No. 19-1336

IN THE

Supreme Court of the United States

THE NATIONAL RETIREMENT FUND, ET AL.,

Petitioners,

v.

METZ CULINARY MANAGEMENT, INC.,

Respondent.

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

BRIEF FOR *AMICUS CURIAE*
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INTEREST OF *AMICUS CURIAE*[1]

Amicus Horizon Actuarial Services, LLC is a leading consulting firm that specializes in providing innovative actuarial solutions to multiemployer benefit plans. Horizon proudly serves more than 120 pension and health and welfare plans in various industries, including construction, trucking, professional sports, hospitality, entertainment, retail food, and communication.

As a leading actuarial firm, Horizon has an interest in the Second Circuit's erroneous holding, which misunderstands actuarial principles and misconstrues the relationship between an actuary and a client plan. The decision below also imposes constraints on actuaries that are inconsistent with standard and appropriate actuarial practices and imperil the health of multiemployer defined-benefit pension plans. Horizon also has an interest in this particular case. In late 2013, shortly before the events giving rise to this dispute, petitioner National Retirement Fund chose Horizon to be the actuary for NRF's multiemployer pension plan. Pet. App. 5a. Horizon was the actuary for the plan when respondent Metz Culinary Management, Inc. withdrew from the pension plan.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioners and for respondent have indicated their consent to the filing of this brief.

Horizon submits this brief to explain why this Court's immediate intervention is warranted to correct the Second Circuit's erroneous decision. If left standing, the court of appeals' decision will place actuaries for multiemployer defined-benefit pension plans in an untenable position by preventing them from using their best judgment in performing withdrawal-liability calculations, even though that is what the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, requires. The decision below also threatens to further imperil the health of multiemployer pension plans, which have long been at risk of leaving millions of Americans without their promised retirement benefits—and are at even greater risk in the current economic climate.

SUMMARY OF ARGUMENT

This Court's immediate intervention is warranted to correct the Second Circuit's erroneous decision. Although this Court rarely grants a writ of certiorari in the absence of a circuit conflict, an exception to that usual practice is appropriate here because of the potential for widespread economic harm to multiemployer defined-benefit pension plans and their hardworking beneficiaries.

The Second Circuit's decision is based on a misunderstanding of actuarial practices, of the distinct obligations assigned by Congress to actuaries and to plan sponsors, and of the statutory obligations that govern an actuary's determination of actuarial assumptions. If allowed to stand, the Second Circuit's decision will continue to place actuaries in the impossible position of simultaneously (1) being required by statute to use their best judgment in setting reasonable assumptions

that reflect actual and reasonably anticipated plan experience and (2) being prohibited from doing exactly that by the decision below.

With the current economic and health-related crises gripping our Nation, the already distressed universe of multiemployer defined-benefit pension plans is at risk of sliding even more quickly towards insolvency. Even the federal agency designated as the backstop in the event of plan insolvency has declared that its own multiemployer-plan insurance fund will be insolvent in five years. The decision below, if left to stand, will only exacerbate those problems at the expense of hard-working Americans. This Court's immediate intervention is warranted.

ARGUMENT

Although the Second Circuit's decision in this case does not directly conflict with any decision of another court of appeals, this Court's immediate intervention is warranted because the decision below is likely to cause serious damage to the already distressed system of multiemployer defined-benefit pension plans. The Second Circuit's decision is based on fundamental misunderstandings about the actuarial practices at issue in this case. As a result, the decision below places actuaries in an impossible position, requiring them to use actuarial assumptions that are unreasonable and that *do not* reflect their best estimate of a plan's expected future experience—in direct contravention of what ERISA requires. Because the universe of multiemployer defined-benefit pension plans is already in serious danger of leaving millions of American workers without the benefits they have toiled so hard to earn, this Court should intervene immediately rather

than waiting for a circuit conflict to arise. The current global financial recession threatens to accelerate the pace of the damage the decision below is likely to cause.

I. The Decision Below Misunderstands And Distorts Settled Actuarial Practices And Professional Standards.

The decision below warrants this Court's immediate review because it seriously distorts settled actuarial practices and places independent actuaries in an impossible position.

A. This case involves a multiemployer defined-benefit pension plan that is underfunded. When a participating employer withdraws from an underfunded multiemployer pension plan, ERISA requires the withdrawing employer to contribute its share of the unfunded vested benefits. Pet. App. 3a. The withdrawing employer must pay its share of expected benefit payments from the plan that will not be covered by existing assets. *Id.* 3a-5a. Calculating a withdrawing employer's share of unfunded vested benefits requires making predictions about the future growth of the plan and about future demands for benefits. *Id.* at 4a. In this case, that role fell to *amicus* Horizon Actuarial Services, the independent actuary hired by petitioners. *Id.* at 5a-6a.

An actuary's calculation of a withdrawing employer's withdrawal liability is governed by ERISA, which requires an actuary to use actuarial assumptions that, "in the aggregate, are reasonable" based on "the experience of the plan and reasonable expectations." 29 U.S.C. § 1393(a)(1). The same provision re-

quires actuaries to set actuarial assumptions that "offer the actuary's best estimate of anticipated experience under the plan." *Ibid.* The Second Circuit's erroneous decision now *prevents* actuaries from adhering to their professional and statutory duties to use actuarial assumptions that reflect their best judgment about what to expect in the future and that reflect the actual experience of the plan in question.

ERISA requires that a withdrawing employer's withdrawal liability be calculated "as of" the last day of the year directly preceding the year of the withdrawal (here, December 31, 2013). 29 U.S.C. §1391(b)(2)(E)(i). But it is generally impossible for an actuary to make a determination about the applicable interest-rate assumption (or other assumptions) *on* December 31 of the relevant year because the actuary lacks the necessary information to make that determination in advance. Interest-rate assumptions depend on an array of data that are generally not available instantaneously—and certainly cannot be effectively analyzed instantaneously. Those data include the allocation of plan assets, historical investment data, current yields on fixed income securities, forecasts of inflation and returns for various asset class, and trends in employer participation in the plan. Sometimes an actuary is made aware of an event that is relevant to selecting an assumption only after the fact. In those circumstances, the actuary must be allowed to take such events into account in selecting the assumptions that best reflect the facts on the ground. Because ERISA requires an actuary to consider the actual "experience of the plan," 29 U.S.C. § 1393(a)(1), in setting assumptions, an actuary needs to evaluate the as-

sumptions in light of recent plan experience before setting those assumptions. That is particularly true where, as here, a plan hires a new actuary. ERISA recognizes that a range of different assumptions can be equally reasonable. When a plan hires a new actuary, the actuary must assess the reasonableness of its predecessor's assumptions—and adopt new assumptions when the old ones are not the most reasonable in the new actuary's opinion.

As facts on the ground change from year to year, actuaries must be allowed to fulfill their statutory obligation to exercise their best judgment in light of the plan's experience when setting actuarial assumptions. Indeed, the applicable standards governing actuarial practice required actuaries like *amicus* to adopt assumptions that take into account "appropriate recent and long-term historical economic data." Actuarial Standards Board, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations*, ¶ 3.3.d (Sept. 2007). But that is no longer possible for plans governed by the Second Circuit's decision, which effectively locks plans into old interest-rate assumptions that necessarily do not reflect recent trends, plan experience, and current economic conditions. That is not what Congress intended and it is not in the interest of multiemployer plans, participating employers, or employee beneficiaries.

Relatedly, ERISA also subjects multiemployer plans to minimum-funding standards. 26 U.S.C. §§ 412, 431. To implement those standards, an actuary determines the minimum funding for a "plan year" (here, a calendar year) by determining the present value of future liabilities for benefits and of the costs of administering the plan. In calculating minimum-

funding requirements, an actuary must use an array of reasonable assumptions, *see* 26 U.S.C. § 431(c)(3); 29 U.S.C. § 1084(c)(3), that are similar to those used to calculate withdrawal liability. Such assumptions may include turnover assumptions that reflect how many employees will vest in their benefits, retirement age and mortality assumptions that reflect how long beneficiaries will receive benefits, and interest-rate assumptions that the actuary uses to discount future plan liabilities to the present dollar equivalent. In the decision below, the Second Circuit suggested that an actuary's choice of different interest-rate assumptions for plan-funding purposes and for withdrawal-liability purposes could reflect bias and manipulation. Pet. App. 13a-14a. That suggestion reflects a further lack of understanding about actuarial practices—and threatens to undermine actuaries' ability to choose assumptions that reflect their best independent judgment.

The court of appeals failed to appreciate that the *purpose* of a withdrawal-liability calculation is fundamentally different from the purpose of a minimum-funding calculation. Standards governing the adoption of the actuarial assumptions at issue here required that, in choosing such an assumption, the actuary must consider, *inter alia*, "the purpose and nature of the measurement" for which the assumption will be used. Actuarial Standards Board, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations*, ¶¶ 3.3.a, 3.6.3 (Sept. 2007). The purpose of a withdrawal-liability calculation is to calculate the value of the unfunded vested benefits that will be allocated to a withdrawing employer. When an employer withdraws from a plan,

it effectively settles its obligations to the plan—and then pays off that fixed settlement amount over a number of years. In contrast, the purpose of a minimum-funding obligation is to determine the budgeting contribution a participating employer must make to cover the fund's obligations and operating expenses.

One critical difference between the minimum-funding calculations and withdrawal-liability calculations is the ongoing relationship (or lack thereof) between the relevant employer and the plan. When an actuary makes an interest-rate assumption for purposes of determining the minimum-funding requirement, the actuary knows that all of the participating employers share the risks associated with market and demographic changes going forward. That means that each employer that stays in the plan will be subject to any future increases in minimum-funding requirements should interest-rate assumptions for funding purposes change for the worse. In contrast, when an employer withdraws from a multiemployer plan, that employer's obligation to the plan is fixed and its relationship with the plan is severed except to the extent it pays off its fixed obligation over time. The withdrawing employer's risk is eliminated with respect to that employer and is instead shifted to the employers that remain in the plan. Because the two calculations serve different purposes and must take into account different future risk portfolios, it is appropriate in some circumstances for actuaries to use different interest-rate assumptions for the two calculations. That is particularly true when the experience of the plan suggests that a withdrawing employer is unlikely to be replaced by a new employer. In that circumstance, the

risk left behind by the withdrawing employer must be borne entirely by the employers remaining in the plan.

As noted, when an employer withdraws from a multiemployer plan, its liability to the plan is forever fixed and that employer is obligated to make periodic payments on that liability over time. Any amount of that obligation that remains after 20 years can be reallocated to the employers that remain in the plan. The actuary's valuation of the withdrawing employer's obligation is the economic equivalent of a settlement valuation, akin to a fixed-rate annuity. In this case, the actuary opted to use an interest-rate assumption established by the federal Pension Benefit Guaranty Corporation (PBGC) that is similar to the type of interest rate that insurance companies use to price an annuity. That choice was reasonable in light of the experience of the plan and it reflected the actuary's best judgment about the current cost of settling a fixed obligation.[2]

B. The Second Circuit also fundamentally misunderstood the different roles and obligations of actuaries on one hand and plan sponsors on the other hand.

First, the court of appeals relied heavily on the requirements of Section 4214 of ERISA, 29 U.S.C.

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[2] The current version of Actuarial Standard of Practice 27 instructs that an actuary should take into account the purpose for which a discount (interest) rate is selected, specifically noting that one such purpose is for "defeasance" or "settlement" measurements and another such purpose is "[c]ontribution [b]udgeting." Actuarial Standards Board, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations*, ¶ 3.9.a (Sept. 2013).

§ 1394, without examining *on whom* those obligations fall. *See* Pet. App. 10a-12a. Section 4214(a) prohibits the retroactive application of a new "plan rule or amendment" "with respect to liability for a withdrawal or partial withdrawal." 29 U.S.C. § 1394(a). And Section 4214(b) requires a "plan sponsor" to "give notice to all employers who have an obligation to contribute under the plan . . . of any plan rules or amendments adopted pursuant to" Section 4214. *Id.* § 1394(b). The court of appeals concluded that the twin prohibition and obligation in Section 4214 prohibit an actuary from setting an interest-rate assumption for purposes of withdrawal liability after December 31 of the previous year. That was incorrect.

The prohibition and obligation in Section 4214 apply to *plan sponsors*, not to actuaries. That much is apparent on the face of the provision, which refers only to a "plan sponsor," not to an actuary (unlike Section 4213, 29 U.S.C. § 1393). Section 4214 expressly applies only to new "plan rule[s] or amendment[s]," 29 U.S.C. § 1394(a)—which do not include the type of actuarial assumptions at issue here. New plan rules or amendments are adopted by plan sponsors, not by actuaries. A new rule or amendment may affect an employer's potential withdrawal liability by altering one or more *methods* used in determining that liability. Permissible methods for calculating withdrawal liability are generally defined by statute or regulation, are selected by the plan sponsor, and are memorialized in a legal document. When a plan sponsor adopts such a new method, the change is subject to Section 4214's notice requirement and prohibition on retroactivity. But a plan sponsor's change to a *method* of calculating withdrawal liability is distinct from an actuary's

change to an *assumption* used to implement such a method.

In contrast to methods, which are adopted by plan sponsors, *assumptions* are adopted by actuaries. Assumptions are basically educated guesses about uncertain future events that are used to determine expected future cash flows from a plan and to determine the present value of those cash flows. In this context, actuaries use assumptions about a variety of unknowns, including interest rates that reflect expected growth of the plan's assets, termination rates that reflect expected employee turnover, disability and retirement rates that reflect expected payout of those benefits, and mortality rates that reflect both expected employee attrition from the plan and expected payout of certain death benefits where appropriate. The rules governing the use of those actuarial assumptions in determining withdrawal liability are set out in Section 4213 of ERISA, 29 U.S.C. § 1393, and in accompanying regulations promulgated by the PBGC. None of the rules set out in those statutory or regulatory provisions prohibit an actuary from changing actuarial assumptions, effective on an earlier date, based on analysis of real-world data that were not reflected in those earlier assumptions.

Section 4213 of ERISA requires actuaries to use assumptions "which, in the aggregate, are reasonable" based in part on "the experience of the plan"—and that, "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). The statutory command that an actuarial assumption reflect both the experience of the plan and the actuary's best estimate of anticipated experience going forward means that an actuarial assumption

must reflect the facts on the ground. In practice, this means that they must be adjusted retrospectively to the measurement date after the relevant facts have been gathered and assessed. That is in part why Section 4213 does *not* include a prohibition on retroactive and unannounced changes to assumptions while Section 4214 does prohibit such changes with respect to plan provisions, including methods.

The court of appeals failed to appreciate the distinct roles that actuaries and plan sponsors play—and the distinct obligations that each entity bears under ERISA. Congress understood those differences when it enacted ERISA, imposing the obligations of Section 4214 on plan sponsors (who adopt new plan rules or amendments) and imposing the distinct obligations of Section 4213 on actuaries (who adopt actuarial assumptions). By reflexively imposing obligations applicable to plan sponsors onto the distinct actions of actuaries, the Second Circuit undermined ERISA's carefully reticulated scheme to protect multiemployer plans.

Second, the court of appeals ignored the institutional independence of an actuary from a plan sponsor when it suggested that an actuary's use of different assumptions for withdrawal-calculation purposes and for minimum-funding purposes could be a sign that the actuary is caving to manipulative pressure and biases of a plan sponsor. *See* Pet. App. 13a-14a.

As explained, plan sponsors do not select actuarial assumptions; actuaries select actuarial assumptions. "ERISA requires that the computation of withdrawal liability be based on 'the *actuary's* best estimate of anticipated experience,'" not the plan sponsor's. *Chi. Truck Drivers, Helpers and Warehouse Workers Union*

(Indep.) Pension Fund v. CPC Logistics, Inc., 698 F.3d 346, 355 (7th Cir. 2012). And an actuary's choice of assumptions is constrained not only by statutory and regulatory requirements, but also by a code of professional standards promulgated by the Actuarial Standards Board and by a code of professional conduct promulgated by the American Academy of Actuaries. This Court has explained that, "[a]lthough plan sponsors employ them, actuaries are trained professionals subject to regulatory standards." *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 632 (1993) (citing 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35)). As such, actuaries are "not, like the trustees, vulnerable to suggestions of bias or its appearance." *Ibid.* "The actuary is a professional, assumed to be neutral and disinterested; a plan's trustees, in contrast, may, whether for short-term reasons, pressures from employers or unions, or lack of relevant expertise, want unreasonably high or unreasonably low interest-rate assumptions." *Chi. Truck Drivers*, 698 F.3d at 355.

To put it in practical terms, an actuary who yields to pressure from plan sponsors to adopt an assumption that is unreasonable and does not reflect the actuary's best estimates cannot expect to work as an actuary for much longer. The very purpose of hiring an actuary is to obtain an independent and unbiased assessment of the range of likely outcomes of unknowable future events. That is why Congress created a presumption that actuarial assumptions are correct by requiring an employer to bear the burden of establishing that any such assumption is unreasonable. 29 U.S.C. § 1401(a)(3)(B). Particularly because sound actuarial practices support the assumptions adopted in this case

and all professional guidance was strictly followed, the court of appeals erred in suggesting that the assumptions reflected potential bias by the actuary.

II. This Court's Immediate Intervention Is Warranted Even In The Absence Of A Direct Circuit Conflict.

As explained, the Second Circuit's erroneous decision is based on a lack of understanding about actuarial principles, practices, and obligations. Although no other courts of appeals have directly confronted the question decided below, this Court's immediate intervention is warranted because the practical consequences of the Second Circuit's decision could be catastrophic for multiemployer pension plans.

Multiemployer defined-benefit pension plans are already in serious trouble. The most recent projections of the PBGC indicate that a large number of multiemployer plans are in critical and declining status and expect to be insolvent in the next 20 years. PBGC, *FY 2018 Projections Report*, at 1[3]; *accord*, Cong. Research Serv., *Data on Multiemployer Defined Benefit (DB) Pension Plans*, at 1 (2020).[4] Although PBGC administers an insurance program that can make up for benefit lapses (up to a statutory cap) due to plan insolvency, the PBGC has projected that its multiemployer plan insurance program, too, will be insolvent by FY 2025 if multiemployer plans continue on this road. PBGC, *FY 2018 Projections Report* at 1-2.

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[3] https://www.pbgc.gov/sites/default/files/fy-2018-projections-report.pdf.

[4] https://fas.org/sgp/crs/misc/R45187.pdf.

With the future solvency of many large multiemployer plans already at risk, the Second Circuit's decision threatens to make matters worse by preventing independent actuaries from using their best judgment and the most relevant data to determine withdrawal liability of departing employers. Although the Second Circuit inappropriately speculated about gamesmanship by the actuary in this case, it is the Second Circuit's decision that could encourage gamesmanship by employers in distressed multiemployer plans who seek a quick exit before assumptions can be updated to reflect recent circumstances.

With the current economic crisis and recession facing this Nation, the situation is likely to get worse quickly. One actuarial firm recently projected that the COVID-19 pandemic will push more multiemployer plans into critical or declining status. Kelly Coffing et al., *COVID-19 to Leave Multiemployer Pension System More Distressed than Ever*, Multiemployer Review (Milliman), Apr. 12, 2020.[5] The combination of market down-turn and economic distress experienced by a number of industries that participate in multiemployer defined-benefit plans is toxic for those plans. As more employers are forced to close their doors—and therefore withdraw from multiemployer plans—and as the demographic data on active and retired employees changes to reflect the health- and economic-related consequences of the pandemic, actuaries must be allowed to use their best judgment to account for the complex array of factors that affect projections about a plan's future liabilities. The Second Circuit's decision

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[5] https://milliman-cdn.azureedge.net/-/media/milliman/pdfs/articles/multiemployer_review_april_2020.ashx.

stands in the way of that commonsense (not to mention congressionally mandated) approach.

To be sure, this Court's ordinary practice is not to step in to correct an erroneous court of appeals decision that is the first to directly address a legal question. The Court should make an exception to that practice in this case—because the potential economic harm that could flow from the Second Circuit's decision while the issue percolates among other courts of appeals could be devastating to retirees and their dependents at a moment of maximum vulnerability for many American workers.

This Court's review is warranted now because it is unlikely that other cases raising this question will result in a final decision in a court of appeals any time soon. ERISA requires that disputes over withdrawal-liability calculations be settled through arbitration, 29 U.S.C. § 1401, and cases often settle even after a party seeks judicial review of an arbitral award. The immediate adverse consequences of the Second Circuit's decision counsel against waiting for a circuit split to develop before this Court steps in to correct the decision below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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