

No. 23-1209

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 OF *AMICUS CURIAE* THE NATIONAL
COORDINATING COMMITTEE FOR MULTIEMPLOYER
PLANS IN SUPPORT OF THE RESPONDENT TRUSTEES OF
THE IAM NATIONAL PENSION FUND

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**INTERESTS OF THE *AMICUS CURIAE* THE
NATIONAL COORDINATING COMMITTEE
FOR MULTIEMPLOYER PLANS**

The National Coordinating Committee for Multiemployer Plans¹ (“NCCMP”) is a nonprofit, tax-exempt organization, and is the only national organization devoted exclusively to protecting the interests of multiemployer plans and the more than twenty million American workers to whom they provide pension, health, and other benefits. For more than fifty years, the NCCMP has advocated on behalf of these plans in Congress, in the courts, and in the regulatory process to help develop sound employee benefits legislation, regulations, and policy.

Hundreds of multiemployer plans and related organizations, including unions, employers, and employer associations, with a nationwide participant base, are affiliated with the NCCMP. Affiliated plans are active in every segment of the multiemployer plan universe, including the airline, building and construction, entertainment, food production, distribution and retail sales, health care, hospitality, mining, maritime, industrial fabrication, service, textile, and trucking industries.

Congress has recognized that the continued well-being and security of employees, retirees, and their dependents are directly impacted by multiemployer plans and that interference with the maintenance and

¹ No counsel for a party authored this brief in whole or in part, and no such counsel, party, nor anyone else made a monetary contribution intended to fund the preparation or submission of this brief, other than the members of the NCCMP through their membership dues.

growth of such plans is contrary to the national public interest.²

Because of the broad range of experience of the NCCMP's constituent organizations, the NCCMP is uniquely qualified to state the position of the Trustees of multiemployer plans and to offer special insight into the impact this case will have on the efficient administration of these plans.

This case is of particular importance to multiemployer pension plans because the position advocated by the Petitioners and adopted by the United States Court of Appeals for the Second Circuit in *National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2nd Cir.), *cert. denied*, 141 S. Ct. 246 (2020), imposes an arbitrary and legally indefensible deadline on the selection of actuarial assumptions that would force plans to use out-of-date actuarial assumptions in withdrawal liability assessments and interfere with independent actuarial judgment to the detriment of plan participants and beneficiaries.

² See 29 U.S.C. § 1001a(a), (c) as added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364 (Sept. 26, 1980), 94 Stat. 1208.

SUMMARY OF ARGUMENT

The Petitioners (“Employers”) argue that the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”)³ requires the selection of the actuarial assumptions used to determine employer withdrawal liability by the statutory measurement date both because it is mandated by the plain language of the statute and because of the strong Congressional policy of protecting employers who withdraw from pension plans. Both arguments are incorrect.

The statutory mandate that withdrawal liability assessments be made “as of” a specific measurement date does not compel the selection of final actuarial assumptions *by* that date. The determination of a plan’s unfunded vested benefits (“UVBs”) involves multiple assumptions, estimates, and determinations, only some of which are actuarial. Nothing in ERISA’s language singles out actuarial assumptions regarding when they must be determined, or mandates that all the determinations underlying the determination of a plan’s UVBs be made by the measurement date. Furthermore, it would be impossible to do so.

Other statutes use the phrase “as of” and are well understood to only require that the measurement be made *for* a point in time, rather than *by* that point in time. Most notably, pension actuarial valuations for minimum funding purposes under both ERISA and the Internal Revenue Code of 1986, *as amended* (“IRC”)⁴ must be made “as of” a measurement date.

³ *Codified in relevant part at* 29 U.S.C. §§ 1001-1461.

⁴ 26 U.S.C. §§ 1-9834.

Yet the Internal Revenue Service has adopted and retained regulations that only impose a prohibition on changing actuarial assumptions affecting the deductibility of employer pension contributions after as many as 22½ months following the measurement date – up to that date, they are subject to revision. For terminated multiemployer plans, the Pension Benefit Guaranty Corporation (“PBGC”) has also adopted a deadline for preparing an actuarial valuation, and therefore adopting actuarial assumptions, that effectively permits assumptions to be changed until as late as 150 days following the end of the plan year for which the valuation is performed. The PBGC has adopted no such regulations imposing a deadline on the selection of actuarial assumptions for withdrawal liability assessments.

Two of the Employers in this case requested – and received – withdrawal liability estimates prior to their complete withdrawals that accurately reflected their liabilities using the Plan’s updated actuarial assumptions, while a third never requested an estimate. None of these three Employers faced any unfairness nor could they have relied upon out-of-date estimates based on out-of-date assumptions because they never received any. The fourth requested, and received, an estimate in a prior Plan year, and so also had no reasonable basis to rely on it for a subsequent Plan year. Furthermore, under the disclosures mandated by Congress, plans are only required to provide estimates that are from one to two years old, so reliance on these estimates is inherently unreasonable.

The Employers’ equitable arguments are equally unavailing. Withdrawal liability was intended to

protect participants and beneficiaries, and to avoid imposing unfair burdens on remaining employers that could hasten their withdrawal. It was not intended to provide withdrawing employers with a better deal than the participants, beneficiaries, and remaining employers they leave behind to face the risk of funding shortfalls.

Additionally, there is no formal process by which actuaries select assumptions. Imposing an artificial deadline on their selection creates an opportunity for obfuscation by withdrawing employers and imposes the types of evidentiary burdens on plans and actuaries Congress sought to avoid.

Furthermore, the decision whether to allow previous years' assumptions to "roll over" or to revise those assumptions is entrusted to a plan's actuary and should not be artificially imposed. It is a violation of law and actuarial standards to automatically roll over out-of-date assumptions an actuary no longer believes are reasonable.

Congress made a deliberate choice to limit the retroactive effect of some actions but not of others. Far from demonstrating a Congressional aversion to retroactivity, this shows that Congress was selective in imposing these limitations. Congress imposed limitations solely on specified decisions that are typically made by Trustees and never made by plan actuaries. Congress' distinction between these two types of decisions is both rational and consistent with this Court's precedent. Finally, the decision by the Plan's actuary to change the assumptions was not retroactive since each of the Employers withdrew after the date the revised assumptions were adopted.

ARGUMENT

I. Introduction

The Petitioners (the “Employers”) contend that the actuarial assumptions used to calculate an employer’s withdrawal liability following its termination of participation in a multiemployer defined benefit pension plan must be the assumptions most recently selected by the plan’s actuary on or before the statutory “measurement date,” no matter how old or out-of-date those assumptions may be.⁵ For this thesis, the Employers have two basic arguments. First, they contend that the statutory directive to determine withdrawal liability “as of” the measurement date (ordinarily the last day of the plan

⁵ The question specifically framed by the Court is:

Whether 29 U.S.C. § 1391’s instruction to compute withdrawal liability “as of the end of the plan year” requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year.

The third option, which is beyond the scope of the binary question posed by the Court, is whether, as permitted in the actuarial standards, under sufficiently unusual circumstances, plan actuaries may consider events occurring after the measurement date (*i.e.*, after the end of the last day of the plan year preceding an employer’s withdrawal) that would have affected the actuary’s opinion as of the measurement date had they been known at the time. Actuarial Standard of Practice (“ASOP”) 27 Sec. 3.4.6, p. 6 (Dec. 2023), *retrieved* Oct. 7, 2025 from https://www.actuarialstandardsboard.org/wp-content/uploads/2024/05/asop027_211.pdf. Because this third option is not part of the question before the Court, we do not take a position on it.

year preceding the date of an employer's withdrawal) on its face imposes a hard and fast deadline on the selection of actuarial assumptions. This argument ignores the plain language of the statute, not to mention years of settled application of the same statutory formulation.

Second, the Employers contend that the Courts should impose such a restriction on actuarial practice because there is a strong Congressional policy of protecting employers who withdraw from pension plans and leave their liabilities behind at the expense of the plans' participants and beneficiaries and the remaining employers. This policy does not exist. Not only does it lack any basis in the statute itself or its legislative history, it conflicts with the decisions of this Court. ERISA's primary function and purpose is to protect *plans and their participants and beneficiaries* – not to shield withdrawing employers from the consequences of their choices to withdraw.

II. ERISA Does Not Require the Selection of Assumptions Prior to the Measurement Date

The statutory language describing the statutory methods for calculating withdrawal liability – and the language upon which the Employers rely – generally states that a plan's unfunded liabilities are to be determined “*as of* the end of the plan year preceding the plan year in which the employer withdraws”⁶

⁶ It is not accurate that each withdrawal liability methodology is entirely based on determinations made “as of” the end of a plan year. The “presumptive method”, *i.e.*, the method that applies unless the plan is not in the “building and construction industry” and the plan sponsor selects a different method, provides that an employer's liability is the excess of the employer's allocated share of the plan's UVBs “*at* the end of the plan year” preceding the

In order to calculate such an unfunded liability, a plan must be able to determine both its assets and its liabilities.⁷ The statute does not, however, single out the determination of liabilities, let alone the selection of actuarial assumptions, in stating that these determinations must be made “as of” the measurement date.

Thus, if the words “as of” the measurement date really mean, as the Employers contend, “by” the measurement date, then each of the determinations required to ascertain a plan’s assets and liabilities would need to be completed “by” the measurement date. This is, of course, impossible. The asset values, for example, are not known until after the measurement date. For hard-to-value assets, such as real estate and private equity, where values may need to be estimated,⁸ it can be many months before the values are known.

year of withdrawal less the sum of the unamortized changes in the employer’s share of the plan’s UVBs for the prior plan years, determined “as of” the end of each of those prior plan years. 29 U.S.C. § 1391(b)(2)(B)(i), (b)(2)(B)(ii)(II), (b)(2)(C), (b)(2)(E)(i), (c)(1) (emphasis added). It is, however, true for the three optional statutory methods. 29 U.S.C. § 1391(c)(2)(C)(i)(I) (describing the “modified presumptive” method of computing withdrawal liability); 29 U.S.C. § 1391(c)(3)(A) (describing the “rolling-5” method of computing withdrawal liability); 29 U.S.C. § 1391(c)(4)(A)(i) (describing the “direct attribution” method of computing withdrawal liability) (emphasis added).

⁷ 29 U.S.C. § 1393(c).

⁸ Employee Benefits Security Administrations (“EBSA”) Information Letter 06-03-20 (Advising whether private equity investments are permitted in participant-directed individual account plans.)

Furthermore, assumptions and estimates are not the sole domain of actuaries. ERISA mandates that the value of plan assets be “presented fairly in conformity with generally accepted accounting principles [(“GAAP”)]. . . .” 29 U.S.C. § 1023(c)(3)(A). GAAP requires accountants to select assumptions and make estimates to determine the value of both assets and liabilities.⁹ There is absolutely no authority for the proposition that *any* of these valuations, or their underlying determinations, estimates, and assumptions, must be made prior to the measurement date -- only that they represent the values as of the measurement date.

Moreover, the dictionary definition of “as of” does not avail the Employers. The Oxford English Dictionary defines “as of” to mean: “As things stood on (a date); (originally U.S.)”¹⁰ In other words, to take a measurement “as of” a date means to project the valuations to that date, without regard to whether any necessary determinations are made before, after, or on that date.

Additionally, the U.S. Code contains other references to “as of.” Most notably are the provisions of ERISA and the IRC governing actuarial valuations for plan funding purposes. Those provisions require

⁹ *E.g.*, FASB (Financial Accounting Standards Board). *ASC* 825-10-50-31. Retrieved Oct. 4, 2025, from 825/showallinonepageplus (“[A]n entity shall disclose the methods and significant assumptions used to estimate the fair value of items for which the fair value option has been elected.”); *see also* fn. 8 above.

¹⁰ Oxford English Dictionary (2011), retrieved Oct. 5, 2025 from https://www.oed.com/dictionary/as_adv?tab=meaning_and_use#194115999

that actuarial valuations of multiemployer plan liabilities be:

made *as of* a date within the plan year to which the valuation refers, or within one month prior to the beginning of such year.¹¹

The meaning of this language is well known and does not include any limitation on the timing of the adoption of actuarial assumptions.

This is demonstrated by the continued efficacy of the regulation originally adopted by the Internal Revenue Service (“IRS”) in 1972,¹² well before Congress amended ERISA and the IRC to add the language quoted above. As stated in the governing IRS regulation:

The amount of a contribution to a pension or annuity plan that is deductible . . . depends upon the methods, factors, and assumptions which are used to compute the costs of the plan and the limitation [on an employer’s deductions]. Since the amount that is deductible for one taxable year may affect the amount that is deductible for other taxable years, the methods, factors, and assumptions used in determining costs and the method of determining the limitation which have been used for determining the deduction for a taxable year *for which the return has been filed shall not be changed* for such taxable year, except when the Commissioner determines that the methods, factors, assumptions, or limitations

¹¹ 26 U.S.C. § 431(c)(7)(B)(i), 29 U.S.C. § 1084(c)(7)(B)(i) (emphasis added).

¹² T.D. 7168 (March 2, 1972), 1972-1 C.B. 118, 119.

were not proper, or except when a change is necessitated by reason of the use of different methods, factors, assumptions, or limitations for another taxable year. However, different methods, factors, and assumptions, or a different method of determining the limitation, if they are proper, may be used in determining the deduction for a subsequent taxable year.¹³

This regulation remains in force, notwithstanding the “as of” the measurement date language originally in the proposed regulations and now in the statute.

The “as of” language was incorporated into ERISA’s and the IRC’s minimum funding requirements in 2001 as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRA”).¹⁴ Although it was new to the statute, the “as of” language had been enforced as part of proposed regulations issued in 1982.¹⁵ Furthermore, when the

¹³ 26 C.F.R. § 1.404(a)-3(c)(emphasis added).

¹⁴ The “as of” language was originally added to 26 U.S.C. § 412 and 29 U.S.C. § 1082 by Section 661 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRA”), P.L. 107-16 (June 7, 2001), 115 Stat. 38, before it was moved to its current codification by Sections 201(a) and 211(a) of the Pension Protection Act of 2006 (“PPA”), P.L. 109-280 (Aug. 17, 2006), 120 Stat. 780.

¹⁵ See 26 C.F.R. § 1.412(c)(9)-1(b)(1) (proposed), *Minimum Funding Requirements and Minimum Funding Excise Taxes*, Notice of Proposed Rulemaking (EE-99-78), 47 F.R. 54093, 54101 (Dec. 1, 1982); *Restoring Earnings to Lift Individuals and Empower Families (RELIEF) Act Of 2001, Technical Explanation of Provisions Approved by the Committee On May 15, 2001*, Committee on Finance, United States Senate, pp. 133, retrieved Oct. 12, 2025 from

“as of” language was proposed in 2001, it was described in the Technical Explanation issued by the Senate Committee on Finance as follows:

Under present law, plan valuations are generally required annually for plans subject to the minimum funding rules. Under proposed Treasury regulations, except as provided by the Commissioner, the valuation must be *as of* a date within the plan year to which the valuation refers or within the month prior to the beginning of that year.

* * *

The provision incorporates into the statute the proposed regulation regarding the date of valuations.¹⁶

In other words, when Congress incorporated the “as of” formulation into the statutory minimum funding requirements – the same “as of” language relied upon by the Employers with regard to withdrawal liability, no change in the law was intended. Congress could not have meant “as of” to mean “by,” since that would have resulted in a significant change in the law. Furthermore, it is axiomatic that, in enacting legislation, Congress is presumed to be aware of the current state of the law, particularly of administrative and judicial interpretations of statutes.¹⁷

<https://www.finance.senate.gov/imo/media/doc/leg031501cmppt.pdf>

¹⁶ *RELIEF Act Technical Explanation*, p. 133 (emphasis added).

¹⁷ *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382, n. 666 (1982); *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

Thus, the deadline for making a final selection of actuarial assumptions for minimum funding purposes remains the date on which the Form 5500, Schedule MB (formerly Schedule B)¹⁸ is filed, which is due 210 days following the end of the plan year for which it is filed, subject to an automatic extension to the 15th of the third month following the original deadline.¹⁹ For a calendar year plan, this means that the actuarial assumptions must be finally selected by October 15 of the year *following* the year for which the valuation is performed. This is 9½ months after the end of the year. Furthermore, because the measurement date is not required to be the last day of the year, the selection of assumptions need not become final until considerably longer after the measurement date, potentially as long as 22½ months. This deadline is not imposed because of the words “as of,” but rather because the IRS imposed a deadline under a separate regulation under a different, albeit related, statutory provision governing the deductibility of employer pension contributions.²⁰

Here the IRS-imposed limit does not apply apply.²¹ Equally inapplicable is the PBGC regulation

¹⁸ 26 C.F.R. §§ 301.6059-1, 301.6059-2(d)(2).

¹⁹ 29 U.S.C. §§ 1023(d), 1024(a)(1). 26 C.F.R. § 1.6081-11(a); *see Rubin v. Commissioner*, 103 T.C. 200 (1994)(Employer should not have relied upon actuary’s tentative valuation in making its contributions, which was generated prior to the actuary having changed those assumptions and certifying Schedule B nearly 9½ months following the end of the plan year).

²⁰ 26 U.S.C. § 404 (Governing deductibility of employer pension contributions).

²¹ Although pursuant to Section 101 of Reorganization Plan No. 4 of 1978, 43 F.R. 47713 (Oct. 17, 1978), 92 Stat. 3790, *as*

governing the deadline for the preparation of actuarial valuations, and therefore the selection of actuarial assumptions, for terminated multiemployer plans. As stated in the PBGC's regulations:

Each actuarial valuation under this paragraph (a) must be performed ***within 150 days after the end of the plan year for which it is performed*** and must be filed with PBGC within 180 days after the end of that plan year in accordance with the valuation instructions on PBGC's website (www.pbgc.gov).²²

No such limiting regulation, however, has been issued by the PBGC applicable to actuarial valuations used for withdrawal liability assessments.

As an additional example of Congress' use of the "as of" formulation, for estate tax purposes, an executor may generally elect to use the "value at the time of death of all property" or the value "as of" six months after the date of death.²³ Neither the valuation nor the election must be made "by" either the date of death or six months following. Rather, the election is generally not required until the date the estate's tax return is filed, and those returns are not

amended by PPA Sec. 108(c), the authority to issue regulations related to minimum funding standards that are included in both the Internal Revenue Code and Title I of ERISA was transferred to the Department of the Treasury, 26 U.S.C. § 404 is not duplicated in Title I of ERISA, and no part of Title IV of ERISA, which includes multiemployer plan withdrawal liability, is covered by the Reorganization Plan, and remains solely subject to the regulatory authority of the PBGC.

²² 29 C.F.R. § 4041A.24(a)(4) (emphasis added).

²³ 26 U.S.C. §§ 2031(a), 2032(a)(2).

due until nine months following the decedent's death and may be extended for up to six months.²⁴ In other words, while the value must be determined as of a certain date (date of death or six months later), the valuation need not be performed until later.

Additionally, the same issue has been squarely addressed in state court. As explained by the Supreme Court of Rhode Island:

In our opinion, the correct interpretation of this provision is that the finance director can and, indeed, must prepare and submit a financial statement for the city “as of” the fiscal-year end, but he can do so only on a date *after* that fiscal-year end has passed. This is so because the finance director must have the benefit of all financial transactions that occurred through and including the last day of the city's fiscal year before he can possibly submit any financial statement that is accurate “as of” that date. Thus, as a practical matter, the finance director must submit the financial statement after the fiscal year already has concluded.²⁵

Thus, the Court had no difficulty construing a requirement that a report be prepared “as of” a date as *not* meaning that the report, or its contents, must be prepared *by* that date.

Thus, where neither Congress nor the agency with regulatory jurisdiction over the statute has adopted any arbitrary deadline for the final selection of

²⁴ 26 U.S.C. §§ 2032(d)(1), 6075(a), 6081(a), 26 C.F.R. § 20.6081-1.

²⁵ *Nye v. City of Warwick*, 736 A.2d 82, 84 (R.I. 1999).

actuarial assumptions, none should be artificially imposed by the Court.

III. There is No Rationale for Imposing an Artificial Deadline for the Selection of Actuarial Assumptions

A. Reliance Upon Withdrawal Liability Estimates and Assumptions is Unreasonable on its Face

The Employers contend that it is unfair to not require the selection of actuarial assumptions prior to the measurement date, *i.e.*, the end of the year prior to the date of withdrawal, because they should have been able to reasonably rely upon those estimates and assumptions. The facts of this case, however, demonstrate the illogic of their argument.

Here, only three of the four Employers even made a request for withdrawal liability estimates. Ohio Magnetics, Inc. made no such request,²⁶ and so could not possibly have relied upon any estimate – out-of-date or otherwise.

More remarkably, M&K Employee Solutions, LLC, along with other members of its controlled group (collectively “M&K”), first requested an estimate of its liability for a total withdrawal in 2018, following two partial withdrawals in 2017. Because its request was made during 2018, the Plan could have lawfully provided an estimate based upon a 2017 withdrawal, which would have used the outdated assumptions. Instead, the Plan provided an estimate for a

²⁶ J.A. 150.

withdrawal in 2018 using the revised assumptions.²⁷ On June 26, 2018, the Plan provided its estimate that the withdrawal liability would be \$5,829,626. Notwithstanding this estimate, on December 31, 2018, six months after it received a remarkably accurate estimate, M&K terminated its last remaining contract requiring contributions to the Plan, triggering a complete withdrawal. The Plan ultimately withdrew its outstanding assessment for partial withdrawal liability²⁸ and, on June 14, 2019, assessed the amount of \$6,158,482 in withdrawal liability for M&K's complete withdrawal, only modestly more than its estimate.²⁹

Similarly, Toyota Logistics Services, Inc. ("Toyota") made its request for an estimate on or about September 13, 2018. Even though the Plan had 180 days to respond and could lawfully have provided an estimate based on a 2017 withdrawal, it instead provided Toyota with an estimate on December 3, 2018 for a 2018 withdrawal. As a result, the estimate used the revised actuarial assumptions to produce an estimate of \$1,344,032. Notwithstanding this estimate, Toyota withdrew on December 29, 2018, several weeks after receiving its estimate. On June 18, 2019, the Plan assessed Toyota the amount of \$1,289,384 for its withdrawal, which was remarkably

²⁷ J.A. 284.

²⁸ On June 26, 2018, the Plan had assessed liability in the amount of \$611,110 for one of M&K's partial withdrawals. That assessment was withdrawn following M&K's complete withdrawal. J.A. 263.

²⁹ J.A. 266.

close to, albeit slightly *lower* than the estimate it had provided to Toyota prior to its withdrawal.³⁰

These facts make clear that any suggestion that either M&K or Toyota relied upon the out-of-date estimates and assumptions to their detriment is mistaken. *Both* of these Employers withdrew *after* having received estimates that were based on the actuarial assumptions about which each now complains.

Only one of the four Employers requested, and received, its estimate in an earlier plan year. Phillips Corporation (“Phillips”) was provided its estimate on September 28, 2017, which was based upon a withdrawal occurring during 2017. The estimate therefore used the earlier actuarial factors.³¹ Nevertheless, by the time Phillips withdrew on April 7, 2018,³² the revised actuarial assumptions had been in place for two-and-a-half months. Nevertheless, knowing that its estimate was for an earlier Plan year and that both the Plan’s financial condition and its estimated liabilities could well have changed dramatically, Phillips claims it should have been able to rely upon that out-of-date estimate. Any such reliance was inherently unreasonable.

Each of these scenarios illustrates the fundamental implausibility of the Employers’ underlying argument of unfairness. There is no unfairness here, nor is there any reasonable basis for their argument that contributing employers need to

³⁰ J.A. 230-31.

³¹ J.A. 150-51.

³² J.A. 150.

be able to rely on estimates and assumptions they know are out of date.

More significantly, it is clear from the language of ERISA itself that employers have no reasonable basis to rely on the estimates plans are required to provide. As stated in the ERISA provision requiring the disclosure of withdrawal liability estimates and assumptions:

The plan sponsor or administrator of a multiemployer plan shall, upon written request, furnish to any employer who has an obligation to contribute to the plan a notice of—

(A) the estimated amount which would be the amount of such employer's withdrawal liability . . . *if such employer withdrew on the last day of the plan year preceding the date of the request*, and

(B) an explanation of how such estimated liability amount was determined, including the *actuarial assumptions* and methods used to determine the value of the plan liabilities and assets, the data regarding employer contributions, unfunded vested benefits, annual changes in the plan's unfunded vested benefits, and the application of any relevant limitations on the estimated withdrawal liability..³³

Thus, the estimate and assumptions required to be provided by a plan will already be a year out of date

³³ 29 U.S.C. § 1021(l)(1) (emphasis added).

when the request is made, since it assumes a withdrawal in the prior plan year.

Furthermore, the estimate and assumptions are not required to be provided until 180 days after the request.³⁴ Thus, the estimates and assumptions required to be provided by a plan to an employer considering a withdrawal will *always be* at least one year, and possibly two years, out-of-date. Additionally, unlike changes in withdrawal liability rules and methodologies, Congress has imposed *no obligation* on plans to provide contributing employers with notice of changes in actuarial assumptions.³⁵

Any pretense of reasonable reliance upon these estimates and assumptions ignores the plain language of the statute. Congress could not have intended for employers to rely on these estimates, and especially that the underlying assumptions would not change.

B. Withdrawal Liability was Designed to Protect Participants and Beneficiaries, and to Avoid Undue Burdens on Remaining Employers, not to Permit Withdrawn Employers to Impose Arbitrary Limitations on Their Liabilities

In adopting the withdrawal liability provisions of ERISA, Congress included “findings and declaration of policy,” which state, *inter alia*:

The Congress finds that—

* * *

³⁴ 29 U.S.C. § 1021(l)(2).

³⁵ 29 U.S.C. § 1394(b).

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.³⁶

Consistent with this Congressional declaration, in response to a due process challenge to withdrawal liability, this Court recognized:

That the solvency of a pension trust fund may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of plan failure, is merely incidental to the *primary congressional objective of protecting covered employees and beneficiaries of pension trusts like the Plan*.³⁷

Furthermore, as quoted by the Court from the House of Representatives' Committee Report on the

³⁶ 29 U.S.C. § 1001a.

³⁷ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (emphasis added).

legislation that ultimately added withdrawal liability to ERISA:

“[T]hese rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination.”³⁸

It is clear from this language that the intended beneficiaries of these provisions are the plans’ participants and beneficiaries. As also stated by this Court:

“A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage – or force – further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.”

* * *

³⁸ *Concrete Pipe*, 508 U.S. at 628, *quoting* H. R. Rep. No. 96-869, pt. 1, p. 86 (1980).

“To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .

"We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan."

After 17 months of discussion, Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations.³⁹

It is clear from these statements that Congress intended to protect participants and beneficiaries, to discourage withdrawals, to force withdrawing employers to pay their appropriate share of the plan's liabilities, and to avoid placing unfair burdens on the remaining employers.

³⁹ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 216-17 (1986), *quoting* Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22-23 (1978) (statement of Matthew M. Lind, PBGC Executive Director).

The remaining employers must live with changing interest rates and other assumptions, market declines, deteriorating industries, and more, whereas a withdrawn employer has fixed its liabilities. Furthermore, the participants and beneficiaries must live with the consequences of any plan underfunding. Fairness does not require that withdrawn employers get a better deal than the employers that remain, and certainly not a better deal than a plan's participants and beneficiaries who ultimately suffer the consequences of employer withdrawals.

Congress, of course, did adopt measures to ameliorate the impact of withdrawal liability on withdrawing employers. Although these measures do not satisfy the Employers, that was not Congress' intent. There is no rationale to impose an artificial deadline on the selection of assumptions in order to benefit employers who have chosen to leave the risk of funding shortfalls behind for others to face.

C. The Employers' Theory Opens a Can of Evidentiary Worms

Implicit in, but necessary to, the Employers' argument is that there is a formal process for an actuary to "select" assumptions so that it is always possible to easily tell the date those assumptions are selected. This is not the case.

The only formal reporting of the selection of actuarial assumptions for withdrawal liability is on a plan's Schedule MB, which became effective for plan years beginning in and after 2022.⁴⁰ As noted above, Schedule MB is not filed until as late as 9½ months

⁴⁰ 87 F.R. 31133, 31135 (May 23, 2022).

after the close of a plan year, which would be 21½ months after the withdrawal liability measurement date for that year.

Furthermore, the actuarial standards do not provide any hard and fast deadline for the required disclosure of actuarial assumptions to the affected principals, in this case a plan's board of trustees. As stated in the relevant actuarial standard:

3.1.3 Timing of Communication

The actuary should issue each actuarial communication within a reasonable time period, unless other arrangements as to timing have been made. In setting the timing of the communication, the needs of the intended users should be considered.⁴¹

Importantly, although an actuary may consider the circumstances surrounding the use of those assumptions,⁴² it is well settled that, ultimately, the duty of choosing the assumptions falls to the actuary.⁴³ Thus, any notion that an assumption applicable to a plan is not “selected” until it is

⁴¹ ASOP 41, *Actuarial Communications*, Sec. 3.1.3, p. 3 (Dec. 2010), *retrieved* Oct. 7, 2025, from https://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop041_120.pdf.

⁴² *E.g.*, ASOP 27, Sec. 3.5.a, p. 6 (Dec. 2023) (Assumptions must be “appropriate for the purpose of the measurement.”), *retrieved* Oct. 7, 2025 from https://www.actuarialstandardsboard.org/wp-content/uploads/2024/05/asop027_211.pdf.

⁴³ *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 357 (7th Cir. 2012).

communicated to, or ratified by, a plan's Board of Trustees is unfounded.

Because there is no formal date marking when an assumption is selected, acceptance of the Employers' thesis would reduce withdrawal liability disputes to forensic examinations of actuarial notes, papers, and other records to determine when an assumption was selected by the actuary. This result is directly contrary to both Congressional intent and this Court's precedent.⁴⁴

D. Automatically Rolling-Over Assumptions is Contrary to the Law and Professional Standards

The rule advocated by the Employers would require that, absent an actuary's affirmative selection of assumptions by the measurement date, the prior year's assumptions would roll-over to be used in determining a plan's UVBs. This proffered rule, however, trivializes the process for determining whether to retain or change prior assumptions. As stated in the actuarial standards:

Reviewing Assumptions Previously Selected by the Actuary—At each measurement date, the actuary should determine whether the assumptions selected by the actuary for a previous measurement date continue to be reasonable. In making this determination, the actuary should take into account changes in relevant factors known to the actuary that may affect future experience. . . . ***For each previously selected assumption that the***

⁴⁴ See fns. 38, 39.

actuary determines is no longer reasonable, the actuary should select a reasonable new assumption.

* * *

Reliance on Another Actuary—The actuary may rely on another actuary who has selected assumptions or given advice on the selection of assumptions. However, *the relying actuary should be reasonably satisfied that the reliance is appropriate*, taking into account whether the actuary knows that the other actuary is qualified to select the assumptions and the assumptions were selected in accordance with this ASOP and other applicable ASOPs.⁴⁵

In short, under the actuarial standards, it is the actuary's responsibility to determine whether to continue using an existing assumption, whether the old assumption was selected by that actuary or a different actuary. It should not be presumed based on a timing foot-fault.

Similarly, although ERISA does not impose any explicit deadlines on the timing of selecting assumptions, it does impose requirements that actuarial assumptions not be “unreasonable” and that they represent the actuary’s “best estimate.”⁴⁶ Requiring that an actuary’s judgment be overridden, not because of a mistake or express legal requirement, but because of a timing rule imposed without any

⁴⁵ ASOP 27, Secs. 3.19. 3.23.

⁴⁶ 29 U.S.C. §§ 1393(a)(1), 1401(a)(3)(B)(i).

legislative or regulatory support, is directly contrary to the duties imposed under the law.

The wisdom of Congress' determination to place the choice of actuarial assumptions in the hands of a plan's actuary is, ironically, best exemplified in the *amicus curiae* brief submitted by James P. Naughton in Support of Petitioners. Professor Naughton's principal argument is that he does not believe that actuaries need to be allowed to take into account all of the facts in existence as of the measurement date. In his view, their estimates would be just as good if the Court were to impose artificial deadlines on them not found in the statute.⁴⁷

As this Court has stated, however:

As the text plainly indicates, the assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary.⁴⁸

The determination whether to take into account all available information up through the measurement date is, therefore, a determination Congress left to the actuary who signs the actuarial valuation and the Schedule MB for the plan. It is not a determination to

⁴⁷ Professor Naughton also suggests that the Court of Appeals' concern in the *Metz* case was over the decision by the plan's actuary to use a different discount rate for withdrawal liability from the one used for minimum funding purposes. Naughton *Amicus* Brief at 3. That issue, however, is not currently before the Court and remains unresolved.

⁴⁸ *Concrete Pipe*, 508 U.S. at 632; see also *CPC Logistics*, 698 F.3d at 357.

be made, let alone second-guessed, by an academic with no professional duty to the plan.

The wisdom of Congress' choice may be shown by a simple example. Many actuaries use the *Survey of Capital Market Assumptions* prepared annually by Horizon Actuarial Services, LLC.⁴⁹ to assist in determining their interest rate assumptions. That Survey is typically published in August of each year, and includes a survey of expected returns of different asset classes from multiple investment advisers.⁵⁰ Although a majority of those surveyed provide their estimates as of January 1 of the year or earlier, a few provide projections for as late as March 31 of the year surveyed.⁵¹ Under the rule proposed by the Employers and adopted in *Metz*, an actuary for a plan with a July 1-June 30 Plan Year would be required to use projections that are already a year out of date because the survey is not published until August. The decision below by the Court of Appeals for the District of Columbia Circuit would allow the plan's actuary to use the most current survey, because it would be based on data drawn from periods prior to the measurement date. It stands to reason that an actuary should have the opportunity to use the most current data in selecting assumptions, and it defies logic to summarily conclude that it makes no

⁴⁹ See <https://www.horizonactuarial.com/survey-of-capital-market-assumptions>.

⁵⁰ See, e.g. *Survey of Capital Market Assumptions, 2025 Edition*, retrieved October 15, 2025 from https://www.horizonactuarial.com/files/ugd/f76a4b_a39fff36468c4cf9bf837c85a9b56d76.pdf, pp. 1, 3.

⁵¹ *Ibid.*, p. 6.

difference to the accuracy of the actuarial assumptions.

E. Congress Made a Deliberate and Reasoned Choice of Which Retroactive Changes to Limit

The Employers argue that the statutory provision limiting the retroactive effect of certain aspects of withdrawal liability assessments demonstrates a generalized Congressional policy against all retroactivity. The specific provision upon which the Employers rely states as follows:

No plan rule or amendment adopted . . . under section 1389 [the *de minimis* rule] or 1391(c) [the selection of withdrawal liability assessment methodologies] . . . may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted.⁵²

The Employers' assertion is mistaken for no fewer than three reasons.

First, and most obviously, the statutory provisions dealing with actuarial assumptions, sections 1393(a) and 1401(a)(3)(B)(i), make no mention of prohibiting or limiting retroactivity. Similarly, sections 1389 and 1391(c), the specific provisions to which the limitation on retroactivity applies, do not govern actuarial assumptions. Congress knew how to prohibit retroactivity, but chose to constrain those limitations to specific matters. As this Court has previously stated:

⁵² 29 U.S.C. § 1394(a).

A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.⁵³

Thus, no generalized Congressional policy against retroactivity may be inferred from this very specific and deliberate Congressional choice.

Second, the reason Congress made a clear statutory distinction between those changes that are subject to restrictions on retroactivity and those that are not is obvious. Both Sections 1389 and 1391(c), which are subject to the retroactivity prohibition, allow plans to deviate from the statutory default rules *by plan amendment*.⁵⁴ The power to amend a plan, and the power to adopt rules pursuant to those amendments, are typically under the control of the trustees as plan sponsor. They are never under the control of the plan's actuary. On the other hand, the choice of actuarial assumptions belongs exclusively to the plan's actuary. As this Court previously noted, "The trustees could act in a biased fashion for several

⁵³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 578, (2006), *citing Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *see also Bittner v. United States*, 598 U.S. 85, 94 (2023), *Gallardo v. Marstiller*, 596 U.S. 420, 429-430 (2022); *Salinas v. Railroad Retirement Bd.*, 592 U.S. 188, 196, (2021); *Azar v. Allina Health Services*, 587 U.S. 566, 576-577 (2019), *Department of Homeland Security v. MacLean*, 574 U.S. 383, 391 (2015), *Russello v. United States*, 464 U.S. 16, 23 (1983).

⁵⁴ 29 U.S.C. §§ 1389(b) ("A plan may be amended to provide for . . ."), 1391(c)(1) ("A multiemployer plan . . . may be amended to provide . . .").

reasons.”⁵⁵ On the other hand, in upholding the constitutionality of the presumption supporting the assumptions selected by a plan’s actuary, the Court noted:

Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards. . . . Since [actuarial] methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation.

* * *

The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice.⁵⁶

Thus, the distinction made by Congress in its very limited restriction on retroactivity is both rational and well recognized by this Court.⁵⁷ Whereas plan

⁵⁵ *Concrete Pipe*, 508 U.S. at 617.

⁵⁶ *Concrete Pipe*, 508 U.S. at 635.

⁵⁷ Any confusion the Employers may have over the allocation of roles and responsibilities between a plan’s trustees and its actuary pales before the descriptions of actuarial conduct espoused by the HR Policy Association (“HRPA”) in its *amicus* brief filed in this case. Among other things, HRPA accuses actuaries of “assess[ing] withdrawal liability when no

trustees may have multiple motivations, not the least of which is to protect the interests of their participants and beneficiaries,⁵⁸ actuaries are professionals governed by professional standards of conduct.

Finally, there was in fact no retroactivity in this case. Each of the Employers withdrew *after* the date the revised actuarial assumptions were chosen. Two of them even requested, and received, estimates based on those revised assumptions prior to their dates of withdrawal. Thus, even if 29 U.S.C. § 1394(a) were applicable to this case, the Employers would still lose.

Manifestly, the equitable arguments raised by the Employers are baseless.

withdrawal . . . occurred” and “misidentifying the highest contribution rate when calculating an employer’s withdrawal liability.” HRPB Brief, pp. 11, 13. Actuaries do not, however, assess withdrawal liability. That function is reserved to a plan’s board of trustees as the plan sponsor. 29 U.S.C. §§ 1301(a)(10)(A), 1382. Nor are actuaries lawyers with responsibility for interpreting ERISA’s legal requirements. With regard to making withdrawal liability assessments, an actuary’s role is limited to applying his or her professional judgment in selecting assumptions necessary to calculate a plan’s UVBs, performing the calculations based on those assumptions, and possibly performing other related calculations.

⁵⁸ *Concrete Pipe*, 508 U.S. at 617.

CONCLUSION

For the reasons set forth herein, the NCCMP respectfully requests that the decision below be affirmed.

Respectfully Submitted,

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