

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,
Respondents.

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

**BRIEF OF *AMICUS CURIAE*
THE PENSION RIGHTS CENTER
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST

The Pension Rights Center (“Center”) is a Washington, DC non-profit, nonpartisan consumer organization.¹ The Center was established in 1976, less than two years after the Employee Retirement Income Security Act of 1974 (“ERISA”) was enacted, with a mission largely co-extensive with that of the statute, to protect and promote the retirement security of American workers, retirees, and their families.

For almost fifty years, the Center has sought to protect the retirement security of participants in traditional defined benefit pension plans, including multiemployer plans, through engagement with Congress, the ERISA agencies, and the courts. The Center has played a leading role in shaping multiemployer plan legislation and implementing Pension Benefit Guaranty Corporation (“PBGC”) rules, such as the rescue of severely troubled multiemployer plans in the American Rescue Plan Act of 2021 (“ARPA”), Pub. L. No. 117-2, Subtitle H, § 9704, 135 Stat. 4, 190-195 (2021). Many multiemployer plans have adjusted benefits downward under rehabilitation plans mandated by the Pension Protection Act of 2006 (“PPA ‘06”), Pub. L. No. 109-280, § 202, 120 Stat. 780, 868-886 (2006). Some even suspended benefits in pay status under the Multiemployer Pension Reform Act of 2014, Pub. L. No. 113-235, Division O, § 201, 128 Stat. 2129, 2798-2822 (2015), before ARPA restored and funded those benefits. Such plans have long suffered from adverse economic and demographic trends including increased employer withdrawals.

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.

The issue in this case is whether the actuary for a multiemployer pension plan must select an interest rate assumption to compute a withdrawn employer's liability for its share of the plan's underfunding under ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 93-364, 94 Stat. 1208 (1980), by the last day of the plan year preceding withdrawals as long the actuary does so "as of" that date and based on data existing at that date. The District of Columbia Circuit held that the last day of the plan year is a measurement date and not a deadline for completion of the valuation, and that the assumptions therefore may be selected after the last day of the plan year.

Though the issue is technical, for this Court to overturn the D.C. Circuit could invite opportunistic withdrawals. That could destabilize more than 1,200 multiemployer plans covering more than ten million employees, retirees, and their dependents nationwide. See PBGC, Introduction to multiemployer plans, <https://www.pbgc.gov/employers-practitioners/multiemployer/introduction> (last visited October 18, 2025).

STATEMENT OF THE CASE

This case involves challenges by four employers to a valuation by the actuary to the IAM National Pension Fund ("Fund") of vested benefits for purposes of withdrawal liability under ERISA. The employers claimed before arbitrators, district judges, and the court of appeals that in performing a valuation of benefits "as of" the last day of a plan year, as required by 29 U.S.C. § 1391(b), the actuary must select the interest rate for discounting to present value by that date.

The Plan is a multiemployer pension plan whose plan year runs from January 1 to December 31. Pet. App. 6a-7a. Cheiron, Inc. (“Cheiron”) serves as the Plan’s actuary and prepares annual valuations of the Plan’s assets and liabilities. Pet. App. 21a.

In November 2017, Cheiron determined that, as of December 31, 2016, the Plan was underfunded by nearly \$450 million for withdrawal liability purposes. JA7a. In making this determination, Cheiron assumed a rate of 7.5% to discount future benefit payments to present value. *Id.* Employers withdrawing in 2017 would therefore owe a share of \$450 million.

On January 24, 2018, Cheiron selected a 6.5% assumption as of December 31, 2017, for employers withdrawing in 2018. Along with changes in the value of Plan assets and other valuation assumptions, this meant that such employers would owe a share of about \$3 billion, rather than about \$450 million under the prior 7.5% assumption. Pet. App. 8a-9a, 24a.

Petitioners are employers who withdrew from the Plan in 2018 after Cheiron had selected the 6.5% discount rate. In April 2019, the Plan assessed each employer withdrawal liability, and each employer commenced arbitration under 29 U.S.C § 1401(a) challenging the use of the 6.5% discount rate assumption. In each case, the arbitrator held for the employer, relying on the Second Circuit’s holding in *National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020). *Metz* held that a discount rate assumption may not be selected after the end of the plan year to which it applies, while acknowledging that an actuarial assumption, adopted under 29 U.S.C. § 1393, is not a plan “rule” or “amendment” subject to a statutory bar on retroactivity in 29 U.S.C. § 1394.

Respondent Trustees sued in the United States District Court for the District of Columbia to challenge the arbitration decisions. Three of the cases were consolidated before Judge Moss; the fourth was assigned to Judge Lamberth.

Both district judges held that ERISA does not require actuaries to select their assumptions on or before the valuation date. Pet. App. 18a–119a. The judges relied on the statutory text, which is “silent” on when a valuation must be performed and thus does not “impose any [year-end] limitation” for selecting valuation assumptions. The judges also relied on 29 U.S.C. § 1393(a)(1)’s requirement that actuaries select assumptions that offer their “best estimate of anticipated experience under the plan,” which entails consideration of information about the plan that may not be available before the end of the plan year in question. If actuaries could not select assumptions after the plan year ends, the judges explained, they might need to use stale assumptions that are “disconnected from reality” and that do not reflect their “best estimate” of the plan’s anticipated experience. Pet. App. 54a–55a, 95a–96a.

A unanimous panel of the court of appeals affirmed. Pet. App. 1a–17a. The court of appeals largely relied on the analyses of the district judges. Pet. App. 12a–15a. As the court of appeals explained, “[i]t would be contrary to 29 U.S.C. § 1393(a)(1)’s requirement that an actuary use its ‘best estimate’ of the plan’s anticipated experience as of the measurement date to require an actuary to determine what assumptions to use before the close of business on the measurement date.” “[T]he value of unfunded vested benefits ‘as of’ the measurement date constitutes a snapshot of the information available ‘as of’ that date.” Pet. App. 13–14a.

BACKGROUND

This Court has long been concerned with the financial well-being of multiemployer plans and has recognized the implicit inter-employer compact that sustains them. In *Lewis v. Benedict Coal*, 361 U.S. 459 (1960), the Court declined to allow an employer to offset damages for a union breach of contract against a plan's claim for employer contributions. The Court explained:

[U]nlike the usual third-party beneficiary contract, this is an industrywide agreement involving many promisors. If Benedict and other coal operators having damage claims against the union for its breaches may curtail [contributions], the burden will fall in the first instance upon the employees and their families across the country. This might result in pressures upon the other coal operators to increase their [contributions] to maintain the planned schedule of benefits.

Id. at 469.

As discussed in this Court's decision in *PBGC v. R. A. Gray & Co.*, 467 U.S. 717 (1984), in enacting ERISA Congress deferred mandatory pension insurance coverage for multiemployer plans out of concern for the capacity of the PBGC insurance system. Congress directed PBGC to report on the need for additional legislation. PBGC's report concluded that it was necessary to "provide a disincentive to voluntary employer withdrawals," among other things, and suggested new rules "under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation." *Id.* at 723.

In MPPAA, Congress adopted this suggestion, imposing liability on a withdrawn employer for its share of the plan's unfunded vested benefits determined by several mathematical formulae. *R.A. Gray*, 467 U.S. at 720-725; see 29 U.S.C. § 1381, *et seq.*

Congress designed withdrawal liability to reduce incentives to withdraw by fairly allocating the burden of funding promised benefits between remaining and withdrawn employers and to shore up the plan's finances, thereby protecting participants and beneficiaries and the PBGC insurance system. *Connelly v. PBGC*, 475 U.S. 211, 216-217 (1986). In addition to the PBGC report, Congress relied on succinct testimony by PBGC's Executive Director:

. . . . 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.

Connelly, 475 U.S. at 215-216 (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind)).

In MPPAA, Congress also amended the pension insurance rules to provide a limited benefit guaranty for minimal premiums for multiemployer plans, given their expected stability as compared to single-employer plans. 29 U.S.C. §§ 1306(a)(3), 1322(a), 1322A.²

ERISA provides for the enrollment by an inter-agency Joint Board for the Enrollment of Actuaries (“JBEA”) of actuaries who perform valuations of pension plans. 29 U.S.C. §§ 1241-1242; 20 C.F.R. § 900.3. MPPAA requires a plan’s enrolled actuary to determine the plan’s unfunded vested benefits (the difference between the present value of vested benefit liabilities and the value of assets) based on assumptions and methods that “in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary’s best estimate of anticipated experience under the plan.” 29 U.S.C. § 1393(a)(1). Under the “presumptive” allocation method the Respondent Fund uses, though the formula is complex, the unfunded vested benefits are to be determined “as of” the last day of the plan year before the employer’s

² Though they have been increased since MPPAA, the multiemployer plan guaranty and the premiums remain modest compared to those for single-employer plans. *Compare* 29 U.S.C. §§ 1306(a)(3)(vi), 1322a(c)(1) (annual premiums of \$39 per participant and guaranty of benefits (unindexed) equating to about \$13,000 per year with 30 years’ service for multiemployer plans) *with* §§ 1306(a)(3)(A)(i), (E), (G), (L), 1322(b)(3) (annual premiums of \$106 per participant plus \$52 per \$1,000 of unfunded vested benefits and guaranty of benefits (indexed) up to about \$89,000 per year at age 65 for single-employer plans). <https://www.pbgc.gov/employers-practioners/premiumfilings/rates>; <https://www.pbgc.gov/workers-retirees/learn/guaranteedbenefits>; <https://www.pbgc.gov/workers-retirees/learn/guaranteedbenefits/multiemployer-plan-facts> (all last visited Oct. 18, 2025).

withdrawal. 29 U.S.C. § 1391(b)(2)(D), (b)(4)(E)(i), (b)(4)(D)(i).

MPPAA provides for mandatory arbitration of disputes, followed by judicial review. 29 U.S.C. § 1401(a)(1), (b)(2). In the case of actuarial assumptions, the arbitrator can overturn the actuary's assumptions if they are "in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1401(a)(3)(B)(i). On questions of fact, the employer has the burden of "disprov[ing] a challenged factual determination by a preponderance." *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 629 (1993) (interpreting 29 U.S.C. § 1401(a)(3)(A)). On questions of law, judicial review is plenary. *Trustees of the Mo-Kan Teamsters Pension Fund v. Union Asphalts and Roadoils, Inc.*, 857 F.2d 1230 (8th Cir. 1988).

The Court upheld MPPAA against a substantive due process challenge in *Gray*, a takings challenge in *Connelly*, and a procedural due process challenge to MPPAA's actuarial valuation and arbitral review standards in *Concrete Pipe*. The Court has dealt with a withdrawal liability calculation issue in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995) (accrual of interest on permitted installment payments of withdrawal liability), and withdrawal liability collection in *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192 (1997) (accrual of claim for unpaid installments). Despite its complexities, therefore, MPPAA is familiar ground for the Court.

SUMMARY OF THE ARGUMENT

“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *United States v. Miller*, 604 U.S. ___, ___, 145 S. Ct. 839, 853 (2025) (citation omitted). And Congress may use a term of art with a “long-encrusted connotation in a given field.” *Feliciano v. Department of Transportation*, 605 U.S. ___, ___, 145 S. Ct. 1284, 1291 (2025).

In this case, “as of” has a settled meaning in federal law governing valuations. For instance, a decedent’s estate is to be valued “at” the time of death, or, alternatively, “as of” a date no more than six months later. 26 U.S.C. §§ 1031(a), 1032(a).

Valuations under the Internal Revenue Code are generally based on things “as they stood” on the measurement date. *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929). But that does not suggest that the valuation must be performed by that date.

This is true of ERISA’s minimum funding standard, enacted in 1974, 26 U.S.C. § 412(a) (1976), and it is true of 29 U.S.C. § 1391, the controlling provision in this case, enacted six years later. Section 1391 requires valuations to be done “as of” the end of a plan year under each of the four permitted methods for allocating unfunded vested benefits to withdrawn employers. This is true even though the provision uses other temporal prepositions, including “at,” “in,” “before,” and “after.”

This understanding is confirmed by ERISA’s requirements for an annual report under 29 U.S.C. §§ 1023, 1024. The report must contain an actuarial statement that represents the actuary’s “best estimate of anticipated experience under the plan,” and a

financial audit, for which the accountant may rely on the actuarial report. 29 U.S.C. § 1023(a)(3), (4). The annual report must contain requisite actuarial information and additional information “as of the end of the plan year to which the report relates.” 29 U.S.C. § 1023(d), (f). The annual report is due within 210 days after the end of the plan year. 29 U.S.C. § 1024(a). This strongly suggests that the plan and its professionals may—and indeed should—wait until all the year-end information is received and analyzed before the actuary finalizes his assumptions for that plan year.

Under a textual analysis of the statutory framework, even prepositions matter. In this case, Congress understood that “as of” is different from “on,” “by,” or “before.”

Other MPPAA provisions show that Congress was aware of the import of temporal words and phrases. For example, the date of withdrawal is the “date of” a permanent cessation of covered operations or the obligation to contribute. Even that cannot be determined immediately, as it takes time to judge whether the cessation is permanent.

The canon that Congress’s use of disparate language is presumed to be intentional, *Russello v. United States*, 464 U.S. 16, 23 (1983), applies with great force in this case. Though textual canons are not applied in a vacuum, in this case Congress did not equate the time the valuation assumptions are selected with the measurement date.

Therefore, when Congress said that a withdrawal valuation is to be done “as of” the close of the plan year preceding withdrawal, it did not mean that the assumptions must be selected on, by, or before that date. To make its “best estimate” of a plan’s anticipated experience as of the measurement date, the actuary must often

wait until after that date when it has more complete information and time to analyze that information.

No different rule is needed to protect against abuse. In *Concrete Pipe & Products Of Cal. v. Constr. Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 632 (1993), the Court noted that “actuaries are trained professionals subject to regulatory standards.” The Court also noted that if a plan sponsor “exercised decisive influence” over an actuary, that influence could be corrected. *Id.* at 633 n.19. That continues to be the case, as illustrated by *Chi. Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 356-357 (7th Cir. 2012).

Moreover, enrolled actuaries under ERISA are subject to standards of practice, a code of professional conduct with disciplinary enforcement, and reciprocal enforcement by an inter-agency enrollment board. The standards require an actuary to “disclose any pertinent information that could impact their independence,” Standard of Practice 41, and the code of conduct requires the actuary to ensure that his “ability to act fairly is unimpaired.” Code of Professional Conduct, Precept 7.

When plans overreach on points of law, or when employers do, the courts have not hesitated to correct them. Legal combat where large sums are involved should come as no surprise. But it hardly shows that actuaries are motivated to oppress withdrawn employers, in this case or in general.

Withdrawal liability estimates are important to employers considering withdrawal and in transactional work. But Congress enacted MPPAA to protect participants, whose benefits are subject to reduction, and it was concerned that withdrawals lead to increased

contributions for remaining employers. Successful challenges to valuation norms may lead to opportunistic withdrawals, undercutting these protections.

A more recent estimate would still lag, particularly given the time it can take to negotiate the sale of a business. Fortunately, techniques for managing such uncertainty are well known. The predictability that comes from a nationwide rule should satisfy those valid business concerns.

ARGUMENT

I. TEXTUAL INTERPRETATION COMPELS THE CONCLUSION THAT A WITHDRAWAL LIABILITY VALUATION NEED NOT BE DONE “ON,” “BY,” OR “BEFORE” THE END OF A PLAN YEAR BUT ONLY “AS OF” THAT DATE.

A. “As of” Has a Settled Meaning in the Valuation Context.

“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *United States v. Miller*, 604 U.S. ___, ___, 145 S. Ct. 839, 853 (2025) (citation omitted). And Congress may use a term of art with a “long-encrusted connotation in a given field.” *Feliciano v. Department of Transportation*, 605 U.S. ___, ___, 145 S. Ct. 1284, 1291 (2025). *Accord City of Dallas Texas v. Federal Communications Commission*, 118 F.3d 393 (5th Cir. 1997), *citing McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).

In this case, “as of” has a settled meaning in federal law governing valuations. For instance, a decedent’s estate is to be valued “at” the time of death, or, alternatively, “as of” a date no more than six months later. 26 U.S.C. § 1031(a), 1032(a). A corporate

acquiror of another corporation's assets succeeds to and must take into account certain tax attributes "as of" the close of the day of the transaction. 26 U.S.C. § 381(a). The phrase has also been used in that sense for bad debts (26 U.S.C. § 166), life insurance reserves (26 U.S.C. § 801), and straddles (offsets with respect to personal property) (26 U.S.C. § 1092).

Valuations under the Internal Revenue Code are based on things "as they stood" on the measurement date. *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929) (estate tax); *Okerlund v. United States*, 365 F. 3d 1044, 1053 (Fed. Cir. 2004) (gift tax).³ That does not suggest that the valuation must be performed by that date.⁴

This was true of ERISA's original minimum funding standard. The minimum funding standard required the use of actuarial assumptions and methods that "in the aggregate are reasonable (taking into account the

³ See Rev. Rul. 59-60:

[V]aluation is not an exact science. A sound valuation will be based upon all the relevant facts, but the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance. . . . Valuation of securities is, in essence, a prophesy as to the future and must be based on facts available at the required date of appraisal.

1959-1 C.B. 237.

⁴ That understanding holds true for counting "as of" a given date, though it may be even more forgiving in that context. See *Barnhardt v. Peabody Coal Co.*, 537 U.S. 149, 170 (2003) (assignments of beneficiaries to operators under the Coal Act "as of" of a given date means "as they shall be on that date" not as they "actually stand," even if the assignment is made after the statutory deadline).

experience of the plan and reasonable expectations)” and “in combination, offer the actuary’s best estimate of anticipated experience under the plan.” 26 U.S.C. § 412(c)(3) (1976).⁵

Using such assumptions, Congress specified that:

[a] plan to which this section applies shall have satisfied the minimum funding standard for [a] plan year for such plan if *as of the end of such plan year*, the plan does not have an accumulated funding deficiency.

Pub. L. No. 93-406, § 1013, 88 Stat. 829, 914 (1974), codified as 26 U.S.C. § 412(a) (1976) (emphasis added).⁶

⁵ The quoted provision has changed slightly for multiemployer plans, to require that “each” assumption be reasonable. 26 U.S.C. § 431(c)(3).

⁶ The provision defined an accumulated funding deficiency as the excess of the total charges to the funding standard account “for” all plan years over the total charges “for” such year. *Id.*

Current law contains the same requirements in substance. 26 U.S.C. §§ 412(a)(2) (contributions to a multiemployer plan must be “sufficient to ensure that the plan does not have an accumulated funding deficiency under section 431 as of the end of the plan year”), 431(a) (accumulated funding deficiency of a multiemployer plan is the amount, “determined as of the end of the plan year, equal to the excess (if any) of the total charges to the funding standard account of the plan for all plan years . . . over the total credits to such account for such years.”

Congress also used the phrase “as of” in connection with the full funding limit on contributions—the excess of the accrued liability over the value of assets:

If, *as of the close of a plan year*, a plan would . . . have an accumulated funding deficiency . . . in excess of the full funding limitation

(A) the funding standard account shall be credited with the amount of such excess, and

Mirroring ERISA's minimum funding standard, in MPPAA Congress required the actuary to use assumptions for withdrawal liability purposes that "in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan" (or assumptions prescribed by PBGC). 29 U.S.C. § 1393(a). In doing so, Congress permitted the actuary to "rely on the most recent complete actuarial valuation used for purposes of section 412 of title 26." 29 U.S.C. § 1393(b)(1). Thus, Congress must have used the 1974 minimum funding standard as a model for MPPAA six years later.

Like that minimum funding standard, Section 1391 requires valuations to be done "as of" the end of a plan year under the default "presumptive" method (used by the Respondent Fund) or one of three elective methods for allocating unfunded vested benefits to withdrawn employers.

Greatly simplified, under the presumptive method, 29 U.S.C. § 1391(b), the employer has a share of three components, the unamortized changes in unfunded benefits since an initial year, the unamortized initial year unfunded vested benefits, and the unamortized unfunded vested benefits that are not assessable against or collectible from other withdrawn employers. While each requires a number of *intermediate* calculations, the amounts are determined "as of" the end of the plan year, and ultimately the employer has a share of

the unamortized amount of each year's change
in unfunded vested benefits "*as of* the end of

(B) all amounts described [in certain preceding subparagraphs] shall be considered fully amortized

88 Stat. 916-17 (adding 26 U.S.C. § 401(c)(6), (7)) (emphasis added).

the plan year preceding the plan year in which the employer withdraws,” § 1391(b)(2)(E)(i), plus the unamortized amount of unfunded vested benefits for the initial year “*as of* the end of that plan year,” § 1391(b)(2)(D),⁷ plus the unamortized amount of the reallocated unfunded vested benefits, again “*as of* the end of the plan year preceding the plan year in which the employer withdraws.” § 1391(b)(4)(D)(i) (all emphases added).

Under the modified presumptive method, 29 U.S.C. § 1391(c)(2), also simplified, the employer has a share of:

the plan’s unfunded vested benefits “*as of* the end” of an initial plan year,⁸ reduced as if those obligations were being fully amortized in level annual installments over 15 years, plus the plan’s unfunded vested benefits “*as of* the end of the plan year preceding the plan year in which the employer withdraws. . . .” § 1391(c)(2)(B), (C)(i)(I) (emphases added).

Under the rolling-five method, 29 U.S.C. § 1391(c)(3), again simplified, the employer has a share of:

⁷ Under MPPAA, the initial plan year was the year ending before September 26, 1980, MPPA’s enactment date. As the initial year’s unfunded vested benefits would have been reduced to zero by the year 2000, in PPA ’06 Congress permitted use of a “fresh start” in a year when the plan had no funded vested benefits. PPA § 204(c)(2), 120 Stat. 887, *adding* 29 U.S.C § 1391(c)(5)(E). *See also* 29 C.F.R. § 4211.12(d).

⁸ Under PBGC rules, there is also a fresh start for this method, as the initial year’s unfunded vested benefits would have been reduced to zero by 1995. 29 C.F.R. § 4211.12(e).

the plan's unfunded vested benefits "*as of* the end of the plan year preceding the plan year in which the employer withdraws." § 1391(c)(3)(A) (emphasis added).

And under the direct attribution method, 29 U.S.C. § 1391(c)(4), again simplified, the employer has a share of :

the unfunded vested benefits attributable to participants' service with the employer, "determined *as of* the end of the plan year preceding the plan year in which the employer withdraws." § 1391(c)(4)(A)(i) (emphasis added).⁹

See also § 1391(e) (reduction of withdrawal liability for value "as of" last day of plan year preceding withdrawal of unfunded vested benefits transferred to another plan).

In addition to "as of," the minimum funding rules used other temporal prepositions, such as "on," "after," "at any time in," and "in." So does Section 1391, such as "over" a period of years, "at," "before," "preceding" or "after" a date, "during," "in," or "with respect to" a period, and a period of "more than . . . but not more than. . . ." Whether these varying words and phrases are used systematically or not, at bottom, the valuation is done "as of" the close of the plan year before withdrawal, not "on," "by," or "before" that date. "As of" therefore connotes a measurement date and not a deadline.

⁹ Congress sometimes used the term "at" and sometimes the phrase "as of" for the presumptive method. 29 U.S.C. 1391(b)(2)(B), (D), (E), (3). In context, both define a measurement date rather than a deadline, as they apparently do for estate tax purposes. See 26 U.S.C. §§ 1031, 1032 (decendent's estate is valued "at" death or "as of" six months later), as appraisals presumably are not done on the date of death itself.

That understanding is confirmed by ERISA’s requirements for an annual report, in 1974 and today. Under 29 U.S.C. § 1023, a plan must file an annual report (known as Form 5500), with a financial audit and an actuarial statement (now known as Schedule MB for a multiemployer plan). 29 U.S.C. § 1023(a)(1). Similar to the minimum funding and withdrawal liability rules, the actuary is to use assumptions that enable him to form an opinion that the matters he reports are “in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and . . . represent his best estimate of anticipated experience under the plan.” 29 U.S.C. 1023(a)(4)(B). The actuarial statement is “applicable to” a plan year, 29 U.S.C. § 1023(d), and the accountant may “rely” on the actuarial statement in its audit, 29 U.S.C. 1023(a)(3)(B). The actuarial statement must detail participant information, employer contributions, and the plan’s funding level. 29 U.S.C. § 1023(d).

The annual report, together with the audit and the actuarial report, is to be filed within 210 days after the close of the plan year. 29 U.S.C. 1024(a)(1)(A). These reporting rules strongly suggest that the plan and its professionals may—and indeed should—wait until all the year-end information is received and analyzed before the actuary finalizes his assumptions for that plan year.¹⁰

¹⁰ Current law requires additional information about multiemployer plans “as of” the end of the plan year. 29 U.S.C. § 1023(f)(2). But there is no suggestion that the audit or the actuarial statement must be prepared or finalized “on,” “by,” or “before” the last day of the plan year. To the contrary, the requirement that the report be filed within 210 days after the end of the plan year establishes that that is not the correct interpretation. Moreover, requiring actuarial assumptions “on,” “by,” or “before” the last day

B. Temporal Prepositions Have Significance.

Under a textual analysis, even prepositions matter. Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, at 71 (discussing *Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009), which held that discharging a firearm within an occupied structure did not constitute a prohibited discharge “into” such a place).

A comparison of Section 1391’s phrase “as of” with other MPPAA provisions shows that Congress was aware of the import of temporal words and phrases. For example, a complete withdrawal occurs “when” an employer permanently ceases to have an obligation to contribute to a plan or covered operations under the plan, and the date of withdrawal is the “date of” the cessation. 29 U.S.C. § 1383(a), (e). Similarly, a partial withdrawal occurs “on” the last day of a plan year if, “during” that year, an employer incurs a 70-percent contribution base unit (“CBU”) decline or permanently ceases to have an obligation to contribute at one but fewer than all collective bargaining agreements or facilities but continues the operations on a non-contributory basis. 29 U.S.C. § 1385(a)(b).¹¹

of the plan year ignores the complexities of year-end information gathering, much of which is not available until after year-end. See *Chi. Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 348-49 (7th Cir. 2012) (describing numerous factors needed to calculate withdrawal assumptions and liability); Brief of Amici Curiae Actuarial Firms at 8, 11, filed in *Trustees of the IAM Nat’l Pension Fund v. M&K Employee Solutions, LLC* (filed March 30, 2023), No. 22-7157 (D.C. Cir.).

¹¹ As with a valuation, the fact of withdrawal cannot be determined on the date of the cessation, as it takes time for a

Continuing with this analysis, withdrawal liability is stated as a lump sum but is payable in installments. Under 29 U.S.C. § 1399(a)(1), the annual payment is the product of the employer's highest contribution rate and its highest three-year average contribution base units (typically hours worked) "during" overlapping 10-year periods leading up to the withdrawal and is calculated as if the first payment is due "on" the first day of the plan year following withdrawal. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995).

The textual evidence therefore demonstrates that Congress did not equate "as of" with "on," "by," or "before." Rather, it presumably was aware that a valuation "as of" a given date can depend on assumptions selected after that date.

C. The "Disparate Language" Canon Is Particularly Applicable to the Meaning of "As Of" as Compared with Other Temporal Prepositions Used in the Statute.

In *INS v. Cardoza-Fonseca*, 480 U.S. 412 (1987), this Court stated:

"[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

cessation to mature into permanence. *See, e.g., Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491, 497 (9th Cir. 1987) ("The mere existence of an impasse in negotiations does not lead to withdrawal, even if contributions by the employer to the pension fund cease. . . .").

or exclusion.” *Russello v. United States*, [464 U.S. 16, 23 (1983)] (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)).

480 U.S. at 432.

Contrary to Petitioners’ suggestion (Pet. Br. at 32), the disparate language canon has great force here, and *Clay v. United States*, 535 U.S. at 522 (2003), is distinguishable. *Clay* involved Judicial Code provisions for post-conviction review of “final” federal and state judgments. Congress defined a final state judgment as one that had become final “by the conclusion of direct review or the expiration of the time for seeking such review.” The Court concluded that it was necessary to define “final” to establish a uniform federal rule for state court judgments, but not for federal judgments as they are by definition subject to a federal rule. Thus, the federal finality standard was “no less broad” than the state rule despite the disparate language. 535 U.S. at 530-531.

The disparate language canon, of course, does not exist in a vacuum. In *Clay*, the disparate language logically had the same meaning. In this case, however, Congress did not equate the time for selecting valuation assumptions with the measurement date, any more than with other “pinpointed” dates (*Clay*, 535 U.S. at 531) such as the backward-looking date of withdrawal or deemed date of the first installment payment. Nor does it logically follow that Congress meant to do that.

Therefore, when Congress said that a withdrawal liability valuation is to be done “as of” the close of the plan year preceding withdrawal, it did not mean that the assumptions must be selected “on,” “by,” or “before” that date.

The statutory history does not require a contrary conclusion. To be sure, Congress considered making the measurement date the date of withdrawal or the last day of the plan year of withdrawal before settling on the last day of the plan year before withdrawal (Pet. Br. at 20-21). But that does not bear on the meaning of “as of,” which would have been an issue regardless of which measurement date Congress chose.

II. THERE IS NO SIGNIFICANT POTENTIAL FOR MANIPULATION AND NO COMPELLING NEED FOR MORE ACCURATE ESTIMATES.

A. Professional Standards and Judicial Review Standards Suffice to Prevent Manipulation.

The employers in this case withdrew after the plan’s actuary selected his assumptions. There is no aura of manipulation, at least on this record, unlike that suggested in the Second Circuit’s decision in *Metz*.

As this Court said in *Concrete Pipe & Products of Cal. v. Constr. Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 632 (1993), “[a]lthough plan sponsors employ them, actuaries are trained professionals subject to regulatory standards. See 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35).”

The Court was aware of one case “in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it disliked, see *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 93 (CA3 1990),” but “none in which a plan sponsor was found to have replaced an actuary’s actuarial methods or assumptions with different ones of its own.” *Concrete Pipe*, 508 U.S. at 633 n. 19. The Court noted that the legislative history of the analogous minimum funding rules “suggests that the actuarial assumptions must

be ‘independently determined by an actuary,’ and that it is ‘inappropriate for an employer to substitute his judgment ... for that of a qualified actuary with respect to these assumptions. S. Rep. No. 93-383, p. 70 (1973); see also H. R. Rep. No. 93-807, p. 95 (1974).” *Id.*

MPPAA’s arbitral standard for actuarial assumptions, 29 U.S.C. § 1401(a) mirrors Section 1393(a)’s “reasonable[ness]” standard. Though it does not include a “best estimate” component, arbitrators and courts have examined that question as well. *E.g., Chi. Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 356-357 (7th Cir. 2012) (stating that an actuary is “a professional, assumed to be neutral and disinterested” and reversing on grounds that trustees’ direction that actuary use assumptions that did not represent his best estimate was “unreasonable”).

Moreover, enrolled actuaries under ERISA are subject to Actuarial Standards of Practice, <https://actuary.org/professionalism/actuarial-standards-of-practice>, and a Code of Professional Conduct enforced by the Actuarial Board of Counseling and Discipline, <https://actuary.org/professionalism/code-of-conduct>; <https://www.abcdboard.org/resources> (all last visited Oct. 18, 2025). Standard 41 bears on an actuary’s independence, requiring the actuary to “disclose any pertinent information that could impact their independence,” as does Precept 7 of the Code of Professional Conduct, requiring an actuary to ensure that his “ability to act fairly is unimpaired” when a conflict of interest exists. So do the JBEA’s rules, which require that an actuary under disciplinary action re-enroll before he may perform a valuation or prepare a report. 20 C.F.R. § 901.11(m).

When plans overreach on points of law, the courts have not hesitated to correct them, as the HR Policy Association points out (Br. at 11-13). *See, e.g., Teamsters Pension Fund v. Central Michigan Trucking*, 857 F.2d 1107 (6th Cir. 1988) (rejecting a theory that contingent withdrawal liability “accrued” to a controlled group member and remained with it after a controlled group breakup); *Chi. Truck Drivers*, 698 F.3d at 356-357 (concluding that trustee’s direction to actuary to use improper assumptions constituted grounds for reversal).

Withdrawn employers also take aggressive litigation positions, however, and they too are not always correct. *E.g., Central States, Southeast and Southwest Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605,614 (7th Cir. 2000) (commenting on a “broadside” attack on the method for crediting liability for a partial withdrawal against that for a complete withdrawal: “Congress could have come up with (or could have had PBGC come up with) more sophisticated methods that would more perfectly match a plan’s UVBs with a particular plan year. But it is only accounting fiction because Safeway is unhappy with the result. Everywhere else, it is just accounting.”)

Legal combat where large sums are involved should come as no surprise. But it hardly shows that actuaries are motivated to oppress withdrawn employers, in this case or in general.

B. Employers Can Adapt to Lagging Estimates.

Withdrawal liability estimates are important to employers considering withdrawal from, or, more rarely, entry into a multiemployer plan. They are also important

in mergers and acquisitions, as they can affect the form of the transaction and the purchase price.¹²

But Congress enacted MPPAA to protect participants' and beneficiaries' "well-being and security." 29 U.S.C. § 1001a(a)(3). Their benefits are subject to downward adjustment under a PPA '06 rehabilitation plan to assure plan solvency. See 29 U.S.C. § 1085(e). Indeed, the Respondent Fund adopted a rehabilitation plan that eliminated "adjustable benefits" effective January 1, 2022, including early retirement subsidies, unreduced age and service benefits such as "30 and out," unreduced disability pensions, and survivors' benefits for unmarried participants. See IAM National Pension Fund, Rehabilitation Plan, Adopted April 17, 2019, Rehabilitation Plan 1.pdf, <https://www.iamnpf.org/sites/iamnpf.org/files/Rehabilitation%20Plan%201.pdf> (last visited Oct. 20, 2025).

Successful challenges to valuation norms are apt to encourage opportunistic withdrawals, undercutting MPPAA's protections for both participants and continuing employers. "[W]ithdrawals of contributing employers . . . frequently result in substantially increased funding obligations for employers who continue to contribute to the plan. . . ." 29 U.S.C. § 1001a(a)(4)(A). Again, the Court need not look beyond this case, as the Fund's rehabilitation plan increases employer contributions 2.5% per year under

¹² A stock sale ordinarily would not result in a withdrawal. See PBGC Op. Ltr. 92-1, <https://www.pbgc.gov/sites/default/files/legacy/docs/oplet/92-1.pdf>. An asset sale ordinarily would result in a withdrawal, but the sale can be structured so as not to trigger withdrawal, with the buyer inheriting the seller's exposure and the seller retaining secondary liability. 29 U.S.C. § 1384(a)(1)(A), 1384(a)(1)(B), 1384(a)(1)(C), 1384(a)(2), 1384(b)(1).

a “preferred schedule” without providing additional benefit accruals.

Petitioners assert that a plan’s required estimate of an employer’s withdrawal liability (29 U.S.C. § 1021(*l*)) would have “very little value” if the valuation assumptions are not selected by the end of the plan year to which they pertain (Pet. Br. at 34). But such an estimate would still lag, as it would assume that the employer withdrew in the year before the estimate is provided, *e.g.*, 2024 for a 2025 estimate. *See* 29 U.S.C. § 1021(*l*)(1)(A).

Moreover, the sale of a business can take months to negotiate, so an estimate may lag even more by the closing date. Fortunately, techniques for managing such uncertainty are well known. As with other contingencies, sellers provide “diligence” materials on exposure to withdrawal liability. And buyers can negotiate representations and warranties, purchase price adjustments, conditions to closing, and termination rights accordingly, in consultation with their actuaries and other expert advisors. *See* Martin D. Ginsburg, Jack S. Levin, Donald. E. Rocap, *Mergers, Acquisitions & Buyouts* (Wolters Kluwer 2025), ¶ 1702.3.5 *et seq.* (ERISA Group Liabilities) and, *e.g.*, ¶¶4 (Representations and Warranties Concerning Target and Its Subsidiaries), 7 (Conditions to Obligation to Close), 9 (Termination), and 2205 n.7 (Purchase Price Adjustment for multi-employer plan liability). The predictability that comes from a nationwide rule, rather than greater precision, should satisfy those valid business concerns.

CONCLUSION

This case involves the stability of multiemployer plans for the benefit of their participants and contributing employers, which Congress sought to assure in MPPAA. The D.C. Circuit's decision is correct as a matter of law and appropriately weighs the interest of stakeholders and should therefore be affirmed.

Respectfully submitted,

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