No. 23-1209

In the Supreme Court of the United States

M & K EMPLOYEE SOLUTIONS, LLC, ET AL., PETITIONERS

v.

TRUSTEES OF THE IAM PENSION FUND

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Respondents concede that the D.C. Circuit and Second Circuit are split on the question presented and that petitioners win under the Second Circuit's rule. See Br. in Opp. 2. They do not dispute that the issue is a pure question of statutory interpretation and that this case is an ideal vehicle to resolve it. See Pet. 17.

Instead, respondents insist that the split's existence is "tolerable." Br. in Opp. 2. But their own arguments show it is not. While respondents claim there is no risk of forum shopping, they highlight plans' ability to unilaterally adopt forum-selection clauses that enable forum shopping at the wholesale level. Trustees can easily adopt a forum-selection clause as respondents did here and confine all withdrawal-liability disputes to the D.C. Circuit. It would be understandable for plans to do so after the decision below.

Equally unpersuasive is respondents' claim that the issue is rare and unimportant. This claim rests on respondents' unsupported assertion that actuaries have adjusted their practices to comply with the Second Circuit's rule. But in respondents' own view—and that of the actuaries who supported them as amici below—the Second Circuit's rule violates the statute and actuarial norms. So even if actuaries grudgingly followed that rule when there was no contrary precedent, actuaries will surely revert to their preferred practice now that D.C. Circuit precedent gives them cover. The Chamber of Commerce amicus brief details (at 6-17) how the D.C. Circuit rule—however attractive to plans—is terrible for employers, employees, and collective bargaining over retirement benefits. The amicus participation at both appellate stages in

this case confirms that the issue is important to all sides.

That leaves respondents' arguments on percolation and the merits. Respondents never explain what more this Court could learn by letting this issue percolate. Their arguments on the merits just rehash the parties' dispute below. The issue is a binary question of statutory interpretation with two possible answers: either Section 1391's instruction to calculate withdrawal liability "as of" the measurement date requires using the inputs, including actuarial assumptions, that existed on that date, or Section 1393's requirement that actuarial assumptions offer the actuary's "best estimate" of anticipated experience allows an actuary to increase withdrawal liability by changing assumptions after the measurement date. This is a bread-and-butter statutory dispute that this Court is fully capable of resolving through the traditional tools of construction. Further percolation would not help. But it would foster uncertainty, cloud contract negotiations and long-term planning, and threaten massive disparities in employer liability under a statute that demands uniformity and predictability. The Court should nip these problems in the bud and resolve the split now.

A. The circuits are concededly split.

Petitioners detailed (at 10-15) how the decision below rejected the holding in *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146, 152 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020). In *Metz*, the Second Circuit held that withdrawal liability calculations must use the actuarial assumptions in effect on the measurement date. The D.C. Circuit

held the opposite. Pet. App. 14a. Respondents accept (at 2) the petition's premise that "the decision below conflicts with the Second Circuit's decision in *Metz*, which imposed the deadline proposed by Petitioners."

Still, respondents argue (at 11) that the Court should ignore the split because it involves only two circuits. But this Court often decides to resolve 1–1 splits, especially when circuits are applying a federal statute in conflicting ways. See, *e.g.*, *Bissonnette* v. *LePage Bakeries Park St., LLC*, 601 U.S. 246, 252 (2024); *Bittner* v. *United States*, 598 U.S. 85, 89 (2023); *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 455 (2022); *Dep't of Homeland Sec.* v. *Thuraissigiam*, 591 U.S. 103, 116 (2020). The Court should do likewise here and settle the Second and D.C. Circuits' disagreement over ERISA's withdrawal-liability rules.

B. The question presented is important and warrants review in this case.

Respondents argue for letting the circuit split persist because there is little risk of forum shopping, the issue is unimportant, and the Court would benefit from further percolation in the lower courts. None of these arguments withstands scrutiny.

1. Respondents' lead argument is that litigants cannot exploit the circuit split through forum shopping. They contend (at 13) that it is standard practice for multiemployer pension plans to adopt forum-selection clauses dictating where withdrawal-liability disputes must be resolved, and they note that they amended the trust agreement here to require arbitrations and litigation in Washington, D.C. 22-7157 C.A. App. 67. This argument backfires because it exposes how forum-selection clauses enable plans to confine

litigation in the D.C. Circuit to take maximum advantage of the circuit split.

Respondents' cited cases recognize that ERISA plan sponsors have wide latitude to impose forum-selection provisions through unilateral plan amendments. Plan documents are enforceable as contracts, and forum-selection clauses that they contain "are presumptively valid even in the absence of arm's-length bargaining." *In re Mathias*, 867 F.3d 727, 731 (7th Cir. 2017); accord *Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922, 930 (6th Cir. 2014). Moreover, ERISA generally permits plan sponsors to amend their plan for any reason at any time. See, *e.g.*, *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 890-891 (1996). Multiemployer pension plans thus have significant power to confine withdrawal-liability litigation to the District of Columbia, as respondents have done here. Because D.C. Circuit precedent follows the timing rule that most favors plans, trustees have ample reason to unilaterally amend their plans to require a D.C. venue even if that venue would not otherwise be available.[1]

And this opportunity for forum-shopping is one-sided. Plans can unilaterally bind employers through

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[1] Although the MPPAA's venue provision authorizes suit wherever the plan is administrated or a defendant resides or does business, 29 U.S.C. 1451(d), a forum-selection clause might lawfully select other venues. The Sixth Circuit, for example, has determined that an ERISA plan's forum-selection clause would control even if it "laid venue outside of the three options provided by" ERISA's general venue provision. *Smith*, 769 F.3d at 932 (discussing 29 U.S.C. 1132(e)(2)). The same reasoning applies to the MPPAA's venue provision for withdrawal-liability disputes, 29 U.S.C. 1451(d).

forum-selection provisions, but employers cannot reciprocate. As respondents themselves explain (at 14), withdrawing employers are limited under the MPPAA to filing suit where the plan is administered. In short, respondents' lead argument for tolerating the circuit split merely exposes an asymmetrical opportunity for forum-shopping, increasing the importance of review in this case.

2. Respondents maintain that the question presented has rarely arisen and is unlikely to arise again. Yet they fail to counter the Chamber's observation (at 10) that now virtually every actuarial decision on the timing issue will be challenged. Under 29 U.S.C. 1401(a)(1), either side can initiate arbitration of a withdrawal liability dispute. If an actuary changes assumptions after the measurement date, an employer can argue for the Second Circuit rule. If an actuary refuses to change measurement-date assumptions, trustees can argue for the D.C. Circuit rule. Individual arbitrators are not bound by either circuit's rule, and huge sums are at stake. Chamber Br. 8-9, 11, 13.

Respondents claim (at 3) that the circuit split does not affect "the legal duties of employers participating in multiemployer plans." But it has a massive effect on the duties of *withdrawing* employers. A retroactive change in assumptions can multiply liability threefold (as in this case), fourfold (as in *Metz*), or higher still. Pet. 7, 11, 16. Because of the retroactive use of changed actuarial assumptions here, petitioners' inflated withdrawal-liability assessments collectively exceeded $9.9 million. See Pet. App. 25a, 83a. Even

for a single employer, this is often a multimillion-dollar issue. See Pet. 7. And in the aggregate, the selection of actuarial assumptions is a multi*billion*-dollar issue. See Chamber Br. 14-15.

Changing tack, respondents argue (at 13) that the likelihood of future arbitration and litigation over the timing issue weighs against certiorari now. This argument disregards the harms that such arbitration and litigation impose. The process is long and expensive. Chamber Br. 8. In this case, going from withdrawal to appellate ruling took five years, four arbitrations, and two district court rulings. In *Metz*, the road from withdrawal to arbitration to litigation to appellate ruling took over five years as well. See 946 F.3d at 146, 148. Neither plans nor employers benefit from these delays and associated expenditures. See, *e.g.*, *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996) (recognizing that ERISA seeks to avoid excessive "administrative costs" and "litigation expenses"). Nor does the judicial system benefit from the strain on its resources. Conversely, everybody benefits from a definitive resolution of the question presented. Indeed, as the Chamber explains (at 15-16), the persistence of this circuit split injects huge uncertainty into negotiations between employers and employee representatives over the costs of changing retirement benefits.

Respondents' own amici in the court below further attest to this issue's importance. Four actuarial firms submitted a brief urging the D.C. Circuit to reject *Metz*. 22-7157 Amici C.A. Br. 14. One of those firms thought the issue important enough that it asked this Court to grant certiorari in *Metz*, arguing for the Court's "immediate intervention" even *before* a circuit

split. Horizon Amicus Br. at 2, *Nat'l Ret. Fund* v. *Metz Culinary Mgmt., Inc.*, No. 19-1336 (June 12, 2020).

Yet respondents claim (at 16) that the issue is unimportant because actuaries "have acceded to *Metz*'s timing rule by formally selecting their assumptions before the measurement date." That unsupported claim is belied by their own amici's objections to *Metz*. But even if the claim were true, it would not remain true after the D.C. Circuit's decision. Respondents and their amici insist that *Metz*'s timing rule is incompatible with their reading of the statute, with actuarial standards of practice, and with pre-*Metz* behavior. Right or wrong, those views guarantee more disputes going forward.

3. There is no basis for respondents' speculation (at 11-12) that allowing such disputes to percolate will improve this Court's ability to resolve the question presented. Respondents advance only generic arguments in favor of percolation, without ever explaining what aspect of the issue could plausibly benefit from additional lower court study.

The question is undeniably important, but it is relatively straightforward—as the two circuit court opinions and the parties' own arguments reveal. One side interprets the requirement to calculate withdrawal liability "as of" the measurement date as precluding retroactive inflation of withdrawal liability by switching actuarial assumptions after the measurement date. The other side interprets the requirement to use assumptions offering the actuary's "best estimate" of anticipated plan experience as permitting it. Other circuits may ultimately line up behind one view or the other. But it is hard to imagine them coming

up with some new theory. The statute either permits post-measurement date changes, or it does not.

Deciding between these readings of the statute is squarely in this Court's wheelhouse. And *only* this Court can issue a decision that restores uniformity to the law. As the Court has emphasized, ERISA was designed to ensure a single benefits framework that governs the whole country. Pet. 15. The statute is failing at that basic goal as long as this split remains.

C. The decision below is incorrect.

Respondents fail to justify their interpretation under the text, structure, or purposes of the statute.

1. Respondents confront a strawman version of petitioners' textual argument. Petitioners argue: (1) the statute requires plans to calculate underfunding "as of the end of the plan year preceding the plan year in which the employer withdraws," 29 U.S.C. 1391(b)(2)(E)(i); see also 29 U.S.C. 1391(c)(2)(C)(i), (c)(3)(A), (c)(4)(A); *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995); (2) a plan's underfunding on any given date is the product of multiple factors, including objective historical facts (like the number of participants, the terms of the parties' obligations and entitlements under the plan, and the present value of plan assets) and subjective professional judgments (like actuarial assumptions about life expectancy and interest rates); and so (3) an actuary may not calculate underfunding using actuarial assumptions that contradict the assumptions the actuary held on the measurement date.

Respondents identify no flaw in this straightforward reasoning. They cannot dispute that the plain meaning of "as of" refers to the state of things at the relevant point in time. See, *e.g.*, *The Oxford English Dictionary* (online ed. 2024) ("[a]s things stood on (a date)"); *Webster's Third New International Dictionary of the English Language* 129 (1966) ("at or on (a specific time or date"). They cannot dispute that actuarial assumptions are critical—indeed the most important—inputs in determining the amount of plan underfunding. See, *e.g.*, *United Mine Workers of Am. 1974 Pension Plan* v. *Energy W. Min. Co.*, 39 F.4th 730, 739 (D.C. Cir. 2022), cert. denied, 143 S. Ct. 1024 (2023). Nor can they explain how refusing to use the inputs that existed on the measurement date yields withdrawal liability as of that date.[2] Calculating underfunding based on post-measurement date changes in actuarial judgment or plan policy does not produce a snapshot of the plan's state on the measurement date itself.

Respondents respond (at 24) that actuaries are "capable of selecting assumptions after the measurement date." But petitioners do not argue otherwise.

[2] Respondents try to muddy the water (at 25-26) over whether their actuary still accepted the 7.5% discount rate on the measurement date. They insist that actuarial assumptions do not remain in effect for a plan from year to year. But this claim is untrue and contradicts their statements elsewhere. Respondents stipulated that as of December 31, 2017, neither the plan nor its actuary had changed the 7.5% discount rate. Pet. 7. Even now, respondents admit that actuarial assumptions remain stable year to year. Br. in Opp. 16. Moreover, the actuary's January 2018 presentation showed that its current policy before the post-measurement date reduction was to use a 7.5% rate. Pet. 7.

Petitioners' claim is not that actuaries *cannot* select retroactive assumptions, but that they *may not* do so under 29 U.S.C. 1391.[3]

2. Respondents' lone textual source for their position is 29 U.S.C. 1393(a)(1). But respondents acknowledge (at 23) that this provision is silent on "when an actuary must select its assumptions." The only provision that deals with timing is Section 1391.

In respondents' view, Section 1393(a)(1) implicitly authorizes post-measurement date changes in actuarial assumptions by requiring those assumptions to reflect the actuary's best estimate of anticipated plan experience. The petition explained (at 20-21) why this argument fails: the statute requires use of the actuary's best estimate *as of the measurement date*. There is no other way to read Section 1391 and Section 1393 as part of a coherent whole, as a court must. See, *e.g.*, *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 587 U.S. 601, 608 (2019) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)). Respondents have no response.[4]

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[3] Respondents cannot justify using retroactive assumptions by appeals to the Actuarial Standards of Practice. See Br. in Opp. 24-25. "ERISA does not yield to the Actuarial Standards of Practice; the standards must succumb to the statutory requirements." *Sofco Erectors, Inc.* v. *Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 423 (6th Cir. 2021).

[4] Respondents belittle (at 24) Section 1391 because it contains "sub-sub-subsections" and "mentions neither actuaries nor their assumptions." But Section 1391 has an intricate structure because it articulates four detailed methods for calculating withdrawal liability. And it works in tandem with Section 1393 to define a withdrawing employer's share of the plan's unfunded

At best, respondents make a policy argument (at 23-24) that post-measurement date changes help avoid "stale assumptions" that an actuary prefers to change. This policy concern, even if well founded, cannot justify failing to give Section 1391's timing requirement its full effect. But the concern is not well founded. Respondents elsewhere assure the Court (at 16) that "[a]ctuarial assumptions tend to remain stable over time," allowing actuaries to "calculate an employer's liability using the same assumptions that it used to calculate withdrawal liability during the prior year." Section 1393 itself acknowledges this stability by permitting actuaries to start their calculations using a prior year's valuation. 29 U.S.C. 1393(b)(1). Respondents' proposal is a solution in search of a problem.

3. Respondents seem to agree (at 25) that the decision below cannot be defended based on the MPPAA's general statement of purpose. That provision refers, among other things, to "protect[ing] [plans] and their beneficiaries," and the court of appeals identified this provision as "the main point" of its disagreement with *Metz*. Pet. App. 14a. Petitioners explained (at 21-22) that the statute balances competing purposes and does not single-mindedly elevate plans' interests above all else.

In the end, respondents commit the same mistake. They completely dismiss employers' interests in predictability. Yet predictability is vital to the MPPAA's goal of encouraging the maintenance and growth of multiemployer pension plans. To do that, the statute

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vested benefits. Only petitioners' interpretation gives full effect to both sections.

cannot threaten to saddle employers with massive unforeseen changes in liability. See Chamber Br. 13. Under the rule adopted below, a plan can change assumptions after announcing its measurement date assumptions and even after the employer has decided to withdraw. Under *Metz*, in contrast, employers can count on what the plan has told them about measurement date assumptions.

An unexpected change in actuarial assumptions destroys employers' ability to predict withdrawal liability. It is not comparable to waiting for a final tally of "the plan's assets and liabilities as of the measurement date." Br. in Opp. 20. Actuarial assumptions are subjective determinations within the control of the plan and its actuary. And they have the greatest impact on the ultimate amount of liability. The power to retroactively change such assumptions may be good for plans. But that is no reason to read such a power into the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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