

No. 21-495

In the Supreme Court of the United States

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DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH
HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION,
PETITIONERS,

v.

PENSION BENEFIT GUARANTY CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF OF AMICI CURIAE STATES OF MICHIGAN,
DELAWARE, FLORIDA, MINNESOTA,
OHIO, PENNSYLVANIA, AND VERMONT IN
SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Do retirees have a property right in vested but unfunded pension benefits, such that termination of those benefits without adequate procedural safeguards violates due process?

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INTEREST OF AMICI CURIAE

The amici, attorneys general of their respective states, serve as the chief law enforcement officers of their states. Among other duties, attorneys general appear, as parties, intervenors, or amici, to defend the constitutional rights of the citizens of their states.

Amici states, which include the home states of more than half the Delphi retirees involved in this case, have signed this petition for a few reasons. To begin, the decisions of the lower courts upheld a violation of the due process rights of thousands of residents of amici States.¹ Not only that, but the constitutional deprivation in this case was economically devastating to the petitioners, retirees who in many cases rely on their promised pension benefits to survive.

Further, the fundamental constitutional error the Sixth Circuit committed is not limited to Delphi retirees. The broad holding is precedential in the States of the Sixth Circuit, and, if found persuasive and adopted by other courts of appeals, could wreak economic havoc in other states. Thus, even amici States with a small number of Delphi retirees have an interest in this case and sign onto this brief to protect the constitutional rights of their citizens in future cases.²

¹ The decisions below also ratified a violation of the statutory rights of petitioners, though those issues are not addressed in this brief.

² As required by Supreme Court Rule 37.2(a), Michigan has notified counsel of record for both parties of amici's intention to file this brief at least 10 days prior to the due date. Counsel for both parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When times were good, Delphi attracted skilled professionals with compensation that included a pension plan—a promise that those employees would be compensated after their retirement. The employees earned this promised future compensation by working, giving Delphi the full benefit of its bargain. But when times worsened, it became clear that Delphi would not make good on its end of the bargain. While there is nothing novel about a company reneging on its bargain to employees (indeed, in the bankruptcy context debtors cannot always pay their creditors), the problem here is a systemic failure to recognize that there was anything owed in the first place.

According to the Sixth Circuit, the retirees had no cognizable legal right to the portion of their pension benefits Delphi had not funded. This was despite the fact that the benefits in question had vested—a term which in ordinary usage, in ERISA, and in caselaw denotes the conferring of a property right.

The Sixth Circuit's broad holding has dire implications within that circuit, as well as anywhere else where the same is adopted. Retirees already occupy a precarious position, reliant for their survival on pensions and other fixed sources of income. It is concerning enough that these individuals can be endangered when their former employers proceed in bankruptcy and are judicially relieved of their commitments. But at least in a bankruptcy proceeding, there is a recognition that creditors have property rights, and there are safeguards in place and a process that ensures that all parties are heard, after which a judge—not a

government corporation—makes the final adjudication. Here, retirees had no opportunity to challenge the plan termination before it was terminated, since the bankruptcy court would not hear the challenge, and the respondents then terminated the plan without an adjudication. And when the retirees sought post-deprivation relief, the Sixth Circuit held they had no constitutional right to any process at all.

The decision below should be reversed because it failed to even recognize that the retirees had a cognizable property interest in the payments they had been promised.

ARGUMENT

- I. Certiorari is warranted in this case to correct the Sixth Circuit’s serious error in holding that retirees have no property interest in receiving the compensation they have been promised.**

While petitioners identify several serious legal errors in the decision below, amici States focus in this brief on a fundamental one: the court’s rejection of petitioners’ due process argument based on the holding that the retirees had no property interest in the money they had been promised as compensation for their work.

- A. The Sixth Circuit stands apart from the other circuits in its erroneous due process holding, as well as running afoul of this Court’s precedent and its own precedent.**

Certiorari is warranted here to correct the Sixth Circuit’s decision to depart from this Court’s precedent, that of the other circuits, and its own precedent leaving that court standing alone in holding that there is no property right in a vested benefit.

- 1. The holding below is out of step with this Court’s holding in *Nachman*.**

As petitioners point out, the Sixth Circuit’s holding in this case failed to adhere to this Court’s holding in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, which recognized that an employer cannot simply disclaim responsibility for paying vested but unfunded pension benefits by declaring them “forfeitable.” 446 U.S. 359, 366 n.10 (1980). In *Nachman*, this Court

held that section 203(a) of ERISA (29 U.S.C. § 1053(a)) “requires generally that a plan treat an employee’s benefits, to the extent they have vested . . . as not subject to forfeiture.” *Id.* Not only that, but “[a] provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976.” *Id.* And “[n]one of the listed conditions [in subsection (a)(3)] relates to insufficient funding.”

The Sixth Circuit dismissed this language as merely a recognition that ERISA requires that the respondent cover the lack of funding (not fully, but only up to the statutory limit), such that the “retirees have a statutory right to *some* payment,” albeit “from PBGC rather than from the plan itself.” *Black v. Pension Benefit Guaranty Corp.*, 983 F.3d 858, 869 (6th Cir. 2020).

But that interpretation of *Nachman* does not square with this Court’s language. *Nachman* did not merely say that a contract clause that purported to render vested benefits forfeitable would have no effect on PBGC coverage. Rather, *Nachman* held that such a clause “*would be invalid* after January 1, 1976.” 446 U.S. at 366 n.10 (emphasis added).

To be sure, *Nachman* was a statutory case, not a due process case, but its statutory reasoning nevertheless controls the first step of the due-process inquiry—the existence of a protected property right. That was the Sixth Circuit’s stumbling block below, as it found no baseline property right, relying on its misreading of *Nachman* and the statute. The Sixth Circuit recognized that, while the Constitution protects

property interests, it does not create them. *Black*, 983 F.3d at 868. And so the court “look[ed] to the source that creates the purported property interest,” to wit, “the private contract between the retirees and Delphi.” *Id.* And in looking to that contract, the court gave weight to Delphi’s apparent³ attempt to render vested but unfunded benefits forfeitable. To the extent the contract declared vested but unfunded benefits forfeitable, that clause of the contract was “invalid” under *Nachman*.

2. The holding below brings the Sixth Circuit out of step with the other circuits.

The circuits are in accord with *Nachman*, leaving the decision below an anomaly. In 2006, the Seventh Circuit rejected a retiree’s claim for benefits for the sole reason that he not yet vested. *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 359 (7th Cir. 2006). Because the retiree had not vested, his employer had not, by changing the vesting rules while he worked there, “deprive[d him] of anything to which he had legal entitlement.” *Id.* And although the Second Circuit panel that decided *Winston v. City of New York* split on whether the retirees had been improperly deprived of their property interest in their vested retirement benefits, it was unanimous on the point that the retirees *had* a property right in those benefits. 759

³ As noted, the contract did not *explicitly* declare unfunded benefits forfeitable; this inference was the result of the faulty “necessary implication” from the contract’s declaration that funded benefits are nonforfeitable. *Black*, 983 F.3d at 868.

F.2d 242, 249 (1985); see also *id.* at 250 (Van Graafeiland, J., dissenting).

The D.C. Circuit has held that “‘vesting’ governs when an employee has a *right* to a pension; . . .” *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D.C. Cir. 1984). In *Hoffman v. City of Warwick*, the First Circuit cited a string of cases from various courts that drew the distinction between vested rights, which are property rights protected by the Constitution, and mere expectations, which can be repealed without offending the Takings Clause. 909 F.2d 608, 616–17 (1990) (collecting cases).

3. The holding below is out of step with the Sixth Circuit’s own precedent.

The Sixth Circuit briefly cited *Duncan v. Muzyn*, 833 F.3d 567 (6th Cir. 2016), in its opinion to address the retirees’ argument that *Duncan* “stands for the proposition that ‘whether a benefit is constitutionally protected’ turns on ‘whether it has vested.’” *Black*, 983 F.3d at 869. *Duncan* included a claim that the Tennessee Valley Authority Retirement System’s change in rules that removed cost of living adjustments (COLAs) to their retirement benefits violated the Takings Clause. 833 F.3d at 570.

The decision below described *Duncan*’s holding: “that the plaintiffs were not deprived of a property right because the COLAs were not vested, and the plaintiffs had failed to show that TVARS unmistakably intended to create a binding contract right.” 983 F.3d at 869 (citing *Duncan*, 833 F.3d at 584). But *Duncan* did not take the “vesting” question and the “binding contract right” question as separate questions,

each defeating plaintiffs' claims. Rather, *Duncan* treated the "vesting" question as *dispositive* of the "binding contract right" question. The clear implication was that, if the COLAs had been vested, the retirees would have had a constitutionally cognizable property right that implicated the Takings Clause. In other words, vesting creates a property right.

The court below erred in sidestepping *Duncan* by noting (correctly but irrelevantly) that "*Duncan* addressed different legal issues than those raised in this case." 983 F.3d at 869. The court also pointed out that *Duncan* involved a public contract while this case involves a private contract, *id.*, but it did not explain why that distinction matters to the broader question whether vesting confers a property interest.

Duncan's connection between "vesting" and a cognizable property right is far from anomalous. This Court has described vesting, in the ERISA context, as "the process by which an employee's already-accrued pension account becomes irrevocably his *property*." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004)(emphasis added).

All of this confirms what most people—including most people induced to work for an employer by the promise of a pension plan—would understand the term "vest" to mean. Black's defines the term to mean: "1. To confer ownership (of property) on a person. 2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment." Vest, Black's Law Dictionary (11th ed. 2019). And Merriam-Webster defines the term in relevant part to mean, "to grant or endow with a particular authority, right, or property." Vest,

Merriam-Webster, avail. at <https://www.merriam-webster.com/dictionary/vest>, last accessed Oct. 21, 2021.

In sum, nothing in the text of ERISA or elsewhere defeats the conclusion, supported by case-law and common understanding of the term, that a vested right is a cognizable property right under the Constitution. The significance of the Sixth Circuit’s error here is not merely that it ratified the Government’s wrongful deprivation of a property right (though it did that), but that it did so by holding that the petitioners had no property right in the first instance. This error cries out for this Court’s correction.

B. Certiorari is warranted not only because of the impact the error below has had on the petitioners, but to avoid similar harm to other retirees in future cases.

The Sixth Circuit’s holding that retirees have no property interest in their vested benefits upsets the reasonable expectations of not only the thousands of Delphi retirees in this case, but also countless other retirees. Employers like Delphi derive a benefit from promising to pay a pension—no different than promising a salary or health insurance plan.

If “vesting” means anything, it means that a right has been conferred. See, e.g., *Nachman*, 446 U.S. at 363–64 (“Benefits became ‘vested’—that is to say, the *employee’s right to the benefit* would survive a termination of his employment . . .”) (emphasis added); *Central Laborers’ Pension Fund*, 541 U.S. at 749 (describing vesting as “the process by which an employee’s

already-accrued pension account becomes irrevocably his property.”).

Nobody contends, of course, that a vested pension benefit constitutes an ironclad and inviolable promise to pay. Indeed, the entire point of bankruptcy proceedings is that promises to pay may be broken. But a key part of the point of bankruptcy proceedings is to provide a *process* by which these promises might be broken and through which creditors may be heard and their interests considered by a bankruptcy judge who will make the ultimate decision. But petitioners could not challenge the termination in bankruptcy court.

Indeed, petitioners received no pre-deprivation process, since the bankruptcy court held that they could challenge the termination by intervening in the district court, but the PBGC decided not to go through the district court. Instead, the retirees were cut out of the process as the debtor was relieved of its promise by the government corporation that was supposed to be in the business of maintaining pension plans. And when the petitioners tried to avail themselves of post-deprivation process by suing the PBGC in district court, the Sixth Circuit held that they were not constitutionally entitled to any process at all.

The due process question presented in this petition is a significant one because the holding below threatens retirees throughout the states within the Sixth Circuit. Indeed, the decision below has already had an impact within that circuit. The Western District of Tennessee has already relied in part on *Black* to dismiss a retiree’s claim to benefits, declining to address her argument that benefits had vested and noting that the benefits had not been funded, making

vesting irrelevant. *Pynkala v. Blake Enterprises, LLC*, 2021 WL 261695, at *3 (W.D. Tenn. Jan. 26, 2021). While amici take no position on the overall merits of the plaintiff's claim in *Pynkala*, they are troubled that the court was able to ignore the question of vesting in reliance on *Black*.

Because the Sixth Circuit's holding contradicts precedent of this Court and the courts of appeals and is a significant constitutional question with broad potential application, it merits this Court's attention.

II. Retirees have a cognizable property interest in vested benefits, such that deprivation of those benefits without adequate procedural safeguards violates the Fifth Amendment guarantee of due process.

In determining whether the retirees had a property interest in what they were promised, the Sixth Circuit relied in large part on the contract language, which stated in part that the employees' "right to benefits accrued to the date of [plan] termination . . . to the extent funded as of such date, is nonforfeitable." *Black*, 983 F.3d at 868. The court then considered it a "necessary implication" from this contract language that "unfunded benefits are forfeitable upon plan termination."

This reasoning is logically flawed. To begin with, a negative inference is not a necessary implication. The mere fact that that a funded benefit is nonforfeitable does not imply that an unfunded benefit is forfeitable. This is the logical fallacy known as denying the antecedent.

More to the point, the Sixth Circuit's holding that the vested but unfunded benefits are forfeitable *if a plan is terminated* says nothing about what process is required in order to terminate the plan. This is akin to saying that if the State takes your home in a tax foreclosure, you no longer have the right to live there, therefore you have no cognizable property right to the occupancy of your home. This reasoning puts the cart before the horse. As this Court noted in *Nachman*, "the term 'forfeiture' normally connotes a total loss *in consequence of some event* rather than a limit on the value of a person's rights." 446 U.S. at 372 (emphasis added).

Contrary to the Sixth Circuit's reasoning, it is precisely because retirees lose the unfunded portion of their pension benefits on plan termination that termination of a pension plan implicates due process concerns. And so, regardless of what rights, if any, the Delphi retirees *would* have to benefits if the plan were legitimately terminated, they *do* have a cognizable property right to those benefits until the plan is legitimately terminated. The Sixth Circuit erred in holding otherwise.

The holding below is not only out of step with previous decisions of other courts, including this one, it is patently erroneous. Amici respectfully request that this Court grant certiorari and reverse.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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