No. 18-1279

IN THE
Supreme Court of the United States

K. WENDELL LEWIS, *ET AL.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners ("the pilots") respectfully file this reply to the Brief in Opposition of Respondent Pension Benefit Guaranty Corporation ("the Corporation").

ARGUMENT

I. THE CORPORATION DOES NOT DISPUTE THAT THERE IS A CIRCUIT SPLIT ON THE MEANING AND EFFECT OF § 1344(c)

The Corporation does not contest that the Circuits are divided as to the meaning and effect of 29 U.S.C. § 1344(c). As the Corporation candidly puts it, the "statements in *Kinek* [*v. Paramount Communications, Inc.*, 22 F.3d 503 (2d Cir. 1994)] and *Wilmington Shipping* [*Co. v. New England Life Insurance Co.*, 496 F.3d 326 (4th Cir. 2007)]" are "certainly not consistent with the D.C. Circuit's careful analysis." Opp. 11. In particular, the Corporation singles out *Wilmington Shipping* for criticism. In comparison to the D.C. Circuit's supposedly "careful" analysis, the Fourth Circuit's decision, to the Corporation, makes "several sweeping statements about [the Corporation's] role as statutory trustee," reached its holding with insufficient "analysis of the text of § 1344(c)," "was decided with no [Corporation] involvement," is "demonstrably wrong," and contains "baffling conclusion[s]." *Id.*

Notwithstanding that the Corporation especially pits the D.C. Circuit's decision against *Wilmington Shipping*, it says this Court should decline review because there is no "developed" or "genuine" division among the Circuits. *Id.* at 11, 8. That dubious proposition stems foremost from the Corporation's view that *Wilmington Shipping* is an illegitimate decision – *i.e.*, one that the Corporation thinks contains "no meaningful analysis." *Id.* at 11. But if a Circuit split could be

discredited simply because the party who won below views the alternative Circuits' viewpoints as unsound, then this Court would have few cases indeed to review, as just about every opponent to certiorari believes the decisions on the other side are infirm.

Moreover, there is nothing thin about the analysis in *Wilmington Shipping* or, for that matter, *Kinek*. *Wilmington Shipping* discusses for more than ten paragraphs the Corporation's role as trustee and the Corporation's ability to claim gains on assets the Corporation holds – in fact, at far greater length than any of the other relevant decisions, including the D.C. Circuit's analysis below. *See Wilmington Shipping*, 496 F.3d at 332-33 & n.7, 335-37; *see also Kinek*, 22 F.3d at 514-15 & n.7. Of significance, the Ninth Circuit in *Paulsen v. CNF, Inc.*, 559 F.3d 1061 (9th Cir. 2009), saw nothing outlandishly aberrant in *Wilmington Shipping*; it treated the decision with respect, but as necessitating the creation of a Circuit split (further deepened now by the D.C. Circuit's agreement with *Paulsen*). *Id.* at 1075.

Another theme in the Corporation's opposition is that the Circuit split need not be taken seriously because the various decisions arise in different contexts. *Kinek* involved § 1344(c)'s construction when "determin[ing] . . . prejudgment interest on [the Corporation's] recoveries," and *Wilmington Shipping* and *Paulsen* concerned a litigant's "standing to sue" a private party for misconduct where the liability would have increased only the Corporation's gains on plan assets it held post-termination if § 1344(c) were read in the manner the Corporation wants. Opp. 11. The case below, in turn, involves § 1344(c)'s potential (and si-

lent) nullification of an equitable remedy – disgorgement – available against the Corporation under 29 U.S.C. § 1303(f) where the Corporation, as trustee, has inflated its investment returns through its fiduciary misconduct. While, unquestionably, the contexts are different, the fact that § 1344(c) has relevance in all these different settings only heightens the need for this Court to resolve the differences among the Circuits. This is not a situation where a statutory provision's meaning and effect arises only rarely; rather, § 1344(c) potentially is at the core of several sorts of disputes arising under Title IV of ERISA. Additionally, § 1344(c)'s operation in *this* context is the most important of all, and thus most readily presents the urgency inviting this Court's review, because § 1344(c)'s utilization here by the D.C. Circuit (unlike some of the other contexts) worked *against* the very persons Title IV of ERISA was designed to protect: participants in pension plans that have been terminated. *See* Pet. 16.

II. THE CORPORATION LIKEWISE CONCEDES THAT THE QUESTION PRESENTED IS IMPORTANT

The Corporation also concedes the presence of another ingredient necessary for this Court to grant certiorari: the Question Presented is important. Though the Corporation spends some time reformulating the Question Presented (*see* Opp. i), ultimately landing on a version that nearly verbatim replicates the one presented by the pilots, it has no qualms characterizing the case as involving an "important issue." *Id.* at 12; *accord id.* at 14 ("[The Corporation] agrees with the Pilots that the issue of whether participants

can seek disgorgement of [the Corporation's] investment gains is 'of critical concern to the federal pension system.'") (quoting Pet. 17).

Still, the Corporation rejects the notion that, because the issue is important and the D.C. Circuit's decision otherwise could become the last word on the Question Presented, certiorari should be granted. The pilots pointed out that § 1344(c)'s operation with respect to remedies against the Corporation in its trustee capacity post-termination potentially might be determined solely by the D.C. Circuit, due to the Corporation's success under the relevant venue provision in steering all similar litigation to the District of Columbia federal courts. *See* Pet. 20. The Corporation surmises that, if that were enough to warrant certiorari, then "[b]y this logic, the Court should review all D.C. Circuit decisions involving [Corporation] interpretations of Title IV that affect participant benefits." Opp. 16.

To the contrary, the pilots do not assert that every D.C. Circuit case involving the Corporation's post-termination trusteeing deserves this Court's attention. As detailed in the Petition, certiorari is warranted in *this* case because: (1) the construction of § 1344(c) arises in various settings, and all parties agree there is a Circuit split on § 1344(c)'s meaning among the Circuit decisions in the various settings; (2) the issue of whether § 1344(c) nullifies the disgorgement remedy under § 1303(f) against the Corporation is important, as all parties also agree; (3) the D.C. Circuit's construction of § 1344(c) to nullify disgorgement against the Corporation transgresses statutory-construction rules this Court has carefully crafted (as the pilots

reinforce next, *see infra* pp. 6-9; *see also* Pet. 11-17); and (4) the D.C. Circuit's decision, though in conflict with other Circuits' views of § 1344(c) in other contexts and violative of this Court's precedents on statutory construction, may become the final and absolute word on § 1344(c)'s application in the important context of disgorgement against the Corporation, absent review by this Court. Granting certiorari under these circumstances is not tantamount to routine error correction, but well within the Court's guidelines for review of important, unsettled federal issues.

Ultimately, the significance of this case cannot be overstated. At issue is whether hundreds of thousands of current and future pensioners will have a meaningful way to police the fiduciary conduct of the Corporation when it serves as trustee of their terminated plans. Not only is that a momentous question in the abstract, it goes to the heart of ERISA's objectives. ERISA seeks to protect "the interests of participants . . . and their beneficiaries" expressly by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Respectfully, on such a critical issue, this Court's input, not just the D.C. Circuit's, is warranted.

III. THE CORPORATION FAILS TO UNDERMINE THE PILOTS' SHOWING THAT THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

The Corporation, in its opposition brief, presses a number of arguments to try to undermine the pilots' presentation that the D.C. Circuit's decision severely

departs from this Court's precedents, particularly the Court's precedents on the proper way to interpret statutory language. None of the Corporation's arguments succeeds.

First, in response to the pilots' contention that an accounting concept is implied by the key word in § 1344(c)'s second sentence, which is that the Corporation shall be "credited" with asset gains post-termination, the Corporation says accounting terminology is foreign to Title IV of ERISA. According to the Corporation, it "pools the assets of terminated plans" rather than keeps "accounts." Opp. 12. The Corporation's semantic assertion is beside the point. The pilots' argument is that the Corporation's accounts – as in, its books and banking ledgers – all along have been "credited" with the asset gains of the terminated plan, not that there must be a specific, separate account for any given terminated plan. Given that the Corporation cannot dispute that its financial ledgers have so far enjoyed all gains on the assets of the pilots' terminated plan, the Corporation has been "credited" with those gains, as the statute requires. The real issue is whether the statute's use of the word "credited," and its accounting connotation, means the Corporation also can *forever keep* the gains with which it has been credited, especially when earned wrongfully. The Corporation does not address that issue.

Second, the Corporation chastises the pilots for not focusing on the other part of the second sentence of § 1344(c), which mandates that losses on the terminated plan's assets should be "suffered by" the Corporation. *See* Opp. 12. This language, the Corporation says, "unmistakably convey[s] Congress's intent

that participants' benefits should not depend, one way or the other, on post-termination investment returns." *Id.* at 12-13. What is so unmistakable for the Corporation was not unmistakable for the Fourth Circuit in *Wilmington Shipping*, which held exactly the opposite – *i.e.*, that the participants' asset allocations, at least when there is a gain, *do* depend on the asset performance while the trustee (whether a private trustee or the Corporation) holds the assets. *See Wilmington Shipping*, 496 F.3d at 336. In any event, the "suffered by" language only fortifies that investment returns – up or down – are not permanently etched into the Corporation's books. The Corporation would assert that, even if it has suffered a loss on the assets, it might seek relief from a wrongdoer (like an incompetent investment manager or a prior fiduciary) who has triggered the loss. Hence, just as "credited" with a gain is no synonym for "forever keep" a gain, a loss to be "suffered by" a person need not inevitably signal that the person must "forever endure" the loss.

Third, the Corporation misapplies the familiar rule that a specific statute governs a general one, by treating § 1344(c) as a specific measure overriding the supposedly more general Title IV remedial provision here implicated, § 1303(f). But it is § 1303(f) that is the specific provision. Section 1303(f) concerns the types of relief available in litigation *solely* against the Corporation in federal court cases arising under Title IV; § 1344(c) addresses the manner in which increases and decreases in the value of plan assets are booked for *any* terminated plan, whether subject to litigation or not. Additionally, in other ERISA settings, the Court has repeatedly emphasized that ERISA's enforcement mechanisms are "careful" (*Pilot Life Ins. Co.*

v. Dedeaux, 481 U.S. 41, 54 (1987)), "comprehensive," and key to achieving ERISA's overarching purposes and, therefore, override other ERISA provisions. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 217 (2004) (holding that insurance savings clause in Title I of ERISA must be "'informed by the legislative intent concerning the civil enforcement provisions'") (quoting *Pilot Life*, 481 U.S. at 52). Still further, the rule of the specific over the general only applies when the two provisions otherwise cannot be reconciled. Section 1344(c) and 1303(f) easily can be harmonized, whether as the district court reconciled them, by adopting *Wilmington Shipping*'s understanding of § 1344(c), or by reading "credited" consistent with its ordinary definition rather than as meaning "forever keep." *See* Pet. 13-14.[1]

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[1] The correctness of *Wilmington Shipping*'s approach takes on added purchase after this Court's very recent decision in *Thacker v. TVA*, 139 S. Ct. 1435 (2019). In *Thacker*, the Court refused to permit "a 'wholly owned public corporation of the United States'" that sometimes took on roles usually performed by private parties – what the Court called a "hybrid" agency – to escape the liability that a private party would incur for the same activity. *Id.* at 1439 (quoting *TVA v. Hill*, 437 U.S. 153, 157 (1978)). The Corporation under Title IV is a similar "hybrid" entity, as it performs public functions as a guarantor of benefits and a private trusteeship role in allocating assets. *See* Pet. 2-3. The Fourth Circuit in *Wilmington Shipping*, consistent with *Thacker*, separated the Corporation's roles, which led to its holding that gains on a terminated plan's trusteed assets could only be credited to the Corporation once the Corporation (as trustee) has paid to participants all benefits promised by the original plan sponsor. *See* 496 F.3d at 335-36; *but see* Pet. App. 13a (D.C. Circuit construing § 1344(c) in a manner that supposedly avoids complicating the Corporation's "capacity as *guarantor*").

Fourth, the Corporation continues to invoke its own preferred conventions that would allow for § 1344(d) to take precedence over § 1303(f), this time around saying its duties are "limited by applicable Title IV provisions and its mandate to implement the insurance program." Opp. 5. Again, no rules of precedence need be conjured up because the two provisions can readily be reconciled; a contest between the two arises only because the Corporation takes (like the D.C. Circuit) an extreme view of § 1344(c). Tellingly, the Corporation now hardly mentions 29 U.S.C. § 1342(d)(3), a provision on which it relied heavily below and on which the D.C. Circuit rested its decision. As the pilots showed in their Petition, § 1342(d)(3) – by its express terms – has application only when there is conflict between a fiduciary duty outlined "'under part 4 of subtitle B of title I'" and Title IV, and there is no rivalry here between a provision in that (or any) portion of Title I and a Title IV provision. Pet. 15 (quoting 29 U.S.C. § 1342(d)(3)) (emphasis removed). Of significance, the one time it cites § 1342(d)(3), the Corporation – out of necessity – leaves out the key language in § 1342(d)(3) referencing part 4 of subtitle B of Title I and misleadingly substitutes generically "[Title I]." Opp. 5.

IV. REVIEW WOULD BE NEITHER PREMATURE NOR OBVIATED BY OTHER REMEDIES

The Corporation's assertions that this Court's review would be premature and unnecessary given other available remedies are, first of all, laden with hypocrisy. It was *the Corporation* that, in full hair-on-fire mode, forced an interlocutory appeal of whether the

remedy of disgorgement is available against it, rather than awaiting completion of the entire matter. Now it contends that determinations in other parts of the case might "prevent[] the Pilots from establishing the factual basis for asserting [disgorgement]" and that proceedings on remand in the district court "would provide additional context for any review of the disgorgement issue." Opp. 16. And on review being unnecessary because "other forms of equitable relief may be available" (*id.* at 15), the Corporation argued below, and no doubt will argue on remand in the district court, exactly the opposite (*i.e.*, that no other equitable relief is available). *See* D.C. Cir. ECF #1759577 at 4-7 (Nov. 13, 2018).

The Corporation's pleas of prematurity and other available remedies also fail on more substantive grounds. As to prematurity, the final resolution of *every* other claim in the case in the Corporation's favor would not negate the need to determine if disgorgement is an available remedy against the Corporation. As the pilots explained to the D.C. Circuit, rulings for the Corporation on claims that the Corporation's final benefit determinations violated statutory commands in ERISA would not decide whether the Corporation's egregious delays, manipulation of the asset allocation process, and other fiduciary breaches resulted in the Corporation unjustly earning enormous profits over the multi-year period before the Corporation paid the final benefit determinations that it did. *See* D.C. Cir. ECF #1684292 at 21-22 & n.6 (July 14, 2017); *see also* D.C. Cir. ECF #1754126 at 11 n.1 (Oct. 5, 2018). To the end, the Corporation persists in its effort to mischaracterize the fiduciary-breach claim as nothing but a duplicate of the benefits claims, when in reality the

former quite separately strikes at the whipsaws, biases, and manipulations that the Corporation erected to enrich itself, whether or not the district court (and appellate review) might eventually find "reasonable each of [the Corporation's statutory] interpretations." Opp. 7. Backing the pilots, the D.C. Circuit did not view the district court's intervening ruling in favor of the Corporation on the benefits-oriented claims as in any manner diminishing its need to resolve whether disgorgement against the Corporation is available under the fiduciary-breach claim. *See* Pet. App. 6a.

As to the potential availability of other equitable remedies on remand substituting for disgorgement (other remedies that, again, the Corporation previously has argued are not available), the closest additional remedy to disgorgement that the pilots have sought is surcharge. But courts and the traditional equitable treatises have uniformly noted that even disgorgement and surcharge are distinct remedies: whereas disgorgement seeks *the gain* a fiduciary has earned for his or her misdeeds (irrespective of whether the victim experienced a loss), surcharge awards recovery for *the loss* incurred by the victim (irrespective of whether the fiduciary made any gain). *E.g.*, *Perelman v. Perelman*, 793 F.3d 368, 373, 375 (3d Cir. 2015); Restatement (Third) of Trusts § 100 & cmt. a (Am. Law Inst. 2012).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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