISA claims on behalf of their plans, the Ninth Circuit's position will exacerbate PBGC's difficulty.

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[12] Pension Benefit Guar. Corp., *2008 Annual Report*, *supra* note 5, at 2, 8, 47.

[13] David S. Hilzenrath, *Stock Losses Leave Pensions Underfunded by $400 Billion*, Washington Post, Jan. 7, 2009, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010701387.html?hpid=topnews.

First, PBGC will never receive assets recovered for plans through participant claims if participants lack standing to bring claims. Second, PBGC must risk its own resources to bring any claim, which it may be unwilling or unable to do even where the merits are strong. *See* App. 55-56 (discussing factors affecting PBGC's decision to bring suit). Third, lack of participant standing to pursue breach claims with respect to PBGC-trusteed plans creates a perverse incentive for breaching fiduciaries to do as much harm as possible. As courts have observed in the context of plans not insured by PBGC, denying participants statutory standing on the basis that the plan has been terminated "would reward defendants for the thoroughness of their alleged mismanagement. If defendants wound the victim they may be sued, but kill it and the claim dies with it." *Kling v. Fidelity Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 127 (D. Mass. 2003) (internal quotation marks and citation omitted). Indeed, in 1986, Congress found that the termination insurance system "in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers"—precisely the result achieved by the Ninth Circuit's opinion. 29 U.S.C. § 1001b(a)(4).

5. The split of authority created by the Ninth Circuit's opinion defeats national uniformity in the rights and obligations of plan participants, plan fiduciaries, and PBGC. Under the Fourth Circuit's

rule, participants can sue prior fiduciaries of plans trusteed by PBGC in an effort to augment the plans' funding; under the Ninth Circuit's rule, they cannot. Under the Fourth Circuit's rule, fiduciaries can be liable in suits by participants for plan losses occasioned by fiduciary breaches; under the Ninth Circuit's rule, that liability is extinguished upon plan termination. Under the Fourth Circuit's rule, PBGC's burden of paying guaranteed benefits may be reduced or eliminated due to recoveries obtained by participants from breaching fiduciaries; under the Ninth Circuit's rule, PBGC must shoulder the risk and expense of obtaining such recoveries itself.

6. Rather than strengthening the role of PBGC in ensuring the security of our nation's pension system, the Ninth Circuit's decision undermines it. Under the Ninth Circuit's decision, an incentive is created for participants to seek appointment of a third party, rather than PBGC, as trustee. While PBGC has, historically, nearly always been appointed as statutory trustee of a distressed plan, *see LTV Corp.*, 496 U.S. at 637, ERISA provides for the possibility that a third-party trustee could be appointed. *See* 29 U.S.C. § 1342(b)(1) (providing for the appointment of a trustee of a distress terminated plan, which may be PBGC or may be a third party).[14] As the

[14] The legislative history indicates that Congress expected that third-party trustees would be appointed in at least some cases. *See* H.R. Conf. Rep. 93-1280, at 5153-54 (referencing trustee's right to apply to the court for a determination about

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Fourth Circuit pointed out, if PBGC as trustee has discretion to favor some plans' participants over others, then PBGC would have greater discretion in disposing of plan assets than would any other trustee appointed to oversee a terminated plan:

> [I]t would be particularly disadvantageous to plan participants for the PBGC to be appointed statutory trustee over a terminated plan given the PBGC's license to skirt the duties imposed on statutory trustees to hold plan assets in trust for the benefit of plan participants. . . . The duties imposed on the statutory trustee do not fall by the wayside just because the PBGC, and not a private party, becomes the trustee.

Wilmington, 496 F.3d at 337.

In addition to the disadvantage to participants, plans also would be disadvantaged by appointment of PBGC as trustee rather than a private party, because participants would retain constitutional standing to sue on their plans' behalf if a private party were appointed. In light of *Paulsen*, participants in terminated pension plans with possible claims against breaching fiduciaries have an interest in challenging appointment of PBGC and seeking appointment of a third-party trustee.[15] Thus, there is reason to expect

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how to manage terminated plan assets if the trustee disagreed with the recommendation of PBGC).

[15] *Cf.* Plaintiff's Motion for Preliminary Injunction, U.S. Airline Pilots Ass'n v. Pension Benefit Guar. Corp., No. 09-cv-01675-JR

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that post-termination trusteeship practices will diverge according to whether the trustee is PBGC or a third party, although there is no basis in the statute or in logic for any difference in the duty to hold plan assets in trust for the benefit of plan participants.

II. The Petition Should Be Granted to Resolve Confusion in the Lower Courts About Who Is Entitled to Plan Assets Recovered After a Plan's Termination: The Plan or PBGC.

The Fourth and Ninth Circuit's divergent holdings on constitutional standing raise recurrent questions as to the interpretation of ERISA § 4044(c), 29 U.S.C. § 1344(c), which provides for post-termination increases in plan assets to be either allocated between the plan and PBGC, or credited to PBGC alone.[16]

(D.D.C. Sept. 2, 2009) (Doc. 4) (moving the court for a preliminary injunction appointing a temporary trustee to perform statutory and fiduciary duties that plaintiff in that case alleged PBGC had not performed); *US Airline Pilots Association Sues Pension Benefit Guaranty Corporation*, Business Wire, Sept. 2, 2009, *available at* http://www.reuters.com/article/pressRelease/idUS211265+02-Sep-2009+BW20090902.

[16] As set forth above, § 1344(c) provides as follows: "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 4042(b) 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

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1. A recovery for breaches alleged to have caused losses to the Plan before its termination is not a post-termination increase in the value of Plan assets. A post-termination increase in the value of plan assets would occur, for example, where the price of a stock held by the plan increases after termination. In contrast, a recovery for pre-termination breaches augments the Plan's assets as of termination, as contemplated by 29 U.S.C. § 1109's requirement that a breaching fiduciary make the plan whole for losses resulting from a breach. *See Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (holding that former employees who had received distributions of their benefits under a defined contribution plan had statutory standing because if they succeeded in showing that the plan assets had been diminished due to imprudent management by fiduciaries, the plan assets available to pay benefits as of the time of distribution to the plaintiffs would be increased); *accord Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1026 (9th Cir. 2009) (holding same with respect to terminated defined contribution plan); *see also LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1026 & n.6 (2008) (citing *Harzewski* and holding that 29 U.S.C. § 1132(a)(2) provides a remedy for plan injuries that impair the value of plan assets

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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." 29 U.S.C. § 1344(c).

in an individual account, even where the participant has withdrawn the assets in his account). Thus, if Petitioners succeed in demonstrating that the prior *fiduciaries breached their duties, causing under-funding* of the Plan, then the fiduciaries will be liable to restore to the Plan the assets that it would have had *at termination* but for the breach, and the Plan's assets as of termination will be increased.[17]

2. Moreover, as courts have recognized, § 1344(c)'s two sentences can be read as contradicting each other, with the first sentence providing for post-termination increases in plan assets to be shared between the plan and PBGC and the second crediting the same increases to PBGC. PBGC has taken different positions as to the provision's meaning in different courts. *See Kinek*, 22 F.3d at 515 (quoting *Pension Benefit Guar. Corp. v. Beadle*, 685 F. Supp. 628, 632 (E.D. Mich. 1988), as an example of PBGC's past inconsistent litigation positions). The Ninth Circuit's interpretation of § 1344(c) conflicts with other courts' interpretation, as well as with this Court's interpretation of § 1344(a), and in particular with this Court's ruling regarding the relationship

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[17] For this reason, the *Paulsen* court's citation to regulations under § 1344 for the proposition that "the amount of funds available for distribution is determined as of the date of termination" does not support its conclusion that Petitioners lack standing. App. 23. A recovery on Petitioners' breach of fiduciary duty claims would increase the Plan's assets as of termination and therefore increase the Plan funds available for distribution under 29 U.S.C. § 1344(a).

between the fiduciary liability provisions of Title I and the insurance provisions of Title IV.

The Ninth Circuit relied on the second sentence of § 1344(c), stating that post-termination increases in plan assets are credited to PBGC, without noting or attempting to distinguish the first sentence, which requires allocation of such an increase between the plan and PBGC. App. 23. On this basis, the Ninth Circuit concluded that any recovery in this case would be credited exclusively to PBGC, rather than credited to the Plan, thereby depriving participants of redressability. *Id.*

Other courts have rejected the interpretation of § 1344(c) adopted in *Paulsen*. The court in *Beadle*, for example, agreed with PBGC's position in that case that § 1344(c) "allocates post-termination gains or losses between PBGC and the plan sponsor/employer or participants." *Beadle*, 685 F. Supp. at 632. In *Kinek*, where PBGC took the opposite position as it did in *Beadle*, the Second Circuit declined to adopt PBGC's interpretation as "not reasonable because it does not account in any way for the first contradictory sentence of that provision." *Kinek*, 22 F.3d at 515 n.7. The Second Circuit rejected the contention that PBGC has a "statutorily created opportunity to benefit from an overfunding that occurs in the event of an unexpected increase in the value of plan assets in the post-termination period." *Id.*; *cf.* App. 25 (concluding that distinction between guaranteed and non-guaranteed benefits creates "a trade-off in which PBGC is permitted to receive the excess of non-guaranteed benefits collected from an employer in return for guaranteeing certain benefits to the plan participant").

Likewise, in *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125, 128 (E.D.N.Y. 1990), the court rejected PBGC's argument that prejudgment interest on a post-termination recovery on behalf of a plan should be credited to PBGC, because "[i]t is hard to see . . . how the Guaranty Corp.—rather than the Plan and beneficiaries—should recover such lost interest." That the recovery itself should be allocated to the plan was apparently never in question. *See id.* Thus, as in *Kinek*, *Solmsen* held that the prejudgment interest would not be considered an "increase in assets" that would be credited to the corporation, according to PBGC's interpretation of the second sentence of § 1344(c).

This Court should grant the writ in order to resolve the confusion in the lower courts about post-termination allocation of recoveries for the plan, to establish that because of PBGC's trustee role, even where a post-termination recovery is credited to PBGC, any recovery is not a windfall to PBGC but a plan asset that PBGC must allocate in the exercise of its fiduciary duties. The recovery in this case is not similar to an increase in plan assets that might occur through PBGC's investments of the pooled assets; rather, any recovery would restore to the Plan an asset that it should have held prior to termination, but for the fiduciaries' breach.

3. The confusion in the lower courts over whether and when post-termination recoveries should accrue to PBGC or to the plan participants is not limited to differences over the interpretations of § 1344(c), but also concerns other provisions of the statute and, more fundamentally, involves differences over the role of PBGC as a trustee of post-termination plans and the degree to which it is subject to the fiduciary duties in ERISA. This Court should grant the writ to clarify these issues.

As noted above, the Ninth Circuit did not acknowledge the difference between PBGC's role as guarantor and its role as trustee, which was a distinction that was critical to the Fourth Circuit's analysis. Rather, the Ninth Circuit stated that its "approach recognizes PBGC's role as an insurer of guaranteed and non-guaranteed benefits." App. 25.[18] In *Wilmington*, the Fourth Circuit recognized that § 1342(d)(1)(A)(ii) gives the statutory trustee of a terminated plan the power "to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee." The Fourth Circuit interpreted this provision correctly to mean that PBGC holds plan assets in its capacity as trustee, not in its capacity as guarantor. *Wilmington*, 496 F.3d at 332.

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[18] It is a mistake to say that PBGC is an "insurer . . . of non-guaranteed benefits." By definition, non-guaranteed benefits are non-insured benefits. *See* 29 U.S.C. § 1322.

The *Wilmington* court determined that 29 U.S.C. § 1305(b)(1)(C) applies when PBGC acts as trustee, to require that plan assets are part of PBGC's funds available to pay guaranteed benefits only to the extent that they exceed the plan's liabilities. *Wilmington*, 496 F.3d at 336. Section 1305(b)(1)(C) provides, "Each fund established under this section shall be credited with the appropriate portion of . . . (C) the value of the assets of a plan administered under section 1342 of this title by a trustee to the extent that they exceed the liabilities of such plan." 29 U.S.C. § 1305(b)(1)(C). As the Ninth Circuit opinion did not address § 1305(b)(1)(C), the split of authority also implicates the meaning of this critical statutory provision, which governs the extent to which PBGC is permitted to pool assets and liabilities of the terminated plans it administers in trust.

Indeed, the Ninth Circuit held that *Wilmington*'s reliance on §§ 1342(d)(1)(A)(ii) and 1344 was contrary to "the superior power to pool and [disburse] assets given to PBGC in 29 U.S.C. § 1342(a)." App. 27. Section 1342(a) provides that notwithstanding any other provision of Title IV, PBGC is "authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as [PBGC] deems to be appropriate in the administration of" Title IV. 29 U.S.C. § 1342(a). The Ninth Circuit held that PBGC's power to pool assets means that it is only speculative that should a plan recovery cause its assets to exceed those necessary to pay guaranteed benefits, PBGC would use the recovery to pay non-guaranteed benefits. App. 27.

The Ninth Circuit assumed that by relieving PBGC of the traditional duty of a trustee to segregate trust assets, § 1342(a) also relieves PBGC of the duty to use plan assets for the benefit of plan participants, an interpretation wholly unsupported by the statute, and in conflict with the Fourth Circuit in *Wilmington*, 496 F.3d at 336. The Ninth Circuit held, in effect, that PBGC not only has the ability to commingle assets, but also has the discretion to favor some participants over others by using commingled assets to pay non-guaranteed benefits, without regard to the amount of assets attributable to a particular plan. Under this interpretation, if Plan A had sufficient assets to pay benefits through priority category 5 under § 1344(a), but Plan B only had assets sufficient to pay benefits through priority category 4, PBGC could opt to use the pooled assets of the two plans to reverse the positions of the two groups of participants, paying Plan A's participants through category 4 and Plan B's through category 5. That interpretation is contrary to the fiduciary duties owed by PBGC as trustee under § 1104(a) and contradicts numerous other provisions of Title IV, including the § 1344 priority scheme. It is also contrary to the Fourth Circuit's holding in *Wilmington*, that PBGC is not exempt from the "absolute duty ERISA imposes on fiduciaries, including statutory trustees, to hold plan assets in trust for the benefit of plan participants." 496 F.3d at 336.

3. This Court has previously addressed the question of the meaning of ERISA § 4044(a), 29 U.S.C. § 1344(a), and the interaction of Title I and Title IV. In *Mead Corp.*, this Court held that the distribution scheme of § 1344(a) "in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits."[19] 490 U.S. at 722. To reach this conclusion, this Court analyzed the relationship between the provisions of ERISA providing for the substantive rights to benefits, in Title I, and the provisions relating to the insurance of such benefits, in Title IV. This Court held that the language of § 1344(a) indicated that it functioned only as an "allocation mechanism," or a "distribution mechanism." *Id.* at 723. *Mead* relied on an analysis of the "structure of the statute" to reach this determination, and noted that it was in Title I that employees' rights to benefits were established, and that Title IV "simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I." *Id.*[20]

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[19] *Unaccrued* benefits are benefits for which participants are not yet eligible. For example, in *Mead*, at the time of plan termination the plaintiff-participants had not met the age requirement for an unreduced early pension, so the unreduced early pension benefit was unaccrued and not subject to being paid out under the § 1344 priority scheme. *Non-guaranteed* benefits, in contrast, are benefits that are accrued but are above the minimum amount guaranteed by PBGC under 29 U.S.C. § 1322. In this case, Petitioners have been harmed by the loss of accrued but non-guaranteed benefits.

[20] Although § 1104(a) makes fiduciary duties subject to certain provisions of Title IV, Title IV does not override in their

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Section 1344(a) requires that the plan administrator (that is, PBGC in its trustee capacity) "*shall* allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan." 29 U.S.C. § 1344(a) (emphasis added). Consistent with the reasoning of this Court in *Mead*, the *Wilmington* court interpreted this provision to mean that PBGC does not have discretion to put plan assets to uses other than paying benefits to the plan's participants, until all of the plan's liabilities are satisfied. *Wilmington*, 496 F.3d at 336. The Ninth Circuit, with little discussion, held only that § 1344 does not "compel or direct" payment to plan participants in the event of any recovery. App. 26-27.

Applying *Mead*'s analysis of the statute's structure shows that no provision of Title IV can affect participants' substantive rights to eligibility under the terms of their plan, and thus that PBGC acting as trustee must pay benefits to the maximum extent that it is able based on the amount of assets in the plan, consistent with its fiduciary duties. Regardless, this Court should grant the writ to establish how *Mead* bears on the circuit split between *Paulsen* and *Wilmington*.

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entirety the § 1104(a) obligations on PBGC as fiduciary. *See Mead Corp.*, 490 U.S. at 722-23; 29 U.S.C. § 1342(d)(3) (providing that PBGC is a fiduciary); *Wilmington*, 496 F.3d at 336.

CONCLUSION

In sum, to address the important questions raised by the split between the Ninth and the Fourth Circuits, to enhance the security of the nation's pension system, and to ensure clarity regarding the degree of likelihood required to establish redressability for purposes of constitutional standing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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