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 JAMES P. NAUGHTON IN SUPPORT OF PETITIONERS

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September 4, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF AMICUS CURIAE [1]

Amicus curiae, James P. Naughton, is a Fellow of the Society of Actuaries and an Associate Professor at the University of Virginia's Darden School of Business, where he teaches and researches in the areas of accounting, law, and pension regulation. He previously worked as an actuarial consultant at Hewitt Associates LLC, advising multiemployer and corporate pension plans on valuation, funding, and regulatory compliance. He holds a Doctor of Business Administration from Harvard Business School and a Juris Doctor, *cum laude*, from Harvard Law School.

Professor Naughton has testified as an expert before Congress on issues related to multiemployer pension plans and has published extensively in leading academic journals on the interaction between pension accounting, regulatory policy, and financial reporting. His work examines how actuarial assumptions, legal frameworks, and governance structures influence decision-making in pension systems — precisely the interplay at issue in this case.

He submits this brief to assist the Court in interpreting ERISA's timing requirements for withdrawal liability in a manner consistent with sound actuarial practice, economic efficiency, and the statute's commitment to predictability and fairness.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Amicus further declares that he has not represented any of the parties in any capacity in connection with this matter and has no direct or indirect financial interest in the outcome of the case.

SUMMARY OF THE CASE

Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) to prevent employers from avoiding their share of pension obligations by withdrawing from underfunded multiemployer plans.[2] Under the MPPAA, an employer that ceases to contribute to a multiemployer plan must pay withdrawal liability, an obligation that is derived from its proportionate share of the plan's unfunded vested benefits determined as of the end of the plan year preceding the plan year in which the employer withdraws.[3] The calculation depends heavily on actuarial assumptions, particularly the discount rate used to convert expected future benefit payments into present value.

The case before this Court arises from the D.C. Circuit's decision in *Trs. of the IAM Nat'l Pension Fund v. M&K Employee Solutions, LLC*, 92 F.4th 316 (D.C. Cir. 2024). In *M&K*, several employers, including M&K Employee Solutions, withdrew during the 2018 plan year from the IAM National Pension Fund.[4] The Fund's actuary had long used a 7.5% discount rate for both withdrawal liability and minimum funding purposes.[5] However, after the statutory measurement date of December 31, 2017, the Fund's actuary, Cheiron, Inc., lowered the discount rate to 6.5% *only* for purposes of determining withdrawal liability, while continuing to use the 7.5% rate for funding purposes.[6]

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[2] See 29 U.S.C. § 1391(b)(2)(A).

[3] See 29 U.S.C. § 1391(b)(2)(A).

[4] *Id.* at 319.

[5] *Id*.

[6] *Id.* at 319–20.

The employers had previously received withdrawal liability estimates calculated using the 7.5% rate.[7] Applying the lower 6.5% rate after the fact substantially increased the assessed withdrawal liabilities.[8] The D.C. Circuit upheld the use of the 6.5% discount rate, holding that actuaries may adopt assumptions after the measurement date, so long as those assumptions are based on information as of that date.[9]

This holding directly conflicts with the Second Circuit's earlier decision in *Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir. 2020). In *Metz*, Metz Culinary Management, Inc. withdrew during the 2014 plan year from the National Retirement Fund. The Fund's actuary had long used a 7.25% discount rate for both withdrawal liability and minimum funding purposes.[10] However, after the statutory measurement date of December 31, 2013, the Fund's newly hired actuary, Horizon Actuarial Services, LLC, lowered the discount rate to 3.25% *only* for purposes of determining withdrawal liability, while continuing to use the 7.25% rate for funding purposes.[11] Metz had previously received withdrawal liability estimates calculated using the 7.25% rate.[12] The lower discount rate tripled Metz's assessed withdrawal liability.[13] The Second Circuit held that § 1391's timing provision requires actuarial assumptions to be in place by the measurement date, thus

[7] *Id.* at 319.

[8] *Id.* at 320.

[9] *Id*. at 320–21.

[10] *Id*.

[11] *Id.* at 148–49, 151.

[12] *Id*. at 148.

[13] *Id*. at 148–49.

eliminating the possibility of retroactive assumption changes for withdrawal liability purposes.[14]

The fact that Horizon continued to use a 7.25% rate for minimum funding purposes raised concerns about how two dramatically different discount rates (3.25% versus 7.25%) could simultaneously reflect a best estimate of the same underlying construct—the long-term expected return on the Fund's pension assets.[15] This inconsistent application was a central concern of the Second Circuit, which recognized the potential for opportunistic manipulation by the Fund through its actuary.[16]

The D.C. Circuit did not follow *Metz*, thereby creating a clear circuit split on the meaning of ERISA's fixed-date rule. The petitioners in *M&K* now seek resolution of that conflict.

SUMMARY OF ARGUMENT

This case presents a fundamental question of statutory interpretation with profound actuarial and economic implications: whether a multiemployer pension plan may calculate withdrawal liability using actuarial assumptions adopted after the statutory measurement. Petitioners have consistently argued that § 1391's direction to calculate withdrawal liability as of the end of the plan year requires actuarial assumptions to be fixed as of that statutory date.[17] This brief does not restate those statutory arguments. Instead, it

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[14] *Id*. at 152.

[15] *Id*. at 151–52.

[16] *Id*. at 151.

[17] See Br. for Appellants at 17–24, *Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC*, Nos. 22-7157 & 22-7158 (D.C. Cir. Feb. 22, 2023).

supports them by explaining, from an actuarial and economic perspective, why post-measurement-date adjustments neither improve accuracy nor comport with sound policy, and why ERISA's fixed-date rule is the only framework consistent with actuarial standards and efficient regulatory design.

At each stage of this litigation, post-measurement date assumption setting has been defended in the name of "accuracy": by the Fund in its opposition to certiorari,[18] by actuarial firms as amici in the D.C. Circuit,[19] and by the Solicitor General, who urged this Court to grant review but nonetheless endorsed the D.C. Circuit's interpretation.[20] Yet none of these parties present empirical evidence that post-measurement-date changes improve accuracy, and in actuarial practice, "perfect hindsight" is neither attainable nor the relevant standard.

In liability measurement, especially for statutory debt as consequential as withdrawal liability, *predictability*, not retroactive recalibration, is the guiding principle.[21] Employers make withdrawal decisions based on liability estimates provided before the statutory date and Congress fixed that date to ensure

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[18] Brief in Opp'n at 4–8, *M&K Emp. Sols., LLC v. Trs. of the IAM Nat'l Pension Fund*, No. 23-1209 (U.S. July 12, 2024).

[19] Brief of Amici Curiae The Segal Group, Milliman, Horizon Actuarial & Cheiron at 7–9, *Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols.*, LLC, Nos. 22-7157 & 22-7158 (D.C. Cir. Mar. 30, 2023).

[20] Brief for the United States as Amicus Curiae at 8–13, *M&K Emp. Sols.*, No. 23-1209 (U.S. May 27, 2025).

[21] See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 562–63 (1992) (explaining that rules provide stable *ex ante* guidance in high-information-asymmetry environments).

those estimates would match the assumptions ultimately used in the assessment.[22] When a plan has the ability to change its assumptions after the employer has acted, the employer is being forced to make a critical business decision in the dark, and under ERISA's "pay now, dispute later" regime[23] must immediately pay potentially inflated amounts it could not possibly have foreseen.[24]

In their D.C. Circuit amicus brief,[25] the actuarial firms defend post hoc flexibility without citing any legal authority, regulatory endorsement, or empirical evidence that supports the use of retroactive assumption-setting in this context. Rather, they claim support from Actuarial Standard of Practice No. 27 (ASOP No. 27). But ASOP No. 27 is aimed at forward-looking funding and accounting valuations, not backward-looking withdrawal liability determinations.[26] Moreover, ASOP No. 27 cannot override ERISA's statutory command. Indeed, the best evidence of legislative intent for permissible actuarial discretion in the multiemployer pension plan setting lies in the PBGC's administration

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[22] See 29 U.S.C. § 1391(b)(2)(A).

[23] See 29 U.S.C. § 1401(b)(1); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 208–09 (1997).

[24] See 29 U.S.C. § 1399(c)(2)("Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor… notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.").

[25] Brief of Amici Curiae The Segal Group, Inc., Milliman, Inc., Horizon Actuarial Services, LLC, and Cheiron, Inc. at 6–9, *Trs. of the IAM Nat'l Pension Fund v. M&K Employee Solutions, LLC*, Nos. 22-7157 & 22-7158 (D.C. Cir. Mar. 30, 2023).

[26] See Actuarial Standards Bd., Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations § 1.2 (rev. June 2020) [hereinafter ASOP No. 27] (scope: pension measurements, primarily funding and accounting).

of the Special Financial Assistance program, which mandates the use of fixed assumptions, thus prohibiting selective or retroactive adjustments to avoid precisely this kind of opportunism.[27]

The Second Circuit's decision in *Metz* recognized that post-measurement-date assumption changes invite gamesmanship and create economic uncertainty.[28] From an actuarial perspective, such changes provide no meaningful improvement in accuracy. In both *M&K* and *Metz*, the post-measurement discount rate changes could just as easily have been adopted before year-end,[29] confirming that the retroactive change did not improve accuracy. The *M&K* rule thus introduces uncertainty and the risk of opportunism without any corresponding gain in precision. By contrast, the *Metz* rule secures predictability while preserving accuracy. That balance makes *Metz* a better approach on actuarial and economic dimensions. *Metz* also correctly harmonizes ERISA's timing and reasonableness provisions, enforcing the statute's structural commitment to predictability, neutrality, and fairness.

This Court should adopt *Metz* and reaffirm that withdrawal liability must be calculated using the assumptions in effect on the statutory measurement date. Such a rule is consistent with actuarial practice, economic theory, and sound policy, and it ensures that

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[27] See 87 Fed. Reg. 40968, 40995–96 (July 8, 2022) (codified at 29 C.F.R. § 4262.16(f)).

[28] See *Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146, 151–52 (2d Cir. 2020) (noting that selective changes in assumptions create a "risk of bias" and are "presumptively unreasonable").

[29] *Id*. at 148–49, 151–52 (noting that the discount rate switch was to a published PBGC rate, a benchmark that is determined by the PBGC not the plan).

critical business decisions are not subject to uncertainty and post hoc opportunism.

ARGUMENT

I. Actuarial Norms Favor Fixed Assumptions to Preserve Predictability

The principal opponents of the *Metz* rule—including the Fund, the Solicitor General, and actuarial amici—have all defended an approach under which actuaries may adopt assumptions after the measurement date, so long as those assumptions are derived from data in existence on the measurement date.[30] The primary justification for this approach is the assertion that post-measurement assumption changes enhance accuracy. This belief is unwarranted on two counts.

First, while accuracy is always desirable, predictability, not accuracy, is the guiding principle when it comes to the determination of withdrawal liability. Legal rules that allow regulated parties to plan and act in reliance on known standards are more valuable than rules that introduce uncertainty.[31] Courts and

[30] See Brief in Opp'n at 4–8, *M&K Emp. Sols., LLC v. Trs. Of the IAM Nat'l Pension Fund*, No. 23-1209 (U.S. July 12, 2024) (arguing that actuarial accuracy requires the ability to incorporate year-end data after the measurement date); Brief for the United States as Amicus Curiae at 8–13, *M&K Emp. Sols.*, No. 23-1209 (U.S. May 2025) (endorsing the D.C. Circuit's rule that assumptions may be set post-measurement date if based on data "as of" that date); Brief of Amici Curiae Segal Group, Milliman, Horizon Actuarial & Cheiron at 7–9, *Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC*, Nos. 22-7157 & 22-7158 (D.C. Cir. Mar. 30, 2023) (asserting that actuarial standards contemplate post-date assumption selection in order to achieve more accurate "best estimates").

[31] See Kaplow, supra note 21, at 562–63 (explaining that rules enhance predictability in settings with asymmetric information).

economists alike have recognized this point: in environments characterized by asymmetrical incentives and opaque calculations, bright-line rules are essential. They promote neutrality, discourage opportunism, and reduce litigation.[32]

In fact, complete accuracy is unobtainable when it comes to actuarial calculations, which are, by their nature, estimates rather than prophecies. They necessarily rest on assumptions about uncertain future events: when participants will retire, how long they will live, the investment returns the plan's assets will generate, and countless other variables.[33] No one supposes that the actuary's projections will match the future with perfect fidelity. When reality diverges from prior expectations, the original estimate is not retroactively rewritten. The estimate serves its purpose at the time it is made: to provide a consistent, reasonable basis for planning and decision-making at a point in time, not to guarantee the future.[34]

Second, it is actuarially and economically implausible that the discount rate assumption, which reflects long-term expected returns measured over decades, would materially change based on events that occur before but are not known until after plan year-end. Even significant capital market shifts, which are

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[32] See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 633 (1993) (noting potential for bias in withdrawal liability calculations).

[33] See *Id.* at 635–36 ("Imprecision inheres in the choice of actuarial methods and assumptions.").

[34] See ASOP No. 27, supra note 26, § 3.12.3 (instructing actuaries to focus on long-term patterns, not "recent experience" or "short-term fluctuations in economic or demographic data").

observable prior to plan year-end, rarely alter a well-founded long-term projection. Actuarial standards of practice, including the ASOP No. 27 extensively cited by the actuarial firms in their amicus brief to the D.C. Circuit, emphasize gradual adjustments based on broad patterns, not immediate events.[35] The residual year-end data that becomes available only after the close of the plan year is, at most, marginal. To suggest that such data must be incorporated post hoc to maintain "best estimate" standards grossly overstates the role of such data and completely misrepresents the nature of long-term return assumptions and the nature of actuarial assumption setting.[36]

In their amicus brief to the D.C. Circuit, the actuarial firms also suggest that ASOP No. 27 supports *post hoc* assumption changes in the context of withdrawal liability calculations.[37] It does not. ASOP No. 27 was not written to address specific issues

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[35] See ASOP No. 27, supra note 26, §§ 3.9, 3.12, 3.12.3–.4 (directing actuaries to base assumptions on long-term expectations and patterns rather than short-term fluctuations, and to avoid abrupt, inconsistent changes absent good reason).

[36] *Id.* § 3.12 ("In selecting a reasonable assumption, the actuary should consider the purpose of the measurement, the length of the measurement period, and relevant data, giving more weight to long-term expectations…The actuary should focus on patterns and trends rather than giving undue weight to recent, temporary economic fluctuations.").

[37] See Brief of Amici Curiae The Segal Grp., Inc., Milliman, Inc., Horizon Actuarial Servs., LLC & Cheiron, Inc. at 8–9, *Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC*, Nos. 22-7157 & 22-7158 (D.C. Cir. Mar. 30, 2023).

that arise in the determination of withdrawal liability.[38] Rather, ASOP No. 27 was developed primarily for defined benefit pension plan estimates generated for funding valuations, accounting disclosures, and cash flow projections for ongoing plans.[39] These types of measurements are inherently forward-looking and often involve post-measurement date assumption selection, especially for public pension plan funding, where annual valuations are conducted long after the valuation date.

By contrast, withdrawal liability under ERISA Section 4211 is a backward-looking liability determination triggered by a specific legal event — an employer's withdrawal — that must be calculated as of the last day of the prior plan year.[40] Thus, withdrawal liability is a unique, statutorily defined debt, not a funding target or a budget. Its estimation is fundamentally different than the type of valuation that ASOP No. 27 addresses.

II. *Post Hoc* Assumption Setting Invites Strategic Behavior and Undermines Fiduciary Integrity

Allowing for *post hoc* assumption changes provides an opportunity for the Fund to pressure its actuary to conform with the Fund's preferences and to face possible replacement if the actuary does not conform. It is a step too far to assume that actuaries are

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[38] Withdrawal liability is never mentioned in ASOP No. 27 nor in the accompanying appendices providing background on current practices and comments on the Second Exposure Draft and responses.

[39] See ASOP No. 27, supra note 26, § 1.2 (scope: pension measurements, primarily funding and accounting).

[40] 29 U.S.C. § 1391(b)(2)(E)(i).

immune from client pressure, as the records in both *M&K* and *Metz* clearly demonstrate. In *Metz*, a newly hired actuary adopted a much lower discount rate *only* for withdrawal liability purposes after the statutory measurement date.[41]

In *Metz*, the application of a significantly lower discount rate only in the context of withdrawal liability—and not for plan solvency or contribution calculations—reveals a strategic asymmetry that the Second Circuit appropriately viewed as incompatible with ERISA's requirement for consistent, reasonable estimates.[42] After all, both the 3.25% and 7.25% discount rate assumptions reflect the same economic construct—the long-term expected return on the Fund's pension assets.[43]

To be clear, this is not a challenge to the integrity of the actuarial profession as a whole. Actuaries frequently act in good faith and provide essential guidance to complex retirement systems. But deference to actuarial discretion must have limits,

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[41] See *M&K*, 92 F.4th at 320–21; *Metz*, 946 F.3d at 148–49, 151–52.

[42] *Metz,* 946 F.3d at 148–49, 151–52. (noting that use of a significantly lower discount rate solely for withdrawal liability calculations, and not for funding or other purposes, "illustrates the type of results that can be 'attacked as presumptively unreasonable'" under *Concrete Pipe*).

[43] Notably, there is no evidence in the *Metz* record that the plan invested the additional withdrawal liability collections using the more conservative asset allocation implied by the lower discount rate. To the contrary, the plan continued using the higher 7.25% rate for its own funding valuations, indicating that it maintained a portfolio consistent with higher expected returns and greater risk exposure.

especially where incentives are misaligned and the legal framework provides specific timing constraints.

The Pension Benefit Guaranty Corporation (PBGC) has recognized the risks of discretionary actuarial assumptions, especially in high-stakes settings where liability determinations are susceptible to manipulation. In the Special Financial Assistance (SFA) Program created under the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704, 135 Stat. 4, 185–94, actuaries were required to generate projections based on the interest rate used in the plan's most recent zone certification for non-SFA assets and the PBGC's part 4044 discount rate for SFA assets. These prescriptions eliminated selective or retroactive adjustments to the discount rate.[44] This choice echoes ERISA's own structure, which directs that withdrawal liability installment payments be based on "the assumptions used for the most recent actuarial valuation."[45]

These constraints reflect a deliberate policy decision to limit discretion in favor of predictability, integrity, and fairness.[46] With the SFA, the PBGC's decision to impose these limits affirms the broader point: when liabilities are large and incentives are misaligned, bright-line standards are essential to preserve integrity and fairness.

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[44] See 87 Fed. Reg. 40968, 40995–96 (July 8, 2022) (codified at 29 C.F.R. § 4262.16(f)).

[45] 29 U.S.C. § 1399(c)(1)(A)(ii).

[46] See 29 C.F.R. § 4262.4(b) (requiring use of standardized interest rate assumptions for SFA eligibility).

III. Potential *Post Hoc* Adjustments Severely Undermine Employer Decision-Making

Only *Metz's* reasoning—requiring assumptions to be fixed as of the measurement date—allows an employer to withdraw from a plan with confidence that its withdrawal liability will line up with prior estimates.[47] Without this requirement, any estimate provided prior to withdrawal becomes speculative as plans retain the ability to materially alter assumptions after the employer has acted. This concern applies equally to the D.C. Circuit's rule in *M&K*, which permits actuaries to adopt assumptions after the measurement date so long as they are based on information as of that date.[48] Even under that more moderate formulation, employers cannot know whether or when assumptions will be changed. Any discretion left in the hands of plans or their actuaries after the measurement date creates the potential for strategic recalibration and makes it impossible for employers to rely on liability estimates at the time they make the withdrawal decision.

This is not a hypothetical concern. In their amicus brief in *Metz*, employers such as Joseph Abboud Manufacturing and Waterford Hotel Group explained that they relied on pre-withdrawal estimates based on long-standing assumptions, only to have those assumptions changed retroactively, causing their withdrawal liability to skyrocket.[49] These cases

[47] See *Metz*, 946 F.3d at 148–49, 151–52. (holding that interest rate assumptions "must be determined as of the last day of the plan year preceding the employer's withdrawal").

[48] See *M&K*, 92 F.4th at 320–21.

[49] See Brief of Amici Curiae Joseph Abboud Mfg. Corp. & Waterford Hotel Grp., Inc. in Support of Def.-Appellant at 6–8, *Metz Culinary Mgmt.*, 946 F.3d 146 (No. 17-1211-cv) (2d Cir. Aug.

exemplify the legal and economic instability inherent in permitting plans to alter the financial terms after an employer has already decided to exit.

Retroactive recalibration also violates basic tenets of legal and economic design. Legal rules are meant to provide forward-looking guidance so that regulated actors can plan their conduct accordingly.[50] Scholars have emphasized that retroactive rule changes impose efficiency costs by distorting *ex ante* behavior and creating legal uncertainty.[51] When actors cannot rely on the legal framework to remain stable through the course of a transaction, their incentive to engage in productive activity diminishes. Employers are entitled to shape their business conduct—such as whether and how to withdraw from a multiemployer plan—based on the law and assumptions reasonably in place at the time. Allowing plan actuaries to revise those assumptions months later, and apply them retroactively, collapses this reliance structure and undermines economic incentives.

IV. ERISA's Framework Mandates Fixed Assumptions as of the Measurement Date

ERISA's withdrawal liability regime is anchored by a fixed statutory measurement date which governs not only the timing of the valuation but also the inputs used to calculate liability. This design ensures that

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1, 2017) (describing reliance on prior estimates and subsequent retroactive change in discount rate).

[50] See Kaplow, supra note 21, at 562–63 (explaining efficiency advantages of rules that provide stable ex ante guidance).

[51] See Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1060–61 (1997) (explaining that retroactivity undermines reliance and increases uncertainty).

employer exposure is based on settled assumptions rather than discretionary adjustments made after withdrawal. Section 1391(b)(2)(A)(ii) includes in the calculation unfunded vested benefits, the starting point in the withdrawal liability determination, only for years ending "before the plan year in which the withdrawal of the employer occurs,"[52] while § 1381(b)(1) reinforces this fixed date by tying withdrawal liability directly to the plan's "unfunded vested benefits" as determined under § 1391. Section 1399(c)(1)(A)(ii) additionally directs that withdrawal liability installment payments be based on "the assumptions used for the most recent actuarial valuation." Together, these provisions make clear that both the withdrawal liability and the assumptions used to calculate it are fixed as of the measurement date.

The Second Circuit in *Metz* correctly interpreted this framework to require that actuarial assumptions must not only rely on pre-existing data but must be formally adopted as-of the measurement date. Allowing post hoc changes disrupts this scheme by injecting retroactive discretion into a statutory regime that was designed for predictability. As that court noted, absent a statutory basis for retroactive assumption-setting, the default rule is continuity: assumptions from the prior plan year should roll forward.[53] The D.C. Circuit's contrary reading renders the timing clause in § 1391 effectively meaningless.[54]

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[52] See also § 1391(b)(2)(E)(i) (proportional share measured "as of the end of the plan year preceding" the withdrawal).

[53] *Metz*, 946 F.3d at 149–50.

[54] See *M&K*, 92 F.4th at 320–21 (holding that assumptions may be adopted after the measurement date if based on information available "as of" that date).

The approach in *Metz* is supported by the fact that ERISA explicitly identifies circumstances where retroactive adjustments to withdrawal liability are permitted. For example, § 1391(b)(4)(B)(ii) allows funds to reallocate amounts that prove uncollectible because of the de minimis rule,[55] the 20-year cap on payments,[56] or the insolvency limitation.[57] Congress thus distinguished between post hoc reallocations for collection shortfalls, which it expressly authorized, and post hoc recalibration of assumptions, which it did not.

The approach in *Metz* better aligns with ERISA's broader valuation architecture, which clearly distinguishes between forward-looking and backward-looking financial calculations. For example, for minimum funding determinations, 26 U.S.C. § 430(g)(2)(A) states that "the valuation date of a plan for any plan year shall be the first day of the plan year," thus enabling timely contribution decisions. Withdrawal liability, by contrast, is a retrospective assessment, rooted in the financial condition of the plan at the end of the prior year.[58] Permitting assumption changes after the measurement date would collapse this distinction between forward- and backward-looking valuations. It would allow plans to recalculate liabilities using information and methods that were not in use—and perhaps not even contemplated—at the relevant time.[59]

In sum, ERISA's text, structure, and design converge on the same point: withdrawal liability must be

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[55] 29 U.S.C. § 1389.

[56] 29 U.S.C. § 1399(c)(1)(B).

[57] 29 U.S.C. § 1405.

[58] See 29 U.S.C. § 1391(b)(2)(A).

[59] *Concrete Pipe*, 508 U.S. at 633 (recognizing the dangers of discretionary assumption changes in withdrawal liability).

determined using assumptions fixed as of the statutory measurement date. Section 1381 ties liability to unfunded vested benefits; § 1391 fixes the unfunded vested benefits determination to be before the plan year in which the withdrawal occurs; § 1399 directs that withdrawal liability installment payments be based on "the assumptions used for the most recent actuarial valuation"; and § 1394 shows that when Congress intended post-withdrawal changes, it explicitly said so. The Second Circuit's rule in *Metz* honors this cohesive framework by ensuring that liability determinations are anchored to settled assumptions, just as ERISA requires. The D.C. Circuit's contrary approach strips the timing clause of meaning, injects discretion after the fact, and undermines the statute's central commitment to predictability, neutrality, and fairness.

V. Allowing *Post Hoc* Assumption Changes Contradicts ERISA's Prohibition on Retroactive Increases and Congress's Stated Preference for Predictability

The ERISA withdrawal liability framework hinges on predictability. Congress designed the regime so that employers could understand their exposure and plan accordingly. Together, the statutory ceiling on annual payments and the 20-year maximum payment term "act[] as a ceiling on the amount of liability that an employer owes."[60] The Senate Committee added that it "supports the combination of the 20-year cap with a periodic payment based on past contributions as a way of making both the maximum amount of liability and

[60] S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess. 18 (Comm. Print 1980).

the annual amount required to be paid toward that liability easily predictable by employers."[61] Consistent with that focus on predictability, ERISA enforces a "pay now, dispute later" regime, requiring employers to make payments on the schedule imposed by the plan—even when they challenge the liability calculation in arbitration or litigation.[62]

As the Supreme Court has recognized, this system is designed to protect plan liquidity while disputes are pending.[63] Under this regime, if a plan inflates liability through changes retroactively adopted after the measurement date, the employer must still pay the claimed amount during the dispute.[64] Nonpayment can trigger acceleration and enforcement penalties.[65] This structure makes it essential that the inputs used in calculating liability are fixed and knowable at the time of decision-making.

Because of this structure, plans are prohibited from increasing withdrawal liability through plan amendments adopted after an employer has withdrawn.[66] Congress also imposes strict timing and oversight requirements on post-MPPAA plan amendments

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[61] *Id.*

[62] See 29 U.S.C. §§ 1399(c)(2), 1401(b)(1).

[63] *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 208–09 (1997) (explaining that Congress required interim payments to "protect plans from the risk of employer insolvency").

[64] See 29 U.S.C. § 1399(c)(2) (requiring payment according to the schedule "notwithstanding any request for review or appeal").

[65] See 29 U.S.C. § 1399(c)(5) (permitting the plan sponsor, in the event of default, to accelerate the full outstanding liability with interest).

[66] See 29 U.S.C. § 1394(a) (prohibiting application of plan amendments that "increase the amount of unfunded vested benefits" to employers who withdrew before the amendment's adoption).

generally.[67] These provisions show that when Congress intended post-withdrawal changes to be permitted, it prescribed explicit timing and review safeguards—underscoring the absence of any comparable authority for retroactive assumption changes. A prohibition against assumption changes after the measurement date would perfectly incorporate the intent of § 1394's prohibition on retroactive plan amendments. In both contexts, ERISA's prohibition against *post hoc* changes to withdrawal liability preserves fairness, transparency, and accountability.[68]

VI. Only a Bright-Line Rule Promotes Predictability and Comports with Actuarial Standards, Economic Theory, and Sound Policy

The risks of discretionary actuarial changes are not abstract. As the Chamber of Commerce of the United States explained in its amicus curiae brief supporting certiorari in this case, the ability of plans to retroactively alter liability calculations deters employer participation, invites forum shopping, and destabilizes bargaining relationships.[69] A rule that permits retro-

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[67] Section 1400 requires PBGC review of any amendment adopted more than three years after MPPAA's effective date; such an amendment may take effect only if PBGC does not disapprove it within 90 days. 29 U.S.C. § 1400(a), (c). Amendments altering withdrawal liability allocation methods are subject to special procedures under § 1391(c)(5). *Id.* § 1400(b).

[68] *Metz*, 946 F.3d at 148–49, 151–52. (warning that retroactive assumption changes invite bias and undermine statutory safeguards).

[69] See Brief for Amicus Curiae Chamber of Com. of the U.S. in Support of Petitioners at 6–9, *M&K Emp. Sols., LLC v. Trs. of the IAM Pension Fund*, No. 23-1209 (U.S. June 12, 2024) (arguing that retroactive changes to actuarial assumptions deter employer

active recalibration exposes employers to asymmetric and unpredictable liabilities, especially in multi-jurisdictional plans.

Bright-line rules offer an established remedy. Economic literature has long recognized that bright-line rules are preferable in settings where actors face asymmetric information, high enforcement costs, or incentives to strategically exploit uncertainty.[70] Bright-line rules reduce ambiguity and compliance costs, promote uniform application, and limit the scope for discretion that can lead to opportunistic behavior. Rules outperform standards in circumstances requiring advance planning and predictable guidance, especially where *post hoc* evaluation would be costly or subjective.[71] Rules also constrain opportunism by self-interested actors in complex, repeat-play institutional settings.[72]

In the multiemployer pension context, where plan trustees and actuaries have informational and procedural advantages over employers, and where liability calculations are high-stakes and technical, a rule-based framework ensures neutrality and transparency. The *Metz* rule fits this framework, while

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participation in multiemployer plans, promote forum shopping, and undermine stable collective bargaining).

[70] See Kaplow, supra note 21, at 562–63 (explaining that rules provide greater predictability and reduce decision costs in high-information-asymmetry environments).

[71] *Id.* at 563–65.

[72] See Edward L. Glaeser & Andrei Shleifer, The Rise of the Regulatory State, 41 J. Econ. Literature 401, 408–10 (2003).

the D.C. Circuit's open-ended standard invites inconsistent outcomes and discretionary abuse.[73]

The multiemployer pension system is a textbook example of a regulatory environment that benefits from bright-line rules. These plans operate under collective governance, involve hundreds of employers and thousands of participants, and frequently span industries with varying financial health. The complexity and interconnectedness of the system create enormous opportunities for discretion and asymmetry in information and incentives. Trustees and actuaries often have long-standing relationships, and decisions are made without centralized oversight. In such an environment, where the costs of error or manipulation are borne by others—be it withdrawing employers, new entrants, or the PBGC—clear, objective rules are essential to avoid gamesmanship and preserve confidence in the system.

The fixed measurement date requirement, and the related limitation on retroactive assumption-setting, ensure that withdrawal liability is calculated on a predictable, verifiable, and evenly applied basis. This approach is not only the most efficient rule, but also the approach that most closely aligns with actuarial standards, economic theory, and sound policy design.

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[73] See *Metz*, 946 F.3d 150–52 (warning against the risk of bias when plan-controlled assumption changes apply only to withdrawal liability).

CONCLUSION

This case presents an opportunity for the Court to prioritize clarity and consistency in the administration of multiemployer pension plans. ERISA establishes a fixed measurement date to ensure that employers can make critical decisions based on known rules and stable assumptions , and actuarial practice confirms why that bright-line rule is essential. Adopting the D.C. Circuit's approach would reintroduce discretionary recalibration and undermine the statutory framework Congress enacted to protect predictability and fairness. The Court should instead adopt the Second Circuit's rule in *Metz*. A judicially enforced bright-line rule requiring plans to use actuarial assumptions in effect on the measurement date would not only limit uncertainty and prevent opportunism without impacting accuracy, but would also reinforce fiscal discipline in a system that urgently needs it.

Respectfully submitted,

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September 4, 2025