

ORAL ARGUMENT SEPTEMBER 10, 2013
No. 12-5274

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS G. DAVIS, *et al.*,
Plaintiffs - Appellants
v.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant - Appellee

On Appeal from the U.S. District Court for the District of Columbia
No. 1:08-cv-01064 (Frederick J. Scullin, Jr., J.)

SUPPLEMENTAL BRIEF OF APPELLEE
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U.S. Constitution, Article III, § 2.....1

Pursuant to the Court’s Order of August 23, 2013, the Pension Benefit Guaranty Corporation (“PBGC”) files this supplemental brief to address whether appellants (“the Pilots”) have standing to raise Claims 8 and 11.

APPLICABLE LAW

According to bedrock constitutional principles, the judicial power of federal courts is confined to deciding actual “cases” or “controversies.”¹ Thus, any person invoking the power of a federal court must prove that “he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct and is likely to be redressed by a favorable judicial decision.”² Such Article III standing is a jurisdictional requirement that cannot be waived by the parties.³

Moreover, the Supreme Court has made clear that “every federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.’”⁴ Following that mandate,

¹ U.S. Constitution, Article III, § 2. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

² *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

³ *See Cherry v. FCC*, 641 F.3d 494, 497 (D.C. Cir. 2011).

⁴ *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (citation omitted).

this Court regularly dismisses appeals (or portions of appeals) for which parties do not have standing.⁵

CLAIMS 8 AND 11

In Claims 8 and 11, the Pilots challenge PBGC’s application of specific pension plan terms in the course of administering the federal termination insurance program in Title IV of the Employee Retirement Income Security Act.⁶ The standing inquiry here is whether the Pilots have proven in these claims that they “suffered a concrete and particularized injury.”⁷ They bear the burden of “establish[ing] standing for each challenge [they] wish to bring and each form of relief [they] seek.”⁸

⁵ See, e.g., *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1320 (D.C. Cir. 2013) (“We affirm the denial of intervention – because UWAG lacks Article III standing – and, as there is no appellant with standing, we dismiss the remainder of the appeal.”); *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 936 (D.C. Cir. 2012) (“the Timbisha Shoshone appeal the district court’s dismissal of their case for failure to state a claim, but we do not reach that issue because we conclude the plaintiffs lack standing. We vacate the judgment of the district court and remand with instructions to dismiss their complaint for lack of jurisdiction.”); *Occidental Permian v. FERC*, 673 F.3d 1024, 1024 (D.C. Cir. 2012) (“Because we conclude Occidental lacks standing to challenge these orders, we do not reach this question and instead dismiss the petition.”).

⁶ 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

⁷ *Hollingsworth*, 133 S. Ct. at 2661.

⁸ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); accord *Heller v. District of Columbia*, 670 F.3d 1244, 1249 n.* (D.C. Cir. 2011) (plaintiff “bears the burden of showing that he has standing for each type of relief sought”), quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

In Claim 8, the Pilots challenge PBGC's interpretation and application of the pension plan's "minimum benefit" provisions. But they did not allege a concrete and particularized injury. As the agency noted in its Appeals Board determination:

Your appeal does not provide any specific examples to illustrate the financial impact upon appellants of the alleged errors in PBGC's Prior Plan minimum benefit calculations. Rather, your appeal focuses only on the general methodology used by US Airways and PBGC in calculating benefits.

JA 301-02. Similarly, in the Pilots' Second Amended Complaint, Claim 8 alleges no particularized injury, stating only that individuals were "adversely affected."

JA 73-76, ¶¶ 103-111.

In Claim 11, the Pilots challenge PBGC's interpretation and application of the pension plan's disability provisions. The facts here show that PBGC determined that the disability issue "potentially affects PBGC benefits for the 32 appellants listed on Enclosure 1 to this decision." JA 1002. The agency granted the appeal for some individuals on certain issues, while denying it for others. JA 1019.

CONCLUSION

The Pilots bear the burden of establishing that they have suffered a concrete and particularized injury that is fairly traceable to the conduct they have asserted in Claims 8 and 11. Even an "objectively reasonable likelihood" of injury

is simply not enough.⁹ The Pilots' assertion that PBGC's interpretations "adversely affected the Retired Pilots"¹⁰ does not show that any plaintiff suffered a specific financial impact on Claim 8.

Dated: September 3, 2013

Respectfully submitted,

/s/ Paula J. Connelly

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⁹ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

¹⁰ Second Amended Complaint ¶ 111, JA 76.

CERTIFICATE OF SERVICE

I, Paula J. Connelly, certify that on September 3, 2013, true and correct copies of the Appellee's Supplemental Brief were served via the Court's ECF filing system upon the following counsel:

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CERTIFICATE OF COMPLIANCE

I, Paula J. Connelly, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that the word count of Appellee's Supplemental Brief is 753, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Appellee's Supplemental Brief was prepared using Microsoft Word 10, and Appellee's counsel has relied on the word count function of Microsoft Word 10 to calculate the word count.

Appellee's Supplemental Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

Dated: September 3, 2013

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