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 HR POLICY ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae, the HR Policy Association (HRPA), files this brief in support of petitioners M & K Employee Solutions, LLC, Ohio Magnetics, Inc., Phillips Liquidating Trust, and Toyota Logistics Services, Inc. (collectively, "Petitioners").[1] HRPA is a public-policy advocacy organization that represents the most senior human resources officers in more than

[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.

400 of the largest corporations in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States and 20 million employees worldwide. HRPA's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

Many of HRPA's members participate (or participated) in one or more multiemployer pension plans. Some of HRPA's members have withdrawn from a multiemployer pension plan and are awaiting a withdrawal liability assessment. Other of HRPA's members have withdrawn from a multiemployer pension plan and are currently challenging an inflated withdrawal liability assessment. Thus, because this case is about determining withdrawal liability consistent with the statute (and not the whims of an actuary, who may prioritize maximizing withdrawal liability over compliance with the plain language of the statute), HRPA's members have a significant stake in the outcome of this case.

Amicus is well-suited to address these considerations and the importance of the issues beyond the immediate concerns of the parties to the case. HRPA files this brief to assist the Court in understanding the real-world consequences of the D.C. Circuit's decision and to underscore a trend seen among actuaries since this Court's decision in *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993).

SUMMARY OF THE ARGUMENT

The first enumerated purpose of Title IV of the Employee Retirement Income Security Act (ERISA) is "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1). *See also* 29 U.S.C. § 1001a(c)(2). Because the establishment and continuation of private pension plans is voluntary, unpredictable decisions by a plan or its actuaries that inflate a participating employer's liability on a moment's notice (and are beyond the scope of ERISA's authorization) is inapposite to the goal of maintaining voluntary pension plans. Rather, such unpredictability only encourages employers to avoid participation in private pension plans. Accordingly, neither this Court, nor any court, should defer to assumptions selected by a multiemployer pension plan's actuary when such assumptions are inconsistent with the plain language of the statute. Allowing actuaries to inflate an employer's withdrawal liability beyond that contemplated by statute only frustrates ERISA's stated purpose. *Caesars v. Local 68 Operating Engineers Pension Fund*, 932 F.3d 91, 97 (3d. Cir. 2019).

Withdrawal liability is intended to—and does—reduce a multiemployer pension plan's unfunded vested benefits by allocating such underfunding to employers when they withdraw. This reduces the cost of maintaining the plan for the remaining contributing employers. But this goal (reducing the cost of maintaining the plan for the remaining contributing employers) does not permit multiemployer pension plans or their actuaries to inflate liability above that intended by Congress.

Moreover, a multiemployer pension plan's obligation to collect withdrawal liability does not override the requirement for the plan to follow ERISA's plain language. As the Third Circuit recently held, a multiemployer pension plan's failure to comply with ERISA may even result in the inability to collect any withdrawal liability from an employer for whom liability is otherwise owed. *See Allied Painting & Decorating, Inc. v. Int'l Painters & Allied Trades Indus. Pension Fund*, 107 F.4th 190, 198 (3rd Cir. 2024) (employer that failed to assess employer "as soon as practicable" as required by 29 U.S.C. § 1391(b) was prohibited from collecting any withdrawal liability from that employer).

This obligation—to follow the statute—applies equally to multiemployer pension plan actuaries. As Circuit Courts have consistently held in withdrawal liability cases, "ERISA does not yield to [actuarial standards], the standards must succumb to the statutory requirements." *See e.g., Sofco Erectors, Inc., v. Trs. Of the Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 423 (6th Cir. 2021). And whether policy may support a different result is irrelevant, because "[e]ven if Congress could or should have done more, still it 'wrote the statute it wrote—meaning, a statute going so far and no further.'" *Caesars*, 932 F.3d at 98 (*citing Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 583 U.S. 416, 434 (2018) (*quoting Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014))).

Applying ERISA's plain language, and rejecting assumptions selected by a multiemployer pension plan's actuary that do not obey the statute, is consistent with this Court's decision in *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension*

Trust for S. Cal., 508 U.S. 602 (1993). *Concrete Pipe* addressed whether ERISA's presumption in favor of the determinations made by a multiemployer pension plan's actuary violated an employer's due process rights. 508 U.S. at 615 fn10. This Court found no such violation, *inter alia*, because unlike a multiemployer pension plan's trustees, its "actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance." *Concrete Pipe*, 508 U.S. at 632. But *Concrete Pipe* did not provide actuaries *carte blanche* authority to disregard statutory requirements. Since *Concrete Pipe*, Circuit Courts have repeatedly had to force actuaries to heel to the plain language of ERISA. The Court should do the same in this case.

ARGUMENT

Petitioners thoroughly explained that, under the plain language of ERISA, assumptions selected by the actuary for the Trustees of the IAM National Pension Fund (the "Fund") in effect on December 31, 2017, must be used to calculate the withdrawal liability of an employer that withdraws during the 2018 plan year. Amicus incorporates those arguments by reference. Amicus focuses its argument here on the necessity to strictly apply the statute's plain language in all aspects of withdrawal liability. Strict application of the statutory text is necessary to avoid the potential for actuary bias, intentional or not, against withdrawing employers.

I. AFTER *CONCRETE PIPE*, MULTI-EMPLOYER PENSION PLANS AND THEIR ACTUARIES HAVE FREQUENTLY CALCULATED WITHDRAWAL LIABILITY INCONSISTENT WITH ERISA'S PLAIN LANGUAGE

In *Concrete Pipe*, this Court found that actuaries are not "vulnerable to suggestions of bias or its appearance." 508 U.S. at 632. But since then, numerous instances followed of actuaries failing to comply with the plain language of the statute. This disregard for the statutory text has been the result of direct instructions from trustees of multiemployer pension plans. *See e.g.*, *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 355–57 (7th Cir. 2012) (recounting that the trustees selected the interest rate and the actuary's use of the interest rate the trustees selected "was a result either of [the actuary] having been confused by the Supreme Court's decision in the *Concrete Pipe* case or of pressure from the plan"). Alternatively, the actuary's disregard for the statutory text may be the result of more general statements from trustees that they may end the actuary's engagement if the actuary does not tailor assumptions to maximize withdrawal liability. Or it might still be the result of an actuary's marketing tactic to obtain a multiemployer pension plan as a client. Or it could simply be because the actuary believes the trustees want the actuary to maximize withdrawal liability. In each instance of an actuary overstepping their authority (and showing "vulnerab[ility] to suggestions of bias or appearance"), Circuit Courts have correctly applied the plain language of ERISA, rejecting the actuary's disregard for the statutory text. *Concrete Pipe*, 508 U.S. at 632.

A. Actuaries manipulate the interest rates used to calculate an employer's withdrawal liability, in direct violation of ERISA.

Three Circuit Courts have struck down actuaries' assumptions used to determine the multiemployer pension plans' unfunded vested benefits for purposes of calculating withdrawal liability. *See Sofco*, 15 F.4th at 423; *UMW 1974 Pension Plan v. Energy West Mining Co*., 39 F.4th 730, 739 (D.C. Cir. 2022); *GCIU-Employer Retirement Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092, 1099 (9th Cir. 2022). Like this case, these cases involved the interest rate selected by the relevant multiemployer pension plans' actuaries to value vested liabilities. (Unlike the present case, these assumptions were adopted before the end of the plan year preceding the relevant employer's withdrawal.) The issue in each case was that the assumptions selected by the actuaries failed to comply with the requirements of ERISA § 4213(a)(1), 29 U.S.C. § 1393(a)(1). Specifically the actuaries did not base their assumptions on the characteristics of the multiemployer pension plan in question, taking into consideration the historical experience of the plan as well as reasonable expectations of future experience.

In *Sofco*, the multiemployer pension plan's actuary used a blended interest rate, commonly referred to as the Segal Blend. 15 F.4th. at 420–21. The Segal Blend values a portion of the plan's liabilities using the same interest rate applied by the Pension Benefit Guaranty Corporation (PBGC) for terminating single-employer plans and for multiemployer plans that have incurred a mass withdrawal. *Id.* In turn, at the relevant time, PBGC based this interest rate on the rates charged by insurers to price annuities. *Id.* But annuity rates have nothing to do with the characteristics of the plan, and are not based on the plan's historical experience or its reasonable future expectations. Instead, annuities are assets that the fund had not indicated it will ever purchase. *Id.* at 421. In the Segal Blend, the remaining liabilities not valued using PBGC interest rates are valued based on an interest rate reflecting characteristics of the plan, including historical experience and reasonable future expectations. *Id.* The Sixth Circuit held that the use of the Segal Blend violated ERISA because "it dilutes the actuary's best estimate with rates on investments that the plan is not required to and might never buy, based on a set formula that is not tailored to 'the unique characteristics of the plan.'" *Id.* (*quoting Board of Trustees v. Eberhard Foods, Inc.*, 831 F.2d 1258, 1263 (6th Cir. 1987)). Rejecting the multiemployer pension plan's argument that its actuary's use of the Segal Blend was accepted actuarial practice, the Sixth Circuit held that "ERISA does not yield to [actuarial standards], the standards must succumb to the statutory requirements." *Sofco*, 15 F.4th at 423. The court then required the multiemployer pension plan to calculate the withdrawn employer's withdrawal liability using an interest rate based solely on the plan's characteristics.

Although *Sofco* addresses the validity of the interest rate chosen by the actuary, and not the timing of the interest rate selection, the case illustrates an actuary's bias, whether intentional or not, to select assumptions that increase an employer's withdrawal liability rather than comply with statutory requirements. It is one example of many.

In both *Energy West* and *MNG Enterprises*, when calculating withdrawn employers' withdrawal liability, the respective multiemployer pension plans and their actuaries valued all liabilities based on the PBGC interest rate. The D.C. Circuit and the Ninth Circuit, respectively, rejected the use of the PBGC interest rate as noncompliant with ERISA § 4213(a)(1).

In *Energy West*, the D.C. Circuit held that compliance with ERISA § 4213(a)(1) requires an actuary to base interest rate assumptions on the plan's actual investments because the plain language of the statute requires assumptions be based on the multiemployer pension plan's characteristics. 51 F.4th at 740–41. Because the statute (and not actuarial standards) is the law, the D.C. Circuit rejected the multiemployer pension plan's argument that use of the PBGC rate was accepted practice under the Actuarial Standards of Practice. *Id.* Further, the court held that the requirement under ERISA §§ 4213(a)(1) and 4221(a)(3)(B)(i) that assumptions be reasonable in the aggregate extended beyond the abstract—it requires assumptions that are "reasonable relative to the plan, taking the plan's experience into account." *Id.* at 741. If an actuary does not base assumptions on the plan's characteristics, the assumptions are not reasonable because they fail to take "into account the experience of the plan." *Id.*

Similarly, in *MNG Enterprises*, the Ninth Circuit rejected an actuary's use of the PBGC interest rate to calculate unfunded vested benefits in determining an employer's withdrawal liability. The court reasoned the statute "specifies that these assumptions and methods must 'tak[e] into account the experience of the plan and reasonable expectations' and 'in combination, offer the actuary's best estimate of anticipated experience under the plan.'" *MNG Enterprises*, 51 F.4th at 1099 (*quoting* 29 U.S.C. § 1393(a)(1)). Further, following the D.C. Circuit, the court held that the "best estimate" language means that "the actuary must make assumptions based on the plan's particular characteristics when calculating withdrawal liability." *Id.* (*quoting Energy West*, 39 F.4th at 738). And that by ignoring the expected returns of the plan's assets and experience, the multiemployer pension plan's actuary's assumptions failed to meet the statutory "best estimate" standard because it was not tailored to the features of the plan. *Id.* (*citing Sofco*, 15 F.4th at 421). The court rejected the multiemployer pension plan's argument that an actuary's assumptions need only be reasonable in the aggregate, even if not based on plan characteristics. The court held instead that it could not ignore the statute's language directing the actuary to offer "the best estimate of anticipated experience *under the plan*." *Id.* (*quoting* 29 U.S.C. § 1393(a)(1)) (italics in original).

As with *Sofco*, neither *Energy West* nor *MNG Enterprises* involves the question of whether the actuarial assumptions must be those adopted as of the last day of the plan year preceding the year of withdrawal; in each case, the assumptions challenged were in effect as of such date. Instead, the issue was whether the interest rate selected complied with the statute. Nonetheless, these cases illustrate that multiemployer pension plans' actuaries do, in fact, use assumptions to inflate withdrawal liability notwithstanding whether such assumptions are supported by the plain language of the statute.

B. Multiemployer plans and their actuaries attempt to assess withdrawal liability when no withdrawal (as defined by ERISA) occurred.

MNG Enterprises provides still another example of an actuary making determinations inconsistent with the statute for the purpose of increasing an employer's withdrawal liability. In addition to the question of the appropriate interest rate to be used to calculate an employer's withdrawal liability, the Ninth Circuit also faced the question of whether the multiemployer pension plan could assess the employer for partial withdrawals at the end of 2014 and 2015 even though the employer had completely withdrawn from the plan in early 2014. *MNG Enterprises*, 51 F.4th at 1096. The multiemployer pension plan argued that partial withdrawals could follow the complete withdrawal because ERISA contained no language expressly prohibiting such a determination. *Id*. The court, however, held that ERISA was unambiguous that a partial withdrawal could not occur after a complete withdrawal. *Id*. at 1098. It reasoned that because the statute defines a complete withdrawal as a permanent cessation of any contribution obligation or covered operation, and one cannot partially cease something after completely ceasing it, a partial withdrawal cannot follow a complete withdrawal. *Id*.

The Ninth Circuit's conclusion that the plain language of the statute does not permit a multiemployer pension plan from assessing an employer for partial withdrawals that allegedly occur after the employer has already completely withdrawn from the same multiemployer pension plan makes perfect sense. But, what matters here is that the multiemployer pension plan and its actuary even attempted to assess a partial withdrawal after it had assessed a complete withdrawal. This is just another example of an actuary whose determination is based on inflating a withdrawn employer's withdrawal liability, and not on compliance with the plain language of the statute.

Caesars provides another such example. There, a multiemployer pension plan assessed an employer for partial withdrawal liability as calculated by its actuaries after Caesars closed one of its four contributing Atlantic City casinos. *Caesars*, 932 F.3d at 94. The multiemployer pension plan argued that based on the policy behind withdrawal liability—which it alleges was to maximize payments to the plan to ensure plan solvency—the court should find a partial withdrawal even though no such partial withdrawal occurred under the statutory language. *Id.* at 97. The court rejected this argument, concluding that imposing capricious withdrawal liability where the statute does not provide for it discourages "the maintenance and growth of multiemployer pension plans" in the first place, thereby frustrating one of ERISA's stated policies. *Id.* (*citing* 29 U.S.C. § 1001a(c)(2)). The court instead enforced the law that Congress wrote. *Id.* at 98.

Although *Caesars* is not related to interest rate assumptions, it shows a multiemployer pension plan and its actuary making a withdrawal liability determination not grounded in the plain language of ERISA, but rather based on maximizing an employer's withdrawal liability beyond what ERISA authorizes.

C. Multiemployer plans and their actuaries violate ERISA by misidentifying the highest contribution rate when calculating an employer's withdrawal liability.

In still another example of actuary bias against withdrawn employers in the face of contrary statutory language, the Seventh Circuit recently rejected a multiemployer pension plan's actuary's attempt to use post-2014 contribution rate increases in determining a withdrawn employer's withdrawal liability. *Cent. States v. Event Media, Inc.*, 135 F.4th 529, 533 (7th Cir. 2025). Under ERISA § 4219(c), a withdrawn employer's annual withdrawal liability payment is determined, in part, by the employer's highest contribution rate during the ten-year period ending in the year the employer withdraws. 29 U.S.C. § 1399(c)(1)(C)(i)(II). However, for a critical status multiemployer pension plan (like the plan at issue in *Event Media*), any required contribution rate increase after 2014 is disregarded for purposes of determining an employer's annual withdrawal liability payment. 29 U.S.C. § 1085(g)(3)(A); *Event Media*, 135 F.4th at 533. Even though the two exceptions to this general rule were inapplicable, the actuary in *Event Media* still calculated the employer's annual withdrawal liability payment using contribution rates that included the post-2014 rate increases. 135 F.4th at 533. The multiemployer pension plan attempted to justify this calculation because it generates greater withdrawal liability payments to the plan, thereby reducing unfunded vested benefits. *Id.* at 533–34. The Seventh Circuit rejected the actuary's use of these contribution rates and the multiemployer pension plan's argument in support of those higher contribution rates, because they ignored the plain language of the statute that prohibited the use of those higher contribution rates. *Id.* at 534.

Although *Event Media* is also not a case addressing the timing issue of an actuary's selection of assumptions, it further illustrates a multiemployer pension plan's and actuary's practice of calculating withdrawal liability based on assumptions, rules and policies designed to maximize the amount of an employer's withdrawal liability, notwithstanding precise statutory language prohibiting such practices.

D. Actuaries implement their own policy preferences when calculating an employer's withdrawal liability.

Just last month, the Sixth Circuit rejected a multiemployer pension plan's actuary's use of an interest rate not based on the characteristics of the plan, but instead on the actuary's policy considerations of discouraging employers from leaving the plan. *Ace-Saginaw Paving Company v. Operating Engineers Local 324 Pension Fund*, No. 24-1288, ____ F.4th _____, 2025 WL 2238023, **4–5 (6th Cir. 2025). The multiemployer pension plan unsuccessfully argued that it was appropriate for its actuary to prioritize the plan's remaining employers over its withdrawing ones because ERISA was concerned with protecting multiemployer pension plans and their participants, and not withdrawing employers. *Id.*,*6. The court rejected this argument, reasoning:

> [I]t is not the role of the actuary to consider these policy issues. Congress made the applicable policy choices when it enacted § 1393. In doing so, it removed policy considerations from the equation by requiring the "apparently unbiased" actuary to calculate withdrawal liability, and by prohibiting trustees from influencing the assumptions and methods used to do so.

Id., *5 (*quoting Concrete Pipe*, 508 U.S. at 635). The Sixth Circuit continued, explaining that Congress did not intend to "pursue a statute's objectives to every possible extent." *Id.* (*citing Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (*per curiam*)). Further, the court observed that withdrawal liability, even when calculated consistent with the statute, already discourages employer withdrawals on its own, and that there is no evidence Congress intended for withdrawing employers to pay more than their "fair share" of the multiemployer pension plan's unfunded vested benefits. *Id.* And what the plan's actuary attempted to do was just that, make withdrawn employers pay more than their "fair share." *Id.*

Lastly, only one other Circuit Court has addressed whether a plan actuary may adopt new assumptions after the last day of the plan year in which an employer withdraws, but still apply the changed assumptions to such withdrawn employers. In *National Retirement Fund v. Metz*, the Second Circuit concluded that the plain language of the statute prohibited the use of assumptions adopted after the last day of the plan year preceding the employer's withdrawal. 946 F.3d 146, 151 (2nd Cir. 2019). The court held that the assumptions in effect on the last day of the plan year before the year of the employer's withdrawal must be used. *Id*. at 151. Otherwise, the selection of assumptions after such time would create significant opportunity for manipulation and bias against withdrawn employers. *Id*. Relying in part on this Court's recognition in *Concrete Pipe* that a multiemployer pension plan's use of different interest rates for different purposes may be attacked as presumptively unreasonable, the Second Circuit recognized that finding for the fund might permit even greater manipulation by multiemployer pension plans or their actuaries. *Id*. at 151–52 (*citing Concrete Pipe*, 508 U.S. at 632).

* * * * * *

In *Concrete Pipe*, this Court reasonably assumed that multiemployer pension plan actuaries would not be subject to bias against withdrawing employers, for whatever the reason. History shows, however, that assumption has not always borne true. And in fact, as illustrated above, actuaries have ignored the statutory requirements completely to achieve policy goals the actuary believes, correctly or not, is in the best interest of the multiemployer pension plan.

Amicus does not intend to suggest that all multiemployer pension plans influence the assumptions of their actuaries, or that all actuaries choose assumptions and make determinations for the sole purpose of inflating withdrawal liability even when contrary to the plain language of the statute. Amicus merely draws attention to the fact that such biased decisions, or at least the appearance of bias, are not a rare occurrence.

The only true means of assuring fairness in the process of calculating an employer's withdrawal liability is to precisely apply the words Congress chose for the statute controlling the calculation of withdrawal liability. Further, withdrawal liability should be calculated based on assumptions in effect on the last day of the plan year immediately before an employer withdraws. Freezing assumptions on that date prevents a multiemployer pension plan or actuary from manipulating assumptions to inflate withdrawal liability against a particular employer or group of employers, for example, a large employer that may unexpectedly withdraw. Congress did not confer power upon multiemployer pension plans to adjust assumptions as each employer withdraws. Otherwise it would not have required withdrawal liability to be calculated as of the last day of the plan year before the plan year of an employer's withdrawal. *See* 29 U.S.C. § 1391.

II. UNCERTAINTY IN CALCULATING AN EMPLOYER'S WITHDRAWAL LIABILITY FRUSTRATES THE PRIMARY PURPOSE OF ERISA—TO CONTINUE AND MAINTAIN VOLUNTARY PENSION PLANS.

The uncertainty created by the assumptions, rules and policies adopted by certain multiemployer pension plans and their actuaries to inflate an employer's withdrawal liability only frustrate ERISA's objective "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1). *See also* 29 U.S.C. § 1001a(C)(2). An employer's inability to rely on the plain language of ERISA discourages such continuation because it creates risk of unpredictable liability being imposed on employers once they exercise their right to voluntarily cease participating in a given multiemployer pension plan. With this uncertainty, it is less likely existing employers will remain in a multiemployer pension plan, or that new employers will join a multiemployer pension plan.

ERISA's provisions, if enforced as written, reduce the uncertainty surrounding participation in multiemployer pension plans. For example, establishing that multiemployer pension plans must base withdrawal liability on unfunded vested benefits existing at the end of the plan year before the employer withdraws assures employers that a plan cannot influence an actuary to take actions after-the-fact to punish the employer for its decision to withdraw. Likewise, other rules also reduce employer uncertainty. Specifically, and as discussed above, ERISA provides detailed and precise statutory provisions that dictate when withdrawals occur, how assumptions in calculating withdrawals are to be selected, and how soon withdrawal liability is to be assessed and collected. Collectively, these rules assure a level playing field for employers, pension plans, and unions. But when a multiemployer pension plan can take actions that put a foot on the scale in its favor, employers' only recourse is to end participation in these voluntary defined benefit pension plans.

The concern that employers are ceasing to support voluntary defined benefit pension plans is not a hypothetical "sky is falling" argument. It is a practical fact that employers are withdrawing from defined benefit multiemployer plans in much greater numbers than they are agreeing to participate in 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) (active plan participants decreased approximately 40% between 1975 and 2022). *Amicus* does not argue that unpredictability in withdrawal liability is the sole cause of this decline, but employers' knowledge that multiemployer pension plan actuaries can increase an employer's potential withdrawal liability sixfold at a moment's notice with a simple stroke of the pen does not encourage continued participation in multiemployer pension plans.

Just consider the Fund in this case. At the end of the plan year after the Petitioners withdrew, the plan's actuary increased the Fund's unfunded vested benefits from under \$500 million to over \$3 billion overnight. See Pet. App. 23a-24a. The Fund did not lose \$2.5 billion in assets that night. Rather, its actuary decided that the plan would no longer earn 7.5% on its investments, and therefore reduced the interest rate by over 15%. *Id*. Surprisingly, the actuary still believed these same assets would earn 7.5% for other purposes, without explaining how the same assets could have different returns for different purposes. How can any reasonable employer continue to participate in these voluntary defined benefit pension plans when multiemployer pension plans and their actuaries flaunt the strict requirements of the statute to maximize withdrawal liability? The obvious answer is that they cannot.

This Court reasonably believed, in *Concrete Pipe*, that actuaries' professional obligations and judgment would not create the kind of mischief, intentional or not, discussed herein. 508 U.S. at 632. But as illustrated above, that simply has not been the case, at least for some multiemployer pension plans and actuaries.

Although some fluctuations in an employer's withdrawal liability will occur from year-to-year based on a plan's performance, the way to prevent manipulation, and create some certainty in withdrawal liability calculations, is to enforce the statute strictly as written. As the Second Circuit held in *Metz*, an employer that withdraws in one year should be able to rely on the assumptions in effect at the end of the plan year preceding its withdrawal, as that is the date for which unfunded vested benefits are to be determined in calculating such employer's withdrawal liability. 946 F.3d at 150–51. Confirmation that the statute governs—not the whims of actuaries—will allay employers' concern that a multiemployer pension plan can manipulate assumptions to inflate an employer's withdrawal liability after it has already withdrawn. The same is true for all other statutory withdrawal liability provisions discussed above, but that are not the subject of this appeal. Strict enforcement of the statute as written, and not deference to actuarial standards of practice or other multiemployer pension plan rules, policies and procedures, enables employers to reasonably predict potential liability relating to participation in a defined benefit multiemployer pension plan. Such certainty only fosters employers' willingness to continue and maintain their voluntary participation in defined benefit plans, rather than avoiding them at all costs. Such a result benefits employers, plans, and participants alike.

CONCLUSION

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

Respectfully submitted,

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