No. 23-1209

IN THE

Supreme Court of the United States

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

Petitioners,

v.

TRUSTEES OF THE
IAM NATIONAL PENSION FUND,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SEGAL GROUP, INC., HORIZON ACTUARIAL SERVICES, LLC, MILLIMAN, INC., AND CHEIRON, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae, The Segal Group, Inc., Horizon Actuarial Services, LLC, Milliman, Inc., and Cheiron, Inc., collectively provide actuarial services to a substantial majority of multiemployer pension plans nationwide.[1] The issue in this case—when actuarial assumptions used to calculate withdrawal liability may be selected—directly impacts the work that amici curiae do for hundreds of multiemployer pension plans each year. Amici curiae submitted a brief in this case at the D.C. Circuit, which the United States cited in recommending that this Court grant certiorari. *See* U.S. Cert. Br. at 18.

The D.C. Circuit correctly concluded that actuaries may, consistent with the text of the statute and longstanding actuarial practice, select actuarial assumptions used to calculate a withdrawing employer's liability after the "measurement date" for such liability. The D.C. Circuit's holding allows actuaries to take into account information "as of" the measurement date that is not available until after the measurement date.

SUMMARY OF THE ARGUMENT

The Employee Retirement Income Security Act ("ERISA") generally provides that withdrawal liability is based on a plan's unfunded vested benefits (i.e., the difference between the value of a plan's liabilities

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

and assets) "as of" the last day of the plan year (the "measurement date"). This calculation requires actuaries to make a variety of assumptions about the expected future experience of the plan. Much of the necessary information is not known until after the measurement date. Accordingly, it is generally accepted practice for actuaries to select assumptions after the end of the plan year based on the actuary's evaluation of the plan's experience through the end of the year.

This generally accepted practice is consistent with ERISA's requirement that the valuation be conducted "as of" the measurement date. The term "as of" is not a deadline by which work must be done or information must be received, but rather is the date of reference for assessing, on a snapshot basis, the financial condition of the pension plan.

Neither Petitioners nor any of their amici curiae cite a single case, professional standard, or article relating to valuations in support of their position, despite the ubiquity of "as of" valuations across multiple professions and under multiple statutes. Nor are their policy arguments, largely premised on unfounded accusations of actuarial bias, persuasive. As this Court has previously recognized, "actuaries are trained professionals subject to regulatory standards" and are not "vulnerable to suggestions of bias or its appearance." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 632 (1993).

The D.C. Circuit correctly concluded that actuaries may, consistent with the text of the statute and longstanding actuarial practice, select actuarial assumptions after the last day of the prior plan year. This Court should affirm.

ARGUMENT

I. The D.C. Circuit's Holding That Actuarial Assumptions May Be Selected After the Measurement Date Is Supported by Governing Law and Longstanding Valuation Practice.

Section 4211 of ERISA generally requires that actuaries value a pension plan's assets and liabilities "as of" the measurement date—which here (as is often the case) was December 31. *See* 29 U.S.C. § 1391; Pet. App. 8a. As Petitioners concede, this calculation requires actuaries to make a variety of assumptions about the expected future experience of the plan, often including "assumptions about the income the plan's assets will generate" after the measurement date. Pet'rs' Br. at 23–25. *See also* 29 U.S.C. § 1393(a)(1) (requiring that assumptions "tak[e] into account the experience of the plan and reasonable expectations" and "offer the actuary's best estimate of anticipated experience under the plan"). Section 4213 of ERISA, which governs the selection of actuarial assumptions used to calculate withdrawal liability, does not impose a deadline by which an actuary must select the assumptions. *See* 29 U.S.C. § 1393.

It is, of course, impossible for an actuary, on December 31, to instantaneously "digest end-of-year market data," for purposes of selecting actuarial assumptions. *See* Pet'rs' Br. at 43. For example, multiemployer pension plans generally invest in asset classes, such as real estate and private equity, that are not valued daily. As such, the year-end asset value and investment returns for these asset classes—and the plan as a whole—are not available on December 31, but rather are reported out to

the multiemployer plans in the first and second quarters of the following year. *See, e.g.*, Meketa Investment Group, *Lag effect in Private Equity, or "Where are my returns?"* at 1 (July 2023) ("[P]rivate company valuations can be lagged 3 months or more and are generally updated on a quarterly basis.").[2]

Similarly, actuaries often take into account projections of investment returns by asset class (commonly referred to as "capital market assumptions") as of December 31, which are not available until after the valuations and performance of those asset classes as of December 31 are determined. So too, information relevant to "Demographic Assumptions," including rates of retirement and mortality, as of December 31, may not be available until after December 31. *See* American Academy of Actuaries, Issue Brief, *Selection of Actuarial Assumptions for Multiemployer Plans* at 3–4 (July 2020) ("Academy Issue Brief").[3]

As the D.C. Circuit rationally held, ERISA does not "require an actuary to determine what assumptions to use before the close of business on the measurement date," especially since such a determination would be based on incomplete data. Pet. App. 13a. This Court should affirm.

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2. https://meketa.com/wp-content/uploads/2023/07/MEKETA_Lag-Effect-in-Private-Equity.pdf.

3. https://actuary.org/wp-content/uploads/2020/07/IB.MultiEmpPenPlan.pdf.

A. The Term "As Of" Is Not a Deadline by Which Work Must Be Done or Information Received.

The term "as of" in the context of a valuation is not a deadline by which work must be done or information must be received, but rather is the date of reference for assessing on a snapshot basis the financial condition of the subject company or, in this case, the pension plan. This understanding of the term "as of" is borne out by multiple sets of independent professional standards, as well statutes governing valuations in other contexts.

"The Supreme Court has recognized that when a statute uses a technical term, we must assume that Congress intended it to have the meaning ascribed to it by the industry under regulation." *City of Dallas v. F.C.C.*, 118 F.3d 393, 395 (5th Cir. 1997) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991)).[4] In the United States, the Actuarial Standards Board "sets standards for appropriate actuarial practice . . . through the development and promulgation of Actuarial Standards of Practice (ASOPs)." Actuarial Standards Board, *About ASB*.[5] The ASOPs do not state that assumptions must be selected before the end of the plan year. Nor do they state that the assumptions are to be based on the partial information that the actuary was able to collect on or before the

4. *See also Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1319–20 (D.C. Cir. 1977) ("Congress often does not specify in detail phrases that have an established meaning within a particular industry; such definitions are best developed with reference to the actual context of the regulated industry in question.").

5. https://www.actuarialstandardsboard.org/about-asb/ (last visited Oct. 16, 2025).

measurement date. Rather, the ASOPs direct the actuary to "select assumptions that reflect the actuary's knowledge *as of* the measurement date" and direct the actuary take into account "*current* and historical data that is relevant to selecting the assumption for the measurement date[.]" *See* ASOP 27, *Selection of Economic Assumption for Measuring Pension Obligations*, §§ 3.4.6, 3.5(b) (Dec. 2023) (emphasis altered).[6] In other words, the applicable actuarial standards specifically instruct actuaries, when selecting assumptions, to incorporate "current . . . data" about events "as of the measurement date," including experience through the measurement date that is collected and reviewed after the measurement date. *Id.* at 6.

Courts similarly have recognized that the term "as of" is not a deadline by which work must be done or information must be received. "[I]n the accounting industry . . . 'as of' is a term of art" which "establishes the point in time for which the [valuation] is calculated but does not limit the availability date for the information used to calculate that value," and does not "relate[] only to when the [valuation] calculation is performed." *See, e.g.*, *Transpro, Inc. v. Leggett & Platt, Inc.*, 297 F. App'x 434, 441–42 (6th Cir. 2008). So too, in the appraisal industry, a valuation "as of the date of the appraisal" may be done on a "retrospective basis," with the "as of" date being "used as the cut-off date for data considered by the appraiser," except that the appraiser may also rely on subsequent data "as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date." *Masalehdan v. Allegheny Cnty. Bd. of Prop. Assessment, Appeals & Rev.*, 931 A.2d 122, 127–28 (Pa. Commw. Ct. 2007) (emphasis omitted) (citing guidance from the Uniform Standards of Professional Appraisal Practice).

6. https://www.actuarialstandardsboard.org/wp-content/uploads/2024/05/asop027_211.pdf.

Congress' use of the term "as of" in other statutes governing valuations confirms that "as of" is not a deadline by which work must be done or information must be received. For example, 12 U.S.C. § 214a provides a dissenting shareholder in "a national banking association" with the right to receive "[t]he value of [his] shares . . . determined ***as of*** the date on which the shareholders' meeting was held authorizing [a] conversion" to a "State bank[.]" 12 U.S.C. § 214a(b) (emphasis added). The statute describes that this "as of" valuation shall be conducted "by a committee of three persons"—none of whom can even be selected until after the conversion has been consummated, which is necessarily after the measurement date of when the conversion was authorized. *See id.*[7]

B. Actuaries for Multiemployer Plans Generally Select Assumptions After the Measurement Date.

Consistent with the understanding of "as of" discussed above, actuarial firms for decades have prepared valuations of multiemployer pension plans as of the end of the plan year using data provided to the actuary after that date. As the year-end data is reported by third parties to the plan's fiduciaries and administrators, actuaries collect and review the plan's experience through the end of the year. Based on the actuary's evaluation of that experience through the end of the plan year, the actuary then determines whether to maintain or revise actuarial

7. The committee is comprised of: (i) "one [person] selected by a majority vote of the dissenting shareholders entitled to receive the value of their shares," i.e., those who make a "written request . . . at any time before thirty days after the date of consummation of such conversion[;]" (ii) "one by the directors of the resulting State bank[;]" and (iii) "the third by the two so chosen." *Id.*

assumptions and methods to determine the relevant values "as of" the last day of the plan year.

This is generally accepted practice for actuaries providing services to multiemployer pension plans, is consistent with the ASOPs, and, as the D.C. Circuit concluded, helps ensure that the assumptions "offer the actuary's best estimate of anticipated experience under the plan" going forward. *See* 29 U.S.C. § 1393(a)(1); Pet. App. 13a. As the American Academy of Actuaries has explained:

> In practice, the most recent relevant data that the actuary uses to perform this analysis is generally not available until after the measurement date. Accordingly, ***an actuary typically makes the final selection of actuarial assumptions after the measurement date*** but before preparation of the actuarial model used to perform the calculations . . . .

Academy Issue Brief at 4 (emphasis added).

II. The Arguments of Petitioners and Their Amici Curiae Are Misplaced.

A. The D.C. Circuit's Decision Is Neither "Novel" Nor Contrary to "Common Practice in the Actuarial Profession."

In explaining the scope of its holding, the D.C. Circuit stated that "[w]hen adopting actuarial assumptions, an actuary may base their assumption on information after

the measurement date 'so long as those assumptions are 'as of' the measurement date—that is, the assumptions must be based on the body of knowledge available up to the measurement date.'" Pet. App. 13a (quoting Pet. App. 64a). Petitioners erroneously contend that this is "a novel distinction" that does not "track common practice in the actuarial profession" and has been "reject[ed]" by "the Actuarial Standards Board." Pet'rs' Br. at 3, 39. As discussed above, it is generally accepted practice for actuaries after the end of the plan year: (i) to collect and review the plan's experience through the end of the year; and then (ii) select or revise assumptions based on the plan's experience through the end of the year. *See supra* at 7–8.

Indeed, ASOP 27 generally provides that the "[t]he actuary should select assumptions that reflect the actuary's knowledge as of the measurement date." ASOP 27, § 3.4.6 (emphasis omitted). Petitioners observe that ASOP 27 also provides a caveat which gives an actuary discretion to consider "an event occurring after the measurement date," such as a "plan termination . . . if appropriate for the purpose of the measurement." ASOP 27, § 3.4.6 (emphasis omitted). *See also* Academy Issue Brief at 4–5 (explaining that while "the selection of actuarial assumptions is ***generally*** based on knowledge of the situation as of the measurement date[,]" if "[a] multiemployer pension plan actuary . . . become[s] aware of significant real-world events that occur after the measurement date but before the actuarial communication is finalized[,] . . . the actuary may decide . . . to reflect the[m] . . . ." (emphasis added)).

The ASOPs' allowance, in some circumstances, for consideration of real-world events occurring after the end of the year does not negate the generally applicable principle that year-end data is relevant. Indeed, courts have recognized this point in similar contexts. *See, e.g.*, *Est. of Noble v. Comm'r*, T.C.M. (RIA) 2005-002 (T.C. 2005) (holding that "[g]enerally speaking, a valuation of property for Federal tax purposes is made as of the valuation date without regard to any event happening after that date[,]" under *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), but "[a]n event occurring after a valuation date, however, is not necessarily irrelevant to a determination of fair market value as of that earlier date"). *See also* U.S. Cert. Br. at 16.

Regardless of whether an actuary may consider real-world events that actually take place after the end of the year—an issue not presented here—there is no basis for Petitioners' assertion that the assumptions must be selected by the measurement date using incomplete reporting of data regarding events that occur on or before that date. *See also* U.S. Cert. Br. at 15–16, 19–20 ("That question [of whether actuaries may incorporate developments after the measurement date] is not at issue here[;]" rather "[t]he real point of dispute between the parties and between the Second and D.C. Circuits is whether a plan's actuary can select its assumptions for withdrawal liability after the measurement date."). Tellingly, other than *Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir. 2020), neither Petitioners nor any of their amici curiae cite a single case, professional standard, or article relating to valuations in support of their position, despite the ubiquity of "as of" valuations across multiple professions and under multiple statutes.

The D.C. Circuit's distinction is not novel—indeed, it is precisely the distinction that the employer challenging the actuarial assumptions in *Metz* conceded was appropriate during oral argument before the Second Circuit:

> JUDGE LIVINGSTON: . . . But the statute so far as I can tell is . . . silent as to when the assumptions and methods must be set for the preceding year.
>
> MR. ROTH: Yeah. I think the legal question is what does it mean to do the calculation as of the measurement date, right? . . . . ***[O]ur position is . . . if you're looking at the last day of the prior plan year you want to look at . . . the state of the world as it stood at that time*** . . . .
>
> JUDGE CHIN: But sometimes the information with respect to the state of the world as of that date doesn't become available until later.
>
> MR. ROTH: I Agree with that, Your Honor. And –
>
> JUDGE CHIN: So it makes sense that you would look at it later.
>
> MR. ROTH: ***I Agree with that, Your Honor . . . . You're looking back. You're trying to put yourself in the position you were in at that time . . . .***

Petition for Writ of Certiorari Appendix, *Nat'l Ret. Fund v. Metz Culinary Mgmt.*, No. 19-1336 (U.S. filed May 29, 2020) at App. 20a–21a (emphasis added).

B. The Policy Arguments Advanced by Petitioners and Their Amici Curiae Are Unpersuasive.

Petitioners and their amici curiae argue that allowing actuaries to select assumptions after the end of the plan year will lead to calamitous results. But, as this Court has recognized in another context, "[p]erhaps the best indication that the sky will not fall after today's decision is that it has not done so already." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009). As discussed above, it is—and has been for decades—standard practice for actuaries to select assumptions for multiemployer plans after the end of the plan year. Neither Congress nor the Pension Benefit Guaranty Corporation ("PBGC"), the federal regulator with primary regulatory authority, have identified any issue with this longstanding practice.

Petitioners note that "[e]mployers . . . for decades have relied" on information about their potential withdrawal liability that is disclosed on "an annual, publicly accessible report on the state of the plan"—the plan's Form 5500, filed with U.S. Department of Labor—"when making decisions about withdrawal at the bargaining table." Pet'rs' Br. at 33–34. Petitioners then argue that this "information would lose . . . [its] value if actuarial assumptions could be changed after the valuation date . . . ." *Id.* at 32.

As discussed above, in the decades Petitioners reference, actuaries could and did change actuarial assumptions and methods after the valuation date, without controversy. Moreover, since the original Form 5500 was released in 1978, these "[a]nnual return/reports generally are due to be filed beginning seven months after the end of the applicable plan year (e.g., July 31, 2024, for 2023

annual return/reports for calendar year plans)." U.S. Dep't of Labor, *Annual Reporting and Disclosure*, 88 Fed. Reg. 31,608-02, 31,609 (May 18, 2023). *See also* U.S. Dep't of Labor, *Annual Reporting Requirements; Final Regulations*, 43. Fed. Reg. 10,130, 10,152 (Mar. 10, 1978); 29 C.F.R. § 2520.104a-5(a). In other words, the federal government has given plans ***at least seven months after the close of a plan year*** to value their assets and liabilities.[8] As Form 5500s do not have to be filed until at least seven months after the end of the year, there is no reason for actuaries to rely only on data reported out and available on the last day of the plan year.

Petitioners also argue that "[e]ven the most well-meaning actuaries would struggle to comply with" a "restriction" on considering information about real-world events after the measurement date. Pet'rs' Br. at 40. Petitioners then give an example of "asking an expert today to determine the true fair market value of Zoom, the video conference software company, as of December 31, 2019," claiming it would "require heroic discipline to provide an honest valuation that ignored what the coronavirus pandemic and advent of widespread remote work later showed about the company's potential." Pet'rs'

8. As a practical matter, many plans obtain a two-and-a-half-month extension that is automatically approved upon the filing of an extension request. *See also* 29 C.F.R. § 2520.104a-5(a) (providing that the deadline may be "extended" as set forth in the filing instructions for Form 5500s); U.S. Dep't of Labor, *2024 Instructions for Form 5500* at 4 ("A plan . . . may obtain a one-time extension of time . . . [of] . . . up to 2 ½ months . . . ."), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2024-instructions.pdf

Br. at 41. But valuation professionals do these types of retrospective "as of" valuations all the time, particularly in the context of privately-held companies. *See supra* at 3–4, 6–7. *See also* U.S. Cert. Br. at 10 ("Valuing property as of a past date is . . . a common task."). Moreover, as this Court has recognized, "actuaries are trained professionals subject to regulatory standards[,]" *Concrete Pipe*, 508 U.S. at 632, and follow the professional standards and guidance discussed above about the information that may be used.

The amicus briefs filed in support of Petitioners further argue that assumptions must be selected before December 31 "to avoid the potential for actuary bias, intentional or not, against withdrawing employers." HR Policy Ass'n Amicus Br. at 5. *See also* Chamber of Commerce Amicus Br. at 9 (arguing that MPPAA should be "construed in a manner to eliminate the potential for bias in the selection of actuarial assumptions"); Naughton Amicus Br. at 13 (asserting that actuarial assumptions "are susceptible to manipulation"). These arguments are directly contrary to this Court's prior conclusion that actuaries are not "vulnerable to suggestions of bias or its appearance." *Concrete Pipe*, 508 U.S. at 632.

Evidently recognizing that these arguments are inconsistent with *Concrete Pipe*, amicus HR Policy Association argues that "[h]istory shows" this Court's recognition in *Concrete Pipe* that actuaries are unbiased professionals "has not always borne true" and that "biased decisions, or at least the appearance of bias, are not a rare occurrence." HR Policy Ass'n Amicus Br. at 16–17. This attack on the actuarial profession is unfounded. Far from showing a pattern of bias, the cases the HR Policy Association cites show two things, each of which

undercut the arguments advanced by Petitioners and their amici curiae: (i) actuaries seek to comply with court decisions; and (ii) ERISA already provides an adequate mechanism for employers to challenge the selection of actuarial assumptions, thereby obviating the need for an artificial rule that assumptions must be selected prior to the measurement date.

The primary cases cited by the HR Policy Association address an issue this Court encountered in *Concrete Pipe*: the extent to which actuaries may use assumptions for withdrawal liability calculations that differ from those "used in determining whether a plan has satisfied the minimum funding requirements contained in the statute." *See Concrete Pipe*, 508 U.S. at 632–33. This Court explained that "the assumptions used by the Plan in its other calculations may be 'supplemented by several actuarial assumptions unique to withdrawal liability[,]'" and that the only such assumption that had been challenged, "the critical interest rate assumption," was one of the assumptions "that must be used for other purposes as well[,]" thereby minimizing the risk of bias. *Id.*

In the first case cited by the HR Policy Association, an actuary "was worried" that employers might argue under *Concrete Pipe* that the same interest rate assumptions were required to be used. *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 354–55 (7th Cir. 2012); HR Policy Ass'n Amicus Br. at 6. Accordingly, the actuary suggested that the plan direct the actuary to calculate withdrawal liability using both the interest rate assumption used for minimum funding and the different interest rate assumption the actuary believed

was appropriate for the withdrawal liability calculation—and to then use whichever rate "would generate a ***lower*** withdrawal liability" for the withdrawing employer. *Chicago Truck Drivers*, 698 F.3d at 355 (emphasis added). In other words, the actuary did exactly the opposite of what the HR Policy Association claims is a systemic risk: "actuaries choos[ing] assumptions . . . for the sole purpose of ***inflating*** withdrawal liability . . . ." HR Policy Ass'n Amicus Br. at 16 (emphasis added).

The Seventh Circuit explained that the "danger" *Concrete Pipe* "could be read to suggest that having two different interest-rate assumptions" violated ERISA was "remote" because "the Court had indicated that 'supplemental' assumptions that might cause the rates to diverge were permissible." *Chicago Truck Drivers*, 698 F.3d at 355–56. The Seventh Circuit, therefore, held that the actuary was ***required*** by ERISA's "best estimate" requirement to use the interest rate it believed was appropriate for withdrawal liability purpose. *Id.* at 357.

Nine years later, in the second case the HR Policy Association cites, the Sixth Circuit issued a ruling that narrowly interpreted ERISA to reach the opposite conclusion that the withdrawal liability interest rate should not materially diverge from the minimum funding interest rate. *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 421 (6th Cir. 2021); HR Policy Ass'n Amicus Br. at 7. The Sixth Circuit's *Sofco* decision is contrary to more than 40 years of settled actuarial practice and regulatory guidance issued by PBGC.[9]

9. PBGC, noting that "[c]ourt decisions have varied," explained that the actuary's approach at issue in *Sofco* was

The other cases the HR Policy Association cites either follow *Sofco* or do not involve challenges to decisions made by actuaries, but rather to decisions made by the pension plans themselves. They are neither evidence of pervasive bias nor establish that actuaries refuse "to heel to the plain language of ERISA." HR Policy Ass'n Amicus Br. at 5.

CONCLUSION

This Court should affirm the D.C. Circuit's holding that actuarial assumptions need not be selected before the end of the prior plan year.

October 21, 2025

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"reasonable," and proposed a regulation that would override any contrary court decisions, by "specifically permit[ting] the use of an interest rate anywhere in the spectrum from [annuity] rates alone to funding rates alone." PBGC, *Actuarial Assumptions for Determining an Employer's Withdrawal Liability*, 87 Fed. Reg. 62,316, 62,317–18 (Oct. 14, 2022). PBGC has not yet issued a final regulation.