No. 23-1209

# In the Supreme Court of the United States

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

*v.*

TRUSTEES OF THE IAM NATIONAL PENSION FUND

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

Under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, when an employer withdraws from a multiemployer pension plan, it must pay its share of the plan's unfunded vested benefits. That amount is calculated as of the last day of the year preceding the withdrawal, *i.e.*, the "measurement date." The question presented as phrased in the petition for a writ of certiorari is: Whether 29 U.S.C. 1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year.

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## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted. As explained below, the United States suggests that the Court reformulate the question presented.

## INTRODUCTION

When an employer withdraws from a multiemployer pension plan, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires the employer to pay its share of the plan's unfunded vested benefits. That amount, the employer's "withdrawal liability," must be calculated as of the last day of the year preceding the withdrawal, *i.e.*, the "measurement date." See 29 U.S.C. 1391. Withdrawal-liability calculations turn on both hard data about the plan and indeterminate actuarial assumptions.

For decades, pension-plan actuaries selected their actuarial assumptions after the measurement date. In 2020, however, the Second Circuit held in *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146, that ERISA requires the assumptions to be adopted on or before the measurement date, so that "[a]bsent any change to the previous plan year's assumption made by the Measurement Date, the interest rate assumption in place from the previous plan year will roll over automatically." *Id.* at 152. This Court denied a petition for a writ of certiorari in that case. 141 S. Ct. 246 (2020). But in the decision below, the D.C. Circuit declined to follow *Metz* and held instead that "an actuary may set actuarial assumptions for a given measurement date after the measurement date based on information that was available 'as of' the measurement date." Pet. App. 3a.

In the view of the United States, this Court should grant certiorari to resolve that clear circuit conflict and reject the timing rule of *Metz*, which has no sound basis in ERISA. If certiorari is granted, we recommend that the Court reformulate the question presented to ensure that the disagreement between *Metz* and the decision below is squarely presented.

## STATEMENT

### A. Legal Background

1. "Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986). "In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension ben-

efit insurance" to be administered by the Pension Benefit Guaranty Corporation (PBGC). *Ibid.* "This comprehensive and reticulated statute was designed * * * to guarantee that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Ibid.* (citation and internal quotation marks omitted).

ERISA governs both single-employer and multiemployer plans, the latter of which are common in some industries. See *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 606 (1993). "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." *Id.* at 605. Soon after ERISA was enacted, however, it became clear that the statutory scheme incentivized an employer "to withdraw from a financially shaky [multiemployer] plan * * * , rather than to remain and (if others withdrew) risk having to bear alone the entire cost of keeping the shaky plan afloat." *Milwaukee Brewery Workers' Pension Plan* v. *Joseph Schlitz Brewing Co.*, 513 U.S. 414, 416-417 (1995). "Consequently, a plan's financial troubles could trigger a stampede for the exit doors, thereby ensuring the plan's demise." *Id.* at 417; see *Connolly*, 475 U.S. at 216 (describing that potential "vicious downward spiral") (citation omitted).

To address the problem, the PBGC proposed in 1979 that a withdrawing employer be required "to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 723 (1984). Congress adopted that approach by amending ERISA in the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208.

2. As amended, ERISA requires an employer that withdraws from a multiemployer plan to pay the plan its "withdrawal liability," which basically means the employer's share of the plan's unfunded vested benefits (UVBs). 29 U.S.C. 1381(a) and (b)(1). The plan's UVBs equal the value of the benefits owed to employees minus the value of the plan's assets. 29 U.S.C. 1393(c). Valuing those liabilities and assets requires the use of actuarial assumptions about matters both demographic (*e.g.*, employee mortality) and economic—most importantly, the assumed discount rate, which is "the rate at which the plan's assets will earn interest." Pet. App. 21a (citation omitted). (Thus, the higher the discount rate, the lower the UVBs and withdrawal liability.) The plan's actuary 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).* A similar standard governs the actuary's calculation of the plan's liabilities to determine the required contributions of participating employers for minimum-funding purposes. See 29 U.S.C. 1084(c)(3).

The plan's sponsor (typically a board of trustees appointed by participating employers and labor unions) makes the ultimate determination of withdrawal liabil-

* The actuary may alternatively use "actuarial assumptions and methods set forth in the [PBGC's] regulations for purposes of determining an employer's withdrawal liability." 29 U.S.C. 1393(a)(2). The PBGC has never promulgated such regulations, however, though it has proposed to do so in a pending rulemaking. 87 Fed. Reg. 62,316 (Oct. 14, 2022); see p. 17, *infra*.

ity. 29 U.S.C. 1382; see 29 U.S.C. 1301(a)(10); *Massaro* v. *Palladino*, 19 F.4th 197, 201 (2d Cir. 2021). That amount, *i.e.*, the withdrawing employer's share of the UVBs, is calculated using one of four formulas set forth in 29 U.S.C. 1391. See 29 U.S.C. 1381(b)(1), 1391. Under any of those approaches—the details of which do not matter here—the employer's allocated share of UVBs is calculated "as of the end of the plan year preceding the plan year in which the employer withdraws," *e.g.*, 29 U.S.C. 1391(b)(2)(E)(i), "not as of the day of withdrawal." *Milwaukee Brewery*, 513 U.S. at 417-418. For instance, if the plan year follows the calendar year, the liability of an employer that withdraws on June 1, 2025, would be calculated "as of" the measurement date of December 31, 2024. See *id.* at 418. "The reason for this calculation date seems one of administrative convenience," because the plan must annually calculate its liabilities anyway. *Ibid.* (citing 29 U.S.C. 1082(c)(9) (1994), now codified at 29 U.S.C. 1084(c)(7)).

Withdrawal-liability disputes are resolved through arbitration. 29 U.S.C. 1401(a). After arbitration, the employer or plan sponsor may bring suit in federal district court "to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. 1401(b)(2).

**B. The Present Controversy**

1. Respondents are the trustees of the IAM National Pension Fund, a multiemployer pension plan "that provides retirement benefits to employees of employers who maintain collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO." Pet. App. 6a. Every year, as required by ERISA, the plan's actuary calculates the plan's UVBs as of the end of the prior year. *Id.* at 23a; see 29 U.S.C. 1084(c)(7). In November 2017, for

example, the actuary determined that, as of the end of 2016, the plan had UVBs of about $448 million, based on a discount rate of 7.5 percent and other assumptions. Pet. App. 7a, 23a.

In January 2018, the actuary met with respondents "to review assumptions and methods used in making actuarial valuation calculations." Pet. App. 7a. The actuary and respondents agreed to adopt new assumptions for purposes of "calculat[ing] withdrawal liability for employers withdrawing from the Fund during the 2018 Plan Year," including a lower discount rate of 6.5 percent. *Id.* at 7a-8a; see 22-7157 C.A. App. 144.

Petitioners are four employers that participated in the plan but withdrew in 2018 after the January meeting. Pet. App. 2a-3a. Respondents accordingly assessed their withdrawal liability using the new actuarial assumptions. *Id.* at 9a-11a & n.9. The new assumptions significantly affected the assessments: for example, petitioner M & K Employee Solutions was determined to owe about $6.2 million, whereas it would have owed about $1.8 million under the previous assumptions. See Pet. 7. Petitioners initiated arbitrations to challenge the assessments, including on the ground that the actuary had improperly relied on assumptions adopted after the measurement date of December 31, 2017. *Ibid.*

2. The arbitrators ruled for petitioners on that timing issue, based on the Second Circuit's decision in *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146, cert. denied, 141 S. Ct. 246 (2020). See Pet. App. 84a-85a; 22-7157 C.A. App. 369-371. In *Metz*, an employer withdrew from a multiemployer plan and was assessed withdrawal liability using a discount-rate assumption that was adopted after the measurement date. 946 F.3d at 148-149. The Second Circuit rejected

that approach. It held that, under ERISA, "interest rate assumptions for withdrawal liability purposes must be determined as of" the measurement date, and "[a]bsent any change to the previous plan year's assumption made by the Measurement Date, the interest rate assumption in place from the previous plan year will roll over automatically." *Id.* at 152. In accordance with *Metz*, the arbitrators issued awards concluding that petitioners were entitled to have their withdrawal liability assessed under the actuarial assumptions used in November 2017 instead of the ones adopted in January 2018. Pet. App. 9a-11a & n.9.

3. Respondents filed suits challenging the arbitral awards in the United States District Court for the District of Columbia. Two district judges, in separate decisions, vacated the arbitral awards. Pet. App. 18a-72a, 73a-119a. Both courts rejected the reasoning of *Metz* and interpreted ERISA to permit "later adoption of actuarial assumptions, so long as those assumptions are * * * based on the body of knowledge available up to the measurement date." *Id.* at 64a; accord *id.* at 92a-93a. The courts remanded the cases to the arbitrators to determine whether respondents' actuary complied with that latter limitation. See *id.* at 65a-66a, 119a.

4. The court of appeals consolidated the cases and affirmed. Pet. App. 1a-17a. It agreed with the district courts that ERISA permits plan actuaries to adopt their withdrawal-liability assumptions after the measurement date, provided the assumptions are based on information available on that date. See *id.* at 13a. That rule, the court of appeals explained, best reconciles "Congress' dual directives that unfunded vested benefits be determined 'as of' the measurement date" and that actuarial assumptions represent the "'best esti-

mate of anticipated experience.'" *Ibid.* (citation omitted). The court further concluded that "*Metz* is 'neither controlling in this jurisdiction nor persuasive.'" *Id.* at 14a (citation omitted). It found *Metz*'s reasoning inconsistent with the statutory objective of "protect[ing]" multiemployer plans, and it questioned *Metz*'s reliance on an ERISA provision, 29 U.S.C. 1394, that "expressly limits retroactivity for changes to plan rules and amendments" but not for actuarial assumptions. Pet. App. 14a & n.10.

## DISCUSSION

The court of appeals correctly held that ERISA permits a multiemployer pension plan to calculate withdrawal liability using actuarial assumptions that are adopted after the measurement date. This Court should grant certiorari to resolve the clear conflict between the decision below and *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020). As explained below, however, the United States suggests that the Court reformulate the question presented.

### A. Actuarial Assumptions For Withdrawal Liability May Be Adopted After The Measurement Date

A multiemployer pension plan may determine an employer's withdrawal liability under ERISA using actuarial assumptions adopted after the measurement date, at least if the assumptions are based on information available as of that date.

1. Under ERISA, an employer's withdrawal liability is essentially its share of the plan's unfunded vested benefits "as of" the last day of the preceding plan year, the measurement date. *E.g.*, 29 U.S.C. 1391(b)(2)(E)(i). Those calculations—the plan's UVBs and the withdrawing employer's share of those UVBs—depend on an ar-

ray of inputs. The relevant data include both "knowable values" like the "plan's assets, the number of its beneficiaries, the generosity of the plan's benefits, and the schedule by which those benefits vest," as well as "indeterminate assumptions, like the discount rate and the life expectancy of the beneficiaries." Pet. App. 96a.

By requiring withdrawal liability to be determined "as of" the measurement date, ERISA does not require that the relevant inputs actually be determined on or before that date. In this context, the term "as of" is used to describe a *retrospective* determination of some state of affairs on a prior date. See *Oxford English Dictionary* (online ed. Sept. 2024) (defining "as of" as "As things stood on (a date)"); *United States* v. *Munro-Van Helms Co.*, 243 F.2d 10, 13 (5th Cir. 1957) ("'As of' means 'as if it were.'") (citation omitted). The term simply asks what the state of the world was on the designated date. For example, if a statute directed a company to report its total number of employees "as of December 31," but the year-end personnel data only became available the following February, the company would be entitled to rely on that information in making its report, absent some other limitation in the statute. In the same way, provisions of ERISA requiring calculation of "the value of the plan assets as of the end of the plan year," *e.g.*, 29 U.S.C. 1391(c)(4)(C)(i), do not impose on plans the impracticable task of making such valuations on the last day of the year itself.

The complication here is that actuarial assumptions are not facts about the world, always existing at any given time, like a company's number of employees. Instead, they are predictive judgments that an actuary makes as the need arises. Unless the actuary made the relevant assumptions on the measurement date, no assumptions could be said to exist on that date.

Valuing property as of a past date is nevertheless a common task. "Retrospective appraisals may be required for inheritance tax (date of death), insurance claims (date of casualty), income tax (date of acquisition), law suits (date of loss), and other reasons." Am. Inst. of Real Estate Appraisers, *The Appraisal of Real Estate* 45 (8th ed. 1983). In *United States* v. *Miller*, 317 U.S. 369 (1943), for example, this Court held that the value of condemned property "is to be ascertained" for purposes of the Just Compensation Clause, U.S. Const. Amend. V, "as of the date of taking," even though the valuation "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." 317 U.S. at 374; see, *e.g.*, *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154-155 (1929) (valuation of an estate as of the decedent's demise); *Latimore* v. *Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998) ("retrospective appraisal" of a home).

When an actuary performs a retrospective valuation, it is standard practice for the actuary to select its assumptions after the measurement date. See, *e.g.*, *Okerlund* v. *United States*, 365 F.3d 1044, 1047-1049 (Fed. Cir. 2004) (discussing experts' selection of assumptions in valuing corporate stock as of a prior date). At least until recently, see p. 18, *infra*, this was standard practice in the pension-plan context as well. See Am. Acad. of Actuaries, *Selection of Actuarial Assumptions for Multiemployer Plans* (July 2020), https://perma.cc/CQ6C-CTV5 ("an actuary typically makes the final selection of actuarial assumptions after the measurement date"); Br. in Opp. 6-7. Indeed, if an actuary has not previously valued the relevant property and is hired to do so after the measurement date, it would have no choice but to select its assumptions after the measurement date.

2. In *Metz*, however, the Second Circuit established a "bright-line rule" (Pet. 2) to the contrary. "Absent any change" by the measurement date, the court held, the most recently used actuarial assumptions "roll over automatically" and are treated as "remain[ing] in effect" as of the measurement date. *Metz*, 946 F.3d at 151-152. In other words, actuarial assumptions for withdrawal-liability purposes must be selected by the measurement date. That rule is incorrect.

a. As the Second Circuit acknowledged, the ERISA provision that directly addresses actuarial assumptions for withdrawal liability, 29 U.S.C. 1393, is "silent" on when the assumptions may be selected. *Metz*, 946 F.3d at 150. And courts generally do not "read into statutes" limitations that do not appear in their text. *Romag Fasteners, Inc.* v. *Fossil Grp., Inc.*, 590 U.S. 212, 215 (2020).

If anything, moreover, the text of Section 1393 undermines the Second Circuit's rule. That section requires the actuary to choose assumptions that account for "the experience of the plan" and that represent the actuary's "best estimate of anticipated experience under the plan." 29 U.S.C. 1393(a)(1). As the D.C. Circuit explained below, "to require an actuary to determine what assumptions to use before the close of business on the measurement date" would be in serious tension with those statutory directives. Pet. App. 13a. For example, the actuary would be deprived of year-end information that became accessible only after the measurement date (or too close to that date to realistically be considered), even when the information would more fully represent "the experience of the plan" or improve the actuary's "estimate of anticipated experience under the plan." 29 U.S.C. 1393(a)(1).

b. Given those problems with relying on Section 1393, the Second Circuit in *Metz* drew its holding from other parts of ERISA. It noted that 29 U.S.C. 1394 protects employers from retroactive application of a "plan rule or amendment * * * under [29 U.S.C.] 1389 or 1391(c)" with respect to a withdrawal that predated the rule or amendment. 29 U.S.C. 1394(a). That provision, the court reasoned, evinces a "legislative intent" to prohibit "the retroactive selection of interest rate assumptions for purposes of withdrawal liability." *Metz*, 946 F.3d at 151.

But actuarial assumptions are not plan rules or amendments subject to Section 1394, Pet. App. 14a, and the Second Circuit did not suggest otherwise. Section 1394 therefore invites the opposite inference from the one drawn in *Metz*: Congress's failure to enact a similar anti-retroactivity provision for actuarial assumptions indicates that ERISA imposes no such limitation. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

Even assuming, however, that the Second Circuit's conjecture about congressional intent were correct, that court's rule would go too far. *Metz* bars an actuary from selecting its assumptions after the measurement date even if it does so before the relevant employer withdraws from the plan (which is what happened in this case, see p. 6, *supra*). See 946 F.3d at 151-152. *Metz* thus precludes actuarial assumptions that are not even retroactive in the sense covered by Section 1394.

The Second Circuit also invoked 29 U.S.C. 1021(*l*)(1), which entitles a contributing employer to obtain an estimate from the plan of its potential withdrawal liability. In the court's view, that provision is "of no value if retroactive changes in interest rate[] assumptions may be made at any time." *Metz*, 946 F.3d at 151. The court appears to have misunderstood the statute, which requires the estimate to be made "[as] if such employer withdrew on the last day of the plan year preceding the date of the request." 29 U.S.C. 1021(*l*)(1)(A). Because Section 1391 in turn requires withdrawal liability to be calculated as of the last day of the preceding plan year, "the estimated withdrawal liability is * * * calculated" under Section 1021(*l*)(1) "as of the last day of the Plan Year *two* years prior to the Plan Year during which the employer requested the estimate." Pet. App. 47a (emphasis added). So *Metz*'s rule does not ensure that the estimate is based on the same actuarial assumptions that would apply if the employer actually withdrew. See *id.* at 61a-62a, 111a-112a.

c. The Second Circuit's final point was that selecting assumptions "after the Measurement Date would create significant opportunity for manipulation and bias" because plan sponsors could "pressure actuaries" to change their assumptions so as "to assess greater withdrawal liability" on departing employers—for example, by lowering the discount rate. *Metz*, 946 F.3d at 151. But such policy concerns "generally cannot 'surmount the plain language of the statute,'" *Truck Ins. Exch.* v. *Kaiser Gypsum Co.*, 602 U.S. 268, 284 (2024) (citation omitted), which the Second Circuit conceded does not express the timing rule that the court adopted, *Metz*, 946 F.3d at 150.

In any event, the Second Circuit's manipulation concern was overstated. This Court rejected similar concerns in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). That case involved a due-process challenge to ERISA's provision requiring that, in arbitration to determine withdrawal liability, the actuary's determination of the UVBs "is presumed correct" unless a party makes certain showings. 29 U.S.C. 1401(a)(3)(B); see *Concrete Pipe*, 508 U.S. at 631-632. An employer argued that the presumption worked to deny it "a fair adjudication" because actuaries may be pressured by the "plan sponsors [who] employ them" to "come down hard on withdrawing employers." *Concrete Pipe*, 508 U.S. at 620, 632, 635.

This Court disagreed. It described actuaries as "trained professionals" who are "subject to regulatory standards" and are not "vulnerable to suggestions of bias or its appearance." *Concrete Pipe*, 508 U.S. at 632. And the Court emphasized that actuaries must also calculate the plan's liabilities for purposes of determining the funding obligations of participating employers—a context in which, by contrast with withdrawal liability, the plan would have an incentive to *minimize* its UVBs. See *id.* at 632-633; 29 U.S.C. 1084. If the actuary were to alter its assumptions to inflate withdrawal liability, it would either concomitantly increase the required contributions of participating employers (if it uses the same assumptions for funding purposes) or invite a challenge to its assumptions in arbitration (if it uses different assumptions). See *Concrete Pipe*, 508 U.S. at 633 (citing *United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan* v. *Yahn & McDonnell, Inc.*, 787 F.2d 128, 146-147 (3d Cir. 1986) (Seitz, J., dissenting in part), aff'd by an equally divided Court *sub nom. PBGC* v. *Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987)).

The same considerations undercut the Second Circuit's manipulation concerns in *Metz*. And at all events, as with the retroactivity issue discussed above, those concerns could not support a rule barring actuaries from adopting new assumptions after the measurement date but, as here, before any employer withdraws. See pp. 12-13, *supra*.

3. For the foregoing reasons, the D.C. Circuit properly declined to follow *Metz* and correctly held that ERISA permits an actuary to select its assumptions for purposes of determining withdrawal liability after the measurement date. See Pet. App. 3a. Nothing in ERISA forbids that common actuarial practice, and the most on-point provisions of the statute tend to support it. See 29 U.S.C. 1393(a).

The court of appeals added the caveat that the actuarial assumptions must still be "based on information that was available 'as of' the measurement date," and so cannot incorporate developments occurring after that date. Pet. App. 3a. Although that qualification may be correct, some authority suggests otherwise. The Actuarial Standards Board has taken the view that "[t]he actuary should select economic assumptions that reflect the actuary's knowledge as of the measurement date," but "[i]f the actuary learns of an event occurring after the measurement date that would have changed the actuary's selection of an economic assumption, the actuary may reflect this change as of the measurement date." *Actuarial Standard of Practice No. 27*, § 3.5.5 (June 2020) (emphasis omitted); but cf. *Sofco Erectors, Inc.* v. *Trustees of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 423 (6th Cir. 2021) ("ERISA does not yield to the Actuarial Standards of Practice"). In other contexts, courts have held that "[e]vents subsequent to the valuation date may, in certain circumstances, be considered in determining value as of the valuation date." *Estate of Jephson* v. *Commissioner*, 81 T.C. 999, 1002 (1983); see *Sinclair Ref. Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 697-699 (1933); *Okerlund*, 365 F.3d at 1053. It is possible that, as respondents argued in district court, the measurement date was meant to apply only "for the fixed, knowable components of the withdrawal liability calculation," not the actuarial assumptions. Pet. App. 91a; see *id.* at 49a.

That question is not at issue here, however. In this Court, petitioners' contention, consistent with *Metz*, is that respondents' actuarial firm violated ERISA by adopting its assumptions after the measurement date, not by relying on post-measurement-date developments in adopting the assumptions. See Pet. i, 1-2. Whether the actuary satisfied the D.C. Circuit's rule would remain to be resolved on remand if this Court were to deny certiorari or grant certiorari and affirm. See p. 7, *supra*.

**B. Certiorari Should Be Granted**

The petition for a writ of certiorari should be granted, but we suggest that the Court reformulate the question presented.

1. This case satisfies the Court's criteria for granting certiorari. See Sup. Ct. R. 10(a). As discussed, the decision below creates a clear conflict with the Second Circuit's decision in *Metz*. And that conflict concerns an issue of importance to the approximately 1400 multiemployer pension plans, covering about 11 million workers, across the United States. See 87 Fed. Reg. 62,316, 62,316 (Oct. 14, 2022). Actuarial assumptions tend to remain

relatively stable from year to year, see *Metz*, 946 F.3d at 150; Br. in Opp. 16, but they do sometimes change—for example, to reflect economic developments. Even relatively small changes in those assumptions can affect employers' withdrawal liability by millions of dollars. The decision below and *Metz* provide different rules on when the assumptions may be selected. Those different rules affect the universe of information that may bear on the plan's calculation of its assumptions, and thus can substantially affect the amount of withdrawal liability that multiemployer plans impose.

The dueling rules also open any determination of withdrawal liability to challenge, perhaps brought by different withdrawing employers in different circuits. If an actuary follows the decision below, its assumptions can be attacked on the theory of *Metz*. If the actuary follows *Metz*, its assumptions can be challenged for failing to satisfy the "best estimate" and other commands of 29 U.S.C. 1393(a)(1).

Furthermore, although the PBGC has initiated a rulemaking on actuarial assumptions for withdrawal liability, see n.*, *supra*, its proposed rule would not address the question presented in this case. Pursuant to 29 U.S.C. 1393(a)(2), the proposed rule would allow a plan's actuary to select a discount rate falling within a designated "spectrum" of rates without regard to the criteria of Section 1393(a)(1). 87 Fed. Reg. at 62,318. The PBGC's proposed rule does not concern other actuarial assumptions besides the discount rate, nor does it address when any assumptions must be selected.

2. Respondents emphasize (Br. in Opp. 11-13) that only the Second and D.C. Circuits have addressed the question presented. While the Court often benefits from further percolation in the courts of appeals, respond-

ents do not show that percolation is necessary to resolve the straightforward question of statutory interpretation at issue here. See pp. 8-16, *supra*; Br. in Opp. 22-27.

Respondents also assert (Br. in Opp. 16), albeit without citing documentation, that the question presented is unimportant because "actuaries of multiemployer plans have acceded to *Metz*'s timing rule by formally selecting their assumptions before the measurement date." But to the extent that is so, that is all the more reason for this Court to determine whether *Metz* is correct. As respondents explain, *Metz*'s timing rule rejects the longstanding and "'widespread actuarial practice'" of selecting assumptions after the measurement date, and it requires actuaries to select their assumptions before "complete information about the plan" as of the measurement date may be accessible. Br. in Opp. 18, 24 (citation omitted); see Actuarial Firms C.A. Amici Br. 2, 10-11. If *Metz*'s understanding of ERISA is erroneous, then actuaries should be relieved of any apprehension that their assumptions would be invalidated if they failed to follow *Metz*.

3. If the Court grants certiorari, however, we suggest that the Court reformulate the question presented. See Stephen M. Shapiro et al., *Supreme Court Practice* 6-98 (11th ed. 2019); see also, *e.g.*, *Dawson* v. *Steager*, 585 U.S. 1015, 1015-1016 (2018) (granting certiorari "limited to the question presented by the Solicitor General in his brief for the United States as *amicus curiae*"). Petitioners phrase the question as whether ERISA requires a plan to assess withdrawal liability using "the actuarial assumptions *to which its actuary subscribed at the end of the year*, or allows the plan to use different actuarial assumptions that were adopted after the end

of the year." Pet. i (emphasis added). The italicized language appears to assume *Metz*'s conclusion, which is that whatever actuarial assumptions were used most recently before the measurement date are deemed to "remain in effect" on that date and thus must be used for withdrawal liability. 946 F.3d at 151. As respondents explain (Br. in Opp. 25-26), an actuary's use of certain assumptions on one occasion does not automatically mean that those assumptions "'remain in effect,'" or that the actuary "continues to 'believe'" or subscribe to them, on an ongoing basis thereafter.

Alternatively, that aspect of petitioners' question presented could represent a factual premise that the actuary in this particular case subscribed to pre-existing assumptions on the measurement date. Petitioners highlight respondents' statement below that their pre-measurement-date assumptions had not "changed" as of the measurement date, and the actuary's description of those assumptions at the January 2018 meeting as "Current Policy." Pet. 7 (citations omitted); see Cert. Reply Br. 9 n.2. Those statements more likely meant simply that the actuary had not yet revisited the assumptions—which was the purpose of the January 2018 discussion—not that the actuary actually continued to subscribe to those previous assumptions on the measurement date. In any event, the factual premise on which petitioners' question presented could be understood to rest would render this case factbound and unimportant: a plan's actuary could avoid the issue merely by making clear that it does not "subscribe[]" to any withdrawal-liability assumptions on an ongoing basis. Pet. i.

This Court therefore should not grant certiorari on that premise. The real point of dispute between the parties and between the Second and D.C. Circuits is whether a plan's actuary can select its assumptions for withdrawal liability after the measurement date. See Pet. App. 3a (D.C. Circuit describing "[t]he issue before us" as "whether an actuary may set actuarial assumptions for a given measurement date after the measurement date"); Cert. Reply Br. 9-10 ("Petitioners' claim is * * * that [actuaries] *may not*" "'select[] assumptions after the measurement date.'") (citations omitted). If the Court grants certiorari, we therefore recommend that the question presented be reformulated to ask: Whether 29 U.S.C. 1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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