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,

Respondent.

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

BRIEF FOR AMICUS CURIAE
CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITIONERS

JORDAN L. VON BOKERN
MARIEL A. BROOKINS
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN
Counsel of Record
GREGORY OSSI
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W.
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

Page(s)

IN THE

Supreme Court of the United States

No. 23-1209

M & K EMPLOYEE SOLUTIONS, LLC, et al.,

Petitioners,

v.

TRUSTEES OF THE IAM NATIONAL PENSION FUND,

Respondent.

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

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, like this one, involving issues of national concern to the business community.

The Chamber has a strong interest in promoting predictability and certainty for its many members who are now, or may be in the future, faced with withdrawal liability as a contributing employer to a multiemployer pension plan. The decision below, if adopted by this Court, would seriously impair the ability of employers to make informed economic decisions about continued participation in multiemployer pension plans. Congress directed that a withdrawing employer's liability must be determined as of the end of the year before the withdrawal, which is known as the "measurement date." But under the D.C. Circuit's decision, employers considering whether to withdraw from a plan cannot rely on the actuarial assumptions made by a plan's actuary before that date, including, most importantly, its understanding of future interest rates. Instead, the decision allows the plan to make changes to these assumptions months or even years later, which can dramatically increase an employer's liability and effectively do so retroactively.

Even a small variation in the interest rate assumption can substantially alter the amount of withdrawal liability an employer owes upon exiting a plan. Timing is therefore critical because employers cannot withdraw from multiemployer pension plans without agreement from their employees through negotiations with their collective bargaining representative. An employer cannot meaningfully bargain for such an agreement without a fair estimate of its withdrawal liability, which is a critical factor in weighing the total cost of retirement benefits. The Chamber has a strong interest in promoting this certainty and predictability, which will benefit plans and workers alike. It therefore urges the Court to reverse the judgment below.

SUMMARY OF THE ARGUMENT

The most important factor in determining an employer's withdrawal liability is the interest rate assumption used in calculating the unfunded vested benefits of a multiemployer pension plan. Even a small change in that rate can dramatically increase employers' withdrawal liability, which can run into the millions—or even billions—of dollars. An employer's decision to withdraw requires careful analysis, using the latest information from the plan. It is therefore critical that employers be able to rely on the information and assumptions used and reported by the plan in advance of the actual withdrawal date. Yet the D.C. Circuit held below that a plan may use a different interest rate (or any other actuarial assumption) than that which it adopted as of the end of the prior year, which Congress mandated as the measurement date for the next year's withdrawal liability.

The D.C. Circuit's rule, if adopted by this Court, would effectively nullify Congress's careful adoption of a measurement date that *precedes* an employer's decision to withdraw. In drafting the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Congress considered different measurement dates, including one that would have allowed plans to measure employers' withdrawal liability after they had withdrawn, but Congress definitively mandated that the measurement date must be the end of the plan year preceding the withdrawal. By doing so, Congress ensured that employers could reasonably estimate their withdrawal liability before they made a decision whether to withdraw. Moreover, the decision below, which allows actuarial assumptions to be changed retroactively, is contrary to the statutory requirement that all such assumptions must embody the actuary's "best estimate" as of the measurement date, which this Court has held is critical to ensuring that trustees will not be able to improperly influence those decisions.

As the Pension Benefit Guaranty Corporation ("PBGC") informed this Court more than 30 years ago, the statutory measurement date requires plans to set their actuarial assumptions in advance of the withdrawal of any employer to whom they will apply. The interpretation adopted below undermines this much-needed certainty for employers by allowing enormous unforeseen withdrawal liability to be retroactively imposed potentially years *after* that withdrawal, in direct contravention of Congress's mandate that such liability be determined using actuarial assumptions as of the end of the year *before* that withdrawal.

Such retroactive alteration in liability is not only contrary to Congress's expressed intent, but it is also untenable for employers, which need a predictable calculation of their potential withdrawal liability to make critical business decisions, including collective bargaining. Allowing a plan to retroactively change the fundamental assumptions underlying that liability severely hampers a participating employer's ability to plan for the future. Some employers may decide not to participate in a plan if they cannot reasonably predict their withdrawal liability. Others already participating may decide to reduce or alter benefits to account for this unpredictable risk.

Moreover, participating in a multiemployer plan is a product of collective bargaining that involves give-and-take between the employer and the employees' bargaining representative. If a plan can retroactively change actuarial assumptions, then employers will be unable to effectively negotiate over crucial economic issues such as wages and benefits. This will be detrimental not only to employers, but also to plans, employees, and their beneficiaries. By contrast, requiring actuarial assumptions to be made as of the measurement date preceding any withdrawal will not burden plans or their actuaries. If an actuary reasonably believes a change in assumptions is warranted, it will be able to alter those assumptions at least annually, provided that those changes are not applied retroactively to withdrawing employers.

The Court should therefore reverse the judgment below, and return the predictability and certainty that Congress intended when it set the measurement date for assessing employer withdrawal liability.

ARGUMENT

I. THE D.C. CIRCUIT'S INTERPRETATION EFFECTIVELY NEGATES CONGRESS'S STATUTORY DATE FOR MEASURING WITHDRAWAL LIABILITY AND RUNS AFOUL OF THE "BEST ESTIMATE OF ANTICIPATED EXPERIENCE" RULE IN 29 U.S.C. § 1393(A)(1).

A. Congress Addressed Withdrawal Liability Uncertainty By Requiring That All Actuarial Assumptions And Methods Be Fixed And In Place As Of A Date That Precedes An Employer's Withdrawal.

Withdrawal liability is a statutory requirement, created when Congress amended the Employee Retirement Income Security Act of 1974 ("ERISA") in 1980 through the MPPAA. Withdrawal liability is not a penalty but rather the calculated cost, as of a date certain, of an employer's fair share of a multiemployer pension plan's unfunded vested benefits. As this Court has explained, the purpose of this requirement was to "transform[] what was only a risk * * * into a *certainty*." *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417 (1995) (emphasis added); *see also Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984) (withdrawal liability is a "fixed and certain debt to the pension plan").

As a mathematical exercise, when an employer withdraws from a multiemployer plan, the plan's actuary must first determine the present value of the plan's liability for vested benefits. *See* 29 U.S.C. § 1393(c)(A); *see also Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508

U.S. 602, 609 (1993). In the absence of PBGC regulations governing the actuarial assumptions and methods to be applied to determine such present value (and there are none), the plan's actuary must use assumptions that in the aggregate are reasonable, and constitute "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

After calculating the present value of vested benefits, the actuary then calculates the unfunded portion of those benefits by deducting the value of pension plan assets. *See id.* § 1393(c)(B). The last step in the calculation exercise is to then allocate a portion of the resulting sum to the withdrawing employer, using one of several statutory approved methods. *Concrete Pipe*, 508 U.S. at 610.

These calculations necessarily require that the actuary use a particular point in time to determine the required values. For withdrawal purposes that point in time is known as the "measurement date," and it is the end of the plan year preceding the plan year in which the employer withdraws. *See* 29 U.S.C. § 1391(b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)(i); *see also Milwaukee Brewery*, 513 U.S. at 418; *Nat'l Ret. Fund* v. *Metz Culinary Mgmt., Inc.*, 946 F.3d 146, 148 (2d Cir. 2020) ("*Metz*").

The measurement date is, by design, a bright-line point by which plans and employers must have the information required to determine withdrawal liability. *See* 29 U.S.C. § 1391(b), (c). As noted by this Court in *Milwaukee Brewery*, even though "[o]ne might expect § 1391 to calculate a withdrawal charge that equals the withdrawing employer's fair share of a plan's underfunding as of the day the employer withdraws," the statute instead "instructs a plan to make the withdrawal charge calculation, not as of the day of withdrawal, but as of the last day of the plan year preceding the year during which the employer withdrew—a day that could be up to a year earlier." 513 U.S. at 418-19 (emphases omitted).

Indeed, when drafting the MPPAA, Congress considered several possibilities for the measurement date, including the last day of the withdrawal year (which would have allowed for retroactive, post-withdrawal calculations), before fixing it where it now resides: the end of the year preceding the withdrawal. *See id.* at 429-30 (discussing legislative proposals relevant to the measurement date referred to by the Court as the valuation date). As described by this Court, under that measurement date chosen by Congress, "the withdrawal charge for an employer withdrawing from an underfunded plan * * * equals that employer's fair share of the underfunding *as calculated on* December 31" of the year before. *See id.* at 418 (emphasis added).

That Congress specifically chose to set the measurement date at a time before the withdrawal instead of setting it on the date of withdrawal or at the end of the year of withdrawal shows Congress's intent to inject certainty, predictability, and consistency in withdrawal-liability calculations. Those objectives are evident in other related provisions in the MPAA regime. For example, employers are entitled not only to an estimate of their withdrawal liability every twelve months, but also to a vast array of relevant financial and actuarial information about a multiemployer pension plan. *See* 29 U.S.C. § 1021(k)(1), (*l*). The MPPAA also prohibits multiemployer plans from retroactively applying plan rules and amendments after an employer's withdrawal, and further requires those rules and amendments be applied uniformly to all employers in the plan. *See id.* § 1394. These provisions underscore Congress's intent to give employers predictability, certainty, and consistency in understanding and calculating that liability.

Those objectives are undermined if plans and their actuaries can change their actuarial assumptions after the measurement date and then apply them retroactively to the measurement date. Yet that is exactly what the D.C. Circuit authorized a plan to do. Under the D.C. Circuit's approach, nothing precludes plan actuaries from changing their assumptions after the withdrawal itself, which could result in very significant increases in withdrawal liability.

B. The D.C. Circuit's Ruling Is Inconsistent With This Court's Decision In *Concrete Pipe* And The "Best Estimate Of Anticipated Experience" Requirements Of 29 U.S.C. § 1393(a)(1).

The D.C. Circuit's rule is also inconsistent with another concern that this Court has made clear needs to guide construction of the MPPAA regime—ensuring that the statutory rules are construed in a manner to eliminate the potential for bias in the selection of actuarial assumptions. In *Concrete Pipe*, this Court addressed due process and other constitutional challenges to the MPPAA regime, including a due process challenge to the presumption of correctness that applies to actuarial assumptions selected by plan actuaries. *See* 508 U.S. at 631-36. In addressing such challenges the Court noted the potential for bias in management of plans, observing that trustees may be "vulnerable to suggestions of bias or its appearance." *Id.* at 632. The Court was also cognizant that trustees could "exercise[] * * * influence over an actuary whose initial assumptions it disliked." *See id.* at 633 n.19. The Court ultimately determined that these concerns fell short of constitutional infirmity, but this was in large measure because the Court concluded that actuarial-practice standards and the requirement in 29 U.S.C. § 1393(a)(1) that the actuary select assumptions that reflect the actuary's "best estimate of anticipated experience," would sufficiently constrain actuaries in their selection of assumptions to protect against a due process violation. 508 U.S. at 632-36.

Indeed, in *Concrete Pipe*, the Court noted that "arguably the most important [actuarial] assumption" in the withdrawal calculation is the discount rate selected by plan actuaries to present value the future payment of vested benefits. *See id.* at 633. It held that the discount rate for withdrawal liability ordinarily should be the same rate that the actuary uses for minimum funding purposes. *Id.* This makes sense, because actuaries select the discount rate for both minimum funding and withdrawal liability based on the investment return assumption on the same pool of assets—the assets in the plan's trust—that will pay for vested benefits over the coming years. *See United Mine Workers of Am. 1974 Pension Plan* v. *Energy W. Mining Co.*, 39 F.4th 730, 738 (D.C. Cir. 2022); *Sofco Erectors, Inc.* v. *Trs. of the Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 418-19 (6th Cir. 2021).

In this case, the discount rate assumption to value vested benefits was changed after the measurement date and applied retroactively. A change in the discount rate, from 7.5% to 6.5% resulted in a more than threefold retroactive increase in the plan's UVBs, from $935 million to $3 billion. *See* Br. for Petitioners at 11. Similarly, in *Metz*, after an employer withdrew from a pension fund, the trustee retroactively changed the discount rate from 7.25% to 3.25%, which nearly quadrupled the employer's withdrawal liability. 946 F.3d at 148-49. Even small changes in the discount rate to value vested benefits can thus impose tens of millions or even billions of dollars in additional liability on withdrawing employers.

If, as of December 31 of the year prior to a withdrawal, the "best estimate" of a plan actuary is that a plan's investment portfolio will return 7.5% annually over the long-term and the resulting discount rate for withdrawal liability is 7.5%, that actuary should not be allowed—for any reason—to *thereafter* decide that the same portfolio will only return 6.5% over the long haul and retroactively state that it was his or her best estimate as of that prior December 31. As explained in even more detail below, to construe the MPPAA to allow such a result would effectively mean that the prior-year measurement date rule has no force and the "best estimate of anticipated [plan] experience" requirement in 29 U.S.C. § 1393(a)(1) is easily manipulable. The D.C. Circuit's construction gives a green light to the potential exercise of plan bias that this Court in *Concrete Pipe* took pains to avoid in order to sidestep due process concerns. To be sure, if for a variety of sensible reasons a multiemployer plan decides to modify its investment portfolio to take less risk and invest more conservatively, it is appropriate for the plan's actuary to exercise actuarial judgment after that modification and similarly develop a more conservative withdrawal discount rate based on that revised portfolio. But what the actuary cannot do is then assume that such an investment portfolio actually existed as of the prior year's end if that was not the actual experience at that time.[2]

Congress selected a specific date for determining a withdrawing employer's liability. Applying a bright-line requirement that all actuarial assumptions and methods need to be in place as of that specific date, and cannot be imposed retroactively, is part of the necessary balance in the MPPAA. With a rule that precludes using actuarial assumptions changed after the measurement date, neither the plan nor the actuary can alter those assumptions after an employer withdraws, which appropriately balances fairness and certainty to the plan and to the employer.

C. As The PBGC Previously Informed This Court, Actuarial Assumptions Upon Which Withdrawal Liability Is Based Must Be Set Before The Measurement Date.

More than 30 years ago, the PBGC informed this Court that, as petitioners and the Chamber now

---

[2] As several circuit courts have ruled, the "best estimate" requirement of 29 U.S.C. § 1393(a)(1) prohibits the actuary from using an interest rate assumption that is not based on the actual characteristics of the plan. *See United Mine Workers*, 39 F.4th at 742; *Sofco Erectors*, 15 F.4th at 422 (noting that the interest rate cannot be dictated by "the future investment portfolio of the plan") (citation omitted); *GCIU-Employer Ret. Fund* v. *MNG Enters., Inc.*, 51 F.4th 1092, 1099 (9th Cir. 2022).

contend, the actuarial assumptions upon which withdrawal liability is based must be set by the measurement date and not thereafter. This position directly contradicts the D.C. Circuit's interpretation as well as the Solicitor General's recent about-face in his certiorari-stage brief in this case.

In *Concrete Pipe*, counsel for the PBGC expressly stated to the Court that the actuaries who make the assumptions upon which withdrawal liability is determined "*are required by law to set these assumptions in advance of the withdrawal of any employer to whom they will apply*." Transcript of Oral Argument at 42, *Concrete Pipe*, 508 U.S. 602 (No. 91-904) (emphasis added). The "law" that counsel referred to was 29 U.S.C. § 1391, which has remained unchanged since its enactment in all ways pertinent to this case. And the meaning of this statement was also clear: Section 1391 requires that the assumptions in place on the measurement date must be used to determine the withdrawal liability of employers that withdraw in the following year, such that the assumptions will always be "set" by the actuary "in advance of the withdrawal of any employer to whom they will apply." *Id.* Moreover, as the PBGC's counsel further stressed, under ERISA, "the assumptions have to be the actuary's best estimate" when they are set. *See id.*

The PBGC's statement was correct then and is correct now. The actuary will neither be biased against a withdrawing employer nor engaging in adjudication of that employer's liability because the actuary must employ its best estimate of actuarial assumptions that are "set" *before* an employer withdraws, *i.e.*, by the measurement date. The statute's command that the actuary and trustee determine withdrawal liability as of the measurement date is therefore violated when plans base withdrawal liability on actuarial assumptions that were later changed after that date.

D. Allowing Plans To Substantially Increase Withdrawal Liability By Changing And Retroactively Applying Their Actuarial Assumptions After The Measurement Date Would Effectively Render The Prior-Year Measurement Date Rule Meaningless.

There is no clear statute of limitations for a plan's assessment of withdrawal liability. Rather, withdrawal liability must be assessed "[a]s soon as practicable." 29 U.S.C. § 1399(b)(1). Even if the MPPAA's six-year statute of limitations for actions to collect assessed withdrawal liability, *id.* § 1451(f)(1), were applicable to the assessment of withdrawal liability in the first instance, that is a considerable amount of time before a plan would require its actuaries to calculate withdrawal liability. And whether a withdrawal occurs is solely determined by the plan's trustees, who again may have at least six years to make their decision. *See, e.g.*, *Allied Painting & Decorating, Inc.* v. *Int'l Painters & Allied Trades Indus. Pension Fund*, 107 F.4th 190, 196-97 (3d Cir. 2024).

Under the D.C. Circuit's interpretation, plans are free to use actuarial assumptions changed at any time, even years later, potentially resulting in enormous retroactive increases in withdrawal liability. There is also no effective restriction on when the actuary has to make the selection of the interest rates. Thus, a plan that had no withdrawals for many years could wait until an actual withdrawal before the actuary would need to select any actuarial assumptions governing the withdrawal.

This interpretation effectively renders meaningless Congress's direction that withdrawal liability be determined as of a measurement date that occurred in the past. By selecting that date, rather than no date at all or a date that is coterminous with or postdates the employer's withdrawal, Congress provided employers considering withdrawal with an understanding of the liability that decision would entail. Yet under the D.C. Circuit's interpretation, an employer could make a decision to withdraw based on one understanding of its withdrawal liability and then be blindsided, years later, with an enormous retroactive increase in that liability, possibly in the tens or even hundreds of millions of dollars. Whereas Congress intended the MPPAA to "transform[] what was only a risk * * * into a certainty," *Milwaukee Brewery*, 513 U.S. at 417, the D.C. Circuit's interpretation only creates more risk. Not only does that interpretation effectively eviscerate Congress's choice of a measurement date that precedes any withdrawal, but, as next explained, it threatens to undermine employer participation in plans and therefore the plans' long-term solvency.

II. THE D.C. CIRCUIT'S INTERPRETATION PERPETUATES THE HARMFUL UNCERTAINTY THAT CONGRESS ELIMINATED THROUGH THE MEASUREMENT DATE.

A. A Bright-Line Measurement Date For All Actuarial Assumptions Provides Certainty And Predictability For Employers And Pension Plans.

In adopting its interpretation, the D.C. Circuit focused, in part, on broad policy declarations of the MPPAA. *See* Pet. App. 14a. A closer review of these policies, however, undermines that court's ruling. The MPPAA's objectives include "foster[ing] and facilitat[ing] interstate commerce" and "alleviat[ing] certain problems which tend to discourage the maintenance and growth of multiemployer pension plans." 29 U.S.C. § 1001a(c)(1)-(2). Having a date certain upon which an employer can rely in determining the amount of withdrawal liability meets these objectives. The same cannot be said of the D.C. Circuit's interpretation, which allows plans to change key actuarial assumptions months or even years down the road.

By specifically considering—and ultimately rejecting—a measurement date set at the end of the withdrawal year, *see Milwaukee Brewery*, 513 U.S. at 429-30, Congress removed the uncertainty that would have resulted if an employer withdrew before knowing definitively the critical information needed to accurately estimate its withdrawal liability. Employers need predictability when making any business decisions, and they cannot tolerate the imposition of retroactive withdrawal liability that can be many multiples of what they understood it would be before a decision to withdraw. Accordingly, if the decision below were adopted by this Court, that holding would necessarily discourage future participation in multiemployer pension plans by new employers and constrain the actions of existing participating employers—which would further undermine the stability of multiemployer pension plans. Many employers will not want to join a multiemployer plan knowing that the plan could change actuarial assumptions after the measurement date and even after an employer's date of withdrawal. As noted above, the change in discount rate is no small issue. *See supra* at 10-11.

This desire for predictability, certainty, and consistency underpins the MPPAA's entire system for calculating, assessing, and collecting withdrawal liability. As the Second Circuit held in *Metz*, 946 F.3d at 150-51, an employer that withdraws in one year should be able to rely, in calculating its expected withdrawal liability, on the discount rate adopted and unchanged by the plan as of the measurement date at the end of the prior year. As explained above, it would contravene Congress's intent to foster predictability, certainty, and fairness if a company suddenly faced a substantial increase in withdrawal liability because, following its withdrawal, the plan significantly alters how it plans to invest its assets in the future—thus changing its investment return assumption and withdrawal liability discount rate—and assumes that such a future portfolio was in existence as of the year prior to the withdrawal.

Certainty and predictability are also necessary to the collective bargaining process through which a multiemployer plan is created and withdrawal from a such a plan is approved. Having a bright-line date for actuarial assumptions provides the necessary certainty for employers engaged in the bargaining process. If an employer can rely on the actuarial assumptions as set forth at the end of the plan year, then it can weigh the costs of continuing in the plan or exiting the plan and providing retirement benefits through a different method. This is not a theoretical exercise. Younger employees, for example, may want defined contribution plans because they are more likely to switch to jobs that may not be covered by a multiemployer plan and, therefore, they need benefits that are portable and do not have long waiting periods before a meaningful benefit is available. *See, e.g.*, Pew Charitable Trusts, *Retirement Needs and Preferences of Younger Public Workers* (May 16, 2017) (https://tinyurl.com/2vpjttfj).

Accordingly, some collectively bargained employees may push for a change from the pensions of the past, desiring portability and flexibility. Against this backdrop, the employer may find itself with bargaining proposals that seek this new benefit, either in conjunction with or replacing the multiemployer pension. All unionized employers must bargain in good faith. *See* 29 U.S.C. § 158(a)(5). And bargaining in good faith requires knowledge of the costs of the proposals. But under the D.C. Circuit's rule, an employer would have to bargain without knowing how much it will cost it to leave the plan. If the employer cannot, with reasonable certainty, predict the cost of exiting a multiemployer plan, it may not be able to adequately weigh the costs, choosing instead to remain in the plan even against the wishes of the bargaining unit. Alternatively, without knowing its ultimate withdrawal liability, an employer will need to be conservative in all its bargaining, leading it to bargain for lower wages and fewer benefits. In short, without a bright-line measurement date, the ability of businesses to plan their operations and bargain in good faith will be impaired, and employee choices of alternative retirement options will be hindered and their benefits lessened.

B. Enforcing Congress's Measurement Date Through A Rule Prohibiting Retroactive Use Of Changed Actuarial Assumptions Would Lead To Greater Employer Participation And Plan Solvency Without Hindering Plans' Administration.

Having the bright-line predictability of fixed actuarial assumptions in place prior to an employer's withdrawal is also beneficial to multiemployer pension plans. After all, the MPPAA's objectives are to "foster and facilitate interstate commerce" and "alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans." 29 U.S.C. § 1001a(c)(1)-(2). Predictability will encourage greater participation in plans, increasing their funding bases, consistent with the purpose of ERISA. For many years, employers have been exiting defined benefit multiemployer plans faster than they have been joining them. *See* Emp. Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs 1975–2022* at 9 tbl. E7 (September 2024) (https://tinyurl.com/mv9dwt23) (the number of active plan participants shrank by 40% between 1975 and 2022). If this Court endorses the D.C. Circuit's unpredictable exit liability rule, such a holding will only exacerbate that trend. By contrast, if the Court adopts the interpretation of the Second Circuit in *Metz*, plans will be strengthened as more employers may elect to join, which could help to provide better and more stable benefits. Plans will still have the ability to change actuarial assumptions each plan year as long as they abide by the best estimate rule of 29 U.S.C. § 1393(a)(1), but a participating employer will never be surprised by material changes that could occur long after withdrawal.

A bright-line test will not burden actuaries or hinder plans' administration. In practice, actuarial assumptions rarely change from year to year. For example, respondent in this case, the IAM Plan, used the same valuation interest rate (also called the "minimum funding rate") of 7.5% from at least 2009 through 2019.[3] This constancy make sense because these rates are long-term valuations that, as explained above, *see supra* at 10, are set by the plan actuary based on the plan's long-term investment portfolio and policies. But if the actuary and plan trustees decide to alter the investment portfolio to invest more conservatively, resulting in a lower

---

[3] *See* 2009-2019 Form 5500, Schedule MB, line 6d (https://www.efast.dol.gov/5500Search/) (search for "Board of Trustees of the I.A.M. National Pension Fund" as "Plan Sponsor" and download forms for 2009-2019). Form 5500 is an annual reporting form required to be filed by plans to satisfy annual reporting requirements under Title I and Title IV of ERISA and the Internal Revenue Code. Withdrawal liability assumptions were not reported on Form 5500 until 2022. Using the valuation rate is a fair proxy because the statutory instructions to the actuary on how to select these assumptions are nearly identical. *Compare* 29 U.S.C. § 1084(c)(3), *with id.* § 1393(a)(1). Data for the IAM Plan is not accessible prior to 2009.

investment return assumption and withdrawal discount rate, the rule advocated by petitioner and the Chamber would still allow the actuary to modify the discount rate assumption for withdrawals in future years. It simply would prohibit plans and their actuaries from assuming that the actuary had already given a new best estimate of anticipated plan experience before the date of withdrawal when the actuary did not in fact do so. The rule Congress chose thus balances flexibility for reasoned actuarial judgment with predictability for employers.

CONCLUSION

For the foregoing reasons and those in petitioners' brief, the Court should reverse the judgment below.

Respectfully submitted,

JONATHAN S. FRANKLIN
Counsel of Record
GREGORY OSSI
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W.
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

JORDAN L. VON BOKERN
MARIEL A. BROOKINS
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae

September 2025