No. 22-742

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

BRIEF OF *AMICI CURIAE* ACTUARIAL FIRMS, NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS, AND MULTIEMPLOYER PENSION PLANS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Segal Group, Milliman, Horizon Actuarial Services, Cheiron, and United Actuarial Services, collectively provide actuarial services to a substantial majority of multiemployer pension plans nationwide. *Amici curiae* Sheet Metal Workers' National Pension Fund, National Retirement Fund, LIUNA National (Industrial) Pension Fund, and New York State Teamsters Conference Pension and Retirement Fund are multiemployer pension plans. *Amicus curiae* National Coordinating Committee for Multiemployer Plans is the leading non-partisan organization dedicated to advocacy for and the protection of multiemployer plans.

Amici curiae have a substantial interest in the decision in this case by the United States Court of Appeals for the District of Columbia Circuit, which addresses the actuarial assumptions that can be used when calculating the liability of employers who withdraw from multiemployer plans. The Court of Appeals decision limits the previously accepted range of reasonable interest rate assumptions utilized by *amici curiae* in connection with withdrawal liability calculations. As this Court previously recognized – in a decision the Court of Appeals failed to follow – the interest rate assumption is a "critical . . . assumption" necessary to determine the present value of future benefits that should be judged by reference to "standard actuarial practice." *Concrete Pipe & Prods. of*

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 633, 635 (1993). The Court of Appeals decision misinterprets the governing statute, improperly interferes with well-established actuarial standards – which direct actuaries to consider the purpose for which the calculation is made – and exposes multiemployer plans, and in turn, the remaining employers in those plans, to billions of dollars of unrecoverable liability exposure.

SUMMARY OF ARGUMENT

This case concerns the calculation of withdrawal liability under the Employee Retirement Income Security Act ("ERISA"). Under ERISA, an employer that withdraws from a multiemployer pension plan with assets less than accrued liabilities must pay its share of the "underfunding" in the form of "withdrawal liability." In ERISA, Congress provided that government-approved professional actuaries must be engaged to calculate the amount of the withdrawal liability and further provided that the actuary's calculations were to be "presumed correct" unless a withdrawing employer could show that the "actuarial assumptions . . . were . . . unreasonable . . . ." 29 U.S.C. § 1401(a)(3)(B).

In 1993, this Court held that a withdrawal liability assessment could only be set aside on the ground that the actuary's assumptions were "unreasonable" if a withdrawing employer met its burden to show by a preponderance of the evidence that the assumptions were not "within the scope of professional acceptability" and "would not have been acceptable to a reasonable actuary." *Concrete Pipe*, 508 U.S. at 635. This Court explained that "actuaries are trained professionals subject to regulatory standards" and are not "vulnerable to suggestions of bias or its appearance." *Id*. at 632 (citing 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35)). For nearly thirty years, courts followed this Court's ruling in *Concrete Pipe* and "judg[ed] 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." *Id.* at 635.

The decision in this case by the Court of Appeals adopts a different standard that conflicts with *Concrete Pipe*. In ruling on this important issue of the federal law governing pension plans, the Court of Appeals held that "the merits of the actuary's theory" and "how widespread the . . . practice is among the profession" were irrelevant to the court's determination that actuarial assumptions selected by the actuary to calculate withdrawal liability owed to Petitioner United Mine Workers of America 1974 Pension Plan (the "Plan") were "unreasonable." App. 18 & n.8. Unconstrained by this Court's precedent or widely-accepted actuarial principles, the Court of Appeals further held that it was unreasonable in calculating withdrawal liability for an actuary's interest rate assumption to reflect the free-market price that the withdrawing employer, Respondent Energy West Mining Company ("Energy West"), would have to pay to settle its pension liabilities. In doing so, the Court of Appeals decision invalidated the use of "actuarial assumptions unique to withdrawal liability," despite this Court's ruling in *Concrete Pipe* that such unique assumptions were permissible. *See* 508 U.S. at 633.

In addition to contravening this Court's decision in *Concrete Pipe*, the Court of Appeals decision deepens a recent circuit split on an important matter of federal law that this Court should resolve. ERISA requires that the actuarial assumptions used to calculate withdrawal liability be both "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan[.]" 29 U.S.C. § 1393(a)(1). Longstanding precedent in the Second, Fifth, and Seventh Circuits holds that "the best estimate test is procedural, as opposed to substantive, in nature" and is designed to determine "whether assumptions truly came from the plan actuary," and were not set by the plan trustees or anyone other than the actuary. *See, e.g.*, *Vinson & Elkins v. Comm'r*, 7 F.3d 1235, 1238 (5th Cir. 1993). In direct conflict with those Circuits, the Court of Appeals decision, along with recent decisions from the Sixth and Ninth Circuits, have held that the "'Best Estimate Requirement' . . . lay[s] 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." *See, e.g.*, App. 12 (emphasis added).

The stakes are significant. In this case alone, as much as $75 million turns on whether a court should apply a second substantive test to the actuarial assumptions and methods, in addition to the reasonableness standard already in place. Without this Court's prompt intervention, the ability of more than a thousand multiemployer plans nationwide to collect billions of dollars in withdrawal liability in connection with the underfunding of pension benefits will be jeopardized, and employers will be incentivized to withdraw from underfunded plans, further imperiling the solvency of such plans and burdening the remaining employers in those plans – many of which are small companies. These are precisely the outcomes Congress sought avoid in 1980 when it passed the

Multiemployer Pension Plan Amendments Act ("MPPAA") to amend ERISA to mandate the collection of withdrawal liability.

This Court should grant the Petition.

ARGUMENT

I. The Court of Appeals Decision Is Contrary to this Court's Decision in *Concrete Pipe*.

A. Contrary to *Concrete Pipe*, the Court of Appeals Held That Actuarial Assumptions May Be Invalidated As "Unreasonable" Regardless of Whether They Are "Acceptable to a Reasonable Actuary."

In *Concrete Pipe*, this Court held that to establish assumptions selected by the actuary were "unreasonable" a withdrawing employer had the burden of showing the assumptions were not "within the scope of professional acceptability," "fall[] outside the range of reasonable actuarial practice," and "would not have been acceptable to a reasonable actuary." 508 U.S. at 635. That burden was not met in this case. The withdrawing employer's own expert actuary conceded that the actuarial assumptions were "not unreasonable" and that the Plan's actuary "follow[ed] the guidance of [Actuarial Standard of Practice 27]." App. 32, 48-49.[2]

2. The Actuarial Standards Board "sets standards for appropriate actuarial practice in the United States through the development and promulgation of Actuarial Standards of Practice," commonly referred to as "ASOPs." Actuarial

In order to calculate withdrawal liability, actuaries must select a discount or interest rate assumption to determine the present value of future benefits. *See* ASOP 27 § 3.9; App. 9, 48-49. ASOP 27 provides that an "actuary should consider the purpose of the measurement as a primary factor in selecting a discount rate" and distinguishes between actuarial calculations undertaken for the purpose of "evaluating the sufficiency of a plan's contribution policy," *i.e.*, determining the plan's ongoing minimum funding needs under ERISA, based on expected returns on plan assets; and "defeasance or settlement," or "a market-consistent measurement" *i.e.*, "use [of] a discount rate implicit in the price at which benefits that are expected to be paid in the future would trade in an open market between a knowledgeable seller and a knowledgeable buyer." ASOP 27 § 3.9. Either of the latter two bases are judged by many actuaries to be appropriate to determine a withdrawal liability assessment that relieves a former contributing employer of future obligations to the plan. *See id.*; App. 9, 48-49. *See also Actuarial Assumptions for Determining an Employer's Withdrawal Liability*, 87 Fed. Reg. 62,316, 62,317 (Oct. 14, 2022) ("Proposed Rule") (explaining that a "common approach[] . . . considers that a withdrawing employer ceases to participate in the plan's investment experience

Standards Board, *Standards of Practice*, www.actuarialstandardsboard.org/standards-of-practice/. ASOP 27, titled "Selection of Economic Assumptions for Measuring Pension Obligations," is the ASOP that principally "provides guidance to actuaries in selecting . . . economic assumptions," including discount or interest rates for measuring obligations under pension plans. *See* ASOP 27 § 1.1(a) (Sept. 2013), www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf.

because the employer is settling its liabilities once and for all and bears no risk of future losses" and, therefore, uses "interest rate assumptions . . . to approximate the market price of purchasing annuities to cover the withdrawing employer's share of the plan's benefit liabilities").

Consistent with ASOP 27 and well-accepted actuarial practice, the actuary in this case used the Plan's projected investment returns to determine the interest rate assumption used to calculate the Plan's ongoing minimum funding needs and used interest rates published by the Pension Benefit Guaranty Corporation ("PBGC"),[3] which approximate the "market rate for an annuity to . . . cover Energy West's share of future benefit payments[,]" App. 39, to calculate Respondent's withdrawal liability.

As the District Court aptly explained:

> An employer that continues to participate in a plan must make [ongoing] contributions . . . [and] if the plan's investments do not achieve the expected rate of return . . . the employer is obligated to make additional contributions to compensate for the shortfall. But withdrawing employers avoid that risk—once they've exited,

3. "[T]he Pension Benefit Guaranty Corporation (PBGC), [is] a wholly owned Government corporation, [which Congress created] to administer an insurance program for participants in both single-employer and multiemployer pension plans." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 214 (1986). "The PBGC is the agency charged with the administration of the withdrawal liability provisions of the MPPAA." *Cent. States Se. & Sw. Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766, 774 (7th Cir. 2010).

> 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.

App. 39 (citations omitted). For decades, federal courts have approved the selection of interest rate assumptions for withdrawal liability that reflect the elimination of the risk to the withdrawing employer of future adverse plan experience and specifically recognized that using the PBGC rates to calculate withdrawal liability is one of the leading "schools of thought among actuaries with respect to the selection of interest rate assumptions." *Combs v. Classic Coal Corp.*, No. CIV. A. 84-1562 TPJ, 1990 WL 66583, at *3 n.5 (D.D.C. Apr. 6, 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991). *See also Bassett Const. Co. v. Trs. of the Centennial State Carpenters Pension Tr. Fund*, No. 83–F– 980, 1985 WL 1270583, at *6 (D. Colo. Feb. 25, 1985) ("[The withdrawing employer] does not bear the burden of future actuarial losses and in turn is not entitled to benefit from actuarial gains occurring subsequent to its withdrawal.").

The uncontroverted testimony of both parties' expert actuaries established that the actuary's use of the PBGC rates in this case to calculate withdrawal liability was reasonable and consistent with generally accepted actuarial standards and practices. App. 32, 46-48. Accordingly, both the arbitrator and the district court correctly concluded that the actuarial assumptions were not unreasonable. *See* App. 49-50.

The Court of Appeals decision reversed the district court's ruling. The Court of Appeals held that "the merits of the actuary's theory" and "how widespread the . . . practice is among the profession" were *irrelevant* to its determination that the plan's actuarial assumptions were "unreasonable." App. 18 & n.8. By refusing to "judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability," *Concrete Pipe*, 508 U.S. at 635, the decision below squarely contradicts this Court's decision in *Concrete Pipe*.

B. The Court of Appeals Decision Contradicts *Concrete Pipe*'s Analysis of the Use of Different Assumptions for Calculating Withdrawal Liability and Minimum Funding.

The actuarial assumption challenged in *Concrete Pipe*, like the actuarial assumption challenged here, was the interest rate assumption, which is a "critical assumption" necessary to determine the present value of future benefits. *See* 508 U.S. at 633 ("[T]he only actuarial assumption or method that Concrete Pipe attacks in terms . . . is the critical interest rate assumption . . . ."). The actuary in *Concrete Pipe*, like the actuary here, used a different interest rate assumption to calculate withdrawal liability than the actuary used to calculate the plan's ongoing minimum funding needs. Specifically, in order to calculate withdrawal liability, the actuary in *Concrete Pipe* used what is referred to in the actuarial industry as the "Segal Blend," which is "a blended interest rate consisting of the PBGC [Pension Benefit Guaranty Corporation] published rates . . . and the plan's funding rate . . . ." Brief on the Merits by Petitioner, *Concrete*

Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., No. 91-904, 1992 WL 511948, at *15-16 (U.S. July 10, 1992).[4] This Court explained that such "actuarial assumptions unique to withdrawal liability" were permissible. *See Concrete Pipe*, 508 U.S. at 633.

Nevertheless, the Court of Appeals held that the PBGC rates, which are the rates that the PBGC "project[s] risk-free annuities will earn," were impermissible interest rates to use in calculating withdrawal liability because they did not reflect the "anticipated rate of return" of "the plan's assets." App. 8, 12-13. The Court of Appeals made this determination without any discussion of *Concrete Pipe*. Only later in the opinion, having already concluded that the interest rate assumption was invalid, did the court acknowledge that "*Concrete Pipe* . . . did not . . . hold" that the "assumptions used to calculate minimum funding and withdrawal liability . . . must be identical." App. 22.

As the PBGC explained in an amicus brief in a similar case, it is contradictory for a court to hold that an interest

4. The Segal Blend was initially developed by actuaries at *amicus curiae* The Segal Group in the 1980s, but it and similar blends have also been used by other actuaries for decades. *See* Segal, *What Is the Segal Blend?* (Jan. 12, 2023), www.segalco.com/consulting-insights/segal-blend. "Blended" rates, "market-observed interest rates" like the PBGC rates, and "the expected return on plan assets" are the three most "[c]ommon approaches to selecting the withdrawal liability interest rate." American Academy of Actuaries Issue Brief, *Determining Withdrawal Liability for Multiemployer Pension Plans: A Range of Approaches to Actuarial Assumptions* ("Academy Issue Brief") at 1 (Apr. 2020), www.actuary.org/sites/default/files/2020-04/Withdrawal_Liability.pdf. *See also Combs*, 1990 WL 66583, at *3 n.5.

rate assumption for withdrawal liability: (i) must reflect the anticipated rate of return on plan assets; and (ii) need not be the same as the assumption used to calculate minimum funding (which reflects the anticipated rate of return on plan assets). *See* Brief for the PBGC as *Amicus Curiae*, *N.Y. Times Co.* v. *Newspaper & Mail Delivers'-Publishers' Pension Fund*, Nos. 18-1140, 18-1408, 2018 WL 6003761, at *28 (2d Cir. Nov. 7, 2018) ("PBGC Amicus") (supporting reversal of a district court decision invalidating the Segal Blend because the district judge's holding that "the interest rate assumption must offer the actuary's best estimate of the long-term average rate of return on plan assets . . . contradicted his own correct holding that funding and withdrawal liability interest assumptions need not be identical").[5] The PBGC's amicus brief reaffirmed its longstanding interpretation of the statute as not requiring "that the actuarial assumptions used to determine withdrawal liability be the same as those used for purposes of [minimum funding]," PBGC Opinion Letter 86-24, 1986 WL 38802, at *1 (Oct. 31, 1986), and explained that if Congress wanted to require actuaries to use "the long-term average rate of return on plan assets[,]" "Congress could easily have said so." PBGC

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5. As the federal agency that oversees the administration of the withdrawal liability provisions of ERISA, PBGC's views regarding withdrawal liability expressed in its amicus brief are entitled to deference. *See, e.g., Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 134-35 (2d Cir. 2012) ("The PBGC, the agency charged with administering the withdrawal-liability provisions under ERISA, is traditionally afforded substantial deference in its reasonable interpretations of the statute."); *O'Neill Bros.*, 620 F.3d at 774 ("The fact that much of the PBGC's elaboration of its analysis is presented in an amicus brief does not make its position bereft of all deference.").

Amicus, 2018 WL 6003761, *15-17 & n.54. Had the Court of Appeals followed this Court's analysis in *Concrete Pipe* or deferred to the PBGC, it could not have concluded that an interest rate assumption must reflect "the anticipated rate of return" of "the plan's assets." App. 12-13.[6]

The Court of Appeals decision erred by relying on a recent similar holding from the Sixth Circuit. The Sixth Circuit held that an interest rate developed using the Segal Blend method was impermissible because the inclusion of the PBGC rates in the blended rate assumption meant that the resulting interest rate was not exclusively based on the plan's projected investment returns, as it was for the plan's minimum funding rates. *See* App. 13 (citing *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 421 (6th Cir. 2021)). Remarkably, the Sixth Circuit declared that in light of its holding invalidating the Segal Blend – which was also at issue in *Concrete Pipe* – it "need not decide" whether "*Concrete Pipe* forbid the actuary from using one interest rate for minimum funding purposes and another to calculate withdrawal liability." *Sofco Erectors*, 15 F.4th at 420. Of course, *Concrete Pipe* does not forbid the use of different assumptions. *See Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 354-55 (7th Cir. 2012) (Posner, J.) ("Language in the Supreme Court's decision in *Concrete Pipe* . . . could be read to suggest that having two different interest-rate assumptions—one for withdrawal liability and one for

6. As the Petition notes, although the PBGC's positions "clearly indicate that the agency supports the actuarial profession's longstanding use of risk-free rates to discount withdrawal liability," "the Court could call for the views of the Solicitor General to confirm the PBGC's position." Pet. 25.

avoiding the tax penalty—might make a plan vulnerable to claims that either or both were 'unreasonable' . . . The danger was remote; the Court had indicated that 'supplemental' assumptions that might cause the rates to diverge were permissible.").

Neither the Court of Appeals decision in this case nor the Sixth Circuit's *Sofco* decision acknowledged that the Segal Blend, which incorporates the PBGC rates, was at issue in *Concrete Pipe* or that this Court held in *Concrete Pipe* that such "actuarial assumptions unique to withdrawal liability" were permissible. *See* 508 U.S. at 633. This Court's analysis in *Concrete Pipe* demonstrates that the use of the PBGC rates as part of the assumptions used to calculate withdrawal liability does not render the assumptions impermissible as a matter of law. By holding otherwise, both the Court of Appeals decision and the Sixth Circuit's *Sofco* decision contravene this Court's decision in *Concrete Pipe*.

II. The Court of Appeals Decision Deepens a Circuit Split on the Issue of Whether Congress Imposed a Second Substantive Test in Addition to the Reasonableness Test.

The Court of Appeals decision deepens the recent circuit split between the D.C., Sixth, and Ninth Circuits on the one hand, and the Second, Fifth, and Seventh Circuits (and the PBGC) on the other hand.

ERISA provides that actuarial assumptions must be both "in the aggregate . . . ***reasonable*** (taking 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) (emphasis added). The Second, Fifth, and Seventh Circuits hold that "the best estimate test is procedural, as opposed to substantive, in nature" and is designed to determine "whether assumptions truly came from the plan actuary" because "[t]he statute refers to the actuary's best estimate, not that of a court," and a "second substantive test would render the reasonableness test superfluous." *Vinson & Elkins*, 7 F.3d at 1238. *See also Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291, 296 (2d Cir. 1994) ("We believe 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.") (citing *Vinson & Elkins*, 7 F.3d at 1238); *Chi. Truck Drivers*, 698 F.3d at 355 ("ERISA requires that the computation of withdrawal liability be based on 'the *actuary's* best estimate of anticipated experience.'").[7] Indeed, relying, *inter alia*, on the Second Circuit's *Wachtell* decision, the Seventh Circuit held that the "'best estimate' requirement . . . exists to maintain the actuary's independence" and that the actuary was required to use the Segal Blend because the "Funding Rate . . . was not its best estimate." *Chi. Truck Drivers*, 698 F.3d at 357. The PBGC has endorsed this procedural interpretation of the best estimate standard in an amicus brief. *See* PBGC Amicus, 2018 WL 6003761, at *15-16.

7. As the Petition notes, *Vinson & Elkins* and *Wachtell* interpreted identical language appearing in the Internal Revenue Code, but every court to consider the issue (including the Court of Appeals decision) has correctly held that the identical language in both the Internal Revenue Code and ERISA describes the same legal test. *See* Pet. 18-19.

By contrast, the D.C., Sixth, and Ninth Circuits have now held that the "Best Estimate Requirement . . . lay[s] 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." App. 12 (emphasis added). *See also GCIU-Emp. Ret. Fund v. MNG Enters., Inc.*, 51 F.4th 1092, 1099-1100 (9th Cir. 2022) ("We follow our sister circuits and interpret the statute to require that the actuary's assumptions and methods reflect the plan's characteristics" under "[t]he 'best estimate' language") (citing App. 12; *Sofco*, 15 F.4th at 422-23); *Sofco*, 15 F.4th at 422-23 (holding that, regardless of the interpretation of the "best estimate" part of the statutory language "as procedural," the "anticipated experience under the plan" part of the statutory language substantively requires assumptions to be based "on the unique characteristics of the plan"). Moreover, directly contrary to the Seventh Circuit's decision in *Chicago Truck Drivers*, which required the Segal Blend to be used because it was the plan actuary's "best estimate," 698 F.3d at 357, the Sixth Circuit's *Sofco* decision prohibits the Segal Blend from being used as a "best estimate." 15 F.4th at 421.

The Court of Appeals decision in this case acknowledged the contrary "out-of-circuit cases" from, *inter alia*, the Fifth and Second Circuits, but described those cases as having "analyzed only" what the "best estimate" statutory language meant, not what the "best estimate of anticipated experience under the plan" statutory language meant. *See* App. 14-16. The Fifth Circuit, however, was clear that the creation of "a second substantive test would render the reasonableness test superfluous" and "frustrate [Congress'] goal" of providing actuaries "freedom from second-guessing" by courts. *Vinson & Elkins*, 7

F.3d at 1238. The Court of Appeals decision explicitly acknowledges that it is creating an additional substantive test, which is in direct conflict with Fifth Circuit's decision in *Vinson & Elkins*.

The Court of Appeals decision is not only inconsistent with the decisions of other Circuits, but it is fundamentally inconsistent with both the plain text and purpose of the statute. Given that an actuary is "a person whose job it is to calculate risk," Actuary, Cambridge Business English Dictionary, www.dictionary.cambridge.org/dictionary/english/actuary, it is inconceivable that Congress intended "the actuary's best estimate of anticipated experience" to preclude the actuary from fully taking into account the plan's anticipated "risk," as the Court of Appeals held by arbitrarily rewriting the statute to say "past or projected investment returns" and "the plan's particular characteristics," neither of which appear in the statute. *See* App. 17.

III. The Federal Question Presented Is Important and the Court of Appeals Decision Is Not Only Wrong But Presents An Ideal Vehicle to Resolve the Question Presented.

According to the PBGC, there are more than 1,300 multiemployer pension plans that are responsible for providing retirement benefits to more than 11 million workers and retirees. Pension Benefit Guaranty Corporation, *How PBGC Operates* (Nov. 15, 2022), www.pbgc.gov/about/how-pbgc-operates. These plans collectively owe nearly three-quarters of a *trillion* dollars to workers and retirees, and are collectively underfunded by approximately $150 billion. *See* Milliman, *Multiemployer*

Pension Funding Study: Mid-year 2022 Edition (Aug. 8, 2022), www.milliman.com/en/insight/multiemployer-pension-funding-study-mid-year-2022.

The Court of Appeals decision, and the broader conflict between the Circuits, strikes at the heart of a multi-billion-dollar recurring question: What is a company's obligation to an underfunded multiemployer pension plan (and its participants, beneficiaries, and remaining contributing employers) when it decides to withdraw from the plan?

According to the Court of Appeals decision, a withdrawing employer is entitled to the benefit of the plan's projected future investment returns without taking any of the associated investment risk. App. 8, 13 (holding that "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," even though "when an employer withdraws from a plan, it no longer bears any risk associated with that plan's investment performance"). No company or investor could obtain the benefit of a valuation calculated with a risk-based discount rate in a free-market transaction with an annuity provider, which the PBGC rates used by the actuary in this case are designed to measure. *See* App. 39 (holding that the actuary's use of the PBGC rates was designed to measure the "market rate for an annuity to . . . cover Energy West's share of future benefit payments"); Academy Issue Brief at 4 (explaining that "[t]he PBGC publishes interest rates each quarter based on its survey of insurers in the annuity marketplace" and that "actuarial liability calculated using [such] a market-observed rate is typically consistent with an estimate of the cost of settling a pension liability"). In an environment in which pension plan assets are projected to earn rates far above the discount rate at which annuity providers are willing to price pension liabilities, the shifting of risk by withdrawing employers would come at a significant cost to plans and employers that remain in those plans, and by extension to plan participants. In just this one case, involving one employer withdrawing from one plan for which it was only responsible "for roughly two percent of the Plan's total unfunded vested benefits[,]" the difference in withdrawal liability calculated based on the PBGC rates and plan's projected investment returns was "about $75 million." App. 38, 57.

The consequences of the Court of Appeals decision, if not immediately addressed by this Court, are significant and include:

(1) The ability of more than a thousand multiemployer pension plans to collect billions of dollars in withdrawal liability will be jeopardized.

(2) More employers will withdraw from plans in order to eliminate the investment risk they formerly took when participating in the plan and shift it to the pension plans and the remaining employers.

(3) As a result of (1) and (2), risks to and underfunding in multiemployer plans will increase.

(4) Increased underfunding may lead to increased contributions from remaining employers, many of which are small companies, and, in some cases, lead to insolvent plans.

(5) Plans that can no longer afford to pay the pensions that they owe will have to draw on the PBGC's financially-limited multiemployer insurance program, which already "face[s] the potential for large claims that could put stress on [its] long-term financial condition."[8]

These consequences are directly contrary to the purposes of ERISA and MPPAA, which were enacted to protect the financial solvency of multiemployer plans. As the Court of Appeals recognized, Congress passed MPPAA "[i]n response" to concerns that where "plan[s] 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." App. 4 (citing *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-17 (1995)). The Court of Appeals, however, gave no consideration to the significant incentives that its decision created for employers to withdraw. Indeed, the need to avoid creating new legal rules that incentivize withdrawals is so important that this Court unanimously concluded Congress properly made MPPAA retroactive in order to avoid creating such incentives:

> In particular, we believe it was eminently rational for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems Congress identified under ERISA was that

8. Pension Benefit Guaranty Corporation, *2022 Annual Report* at 22, www.pbgc.gov/sites/default/files/documents/pbgc-annual-report-2022.pdf.

> the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered.

Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730-31 (1984).

In addition to encouraging employers to withdraw and leaving other employers who continue to contribute to the plan holding the bag, the Court of Appeals decision encourages litigation about withdrawal liability, which Congress sought to minimize by providing that withdrawal liability calculations be "presumed correct." *See* 29 U.S.C. §1401(a)(3)(B); *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137, 1143 (1st Cir. 1985) (explaining that "precise[] . . . point" of the presumption was to "discourage litigation" because "the uncertainties inherent in making actuarial assumptions mean that there is a range of 'reasonable' withdrawal liability amounts"). "Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Concrete Pipe*, 508 U.S. at 635 n.20 (quoting S. 1076, 96th Cong., 2d Sess., 20-21).

The Court of Appeals decision undermines Congress' goals of minimizing litigation in at least two significant ways. First, the decision functionally erases the employer's "burden to show" by a preponderance of the evidence the assumptions "would not have been acceptable to a reasonable actuary," *Concrete Pipe*, 508 U.S. at 635, by holding that assumptions can be unreasonable even where the employer's "own expert conceded that [the actuary's] assumptions were reasonable in light of industry standards." App. 50. Second, the decision adopts vague and amorphous standards, which will invite unnecessary litigation, create more uncertainty, and make efforts to collect withdrawal liability more expensive. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 70 (2008) (Alito, J., concurring) (explaining that a "vague and malleable standard would open the gates for a flood of litigation"). For example, the decision announces that discount rates for withdrawal liability and minimum funding must be "similar," App. 20, but offers no meaningful guidance on how to evaluate when a difference between discount rates is too great to be "similar."

As discussed in the Petition, recognizing the importance of the issues in this case and other "[r]ecent [d]isputes" which have led to "varied" "[c]ourt decisions," PBGC has proposed a rule that may potentially partially ameliorate many of these issues. *See* Pet. 24-25; Proposed Rule, 87 Fed. Reg. at 62,317 & n.3, 62,321 (explaining that "a continuation of the recent trend in withdrawal liability dispute resolution toward requiring that withdrawal liability be based on funding rates . . . could contribute to plan underfunding, benefit losses for participants, cost-shifting to remaining employers, and higher claims on PBGC's insurance system"). *Amici curiae* agree with Petitioners that "[t]he PBGC's proposed rule . . . should not deter this Court" from "resolv[ing] the conflicts that have recently sprung up[,]" Pet. at 25-26, particularly given that there are numerous pending arbitrations and federal court cases in which the employer is challenging the use of the interest rate used to calculate the amount of withdrawal liability.

Additionally, the PBGC's proposed rule only addresses "interest rate assumptions." Proposed Rule, 87 Fed. Reg. at 62,316. The proposed rule does not address any of the other "many assumptions" "[m]ultiemployer plan actuaries use . . . to determine the amount of withdrawal liability." *See* Academy Issue Brief at 1. *See also Concrete Pipe*, 508 U.S. at 610 (observing that, in addition to the interest rate assumption, actuarial assumptions "must cover such matters as mortality of covered employees"). Like the interest rate assumption, each of those other assumptions should also be judged by reference to "standard actuarial practice," *Concrete Pipe*, 508 U.S. at 635, and not be subjected to "a second substantive test [that] would render the reasonableness test superfluous" and "frustrate [Congress'] goal" of providing actuaries "freedom from second-guessing" by courts. *Vinson & Elkins*, 7 F.3d at 1238.

Finally, this case presents an ideal vehicle to resolve the question presented. The facts are clear: the employer's own expert actuary "conceded that [the] assumptions were reasonable in light of industry standards," and the arbitrator and the district court so held. App. 49-50. The interest rate at issue is published by the government to measure free-market transactions, and its use as an actuarial assumption to calculate withdrawal liability has been recognized by courts for decades as one of the leading "schools of thought among actuaries with respect to the selection of interest rate assumptions." *See Combs*, 1990 WL 66583, at *3 n.5. Just as clear is the Court of

Appeals' admitted refusal to consider "the merits of the actuary's theory" and "how widespread the . . . practice is among the profession." App. 18 & n.8.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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