No. _____

IN THE

Supreme Court of the United States

PERFECTION BAKERIES, INC.,

Petitioner

v.

RETAIL WHOLESALE AND DEPT. STORE INTL. UNION AND INDUSTRY PENSION FUND,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first question presented is whether 29 U.S.C. §1386(b)(1)'s instruction to "reduce[]" any "withdrawal liability" of an employer in a subsequent plan year "by the amount of any partial withdrawal liability … for a previous plan year," requires a multiemployer plan to calculate the employer's "withdrawal liability" for the subsequent plan year and reduce *that amount*, or to apply the earlier withdrawal liability as one of four potential adjustments to the "allocable amount of unfunded vested benefits" used to reach the amount of "withdrawal liability" for a subsequent year.

Despite the statute's instruction that any partial withdrawal liability in a previous year "shall" "reduce[]" any "withdrawal liability" in a subsequent plan year, the majority below applied this credit as an adjustment to the "allocable amount of unfunded vested benefits" used to determine the subsequent "withdrawal liability" in the first instance.

This result conflicts with the long-standing opinion of the Pension Benefit Guaranty Corporation, which in 1985 declared such a method "clearly erroneous." PBGC Op. Ltr. 85-4, p. 1 (January 30, 1985). Moreover, the circuit judge supplying the second vote joined the majority opinion only "[a]fter much back and forth," and despite "residual doubts about the correct answer," explaining that his doubts were "not sufficient to create a circuit split." App., *infra*, 16a.

This raises a second question: whether in construing a statute a circuit judge may treat an out of circuit opinion as a statutory tiebreaker, in effect giving that opinion decisive weight *against* creating a "circuit split," and to that degree shield the majority's reasoning from this Court's legitimate scrutiny.

PARTIES TO THE PROCEEDING

Petitioner Perfection Bakeries, Inc. was the plaintiff in the district court and appellant in the court of appeals. Respondent Retail Wholesale and Department Store International Union and Industry Pension Fund was the defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Perfection Bakeries Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Perfection Bakeries, Inc. v. Retail, Wholesale & Department Store International Union, No. 22-cv-00573-ACA, United States District Court for the Northern District of Alabama. Judgment entered July 7, 2023.

Perfection Bakeries, Inc. v. Retail, Wholesale & Department Store International Union, No. 23-12533, United States Court of Appeals for the Eleventh Circuit. Judgment entered on August 1, 2025.

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INTRODUCTION

Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), the cessation of an employer's obligation to contribute to a plan triggers a "partial withdrawal" or a "complete withdrawal." 29 U.S.C. §1381(b)(2)-(3). When that happens, MPPAA requires the employer to pay "withdrawal liability" to cover its calculated share of the underfunding. 29 U.S.C. §1381(a). The statute calculates "withdrawal liability" by determining the employer's "allocable amount of unfunded vested benefits" and applying four adjustments to that amount. 29 U.S.C. §1381(b)(1).

If that employer has previously incurred a partial withdrawal, "the amount of any partial withdrawal liability" for that earlier plan year operates as a credit that "reduce[s]" "any *withdrawal liability* … in a subsequent plan year[.]" 29 U.S.C. §1386(b)(1) (emphasis added). Thus, withdrawal liability in a prior year offsets withdrawal liability in a later year.

By analogy to tax law, a tax credit reduces a taxpayer's tax liability, *i.e.*, the taxes a taxpayer would otherwise owe, not the income used to calculate those taxes. Similarly, the plain language of the statute requires the credit to reduce any *withdrawal liability* in a subsequent plan year, not the *allocable amount of unfunded vested benefits* used to determine that withdrawal liability. 29 U.S.C. §1386(b)(1). Applying a partial withdrawal credit against unfunded vested benefits is like applying a *tax credit* as a *deduction* – that is, as a preliminary step in calculating taxable income, rather than to reduce the taxes owed on that taxable income.

In a 1985 Opinion Letter addressing this exact situation, the Pension Benefit Guaranty Corporation

(PBGC) declared that applying the credit to reduce subsequent *withdrawal liability* was "correct," whereas applying it as one of the adjustments to *unfunded vested benefits* was "clearly erroneous." PBGC Op. Ltr. 85-4, p. 1. As noted by the dissent below, that letter "was issued within a few years of the statute's passage and has been followed by the regulated community for thirty or forty years." App. 30a, (Brasher, J., dissenting).

In fact, the plan's actuary originally calculated Petitioner's withdrawal liability consistent with the PBGC opinion letter as he had done every time during his entire 31-year career. *Id.* But in December 2018, within days of an intervening decision by the Ninth Circuit that "differ[ed] from prior PBGC guidance and would result in an increase in the assessable amount" against Petitioner, App. 66a, the plan's trustees reversed course and required the actuary to re-calculate Petitioner's withdrawal liability "based on the Ninth Circuit decision." *Id.*

Unsurprisingly, the plan's second calculation eliminated Petitioner's nearly two-million-dollar credit. Petitioner challenged the plan's calculation, but a fractured Eleventh Circuit panel upheld it, rejecting the PBGC's opinion letter because that longstanding guidance "merely echoe[d]" the main arguments advanced by Petitioner. App. 15a.

That's not to say the majority did not employ any deference in reaching its conclusion – in a four-sentence concurrence, the second judge in the majority noted how "difficult" the case was but stated that the "residual doubts" he had about the correct answer were "not sufficient to create a circuit split." *Id.* at 16a (Jordan, J., concurring). In refusing to create a split, Judge Jordan relied on the notion that "[w]hen another circuit has ruled on a point," a

different circuit should "follow it (even if we have some doubts about its correctness) *unless we believe the decision to be plainly wrong*." *Id.* (emphasis added).

The majority decision thus rests on a second vote apparently purposefully cast to avoid creating a circuit split, grounded in the legal fiction that – independent of its legal reasoning and ability to persuade – a later circuit court considering the same statute must defer to an earlier opinion of another circuit unless convinced that opinion is "plainly wrong."

In sum, the majority decision is contrary to the plain language and ordinary meaning of the statute and rests on the misguided notion that a later circuit may not reach a different outcome than an earlier circuit unless some higher degree of certainty is met. Both issues invite this Court's review.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-__a) is reported at 147 F.4th 1314. The opinion of the district court (App., *infra*, __a-__a) is not published in the Federal Supplement but is available at 2023 U.S. Dist. LEXIS 116837 and at 2023 WL 4412165.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2025. pp., *infra*, __a. A petition for panel rehearing was denied on September 9, 2025. *Id.* __a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 62-64a. They include:

29 U.S.C. §1381, Section 4201 of ERISA

29 U.S.C. §1386, Section 4206 of ERISA

STATEMENT

A. Legal Background

In 1980, Congress enacted the MPPAA, which establishes "withdrawal liability" "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal[.]" 29 U.S.C. §1381(a). The statute defines "complete withdrawal" and "partial withdrawal," and differentiates between the two. 29 U.S.C. §1381(b)(2)-(3). The statute sets out a sequential formula detailing how "withdrawal liability" is calculated:

> The withdrawal liability of an employer to a plan is the amount determined under section 1391 to be the allocable amount of unfunded vested benefits, adjusted –
>
> > (A) first, by any de minimis reduction applicable under section 1389,
> >
> > (B) next, in the case of a partial withdrawal, in accordance with section 1386,
> >
> > (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B), and

> (D) finally, in accordance with section 1405.

29 U.S.C. §1381(b)(1).

As explained by Congress, a partial withdrawal generates a credit that "is applied as an offset against withdrawal liability for any future withdrawal from the plan, whether partial or complete." *Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980*, CONGRESSIONAL RECORD, p. 20193 (July 29, 1980). Accordingly, "the amount of any partial withdrawal liability" in a given plan year "reduce[s]" any subsequent "withdrawal liability" in a future plan year. 29 U.S.C. §1386(b)(1).

The question here is whether this credit reduces "withdrawal liability" in the subsequent plan year, as the statute says, or rather is applied as one of four potential adjustments to the "allocable amount of unfunded vested benefits" used to determine the "withdrawal liability" for that year. The answer to this question is exceptionally important, as this case illustrates.

B. Facts and Procedural History

1. In 2016, Petitioner experienced a "partial withdrawal" when it partially withdrew from the plan for its Saginaw, Michigan facility. Had Petitioner completely withdrawn from the plan at that time, it would have incurred complete withdrawal liability in the amount of $6,509,962. Accordingly, the 34% partial withdrawal the plan assessed resulted in a partial withdrawal liability (at present value) of $2,228,268. App. 5a, 22a, 50a.

Two years later in 2018, Petitioner ceased having an obligation to contribute for work at its Fort Wayne, Indiana facility. This resulted in a complete

withdrawal from the plan. *Id*. Without taking account of Petitioner's pre-existing partial withdrawal, the 2018 complete withdrawal would have resulted in a complete withdrawal liability of $6,318,741. Based on its prior partial withdrawal of $2,228,268, at the time of the 2018 complete withdrawal Petitioner was entitled to a credit in the amount of $1,962,408. App. 6a.

Consistent with its usual method (which followed the PBGC's opinion letter), the plan originally calculated and applied the credit against Petitioner's subsequent complete withdrawal liability. App. 18a**.** Applying Petitioner's prior partial credit of $1,962,408 against the 2018 complete withdrawal liability of $6,318,741 reduced the 2018 complete withdrawal liability to $4,356,333, App. 6a, which, when added to its 2016 partial withdrawal liability of $2,228,268, meant the total liability for both withdrawals would have been $6,584,601 – almost exactly what Petitioner would have owed had it completely withdrawn in 2016 ($6,509,962).

However, in a case of truly horrible timing, before the plan sent Petitioner its original assessment, the Ninth Circuit in late 2018 issued the *Quad/Graphics* opinion upholding the credit calculation method the PBGC had long described as "clearly erroneous." Specifically, that opinion approved a different plan's application of a credit as an adjustment to the employer's *allocable amount of unfunded vested benefits*, rather than to reduce the employer's subsequent *withdrawal liability*. *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1209 (9th Cir. 2018).

Upon learning of the *Quad/Graphics* decision, the plan's trustees immediately voted to change the plan's method and ordered the actuary to revise his initial

calculations. Specifically, the plan required the actuary to apply the prior partial credit against Petitioner's allocable amount of unfunded vested benefits, rather than its complete withdrawal liability. App. 22a-23a. This resulted in the credit being taken against an amount for which Petitioner was never and could never be liable under the statute. The untimely switch eliminated Petitioner's credit, holding it responsible to pay $6,318,741 for the 2018 complete withdrawal – the same amount for which it would have been liable had the 2016 partial withdrawal not occurred. App. 23a.

2. The arbitrator ruled that the plan had properly applied the credit (the second time), and Petitioner challenged the award by filing an action in federal district court. The plan counterclaimed to enforce the award. The district court granted summary judgment for the plan. App. 61a.

3. A divided court of appeals affirmed the district court's decision, by vote of 2-1.

a. Although the majority acknowledged "[t]his is a hard case," App. 8a, it concluded that the plan properly applied the credit as an adjustment at step two of the process in calculating the subsequent withdrawal liability. App. 15a-16a.

b. Judge Jordan wrote a short concurrence, stating that although he had "residual doubts about the correct answer," those doubts were "not sufficient to create a circuit split." App. 16a.

c. Judge Brasher dissented, writing that Petitioner's "reading best accords with how an ordinary person would understand the text of section 1386, section 1381, and the rest of the statute as whole." App., *infra*, 25a. Judge Brasher listed three

reasons the plan's reading "cannot be squared" with three parts of the statute's text:

> (1) step two in section 1381 is implicated only when we are calculating liability "in the case of a partial withdrawal," (2) "withdrawal liability" is a defined term that means something different than "unfunded vested benefits," and (3) the defined term "withdrawal liability" is what must be "reduced" by the credit in subsection 1386(b). App. 18a-19a.

Judge Brasher ultimately concluded that "[b]ecause the statute requires that Perfection's 'subsequent' complete withdrawal liability be 'reduced' by its previous partial withdrawal liability, the [plan's] actuary was right the first time." App. 32a-33a.

REASONS FOR GRANTING THE PETITION

A. The majority opinion is contrary to the plain text of the statute.

1. Section 1391 of the statute sets forth various methods by which a plan "shall" determine "[t]he *amount of the unfunded vested benefits allocable to an employer* that withdraws from a plan[.]" 29 U.S.C. §1391(a) (emphasis added). To calculate an employer's "withdrawal liability," a plan must apply four potential adjustments to "the amount determined under section 1391 to be the allocable amount of unfunded vested benefits[.]" 29 U.S.C. §1381(b)(1).

As the majority noted, the four potential adjustments "are expressly sequential: 'first,' 'next,' 'then,' 'finally.'" App. 8a (quoting 29 U.S.C. §1381(b)(1)(A)-(D)). Consistent with this, each of the cross-referenced adjustments in section 1381(b)(1)

refers to the *amount determined under section 1391* as adjusted by previous steps as the starting point for that adjustment. Accordingly, the "first" adjustment in section 1381(b)(1)(A) adjusts "the amount of the unfunded vested benefits allocable *under section 1391*[.]" 29 U.S.C. §1389(a) (emphasis added).

"[N]ext," the second adjustment in section 1381(b)(1)(B) further adjusts "the amount determined *under section 1391* and adjusted under section 1389 if appropriate[.]" 29 U.S.C. §1386(a)(1) (emphasis added). "[T]hen" the third adjustment in section 1381(b)(1)(C) adjusts "the amount determined *under section 1391*, adjusted if appropriate first under section 1389 and then under section 1386[.]" 29 U.S.C. §1399(c)(1)(A)(i) (emphasis added). "[F]inally," the fourth adjustment in section 1381(b)(1)(D) limits "the *unfunded vested benefits allocable* to an employer (after the application of all sections of this part having a lower number designation than this section)[.]" 29 U.S.C. §1405(a)(1) (emphasis added).

That the "final[]" adjustment in section 1405 applies to "the unfunded vested benefits allocable to an employer," *id.*, necessarily means that every preceding adjustment likewise adjusts the allocable amount of unfunded vested benefits, just as the statute says. 29 U.S.C. §1381(b)(1) (setting out four "adjust[ments]" to "the allocable amount of unfunded vested benefits"). In contrast, the credit "reduce[s]" "withdrawal liability[.]" 29 U.S.C. §1386(b)(1).

In this way, the statute draws a fundamental distinction between the "allocable amount of unfunded vested benefits" – the amount at the beginning of the calculation process and the interim amount against which every adjustment is applied, and "withdrawal liability" – the amount reached at the end of that process. As noted by the Third Circuit,

because an employer's allocable amount of unfunded vested benefits must be "adjusted" four ways before it becomes withdrawal liability, "an employer's withdrawal liability and allocable amount of unfunded vested benefits are *not synonymous*." *Bd. of Trs. of IBT Local 863 Pension Fund v. C&S Wholesale Grocers, Inc.*, 802 F.3d 534, 546 (3rd Cir. 2015) (emphasis added).[1]

As shown above, the statute also expresses each adjustment with reference to its relation to the other adjustments, consistent with that adjustment's place in the four-step process. For example, the second adjustment applies "*before* the application of sections 1399(c)(1) and 1405," 29 U.S.C. §1386(a) (emphasis added), and *after* the section 1391 amount is "adjusted under section 1389 if appropriate," 29 U.S.C. §1386(a)(1), while the third adjustment applies to the amount "adjusted if appropriate first under section 1389 and then under section 1386," 29 U.S.C. §1399(c)(1)(A)(i), and the fourth adjustment applies "after the application" of the preceding sections. 29 U.S.C. §1405(a)(1).

Once again, section 1386(b)(1) is different: unlike the foregoing adjustments, which no one disputes are part of the four-step process to determine withdrawal

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[1] In related situations, courts have also held that any calculation of "withdrawal liability" must include all four adjustments to the allocable amount of unfunded vested benefits. *See Bd. of Trs., Sheet Metal Workers' Nat'l. Pension Fund v. BES Services, Inc.*, 469 F.3d 369, 373 (4th Cir. 2006) (noting that a "determination of withdrawal liability cannot be accomplished in accordance with the statutory mandate unless it is 'adjusted' in accordance with" the final adjustment in §1405); and *Central States, Se. & Sw. Areas Pension Fund v. JohnCo., Inc.*, 694 F.Supp. 478, 480 (N.D. Ill. 1988) (a "determination of withdrawal liability under Section 1381 necessarily takes into consideration" section 1405).

liability, that section contains no language indicating the credit should be applied within, rather than at the completion of, the four-step calculation process. 29 U.S.C. §1386(b)(1). This makes sense, because "withdrawal liability" is not calculated until after the four required adjustments are made to the allocable amount of unfunded vested benefits. 29 U.S.C. §1381(b)(1).[2]

So the credit is not like every adjustment to the allocable amount of unfunded vested benefits – it reduces "withdrawal liability," and makes no reference to its place in relation to any other adjustment. 29 U.S.C. §1386(b)(1). As Judge Brasher stated in his dissent, "I have no doubt that, in a statute as complex as this one, Congress used the words 'withdrawal liability' as it had defined the term – to refer to the amount calculated *after* the application of the four steps in section 1381." App. 26a (emphasis in original). In short, when Congress said in the MPPAA that the credit reduces "withdrawal liability," 29 U.S.C. §1386(b)(1), that is precisely what it meant. *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Congress says what it means and means what it says.").

Despite the obvious and fundamental difference between the *allocable amount of unfunded vested benefits* and *withdrawal liability*, and the statute's plain text directing the credit to reduce "withdrawal liability," the plan here instead applied the credit as an intermediate step during the process of calculating the subsequent withdrawal liability, like treating a

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[2] The majority agreed with Judge Brasher (and Petitioner) that "the statute *defines* 'withdrawal liability' as 'the amount determined' by the four-step formula." *See* App. 10a (emphasis added).

tax credit as an adjustment to gross income, rather than as a reduction to tax liability.[3] As Judge Brasher noted, this method parts ways with the statute's plain text:

> Perfection's reading of the statute applies the reduction to "withdrawal liability" – the amount at the end of the four-step process – as the text of the statute provides. But the Fund's alternative reading does not. The Fund's reading does not directly "reduc[e]" the employer's "withdrawal liability." It reduces some other figure – whatever amount is calculated after step one but before step three. App., *infra*, p. 26a.

The majority's reading thus ignores the cardinal principle of statutory interpretation – that Congress "says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Consistent with this principle, this Court should grant the petition and give effect to the differences in meaning evidenced by the differences in language.

2. As shown above, "withdrawal liability" means the amount reached at the end of the four-step adjustment process. 29 U.S.C. §1381(b)(1). Moreover, because courts generally presume that identical words used in the same statute mean the same thing, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001), Congress's double use of the term "withdrawal liability" in the same sentence to refer to

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[3] The plan admitted that "*withdrawal liability* and *unfunded vested benefits* are different things," App. 65a (emphasis in original) and that it applied the "credit to which Perfection is entitled against Perfection's allocable unfunded vested benefits, rather than Perfection's subsequent withdrawal liability." *Id.*

both the credit and the amount against which the credit is applied must mean the same thing in each instance – that is, the amount reached at the end of the four-step calculation process. 29 U.S.C. §1386(b)(1) ("any *withdrawal liability* … in a subsequent plan year shall be reduced by … any partial *withdrawal liability* … for a previous plan year.") (emphasis added).

Stated otherwise, the term "withdrawal liability" in §1386(b)(1) cannot simultaneously mean *the final amount* reached at the end of the four-step process, but a few words earlier mean *the interim amount* momentarily existing during step two of the four-step process. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, p. 170 (West, 2012) ("A word or phrase is presumed to bear the same meaning throughout a text").

The plain text requires the reduction of an employer's current "withdrawal liability" by any prior "withdrawal liability" – apples to apples, like reducing like. 29 U.S.C. §1386(b)(1). And because the credit itself is "the amount of any partial withdrawal liability … for a previous year," *id*., and that amount has gone through the entire four-step calculation process, there is no reason it should reduce an amount in a subsequent year that has *not* gone through the entire four-step process, but instead has only proceeded to step two of that process.

In sum, the adjustments under section 1381(b)(1) adjust the *allocable amount of unfunded vested benefits* to calculate an employer's *withdrawal liability*, and the prior partial credit reduces that withdrawal liability as calculated, exactly as the statute says. 29 U.S.C. §1386(b)(1). In holding otherwise, the majority below erred.

B. The majority opinion is contrary to the defined terms of the statute and imbalances the precise equation Congress established.

1. As discussed above, the majority opinion conflicts with how Congress defined the term "withdrawal liability" – as the amount at the end of the required four-step formula under the statute. As discussed below, the majority opinion also conflicts with other express statutory definitions.

Under the statute, a plan must calculate withdrawal liability if an employer withdraws "in a complete withdrawal *or* a partial withdrawal[.]" 29 U.S.C. §1381(a) (emphasis added). The statute defines the term "complete withdrawal" as "a complete withdrawal described in section 1383," 29 U.S.C. §1381(b)(2), and a "partial withdrawal" as "a partial withdrawal described in section 1385." 29 U.S.C. §1381(b)(3).

Thus, the terms "complete withdrawal" and "partial withdrawal" are mutually exclusive, App. 28a, and whether a particular withdrawal is a "complete withdrawal" or a "partial withdrawal" depends on whether it is described in section 1383 or section 1385. *Id. See also GCIU-Emp'r Ret. Fund v. MNG Enters., Inc.*, 51 F.4th 1092, 1098 (9th Cir. 2022) (noting that Black's Law Dictionary defines "partial" as "not complete"). Whether a withdrawal is complete or partial makes a significant difference to the calculation, because the second adjustment to the allocable amount of unfunded vested benefits applies only "in the case of a *partial withdrawal*[.]" 29 U.S.C. §1381(b)(1)(B) (emphasis added).

But the majority opinion applies the credit as an adjustment at step two even though the withdrawal

at issue was a complete withdrawal described in section 1383. App. 67a (alleging that Petitioner "affected a complete withdrawal from the Plan, within the meaning of Section 4203(a)" of ERISA)[4] There is no dispute about this – the plan openly admitted that the relevant calculation involved "a complete withdrawal, and *not a partial withdrawal*." App. 65a (emphasis added)

The majority justified this anomalous result by reasoning that section 1386 supposedly applies to "current" and "previous" partial withdrawals and so encompasses the credit as well as a current partial withdrawal. App. 8a. Respectfully, the proper question is *not* whether section 1386 includes "current" and "previous" partial withdrawals, but whether the defined term "partial withdrawal" can be deemed to include the defined term "complete withdrawal."[5]

It cannot, for two very good reasons: first, because no word or provision "should needlessly be given an interpretation that causes it to duplicate another[.]" READING LAW, p. 174. And second, "[w]hen … a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." *Id*. p. 226 (emphasis in original). As this Court recently stated, "[w]hen Congress takes the trouble to define the terms it uses, a court must respect its definitions as 'virtually conclusive.'" *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 59 (2024). Congress took the trouble to do so here. 29 U.S.C.

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[4] Section 4203 of ERISA is 29 U.S.C. §1383.

[5] Because the credit is not "described in section 1385," it is not included in the statutory definition of "partial withdrawal." 29 U.S.C. §1381(b)(3).

§1381(b)(2)-(3). Because a withdrawal is either partial or complete, when it instructed plans to apply the second adjustment "in the case of a partial withdrawal," 29 U.S.C. §1381(b)(1)(B), Congress in effect instructed plans *not* to apply that adjustment in the case of a complete withdrawal. *Kirtz*, 601 U.S. at 59. *See also* READING LAW, p. 107 ("The expression of one thing implies the exclusion of others[.]").

But rather than respect and give effect to the explicit statutory definitions (not to mention the plan's admission), the majority instead construed the defined term "partial withdrawal" to overlap with and include the calculation of a "complete withdrawal," erasing any distinction between the two terms and supplanting Congress's careful delineation. In so doing, the majority again ran afoul of this Court's pronouncement that statutory definitions are "virtually conclusive." *Kirtz*, 601 U.S. at 59.

The majority provided no reason to ignore the distinction between partial and complete withdrawals and interpret the former to include the latter. Nor could it, for the statutory provisions are easily harmonized by applying the second adjustment to "the amount determined under section 1391," 29 U.S.C. §1386(a)(1), only "in the case of a partial withdrawal," *id*. §1381(b)(1)(B), then applying the credit at the end of the process to reduce the calculated "withdrawal liability." 29 U.S.C. §1386(b)(1). This reading respects the statutory text and definitions, as required by *Kirtz*. 601 U.S. at 59.

2. Consistent with the statutory definition of "partial withdrawal" two things happen every time "a partial withdrawal described in section 1385" occurs: first, as noted above, a plan must apply the second adjustment "in accordance with section 1386[.]" 29 U.S.C. §1381(b)(1)(B). In turn, §1386(a) adjusts "[t]he

amount of an employer's liability for a partial withdrawal" by multiplying the employer's allocable amount of unfunded vested benefits "as if the employer had withdrawn in a complete withdrawal" by a fraction to account for the fact that the withdrawal is partial, not complete. 29 U.S.C. §1386(a).[6]

Second, "[i]n the case of a partial withdrawal" the third adjustment requires a plan to reduce the annual payment by *the same partial prorate fraction determined at step two*. 29 U.S.C. §1399(c)(1)(E)(ii). The formula reduces the annual payment that would otherwise apply if the withdrawal were complete by multiplying that payment by "the fraction determined under 1386(a)(2)." *Id*.

In contrast, in the case of a *complete* withdrawal a plan does not apply the partial prorate fraction at either the second or third adjustment – instead, there is no second adjustment and the third adjustment uses the "full" annual payment applicable for a complete withdrawal to calculate the 20-year payment cap. 29 U.S.C. §1399(c)(1)(C).

Tellingly, neither of the things the statute presumes will happen in every partial withdrawal happened here. In fact, to shoehorn the credit into its revised calculation, the plan ignored the limiting phrase "in the case of a partial withdrawal" to apply the second adjustment to Petitioner's complete withdrawal. App. 25a. But then – because it was calculating a *complete withdrawal* – the plan failed to

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[6] This fraction, generally referred to as the "partial pro-rate fraction," compares the employer's contribution base units for the plan year *after* the partial withdrawal with the employer's average contribution base units for the five plan years *preceding* the partial withdrawal. 29 U.S.C. §1386(a).

apply the very fraction used to determine "[t]he amount of an employer's liability for a partial withdrawal, before the application of sections 1399(c)(1) and 1405," (which are the third and fourth adjustments). 29 U.S.C. §1386(a). As summarized by the dissent:

> When the plan sponsor got to step two, it determined that this complete withdrawal was also a "case of a partial withdrawal," because of Perfection's preceding partial withdrawal. So the plan sponsor referred to subsection 1386(b), *but not subsection 1386(a)*, and applied the credit that Perfection had earned from its prior partial withdrawal to the "unfunded vested benefits" as adjusted by the first step. Then the plan sponsor went back to steps three and four in section 1381 to finish calculating Perfection's complete withdrawal liability. App. 25a (Brasher, J., dissenting) (emphasis added)

Because the plan did not "determine[]" any "fraction" at step two "under 1386(a)(2)," the plan likewise failed to reduce Petitioner's annual payment as part of the third adjustment, which also applies only "[i]n the case of a partial withdrawal[.]" 29 U.S.C. §1399(c)(1)(E). That the third adjustment calls for an employer's annual payment to be reduced "in the case of a partial withdrawal" by "the fraction determined under 1386(a)(2)" *presumes* that such a fraction *has already been generated* as part of the second adjustment. 29 U.S.C. §1399(c)(1)(E)(ii). But again, the plan generated no such fraction because it was calculating a complete withdrawal, not a partial withdrawal. App. 25a (Brasher, J., dissenting)

Thus, to allow the plan to apply the credit as part of the second adjustment the plan (and the majority opinion) interprets the phrase "in the case of a partial

withdrawal" to *include a complete withdrawal*; but interprets that same phrase *not to include* the two adjustments the statute presumes apply every time there is a partial withdrawal. That is no way to read a statute. *Tanzin v. Tanvir*, 592 U.S. 43, 52 (2020) ("Our task is simply to interpret the law as an ordinary person would.").

Despite Petitioner raising this inconsistency at the court of appeals in both briefs on the merits and again in its petition for rehearing, no one has ever addressed this blind spot in the majority's analysis. This Court should compel an explanation.

3. The majority reasoned that the credit – set forth in section 1386(b) – must apply as part of the second adjustment because that adjustment "refers on its face to *all* of 'section 1386' – not just half of it." App. 8a (emphasis in original) That is true, so far as it goes. *See* 29 U.S.C. §1381(b)(1)(B) ("in the case of a partial withdrawal, in accordance with section 1386").

But skipping over the first clause to focus solely on the second has the statutory tail wagging the dog – as one district court has correctly pointed out, the phrase "in accordance with section 1386" is "grammatically dependent" on the preceding clause. *Consumers Concrete Corp. v. Central States, Se & Sw Areas Pension Fund*, 780 F.Supp.3d 754, 761 (N.D. Ill. 2025) (finding that the provisions of section 1386 "apply only where there is a partial withdrawal," and "any reading inconsistent with this proposition is contrary to the plain text of the statute."). Accordingly, *before* a plan looks to section 1386 at all, it must *first* ensure it is dealing with a case involving a "partial withdrawal." And as noted above, the phrase "in the case of a partial withdrawal" cannot be read to include a complete withdrawal, as the majority did here. *Kirtz*, 601 U.S. at 59.

This means that, contrary to its own stated premise that the second adjustment must apply "*all* of 'section 1386' – not just half of it," the majority did not apply "all" of section 1386 in this case: instead, and as explained by the dissent, the majority's opinion "splits section 1386 into its constituent parts and applies them in a piecemeal fashion over two different transactions." App. 31a. So under the majority's reasoning, at the time of an initial partial withdrawal *only* section 1386(a) applies, and at the time of a future complete withdrawal *only* section 1386(b) applies. As Judge Brasher wryly noted, "If someone were concerned about applying '*all* of § 1386,' I think he would follow my reading and not the majority opinion's." App. 32a (emphasis in original).

Despite the majority's insistence that the second adjustment requires the application of "all" of section 1386, its reasoning "applies both parts of section 1386 at the same time only when the second transaction is also a partial withdrawal[.]" App. 31a. But applying "both parts" of section 1386 as part of the second adjustment in the same calculation, as the majority opinion would require in successive partial withdrawals, overlooks the fact that section 1386(a) *by itself* is the second adjustment.

Section 1386(a) adjusts "the amount determined under section 1391, and adjusted under section 1389 if appropriate," 29 U.S.C. §1386(a)(1), which means it adjusts the allocable amount of unfunded vested benefits *after application of the first adjustment*, and it determines "[t]he amount of an employer's liability for a partial withdrawal, *before the application of sections 1399(c)(1) and 1405*," which are the third and fourth adjustments. *Id.* (emphasis added). Thus, section 1386(a) *alone* generates the amount that comes after the first adjustment and before the third

and fourth adjustments, and it does so only "for a partial withdrawal," *id.*, exactly as required by the second adjustment. 29 U.S.C. §1381(b)(1)(B) (requiring second adjustment only "in the case of a partial withdrawal").

More importantly, because "[t]he amount of an employer's liability for a partial withdrawal, *before the application of sections 1399(c)(1) and 1405*, is *equal to* the product of" two numbers, 29 U.S.C. §1386(a)(1)-(2) (emphasis added), and those numbers and the formula to determine the resulting "product" are set forth exclusively in section 1386(a), the amount of an employer's liability for a partial withdrawal "before the application" of the third and fourth adjustments is mathematically determined *solely by the calculation performed in 1386(a)*, and independent of the prior partial credit in 1386(b). 29 U.S.C. §1386(a). The statute is precise on this point – the amount "before" steps three and four must be "equal to" the "product" *determined in 1386(a).* 29 U.S.C. §1386(a).

Of course, if Congress meant for plans to also apply the credit as part of the second adjustment, as the majority opinion requires, section 1386(a) would instead say: "The amount of an employer's liability for a partial withdrawal, before the application of **section 1386(b)(1), below, and** sections 1399(c)(1) and 1405, is equal to the product of …." 29 U.S.C. §1386(a) (bold text added). But that is not what it says.

In sum, applying the credit in section 1386(b) after section 1386(a) necessarily means the amount "before the application" of the third and fourth adjustments will *not* be "equal to" the amount determined there. 29 U.S.C. §1386(a). It would instead be "equal to" the amount determined in section 1386(a) *and then reduced by the credit in section 1386(b)(1).* Thus,

including "both parts" of section 1386 in the same calculation inevitably imbalances the statutory equation and conflicts with its plain language. 29 U.S.C. §1386(a) (amount "before the application of" steps three and four must be "equal to" the product determined in section 1386(a)). This is another reason the Court should grant the petition.

C. The majority failed to exercise independent legal judgment and instead improperly treated the bare outcome of another circuit as binding precedent.

1. The PBGC is the federal government agency responsible for administering and enforcing Title IV of ERISA, including the provisions added by the MPPAA. *See* 29 U.S.C. §1302(a). *See also HOP Energy, L.L.C. v. Local 553 Pension Fund*, 678 F.3d 158, 160 n. 1 (2nd Cir. 2012). As the agency charged with interpreting the MPPAA, this Court and the courts of appeal historically gave substantial deference to the PBGC's construction of the statute. *See, e.g., Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007) ("We have traditionally deferred to the PBGC when interpreting ERISA, for to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embark upon a voyage without a compass."). *See also Trs. of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 210 n.2 (7th Cir. 1989) ("The PBGC's views are entitled to deference because of its responsibility to enforce Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (which includes ERISA's withdrawal liability provisions)."); *Pension Comm. for Farmstead Foods Pension Plan v. Pension Benefit Guar. Corp.*, 991 F.2d 1415, 1420-21 (8th Cir. 1993) (holding that "in situations where the PBGC is interpreting provisions of Title IV of ERISA, the

recommendation proffered by the PBGC should be accorded deference."); and *Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund*, 75 F.3d 529, 534 (9th Cir. 1996) ("We are obligated to defer to the PBGC's interpretation even if reasonable minds could differ as to the proper interpretation of the statute.").

While this Court has recently clarified that judges, not agencies, "say what the law is," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024), it also reiterated that "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon … specialized experience," "constitute a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.* at 388 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

In 1985, the PBGC issued an opinion letter analyzing two possible methods for applying the partial credit under the statute – the exact question at issue here. Under the first method, "a plan calculates withdrawal liability for the subsequent withdrawal as directed by Section 1381(b)(1) (without regard to the prior year's partial withdrawal) and then reduces the current amount of withdrawal liability by the amount of the previously assessed liability as required by Section 1386(b)(1)." PBGC Op. Ltr. 85-4, p. 1. The second method subtracts the 1386(b)(1) credit "in the course of calculating withdrawal liability under Section 1381(b)(1)." *Id.*[7]

The PBGC pronounced the first method "correct," and the second method "clearly erroneous." *Id.* The

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[7] All references to Opinion Letter 85-4 replace the ERISA sections with the U.S. Code sections.

agency reasoned that the credit was *not* an adjustment under section 1381 for two primary reasons: first, because "it is an adjustment to withdrawal liability, *i.e.*, a further adjustment to the Section 1381(b)(1) amount." *Id.*, p. 2. And second, because step two applies only to a partial withdrawal, while the credit "applies to either a partial or complete withdrawal[.]" *Id.* Accordingly, the PBGC explained "that the reduction in an employer's withdrawal liability required by Section 1386(b)(1) on account of a previous partial withdrawal assessment *must be made after the employer's subsequent withdrawal liability is calculated* in accordance with Section 1381(b) (without regard to Section 1386(b)(1))." *Id.* (emphasis added).

In sum, when faced with the same question presented here, shortly after the statute was enacted the PBGC unequivocally sided with Petitioner's position. In the more than forty years since, the agency has never changed its view – in fact, while not binding, as recently as 2016 (the year of Petitioner's partial withdrawal), it reiterated that the credit must be taken after "the employer's complete withdrawal liability is initially calculated pursuant to" section 1381. *See* PBGC 2016 Blue Book, Question #28.[8]

2. The majority below acknowledged that the statute "assigns" the PBGC "a rulemaking role," and that the longstanding opinion letter "interpreted the statutory scheme ... to require the partial-withdrawal credit to be deducted after 1381's four adjustments." App. 15a. But while the majority allowed that the agency's views "merit respect to the extent they have

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[8] The 2016 Blue Book is available on the PBGC website at: https://www.pbgc.gov/employers-practitioners/legal-resources/blue-books (last visited on January 2, 2026).

the power to persuade," it rejected the opinion letter without analysis, asserting the PBGC's "guidance can't convert a losing position into a winning one." *Id*.

The dissent also noted the agency's rulemaking role and agreed that the opinion letter interpreted the credit "to offset 'withdrawal liability' after the calculations in section 1381 are completed." App. 29a-30a (Brasher, J., dissenting). But contrary to the majority, Judge Brasher reasoned that because the letter "was issued within a few years of the statute's passage and has been followed by the regulated community for thirty or forty years," it "may be especially useful in determining the statute's meaning." App. 30a (quoting *Loper Bright*, 603 U.S. at 394). Noting that the plan's "actuary testified that he has followed the opinion letter for every calculation he has made over his thirty-one years of experience, including, initially, in this case," Judge Brasher concluded that "a longstanding practice like this seems a particularly good indication of the statute's ordinary meaning." App. 30a-31a.

Loper Bright is instructive here, for whether and to what degree the PBGC's interpretation is entitled to deference, the majority opinion is not the best reading of the statute – and "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright*, 603 U.S. at 400. The PBGC had it right four decades ago: applying the credit as an adjustment to the allocable amount of unfunded vested benefits rather than as a reduction to withdrawal liability is "clearly erroneous." PBGC Op. Ltr. 85-4, p. 1.

The conflict between the majority opinion and the considered and enduring guidance of the federal agency charged with administering this important

federal law presents a significant legal question that merits this Court's consideration.[9]

3. That the majority opinion exists only by virtue of a single judge who refused any deference to the longstanding opinion of the relevant federal agency but simultaneously gave decisive weight to the non-binding bare holding of another circuit (for the stated purpose of avoiding a circuit split) further heightens the need for this Court's review. It goes without saying that interpreting a statute with an eye towards avoiding a circuit split to that degree inhibits a judge's ability to render his or her "best reading" of the statute.

This is a subtle yet important point – to be sure, a judge may be persuaded by the well-reasoned decision of another court; indeed, that is what judges (appropriately) do all day. *See Loper Bright*, 603 U.S. at 425 ("the primary power of any precedent lies in its power to persuade) (Gorsuch, J., concurring). But that is not what happened here – instead, Judge Jordan joined the majority "[a]fter much back and forth," and despite having "residual doubts about the correct answer" only because he did not think his doubts were "sufficient to create a circuit split." App. 16a (Jordan, J. concurring).

Importantly, neither Judge Jordan's concurrence nor the majority opinion weighed *Quad/Graphics*' reasoning or discussed the quality of its legal analysis. In fact, Judge Jordan never even mentioned the case

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[9] Given that the PBGC is governed by a Board consisting of the Secretaries of Labor, Commerce and Treasury, 29 U.S.C. §1302(d)(1), and that the majority opinion directly conflicts with the agency's long-held interpretation of the statute, the Court may wish to call for the views of the Solicitor General, as it often does in ERISA cases.

and joined only "Judge Newsom's approach" – *not* the Ninth Circuit's. App. 16a. For its part, the majority opinion cited *Quad/Graphics* only a single time (in a footnote), and then only to note that "[l]ike" the majority, the Ninth Circuit had held that the credit must be applied as part of the second adjustment. App. 9a, n. 3.

Truly *Quad/Graphics* was conspicuous by its absence from the majority opinion, which almost palpably refused to engage with that decision. As Judge Brasher put it, "[t]o its credit, the majority opinion does not adopt the Ninth Circuit's analysis or lack thereof." App. 18a (Brasher, J., dissenting). The majority instead rested on what might be called the "first circuit to rule" rule, under which a subsequent circuit "often follow[s]" a prior out of circuit decision "even if" it "doubt[s]" the decision's correctness, unless it "believe[s] the decision to be plainly wrong." App. 16a (Jordan, J., concurring).

As a practical matter, such a rule erects a higher bar for every circuit after the first circuit to decide any issue and endows that first opinion with *binding*, rather than merely *persuasive* authority outside its original circuit. But that is not the law – the bare outcome of a prior out-of-circuit case is *not* binding on any other circuit, a principle repeatedly recognized by the Eleventh Circuit. *See e.g., Pitts v. United States*, 4 F.4th 1109, 1116 fn. 3 (11th Cir. 2021) ("Ninth Circuit decisions aren't binding on any courts in this or any other circuit outside of that one.").

Still, even though it persuaded exactly no one, the prior decision by the Ninth Circuit controlled the outcome of this matter. Such a result overlooks the massive and relevant difference between *binding* and *persuasive* precedent: while the holding of a prior panel is binding on a subsequent panel within the

Eleventh Circuit, *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001), courts of appeal, including the Eleventh Circuit, treat the decisions of sister circuits "as persuasive, not binding, authority." *United States v. McCant*, 805 Fed. Appx. 859, 863 (11th Cir. 2020) (per curiam).[10] And as Judge Tjoflat recently put it in another context, "[t]reating decisions from other circuits as if they bore the same weight as binding law collapses the distinction between guidance and command." *Gilmore v. Georgia Dep't of Corr.*, 144 F.4th 1246, 1297 (2025) (Tjoflat, J., concurring). So a judge's duty is "not to count heads," but to "get the law right – even when others disagree." *Id.* at 1295.

Therefore, in every case a judge has "an obligation to exercise [his] judgment independently," and "[t]his duty of independent judgment is perhaps the defining characteristic of Article III judges." *Loper Bright*, 603 U.S. at 430 (Gorsuch, J., concurring), citing *Stern v. Marshall*, 564 U.S. 462, 483 (2011). In *Loper Bright*, this Court emphasized "the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions," *Loper Bright*, 603 U.S. at 394, "no matter the context," *Id.* at 374, and noted that "the basic nature and meaning of a statute does not change" *id.* at 408 when an agency has construed (or misconstrued) the statute. The same should hold true for an out-of-circuit ruling.

Thus, in the absence of evidence indicating persuasion, any deference to an out-of-circuit opinion

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[10] In fact, a subsequent panel is not even bound by prior unpublished opinions of the Eleventh Circuit. 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

sits in tension with the traditional principles of statutory interpretation a court is presumed to utilize in deciding the meaning of a statute. *See Loper Bright*, 603 U.S. at 371 (noting "the role of the reviewing court" is "to independently interpret the statute and effectuate the will of Congress"). While a non-binding decision may have the power to *persuade*, here Judge Jordan made no such claim. Instead, he simply elected to avoid disagreeing with a case he made no attempt to follow. Respectful consideration is one thing, but an overriding desire to avoid conflict is another entirely. As Justice Thomas once stated, "Two wrongs do not make a right, and an aesthetic preference for symmetry should not prevent us from recognizing the true meaning of an Act of Congress." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 470 (2008) (Thomas, J., dissenting). Much less should "an aesthetic preference for symmetry" prevent a court of appeal from exercising its own independent judgment. And where, as here, there are legitimate concerns that the majority may have intentionally avoided the creation of a circuit split, this Court should view such efforts with skepticism.

In sum, the mere *outcome* of a prior court's ruling is not some statutory "tie breaker," weighing against an alternate view merely by virtue of its existence, regardless of its reasoning or power to persuade. Stated otherwise, the existence (or non-existence) of a circuit split is an *external* factor relevant to this Court's review, not an *internal* factor to which a lower court may resort in interpreting a statute. Thus, while a court exercising its own independent judgment may find persuasive and choose to follow the prior interpretation of another court, in no case may that court (or judge) treat non-binding precedent as

binding merely to avoid a circuit split, which is what was done here.

4. For these reasons, if a judge's "best reading" conflicts with the decision of another circuit, he or she has an obligation to say so and allow this Court to consider that fact when it determines whether to take up a case. As Justice Gorsuch reminded in *Loper*, in our system "each judge takes an oath – both personal and binding – to discern the law's meaning for himself and apply it faithfully in the cases that come before him." *Loper Bright*, 603 U.S. at 447 (Gorsuch, J., concurring). Abdicating this responsibility risks distorting the appellate process and raises an impediment to the further development of the law by inhibiting this Court's legitimate review of important legal questions.

Because one of the primary criteria for this Court's discretionary review is the existence of a circuit split, *see* Sup. Ct. R. 10(a), a fence-sitting judge applying the "first to rule" rule in some measure shields his or her reasoning from legitimate review by this Court. Like the broad deference to an administrative agency this Court rejected in *Loper Bright*, binding deference to out-of-circuit precedent places a finger on the scales of justice and thwarts this Court's duty of supervisory review.

While the avoidance of the creation of a circuit split may arise out of a desire to ensure uniformity, as Chief Justice Roberts noted in dismissing a similar argument in *Loper Bright*, "there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong." *Loper Bright*, 603 U.S. at 403. There, the "desire for the uniform construction of federal law" failed to justify *Chevron's* deference to federal agencies. *Id*. Similarly here, there is no reason "to presume Congress prefers uniformity for

uniformity's sake over the correct interpretation of the laws it enacts." *Id*. The courts of appeal can hardly fill their role as incubators for important legal issues and novel questions of federal law if they approach difficult issues of statutory construction with a stated goal of avoiding conflict.

5. In any event, there was good reason for the majority to eschew the Ninth Circuit's decision, for, respectfully, that court's reasoning in *Quad/Graphics* "is sparse and unpersuasive." App. 18a (Brasher, J., dissenting). That decision "did not address the fact that 'withdrawal liability' is a defined term," and "also failed to address the ordinary meaning of 'in the case of a partial withdrawal' or any of the statutory context." *Id*. In addition, and as noted herein and elsewhere, "*Quad/Graphics* improperly conflates withdrawal liability … with unfunded vested benefits[.]" *Consumers Concrete*, 780 F.Supp.3d at 763.

Finally, like the majority below, *Quad/Graphics* failed to mention or discuss the statutory definitions of "complete withdrawal" or "partial withdrawal," or that the plan there (as here) failed to apply the partial-prorate fraction at step two or to reduce the annual payment at step three, because it was calculating a complete withdrawal. *Quad/Graphics*, 909 F.3d at 1216.

This explains, but does not justify, the majority's decision to "follow" the Ninth Circuit in form only, rather than substance. Because Article III demands more – specifically, independence, not conformity – this Court should grant the petition.

D. The questions presented warrant review, and this case is an excellent vehicle.

1. The majority opinion began its analysis by declaring "[t]his is a hard case," App. 8a, and ended it by repeating that same point. App. 15a ("By any measure, this is a tough case. The statute is complex, and both parties make plausible arguments."). Likewise, the author of the concurrence asserted "[t]his is a difficult case," and joined the majority only "[a]fter much back and forth" while confessing to "residual doubts about the correct answer." App. 16a (Jordan, J., concurring).

Despite its own admitted uncertainty, the majority opinion brushed aside the views of the federal agency with authority to interpret this law and deepened the confusion now swirling around the calculation of the prior partial credit. Respectfully, in so doing, the majority disregarded the plain text and definitions of the statute.

But whether it got the law right or wrong, to the degree the majority exists only by virtue of the majority-making judge's stated desire to avoid a circuit split, it failed to exercise its own independent legal judgment, thereby "depart[ing] from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), and leaving this area of law worse than when it found it. This unusual situation "call[s] for an exercise of this Court's supervisory power[.]" *Id*.

2. As the Court recognized when it granted certiorari in *M&K Employee Solutions* (cert granted June 30, 2025) (Docket 23-1209), the calculation of withdrawal liability is – given the stakes for all involved – an issue of tremendous importance to the sponsors, administrators, participants and employers in multiemployer plans. *See also* 29 U.S.C.

§1001a(a)(1) ("multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest[.]").[11]

Moreover, uncertainty in this area has real consequences – it prevents contributing employers from being able adequately to plan for potential withdrawal liability and could easily influence reticent employers to rationally decline to participate in multiemployer plans. As the Third Circuit has noted, "[i]ncentives matter, and employers have many alternatives to multiemployer plans." *Caesar's Entm't Corp. v. Int'l Union of Op. Eng'rs Local 68 Pension Fund*, 932 F.3d 91, 97 (3rd Cir. 2019).

In fact, declining employer participation was among the reasons that just four years ago led Congress and the American taxpayer to bail out such funds in amounts estimated to approach $100 million dollars. *See* "American Rescue Plan Act of 2021," (https://www.pbgc.gov/american-rescue-plan-act-of-2021) (last visited January 2, 2026). So these issues can and do have an impact far beyond the immediate parties.

3. Judge Brasher's cogent and compelling dissent demonstrates that this issue is ripe for review, notwithstanding the absence of a circuit split the majority may have intentionally avoided. *See* Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33, 37 ("[A] dissent is also a warning flag to the

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[11] As noted by one prominent practitioner, this issue is "incredibly significant" to counsel who advise multiemployer plans and participating employers. *See* "4 ERISA Arguments to Watch in September," *Law360* (September 6, 2024) (available at: https://www.law360.com/articles/1876553) (last visited January 2, 2026).

Supreme Court[,] . . . evidence that the legal issue is a difficult one worthy of the Court's attention.").

The dissent recognizes the fundamental difference between withdrawal liability and the allocable amount of unfunded vested benefits, follows rather than disregards the statutory definitions, applies consistently the phrase "in the case of a partial withdrawal," and aligns with the PBGC's longstanding interpretation of the precise question presented. App. 16a-33a. That the majority opinion fails in each of these respects warrants this Court's attention.

4. On the merits, this petition presents a pure question of law, App. 7a ("[t]his case raises a single question of statutory interpretation: In calculating an employer's 'withdrawal liability,' when should one apply the partial-withdrawal credit?"), and this case is an excellent vehicle to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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