No. 19-1336

IN THE

Supreme Court of the United States

THE NATIONAL RETIREMENT FUND, ET AL.,

Petitioner,

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 IN OPPOSITION

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QUESTION PRESENTED

When a contributing employer withdraws from a multiemployer pension plan, ERISA requires the employer to pay "withdrawal liability" in an amount that roughly reflects the employer's *pro rata* share of the pension plan's underfunding. The liability must be calculated "as of" the last day of the plan year before the year of the withdrawal, known as the "measurement date." *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417–18 (1995).

The question presented is: May the pension plan change the actuarial assumptions that are used to calculate withdrawal liability *after* the measurement date, and indeed after the withdrawal itself, and apply the new assumptions retroactively to inflate a withdrawn employer's liability—even while leaving intact the assumptions used to conduct the same calculation in other contexts?

CORPORATE DISCLOSURE STATEMENT

Metz Culinary Management, Inc. has no parent corporation, and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

This case presents an obscure, narrow, splitless question about the retroactive application of changed actuarial assumptions when calculating "withdrawal liability" under ERISA. The statutory provisions at issue were enacted in 1980, and this is literally the *first* case in which a federal court has been presented with this question. Not only does that mean there is no conflict of any kind (as petitioner does not dispute and its *amici* admit), it also reflects the issue's very limited practical significance. Instead of explaining why this Court's review is warranted, Petitioner simply debates the unanimous Second Circuit panel on the merits, and offers a tale of woe about the state of multiemployer pension plan funding in general. Both arguments are misplaced. The Second Circuit correctly construed the statutory text and purpose, and generalized pleas about pension plan shortfalls should be (and, in fact, already are being) addressed to Congress. This petition should be denied.

When a contributing employer stops participating in a multiemployer pension plan, ERISA requires the employer to pay "withdrawal liability," a payment that is meant to cover the employer's fair share of the pension plan's underfunding. ERISA sets forth a number of permissible methods for calculating the employer's share of the underfunding, but all of them require that the calculation be performed "as of" the last day of the plan year before the withdrawal date. That day is known as the "measurement date." So in computing the extent of the plan's underfunding and the employer's allocable share, the actuary must look to the historical state of the world as it existed on the measurement date. This much is undisputed.

The question here is how to apply the concept of the "measurement date" to actuarial assumptions. To compute withdrawal liability, the actuary needs both facts (*e.g.*, how many participants there are, how old they are, how many are married) and assumptions (*e.g.*, how long the participants will live, how many more years they will work, how much money the plan will take in from contributions). The most important of the assumptions is the interest rate, also known as the discount rate, which seeks to predict how quickly the plan's assets will grow over the next several decades. Changes to the interest rate often carry a leveraged impact on the ultimate liability, because the faster the plan's assets grow, the less money the plan needs to pay future benefits, and hence the lower the underfunding. Conversely, if the plan's assets are predicted to grow more slowly, then the underfunding will appear higher; the withdrawn employer's share will be higher too.

In this case, Petitioner's longtime actuary had for many years assumed an average annual investment growth rate of 7.25%, based on the plan's investment mix. Respondent withdrew from the plan in May 2014, and so its liability had to be calculated "as of" December 31, 2013. But then, in June 2014—*after* the measurement date and *after* Respondent had withdrawn, Petitioner's new actuary decided to dramatically reduce the interest rate assumption (solely for withdrawal liability purposes). There had been no identified change in the plan's asset mix or any other facts. The actuary's stated goal was to jack up withdrawal liability, to deter withdrawals. Indeed, the change inflated Respondent's liability from just over $250,000 to nearly $1 million.

Under ERISA, withdrawal liability disputes must be adjudicated in the first instance by arbitrators, and the highly experienced arbitrator here ruled that it was impermissible for the actuary to change the interest rate assumption retroactively. A unanimous panel of the Second Circuit agreed that a calculation "*as of*" the measurement date does not allow changes to the assumptions *after* the measurement date.

This Court should deny review for four reasons. *First*, being a question of first impression, there is no circuit split. If this is a recurring issue, it will lead to more decisions. If not, it does not warrant review. Either way, there is no reason to take the issue now.

Second, this issue is extremely narrow. It affects only whether an actuary can apply new assumptions retroactively to any withdrawals in the same year as the change—a minor issue that has virtually never arisen because actuaries almost never do this.

Third, two factual features of this case render it a poor vehicle. The actuary here changed assumptions not only after the *measurement date*, but also after Metz's *withdrawal*. That raises unique due process concerns. In addition, the actuary here changed the assumptions *only* for withdrawal liability, which this Court has already ruled is unlawful; the question presented therefore does not affect the result.

Finally, although it should not matter in deciding whether to grant certiorari, the Second Circuit got it right, adhering to the statutory text and its purpose. And the notion that the decision forces the actuary to use an assumption that is not his "best estimate" is illusory. The question is *which* assumption governs when an actuary's estimate *changes* over time.

STATEMENT

A. Statutory Background.

A multiemployer pension plan is created when "multiple employers pool contributions into a single fund" to pay benefits to retirees who worked "for one or more of the contributing employers." *Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co.*, 692 F.3d 127, 129 (2d Cir. 2012). Employers are bound to contribute to the plan under collective bargaining agreements with local unions. 29 U.S.C. § 1392(a).

A "key problem" with multiemployer plans is "employer withdrawal." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984). "If an employer withdraws from a plan after its employees' benefits have vested, but before it meets all of its funding obligations, the plan may be left with sizeable unfunded vested liabilities." *T.I.M.E.-DC, Inc. v. Mgmt.-Labor Welfare & Pension Funds of Local 1730 Int'l Longshoremen's Ass'n*, 756 F.2d 939, 943 (2d Cir. 1985). Accordingly, in 1980, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act ("MPPAA"), which obligates such a withdrawing employer "to pay its share of the benefits that have accrued to plan participants and for which the plan continues to be liable." *Id.* at 944. This statutory obligation—in effect, an exit tax—is known as "withdrawal liability." 29 U.S.C. § 1381.

An employer's withdrawal liability is its "allocable amount" of the plan's "unfunded vested benefits," subject to certain adjustments not relevant here. *Id.* § 1381(b)(1). ERISA sets forth a series of complex actuarial approaches that plans may use to compute and allocate that sum. *Id.* § 1391.

Regardless of which actuarial method is used, the statute "instructs a plan to make the withdrawal charge calculation, not as of the day of withdrawal, but *as of the last day of the plan year preceding the year during which the employer withdrew*." *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417–18 (1995) (citing 29 U.S.C. §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)). In other words, if the plan uses a calendar year, then an employer who withdraws in 2019 would have its share of the plan's underfunding calculated "as of" December 31, 2018. "The last day of the plan year preceding the year during which the employer withdraws is referred to as the 'Measurement Date.'" Pet. App. 4a.

Another constant, regardless of which allocation methodology is used, is the need for certain actuarial assumptions. Roughly speaking, the plan's unfunded benefits "are calculated as the difference between the present value of vested benefits and the current value of the pension plan's assets." *Park S. Hotel Corp. v. N.Y. Hotel Trades Council*, 851 F.2d 578, 580 (2d Cir. 1988). So the actuary must (1) project the benefits that the plan will owe to retirees in the future, based on assumptions about their retirement ages, mortality, etc.; (2) apply an interest rate (or discount rate) to estimate the *present* value of those *future* benefits; and (3) finally, compare the present value of those benefits to the present value of the plan's existing assets. Viewed from the other side of the coin, the actuary must estimate how quickly the plan's assets will grow, through investment return, in order to determine what portion of the future benefit obligations they will suffice to cover.

In this calculation, the interest rate is "arguably the most important assumption." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 633 (1993). The higher the rate at which the plan's assets will grow, the smaller the funding shortfall, and the lower the withdrawal liability needed to cover the withdrawing employer's fair share of the vested benefits. *See id.* Even "[a] small adjustment in the interest rate assumption can lead to a major change" in the ultimate amount of withdrawal liability. *Bd. of Trs., Mich. United Food & Commercial Workers Unions v. Eberhard Foods, Inc.*, 831 F.2d 1258, 1260 (6th Cir. 1987).

Notably, withdrawal liability is not the only time a pension plan's actuary must apply a discount rate to evaluate the plan's funding needs. The actuary must also do so when computing the plan's "minimum funding" requirements, which dictate how much the contributing employers must contribute each year to ensure the ongoing financial health of the plan.

In both contexts, ERISA directs that the actuary's assumptions—including the interest assumption—must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §§ 1084(c)(3), 1393(a)(1). In both contexts, the actuary is looking to the same bucket of plan investments and making a long-term prediction about their "anticipated experience"—*i.e.*, how they will perform over the years and decades to come. *See, e.g.*, *Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291, 293 (2d Cir. 1994) (explaining that this inquiry requires projecting "the rate of return on the investment of plan assets").

B. Factual Background.

Petitioner National Retirement Fund ("the Fund") is a multiemployer pension plan. For "many years," and through the end of 2013, the Fund used Buck Consultants for its actuarial services. Pet. App. 5a. For at least "several years," Buck "utilized a 7.25% interest rate assumption." *Id.* In other words, Buck assumed, based on the Fund's investments, that its assets would grow by an average of 7.25% per year over the long term. Buck used that same interest rate in calculating underfunding for both withdrawal liability and minimum funding. Pet. App. 72a.

Buck memorialized this 7.25% interest assumption in, among other places, the so-called Schedule MB to the Fund's Form 5500 report for 2013, which Buck filed with the Department of Labor on November 6, 2014. *Id.* That form covered the entirety of calendar year 2013. *See* C.A. JA.183 (describing the filing as covering "plan year beginning 01/01/2013 and ending 12/31/2013"). And, under the heading of "Actuarial assumptions" and subheading "Interest," it specified that, "[f]or the purposes of section 431 of the Internal Revenue Code, unfunded vested benefits for withdrawal liability purposes, and section 960 of Accounting Standards Codification, an assumption ... of 7.25% was used." C.A. JA.194.

The Fund's trustees decided to replace Buck with another firm—*amicus* Horizon Actuarial Services, LLC—"beginning in 2014." Pet. App. 5a. However, Buck filed the Form 5500 for the 2013 year (even though it was not completed until November 2014), because Buck had served as the plan actuary until the end of 2013. Pet. App. 43a.

Respondent Metz Culinary Management, Inc. ("Metz") "withdrew from the Fund on May 16, 2014." Pet. App. 44a. That "triggered Metz's obligation to pay withdrawal liability, which would be calculated as of December 31, 2013." *Id.* Before it assessed the liability, however, in June 2014, the new actuarial team at Horizon "informed the [Fund] Trustees that the interest rate assumption for purposes of withdrawal liability was reduced from 7.25% to approximately 3.25%." Pet. App. 6a. The latter figure was derived from "PBGC rates," which are risk-free rates used for pricing annuities. They have no connection to this Fund, its investments, or its anticipated experience. *But see Eberhard Foods*, 831 F.2d at 1263 ("the statutory scheme contemplates that the actuary will be determining an interest rate based on the unique characteristics of the plan").

Horizon explained the rationale for the change in a memorandum. "*Starting in 2014*, we are changing from the prior actuary's valuation interest rate of 7.25% to the interest rates used by the PBGC ...." Pet. App. 138a (emphasis added). Horizon did not identify any change to the Fund's investment mix, express any doubt regarding Buck's projection of 7.25% returns, or even talk about investment return at all. Instead, Horizon reasoned that the change would, "due to leveraging," increase withdrawal liability substantially, which would in turn deter future withdrawals. Pet. App. 139a–140a. "It is vital that the Plan retain as many employers as possible to maintain its contribution base." *Id.* This was thus a transparently biased effort to increase liability.

Horizon's change was limited to "the *withdrawal liability* interest rate assumption," but did not alter the interest rate for any other purpose, including for purposes of calculating the ongoing contributions needed to satisfy the minimum funding obligations. Pet. App. 138a (emphasis added). As such, "the change increased the liability only for withdrawing employers while leaving the contributions of remaining employers unchanged." Pet. App. 6a n.2.

Horizon computed Metz's liability using the lower interest rate assumption adopted in June 2014. The effect of that retroactive change was to inflate Metz's liability from $254,644 to $997,734. Pet. App. 6a.

C. Proceedings Below.

1. Under ERISA, an employer who disputes an assessment of withdrawal liability must arbitrate the dispute in the first instance. 29 U.S.C. § 1401(a). Metz timely initiated arbitration, and Ira F. Jaffe—among the most experienced of MPPAA arbitrators—was appointed to preside. Pet. App. 69a.

The parties "agreed that a preliminary issue"—namely, the validity of the retroactive application of the interest rate assumption—"would be presented for ruling on the basis of written stipulations and briefing." Pet. App. 70a. After reviewing the factual stipulations and the parties' briefs, Arbitrator Jaffe found "no dispute that Horizon did not adopt the PBGC rates as the interest rate assumption for withdrawal liability purposes until some time in 2014," and he held that "[t]he decision to apply that changed assumption retroactively so as to increase the withdrawal liability assessed to the Employer ... was violative of MPPAA." Pet. App. 87a. "MPPAA requires that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability," he explained. *Id.* And it was Buck's "existing assumptions," including the 7.25% interest rate assumption, that "remained in place as of December 31, 2013." *Id.*

Of course, the Arbitrator agreed that the "actual calculation ... may take place after December 31, 2013," but "the assumptions and methods used to calculate" the liability "must be those that were actually adopted and in effect as of December 31, 2013." Pet. App. 89a. "Were it otherwise, the selection of assumptions and methods used for the calculation of withdrawal liability would create significant opportunity for bias and manipulation," as a pension plan could, following a withdrawal, try "to influence actuaries to change ... assumptions," or even "replace the fund actuary" and select a new one with an eye toward "different interest and other assumptions and methods that would result in a higher" liability figure. Pet. App. 89a–90a.

2. After Arbitrator Jaffe issued a final award (Pet. App. 94a), the parties proceeded to district court. That court (Caproni, J.) vacated the award; in its view, ERISA "does not require the actuary to make her assumptions by the Measurement Date but only requires unfunded vested benefits to be *measured* as of that date," using assumptions that the actuary may select at a later time. Pet. App. 58a. It was therefore permissible, according to the district court, for Horizon to apply the June 2014 interest rate assumption in measuring the Fund's unfunded benefits "as of" December 31, 2013. *Id.*

Although the Arbitrator had expressly reserved that Metz had preserved other "claims that only need to be decided should the holding contained in the Interim Award be reversed" (Pet. App. 94a), the court *sua sponte* "denie[d] Metz's request to remand the case to arbitration," leaving Metz no opportunity to adjudicate its other, unresolved challenges to the Fund's assessment. Pet. App. 67a.

3. Metz appealed, and a unanimous panel vacated the district court's order. Pet. App. 2a. Judge Winter (joined by Judges Livingston and Chin) correctly framed the issue as "whether ... a fund may select an interest rate assumption after the Measurement Date and retroactively apply that assumption to withdrawal liability calculations." Pet. App. 8a. As the court noted, the relevant facts were not disputed: The measurement date for Metz's withdrawal liability was concededly December 31, 2013, and "[a]s a factual matter, it is not seriously contested that the interest assumption as of that date was 7.25%." *Id.* Horizon "selected the revised rate no earlier than June 2014." *Id.*

The court held that "the assumptions and methods used to calculate the interest rate assumption for purposes of withdrawal liability must be those in effect as of the Measurement Date." Pet. App. 12a. Thus, "[a]bsent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect." *Id.*

In reaching that conclusion, the Court of Appeals also drew on "Congress's legislative intent" to protect employers from retroactive changes to withdrawal liability. Pet. App. 11a. That intent is manifested by a provision that prohibits the retroactive amendment of plan rules without employers' consent (29 U.S.C. § 1394) and a provision entitling employers to obtain advance estimates of their withdrawal liability before they actually withdraw (*id.* § 1021(l)(1)). Those estimates would be worthless, the court noted, if plans could make "retroactive changes in interest rates assumptions." Pet. App. 12a.

The panel further reasoned, as had the Arbitrator, that "the selection of an interest rate assumption after the Measurement Date would create significant opportunity for manipulation and bias." *Id.* As the court explained, "[n]othing would prevent trustees from attempting to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers than would have been the case if the prior assumptions and methods actually in place on the Measurement Date were used." *Id.* And, although assumptions are selected in the first instance by the actuaries, not plan trustees, "[a]ctuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent." *Id.* Those concerns of bias were particularly acute in this case, the panel proceeded, where the Fund had "use[d] different interest rate assumptions for withdrawal liability and minimum funding," thus circumventing the built-in check on the former by decoupling it from the latter. Pet. App. 13a.

For those reasons, the court vacated the order and "remanded with directions to enter judgment for the appellant and to remand any remaining issues to Arbitrator Jaffe." Pet. App. 14a.

4. The Fund did not petition for panel or en banc rehearing in the Second Circuit, but proceeded directly to this Court.

REASONS FOR DENYING THE PETITION

There is no reason to grant certiorari in this case. The decision below is admittedly splitless; indeed, it is the only decision over the four-decade existence of the MPPAA to confront this issue. As the absence of caselaw reflects, this decision is not particularly important; it simply requires actuaries to apply new assumptions prospectively, as they generally do and as fairness dictates anyway. As for the generalized pleas about multiemployer pension plans' precarious finances, those should be addressed to Congress, and this case certainly offers no comprehensive solution. Further, this case is a bad vehicle to address the retroactivity issue, because the new assumption here was *doubly* retroactive and because the changed assumption is plainly unlawful for an independent reason. Finally, the Fund and its self-interested *amici* (its actuarial firm, and another plan that hired the same actuarial firm to pull the same trick) miss the mark in their attacks on the decision below. The Second Circuit construed the scheme consistent with its text and faithful to its purpose, while the Fund mischaracterizes the decision and its reasoning.

I. PETITIONER AND ITS *AMICI* ADMIT THAT THERE IS NO CIRCUIT CONFLICT.

The Fund's petition does not claim that there is a circuit conflict—or indeed, any conflict of authority—over the question presented. And the Fund's *amici* concede "the absence of a circuit conflict." (Horizon Amicus 2; *see also* NYST Amicus 16 (same).) That is because, as both lower court decisions reflect, this is a question of judicial first impression. Over the 40-year history of the MPPAA, no other court has ever confronted the legality of retroactive assumptions.

As the *amicus* again acknowledges, this Court only "rarely" grants review in the absence of a conflict of authority. (Horizon Amicus 2.) There is no reason to do so here. If the issue is as important as the Fund and *amici* claim, it will recur, conflicts may emerge, and the Court would benefit from that percolation and more complete treatments of the law if it decided to address the issue. On the other hand, if the issue does not recur with any frequency, then it clearly is not the type of important legal question that ought to command this Court's limited resources.

The only response to that obvious point is *amicus*'s claim—with no citation or support—that withdrawal liability cases "often settle." (*Id.* at 16.) All types of cases settle; that is not a reason for this Court to address legal issues the very first time they arise.

Likewise, another *amicus* worries that reaching the Supreme Court "is a long and winding path," so it will take time for a split to develop and the issue to return to this Court. (NYST Amicus 19.) Again, that is always true, but waiting for development of a split helps clarify if the issue is truly important enough to warrant this Court's attention, which here there are many reasons to doubt. *See infra* Part II.

II. THE ISSUE PRESENTED IS EXTREMELY NARROW, WITH MINIMAL PROSPECTIVE IMPORTANCE.

Sometimes, if an issue is especially important or pressing, this Court will grant certiorari even absent a circuit conflict. This is not such a case. Not by a long shot. The question presented has almost never arisen in the real world, has very narrow prospective significance, and is easy for plans and actuaries to accommodate going forward.

First, as already noted, it took four decades after enactment of the MPPAA for this legal question to present itself in federal court. That is not the sign of a truly important or time-sensitive matter. Indeed, other than this Fund in 2014 and the *amicus curiae* Teamsters pension plan in 2010—both of whom had switched to Horizon from more-established actuarial firms, likely as a way to hike withdrawal liability—it is not clear that any other plan or actuary has ever *tried* to alter assumptions retroactively. Nor is there any reason to think that other plans or actuaries will ever seek to do so in the future. In that regard, it is notable that the only *amici* supporting certiorari are the *one* actuarial firm with a vested interest in this case and *one* other plan that engaged in the same scheme (not the American Academy of Actuaries or National Coordinating Committee for Multiemployer Plans, both of whom often appear as *amici*).

Second, it is worth repeating that the sole effect of the decision below is that if an actuary does change actuarial assumptions, that change can be applied only prospectively—*i.e.*, to employers that withdraw the next year. That is a very narrow and limited holding, consistent with due process, and hardly the dramatic or catastrophic ruling Petitioner conjures.

Amicus compares this case to *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). (NYST Amicus 18–19.) As the petition in that case explained, the lower court opinions there conflicted with guidance from three federal agencies, prompted dozens of class-action suits seeking billions of dollars in liability, and unsettled the regulatory framework governing hundreds of charitable entities' pension plans. The comparison is, to put it mildly, inapt.

Third, insofar as the Fund and its *amici* harp on the sorry state of multiemployer pension financing in general (Pet. 8; Horizon Amicus 14–15; NYST Amicus 19–20), that is not a reason to grant this petition. Systemic problems with pension funding have zero to do with this case or the issue presented, and would not be solved by allowing this Fund to extract $700,000 more from a family-owned business. Put another way, the solution to the multiemployer funding crisis is not to allow plans to retroactively fiddle with actuarial assumptions. Indeed, such a rule could actually *hurt* plan funding by discouraging employers from joining in the first place.

Underfunding of multiemployer pension plans is, to be sure, a serious national problem—but one for *Congress* to address. And, indeed, Congress has been seized with this issue recently, with discussions reportedly ramping up in the wake of the pandemic. *See* Rehabilitation for Multiemployer Pensions Act of 2019, H.R. 397 (116th Cong.); Nancy Ognanovich, *Senate GOP Open to Negotiation on Pension Fix, Portman Says*, BLOOMBERG LAW, June 24, 2020; Elizabeth Bauer, *Will a 'Second Stimulus' Bill Be a Second Chance for Multiemployer Pensions—and the GROW Act?*, FORBES, June 26, 2020.

Of course, if Congress revamps the withdrawal liability regime, that could make the issue here even more insignificant. But even if Congress does not act, granting review of this case due to the failing health of multiemployer pension plans would make as little sense as granting review of a medical malpractice decision due to the systemic flaws in the U.S. healthcare system. Sympathy for an industry is not a reason for certiorari in a one-off case.

III. THIS CASE IS A POOR VEHICLE.

Even if the Court were inclined to wade into this splitless and narrow question, this case presents two unique factual features that make it a bad vehicle.

First, the change here was retroactive in *two* ways: It came after the measurement date, but it also came *after the withdrawal itself*. Even if an actuary could change assumptions after the measurement date, to do so after a withdrawal—when it is too late for the employer to alter its behavior—raises another layer of due process concern. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). It would be cleaner for the Court to take up the retroactivity issue in a case that did not implicate this further problem.

Second, although neither the Arbitrator nor the courts below reached the issue, it is clear as a matter of law that Horizon's change to the interest rate was unlawful for an *independent reason*, even apart from its retroactivity. The court's answer to the question presented is thus not necessary to the outcome, and the existence of this related but distinct legal defect would impede (if not preclude) this Court's review.

Specifically, Horizon changed the Fund's interest assumption *only* for withdrawal liability purposes—not any of the other contexts in which the Fund must project its investment growth, such as to compute its employers' minimum funding obligations. Pet. App. 6a n.2. That violates this Court's holding in *Concrete Pipe* that plans "must" use the same interest rate in both of these two contexts. 508 U.S. at 632–33.

Concrete Pipe addressed an employer's argument that ERISA's presumption in favor of the plan actuary's calculations, 29 U.S.C. § 1401(a)(3)(B), violates due process by depriving the employer of an impartial adjudicator. *Id.* This Court upheld the presumption. *See Concrete Pipe*, 508 U.S. at 631–33. The Court reasoned that actuarial decisions do not raise a high risk of bias because their "technical nature," and "*the necessity for applying the same assumptions and methods in more than one context*, ... limit the opportunity an actuary might otherwise have to act unfairly toward the withdrawing employer." *Id.* at 632 (emphasis added). What multiple contexts was the Court referring to? "The statutory requirement (of 'actuarial assumptions and methods—which, in the aggregate, are reasonable …') is not unique to the withdrawal liability context, for the statute employs identical language … to describe the actuarial assumptions and methods to be used in determining whether a plan has satisfied the minimum funding requirements." *Id.*

In other words, because of the "necessity" to use the "same assumptions" for withdrawal liability and minimum funding, *id.*, there is less risk of bias. The Court explained why: When it comes to withdrawal liability, the plan has an incentive to make funding shortfalls seem larger, to extract more money from the withdrawing employers. But when it comes to minimum funding, the plan generally seeks to *reduce* shortfalls, so that the other employers' contribution requirements can be kept affordable. A plan could achieve both of these goals by using a lower interest rate for withdrawal liability than minimum funding. But ERISA forecloses this contrivance:

> [The] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (*such as low interest rates*) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements.

Id. at 633 (emphasis added) (quoting *United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 146–47 (3d Cir. 1986) (Seitz, J., dissenting in part)).

The Court acknowledged that "the assumptions used by the Plan in its other calculations may be 'supplemented by several actuarial assumptions unique to withdrawal liability.'" *Id.* Nevertheless, the potential for "assumptions unique to withdrawal liability" did "not significantly blunt[]" the point that the consistency requirement constrains actuaries from discriminating against withdrawing employers. *Id.* That was because no "method or assumption unique to the calculation of withdrawal liability is so manipulable as to create a significant opportunity for bias to operate, and arguably the most important assumption … *is the critical interest rate assumption that must be used for other purposes as well.*" *Id.* (emphasis added). In other words, consistency on the "critical interest rate assumption" is enough to keep the actuary honest.

The Court's discussion—the basis for its holding that ERISA's presumption in favor of the actuary's assumptions does not violate due process—leaves no doubt that actuaries *"must"* use the same interest rate for withdrawal liability purposes as they use for minimum funding purposes. *Id.* (emphasis added).[1] And there is no doubt, on this record, that Horizon violated that directive when it reduced the interest rate for withdrawal liability but did not reduce the rate for minimum funding. The panel's ruling about retroactivity is therefore not necessary to the judgment below, and any effort to review this case would quickly be confounded by this independent yet related defect in the Fund's aggressive approach.

Ironically, the Fund argues that the court defied *Concrete Pipe* by citing concerns about actuarial bias. (Pet. 25–28.) Yet it was the Horizon actuaries who openly exposed their biased rationale to the trustees and who defied the uniformity rule that, per *Concrete Pipe*, ensures that actuarial bias does not infect withdrawal liability. So emphasizing *Concrete Pipe* throws the Fund out of the frying pan, into the fire.

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[1] The Fund says that lower courts have rejected this reading of *Concrete Pipe*. (Pet. 18 & n.2.) But the issue has never made it to the appellate level. Other than some ill-considered dicta from Judge Posner, the Fund cites only two district courts that confronted the issue: One incorrectly upheld the use of non-uniform rates (*Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365, 368 (D.N.J. 2018)), and the other rejected it on an as-applied basis (*N.Y. Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236, 254–55 (S.D.N.Y. 2018)). The third case involved a distinct issue about compliance with the plan's own rules; the rest of the citations are to unreviewed arbitral awards.

IV. THE DECISION BELOW IS CORRECT.

Because this case satisfies none of the traditional grounds for certiorari, Petitioner (and *amici*) devote most of their efforts to arguing that the unanimous Second Circuit erred on the merits. That is not a reason for review, but is mistaken in any event. The court below correctly held that ERISA precludes actuaries from retroactively changing assumptions *after* the applicable measurement date. The Fund's criticisms of the decision mischaracterize both its rationale and its practical implications.

The basis for the holding below is quite simple. In setting forth the authorized methods for calculating and allocating withdrawal liability, § 1391 instructs the actuary to perform the computation "as of the last day of the plan year preceding the year during which the employer withdrew." *Milwaukee Brewery*, 513 U.S. at 418. Nobody disputes that this means that the calculation occurs on a "snapshot" basis; if relevant facts change after the measurement date, they cannot be used to alter the computation. *See* Pet. App. 81a ("That liability has been described as a 'snapshot' in the sense that events that occur post-December 31, 2013, may not affect that liability."). By the same token, the Court of Appeals understood that a calculation performed "as of" a certain date requires the use of the actuarial assumptions in force as of that date. If the actuary believed on December 31, 2013, that the plan's assets would grow at 7.25% per year, but decides in June 2014 that assuming a 3.25% return instead would be in the "best interest of the Plan" (Pet. App. 138a), then a calculation "as of" the last day of 2013 should properly be founded on the former assumption, not the latter one.

The Fund spends most of its petition arguing that a different provision of ERISA—29 U.S.C. § 1394—is limited to restricting retroactive plan amendments and does not apply to actuarial assumptions. (Pet. 9–17; *see also* NYST Amicus 7–10.) The Second Circuit never suggested otherwise. Rather, the court invoked § 1394, among other provisions, as evidence of legislative intent regarding retroactivity generally in the context of withdrawal liability. Pet. App. 10a–11a. That intent confirmed the court's interpretation of the "as of" requirement of § 1391, which the court recognized as the "[c]ritical" provision (Pet. App. 4a), but which the Fund entirely ignores.

For similar reasons, the Fund does not advance its case by pointing out that § 1393, which sets forth the substantive standard for actuarial assumptions, "does not limit the timing of the adoption and application of actuarial assumptions." (Pet. 9.) It is true that § 1393 does not speak to timing. But the "[c]ritical" provision, § 1391, does exactly that—by requiring the calculation to be performed "as of" the measurement date, *Milwaukee Brewery*, 513 U.S. at 418. That is what grounds the decision below. Yet, again, the Fund never seriously grapples with § 1391 or explains how a calculation "as of" a particular date can be done using actuarial assumptions that are altered, for policy reasons, many months later.

Turning from text to practice, the Fund observes that certain data from the end of the plan year might not be available until the next year. (Pet. 21–23.) That is true, which is why nobody has ever claimed that the calculation itself needs to be *performed by* the measurement date. (*See* Pet. App. 89a.) As one of the *amici* notes, the calculation "requires work to be done after the end of the year in order to accurately reflect the state of the plan 'as of' the last day of the previous year." (NYST Amicus 4.) Quite so. Metz's counsel thus properly acknowledged, at oral argument, that it is perfectly fine to rely on data, reflecting the state of the plan "as of" the end of the prior plan year, even if that data is compiled or computed later. (Pet. App. 21a–22a; NYST Amicus 4–5.) If a natural disaster occurs in December, for example, the actuary can rely on a January report to identify how many plan beneficiaries were still alive "as of" the crucial December 31 date.

But that is entirely irrelevant here. Again, as a factual matter, "it is not seriously contested that the interest assumption as of [December 31, 2013] was 7.25%." Pet. App. 8a. And when Horizon changed that assumption in June 2014, it was not because, for example, the Fund had swapped its risky stocks for corporate bonds in December 2013 and the actuary had not yet had a chance to "catch up." (*Cf*. Horizon Amicus 5 (hypothesizing change in "allocation of plan assets" or other factual developments).) Rather, the change reflected a new actuary's new philosophy to penalize withdrawing employers and thereby deter withdrawals, which Horizon decided to implement "[s]tarting in 2014." Pet. App. 138a. In that context, as the Second Circuit recognized, the statute does not allow the new assumption to apply retroactively. Contrary to the ostensible fears of the Fund and its *amici* (Pet. 22–23; NYST Amicus 20), that holding does not remotely impair actuaries from the proper and routine practice of taking account of the facts as they stood on the measurement date, even if those facts cannot be determined until later.

Finally, the Fund and its *amici* contend that the decision below puts actuaries in an impossible bind: ERISA requires assumptions reflecting the actuary's "best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a), but the Second Circuit's decision (they say) could forbid them from employing their best estimate. (*See* Pet. 20–25; Horizon Amicus 11–12; NYST Amicus 21–22.) That sophistry glosses over the real issue. As of December 31, 2013, Buck was the Fund's actuary, and its "best estimate" of the Fund's experience was a 7.25% investment return. As of June 2014, the new actuaries at Horizon had determined that their "best estimate" (of something, though it clearly was not of the Fund's "anticipated experience") was 3.25%. The question is which "best estimate" governs a liability calculation that must be performed "as of" December 2013. The Court of Appeals correctly determined that it is the estimate in force as of that date. This so-called dilemma is as contrived as Horizon's rate change itself.

In short, the law is exactly what common sense, due process, and basic fairness would dictate, and what all other actuaries and plans have recognized for forty years: Changes in actuarial assumptions cannot be applied retroactively to increase employer liability. The Second Circuit's unanimous agreement on that score does not merit this Court's review.

CONCLUSION

The petition for certiorari should be denied.

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