

No. 19-1336

---

---

IN THE  
**Supreme Court of the United States**

---

THE NATIONAL RETIREMENT FUND, *et al.*,

*Petitioners,*

*v.*

METZ CULINARY MANAGEMENT, INC.,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

---

**BRIEF OF *AMICUS CURIAE* NEW YORK  
STATE TEAMSTERS CONFERENCE  
PENSION AND RETIREMENT FUND  
IN SUPPORT OF PETITIONERS**

---

---

EDWARD J. MEEHAN  
MARK C. NIELSEN  
SAMUEL I. LEVIN  
GROOM LAW GROUP, CHARTERED  
1701 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
(202) 857-0620  
emeehan@groom.com

VINCENT M. DeBELLA  
*Counsel of Record*  
PARAVATI, KARL, GREEN &  
DeBELLA, LLP  
Landmarc Building  
520 Seneca Street, Suite 105  
Utica, New York 13502  
(315) 735-6481  
vdebella@pkgdlaw.com

*Counsel for Amicus Curiae*

Dated: July 15, 2020

---

---

296711



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES .....	iii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. The Second Circuit Largely Ignored the Relevant Statutory Provision and Made Up a Rule Based on Hypothetical Policy Concerns Already Addressed by the Statute .....	3
A. Section 4211’s “As Of” Requirement Allows Withdrawal Liability Assumptions to be Selected After the Last Day of the Previous Plan Year .....	3
B. The Second Circuit’s Reliance on Section 4214 Was Misplaced .....	6
C. The Second Circuit’s Policy Concerns Are Already Addressed by the Existing Statutory Scheme .....	10
D. The Second Circuit’s Reliance on Section 101 Was Misplaced .....	15

*Table of Contents*

	<i>Page</i>
II. This Court Should Review This Issue Now, Rather Than Wait For a Circuit Split to Develop .....	16
A. The Importance of Withdrawal Liability and Multiemployer Pension Plans.....	16
B. Funding Questions for a Significant Portion of the Nation’s Retirement Plans Are Worthy of This Court’s Immediate Attention .....	18
C. The Question Cannot Wait.....	19
CONCLUSION .....	23

**TABLE OF CITED AUTHORITIES**

	<i>Page</i>
<b>Cases</b>	
<i>Advocate Health Care Network v. Stapleton</i> , 137 S. Ct. 1652 (2017) . . . . .	18
<i>Bay Area Laundry &amp; Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California</i> , 522 U.S. 192 (1997) . . . . .	17
<i>Chicago Truck Drivers, Helpers &amp; Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.</i> , 698 F.3d 346 (7th Cir. 2012) . . . . .	14, 21
<i>Concrete Pipe &amp; Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California</i> , 508 U.S. 602 (1993) . . . . .	14, 15
<i>Loughrin v. United States</i> , 573 U.S. 351 (2014) . . . . .	10
<i>Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.</i> , 513 U.S. 414 (1995) . . . . .	4, 11
<i>Pac. Operators Offshore, LLP v. Valladolid</i> , 565 U.S. 207 (2012) . . . . .	11

*Cited Authorities*

	<i>Page</i>
<i>Republic Indus., Inc. v. Cent. Pennsylvania Teamsters Pension Fund</i> , 693 F.2d 290 (3d Cir. 1982) .....	17
<i>Rhoades, McKee &amp; Boer v. United States</i> , 43 F.3d 1071 (6th Cir. 1995).....	13
<i>Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.</i> , 719 F. Supp. 2d 530 (E.D. Pa 2010), <i>aff'd</i> , 444 F. App'x 571 (3d Cir. 2011) .....	12
<i>Transpro, Inc. v. Leggett &amp; Platt, Inc.</i> , 297 F. App'x 434 (6th Cir. 2008) .....	5
<i>United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.</i> , No. 1:18-CV-01905 (CJN), 2020 WL 2615536 (D.D.C. May 22, 2020) .....	14
<i>United States v. Gonzales</i> , 520 U.S. 1 (1997).....	8
<i>Vinson &amp; Elkins v. Comm'r</i> , 7 F.3d 1235 (5th Cir. 1993).....	13
<i>Wachtell, Lipton, Rosen &amp; Katz v. Comm'r</i> , 26 F.3d 291 (2d Cir. 1994) .....	13
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	10

*Cited Authorities*

*Page*

**Statutes and Other Authorities**

29 U.S.C. § 1021(l) .....	15
29 U.S.C. § 1082(c)(9).....	4
29 U.S.C. § 1084(c)(7)(A).....	4
29 U.S.C. § 1389.....	9, 10
29 U.S.C. § 1391.....	4
29 U.S.C. § 1391(c).....	9, 10
29 U.S.C. § 1393.....	8
29 U.S.C. § 1393(a)(1).....	13, 18
29 U.S.C. § 1394.....	7
29 U.S.C. § 1394(a).....	8, 9, 10
29 U.S.C. § 1394(b) .....	10
29 U.S.C. § 1399(b)(2) .....	19
29 U.S.C. § 1401(a).....	15, 19
H.R. Rep. No. 96-869 .....	8

*Cited Authorities*

	<i>Page</i>
<i>Multiemployer Plans: Their Current Circumstances in Historical Context</i> , available at <a href="https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf">https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf</a> (Sept. 29, 2017) . . . . .	17
Pension Benefit Guaranty Corporation, <i>Introduction to Multiemployer Plans</i> , available at <a href="https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans">https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans</a> (Apr. 22, 2020) . . . . .	16
Pension Benefit Guaranty Program, <i>PBGC Projections: Multiemployer Program Insolvent in FY 2025</i> , available at <a href="https://www.pbgc.gov/news/press/releases/pr18-02">https://www.pbgc.gov/news/press/releases/pr18-02</a> (May 31, 2018) . . . . .	19

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus* New York State Teamsters Conference Pension and Retirement Fund (the “New York Fund”) is a multiemployer plan based in Syracuse, New York. With approximately 35,000 participants and beneficiaries, 200 participating employers, \$1.5 billion in assets and \$4.8 billion in liabilities, the New York Fund is one of the largest multiemployer plans in the Second Circuit. The New York Fund is also the respondent in a pending withdrawal liability arbitration in which counsel for the Respondent here is attempting to invalidate, based on the decision below, a change in actuarial assumptions made in the aftermath of the 2007–2009 financial crisis.

Like many other multiemployer plans, several factors have contributed to the New York Fund’s underfunding, including: (i) a dwindling number of participating employers; (ii) the 2007–2009 financial crisis; and (iii) an inability to collect an adequate amount of withdrawal liability from certain employers which have left the Plan (due to bankruptcies, statutory limitations on how much withdrawal liability can be collected, and opportunistic decisions by employers about when to withdraw or through transactions to evade or avoid withdrawal liability). As a result, the New York Fund received approval from the Department of the Treasury in 2017 to cut benefits to participants under the Multiemployer Pension Reform Act of 2014 in order to prevent the Plan from becoming insolvent.

---

1. In accordance with Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that *amicus curiae* paid for the preparation and submission of this brief, without contributions from any counsel for a party or a party. Counsel for petitioners and for respondent were provided proper notice and have indicated their consent to the filing of this brief.



The New York Fund files this brief to further highlight the Second Circuit's mistakes in construing the statute and explain some of the likely impacts on multiemployer pension plans over the next few years if the decision below is not reversed.

### **SUMMARY OF ARGUMENT**

Section 4211 of the Employee Retirement Income Security Act ("ERISA") provides that withdrawal liability is to be calculated "as of" the last day of the prior plan year. For decades, it has been uncontroversial that this calculation, and the assumptions on which it is based, do not have to be determined by the last day of the plan year. This is because necessary information is generally not available until sometime the following year. This principle is so widely accepted that even counsel for Respondent was forced to acknowledge at oral argument that because "sometimes the information with respect to the state of the world as of that date doesn't become available until later," the calculation is "looking back" in order to "put yourself in the position you were in at that time." When the Second Circuit issued its decision, however, it disregarded this concession and ruled that assumptions must be selected by the last day of the prior plan year.

The Second Circuit based its decision largely on another provision of ERISA, Section 4214, and a variety of hypothetical policy concerns about potential manipulation and bias on behalf of pension plans and/or their actuaries. But Section 4214 does not apply to the selection of actuarial assumptions, and even if it did, the Second Circuit's rule is inconsistent with the plain text of Section 4214. And the hypothetical policy concerns identified by the Second

Circuit bear no relationship to the facts of this case, would not be meaningfully addressed by the Second Circuit's rule, and are already covered by existing provisions of ERISA.

The Second Circuit's error will interfere with the ability of actuaries to make accurate and timely withdrawal liability calculations. While actuaries will be forced to make withdrawal liability calculations based on information that is up to two years old, employers will have the benefit of taking into account more recent developments in financial markets and the economy and can make strategic choices to withdraw from plans before actuaries – under the Second Circuit's rule – are allowed to catch up. This comes at the worst possible time for multiemployer plans, many of which are underfunded, and with the federal insurance program that covers them projected to run out of money in the next few years. This Court should therefore resolve this issue now.

## **ARGUMENT**

### **I. The Second Circuit Largely Ignored the Relevant Statutory Provision and Made Up a Rule Based on Hypothetical Policy Concerns Already Addressed by the Statute**

#### **A. Section 4211's "As Of" Requirement Allows Withdrawal Liability Assumptions to be Selected After the Last Day of the Previous Plan Year**

Section 4211 of ERISA requires that withdrawal liability be calculated "as of" the last day of the previous

plan year. *See* 29 U.S.C. § 1391. This requirement is “one of administrative convenience” to allow the plan to use “figures that it must prepare in any event for [an annual] report required under ERISA.” *Milwaukee Brewery Workers’ Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995).<sup>2</sup> Like the annual report of most organizations, a multiemployer pension plan’s annual valuation requires work to be done after the end of the year in order to accurately reflect the state of the plan “as of” the last day of the previous year. Until the Second Circuit’s decision below, this had never been controversial in the 40 years since ERISA was amended to impose withdrawal liability. Indeed, counsel for Respondent Metz Culinary Management, Inc. (“Metz”) conceded this point during oral argument before the Second Circuit:

JUDGE LIVINGSTON: . . . But the statute so far as I can tell is . . . silent as to when the assumptions and methods must be set for the preceding year.

MR. ROTH: Yeah. I think the legal question is what does it mean to do the calculation as of the measurement date, right? . . . [O]ur position is . . . if you’re looking at the last day of the prior plan year you want to look at . . . the state of the world as it stood at that time. . . .

JUDGE CHIN: But sometimes the information with respect to the state of the world as of that date doesn’t become available until later.

---

2. Since the time of this Court’s decision in *Milwaukee Brewery Workers’ Pension Plan*, the annual report requirement has moved from 29 U.S.C. § 1082(c)(9) to 29 U.S.C. § 1084(c)(7)(A).

MR. ROTH: I Agree with that, Your Honor.  
And --

JUDGE CHIN: So it makes sense that you  
would look at it later.

MR. ROTH: I Agree with that, Your Honor .  
. . . You're looking back. You're trying to put  
yourself in the position you were in at that  
time. . . .

App. 20a–21a.

The district court similarly recognized that Section 4211's requirement that withdrawal liability be calculated "as of" the last day of the plan year means that assumptions "*must* incorporate data up through December 31, 2013," and that "the information necessary to make thoughtful withdrawal liability assumptions may not be entirely available before the end of the plan year, and an actuary needs time to collect, review, and synthesize that information after it is all available." App. 59a (emphasis added). The district court further explained that "ERISA does not provide that withdrawal liability is to be calculated based on assumptions and methods 'in effect' on the Measurement Date," and that "[i]n effect' and 'as of' are not the same." *Id.* 52a. The district court's construction of the phrase "as of" is consistent with how the term is generally used in the context of valuations. *See, e.g., Transpro, Inc. v. Leggett & Platt, Inc.*, 297 F. App'x 434, 441–42 (6th Cir. 2008) (affirming district court decision crediting expert testimony that "in the accounting industry . . . 'as of' is a term of art" which "establishes the point in time for which the [valuation] is calculated but

does not limit the availability date for the information used to calculate that value,” and rejecting argument that the term “as of” in a valuation contract “relates only to when the [valuation] calculation is performed”).

The Second Circuit correctly recognized that this provision was “[c]ritical to the present dispute.” App. 4a (“Critical to the present dispute, Section 1391 of the MPPAA directs plans to calculate the withdrawal charge, not as of the date of withdrawal or sometime later, but as of the last day of the plan year preceding the year during which the employer withdrew.”). But then, in a footnote, the Second Circuit summarily rejected the district court’s holding that “as of” does not mean “in effect,” because “[f]or *the reasons* stated in this opinion, however, we believe the district court’s reasoning to be unpersuasive.” *Id.* 12a n.3 (emphasis added). What reasons? Certainly none that had anything to do with the interpretation of Section 4211, which the Second Circuit never mentioned again after identifying it as “[c]ritical to the present dispute.” App. 4a. Instead, the Second Circuit focused on other provisions of ERISA – without determining whether those provisions actually applied to the issue at hand – and invented its own policy solution to problems that do not exist.

### **B. The Second Circuit’s Reliance on Section 4214 Was Misplaced**

The closest the Second Circuit came to actually analyzing the text of the statute was with respect to Section 4214 of ERISA. The Second Circuit concluded that any “retroactive” change “relating to withdrawal liability” – including the “selection of interest rate assumptions”

– was “inconsistent with Congress’s legislative intent.” App. 10a–11a. There is, however, no basis to conclude that changes to actuarial assumptions after the last day of the prior plan year are retroactive. Rather, they are designed to reflect the state of the world “as of” the last day of the prior plan year and the reality that such work cannot be completed until a subsequent date does not make their selection retroactive. Moreover, even accepting the Second Circuit’s premise, as discussed below, there are several significant flaws with its approach, including:

- Section 4214 only applies to “plan rules and amendments,” which does not encompass an actuary’s selection of interest rate assumptions.
- Even with respect to “plan rules and amendments,” Section 4214 does not set forth a *general* anti-retroactivity rule. Rather, it explicitly limits its prohibition on retroactivity to plan rules and amendments dealing with two very specific issues that are not relevant to this case.
- Although Section 4214 only prohibits changes made after an employer withdraws, the Second Circuit’s invented concept of retroactivity would prohibit changes made even before an employer withdraws.

Section 4214 only applies to “plan rules and amendments.” *See* 29 U.S.C. § 1394. Decisions about actuarial assumptions are not plan rules and amendments, *see* Pet. 12–14, and are plainly instead governed by Section 4213 – the section of ERISA appropriately titled

“Actuarial assumptions.” *See* 29 U.S.C. § 1393. Although the Second Circuit identified this as a potential flaw in its analysis, it nevertheless relied on Section 4214 without ever opining whether it actually applied to the selection of actuarial assumptions. *See* App. 11a (“Although Section 4214 does not define ‘plan rules and amendments’ and Section 4213 – unlike Section 4214 – does not specifically address retroactivity, the retroactive selection of interest rate assumptions for purposes of withdrawal liability, as endorsed by the district court, is, therefore, inconsistent with Congress’s legislative intent.”).

It would, of course, be impermissible to use comments in a bill’s legislative history to override the text of the statute passed by both houses of Congress and signed by the President. *See United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history.”). But here, there is not even a conflict between the bill’s legislative history and its plain text. The very portion of the legislative history quoted by the Second Circuit is crystal clear that the prohibition only applies to “the retroactive application of a plan rule or amendment,” and makes no mention of actuarial assumptions. *See* App. 10a (quoting H.R. Rep. No. 96-869, pt. 2 at 30). Moreover, the legislative history quoted by the Second Circuit also makes clear that the prohibition only applies to “**certain** retroactive changes in a plan’s rules.” *Id.* (emphasis added). Those “certain retroactive changes in a plan’s rules” are set forth in the statute.

Specifically, Section 4214(a) provides that plan rules and amendments under two specific sections of ERISA cannot apply retroactively. *See* 29 U.S.C. § 1394(a) (“No

plan rule or amendment adopted . . . under section 1389 or 1391(c) of this title may be applied without the employer’s consent with respect to liability for a withdrawal . . . which occurred before the date on which the rule or amendment was adopted.”). But neither of those sections are about actuarial assumptions and neither were at issue in this case. *See* 29 U.S.C. § 1389 (setting forth a “[d]e minimis rule” that reduces withdrawal liability amounts below certain thresholds); 29 U.S.C. § 1391(c) (setting forth certain permissible “methods” for determining withdrawal liability that may be established by plan amendment). If Congress intended to set forth a generally applicable anti-retroactivity rule, it obviously would not have limited the retroactivity prohibition to only two specific sections.

Nor, in claiming to rely on Section 4214, did the Second Circuit follow the statute’s explanation of what counted as retroactive. The statute is clear that a plan rule or amendment is retroactive only if it is “applied . . . to . . . a withdrawal . . . which occurred before the date on which the rule or amendment was adopted.” 29 U.S.C. § 1394(a). In other words, so long as the change is made prior to the date an employer withdraws, it is not retroactive within the meaning of Section 4214. But the Second Circuit’s invented concept of retroactivity would prohibit changes made even before an employer withdraws. Under the Second Circuit’s rule, as soon as the calendar turns to January 1, any change made during the year would be retroactive, even if it applies to a *future* withdrawal that takes place later in the year.

Finally, Section 4214(b) provides that “[t]he plan sponsor shall give notice to all employers . . . of any plan



rules or amendments adopted pursuant to this section.” *See* 29 U.S.C. § 1394(b). Although the Second Circuit began its discussion of Section 4214 by mentioning this “notice requirement,” there is no basis to conclude that the notice requirement in Section 4214(b) prohibits the retroactive application of “any plan rule or amendment with respect to withdrawal liability.” *See* App. 10a. Rather, Section 4214’s prohibition on retroactive changes is clearly laid out in subsection (a), not subsection (b).

Reading subsection (b) to prohibit any retroactive change would conflict with, and render superfluous, subsection (a)’s prohibition on retroactive changes only with respect to two specific sections of ERISA. *See* 29 U.S.C. § 1394(a) (“No plan rule or amendment adopted . . . under section 1389 or 1391(c) of this title may be applied without the employer’s consent with respect to liability for a withdrawal . . . which occurred before the date on which the rule or amendment was adopted.”). Such a result would “run[] afoul of the ‘cardinal principle’ of interpretation that courts ‘must give effect, if possible, to every clause and word of a statute.’” *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

### **C. The Second Circuit’s Policy Concerns Are Already Addressed by the Existing Statutory Scheme**

The Second Circuit’s analysis seems to have been motivated, in significant part, not by the text of the statute, but by hypothetical policy concerns. Even if those hypothetical policy concerns were justified, it is not the job of the federal courts to engage in “judicial lawmaking”

instead of applying the statute Congress actually wrote. *See* Pet. 9–10; *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 220 (2012) (“policy concerns cannot justify an interpretation . . . that is inconsistent with the text of the [statute]”). Moreover, as discussed below, the hypothetical policy concerns articulated by the Second Circuit are already addressed by the existing statutory scheme.

The first set of policy concerns articulated by the Second Circuit is:

In the context of multiemployer pension plans, interest rate assumptions cannot be altered daily and must have a degree of stability. Nor, in that context, do interest rate assumptions remain open forever and subject to retroactive changes in later years. Indeed, the Plan itself used the 7.25% [interest] rate for several years [as reflected in] its annual reports to the government. . . .

App. 9a. No multiemployer plan has ever “altered” “interest rate assumptions” on a “daily” basis, or anything even close to that. Nor could they do so. As this Court explained in *Milwaukee Brewery Workers’ Pension Plan*, the reason the statute provides for withdrawal liability to be calculated “as of” the last day of the plan year is to “permit[] a plan to base the highly complex calculations upon figures that it must prepare in any event for [an annual] report required under ERISA,” and “avoid[] the need to generate new figures tied to the date of actual withdrawal.” 513 U.S. at 418. Changing actuarial assumptions multiple times within a year – something that there is no evidence has ever occurred, and did not

occur in this case – would almost certainly be a violation of Section 4211, which requires that all withdrawals in a given year be calculated “as of” the same date. The Second Circuit therefore did not need to invent a rule requiring the assumptions to be made prior to the last day of the previous plan year to prevent this hypothetical abuse.

Nor can the Second Circuit’s rule be justified by its concern that “interest rate assumptions [should not] remain open forever and subject to retroactive changes in later years.” App. 9a. The district court correctly recognized that other decisions already establish “that withdrawal liability calculations made in a prior plan year may not be retroactively revised . . . But, that is not the scenario before this Court. At issue here is whether an actuary must choose her withdrawal liability assumptions by the Measurement Date.” App. 66a–67a n.20. Indeed, the case the district court cited confirms that the Second Circuit’s invented concept of retroactivity is both unnecessary and contrary to longstanding precedent and practice. In *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, “[i]n the course of his preparation of the Plan’s 2002 actuarial report during 2003, the Plan actuary . . . discovered a[n] . . . ‘error’” that existed in prior actuarial reports. 719 F. Supp. 2d 530, 546 (E.D. Pa 2010), *aff’d*, 444 F. App’x 571 (3d Cir. 2011). The court held that making changes to actuarial reports for prior years (i.e., 2000 and 2001) would be impermissibly retroactive – but did not hold that correcting the error for the 2002 report during 2003 would be retroactive. *Id.* at 547–51. The Second Circuit entirely ignored the district court’s thoughtful and correct analysis of this issue.

The second set of policy concerns articulated by the Second Circuit is:

Nothing would prevent trustees from attempting to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers than would have been the case if the prior assumptions and methods actually in place on the Measurement Date were used. Actuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent.

App. 12a. But the statute, this Court's precedent, and even the Second Circuit's own precedent already establish that a plan's trustees cannot interfere in the selection of actuarial assumptions. Section 4213 requires that withdrawal liability calculations be based on assumptions that "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. 1393(a) (1). The Second Circuit – along with every other Court of Appeals to address the issue – has made clear 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." *Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291, 296 (2d Cir. 1994). *See also Vinson & Elkins v. Comm'r*, 7 F.3d 1235, 1238 (5th Cir. 1993); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1073–75 (6th Cir. 1995).<sup>3</sup>

---

3. Although these cases arose under the Internal Revenue Code, courts have applied these holdings to the virtually identical

Moreover, as this Court has made clear, the “actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards.” *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 632 (1993). While the Second Circuit recited this portion of *Concrete Pipe*, it brushed it aside because of the substantive nature of the assumptions that the actuary selected in this case. *See* App. at 12a–14a (expressing concern about “[t]he opportunity for manipulation and bias . . . where funds use different interest rate assumptions for withdrawal liability and minimum funding purposes”). This conflates two distinct issues: *when* an actuary may select assumptions, and *what* assumptions an actuary may select. And, as the Petition correctly observes, the Second’s Circuit’s rule does nothing to prevent an actuary from selecting assumptions for withdrawal liability that differ from those used for minimum funding. *See* Pet. 26–27 (“Creating a hard and fast deadline by which assumptions must be set does not fix the purported problem. Instead, it merely moves the time period for bias and manipulation to before the Measurement Date.”).

Moreover, the issue of whether it was permissible to use different assumptions for withdrawal liability and minimum funding was not before the Second Circuit.

---

“best estimate” requirement with respect to withdrawal liability under ERISA. *See, e.g., Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 355 (7th Cir. 2012); *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, No. 1:18-CV-01905 (CJN), 2020 WL 2615536, at \*11 (D.D.C. May 22, 2020).

But if that issue had been before the Second Circuit, it is important to note that the statute already provides a mechanism for challenging the substantive nature of the selected assumptions. *See* 29 U.S.C. § 1401(a) (providing that such a dispute is to be “resolved through arbitration” and that a “determination of a plan’s unfunded vested benefits for a plan year . . . is presumed correct unless a party contesting the determination shows . . . that . . . the actuarial assumptions and methods used in the determination were . . . unreasonable”); *Concrete Pipe*, 508 U.S. at 635 (explaining that the “employer’s burden . . . is . . . to show that the . . . assumptions . . . would not have been acceptable to a reasonable actuary”). There was therefore no need for the Second Circuit to invent a rule in an attempt to prevent against unreasonable or biased actuarial assumptions, because the statute already prohibits both.

#### **D. The Second Circuit’s Reliance on Section 101 Was Misplaced**

Finally, the Second Circuit seemed to believe that its holding was necessary to preserve the efficacy of ERISA Section 101(l), which requires that, “upon written request,” plans provide employers with a notice of their estimated withdrawal liability. *See* 29 U.S.C. § 1021(l). But the Second Circuit’s holding does nothing to enhance the efficacy of Section 101(l).

Metz withdrew from the Plan on May 16, 2014. App. 3a. The Second Circuit seemed to be under the impression that Metz was entitled to an estimate of what its withdrawal liability would have been for its May 16, 2014 withdrawal, and that unless the Plan was required to finalize its

actuarial assumptions prior to the close of the plan year on December 31, 2013, the estimate Metz received would have been out of date – and, therefore, “of no value.” *See* App. 12a. But that is not how the notice provision works. The estimate Metz was entitled to, in 2014, was of what its withdrawal liability would have been had it withdrawn in 2013 – which would have been calculated “as of” December 31, 2012. *See* Pet. 11–12. In other words, Metz’s estimate would have already been a year old, such that requiring the Plan to finalize its assumptions for a 2014 withdrawal during 2013 would have had no impact on the withdrawal liability estimate Metz could have received under Section 101(l). The district court carefully analyzed all of this, and correctly explained that requiring assumptions to be selected “by the Measurement Date would not improve employer’s ability to gauge their expectations regarding withdrawal liability assessment; the estimates provided to them will always be lagging as they are statutorily required to be based on a prior year.” *See* App. at 65a–66a. But the Second Circuit simply ignored this point, without explanation.

## **II. This Court Should Review This Issue Now, Rather Than Wait For a Circuit Split to Develop**

### **A. The Importance of Withdrawal Liability and Multiemployer Pension Plans**

“There are about 1,400 multiemployer defined benefit pension plans, covering about 10 million participants.” Pension Benefit Guaranty Corporation, *Introduction to Multiemployer Plans*, available at <https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans> (Apr. 22, 2020). As the Petition notes, more than 90 percent

of the plans are underfunded, and some estimates put their collective shortfall in the neighborhood of half a *trillion* dollars. See Pet. 8. Employers who leave underfunded plans are generally required to pay withdrawal liability. See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 195 (1997). The accurate calculation of withdrawal liability in accordance with sound principles of actuarial practice is extremely important. In addition to these calculations' direct effect on withdrawing employers, they also determine, in significant part: (i) whether plans will have enough money to pay benefits; (ii) whether employers will be incentivized to withdraw from plans now and escape future liability; and (iii) how much money other employers who remain in the plan will be required to pay in ongoing contributions or for their own future withdrawals.

In addition to the approximately 10 million participants who rely on the collection of accurate amounts of withdrawal liability to ensure that they will receive the hard-earned retirement benefits they are entitled to, there are also approximately 200,000 businesses<sup>4</sup> who rely on the collection of withdrawal liability. See *Republic Indus., Inc. v. Cent. Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 292 n.1 (3d Cir. 1982) (explaining that one of the purposes of withdrawal liability is “to ensure . . . that a withdrawing employer will continue to fund its proportional share of the plan obligations incurred

---

4. See *Multiemployer Plans: Their Current Circumstances in Historical Context*, page 15, available at <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf> (Sep. 29 2017) (providing estimate of number of participating employers in multiemployer plans).



during its association with the plan, rather than shift those obligations to the remaining contributing employers or to the Pension Benefit Guaranty Corporation, the federal insurer of multiemployer plans”). While some of these businesses are large publicly traded companies, the vast majority are small and medium-sized businesses. If withdrawing employers do not pay an amount that accurately reflects a plan “actuary’s best estimate of anticipated experience under the plan,” 29 U.S.C. 1393(a)(1), employers that remain in the plan will frequently be required to pay more than their fair share of the benefits. This already has forced some small and medium-sized businesses into bankruptcy because they cannot afford to pay for both their own employees’ pensions *and* those of other employers who already withdrew and paid less than their fair share – and thousands more could potentially face the same fate.

**B. Funding Questions for a Significant Portion of the Nation’s Retirement Plans Are Worthy of This Court’s Immediate Attention**

The Second Circuit’s decision upsets decades of actuarial practice and understanding of ERISA and changes the rules for determining how to pay for retirement benefits for a significant portion of the Nation’s retirement plans. Four years ago, this Court was also presented with a question regarding how to pay for retirement benefits for a significant portion of the Nation’s retirement plans, with appellate decisions similarly disregarding decades of practice and understanding of ERISA. This Court granted certiorari “[i]n light of the importance of the issue” and unanimously reversed. *See Advocate Health Care Network v. Stapleton*, 137 S.

Ct. 1652, 1657 (2017) (construing the scope of ERISA’s “church plan” exemption). There was no circuit split. To the contrary, all three Courts of Appeals to address the issue were in agreement – with each of the three panels issuing unanimous opinions, each of which affirmed the respective district court decisions.

### C. The Question Cannot Wait

The assessment of withdrawal liability at issue in this case was made on June 16, 2014, and a petition for a writ of certiorari was not filed until May 29, 2020 – almost six years later. It is a long and winding path for most withdrawal liability disputes to get to the Supreme Court, as ERISA provides for an internal review process at the plan level, followed by mandatory arbitration, 29 U.S.C. §§ 1399(b)(2), 1401(a), before the case can proceed to a federal district court, and then a court of appeals.

Given the unprecedented nature of the Second Circuit’s holding, which adopted a position that had been conceded by counsel for Metz, most of the cases raising this issue are still in the internal review and mandatory arbitration phases. Accordingly, by the time another case presenting this issue reaches this Court, more multiemployer plans will have become insolvent and the federal insurance program for multiemployer plans will likely have run out of money. *See Pension Benefit Guaranty Program, PBGC Projections: Multiemployer Program Insolvent in FY 2025*, available at <https://www.pbgc.gov/news/press/releases/pr18-02> (May 31, 2018) (“[T]here remains a significant chance the program will run out of money during FY 2024. The likelihood the program will remain solvent after FY 2026 is now less than 1 percent.”).

These projections were made before the “current economic and health-related crises gripping our Nation,” which put multiemployer plans “at risk of sliding even more quickly towards insolvency.” *See* Amicus Brief of Horizon Actuarial Services, LLC, at 3.

At arguably the most critical time in the history of multiemployer pension plans and for the collection of withdrawal liability, and with rapidly evolving economic conditions, the decision below will force actuaries to make critical calculations based on stale information. To illustrate just how stale this information could be, consider the present circumstances of 2020 – which has been and will likely continue to be a tumultuous year in financial markets and the broader economy. Under the Second Circuit’s rule, the assumptions in place for withdrawals that occur in 2020 must have been selected prior to the end of 2019. But the most recent full-year data available during 2019 would be as of the end of 2018. That means that, as of the end of 2020, a plan’s assumptions could still be based on the state of the world as of the end of 2018 – and it would not be until 2022 that a plan’s actuary could fully take into account what occurred during 2020.

The impact of the Second Circuit’s decision, however, is entirely one-sided. While actuaries must continue to base calculations at the end of 2020 on information from 2018, employers face no such restrictions in deciding whether or when to withdraw. They can take into account new information in deciding to opportunistically time their withdrawals if doing so is likely to result in lower withdrawal liability. Meanwhile, employers who are not trying to game the system and who withdraw in the ordinary course of business could in some instances face higher withdrawal liability because of stale

information. And employers who would otherwise remain in multiemployer plans may wonder whether they should continue to be part of a system that allows for increasing amounts of gamesmanship, at their expense, by other employers.

Moreover, as the Petition notes, actuaries will face the “Hobson’s choice” of “(i) following the Second Circuit’s decision and violating their statutory and professional obligations, or (ii) adhering to the statute and [Actuarial Standard of Practice] 27 while disregarding the Second Circuit’s decision.” Pet. 25. This Hobson’s choice is also a gold mine for withdrawing employers, with plans left in a damned if you do, damned if you don’t situation. If an actuary follows the decision below, a withdrawing employer could argue that it was unlawful to do so because, as the district court concluded here, that would violate the “best estimate” standard. *See* App. 51a (“[T]o satisfy Section 4213, actuaries must take into account the full experience of the plan . . . and ultimately provide their *best* estimate of unfunded vested benefits in light of the plan’s experience and the actuary’s reasonable expectations. An actuary can only do so by incorporating data from the entirety of the most recent preceding plan year.”). And, under existing precedent, the fact that the plan or the actuary was trying, in good faith, to comply with a court decision may not offer any protection. *See Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 698 F.3d at 356–57 (holding that an actuarial firm violated the statute by not applying what it believed to be its “best estimate” based on “anxiety” and “confus[ion] by the Supreme Court’s decision in *Concrete Pipe*”). Of course, if an actuary does not follow the decision below, a withdrawing employer could argue

that too was unlawful. This additional uncertainty, the ensuing litigation costs, and the settlement leverage given to employers will irreparably exacerbate the challenges facing multiemployer plans over the coming years.

**CONCLUSION**

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

EDWARD J. MEEHAN  
MARK C. NIELSEN  
SAMUEL I. LEVIN  
GROOM LAW GROUP, CHARTERED  
1701 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
(202) 857-0620  
emeehan@groom.com

VINCENT M. DEBELLA  
*Counsel of Record*  
PARAVATI, KARL, GREEN &  
DEBELLA, LLP  
Landmarc Building  
520 Seneca Street, Suite 105  
Utica, New York 13502  
(315) 735-6481  
vdebella@pkgdlaw.com

*Counsel for Amicus Curiae*