No. 22-____

IN THE

Supreme Court of the United States

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN, ET AL.,

Petitioners,

v.

ENERGY WEST MINING COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), an employer who withdraws from an underfunded multiemployer pension plan incurs withdrawal liability, the amount of which ultimately depends on an actuarial determination. The actuary's determination is "presumed correct" unless the employer proves that "the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1401(a)(3)(B)(i). The "employer's burden to overcome the presumption * * * is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. * * * [I]t is a burden to show something about standard actuarial practice[.]" *Concrete Pipe & Prod. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 635 (1993).

The question presented is whether the MPPAA overrides standard actuarial practice, such that a court can order an actuary to use a discount-rate assumption that reflects a pension plan's investment returns even when standard actuarial practice allows an actuary to use a discount-rate assumption that does not reflect the plan's investment returns.

PARTIES TO THE PROCEEDING

The Petitioners are the United Mine Workers of America 1974 Pension Plan ("1974 Plan") and its Trustees who, in their capacities as trustees, were appellees in the proceedings below. The Trustees of the 1974 Plan are:

- Micheal W. Buckner
- Michael D. Loiacono
- Michael O. McKown*

The Respondent is Energy West Mining Company.

RELATED PROCEEDINGS

- The parties' consolidated proceedings in the district court:
  - *United Mine Workers of America 1974 Pension Plan, et al.* v. *Energy West Mining Co.*, Case No. 1:18-cv-1905 (D.D.C)
  - *Energy West Mining Co.* v. *United Mine Workers of America 1974 Pension Plan, et al.*, Case No. 1:18-cv-2085 (D.D.C.)
- The Respondent's appeal to the D.C. Circuit:
  - *United Mine Workers of America 1974 Pension Plan, et al.* v. *Energy West Mining Co.*, Case No. 20-7054 (CADC)

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* In accordance with Rule 12.6, Petitioners state that Michael Holland, who was party to the proceeding below in his capacity as trustee of the 1974 Plan, has retired as trustee and therefore no longer has an interest in this case.

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The district court's opinion (Pet. App. 25) is reported at 464 F. Supp. 3d 104. The court of appeals' opinion (Pet. App. 2) is reported at 39 F.4th 730.

JURISDICTION

In accordance with 29 U.S.C. § 1401(b)(2), the district court exercised jurisdiction over the parties' consolidated actions to enforce and vacate the arbitration award under 29 U.S.C. § 1451(c) and 28 U.S.C. § 1331. The district court entered final judgment confirming the arbitration award on May 22, 2020.

The Respondent filed a timely notice of appeal, and the court of appeals exercised appellate jurisdiction under 28 U.S.C. § 1291. The court of appeals reversed the district court on July 8, 2022 and denied the Petitioners' timely petition for rehearing on September 6, 2022. See Pet. App. 71. On November 4, 2022, the Chief Justice granted the Petitioners' application to extend the time for filing a petition for a writ of certiorari from December 5, 2022 to February 3, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1393(a)

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal

liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—

> (1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or
>
> (2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

29 U.S.C. § 1401(a)(3)(B)

In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

STATEMENT

I. Statutory Background—The MPPAA

A multiemployer pension plan is an arrangement whereby multiple employers collaborate to provide retirement benefits to their employees. Multiemployer plans "have features that are beneficial in industries,"

like coal mining, where employees move from employer to employer and where small employers struggle to maintain their own pension plans. *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 606 (1993); see Pet. App. 4 & n. 1. Employers participating in a multiemployer plan regularly contribute money to the plan: they make payments based on their employees' work (like the number of hours employees work or the tonnage of materials employees produce), and they make annual minimum-funding payments when the plan faces a funding shortfall.

An individual employer who withdraws from a multiemployer plan shifts its contribution obligations to the employers remaining in the plan. Withdrawal is not a problem when an industry is thriving and a plan is well funded. Withdrawal is a major problem, though, when an industry is declining and a plan's assets are insufficient to cover promised benefits. In those circumstances, employers can race to withdraw before they must increase their contributions. Because no employer wants to be the last one shouldering a plan's financial obligations, a multiemployer plan can terminate after serial withdrawals. This downward spiral is harmful to employers, beneficiaries, and the United States, which through the Pension Benefit Guaranty Corporation (PBGC) insures pension plans. See Pet. App. 4–5.

Congress aimed to solve this problem with the Multiemployer Pension Plan Amendments Act of 1980. Drawing from economic theory, the MPPAA forces employers to internalize the costs of withdrawing from a plan and, going further, "provide[s] a disincentive to voluntary employer withdrawals." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 722 (1984) (quoting

the PBGC). The MPPAA accomplishes those ends via withdrawal liability—a payment that settles an employer's obligations to an underfunded plan. Withdrawal liability is the only statutory recourse a plan has against a withdrawn employer.

An employer's withdrawal liability is its share of the plan's unfunded vested benefits, that is, "the difference between the present value of vested benefits and the current value of the plan's assets." *Id.* at 725. The amount of a plan's vested benefits is an estimate of all future payments the plan will make, discounted to a single present value.

Congress anticipated that plans and withdrawing employers would rarely share the same estimates of the cost of a plan's future payments. So, Congress entrusted third-party actuaries with the important task of determining a plan's unfunded vested benefits. Like lawyers, actuaries are "subject to regulatory and professional standards." *Concrete Pipe*, 508 U.S. at 609. The actuarial profession is founded upon actuarial assumptions, which guide actuaries' estimates of "such matters as mortality of covered employees, likelihood of benefits vesting, and, importantly, future interest rates." *Id.* at 610. No two actuaries are likely to use identical assumptions, for within the actuarial profession, "there often are several equally 'correct' approaches." *Id.* at 635 (quoting *S. 1076:* The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 20–21 (Comm. Print 1980)). Understanding this reality, and wanting to forestall fights over the best approach, Congress simply instructed actuaries to use actuarial assumptions and methods "which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations)

and which, in combination, offer the actuary's best estimate of anticipated experience under the plan[.]" 29 U.S.C. § 1393(a)(1). These two statutory instructions are known as the Aggregate Reasonableness Requirement and the Best Estimate Requirement.

To prevent drawn out fights over withdrawal liability, Congress shielded actuaries' determinations from second-guessing. An actuary's determination of a plan's unfunded vested benefits is presumptively correct—unless the challenger proves that the actuary "made a significant error" or that "the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1401(a)(3)(B)(i)–(ii). The latter standard for overcoming the statutory presumption of correctness is known as the Aggregate Unreasonableness Standard.

As this Court observed when interpreting the statutory presumption of correctness and upholding it against a due-process attack, the MPPAA defers to the actuarial profession, treats the profession's views of acceptable standards as binding, and gives actuaries leeway to use their professional judgment within the framework of those accepted actuarial standards:

> [I]t would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreason-

> able) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.
>
> As thus understood, the presumption in question supports no due process objection. The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice.

Concrete Pipe, 508 U.S. at 635.

II. Case Background

1. The United Mine Workers of America 1974 Pension Plan is a multiemployer plan in the coal-mining industry. In accordance with the Labor Management Relations Act, 29 U.S.C. § 186(c)(5)(B), the Plan is jointly administered by representatives of labor and management; half of its trustees are selected by the United Mine Workers of America and half by the Bituminous Coal Operations Association, Inc. See *Concrete Pipe*, 508 U.S. at 612.

As the coal industry has declined, so has the contribution base of the 1974 Plan. From thousands of

contributing employers in its heyday, only ten companies were contributing to the Plan a few years ago, See *H.R. 934, "Health Benefits for Miners Act of 2019" & H.R. 935, "Miners Pension Protection Act": Hearings Before the House Nat. Resources Subcomm. on Energy & Mineral Resources*, 116th Cong. (July 24, 2019 Witness Statement of Lorraine Lewis, Executive Director, UMWA Health and Retirement Funds).

In 2015, the Plan's actuary, William Ruschau, determined that the Plan's $3.8 billion in assets would not last long enough to pay vested benefits of the Plan's 81,500 pensioners. Even assuming the Plan would earn 7.5% annually on its investments, which is approximately what the Plan had earned before 2015, Ruschau determined that the Plan would be insolvent by 2022, and he certified that the Plan was in "critical and declining" status. See Pet. App. 7–8, 27; see also 29 U.S.C. § 1085 (detailing "critical and declining" status).[1]

Also in 2015, Energy West Mining Company withdrew from the 1974 Plan and incurred withdrawal liability. When calculating the Plan's vested benefits, Ruschau recognized that the Plan was facing insolvency and discounted the Plan's future benefits payments to present value using a risk-free rate—2.71% for the first twenty years and 2.78% thereafter. A risk-free rate approximates returns on a guaranteed

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1 Thanks to the Bipartisan American Miners Act of 2019, the 1974 Plan did not become insolvent. The infusion of federal funds the Plan received under that Act has no bearing on this case because the case arose before the Act and because Congress instructed that the federal funds "shall be disregarded ... for purposes of determining [an] employer's withdrawal liability." Pub. L. No. 116-94, div. M, § 102(a)(3), 133 Stat. 2534, 3092 (2019) (codified at 30 U.S.C. § 1232(i)(4)(E)).

investment, like federal government securities, and is typically lower than a risk-adjusted rate, which accounts for the risks of failure. See generally *Energy Capital Corp.* v. *United States*, 302 F.3d 1314, 1333 (CAFed 2002) (explaining the difference between the two types of discount rates); see also *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (explaining how a risk adjustment correlates to the risk of failure). In light of Ruschau's actuarial judgments, Energy West's withdrawal liability was determined to be over $115 million. See Pet. App. 8.

Energy West challenged its withdrawal liability—specifically, Ruschau's decision to discount using a risk-free rate. Energy West wanted Ruschau to use the 7.5% investment-return rate he used when, calculating the Plan's minimum funding requirement, he determined that the Plan was facing insolvency. Substantively, Energy West wanted Ruschau to use the risk-adjusted discount rate that he used to determine whether participating employers must make additional contributions—even though Energy West was withdrawing and shielding itself from market risk and the risk of having to make additional contributions. Energy West argued that the risk-free discount-rate assumption *by itself* rendered Ruschau's assumptions "in the aggregate, unreasonable," 29 U.S.C. § 1401(a)(3)(B)(i)—*i.e.*, the Aggregate Unreasonableness Standard for overcoming the statutory presumption of correctness. Energy West asserted that its withdrawal liability would be around $40 million using the higher discount rate. See Pet. App. 29, 38.

2. After an evidentiary hearing conducted in accordance with the MPPAA's dispute-resolution procedures, see 29 U.S.C. § 1401, an arbitrator sided with the 1974 Plan. Key to the arbitrator's award was his

factual finding that discounting with a risk-free rate is standard actuarial practice, appropriate for plans facing insolvency. Actuarial Standard of Practice No. 27 authorizes actuaries calculating withdrawal liability to calculate present value using *either* an investment-return assumption *or* a risk-free assumption, depending on the actuary's assessment of risk. See Pet. App. 9 (quoting Actuarial Standards Board, Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations, § 3.9 (2013) ("ASOP No. 27")). As the district court later observed, ASOP No. 27 implements "simple" economic principles:

> An employer that continues to participate in a plan must make contributions based on the number of hours its employees work in a given year, but if the plan's investments do not achieve the expected rate of return because of a downturn in market conditions, the employer is obligated to make additional contributions to compensate for the funding shortfall. But withdrawing employers avoid that risk—once they've exited, their obligations remain the same no matter what happens in the market. *As a result, actuaries tend to adjust the discount rate down to account for the absence of future risk for the withdrawing employer.*

Pet. App. 39 (emphasis added) (internal citations omitted).

Every actuary who testified during the arbitration—Ruschau, the Plan's expert (Dr. Ethan Kra), even Energy West's expert (Scott Hittner)—acknowledged that Ruschau's use of a risk-free rate followed standard actuarial practice. See Pet. App. 31–34, 46–

50. The arbitrator agreed, found that Energy West did not satisfy the Aggregate Unreasonableness Standard for overcoming the statutory presumption of correctness, and entered an award for the 1974 Plan. See Pet. App. 34.

3. The parties filed separate actions to confirm and to vacate the arbitration award, and the cases were consolidated in the district court. Energy West argued that the MPPAA required Ruschau to use a single discount-rate assumption for all purposes or, if it allowed him to use multiple rates, to use rates that are closer to each other than 7.5% and 2.7%. See Pet. App. 37–38. Energy West based its arguments on "a creative reading" of this Court's opinion in *Concrete Pipe* and on the Best Estimate Requirement of 29 U.S.C. § 1393(a). Pet. App. 40.

The district court (Judge Nichols) confirmed the award. See Pet. App. 25–70. First, the court held that *Concrete Pipe* does not require an actuary to use a single discount rate for all purposes. See Pet. App. 41–46. On the contrary, *Concrete Pipe* envisions that an actuary may use different rates in different situations. *See* Pet. App. 44 (quoting *Concrete Pipe* and observing that the Court "seems to have assumed that the discount rate for withdrawal liability could differ materially from the minimum-funding rate because the circumstances are different"). Second, the district court held that the Best Estimate Requirement does not override standard actuarial practice or otherwise permit courts to second-guess standard actuarial practice. See Pet. App. 50–58. Surveying appellate opinions addressing the Best Estimate Requirement, the district court concluded that the requirement is purely procedural—it requires only that an actuary

select assumptions himself or herself, without interference or outside influence. See Pet. App. 52–53.

4. Energy West appealed, and the court of appeals (Judge Rao joined by Judge Walker and Senior Judge Sentelle) reversed. See Pet. App. 2–24.

The court of appeals first held that the Best Estimate Requirement overrides the standard actuarial practice of using risk-free rates to determine the present value of vested benefits. See Pet. App. 11–18. According to the court, it "follows directly from the words of the statute" that the Best Estimate Requirement is "both a procedural rule that the assumptions be made by the actuary and a substantive rule that the assumptions reflect the characteristics of the plan." Pet. App. 12. That means, "if the plan is currently and projects to be invested in riskier assets, the discount rate used to calculate withdrawal liability must reflect that fact." Pet. App. 13. The court of appeals distinguished other appellate opinions interpreting the Best Estimate Requirement; on the court's view, while those opinions clearly hold that the Best Estimate Requirement is procedural, they "did not hold that the Best Estimate Requirement was *only* procedural." Pet. App. 15.

After holding that the Best Estimate Requirement limits an actuary's professional discretion to select from among standard actuarial practices, the court of appeals had to confront questions the district court did not—whether and how the Best Estimate Requirement is judicially enforceable. For, though 29 U.S.C. § 1393(a)(1) contains both the Aggregate Reasonableness Requirement and the Best Estimate Requirement, the judicial-review provisions of 29 U.S.C. § 1401 refer only to the Aggregate Reason-

ableness Requirement. Specifically, the statutory presumption of correctness that attaches to an actuary's determination can be overcome only if the actuary's assumptions are "in the aggregate, unreasonable" (a.k.a. the Aggregate Unreasonableness Standard). 29 U.S.C. § 1401(a)(3)(B)(i). The MPPAA does *not* similarly state that the statutory presumption of correctness can be overcome if the actuary's assumptions do not "in combination, offer the actuary's best estimate of anticipated experience under the plan."

The court of appeals nonetheless concluded that a violation of the Best Estimate Requirement overcomes the statutory presumption of correctness. Pointing to a parenthetical phrase Congress inserted into the Aggregate Reasonableness Requirement and the Aggregate Unreasonableness Standard—"(taking into account the experience of the plan and reasonable expectations)"—the court of appeals held that the parenthetical encompasses the Best Estimate Requirement and allows courts to overturn withdrawal-liability determinations that are not based on "the predicted future of the plan." Pet. App. 18–19.

Finally, the court of appeals rejected Energy West's contention that *Concrete Pipe* requires one discount rate for all purposes. See Pet. App. 20–23. Like the district court, the court of appeals recognized this Court's acknowledgement in *Concrete Pipe* that discount rates can be different in different circumstances. Still, the court of appeals concluded that the discount rate for withdrawal liability must be "similar" to the discount rate for other purposes—because the Best Estimate Requirement binds a pension plan's actuary in all of his or her actuarial determinations of the plan. Pet. App. 23.

In light of its conclusions of law, the court of appeals directed that the $115 million arbitral award be vacated because the arbitral record indicated that Ruschau "chose the risk-free PBGC rates based on the theory that risk-free rates are appropriate for withdrawal liability because the withdrawn employer no longer bears risk." Pet. App. 17. And, though the court instructed the 1974 Plan's actuary to recalculate Energy West's withdrawal liability using a discount rate that is "similar" to the rate used for other purposes, Pet. App. 24, the court left it for the arbitrator to consider which rate was, in fact, the actuary's best estimate of the Plan's future investment returns.

REASONS FOR GRANTING THE PETITION

I. The court of appeals' holding conflicts with *Concrete Pipe*.

The court of appeals purported to decide this case as if it were writing on a clean slate. But in *Concrete Pipe*, a case presenting materially similar facts, this Court authoritatively interpreted the MPPAA provisions at issue here. The lower court's interpretation of those provisions is incompatible with *Concrete Pipe*'s interpretation of them, and the lower court's holding that withdrawal-liability discount rates must be based on a plan's investments is incompatible with *Concrete Pipe*'s upholding of a withdrawal-liability determination that was based in part on a risk-free discount rate.

In *Concrete Pipe*, an employer challenged the constitutionality of the MPPAA's process for imposing and reviewing withdrawal-liability determinations. Among the targets of the employer's attack was the statutory presumption of correctness. See *Concrete Pipe*, 508 U.S. at 631. The Court's thorough review

and interpretation of that presumption and the Aggregate Unreasonableness Standard for overcoming the presumption refute the positions the lower court took in the decision below.

Contrary to the court of appeals' conclusion that the MPPAA empowers courts to reject standard actuarial practices and actuaries' professional judgments, the *Concrete Pipe* Court held that the MPPAA incorporates actuarial standards and defers to actuaries' professional judgments. Reading 29 U.S.C. § 1393(a)(1) and 29 U.S.C. § 1401(a)(3)(B) in tandem, the Court found that their "text plainly indicates" that "the assumptions and methods used in calculating withdrawal liability are selected in the first instance * * * by the plan actuary." *Concrete Pipe*, 508 U.S. at 631–32. A court reviews the reasonableness of an actuary's assumptions and methods "by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation." *Id.* at 635. The way for an employer to overcome the statutory presumption of correctness, then, is "to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice," that is, "to show that an apparently unbiased professional" selected "a combination of methods and assumptions that falls outside the range of reasonable actuarial practice." *Ibid.*

There is no way to reconcile *Concrete Pipe*'s holding that MPPAA *requires* an actuary to follow standard actuarial practice and *shields* the determinations of an actuary who does so with the court of appeals'

conclusion that the MPPAA *forbids* an actuary to follow the standard actuarial practice of discounting withdrawal liability using a risk-free rate. The MPPAA is not a basis for employers to attack the actuarial profession's standards.

Concrete Pipe also forecloses the court of appeals' conclusion that the Best Estimate Requirement empowers courts to reject standard actuarial practices. To reach that conclusion, the lower court held that a violation of the Best Estimate Requirement overcomes the statutory presumption of correctness. See Pet. App. 18–19. But in *Concrete Pipe*, after observing how the Aggregate Reasonableness Requirement and the Best Estimate Requirement are paired in 29 U.S.C. § 1393, *id.* at 631, the Court pointed out that the statutory presumption of correctness in 29 U.S.C. § 1401(a)(3)(B) can be overcome only under the Aggregate Unreasonableness Standard, *id.* at 631–32. The Court rightly perceived that the Aggregate Unreasonableness Standard is simply the flipside of the Aggregate Reasonableness Requirement: it "speaks * * * of the aggregate reasonableness of the assumptions and methods employed by the actuary in calculating the dollar liability figure." *Id.* at 634. Unlike the court of appeals, the Court did not hold or even imply that the Aggregate Unreasonableness Standard incorporates the Best Estimate Requirement—because it plainly does not.[2]

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2 Assuming the Best Estimate Requirement is violated when an "actuary uses otherwise reasonable assumptions to estimate the wrong thing," *Sofco Erectors, Inc.* v. *Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 423 (CA6 2021), such a mistake would likely overcome the statutory presumption of correctness under the Significant Error Standard, see 29 U.S.C.

(footnote continued on next page)

The court of appeals' view that the MPPAA forbids discounting using risk-free rates that are not similar to a plan's investment returns ultimately founders on *Concrete Pipe*'s facts. For, as the lower court implicitly acknowledged when it rejected Energy West's argument that *Concrete Pipe* require actuaries to use a single discount rate for all purposes, see Pet. App. 20–23, the withdrawal-liability assessment in *Concrete Pipe* was *not* based on the same discount rate that the plan used for minimum-funding purposes. For withdrawal liability, the *Concrete Pipe* actuary used "a blended interest rate" derived from the risk-free rate and from the plan's investment-return rate. Brief for Petitioner at 15–16, *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993) (No. 91-904), *available at* 1992 WL 511948 (1992). Many actuaries still use this blend, known as the "Segal Blend." Because the Segal Blend is based partly on risk-free rates and partly on the investment-return rate a plan uses to determine minimum-funding requirements, it is almost always different from the plan's investment-return rate.

The standard actuarial practice of discounting withdrawal liability with risk-free rates is not a novelty. It's been accepted since at least 1981, when Concrete Pipe withdrew from its multiemployer plan. See *Concrete Pipe*, 508 U.S. at 613. And it was "the only actuarial assumption or method that Concrete Pipe attack[ed]" during its case. *Id.* at 633. Presumably, if

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§ 1401(a)(3)(B)(ii) ("a significant error in applying the actuarial assumptions or methods"). Here, however, the court of appeals did not find that Ruschau estimated the wrong thing, and there is no dispute that the 2.7% rate Ruschau used reasonably approximates a risk-free rate.

the lower court's interpretations of the Best Estimate Requirement and the Aggregate Unreasonableness Standard were correct, the *Concrete Pipe* Court would have said so and undone the withdrawal-liability determination in that case.

The lower court decision is incompatible with what *Concrete Pipe* said and did. Further review is warranted.

II. The court of appeals' holding conflicts with decisions of other appellate courts.

From ERISA's enactment until mid-2020, no courts of appeals interpreted the Best Estimate Requirement as having a substantive component. All interpreted it as purely procedural. See *Vinson & Elkins* v. *Comm'r of Internal Revenue*, 7 F.3d 1235 (CA5 1993); *Wachtell, Lipton, Rosen & Katz* v. *Comm'r of Internal Revenue*, 26 F.3d 291 (CA2 1994); *Citrus Valley Ests., Inc.* v. *Comm'r of Internal Revenue*, 49 F.3d 1410 (CA9 1995); *Rhoades, McKee & Boer* v. *United States*, 43 F.3d 1071 (CA6 1995). Accord *Combs* v. *Classic Coal Corp.*, 931 F.2d 96, 102 (CADC 1991) (holding that the Best Estimate Requirement prevents an employer from challenging an actuary's determination based on evidence post-dating the withdrawal). In 2018, in an amicus brief filed in a case very much like this one, the PBGC officially endorsed the purely-procedural approach. See Brief for *Amicus Curiae* PBGC, *N.Y. Times Co.* v. *Newspaper & Mail Delivers'-Publishers' Pension Fund*, No. 18-1140 (CA2 Nov. 7, 2018).

That uniformity disappeared when the Sixth Circuit, followed by the D.C. Circuit in the decision below and then the Ninth Circuit late last year, interpreted

the Best Estimate Requirement as having a substantive component and as prohibiting the standard actuarial practice of basing withdrawal-liability discount rates on risk-free rates. See *Sofco Erectors, Inc.* v. *Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (CA6 2021); *GCIU-Employer Retirement Fund* v. *MNG Enters., Inc.*, 51 F.4th 1092 (CA9 2022). Along the way, those three courts also rejected the PBGC's considered view that the Best Estimate Requirement is purely procedural. This conflict warrants further review.

As an initial matter, the lower court properly declined to distinguish earlier decisions on the ground that they interpreted the Best Estimate Requirement in a different setting. Until 2006, an employer who contributed to a defined benefit plan could take an income-tax deduction in the amount necessary to meet the plan's funding requirements. See 26 U.S.C. § 404(a)(1) (cross-referencing 26 U.S.C. § 412). The Internal Revenue Code provision that told actuaries how to determine a plan's funding requirements (26 U.S.C. § 412(c)(3)) contained *both* the Aggregate Reasonableness Requirement *and* the Best Estimate Requirement. The now-repealed Section 412(c)(3) was enacted as part of ERISA in 1974, see Pub. L. 93-406, § 1013, 88 Stat. 829 (1974), and Congress extracted those two requirements, word-for-word, when enacting 29 U.S.C. § 1393 as part of the MPPAA in 1980, see Pub. L. 96-364, § 104(2), 94 Stat. 1233 (1980). Because Congress's use of a term of art "obviously transplanted from another legal source * * * brings the old soil with it," *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citing *Hall* v. *Hall*, 138 S. Ct. 1118, 1128

(2018)), the meaning of the Best Estimate Requirement is the same in both statutes, and the lower court rightly did not disregard the tax cases as such.

Instead, the lower court contended that the decisions in those cases left open the possibility that the Best Estimate Requirement has a substantive component. See Pet. App. 15 ("But these cases generally did not hold that the Best Estimate Requirement was *only* procedural."). That contention lacks merit. In *Vinson & Elkins*, the Fifth Circuit clearly rejected that "the best estimate test imposes a second substantive hurdle for actuarial valuations to clear." *Vinson & Elkins*, 7 F.3d at 1238. "[W]e find that the best estimate test is procedural, as opposed to substantive, in nature." *Ibid.* In reaching that conclusion, the Fifth Circuit relied on the language of "the 'best estimate' provision" and "the statutory scheme as a whole." *Ibid.* "Adding a second, more rigorous level of substantive review via the best estimate test would frustrate" Congress's goal "to give actuaries some leeway and freedom from second-guessing" and "would render the reasonableness test superfluous." *Ibid.* In other words, the Fifth Circuit and the lower court drew conflicting conclusions from the language of the Best Estimate Requirement. See Pet. App. 12 (asserting that the substantive interpretation "follows directly from the words of the statute").

Vinson & Elkins also conflicts with the lower court's holding that courts can reject standard actuarial practices that permit an actuary to select assumptions that are not based on a plan's anticipated experience. In *Vinson & Elkins*, the Commissioner of Internal Revenue argued that the actuary's assumptions and methods were not based on the plan's anticipated experience insofar as the actuary purposefully

chose conservative assumptions and methods. See *Vinson & Elkins*, 7 F.3d at 1239. The Fifth Circuit rejected the Commissioner's argument. The "basic tenet of conservatism" was (and still is) standard actuarial practice, and, quoting *Concrete Pipe*'s holding about "standard actuarial practice," the Fifth Circuit held that the MPPAA respects actuaries' professional freedom to use conservative assumptions that do not reflect a plan's anticipated experience. *Ibid.*

Soon after *Vinson & Elkins*, three other courts of appeals followed the Fifth Circuit's analysis of the Best Estimate Requirement.

- In *Wachtell, Lipton*, the Commissioner argued "that using the same interest rate assumption for plans with different investment strategies does not pass muster under the 'best estimate' test." *Wachtell, Lipton*, 26 F.3d at 296. After noting that "[a]ctual experience is, of course, an important factor to consider," the Second Circuit ultimately held "that the 'best estimate' requirement is basically procedural in nature and is principally designed to insure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors." *Ibid.* (citing *Vinson & Elkins*). In other words, the Second Circuit rejected the very reasoning and result that the lower court accepted here: the Second Circuit rejected that the Best Estimate Requirement mandates "select[ing] a discount rate based on the plan's actual anticipated investment experience." Pet. App. 14. Accord *Nat'l Ret. Fund* v. *Metz Culinary Mgmt., Inc.*, 946 F.3d 146, 151 & n.3 (CA2 2020) (vacating a district court judgment holding that the Best Estimate Requirement requires the actuary to "affirmatively determine[]" an up-to-date discount rate upon an employer's withdrawal).

- In *Rhoades, McKee*, the Sixth Circuit agreed with the Fifth and Second Circuits' construction of the Best Estimate Requirement: "the best estimate test is procedural only, and does not place a second substantive hurdle in the path of actuarial assumptions." *Rhodes, McKee*, 43 F.3d at 1075.

- In *Citrus Valley*, as in *Vinson & Elkins*, the Commissioner argued that "an assumption cannot be an actuary's 'best estimate' if it reflects a more conservative view of an anticipated plan experience than the actuary believes is likely." *Citrus Valley*, 49 F.3d at 1414; see *ibid.* ("As Commissioner reads section 412(c)(3), * * * if a plan actuary selects a set of assumptions that the actuary personally does not believe will come true, the assumptions fail the [Best Estimate Requirement], even if they are otherwise reasonable in the aggregate[.]"). The Ninth Circuit observed that the text of the Best Estimate Requirement could theoretically be read to impose a substantive requirement but held, in light of the statute's structure, that the Best Estimate Requirement is purely procedural. See *ibid.* "So long as the actuary's funding decisions fall within the range of reasonableness, the substantive provisions of section 412(c)(3) are satisfied. This means that the 'best estimate' provision of section 412(c)(3), properly construed, is essentially procedural in nature[.]" *Ibid.*

Recent panels in the Sixth and Ninth Circuits have tried to distinguish or limit *Rhodes, McKee* and *Citrus Valley*, leaving the law in those circuits in doubt.

- In *Sofco*, a panel of the Sixth Circuit asserted that *Rhodes, McKee* did *not* hold that the Best Estimate Requirement is purely procedural. Splicing together sentences from throughout the *Rhodes, McKee*

opinion, *Sofco* read *Rhodes, McKee* as holding that the Best Estimate Requirement does not let courts "second-guess" an actuary "*provided* the chosen assumption is the actuary's best estimate of anticipated experience." *Sofco*, 15 F.4th at 422 (quoting *Rhodes, McKee* and claiming that "[t]he proviso is important"). *Sofco*'s treatment of the *Rhodes, McKee* proviso is an example of an exception swallowing the rule: the *Rhodes, McKee* holding that the Best Estimate Requirement "is procedural only, and does not place a second substantive hurdle in the path of actuarial assumptions," *Rhodes, McKee*, 43 F.3d at 1075, is meaningless if, as *Sofco* asserts, the holding applies only if the actuary satisfies the substantive requirements of the Best Estimate Requirement.

- In *GCIU*, a panel of the Ninth Circuit asserted that *Citrus Valley* did *not* actually decide "whether a 'best estimate' [has] to account for the specific characteristics of a plan because that issue was not presented" on the facts of *Citrus Valley*. *GCIU*, 51 F.4th at 1100. That assertion lacks merit: as quoted above, the Commissioner squarely challenged the *Citrus Valley* actuary's decision to use assumptions that were more conservative than the plan's anticipated experience.

In endeavoring to distinguish the *Vinson & Elkins* line of cases, the Sixth, Ninth, and D.C. Circuits all ignored the considered, contrary view of the PBGC. In a Second Circuit appeal that settled before the court of appeals ruled, the PBGC filed an amicus brief rejecting the substantive interpretation of the Best Estimate Requirement and endorsing the purely-procedural interpretation. What's more, and contrary to *Sofco* and *GCIU*, the PBGC argued that

Rhodes, McKee and *Citrus Valley* did actually and affirmatively hold that the Best Estimate Requirement is only procedural. See Brief for *Amicus Curiae* PBGC at 15–16, *N.Y. Times Co.* v. *Newspaper & Mail Deliv-ers'-Publishers' Pension Fund*, No. 18-1140 (CA2 Nov. 7, 2018). The PBGC's interpretations of ERISA deserve deference, see *PBGC* v. *LTV Corp.*, 496 U.S. 633, 651–52 (1990), yet neither the Sixth, Ninth, nor D.C. Circuits acknowledged the PBGC's position or squared their substantive interpretation of the Best Estimate Requirement with the PBGC's purely-procedural interpretation.[3]

The courts of appeals are divided with each other and with the PBGC over the meaning of Best Estimate Requirement and whether it overrides standard actuarial practices. Further review by this Court would resolve that conflict.

III. Whether the MPPAA overrides standard actuarial practices is important.

The discount-rate assumption is "arguably the most important assumption" an actuary makes when determining an employer's withdrawal liability. *Concrete Pipe*, 508 U.S. at 633; see Pet. App. 6 ("The discount rate is the weightiest assumption in the overall withdrawal liability calculation"). Circuit conflicts over the law governing discount rates, therefore, are

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3 That the PBGC asserted its position in an amicus brief rather than a rule or order does not rob that position of the deference it deserves. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) ("The Secretary's position is in no sense a post hoc rationalization advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.") (cleaned up).

arguably the most important conflicts affecting withdrawal liability.

The issue is so important that it moved PBGC to propose its first-ever rule prescribing actuarial assumptions for withdrawal liability. See *Actuarial Assumptions for Determining an Employer's Withdrawal Liability*, 87 Fed. Reg. 62316 (Oct. 14, 2022). The PBGC asserts that the rule, if adopted, would restore actuaries' discretion to use risk-free rates to discount withdrawal liability. See *id.* at 62317 ("This rule is being proposed under [29 U.S.C. § 1393(a)(2)] to make clear that use of [risk-free] rates, either as a standalone assumption or combined with funding interest assumptions[,] represents a valid approach to selecting an interest rate assumption to determine withdrawal liability in all circumstances."). As discussed throughout this Petition, the Sixth, Ninth, and D.C. Circuits rejected risk-free rates as inconsistent with the Best Estimate Requirement, which applies only if the PBGC has not "prescribe[d] by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan." 29 U.S.C. § 1393(a); see Pet. App. 18 n.9.

For several reasons, the PBGC's proposed rule should not defeat certiorari in this case. First, it's just a *proposed* rule. There's no guarantee the PBGC will finalize it, let alone finalize it without change. Second, assuming the PBGC finalizes the proposal as is, the rule will apply only to future withdrawals. See 87 Fed. Reg. at 62318 ("The changes in this proposed rule would apply to the determination of withdrawal liability for employer withdrawals from multiemployer plans that occur on or after the effective date of the final rule.").

Finally, though the prospect of agency action resolving a circuit split ordinarily might weigh against certiorari, it's not clear that the PBGC's rule will resolve the split over discount rates. Comments on the proposal have already been lodged, and some commenters argue that the PBGC is powerless to undo the lower court's decision. They contend that, even if PBGC authorizes discounting with risk-free rates under 29 U.S.C. § 1393(a), it would not affect the lower court's holding that the statutory presumption of correctness in 29 U.S.C. § 1401(a)(3)(B) only shields withdrawal-liability determinations when actuaries discount with a plan's investment-return rate. See, *e.g.*, Comment Letter of U.S. Chamber of Commerce, *et al.*, re: *Actuarial Assumptions for Determining an Employer's Withdrawal Liability RIN 1212-AB54*, at 6 (submitted Dec. 12, 2022) ("The requirements under § 1401(a)(3)(B)(i) do not exclude assumptions prescribed by the PBGC under § 1391(a)(2) from the requirement to be reasonable taking into account plan's experience and reasonable expectations."). Thus commenters anticipate "inevitable years of litigation * * * if the Proposed Regulation becomes final." *Id.* at 11.

The PBGC's proposed rule is not going to deter employers, so it should not deter this Court. Though the Court could call for the views of the Solicitor General to confirm the PBGC's position, the two PBGC actions bookending the decision below—the agency's 2018 amicus brief and its 2022 proposed rule—clearly indicate that the agency supports the actuarial profession's longstanding use of risk-free rates to discount withdrawal liability. See 87 Fed. Reg. at 62318 (explaining the risk-shifting rationale behind ASOP No. 27 and deeming it "reasonable"). The Court

should therefore grant the petition to resolve the conflicts that have recently sprung up.

CONCLUSION

The Court should grant the petition or, at the least, call for the views of the Solicitor General.

Respectfully submitted,

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APPENDIX

PETITION APPENDIX

Page

United States Court of Appeals
for the District of Columbia Circuit

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN, *et al.*,

Appellees,

v.

ENERGY WEST MINING COMPANY,

Appellant.

No. 20-7054

Decided July 8, 2022

Before RAO and WALKER, Circuit Judges, and SENTELLE, Senior Circuit Judge.

RAO, Circuit Judge:

The Multiemployer Pension Plan Amendments Act ("MPPAA") requires an employer to pay "withdrawal liability" if it decides to leave a multiemployer pension plan. Calculating the amount of money the employer owes the plan requires an actuary to project the plan's future payments to pensioners. As with any financial projection, this requires making assumptions about the future. The MPPAA requires the actuary to use "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

The Energy West Mining Company ("Energy West") withdrew from the United Mine Workers of America 1974 Pension Plan ("Pension Plan") in 2015. In calculating Energy West's withdrawal liability, the actuary did not rely on the Pension Plan's performance to determine what discount rate to use, but instead adopted a risk-free discount rate. An arbitrator upheld the risk-free discount rate and the district court granted summary judgment to the Pension Plan, enforcing the arbitral award. We reverse because the actuary's choice of a risk-free rate violates the MPPAA's command to use assumptions that are "the actuary's best estimate of anticipated experience under the plan."

I.

A.

To ensure that employees who were promised a pension would actually receive it, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1001(a); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984); *see generally* Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001 *et seq.* and in scattered sections of the Internal Revenue Code). By the late 1970s, it had become clear that ERISA was failing to stabilize multiemployer pension plans—those maintained pursuant to a collective bargaining agreement between multiple employers and a

union.[1] *R. A. Gray*, 467 U.S. at 721–22; *see also* 29 U.S.C. § 1002(37)(A) (defining multiemployer plan). Like single employer plans, multiemployer plans had to meet minimum funding standards, which require employers to contribute annually to the plan whatever is needed to ensure it has enough assets to pay for the employees' vested pension benefits when they retire. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416 (1995). Unlike employers managing a single employer plan, however, employers in multiemployer plans could withdraw without triggering the plan-termination provisions of ERISA and thereby avoiding obligations to make ongoing contributions.[2]

If a multiemployer plan was financially stable, then ERISA worked. But if a plan became financially troubled, large contributions would be needed to meet minimum funding standards, incentivizing employers to withdraw and precipitating a death spiral for the plan. *See id.* at 416–17. Every employer withdrawal would shrink a plan's contribution base, forcing the remaining employers to make even larger contributions and increasing their incentive to withdraw. ERISA's only check on this incentive was that if a

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1 Multiemployer plans are used mostly in industries where there are hundreds or thousands of small employers going in and out of business and where the nexus of the employment relationship is the union that represents employees who typically work for many of those employers over the course of their career. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 606 (1993).

2 If an employer withdrew from a plan, the benefits its employees earned while the employer was part of the plan would remain on the plan's books.

plan terminated within five years of an employer's withdrawal, that employer would be liable for its share of the unfunded vested benefits. 29 U.S.C. § 1364 (1976); *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 416. Despite this risk, however, employers chose to withdraw, causing "a significant number of [multiemployer] plans" to experience "extreme financial hardship." *R. A. Gray*, 467 U.S. at 721.

In response, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208. The MPPAA "transformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty" by requiring employers to pay "a withdrawal charge" upon their complete or partial withdrawal from a plan. *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417; *see* 29 U.S.C. § 1381(a). Specifically, a withdrawing employer must pay the plan its proportional share of the plan's "unfunded vested benefits," 29 U.S.C. § 1381(b)(1), which is "the difference between the present value of the plan's vested benefits and the present value of its assets," *Connors v. B & H Trucking Co.*, 871 F.2d 132, 133 (D.C. Cir. 1989); *see* 29 U.S.C. § 1393(c) (laying out this calculation).

An actuary must make numerous assumptions to calculate an employer's withdrawal liability. For example, to project the plan's vested benefits, the actuary must make assumptions about how long employees will work and how long retirees will live. The actuary also must make an assumption about the discount rate, i.e., the rate at which the plan's assets will

earn interest.[3] The discount rate is the weightiest assumption in the overall withdrawal liability calculation. *See Combs v. Classic Coal Corp.*, 931 F.2d 96, 101 (D.C. Cir. 1991) (explaining that an "erroneously low" discount rate, without appropriate offsetting assumptions, might "destroy the validity of the entire calculation" of unfunded vested benefits).

In the absence of a relevant regulation, an actuary must calculate withdrawal liability using assumptions "which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1); *see also id.* § 1393(a)(2) (allowing the use of assumptions set forth in Pension Benefit Guaranty Corporation ("PBGC") regulations).

ERISA and the MPPAA lay out a system to adjudicate disputes over withdrawal liability. The pension plan is responsible for initially determining an employer's withdrawal liability. *Id.* § 1382(1). If an employer wants to contest the plan's determination, it must first do so through arbitration. *Id.* § 1401(a)(1).

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3 Because of the time value of money, a plan does not need to have $100,000 on hand in order to pay $100,000 in the future. The money the plan has on hand will be invested and earn interest; how much interest the assets will earn determines how much the plan must have on hand at the time the employer withdraws. The discount rate is the amount of interest the actuary assumes the plan's assets will earn, which is used to convert the stream of future payments to employees into the present-day amount of assets needed to make those payments.

In those and all subsequent proceedings, a plan's determination of unfunded vested benefits "is presumed correct unless a party contesting the determination shows by a preponderance of the evidence that" either "(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." *Id.* § 1401(a)(3)(B). After arbitration, any party can seek "to enforce, vacate, or modify the arbitrator's award" in district court. *Id.* § 1401(b)(2). The court must apply a "presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Id.* § 1401(c).

B.

The United Mine Workers of America 1974 Pension Plan is a multiemployer pension plan. Energy West was a participating employer in the Pension Plan but withdrew after closing its Utah mine in 2015. At the time of Energy West's withdrawal, the Pension Plan was projected to become insolvent as early as 2022. Needless to say, the Pension Plan had a lot of unfunded vested benefits, requiring Energy West to pay withdrawal liability.[4]

4 The Pension Plan's financial problems were mitigated greatly by the Bipartisan American Miners Act of 2019, but that infusion of money "shall be disregarded ... for purposes of determining [an] employer's withdrawal liability." Pub. L. No. 116-94,

(footnote continued on next page)

The job of calculating Energy West's withdrawal liability fell to William Ruschau, the Pension Plan's actuary. Ruschau testified that he used the Pension Plan's prior experience as a guidepost for most of his assumptions but that he did not consider the Pension Plan's historic investment performance to inform his discount rate assumption. Instead he "use[d] a reasonable risk-free interest rate," which is equivalent to assuming the plan would "buy[ ] an annuity to settle up the employer's share of the unfunded vested benefits." His justification for using risk-free rates was that when an employer withdraws from a plan, it no longer bears any risk associated with that plan's investment performance.

The choice of a risk-free rate made a material difference. If Ruschau had used a discount rate assumption based on the Pension Plan's historic investment performance—around 7.5%—Energy West's withdrawal liability would have been about $40 million. *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 464 F. Supp. 3d 104, 111 (D.D.C. 2020). Instead, Ruschau used a discount rate assumption of 2.71% for 2015 to 2035 and 2.78% for all years thereafter, based on the rates the PBGC projected risk-free annuities will earn. *See id.* Applying that discount rate, Energy West's withdrawal liability was over $115 million. *See id.* at 120.

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div. M, § 102(a)(3), 133 Stat. 2534, 3092 (codified at 30 U.S.C. § 1232(i)(4)(E)).

Energy West disagreed with the discount rate assumption and pursued arbitration.[5] It contended that the risk-free PBGC rate was an inappropriate choice for the discount rate assumption because (1) the actuary was required to "use the same or very similar rate for both withdrawal liability and [minimum] funding purposes," and (2) risk-free rates are not the "best estimate of anticipated experience under the plan" because they are not based on past or projected investment performance.

The arbitrator rejected both arguments. He agreed with the Pension Plan that using risk-free rates to calculate withdrawal liability was reasonable, even though they were not used to calculate minimum funding, because withdrawal liability, unlike minimum funding, acts "as a settlement of the employer's obligations." In reaching this conclusion, the arbitrator placed great weight on Actuarial Standard of Practice 27, Section 3.9(b), which states that "[a]n actuary measuring a plan's present value of benefits on a ... settlement basis may use a discount rate implicit in annuity prices or other ... settlement options." ACTUARIAL STANDARDS BOARD, ACTUARIAL STANDARD OF PRACTICE NO. 27: SELECTION OF ECONOMIC ASSUMPTIONS FOR MEASURING PENSION OBLIGATIONS § 3.9(b) (2013) ("ASOP 27"). The arbitrator read this section as approving the use of risk-free rates to calculate withdrawal liability

5 Energy West also contended that ERISA's 20-year cap on withdrawal liability payments applied to it, but does not appeal the decisions of the arbitrator and the district court holding otherwise. *See id.* at 120–25.

on the theory that an employer's withdrawal constitutes a settlement. He concluded that "almost by definition an actuary who applies the guidance of the actuarial standards of practice is using a combination of methods and assumptions that would be acceptable to a reasonable actuary."

Before the district court, Energy West sought to vacate, and the Pension Plan sought to enforce, the arbitration award. The court granted summary judgment to the Pension Plan and entered an order enforcing the arbitration award. *See United Mine Workers of Am. 1974 Pension Plan*, 464 F. Supp. 3d at 125. The court rejected Energy West's contention that the discount rate assumptions for minimum funding obligations and withdrawal liability had to be identical under the MPPAA. Pointing to the statute's different language in the minimum funding section—requiring that "each" assumption be reasonable—and the withdrawal liability section—requiring that the assumptions be reasonable "in the aggregate"—the court held that different assumptions were permissible under the statute. *See id.* at 112–15. The court also rejected Energy West's contention that the use of risk-free rates was unreasonable because it was not the "best estimate of anticipated experience under the plan." The court held that language meant only that the actuary must independently calculate withdrawal liability and that it did not impose any substantive requirements on the assumptions. *Id.* at 116–20. Energy West appealed.

II.

We review the district court's grant of summary judgment de novo, which means, in essence, we are reviewing the arbitrator's decision. *Combs*, 931 F.2d at 99. The arbitrator's findings of fact are presumed correct unless they are rebutted "by a clear preponderance of the evidence," 29 U.S.C. § 1401(c), and the arbitrator's legal determinations are reviewed de novo, *see I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984).

A.

When calculating withdrawal liability, the MPPAA mandates that actuaries use "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). Energy West concedes that the "Aggregate Reasonableness Requirement" generally leaves the actuary with discretion to use his professional judgment about what assumptions are used to calculate withdrawal liability. The dispute here centers on whether the "Best Estimate Requirement" fetters that discretion. Energy West maintains that the Best Estimate Requirement mandates using assumptions based on the plan's particular characteristics. The Pension Plan, on the other hand, asserts that the Best Estimate Requirement re-

quires that the assumptions be developed independently by the actuary but otherwise imposes no substantive requirements on the assumptions made.

Energy West is correct that the actuary must make assumptions based on the plan's particular characteristics when calculating withdrawal liability. This follows directly from the words of the statute. The MPPAA specifies that the assumptions must be "the actuary's best estimate *of anticipated experience under the plan*." *Id.* (emphasis added). Congress directed what the actuary must estimate when making assumptions used to calculate withdrawal liability, namely a plan's anticipated future liabilities and asset returns. Such predictions necessarily turn on a plan's characteristics.

The district court interpreted the Best Estimate Requirement to require only that the assumptions be made by the actuary; however, such an interpretation disregards the requirement that the actuary estimate the "anticipated experience under the plan." *Id.* "It is our duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (cleaned up). To give effect to every word of the Best Estimate Requirement, we interpret it to lay down both a procedural rule that the assumptions be made by the actuary and a substantive rule that the assumptions reflect the characteristics of the plan.

As applied to the discount rate assumption, using the plan's particular characteristics means the actuary must estimate how much interest the plan's as-

sets will earn based on their anticipated rate of return. An actuary cannot base the discount rate "on investments that the plan is not required to and might never buy, based on a set formula that is not tailored to the unique characteristics of the plan." *Sofco Erectors, Inc. v. Trustees of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 421 (6th Cir. 2021) (cleaned up). Thus, risk-free rates might be appropriate if a plan were invested in risk-free assets, or perhaps if it planned to invest the withdrawal liability payments in risk-free assets. But if the plan is currently and projects to be invested in riskier assets, the discount rate used to calculate withdrawal liability must reflect that fact.

This interpretation of the Best Estimate Requirement is reinforced by comparison to other sections of ERISA. Congress has tailored the calculation of liabilities, providing distinct actuarial specifications for different circumstances. For example, benefits must be paid "in the form of an annuity" upon the "[t]ermination of a multiemployer plan," which can occur when every employer withdraws from the plan. 29 U.S.C. § 1341a(a)(2), (c)(2). When a plan terminates, PBGC regulations require that actuaries use a proxy for risk-free rates to value employees' benefits. *See* 29 C.F.R. § 4281.13(a) (instructing actuaries to use the "interest assumptions" in the rate table for annuities). Similarly, ERISA directs actuaries to calculate minimum funding requirements "without taking into account the experience of the plan" when determining whether a plan has hit its full-funding limitation. 29 U.S.C. § 1084(c)(6)(E)(iii)(I). Such meaningful variation only bolsters the requirement to read the statute to mean what it says. When calculating withdrawal

liability, actuaries must select a discount rate based on the plan's actual anticipated investment experience. *Accord Sofco Erectors*, 15 F.4th at 422.

Although the discount rate is only one of the assumptions used "in combination," 29 U.S.C. § 1393(a)(1), to calculate the withdrawal liability, it is the most impactful, *see Combs*, 931 F.2d at 101. Therefore, if the actuary selects a discount rate that is not the "best estimate of anticipated experience under the plan," this error will usually render the calculation contrary to the MPPAA.

We find unpersuasive the Pension Plan's argument that the Best Estimate Requirement does not impose any substantive requirements on the assumptions but instead requires only that the assumptions come from the actuary. The Pension Plan relies on a series of out-of-circuit cases interpreting the Internal Revenue Code's then-identical Best Estimate Requirement.[6] But the cases the Pension Plan cites involved a distinct question about whether the Best Estimate Requirement meant that the actuary had to choose a single "best" estimate, or rather could choose within a "reasonable" range of estimates. Other circuits have concluded that the actuary may choose within a reasonable range, because if the Best Estimate Requirement meant an actuary had to pick the

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6 26 U.S.C. § 412(c)(3) (1994) ("For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods ... which, in the aggregate, are reasonable (taking into account the experiences of the plan and reasonable expectations), and ... which, in combination, offer the actuary's best estimate of anticipated experience under the plan.").

single point assumption that he thought was "the most likely result," then the requirement that the assumptions be "reasonable" would be "superfluous." *Vinson & Elkins v. Comm'r*, 7 F.3d 1235, 1238 (5th Cir. 1993); *see also Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291, 296 (2d Cir. 1994) (explaining the statute "is not violated when an actuary chooses an assumption that is within the range of reasonable assumptions, even when the assumption is at the conservative end of that range"); *Citrus Valley Ests., Inc. v. Comm'r*, 49 F.3d 1410, 1415 (9th Cir. 1995) (same); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1075 (6th Cir. 1995) (same).

The Pension Plan relies on the fact that, in reaching this holding, these circuits concluded the Best Estimate Requirement is "procedural," meaning that the estimate must be the actuary's alone. *See Citrus Valley*, 49 F.3d at 1414; *Rhoades*, 43 F.3d at 1075; *Wachtell*, 26 F.3d at 296; *Vinson & Elkins*, 7 F.3d at 1238. But these cases generally did not hold that the Best Estimate Requirement was *only* procedural. *See Wachtell*, 26 F.3d at 296 ("[T]he 'best estimate' requirement ... is *principally* designed to [e]nsure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors.") (emphasis added); *Citrus Valley*, 49 F.3d at 1414 (quoting *Wachtell*); *Rhoades*, 43 F.3d at 1075 (same).

Rather, these cases analyzed only the first half of the Best Estimate Requirement—that the assumption be "the actuary's best estimate." As to the requirement that the assumptions be the "best estimate of anticipated experience under the plan," these

courts were either silent, *see Vinson & Elkins*, 7 F.3d at 1237–39, or explicitly clarified that they were not reading it out of the statute, *see Wachtell*, 26 F.3d at 296 (the statute "is not violated when an actuary chooses an assumption that is within the range of reasonable assumptions, even when the assumption is at the conservative end of that range, *provided the chosen assumption is the actuary's best estimate of anticipated plan experience*.") (emphasis added); *Rhoades*, 43 F.3d at 1075 (quoting *Wachtell*).

Nothing in these cases forecloses requiring the actuary to use the plan's particular characteristics, which simply follows from the statutory requirement to determine the "best estimate of anticipated experience under the plan." Therefore, these cases do not support the Pension Plan's argument that the Best Estimate Requirement does not mean what it says. *Accord Sofco Erectors*, 15 F.4th at 422 (holding that *Rhoades*, 43 F.3d at 1073–75, does not "suggest[ ] that actuaries may disregard the statute's requirement that they base their estimates on the 'anticipated experience under the plan' ") (quoting 29 U.S.C. § 1393(a)(1)).

In sum, the MPPAA's rule that the actuary use assumptions "which, in combination, offer the actuary's best estimate of anticipated experience under the plan" requires the actuary to choose a discount rate assumption based on the plan's actual investments. 29 U.S.C. § 1393(a)(1). While there may be a reasonable range of estimates, the discount rate assumption cannot be divorced from the plan's anticipated investment returns.

The arbitrator found, and all agree, that the Pension Plan's actuary chose the risk-free PBGC rates based on the theory that risk-free rates are appropriate for withdrawal liability because the withdrawn employer no longer bears risk. The discount rate assumption was not chosen based on the Pension Plan's past or projected investment returns. Therefore, the PBGC rate assumption was not the actuary's "best estimate of anticipated experience under the plan."

B.

The Pension Plan gives two reasons why the arbitration award should not be vacated even if Energy West's interpretation of the Best Estimate Requirement is correct. First, the Pension Plan asserts that using risk-free rates to calculate withdrawal liability is proper under ASOP 27,[7] and that "[t]he Best Estimate Requirement does not override actuarial standards of practice." But the MPPAA, not ASOP 27, is the law. We also note that the standard actuarial practices recognize that legal requirements supersede any professional norms. *See* ASOP 27 § 1.2 ("If a conflict exists between this standard and applicable law (statutes, regulations, and other legally binding authority), the actuary should comply with applicable law.").

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7 Specifically, the Pension Plan points to Section 3.9(b), which says to "use a discount rate implicit in annuity prices" when "measuring a plan's present value of benefits on a defeasance or settlement basis." We express no opinion on the Pension Plan's argument that withdrawal liability is an occasion where benefits are properly measured on a "defeasance or settlement basis."

In other words, an unlawful assumption violates professional norms and is therefore "unreasonable."[8] Whatever the merits of the actuary's theory, it cannot displace the Best Estimate Requirement.[9]

Second, the Pension Plan asserts that a violation of the Best Estimate Requirement is not a valid ground for vacating an arbitration award under the dispute resolution provision of the MPPAA. The statute specifies that "[i]n the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that ... the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1401(a)(3)(B). The Pension Plan contends that because the dispute resolution provision does not specify that the presumption of correctness can be overcome by showing that the assumptions were not the "best estimate of anticipated experience under the plan," such a showing cannot be grounds to vacate the arbitration.

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8 This remains true regardless of how widespread the unlawful practice is among the profession. *Cf. The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand., J.) ("[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure[.]").

9 Under the MPPAA, the only alternative to the Best Estimate Requirement for calculating withdrawal liability is a PBGC regulation prescribing actuarial assumptions and methods. 29 U.S.C. § 1393(a)(2). But there is no relevant regulation here.

We disagree. The dispute resolution provision permits vacating an arbitration award if the actuarial assumptions were unreasonable in the aggregate "taking into account the experience of the plan." *Id.* § 1401(a)(3)(B)(i). The Aggregate Reasonableness Requirement, both for dispute resolution and for withdrawal liability in Section 1393(a)(1), does not just require assumptions that are reasonable in the abstract; it requires assumptions that are reasonable relative to the plan, taking the plan's experience into account. If the actuary is not basing the assumptions on the plan's characteristics, the assumptions will not be reasonable "taking into account the experience of the plan." In other words, not only must the actuary's assumptions be reasonable, they must be aimed at the right calculation, namely the predicted future of the plan.

Here the discount rate assumption used to calculate unfunded vested benefits did not take into account the experience of the plan and therefore was not a reasonable assumption. Thus, Energy West raised a valid ground for vacating the arbitration award.

* * *

The arbitration award must be vacated because in determining the withdrawal liability for Energy West, the actuary failed to use a discount rate that reflected the Plan's characteristics and was the "best estimate of anticipated experience under the plan."

III.

Having decided that the arbitration award must be vacated, we nonetheless address Energy West's argument that the discount rate assumption used for withdrawal liability and minimum funding must be the same because a resolution of this question is relevant to the scope of acceptable calculations of Energy West's withdrawal liability. We hold that the assumptions need not be identical but must be similar because they both must be "the actuary's best estimate of anticipated experience under the plan."

The current provisions governing the assumptions for minimum funding and withdrawal liability are similar, but not identical. When the MPPAA was enacted, an identical rule applied to actuarial assumptions used to calculate a plan's minimum funding obligations and an employer's withdrawal liability. *Compare* 29 U.S.C. § 1082(c)(3) (1982), *with id.* § 1393(a)(1). In the Pension Protection Act of 2006, Congress tweaked the rule for calculating minimum funding obligations, but left the language regarding withdrawal liability assumptions unchanged. *See* Pub. L. No. 109-280, § 201, 120 Stat. 780, 862 (codified at 29 U.S.C. § 1084(c)(3)). This means that for withdrawal liability, actuaries must use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). For minimum funding, on the other hand, actuaries must use "actuarial assumptions and meth-

ods—(A) each of which is reasonable (taking into account the experience of the plan and reasonable expectations), and (B) which, in combination, offer the actuary's best estimate of anticipated experience under the plan." *Id.* § 1084(c)(3).

Both provisions require using assumptions that reflect "the actuary's best estimate of anticipated experience under the plan." For the reasons given above, this Best Estimate Requirement means that, for both calculations, the assumptions must be based on the actual characteristics of the plan. The discount rate specifically must reflect the interest the plan's assets are projected to earn. Because the discount rate assumptions for calculating withdrawal liability and minimum funding must be estimates of the same thing, they will invariably be similar. It is difficult, for example, to imagine they could diverge by nearly five hundred basis points, as they did here.

But it does not follow that the discount rates must be identical. The Best Estimate Requirement does not mandate adopting any single numerical assumption. As other circuits have held, there is an "acceptable range." *Citrus Valley*, 49 F.3d at 1415. And that must be so because if the Best Estimate Requirement forced actuaries to use the single most accurate estimation for each assumption, the requirement that the assumptions be reasonable would be "superfluous." *Vinson & Elkins*, 7 F.3d at 1238. Nothing in the statutory text indicates the assumptions for minimum funding and withdrawal liability must fall at the same point in the acceptable range of estimates based on the plan's characteristics. The assumed discount rates must be similar, even if not always the same.

This conclusion is supported by the somewhat different statutory language governing the assumptions for minimum funding and withdrawal liability. For withdrawal liability, actuaries must use assumptions "which, in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). Because the assumptions must be reasonable "in the aggregate," it may be possible for one unreasonable assumption to offset another, leading to an overall reasonable withdrawal liability calculation. *Combs*, 931 F.2d at 101.[10] For minimum funding, on the other hand, actuaries must use assumptions "each of which is reasonable." 29 U.S.C. § 1084(c)(3). Since "each" assumption must be reasonable, there is no possibility of offsetting assumptions for minimum funding calculations. Thus, the different statutory requirements suggest the possibility at least that different assumptions could be used for each calculation, so long as both assumptions are based on the plan's actual characteristics.

Energy West maintains that the Supreme Court held the assumptions used to calculate minimum funding and withdrawal liability must be identical in *Concrete Pipe*, 508 U.S. at 615–36. *Concrete Pipe*, however, did not so hold. In considering the constitutionality of a provision of the MPPAA, the Court explained that "[t]he 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 in" the minimum funding context. *Id.* at 632 (cleaned up). When *Concrete Pipe* was decided, the provisions

10 Nothing in the record suggests, nor does any party contend, that there were offsetting assumptions in this case.

for minimum funding and withdrawal liability were still identical. *Compare* 29 U.S.C. § 1082(c)(3) (1988), *with id.* § 1393(a)(1). As the Court explained, that identical language "tends to check the actuary's discretion" because "[u]sing different assumptions for different purposes could very well be attacked as presumptively unreasonable both in arbitration and on judicial review." *Concrete Pipe*, 508 U.S. at 633 (cleaned up).

The Court's reasoning suggests that actuaries must typically use the same discount rate assumption. But the Court stopped short of holding that the statute required actuaries to use identical rates, even when the statutory provisions for withdrawal liability and minimum funding were identical. To hold that using different assumptions "could very well be attacked as presumptively unreasonable" is not to hold that that the assumptions must be the same as a matter of law. *Id.* (cleaned up); *see N.Y. Times Co. v. Newspaper & Mail Deliverers'—Publishers' Pension Fund*, 303 F. Supp. 3d 236, 254 (S.D.N.Y. 2018). Moreover, even if *Concrete Pipe* had held the assumptions must be identical, after the 2006 amendment to the minimum funding provision that holding may no longer be good law. *See Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365, 389–90 (D.N.J. 2018).

Our holding that the discount rates used to calculate minimum funding and withdrawal liability must be *similar* accords perfectly with *Concrete Pipe*, because both rates must be the actuary's "best estimate of anticipated experience under the plan."

* * *

To calculate Energy West's withdrawal liability from the Pension Plan, the actuary was required to base his assumptions on the Plan's actual characteristics. Because the actuary failed to do so, we reverse the judgment of the district court and remand for vacatur of the arbitration award. When the actuary calculates Energy West's withdrawal liability, the discount rate assumption must be similar, but need not be identical, to the discount rate assumption used to calculate minimum funding.

So ordered.

United States District Court
for the District of Columbia

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN, *et al.*, Plaintiffs,

v.

ENERGY WEST MINING COMPANY, Defendant.

Civil Action No. 1:18-cv-01905 (CJN)

Signed 05/22/2020

CARL J. NICHOLS, United States District Judge

Plaintiffs United Mine Workers of America 1974 Pension Plan (the "1974 Plan" or "Plan") and several of its trustees seek to enforce an arbitration award against Defendant Energy West Mining Company. *See generally* Compl., ECF No. 1. Energy West counterclaims, petitioning the Court to vacate or modify the award. *See generally* Countercl., ECF No. 8. The Court agrees with the Plan that the arbitrator's award should not be disturbed, and therefore grants summary judgment to the Plan, denies it to Energy West, and orders Energy West to comply with the terms of the award.

I. Background

Energy West once operated a coal mine in Huntington, Utah and employed about 180 miners to staff it. *See* Def.'s Mem. in Supp. of Energy West's Mot. for

Summ. J. ("Def.'s Mot.") at 4, ECF No. 29-1. As is standard among coal mining companies, Energy West entered into a series of collective bargaining agreements with the United Mine Workers of America ("UMWA"), the prevailing coal miners' union. *See* Pls.' Mem. of P. & A. in Supp. of its Mot. for Summ. J. to Enforce Arb. Award ("Pls.' Mot.") at 7, ECF No. 32-1; Parties' Joint Stipulation of Facts ("Joint Stipulation") ¶ B.3, Joint App'x (J.A.) 419, ECF No. 28. A provision of those agreements required Energy West to contribute to the Union's 1974 Pension Plan, the multi-employer plan that has covered most coal miners in the United States since the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). *See* Pls.' Mot. at 7. "The contributions made by employers participating in such a multiemployer plan are pooled in a general fund available to pay any benefit obligation of the plan." *Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Tr. for S. Calif.*, 508 U.S. 602, 605 (1993). "An employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for [any] participating employers." *Id.* at 606.

Since 2014, the Plan has retained United Actuarial Services ("UAS") to assist in administering the Plan's finances. Joint Stipulation ¶¶ B.10–11, J.A. 420. One of United's duties is to prepare an annual valuation report, which assesses the Plan's financial health and estimates the performance of its investment portfolio for the coming year. *Id.* ¶ B.8; *see also* UAS's UMWA 1974 Pension Plan Actuarial Valuation

Report for Plan Year Commencing July 1, 2015 ("2015 Valuation"), J.A. 556–630. United employee William Ruschau, the Plan's enrolled actuary, prepared the valuation reports for the years 2014 and 2015. *See generally* 2015 Valuation; UAS's UMWA 1974 Pension Plan Actuarial Valuation Report for Plan Year Commencing July 1, 2014 ("2014 Valuation"), J.A. 730–803; William Ruschau Dep. 33:20–36:4, J.A. 432. He categorized the Plan as being in "critical and declining status" under the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006), as amended by the Multiemployer Pension Reform Act of 2014, Pub. L. No. 113-235, div. O, 128 Stat. 2130, 2773–882 (2014). By 2015, Ruschau anticipated that the Plan will likely be insolvent by 2022. 2015 Valuation at J.A. 571; Joint Stipulation ¶ B.7, J.A. 420.

As part of his calculations, Ruschau assumed that the Plan's investments would achieve a net rate of return of 7.5% in the 2015 plan year—the same rate Plan actuaries had projected in previous years. 2015 Valuation at J.A. 565. Ruschau based that assumption on a host of factors, including the Plan's historical performance; in fact, the Plan's actual rate of return for 2014–2015 was 7.31%—not far off the mark. *Id.*; *see also id.* at 566 (charting the Plan's "Historical Rates of Net Investment Return"). The 7.5% assumed rate of return was a critical piece in determining whether the Plan could expect to experience a funding shortfall in the coming year, and therefore whether participating employers would be on the hook to make extra contributions to keep the Plan afloat. *See* Def.'s Mot. at 8; 29 U.S.C. § 1084 (setting "[m]inimum funding standards for multiemployer plans").

That same year, Energy West shut down its coal-mining operations and withdrew from the Plan. Joint Stipulation ¶ C.6, J.A. 421. When an employer withdraws from a multiemployer pension plan, "the employer is liable to the plan in [an] amount" commonly known as its "withdrawal liability." 29 U.S.C. § 1381(a). In short, the Plan must calculate the employer's share of the Plan's "unfunded vested benefits," which is "the difference between the present value of the pension fund's assets and the present value of its future obligations to employees covered by the pension plan." *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 347 (7th Cir. 2012) (Posner, J.). The withdrawing "employer must pay [its] share to the fund ... so that the plan can pay the employer's share of the plan's unfunded vested benefits as those benefits come due in the future." *Id.* at 348.

The Plan asked Ruschau to compute Energy West's withdrawal liability. *See* Def.'s Mot. at 5. Ruschau first determined that, as of June 30, 2015, the Plan had over $3.8 billion in assets. *See* Pls.' Emp'r Withdrawal Liability Notice and Demand, and Req. for Info., under 29 U.S.C. § 1399 ("Liability Notice") at J.A. 552. He then calculated that the present value of the Plan's future obligations to participating employees—the cost of benefits it was obligated eventually to pay out—stood at over $9.5 billion. *Id.* To reach that figure, Ruschau assumed that the Plan's assets would grow at the Pension Benefit Guarantee Corporation's (PBGC) assumed rate for annuities (2.71% for the first twenty years and 2.78% thereafter)—not the 7.5% rate of return he had used in his 2015 Valuation

for the Plan's expected rate of return on its investments. *Id.*; *see also* 2015 Valuation at J.A. 613. The resulting calculations showed a funding shortfall of over $5.7 billion. Liability Notice at J.A. 552.

Ruschau then calculated that, based on the number of hours Energy West employees had worked over the previous five-year period in comparison with the total number of hours worked by all employees participating in the plan, Energy West was responsible for just over two percent of the total, yielding a withdrawal liability of $115,119,099.34. *Id.* at J.A. 551. The Plan gave Energy West the option of paying a lump sum up front or paying in monthly installments of $247,251.12 that would last indefinitely.[1] *Id.* at J.A. 542.

Energy West balked at those numbers and took the Plan to arbitration. Def.'s Mot. at 6. The Parties submitted two questions for Arbitrator Mark L Irvings to decide:

> 1. Whether the actuarial assumptions used ... to calculate Energy West's withdrawal liability were unreasonable in the aggregate ...?

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1 Under ERISA, the monthly installment payments are capped so that the withdrawing employer's installment payments roughly reflect what it was paying monthly before withdrawal. *See* 29 U.S.C. § 1399(c)(1)(C). In addition, in most circumstances, ERISA imposes a twenty-year cap on installment payments, regardless of the total liability. *See id.* § 1399(c)(1)(B). But as discussed below, the Plan takes the position that that twenty-year cap does not apply to it. *See* Section III.B, *infra.*

> 2. Whether the UMWA 1974 Pension Plan is exempt from the 20-year cap on withdrawal liability installment payments set forth in [29 U.S.C. § 1399(c)(1)(B)]?

Award at J.A. 1. Energy West first argued that it was unreasonable as a matter of law for Ruschau to have used one rate (7.5%) to estimate the fund's expected return on investments and a much lower rate (2.71%–2.78%) to estimate the contributions required for Energy West to fund future benefits for its employees. Arb. Tr. Day 1 20:11–21:19, J.A. 78–79. Energy West argued in the alternative that even if the rates need not be identical, the stark difference between the two rates Ruschau selected caused his calculations to be unreasonable under ERISA. *Id.* Second, Energy West contended that the Plan was no longer subject to any exemption from the 20-year cap on installment payments because of changes in its tax consideration that removed it from the set of multiemployer pension plans that Congress exempted from the cap decades ago. *Id.* 21:20–24:14, J.A. 79–82.

Irvings conducted two days of hearings in late 2017. Award at J.A. 1. As to the question of reasonable discount rates, Irvings reviewed Ruschau's deposition testimony about how he had computed Energy West's withdrawal liability. *Id.* at J.A. 13; *see also* Ruschau Dep. at J.A. 423–69. Irvings then heard testimony and considered an expert report from Scott Hittner, an actuary and consultant testifying on behalf of Energy West. *See* Arb. Tr. Day 1 35:14–171:1, J.A. 93–229; *see also* Hittner's Expert Report, J.A. 523–39. Hittner explained that, in his opinion, when

an actuary selects a discount rate for use in calculating an employer's withdrawal liability, "the best measure ... is a market[-]consistent discount rate" akin to the prevailing rates for bond trading. Arb. Tr. Day 1 59:19–62:8, J.A. 117–20. Because the 1974 Plan is in critical status and is projected to become insolvent in the next decade, Hittner suggested, "[a] market[-]consistent discount rate would necessarily have to reflect those factors" and would therefore need to be *higher* to account for the Plan's low creditworthiness. *Id.* 67:16–70:7, J.A. 125–28.

In other words, Hittner opined that because Ruschau knew that the Plan was going to stop paying out benefits in 2022 (or reduce retirees' entitlements), it made little sense to use a low discount rate and thereby make Energy West pay a premium to exit the Plan. *Id.* 76:7–77:12, J.A. 134–35. Using the low PBGC rate, in Hittner's view, was akin to purchasing an annuity from a reputable insurance company with very little chance of default—nothing like purchasing benefits from a pension plan that was likely to default in only a few years. *Id.* 83:21–84:16, J.A. 141–42. Hittner asserted that the use of a low discount rate, rather than the 7.5% minimum-funding rate, overstated the Plan's unfunded vested liabilities by 141%, or $3.4 billion. *Id.* 72:7–20, J.A. 130; 78:19–79:4, J.A. 136–37. He believed that the proper discount rate would have been somewhere in the range of 6.0%–6.5%. Hittner's Report ¶ 26, J.A. 532–33. But on cross-examination, Hittner admitted that guidance from the national Actuarial Standards Board permits the use of annuity-like rates (such as the PBGC rates) when calculating withdrawal liability:

> Q: ... The guidance says that the actuary may consider a rate implicit in annuity prices. You've already agreed that the PBGC rates are a proxy for annuity prices. So, are you saying it was unreasonable for the plan's actuary to follow this guidance from the [Actuarial Standards of Practice (ASOP)]?
>
> A: I don't think it was inappropriate for the actuary to follow the guidance of the ASOP, but in my expert opinion, it would be more appropriate to consider a market[-]consistent measure that is reflective of the 1974 Plan's ability to continue to pay benefits relative to the rates that are implicit in the PBGC or the—the rates implicit in the annuity prices that are reflected in the PBGC interest rates.
>
> Q: Okay. When you say you agreed that it was not inappropriate for the plan's actuary to follow this guidance, would you agree that it was then not unreasonable for the actuary to follow this guidance?
>
> A: It was not unreasonable for the actuary to follow the guidance, but, again, the rates implicit in annuity prices I don't think—in my view, are not the most appropriate basis for setting the discount rate.

Arb. Tr. Day 1 148:9–149:12, J.A. 206–07; *see also* Actuarial Standards Board, ASOP No. 4, Measuring Pension Obligations and Determining Pension Plan Costs or Contributions (2013), J.A. 1230–65; Actuar-

ial Standards Board, ASOP No. 27, Selection of Economic Assumptions for Measuring Pension Obligations (2013), J.A. 1266–1303.

Dr. Ethan Kra, himself an actuary, submitted an expert report and testified on the Plan's behalf. Arb. Tr. Day 2 179:9–269:18, J.A. 286–369; *see also* Kra's Expert Report, J.A. 470–522. He testified that, in his opinion, Hittner's proposed method of pegging withdrawal-liability discount rates to prevailing rates in the bond markets "flies in the face of widely accepted actuarial practice." Arb. Tr. Day 2 191:21–192:5, J.A. 298–99.

> It is not in the literature.... I don't believe any fund in the United States ... uses this method. I have not heard of anyone proposing it. I've not heard it discussed at any actuarial meetings. In committees, task forces, ... this approach was never broached, never came up in any of the discussions at the practice council or at the pension committee in all the years that I sat on [it].

Id. 192:1–22, J.A. 299. Kra also testified that Hittner's method would create perverse incentives for employers because as a fund approaches insolvency, the discount rate for any one withdrawing employer would go up in order to account for the plan's impending default. *Id.* 199:4–203:21, J.A. 306–10. Employers would therefore compete to be the next-to-last participant out the door, because that employer's withdrawal-liability discount rate would be so high that the employer would owe next to nothing upon withdrawal. *Id.* The last employer, however, would then be stuck holding the bag, responsible for funding all

future benefits—even if the fund were to cut back on benefits and restructure, effectively extending insolvency out into the future. *Id.* Kra testified that such an actuarial method was inconsistent with actuarial guidance and practice, as well as the governing statutes. *Id.*

In his August 7, 2018 award, Arbitrator Irvings concluded that Ruschau's assumptions underlying his calculation of Energy West's withdrawal liability were not unreasonable and that there is no cap on Energy West's installment payments. Award at J.A. 50–56. He therefore upheld both the Plan's calculation of Energy West's withdrawal liability and its conclusion that the installment payments would continue indefinitely. *Id.* at J.A. 56.

The Plan filed this suit one year later, seeking to enforce the award. *See generally* Compl. (citing 29 U.S.C. §§ 1401(b)(2), (3)). Energy West answered and filed a counterclaim in which it asked the Court to correct the arbitrator's alleged legal errors and either vacate and remand to the arbitrator or modify the award. *See generally* Countercl. (citing 29 U.S.C. § 1401(b)(2)). The Parties filed Cross-Motions for Summary Judgment on the same issues they submitted for arbitration: whether the actuarial assumptions were unreasonable and whether the number of installments Energy West must pay to satisfy its withdrawal liability is capped. *See generally* Pls.' Mot. for Summ. J. to Enforce Arb. Award, ECF No. 32; Def.'s Mot. for Summ. J., ECF No. 29.

II. Legal Standard

ERISA requires the use of arbitration to resolve disputes between multiemployer pension plans and participating employers. 29 U.S.C. § 1401(a)(1). For the purposes of arbitration, "any determination made by a plan sponsor under [the provisions governing calculation of withdrawal liability] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." *Id.* § 1401(a)(3)(A). The statute permits the parties to go to court "to enforce, vacate, or modify the arbitrator's award." *Id.* § 1401(b)(2). "Any arbitration proceedings ... shall ... be conducted in the same manner, subject to the same limitations ..., and enforced in United States courts as an arbitration proceeding carried out under [the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*.]" *Id.* § 1401(b)(3).

The Parties dispute exactly what the statute requires the Court to do in reviewing the award. The Plan contends that the Court should apply the deferential standard of the Federal Arbitration Act, which permits the Court to overturn the arbitrator's award only if it was the product of corruption, fraud, or undue means or if the arbitrator exceeded his authority. Pls.' Mot. at 19 (citing 9 U.S.C. § 10(a)). By empowering federal courts to enforce arbitral awards "as an arbitration proceeding carried out under [the Federal Arbitration Act]," ERISA's plain text might seem to comport with the Plan's arguments. 29 U.S.C. § 1401(b)(3).

But that's not how courts have interpreted the statute. The Plan points to a single sentence in a 1984 D.C. Circuit case that merely restates the statute's language. *See* Pls.' Mot. at 19 (citing *Wash. Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1505 (D.C. Cir. 1984) ("The court must enforce the arbitrator's decision in accordance with the United States Arbitration Act, 9 U.S.C. §§ 1–14, which authorizes only limited review." (citing 29 U.S.C. § 1401(b)(3)))). And subsequent D.C. Circuit opinions (as well as those from every other circuit to consider the issue) make clear that "the district court[s] also ha[ve] the duty of determining 'whether applicable statutory law has correctly been applied and whether the findings comport with the evidence.' " *Combs v. Classic Coal Corp.*, 931 F.2d 96, 102 (D.C. Cir. 1991) (quoting *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1207 n. 7 (D.C. Cir. 1984)); *see also* Pls.' Mot. at 19 n.3 (collecting cases from other circuits). In fact, *Combs* dealt with the exact same question of reasonableness of actuarial assumptions applied to withdrawal liability, and there was no question there that the district court had correctly reached the question (and overturned the award). *Combs*, 931 F.2d at 102.

Under that framework, the Court therefore reviews the two issues presented to the arbitrator, to the extent that they involve questions of law, *de novo*. *Id.* As to questions of fact, the arbitrator's findings are presumed to be correct but are rebuttable by "a clear preponderance of the evidence." 29 U.S.C. § 1401(c). And the ultimate question is whether Energy West can "show[ ] by a preponderance of the evidence that

the determination [of withdrawal liability] was unreasonable or clearly erroneous." *Id.* § 1401(a)(3)(A).

III. Analysis

Energy West makes roughly the same arguments here that it made in arbitration. It first asserts that, as a matter of law, an actuary cannot select a withdrawal-liability discount rate that is different from a plan's minimum-funding rate—at least not without a compelling justification. Def.'s Mot. at 7–13. Alternatively, Energy West argues that even if there is no legal requirement that the two rates be identical, Ruschau's selection of the low PBGC rate was inconsistent with the statute either because it did not take the right factors into account or because the difference between the rates was so great as to make the selection altogether unreasonable. *Id.* at 13–16. Energy West also contends that the provision exempting certain plans from the 20-year cap on installment payments does not apply to the 1974 Plan as it exists today. *Id.* at 16–22.

A. Ruschau's Actuarial Assumptions Were Not Unreasonable

It is undisputed that, as of 2015, the Plan's assets were less valuable than its liabilities—the future benefits promised to participating employees and their families. Liability Notice at J.A. 552. Therefore, if an employer like Energy West wished to withdraw from the Plan, the employer was required to contribute some amount of money to cover future unfunded liabilities for its own employees whose benefits have

vested and that the Plan will need to pay in the future. 29 U.S.C. § 1399.

ERISA imposes detailed requirements for how to conduct an employer withdrawal and calculate the employer's withdrawal liability. *See id.* §§ 1381–1405. It is the duty of the "plan sponsor" (here, the Plan's joint board of trustees, *see id.* § 1301(a)(10)(A)) to calculate the liability. *Id.* § 1382. As noted above, the Plan calculated Energy West's withdrawal liability at $115,119,099.34. Liability Notice at J.A. 541. To get there, Ruschau, the Plan's actuary, determined the employer's proportional share of unfunded liabilities and assumed that Energy West's contribution would grow at a rate of 2.71%–2.78%, the PBGC's default rates for annuities. *Id.* at J.A. 552. Energy West does not argue that the actuary miscalculated the proportions—that is, that it was responsible for roughly two percent of the Plan's total unfunded vested benefits. It also agrees that Ruschau analyzed several appropriate factors when estimating the Plan's future liabilities, such as "[r]etirement rates; termination rates; [the] percentage [of employees who are] married; spouse age difference; ... mortality; [and] expenses." William Ruschau Dep. 23:7–9, J.A. 429. The only issue is whether it was reasonable for Ruschau to have employed a withdrawal-liability discount rate (again, 2.71%–2.78%) that differed significantly from the Plan's minimum-funding rate (7.5%). If Ruschau had used 7.5% for both numbers, as Energy West argues he was required to do, Energy West's withdrawal liability would have been considerably smaller—somewhere in the neighborhood of $40 million, because assuming a higher rate of return requires a smaller contribution at the outset. Def.'s Mot. at 3.

The difference turns on the assumptions Ruschau used in his calculations. To come up with the Plan's anticipated performance rate for the purpose of assessing minimum-funding requirements, Ruschau took into account the Plan's past performance, along with the various factors listed above. *See* Ruschau Dep. 23:4–10, J.A. 429. But to get the withdrawal-liability discount rate, he selected "a reasonable risk[-]free interest rate that would be appropriate to settle the obligations." *Id.* 24:6–8, J.A. 429. That's equivalent to buying "an annuity to fully settle up the plan's obligations." *Id.* 24:12–13, J.A. 429. In other words, rather than use the Plan's existing experiential data, Ruschau essentially looked at the market rate for an annuity to get a defined output—the amount needed to cover Energy West's share of future benefit payments. *Id.* 24:4–25:10, J.A. 429–30.

The reasoning behind that methodology is simple. An employer that continues to participate in a plan must make contributions based on the number of hours its employees work in a given year, but if the plan's investments do not achieve the expected rate of return because of a downturn in market conditions, the employer is obligated to make additional contributions to compensate for the funding shortfall. *Id.* 64:12–22, J.A. 439. But withdrawing employers avoid that risk—once they've exited, their obligations remain the same no matter what happens in the market. *Id.* As a result, actuaries tend to adjust the discount rate down to account for the absence of future risk for the withdrawing employer. *Id.* Ruschau admitted that he did not factor in the Plan's historical performance in setting the withdrawal-liability discount rate because that data would have no bearing

on Energy West's withdrawal from the Plan going forward. *See id.* at 21–30, J.A. 428–30. Ruschau instead chose the PBGC's rates because its "interest assumptions were a reasonable proxy for risk[-]free interest rates." *Id.* at 39:1–6, J.A. 433.

Energy West makes two separate arguments that Ruschau's actuarial assumptions were "unreasonable" as the term is used in the statute. First, it relies on a creative reading of two subsections of the statute and dicta in a Supreme Court opinion for the proposition that actuaries must use the same rates for both numbers as a matter of law, at least absent some justification for the deviation.[2] *See* Def.'s Mot. at 7–13. Second, even if the rates need not be identical, it argues that the low discount rate for its withdrawal liability was unreasonable because it did not represent "the actuary's best estimate" or "tak[e] into account the experience of the plan," *id.* (quoting 29 U.S.C. § 1393(a)(1)), but was rather a default PBGC rate. *See* Def.'s Mot. at 13–16.

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2 Several statements in Energy West's briefs suggest the argument that the law *always* requires the two rates to be identical. *See, e.g.*, Def.'s Mot. at 9 ("In simple terms, the actuary is free to choose the discount rate assumption, but once chosen, *must use* the same rate consistently for both minimum funding and withdrawal liability purposes." (emphasis added)). But Energy West hedged this argument at the hearing by stating that "you can have a difference, but the actuary has to justify why that difference is." Tr. 5:4–5, ECF No. 39.

1. The Rates Need Not Be Identical

Energy West compares two nearly identical subsections in ERISA to argue that both subsections require the same results. *See* Def.'s Mot. at 7–13. It first looks to ERISA's requirements for how to calculate an employer's withdrawal liability—the provisions most directly relevant here—stating that actuaries should rely on

> actuarial assumptions and methods which, *in the aggregate*, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan ....

29 U.S.C. § 1393(a)(1) (emphasis added). Following those guidelines, Ruschau selected the PBGC rates of 2.71%–2.78%. Ruschau Dep. 24:6–8, J.A. 429.

Energy West then points to similar language in the ERISA provision that guides the actuary's calculation of the Plan's minimum-funding rate, which (again) determines whether participating employees must make excess contributions in any given year to maintain solvency. *See* Def.'s Mot. at 8 (citing 29 U.S.C. § 1084). That subsection states that

> [a]ctuarial assumptions must be reasonable. For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods—

> (A) *each of which* is reasonable (taking into account the experience of the plan and reasonable expectations), and
>
> (B) which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

29 U.S.C. § 1084(c)(3) (emphasis added). When calculating the minimum-funding rate under that guidance, actuaries must analyze plan performance to date, the investment portfolio, and various other factors affecting the Plan's finances to determine how much money employers must contribute in the coming year. *Id.* It was this process that led Ruschau to project that the Plan's investments would achieve a 7.5% rate of return during the 2014 and 2015 plan years. *See* 2015 Valuation at J.A. 565–66, 570, 613–19.

The only textual difference between the two subsections is that *each* of the assumptions must be reasonable in the minimum-funding rate context, 29 U.S.C. § 1084(c)(3), while the assumptions must be reasonable *in the aggregate* to get the withdrawal-liability discount rate, *id.* § 1393(a)(1). If that's the case, Energy West contends, shouldn't the same input in both calculations yield the same output? *See* Def.'s Mot. at 8–9. And if that's so, the argument goes, then the stark difference between Ruschau's two rates must, as a matter of law, be incorrect. *Id.*

At first glance, language in a Supreme Court opinion seems to support that contention. In *Concrete*

Pipe, an employer attacked the entire statutory construct on due process grounds, arguing that submitting to arbitration under standards that were deferential to the plan deprived it of a fair hearing in the first instance. 508 U.S. at 615. The Court rejected that argument because the employer got a fair shake in front of the arbitrator—the fact that the employer had the burden of proof to show that the calculations were unreasonable did not deprive it of due process. *Id.* at 635–36. As relevant here, the Court pointed to various statutory provisions, such as the actuary's calculation of the withdrawal-liability discount rate, to show that there were procedural checks in place to cabin the plan's discretion in calculating the withdrawal liability at the outset. *Id.* at 631–33. The Court pointed out that not only is the actuary an independent professional governed by industry standards, but the actuary also has to pick interest rates that might benefit one party in some areas but hurt it in others, so there isn't really an opportunity to rig the system in favor of the plan. *Id.* For instance, because the subsections governing minimum-funding and withdrawal-liability calculations employ nearly identical language, one might conclude that "[u]sing different assumptions for different purposes could very well be attacked as presumptively unreasonable both in arbitration and on judicial review, ... because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts." *Id.* at 633 (internal quotation omitted).

Energy West seizes on that language. It points out that Ruschau selected two different rates even though the statutory subsections governing the selection of

those rates are nearly identical. *See* Def.'s Mot. at 9–10. In its view, Ruschau's calculations "cannot be the actuary's best estimate because the actuary cannot have two best estimates of plan experience, one for minimum funding at 7.5% and one for withdrawal liability at the PBGC rates." *Id.* at 10. Energy West argues that by selecting two separate rates, both of which are favorable to the Plan, Ruschau disregarded the checks that Congress included to ensure that the Plan's assessments of liability would not unnecessarily burden employers. *Id.*

But the very next sentence in the Supreme Court's opinion dispels any notion that the two rates must be the same as a matter of law: "This point is not significantly blunted by the fact that the assumptions used by the Plan in its other calculations may be supplemented by several actuarial assumptions unique to withdrawal liability." *Concrete Pipe*, 508 U.S. at 633 (internal quotation omitted). The Court seems to have assumed that the discount rate for withdrawal liability could differ materially from the minimum-funding rate because the circumstances are different. The statutory text (as it exists today) bears that out, requiring only that the assumptions underlying the selection of withdrawal-liability discount rates be reasonable "in the aggregate." 29 U.S.C. § 1393(a)(1).[3] That gives actuaries some room to ma-

3 As Energy West notes, the language in the two subsections was identical when the Supreme Court decided *Concrete Pipe*. *See* Def.'s Mot. at 8 n.2. At that time, subsection 1084(c)(3) (then subsection 1082(c)(3)) also contained the "in the aggregate" language. *See Concrete Pipe*, 508 U.S. at 632; 29 U.S.C. § 1082(c)(3)

(footnote continued on next page)

neuver. *Concrete Pipe's* own use of permissive language reinforces that point. *See* 508 U.S. at 633 ("Using different assumptions ... *could very well* be attacked ...." (emphasis added)).

Energy West points to two other recent opinions it believes support its position, but neither does. In *New York Times Company v. Newspaper and Mail Delivers'-Publishers' Pension Fund*, the court vacated an arbitral award upholding the use of the "Segal Blend," an actuarial method that blends a plan's minimum-funding rate and PBGC annuity rates to compute the withdrawal-liability discount rate. 303 F. Supp. 3d 236, 251–56 (S.D.N.Y. 2018), *appeals voluntarily dismissed*, Nos. 18-1140, 18-1408 (2d Cir. Oct. 16, 2019). The employer there argued that, under *Concrete Pipe*, the two rates must be identical as a matter of law. *Id.* at 253–54. After a careful review of the Supreme Court's statements in *Concrete Pipe*, Judge Sweet rejected that argument, concluding that *Concrete Pipe's* language "does not mean ... that deviation is, at all times, impermissible by law." *Id.* at 254 (citing *Chicago Truck Drivers*, 698 F.3d at 355). Likewise, in the other decision on which Energy West relies, the court not only rejected the employer's argument that the two rates must be identical, it *upheld* the use of the Segal Blend (which necessarily causes the two rates

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(1988). Congress amended the subsection (and renumbered it) in 2006 to require each of the actuary's assumptions in the minimum-funding context to be reasonable, removing the "aggregate" language. *See* Def.'s Mot. at 8 n.2; *see also* § 102(a), 120 Stat. at 862. The amendment does not meaningfully affect the Court's analysis here.

to diverge) as reasonable in that instance. *See Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365, 386–93 (D.N.J. 2018), *appeal voluntarily dismissed*, No. 18-2709, 2018 WL 10759131 (3d Cir. Oct. 9, 2018).

In sum, nothing in ERISA's text or in *Concrete Pipe* requires that the minimum-funding rate and withdrawal-liability discount rate be the same, and Energy West has pointed to no case in which a court came to the opposite conclusion. And to the extent that Energy West argues that an actuary must merely justify his choices, that argument is subsumed into the question of whether the actuary's assumptions are reasonable.

2. The Weight of the Evidence Supports the Arbitrator's Conclusions

Because the two rates may deviate from one another, Energy West must demonstrate that Ruschau's actuarial assumptions were unreasonable "in the aggregate" or did not "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

a. Reasonable Assumptions

To recap the evidence, the arbitrator reviewed Ruschau's deposition testimony and took reports and heard testimony from two expert witnesses: Scott Hittner (for Energy West) and Ethan Kra (for the Plan). *See generally* Arb. Trs., J.A. 58–418. Kra testi-

fied that Ruschau's methodology was appropriate, citing (1) the reasonableness of using risk-free annuity proxy rates in exchange for relieving an employer of any future risk, Kra's Report ¶¶ 44–45, J.A. 484–85; (2) the use by many multiemployer plans of similar rates, Arb. Tr. Day 2 218:14–219:8, J.A. 325–26; (3) the fact that no fund uses Hittner's proposed method, *id.* 192:9–193:2, J.A. 192–93; and (4) the perverse incentives that Hittner's method would create for employers to withdraw as a plan neared insolvency, putting all liability on the last employer left in the room and permitting the others to depart without paying much of anything, *id.* 200:16–203:21, J.A. 307–10.

Hittner, in contrast, criticized Ruschau's methods, arguing that although there was no need for the two rates to be identical (contradicting Energy West's argument discussed above), the PBGC rates were unreasonably low because the Plan is set to become insolvent in 2022. Arb. Tr. Day 1 76:7–77:12, J.A. 134–35. Hittner argued that Ruschau instead should have taken the fact of the Plan's impending insolvency into account and assessed its creditworthiness accordingly, yielding a discount rate of 6.0%–6.5%. *See* Hittner's Report ¶¶ 25–26, J.A. 532–33. But on cross-examination, Hittner admitted that Ruschau's methodology comported with professional standards. Arb. Tr. Day 1 148:9–149:12, J.A. 206–07; *see also* ASOP No. 27, J.A. 1266–1303. He also admitted that many other funds use similar methods, and he struggled to name funds that follow his method. Arb. Tr. Day 1 148:9–149:12, J.A. 206–07. Moreover, although he testified that the use of PBGC rates was "not the most appropriate" method, he acknowledged that it was "reasonable:"

> Q: Okay. When you say you agreed that it was not inappropriate for the plan's actuary to follow [ASOP] guidance, would you agree that it was then not unreasonable for the actuary to follow this guidance?
>
> A: *It was not unreasonable for the actuary to follow the guidance*, but, again, the rates implicit in annuity prices I don't think—in my view, are not the most appropriate basis for setting the discount rate.

Id. 149:3–12, J.A. 207 (emphasis added).

Irvings's award focused intently on the expert testimony. *See* Award at J.A. 49–53. Emphasizing the statutory burden of proof, which required Energy West to "show[ ] by a preponderance of the evidence that the [Plan's] determination was unreasonable or clearly erroneous," 29 U.S.C. § 1401(a)(3)(A), Irvings homed in on Hittner's admissions of the reasonableness of Ruschau's assumptions:

> While Hittner opined that it would have been more appropriate for Ruschau to increase the discount rate used to compute withdrawal liability to account for the impending insolvency of the Plan, he acknowledged in sworn testimony that the assessment of withdrawal liability is a settlement of an employer's pension obligations. He said it was proper for an actuary to select different interest[ ] rates, depending on the particular purpose. He stated that it was not inappropriate for Ruschau to have followed the guidance of ASOP No. 27 Section 3.9(b), which states that an actuary may use

> a discount rate implicit in annuity prices when measuring the present value of benefits for defeasance or settlement purposes. Hittner also confirmed that the PBGC rates are a reasonable proxy for annuity prices, and he never suggested Ruschau had misstated what the PBGC rates were at the time of Energy West's withdrawal[-]liability calculation. Finally, while still insisting that a market[-]consistent measure would have been the more appropriate rate, Hittner ultimately conceded that "*It was not unreasonable for the actuary to follow the [ASOP No. 27] guidance*[ ] ...[.]" Given the statutory burden of proof, this conclusion by Energy West's own expert is fatal to its claim.

Award at J.A. 49–50. Irvings went on to point to various ERISA provisions that support the practice of using risk-free rates for withdrawal liability and to Kra's undisputed expert testimony explaining why that practice is consistent with both ERISA and actuarial professional standards. *Id.* at 50–53.

On judicial review of an arbitral award, ERISA creates a "presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). Arbitrator Irvings determined, based largely on Hittner's admission that Ruschau's methods were reasonable, that the selection of the PBGC rates was permissible in this instance. Award at J.A. 49–50. To be sure, "[u]sing differing assumptions for different purposes could very well be attacked as presumptively unreasonable." *Concrete Pipe*, 508 U.S. at 633 (quotation and alterations omitted). But considering

the evidence in the record, especially the fact that Energy West's own expert conceded that Ruschau's assumptions were reasonable in light of industry standards, the Court cannot conclude that Energy West has rebutted the presumption that Irvings's findings were correct.

b. The "Best Estimate" Test

Once its own expert admitted that Ruschau's method was reasonable, Energy West had to switch gears. Rather than attacking the use of PBGC rates as unreasonable *per se*, Energy West pointed to the rest of subsection 1393(a)(1), which requires not only that the assumptions and methods be reasonable "in the aggregate," but also that they "tak[e] into account the experience of the plan and reasonable expectations" and "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). Energy West argued (and renews the argument here) that the use of a default PBGC rate, by definition, cannot serve as the "actuary's best estimate of anticipated experience under the plan," *id.*, because it pays no regard to the Plan's unique characteristics and investment portfolio. Award at J.A. 34–35 (summarizing Energy West's position); *see also* Def.'s Mot. at 13–15 (reiterating argument).

A few months after the arbitration hearings but before Irvings issued his award, Judge Sweet issued his opinion in *New York Times*. *See generally* 303 F. Supp. 3d 236. In that case (which also reviewed one of Arbitrator Irvings's decisions, *see* Award at J.A. 44),

despite rejecting the employer's argument that *Concrete Pipe* mandated identical minimum-funding and withdrawal-liability discount rates, the court nevertheless overturned Irvings's conclusion that the actuary's use of the Segal Blend method in that instance was reasonable. *See N.Y. Times*, 303 F. Supp. 3d at 251–56. The fund there used a 7.5% minimum-funding rate of return, so the actuary blended it with the PBGC rates and calculated that the appropriate withdrawal-liability discount rate was 6.5% (nearly four percentage points higher than the rates at issue here). *Id.* at 255. After the arbitrator decided that using the Segal Blend was *permitted*, he did not further opine on whether it represented the actuary's "best estimate" of the plan's "anticipated experience," as the statute requires. *Id.* The court reversed on that basis and remanded to the arbitrator to consider the question in the first instance.[4] *Id.* Energy West relied heavily on *New York Times* before the arbitrator, and in its briefs here, to support its position that the selection of PBGC rates, which do not take into account the Plan's characteristics at all, is an even greater mistake than using the Segal Blend, which at least uses the Plan's own minimum-funding rate as one of its primary inputs. Award at J.A. 41–42; Def.'s Mot. at 13–15.

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4 Energy West argues that the *New York Times* court "found that the 1.0% deviation [between the minimum-funding and withdrawal-liability discount rates] was unreasonable and in violation of ERISA." Def.'s Mot. at 12. But that's not what the opinion says; the court merely held that the arbitrator failed to consider whether the deviation was reasonable, so the court could not uphold the award. 303 F. Supp. 3d at 255–56. It did not reach the question of whether the deviation was ultimately correct. *Id.*

The Plan responds that *New York Times* is an outlier because every other case to have considered the issue (or related issues) has concluded that blended rates are reasonable so long as it was the *actuary*, not the plan's trustees, who chose to use them. *See* Award at J.A. 42–43 (summarizing the Plan's position); *see also* Pls.' Opp'n to Def.'s Mot. for Summ. J. to Vacate Arb. Award ("Pls.' Opp'n") at 16–18, 26, ECF No. 33. Indeed, several circuits have concluded that "the best estimate test is procedural, as opposed to substantive, in nature." *Vinson & Elkins v. Comm'r.*, 7 F.3d 1235, 1238 (5th Cir. 1993) (interpreting identical language in 26 U.S.C. § 412(c)(3)). That's because ERISA and other statutes that use the phrase "refer[ ] to the *actuary's* best estimate, which implies a procedural approach. One goal of such an inquiry would be to determine whether assumptions truly came from the plan actuary or whether they were instead chosen by plan management for tax planning or cash flow purposes." *Id.* (citing *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85, 93 (3d Cir. 1990)); *see also Chicago Truck Drivers*, 698 F.3d at 354–57 (upholding arbitrator's decision to overturn withdrawal-liability determination because the plan "direct[ed the actuary] to switch from one method of estimating the interest rate to another [and then directed it to switch back, thus] compound[ing] the damage to [the employer], and also violat[ing] the 'best estimate' requirement, which exists to maintain the actuary's independence."); *Citrus Valley Estates, Inc. v. Comm'r.*, 49 F.3d 1410, 1415 (9th Cir. 1995) ("plan funding decisions ... must represent the actuary's professional judgment, not the tax-motivated wishes of plan sponsors or administrators[,] ... [and] plan actuaries must live up to national professional,

ethical and technical standards which help to minimize the risk of untoward advice."); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1075 (6th Cir. 1995) ("[T]he best estimate test is procedural only, and does not place a second substantive hurdle in the path of actuarial assumptions."); *Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291, 295–96 (2d Cir. 1994) (upholding actuarial decision to choose conservative estimates in selecting funding rates and using the same rate across 41 different plans against IRS's charge that actuary didn't make specific findings as to each plan's anticipated performance).

Looking for an example in which a court has given substantive meaning to the "best estimate" language, Energy West cites *National Retirement Fund v. Metz Culinary Management, Inc.*, which considered the question of whether an actuary's modifications to prior assumptions can apply retroactively to modify withdrawal liabilities calculated months earlier. No. 16-CV-2408, 2017 WL 1157156 (S.D.N.Y. Mar. 27, 2017). In *Metz*, the fund's actuary calculated the 2013 withdrawal-liability discount rate at 7.25%, effective December 31, 2012. *Id.* at *3. The fund then hired a new actuarial firm for plan year 2014, but it did not update its withdrawal rate as of December 31, 2013. *Id.* Metz, a participating employer, transmitted its intent to withdraw from the fund on May 16, 2014, with the understanding that, in the absence of any new rates, the fund would calculate Metz's withdrawal liability using the previous year's 7.25% rate. *Id.* at *4. The new actuary finally selected its plan year 2014 discount rate a few weeks after Metz announced its withdrawal from the fund, abandoning the previous firm's assumptions and choosing a PBGC rate of 3%

for the first twenty years and 3.31% thereafter. *Id.* at *3. The fund calculated Metz's withdrawal liability retroactively using the new rate, thereby increasing Metz's withdrawal liability nearly fourfold over what it would have been under the old rate. *Id.* at *4.

An arbitrator vacated the retroactive application of the lower discount rate and reinstated the earlier calculation, concluding that in the absence of a timely determination of the 2014 discount rate, the previous assumptions remained valid and applied to any withdrawals that occurred before the fund modified its assumptions. *Id.* But the district court reversed, holding that because section 1393(a)(1) requires actuaries to use their "best estimate of anticipated experience under the plan," the arbitrator was wrong to conclude that the fund should have used an old rate that did not take into account the fund's experience during 2013. *Id.* at *6. In the district court's view,

> to satisfy Section [1393], actuaries must take into account the full experience of the plan, develop reasonable expectations, and ultimately provide their *best* estimate of unfunded vested benefits in light of the plan's experience and the actuary's reasonable expectations. An actuary can only do so by incorporating data from the entirety of the most recent preceding plan year. In no universe is carrying over assumptions from a prior plan year without *any* examination or analysis as to their continued viability and reasonableness an actuary's "best estimate." Yet the Arbitrator concluded precisely that. An actuary may ultimately conclude that the prior plan year's assumptions continue to be reasonable in light of all of the

> available data, but she must affirmatively reach that conclusion in order for the assumptions to qualify as such.

Id. Moreover, the court found no evidence that the actuary who calculated the 2013 discount rate intended for it to apply in 2014 or that ERISA barred retroactive application of actuarial assumptions. *Id.* at *8–12. The court vacated the award. *Id.* at *13.

From that language, Energy West argues that because the default PBGC rates Ruschau selected do not take into account the 1974 Pension Plan's experience *at all*, the rates cannot meet section 1393's strict criteria. *See* Def.'s Mot. at 14–15. There are several problems with this argument. For one, *Metz* dealt with whether stale assumptions remain valid in the absence of a new determination—an issue that does not exist here, as there is no contention that the Plan failed to update its default-rate assumptions for plan year 2015. As well, the fund in *Metz* transitioned from a discount rate of 7.25% (likely near its minimum-funding rate) *to* a PBGC default rate that excluded the fund's unique characteristics and experience—the exact move that Energy West protests here as improper under the statute but which the court there concluded *was* appropriate, or at least could be, in the right circumstances. *See Metz*, 2017 WL 1157156 at *3.

But perhaps most importantly, after briefing concluded here, the Second Circuit reversed the district court's judgment. *See Nat'l Retirement Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir. 2020). It found no reason to believe that section 1393 requires

updated assumptions each year, and that "[a]bsent a change by a Fund's actuary before the Measurement Date [in that case, December 31, 2013], the existing assumptions and methods remain in effect." *Id.* at 151.

> Were it otherwise, the selection of an interest rate assumption after the Measurement Date would create significant opportunity for manipulation and bias. Nothing would prevent trustees from attempting to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers .... Actuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent.

Id.

That result comports with the holdings of the Second Circuit and other courts that have interpreted section 1393's language about the "actuary's best estimate" as being procedural rather than substantive in nature. Unlike in *Metz*, Energy West does not contend that Ruschau failed to make an affirmative decision about the assumptions he thought proper to use, nor that the 1974 Pension Plan's trustees improperly influenced Ruschau or deprived him of his professional independence. Energy West therefore cannot rely on the statute's "best estimate" test to assail Ruschau's selection of the discount rate. And unlike in *New York Times*, where there was no evidence in the arbitral record about whether the divergence between the minimum-funding rate and the PBGC rate was either the actuary's best estimate or whether it was reasonable, *see* 303 F. Supp. 3d at 255–56, here there is

ample evidence supporting Arbitrator Irvings's reasoned consideration of both issues.

To be sure, the huge gap that results from Ruschau's choice of such different discount rates does give the Court some pause. Many cases with similar legal issues involve either smaller differences between the two rates or much smaller differences between the withdrawal-liability calculations, at least in absolute terms. For example, in *Metz*, the potential withdrawal liabilities were approximately $250,000 and just under $1,000,000, respectively. 2017 WL 1157156 at *4. In *Manhattan Ford Lincoln*, the possible liabilities were either $0 or $2.55 million. 331 F. Supp. 3d at 372–75. And in *New York Times*, the dispute was over whether to use the 7.5% minimum-funding rate or the 6.5% Segal-Blended rate. 303 F. Supp. 3d at 251.

Here, in contrast, the use of low PBGC rates (2.71%–2.78%) results in a difference of nearly five percentage points, *see* Def.'s Mot. at 12–13, and because the discount rate is the single most influential factor affecting the calculation of withdrawal liability, the absolute difference is about $75 million. *See id.* at 3.[5] Nevertheless, the record before the arbitrator sup-

5 The Court also notes that in *Metz*, the Second Circuit discussed the fund's shift from using the minimum-funding rate to using PBGC default rates and expressed concern that such a move was exactly the sort of event that *Concrete Pipe* warned might be "presumptively unreasonable." 946 F.3d at 151–52 (quoting *Concrete Pipe*, 508 U.S. at 632–33). But unlike in *Metz*, because there is no evidence that the Plan's trustees exerted undue influence on Ruschau by pressuring him to apply a low rate

(footnote continued on next page)

ports his conclusion that Ruschau's methods comported with professional guidelines, that his assumptions were reasonable in the aggregate, and that his calculations represented his own best estimate, free from undue interference by interested parties. The Court therefore cannot overturn Arbitrator Irvings's judgment under 29 U.S.C. § 1393.

B. The 1974 Plan is Not Subject to the 20-Year Cap on Installment Payments

In an effort to curb excessive withdrawal penalties, Congress permitted withdrawing employers to pay either an up-front lump sum or installments roughly equal to what the employer was paying monthly while participating in the plan. *See* 29 U.S.C. § 1399(c)(1)(C). Moreover, the statute limits the payment of installments to twenty years—the employer is released from its obligations thereafter, regardless of its remaining balance. *Id.* § 1399(c)(1)(B). If that provision applied here, then Energy West would end up paying only about $59.3 million over twenty years. But in response to extraordinarily targeted lobbying, Congress created a carve-out that exempts a single multiemployer plan from nearly every general provision designed to limit employers' liability, including the 20-year cap. The Plan argues, and Arbitrator Irvings agreed, that this carve-out applies to it.

This issue arises out of the unique history of labor relations in the coal industry. When a post-War

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to Energy West's withdrawal, *see* Award at J.A. 53–54, *Concrete Pipe* does not compel the Court to reverse the award here.

breakdown in collective bargaining between the union and mining companies threatened to bring about a nationwide strike, President Truman seized control of all mines and directed the Secretary of the Interior to broker a deal. *See E. Enters. v. Apfel*, 524 U.S. 498, 504–05 (1998) (citing Exec. Order 9728, 11 Fed. Reg. 5,593 (May 23, 1946)). Among other benefits for coal miners, the agreement led to the creation of the UMWA Welfare and Retirement Plan of 1950 ("UMWA 1950 W&R Plan"). *See id.* at 506. Congress included a provision in the Internal Revenue Code of 1954 carving out certain tax deductions for any plan that was "established prior to January 1, 1954, as a result of an agreement between employee representatives and the Government of the United States during a period of Government operation, under seizure powers, of a major part of the productive facilities of the industry in which such employer is engaged." Pub. L. No. 83-591, § 404(c)(2), 68A Stat. 1, 141–42 (1954) (codified at 26 U.S.C. § 404(c)(2) (1958)). Only one plan then in existence fit that description: the UMWA 1950 W&R Plan. The same language remains today. *See* 26 U.S.C. § 404(c)(2) (2018).

After Congress passed ERISA in 1974, the unions and the employers split the UWMA 1950 W&R Plan into four separate parts: the 1950 Pension Plan, the 1974 Pension Plan, the 1950 Benefit Plan, and the 1974 Benefit Plan. *E. Enters.*, 524 U.S. at 509. Miners who retired prior to 1976 fell into the 1950 plans, while miners who were still active as of January 1, 1976 (or who entered the industry thereafter) were covered by the 1974 plans. *Id.* But because the plans were already underfunded within a few years of the

split, the unions and employers jointly lobbied Congress (as part of the 1980 Multiemployer Pension Plan Amendments Act) to exclude the plans from certain provisions otherwise included in ERISA, including the 20-year cap. *See* Award at J.A. 6. Among those exclusions, Congress included the following language:

> (1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under *a plan to which section 404(c) of title 26, or a continuation of such a plan*, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).
>
> (2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

29 U.S.C. § 1391(d) (emphasis added). The 20-year cap on installment payments contained in subsection 1399(c)(1)(B) thus does not apply in the event of an employer's withdrawal from "a plan to which section 404(c) of title 26, *or a continuation of such a plan*, applies." *Id.* (emphasis added). As described above, 26 U.S.C. § 404(c) only applies to one plan that was ever in existence, the UMWA 1950 W&R Plan. The question, therefore, is how to interpret the second clause in the quoted phrase: what constitutes "a continuation" of the 1950 W&R Plan? *Id.*

Beyond the statute's text, there are only a few other authorities that give clues as to how to answer that question. Arbitrator Irvings first looked to the text of the 1974 collective bargaining agreement that split the 1950 W&R Plan into four separate benefit and pension plans (and subsequent amendments)—that agreement "expressly provided that the 1950 Pension Plan and the 1974 Pension Plan are a continuation of the 1950 W&R Fund." Award at J.A. 5; *see also* Amendments to UMWA 1974 Pension Trust Articles of Incorporation (Dec. 31, 2012), J.A. 804 ("The 1974 Pension Plan and Trust is a continuation of the benefit program established under the UMWA Welfare and Retirement Fund of 1950 ....").

Irvings also looked to the IRS's own determination. *See* Award at J.A. 5–6. Shortly after the employers and unions agreed to split up the UMWA 1950 W&R Plan, they asked the IRS for a determination as to whether the government would continue to treat the successor plans as it had the 1950 W&R Plan for tax purposes. *Id.* The IRS responded "that the 1950 Pension Plan and Trust[ ] and the 1974 Pension Plan and Trust represent a continuation of the [1950 W&R Plan] and therefore constitute a plan described in section 404(c) of the [Tax] Code." Award at J.A. 6 (quoting IRS Determination Ltr. of Jun. 9, 1975, J.A. 1115–19).

Third, Irvings discussed the four known judicial decisions that have had occasion to consider whether the 1974 Pension Plan is a continuation of the 1950 W&R Plan—all four opinions support the conclusion that it is. *See* Award at 7–9. In *Combs v. Adkins & Adkins Coal Co., Inc.*, 597 F. Supp. 122, 127–28

(D.D.C. 1984), the Court considered whether a withdrawing employer should have its liability reduced under the *de minimis* rule in 29 U.S.C. § 1389(a)(2). *Id.* It concluded that the employer could not take advantage of the rule because subsection 1391(d) states that the rule does not apply to continuations of plans listed in 26 U.S.C. § 404(c) and that the 1974 Plan is such a continuation. *Id.* (citing *Short v. United Mine Workers of Am. 1950 Pension Tr.*, 728 F.2d 528, 531 (D.C. Cir. 1984)). In *Calvert & Youngblood Coal Company v. UMWA 1950 Pension Trust*, a court concluded that a withdrawing employer was not eligible for liability limitations contained in 29 U.S.C. § 1405, which again are exempted for continuations of section 404(c) plans under § 1391(d). No. CV 82-P-1070-S, 1985 WL 9436, at *4–5 (N.D. Ala. Feb. 7, 1985). Later that year, the court reached the same conclusion in *Combs v. Western Coal Corp.*, 611 F. Supp. 917, 922 (D.D.C. 1985) (citing *Combs*, 597 F. Supp. at 128). Finally, in *Spring Branch Mining Company, Inc. v. UMWA 1950 Pension Trust & 1950 Pension Plan*, a court upheld the constitutionality of exempting the 1950 and 1974 Plans from many of the employer-friendly liability limitations, briefly commenting on the relationship between the 1950 W&R Plan and the continuation plans under section 404(c). 691 F. Supp. 973, 986 & n.5 (S.D. W.Va. 1987). No court seems to have reached a contrary conclusion.

Fourth, Irvings looked to a later statute that used the same terms. *See* Award at J.A. 9. The Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), which created health benefits for coal workers, defined the term "1974 UMWA Pension Plan" as "a

pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter." *Id.* (quoting Pub. L. No. 102-486, Tit. XIX, Subtit. C, § 9701(a)(3), 106 Stat. 2776, 3038 (1992)) (codified at 26 U.S.C. § 9701(a)(3)).

Energy West attempted before the arbitrator to downplay the relevance of those authorities by positing a novel theory of how to interpret section 1391(d)'s carve-outs as they apply today—and it renews that same argument here. *See* Award at J.A. 36–37; Def.'s Mot. at 16–22. Energy West's argument is hardly clear, but it appears first to argue that section 404(c) has its own carve-out. *Id.* As stated above, Congress included section 404 when it passed the Internal Revenue Code of 1954, creating special tax treatment for the 1950 W&R Plan. § 404(c), 68A Stat. at 141–42. The full text of the subsection, as it stood then, read:

> (c) Certain negotiated plans.
>
> If contributions are paid by an employer—
>
> (1) under a plan under which such contributions are held in trust for the purpose of paying (either from principal or income or both) for the benefit of employees and their families and dependents at least medical or hospital care, and pensions on retirement or death of employees; and
>
> (2) such plan was established prior to January 1, 1954, as a result of an agreement between employee representatives and the Government of the United States during a period of Government operation, under seizure powers, of a major part of

> the productive facilities of the industry in which such employer is engaged, such contributions shall not be deductible under this section nor be made nondeductible by this section, but the deductibility thereof shall be governed solely by section 162 (relating to trade or business expenses). *This subsection shall have no application with respect to amounts contributed to a trust on or after any date on which such trust is qualified for exemption from tax under section 501(a).*

26 U.S.C. § 404(c) (1958) (emphasis added). When Congress amended the section in 1974 as part of ERISA, it struck the italicized sentence above and appended the following language at the end of the subsection:

> For purposes of this chapter and subtitle B, in the case of any individual who before July 1, 1974, was a participant in a plan described in the preceding sentence—
>
> (A) such individual, if he is or was an employee within the meaning of section 401(c)(1), shall be treated (with respect to service covered by the plan) as being an employee other than an employee within the meaning of section 401(c)(1) and as being an employee of a participating employer under the plan,
>
> (B) earnings derived from service covered by the plan shall be treated as not being earned income within the meaning of section 401(c)(2), and
>
> (C) such individual shall be treated as an employee of a participating employer under the plan

> with respect to service before July 1, 1975, covered by the plan.
>
> Section 277 (relating to deductions incurred by certain membership organizations in transactions with members) does not apply to any trust described in this subsection. *The first and third sentences of this subsection shall have no application with respect to amounts contributed to a trust on or after any date on which such trust is qualified for exemption from tax under section 501(a).*

ERISA, Pub. L. No. 93-406, § 2008(A), 88 Stat. 829, 993–94 (1974) (emphasis added).

According to Energy West, the italicized sentence at the end of the 1974 amendment indicates that the subsection's first sentence, which provides special tax rules that only ever applied to the 1950 Plan, was supposed to be temporary because it stops applying once a "trust is qualified for exemption from tax under section 501(a)." Def.'s Mot. at 19. Energy West supports this reading by looking to the legislative history, which contains indications that the 1974 Pension Plan intended to qualify for a tax exemption as soon as possible. *See id.* (quoting H.R. Rep. No. 93-779, at 166 (1974)), J.A. 1356 ("Since the desire of the United Mine Workers is to establish the pension plan as a qualified plan under section 401(a), the bill provides that section 404(c) is not to apply to the pension plan once it becomes a qualified plan except for the purpose of determining which individuals are to be treated as employees of a participating employer under the plan.").

Sure enough, the 1974 Plan qualified for tax exemption under sections 401(a) and 501(a) in 1976. *See* IRS Determination Ltr. of Apr. 6, 1975, J.A. 1113. By Energy West's account, therefore, once the 1974 Plan qualified under subsection 501(a), it no longer fell within the scope of section 404(c) and was therefore no longer a "continuation" of the 1950 W&R Plan. *See* Def.'s Mot. at 19–22. Therefore, Energy West appears to contend (although again its argument is difficult to discern) that the ERISA carveouts do not apply to the 1974 Plan as it exists today, so the 20-year cap on installment payments contained in 29 U.S.C. § 1399(b)(1)(C) limits Energy West's withdrawal liability. *Id.* It thereby attempts to distinguish the text of the 1974 collective bargaining agreement (and all subsequent amendments), the IRS's 1975 determination letter, the cases from the 1980s, and the definition from the 1992 Coal Act as outdated authorities that had no reason to consider whether section 404(c) still applied to the 1974 Plan. *Id.*

Arbitrator Irvings rejected this argument—and for good reason. *See* Award at J.A. 54–56. Whether the 1974 Plan is subject to the tax provisions laid out in section 404(c) has nothing to do with whether it remains a "continuation of" a plan described in that subsection, namely the 1950 W&R Plan. Indeed, the "continuation" language does not itself appear in section 404(c), which on its face applies only to the 1950 W&R Plan—a pension plan that no longer exists in its own right. In fact, that language first appeared in legislation Congress passed *after* the 1974 Pension Plan qualified for tax exemptions under 26 U.S.C. §§ 401 and 501. Congress only added subsection 1391's "con-

tinuation" language in 1980 as part of the Multiemployer Pension Plan Amendments Act. *See* 94 Stat. at 1232. With those considerations in mind, the references in ERISA have nothing to do with tax; they seem to use the phrase "a plan described in § 404(c), or a continuation thereof" as shorthand to refer to all coal mining pension plans, to which they deny various non-tax benefits like the 20-year cap at issue here. 29 U.S.C. §§ 1391(d), 1399(c)(1)(B). As the Plan points out, if Congress had meant in 1980 to refer only to plans that were still subject to tax consideration under section 404(c), it would have been referring to a null set: the 1950 W&R Plan no longer existed by then, and the 1950 and 1974 Pension Plans had qualified for new tax characterizations. *See* Tr. 28:1–24. That seems unlikely (if not an inappropriate method of statutory interpretation).

Using the "continuation" language to refer to all coal pension plans also fits with the definition contained in the Coal Act, which clearly refers to the 1974 UMWA Pension Plan as "a pension plan described in section 404(c) (or a continuation thereof)." 26 U.S.C. § 9701(a)(3). To be sure, as Energy West argues, the substantive provisions of the Coal Act, which have to do with health benefits for miners, do not govern the issues here. *See* Def.'s Reply Mem. in Supp. of Energy West Mining Co.'s Mot. for Summ. J. ("Def.'s Reply") at 19–20, ECF No. 31. But the use of the same "continuation" language in legislation passed more than a decade after the 1974 Plan transitioned to a new tax status is further evidence that Congress used the phrase to refer to a closed set of multiemployer pension plans that includes the 1974 Plan.

Energy West attempts to dismiss the language's inclusion in the definition section as a one-off mistake that "was not carefully considered." *Id.* But while these Motions were pending, Congress incorporated the Coal Act's definition (codified at 26 U.S.C. § 9701(a)(3)) and renewed its usage of the "continuation" language in new legislation:

> (H) 1974 UMWA PENSION PLAN DEFINED.—For purposes of this paragraph, the term '1974 UMWA Pension Plan' has the meaning given the term in section 9701(a)(3) of the Internal Revenue Code of 1986, but without regard to the limitation on participation to individuals who retired in 1976 and thereafter.

Bipartisan Am. Miners Act of 2019, Pub. L. No. 116-94, div. M, § 102(H), 133 Stat. 2534, 3094 (2019) (to be codified at 30 U.S.C. § 1232). Any effort to distinguish the Coal Act's definition as outdated or as sloppy draftsmanship, *see* Def.'s Reply at 19–20, is thus unconvincing.

Energy West's remaining arguments are unavailing. It contends that the statutory provisions were the result of targeted lobbying in the 1970s to address concerns the coal industry and unions had then but that do not apply now. *See* Def.'s Mot. at 20. But that's a policy argument, suggesting that the Court should read certain union-friendly provisions out of the United States Code because economic conditions have changed since those provisions became law. Energy West may make that argument to Congress, but the Court has no authority to amend the law on Energy West's behalf. Energy West also points out that the

IRS determination letter confirming that the 1974 Plan is a continuation of the 1950 Plan is now 45 years old and that the Plan has never asked for a new determination (likely because the one it has in hand is favorable to it). *Id.* at 21–22. But as noted above, the Plan's current tax status is irrelevant to whether it falls within ERISA's provisions creating special rules for the coal industry.

Arbitrator Irvings correctly held that the 1974 Pension Plan is a "continuation of" the 1950 W&R Plan for the purposes of 29 U.S.C. § 1391(d). Therefore, Energy West is ineligible for the 20-year cap on withdrawal contributions under subsection 1399(c)(1)(B).

IV. Conclusion

Energy West has not demonstrated that Ruschau's actuarial assumptions and methods were unreasonable under ERISA's provisions governing the calculation of Energy West's withdrawal liability from the 1974 Pension Plan. Energy West's own expert admitted as much. And because there were no allegations that the Plan's trustees exerted improper influence on the actuary, the evidence supports Irvings's finding that the calculation was the actuary's best estimate of the Plan's experience and performance. Finally, Arbitrator Irvings correctly found that Energy West in ineligible for a statutory cap on the number of installment payments it owes to satisfy its liability. Accordingly, it is

ORDERED that Energy West's Motion for Summary Judgment is DENIED and the Plan's Motion for Summary Judgment is GRANTED. An order will be released contemporaneously with this Memorandum Opinion.

United States Court of Appeals
for the District of Columbia Circuit

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN, *et al.*,

Appellees,

v.

ENERGY WEST MINING COMPANY,

Appellant.

No. 20-7054

Filed on September 6, 2022

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker and Childs, Circuit Judges; and Sentelle, Senior Circuit Judge

Per Curiam

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote; and the motion of The Segal Group, Inc., Milliman, Inc., Horizon Actuarial Services, LLC, Cheiron, Inc., United Actuarial Services, Inc., National Coordinating Committee for Multiemployer Plans, Sheet Metal Workers' National Pension Fund, National Retirement Fund, LIUNA National (Industrial) Pension Fund, New York State Teamsters Conference Pension and Retirement Fund, and SEIU National Industry Pension Fund for invitation

* Circuit Judge Katsas did not participate in this matter.

to file a brief as amici curiae in support of appellees' petition for rehearing en banc, and the lodged brief of amici curiae, it is

ORDERED that the motion be granted. The Clerk is directed to file the lodged brief of amici curiae. It is

FURTHER ORDERED that the petition for rehearing en banc be denied.