

No. 25-809

IN THE
Supreme Court of the United States

PERFECTION BAKERIES, INC.,

Petitioner,

v.

RETAIL WHOLESALE AND DEPARTMENT
STORE INTERNATIONAL UNION AND
INDUSTRY PENSION FUND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where an employer withdraws from an underfunded multiemployer pension plan, ERISA imposes withdrawal liability on the withdrawing employer.

Such withdrawal liability is determined pursuant to a four-step, sequential process set forth in 29 U.S.C. § 1381(b)(1).

The second step of this process states, “next, in the case of a partial withdrawal, in accordance with section 1386 of this title.” 29 U.S.C. § 1381(b)(1)(B). In dispute is whether this second step applies to a prior partial withdrawal, which is governed by 29 U.S.C. § 1386(b)(1).

There is no circuit split here. Relying on the relevant statutory text, the two circuit courts to review this issue—the Ninth and Eleventh Circuits—both held that prior partial withdrawal liability under 29 U.S.C. § 1386(b)(1) must be applied at 29 U.S.C. § 1381(b)(1)(B).

The Question Presented is;

Whether 29 U.S.C. § 1386(b)(1)’s statutory reduction for prior partial withdrawal liability should be applied at step two of 29 U.S.C. § 1381(b)(1)’s four-step statutory formula for calculating withdrawal liability.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceeding.

RULE 29.6 STATEMENT

Respondent, the Retail, Wholesale and Department Store International Union and Industry Pension Fund, is not a nongovernmental corporation and is therefore not required to submit pursuant to Supreme Court Rule 29.6.

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BRIEF IN OPPOSITION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

INTRODUCTION

Petitioner asks the Court to review a question concerning the manner in which the Multiemployer Pension Plan Amendments Act (“MPPAA”) requires a pension fund to apply the statutory reduction for prior partial withdrawal liability in the case of a subsequent complete withdrawal. In the forty-six years since the MPPAA was enacted, this question has been reviewed by just two circuit courts: once in the case below, and once in a case decided by the Ninth Circuit in 2018. *See GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214 (9th Cir. 2018). In both instances, the circuit courts correctly held that the statutory reduction for prior partial withdrawal liability pursuant to 29 U.S.C. § 1386(b)(1) must be applied under 29 U.S.C. § 1381(b)(1)(B), the second step of the four-step statutory process for determining withdrawal liability. The Petition should be denied because there is no Circuit Split, and Petitioner has failed to present any compelling basis for the granting of a Writ of Certiorari.

The issue in this case is whether Congress required the application of 29 U.S.C. § 1386’s statutory reduction for prior partial withdrawal liability at step two of 29 U.S.C. § 1381’s four-step statutory formula. The three tribunals below each concluded that the statutory text does require this. The Fund’s application of the statutory reduction for prior partial withdrawal liability was approved by the

Eleventh Circuit's decision below, which is consistent with the only other circuit decision that has reviewed this issue.

The gravamen of the Petition is that the Eleventh Circuit erred in holding that the statutory reduction for a prior partial withdrawal should be applied at step two of Section 1381's four-step process. Instead, Petitioner contends that it must be applied only after all four of Section 1381(b)(1)'s steps have been completed. Petitioner engages in a roving statutory analysis that ignores the plain language of Section 1381(b)(1)(B), in addition to the sound reasoning in the decision below. Petitioner's interpretation of the statute would undermine the finality of Section 1381(b)(1)'s four-step formula, and it would create an unjustifiable extratextual fifth step that Congress did not reference in the statute.

At its core, the Petition asserts that the Court should grant certiorari because the holding below was decided in error. An alleged error in statutory interpretation, however, is not a basis for this Court to grant certiorari pursuant to Sup. Ct. R. 10.

As a fallback position, Petitioner also alleges that the Eleventh Circuit failed to exercise independent legal judgment. Petitioner advances a convoluted argument that misconstrues the decision below and asserts a basis for granting certiorari that extends far beyond the command of Sup. Ct. R. 10.

Petitioner and *amici* greatly overstate the importance of the Question Presented. *Amici*, in particular, claim that the decision below will somehow prevent employers from making informed financial decisions. But, the reality

is that the statutory reduction for prior partial withdrawal liability is almost never litigated. And, when this issue does arise, there is unanimity among the federal circuits that provides clear instruction as to how liability will be assessed in the case of a partial withdrawal followed by a complete withdrawal. While withdrawal liability in general is important to multiemployer plans, the specific issue raised in this case is not. Even if a circuit split were to emerge, the fact that this question rarely arises undercuts any notion that it is “important” in the relevant sense.

There is no reason for the Court to intervene here to answer a question where: (1) a circuit split does not exist; (2) the issue almost never arises in litigation; and, (3) the Question Presented was correctly decided by the court below. This is a quintessential instance where further percolation would benefit this Court.

STATEMENT OF THE CASE

1.a. A multiemployer pension plan is one to which more than one employer is required to contribute pursuant to a collective-bargaining agreement. 29 U.S.C. § 1002(37). In the late 1970s, multiemployer plans were experiencing “extreme financial hardship” precipitated by employer withdrawals. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984). The problem was that employers could withdraw from insolvent plans “without triggering the plan-termination provisions of ERISA and thereby avoid[] obligations to make ongoing contributions.” *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 734 (D.C. Cir. 2022). That incentivized employers to withdraw from

financially troubled plans rather than “pay [their] fair share of underfunding,” which triggered a death spiral for some plans. *Milwaukee Brewery Workers’ Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 417 (1995).

To address that problem, Congress enacted the MPPAA, which imposes “withdrawal liability” on any employer that withdraws from an underfunded multiemployer plan. 29 U.S.C. § 1381(a). Withdrawal liability represents a withdrawing employer’s proportionate share of the plan’s unfunded vested benefits (“UVBs”). *See id.* § 1381(b). To address concerns about employers withdrawing from pension plans, which would “ensure[] the plan’s demise,” Congress passed the MPPAA. *Milwaukee Brewery Workers’ Pension Plan*, 513 U.S. at 417. The objective was to help eliminate this problem by setting forth a detailed set of rules that determine how much withdrawing employers owe to a fund, and how a fund is to collect those amounts. *Id.*

1.b ERISA sets forth a four-step formula that determines how pension funds are to calculate withdrawal liability. 29 U.S.C. § 1381(b)(1). The formula includes four sequential steps that determine the amount of withdrawal liability that an employer owes to a multiemployer fund when it undergoes a partial or complete withdrawal. The sequential instructions emphasize the specific order of operations for the required statutory reductions. The steps state “first,” “next,” “then,” and “finally.” *See* 29 U.S.C. § 1381(b)(1)(A)-(D).

Section 1381, “Withdrawal Liability established; criteria and definitions,” in relevant part states:

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability

(b) For purposes of subsection (a)—

(1) The Withdrawal liability of an employer to a plan is the amount determined under Section 1391 of this title to be the allocable amount of unfunded vested benefits adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

The Fund followed the plain language of Section 1381(b)(1)(B) when it applied the statutory reduction for prior partial withdrawal liability at Section 1381's second step, "in accordance with Section 1386 of this title." 29 U.S.C. § 1381(b)(1)(B). As explained, *infra*, Section IV, the Eleventh Circuit carefully analyzed and affirmed this interpretation of the statute in a well-reasoned decision, as did the Ninth Circuit.

2. The Retail, Wholesale and Department Store International Union (“RWDSU”) and Industry Pension Fund (the “Fund”) is a multiemployer pension fund that provides retirement benefits to members of RWDSU. Perfection Bakeries, Inc. (“Perfection”) was a party to and bound by collective bargaining agreements with RWDSU locals at facilities in Saginaw, Michigan and Fort Wayne, Indiana. Pet. App. 35a. Pursuant to these agreements, Perfection was obligated to pay and did pay contributions to the Fund on behalf of employees covered by these agreements. *Id.*

The Fund determined that Perfection partially withdrew from the Fund in 2016 when Perfection bargained out of its contribution obligation at its Michigan facility and ceased contributions to the Fund for a portion of its covered employees. *Id.* at 5a. Approximately two years later in 2018, a complete withdrawal occurred when Perfection bargained out of its contribution obligation at its Indiana facility and thereby ceased all contributions to the Fund. *Id.*

After Perfection’s complete withdrawal, the Fund issued, in relevant part, a complete withdrawal liability assessment to Perfection that accounted for the prior partial withdrawal liability. *Id.* The withdrawal liability calculations performed by the Fund actuaries were consistent with the only court of appeals decision that had analyzed how funds must apply the statutory reduction for prior partial withdrawal liability when an employer undergoes a partial withdrawal followed by a complete withdrawal. *Id.*; see *Quad/Graphics*, 909 F.3d at 1214. The Fund accordingly applied the statutory reduction for a prior partial withdrawal at step two of Section 1381’s four-step formula.

3. Perfection initiated arbitration to challenge the Fund's assessment of its withdrawal liability in 2019. Pet. App. 6a. The Arbitrator issued an Opinion and Award in which he concluded that the Fund properly applied the statutory reduction for a prior withdrawal at step two of Section 1381(b)(1). *Id.*

Perfection challenged the Arbitrator's Opinion and Award by moving for summary judgment in the Northern District of Alabama on its claim seeking to vacate or modify the Arbitrator's decision. *Id.* The Fund counterclaimed to enforce the Award. *Id.* The District Court denied Perfection's motion for summary judgment and granted the Fund's motion for summary judgment. *Id.* at 7a. The District Court concluded that the relevant statutory provisions required the Fund to apply the reduction for an employer's prior partial withdrawal liability pursuant to 29 U.S.C. § 1386(b)(1) at the second step of the four-step process set forth by 29 U.S.C. § 1381(b)(1). *Id.* at 37a.

The Eleventh Circuit Court of Appeals affirmed the District Court's cogent decision. Judge Newsom, writing for the majority, found it significant that Section 1381(b)(1)(B) refers to all of Section 1386—not just Section 1386(a). *Id.* at 8a. Thus, “by its plain terms, step two [of Section 1381(b)(1)] incorporates Section 1386(b)'s credit for previous partial withdrawals just as much as Subsection 1386(a)'s proration for current partial withdrawals.” *Id.* at 8a–9a. The Eleventh Circuit analyzed the entire statutory context and found that additional textual clues in the relevant statutory provisions support its holding. *Id.* at 9a. This included, among other things, the cross reference to Section 1405 in Section 1381(b)(1)(D)—the final step in the four-step formula, which is triggered only “after

the application of all sections of this part having a lower number designation than this section.” *Id.* at 9a (citing 29 U.S.C. § 1405(a)(1)). Accordingly, the Eleventh Circuit correctly reasoned that all of Section 1386—a section with a lower number designation than Section 1405—must be applied before step four of Section 1381(b)(1). *Id.*

Petitioner sought a rehearing *en banc*, which the Eleventh Circuit denied. The Petition followed.

REASONS FOR DENYING THE PETITION

I. The Court Should Abide By Its Ordinary Practice Of Denying Certiorari Where No Circuit Split Exists

A. The Eleventh Circuit Decision Does Not Conflict With That Of Any Other Circuit

Petitioner does not argue that the decision below implicates a circuit split. Nor could it. In the forty-six years since the passage of the MPAAA, the courts of appeals have addressed this question only twice. In both instances, they held that the statutory reduction for prior partial withdrawal liability pursuant to 29 U.S.C. § 1386(b)(1) must be applied under the second step of 29 U.S.C. § 1381(b)(1)’s four-step formula. *Quad/Graphics, Inc.*, 909 F.3d 1214; Pet. App. 2a.

First, in *Quad/Graphics, Inc.*, the Ninth Circuit held that ERISA “unambiguously” requires that the Section 1386(b)(1) reduction for a prior partial withdrawal be applied at step two of Section 1381’s four-step formula. 909 F.3d at 1218. Next, in the case below, the Eleventh Circuit

reached the same holding. Pet. App. 9a, 17a. Because the application of the statutory reduction for a prior partial withdrawal is a pure question of law, the only circuit courts to review the issue were presented with the same issue as well as similar arguments made by the employers. Both circuit courts squarely dismissed the employers' arguments, including many that are reasserted in the Petition.

As explained by Justice Scalia, a principal purpose for which this Court grants certiorari is to resolve existing conflicts among the courts of appeal. *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see* Sup. Ct. R. 10(a). Until this Court is presented with reasoning from a circuit court that articulates some basis for rejecting the holdings from the Eleventh and Ninth Circuits, there is no reason for this Court to consider intervention. In the absence of a circuit split, the Petition does not present a compelling reason to grant certiorari pursuant to Sup. Ct. R. 10(a).

B. Certiorari Should Be Consistent With This Court's Practice Of Permitting An Issue To Percolate

As discussed above, there is no current circuit split regarding the Question Presented that has been reviewed by only two courts of appeals. In instances like this where the Question Presented has not often been litigated, this Court has a well-developed and prudent practice of allowing a legal issue to percolate among additional lower courts before it considers granting certiorari. *See, e.g., Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring) (“[T]he experience of our thoughtful colleagues on the district and circuit benches,

could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.”). For decades, the Court has recognized the value of providing additional time for issues to percolate. Justice Frankfurter, writing for the Court in 1950, stated:

A case may raise an important question but . . . [i]t may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening. The issue is best presented where the . . . courts have struck fundamentally different stances on a key legal question.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

The Court has consistently recognized that it is “preferable to allow several courts to pass on a given [issue] in order to gain the benefit of adjudication by different courts[.]” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); see e.g., *Brown v. Texas*, 522 U.S. 940, 943 (1997) (noting that the likelihood of the correct resolution of the issue may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court). As Judge Rehnquist succinctly explained in a unanimous opinion, this Court benefits “from permitting several court of appeals to explore a difficult question before this Court grants certiorari.” *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984) (citing *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135, n. 26 (1977)).

Even in circumstances where a circuit split does exist, this Court has declined to grant certiorari in order to provide the lower courts with more opportunity for percolation. *See, e.g., Visa Inc. v. Nat'l ATM Council, Inc.*, 144 S. Ct. 1381 (2024) (mem.) (denying certiorari to resolve a 4–3 split concerning a fundamental question of class certification under Federal Rule of Civil Procedure 23); *Care Alternatives v. United States*, 141 S. Ct. 1371 (2021) (mem.) (declining certiorari to resolve a 3–2 split concerning the meaning of “falsity” under the False Claims Act).

The absence of a circuit split in the instant case provides the Court here with an even stronger reason to deny the Petition. Respectfully, the Court should follow its practice of permitting additional percolation where this Petition does not even attempt to assert that a circuit split exists.

Although Petitioner does not even address percolation of this issue, at least one other circuit appears likely to weigh in on the question in the near future. *Consumers Concrete Corp. v. Central States, SE. & SW. Areas Pension Fund*, 780 F. Supp. 3d 754 (N.D. Ill. 2025), appeal docketed, No. 25-1765 (7th Cir.). This reinforces that certiorari should be denied because it shows active percolation.¹ *See Guedes v. Bureau of Alcohol, Tobacco,*

¹ The ongoing Seventh Circuit case undermines *amici's* position that additional percolation is likely to be limited. Amicus Br. 22. In addition, *amici's* position that percolation will be limited by forum shopping similarly fails to present a compelling basis for certiorari for several reasons. First, *amici* present no evidence of forum shopping related to this issue subsequent to *Quad/Graphics*, which was decided nearly a decade ago. Second, while *amici*

Firearms & Explosives, 589 U.S. 1258, 1260 (2020) (Gorsuch, J., concurring in denial of certiorari) (“[O]ther courts of appeals are actively considering challenges to the same regulation. Before deciding whether to weigh in, we would benefit from hearing their considered judgments. . . .”); *see also Brown v. Polk County*, 141 S. Ct. 1304 (2021) (Sotomayor, J., statement respecting denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., statement respecting denial of certiorari) (noting that further consideration of the issue by other courts will enable this Court to deal “with the issue more wisely a later date”)).

The lack of a circuit split alone provides the Court with a basis to deny the Petition. If the Question Presented is a proper one, it is one that would benefit from further percolation based on additional exploration in appellate decisions.

portray employers as subject to the whims of pension funds, they do not acknowledge that such funds are jointly administered by employer and union trustees. It is standard practice for the joint trustees to include forum selection clauses, which can limit the possibility of opportunistic forum selection. Third, even if a plan does not have a forum selection clause, the structure of the MPPAA mitigates against forum shopping. Pursuant to the MPPAA, disputes must be resolved by arbitration in the first instance. 29 U.S.C. § 1401(a). Then, if a party desires to challenge an arbitral award, venue is limited to (i) where the plan is administered; (ii) where a defendant resides; or (iii) where a defendant does business. 29 U.S.C. §§ 1401(b)(2), 1451(d). *Amici’s* overheated concerns about forum shopping do not present a compelling basis to grant certiorari.

II. The Eleventh Circuit Exercised Independent Judgment

A. Petitioner's Inaccurate Representation Of The Decision Below Does Not Provide A Compelling Basis To Grant Certiorari

Recognizing that no circuit split exists, Petitioner misconstrues the Eleventh Circuit decision to advance a baseless claim that the court below failed to exercise independent judgment. However, the Eleventh Circuit panel judges thoroughly grappled with the Question Presented before affirming the District Court's decision.

After a “tedious statutory primer” and a meticulous statutory analysis, Judge Newsom, writing for the majority, reasoned that: “The statute’s language and structure counsel that the partial-withdrawal credit’s proper home is in step two . . . [and] in cases like this one, our charge ‘is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice.’” Pet. App. 2a, 15a–16a (quoting *Mansell v. Mansell*, 490 U.S. 581, 594 (1989)).

In a concurrence that joined the majority opinion, Judge Jordan plainly confirmed his agreement with Judge Newsom’s approach. Judge Jordan stated: “I am persuaded that Judge Newsom’s approach is the better one, and I join the majority opinion in full. Neither reading of the statutory language is perfect, but the Fund’s interpretation is more persuasive.” *Id.* at 16a. Any residual considerations expressed by Judge Jordan were insufficient to overcome his agreement with the majority opinion. *See id.* In short, Judge Jordan issued a standard

concurrence where he expressed his agreement with the majority opinion, while acknowledging that any residual considerations were insufficient to make a contrary finding.

Petitioner acknowledges that it is appropriate—in fact that it is standard practice—for judges to consider relevant decisions from other circuits in their own opinions. *See* Pet. Br. 26. Petitioner claims, however, that Judge Jordan joined the concurrence “*only* because he did not think his doubts were ‘sufficient to create a circuit split.’” *Id.* (citing Jordan, J. concurring) (emphasis added). This position ignores Judge Jordan’s clear explanation that the majority opinion correctly interpreted the relevant statutory framework. The plain language and structure of Judge Jordan’s concurrence evinces that he joined the majority opinion because he agreed that the statutory reduction for a prior partial withdrawal must be applied at step two of Section 1381(b)(1). Pet. App. 16a.

In any event, it is unremarkable for a reviewing court to recognize that a judge’s agreement with an interpretation or recommendation advanced by another court or entity is not an abdication of their exercise of independent legal judgment. *See United States v. Earvin*, 51 F. App’x 584, 586 (7th Cir. 2002). (“We decline to assume that because a judge agrees with the government’s recommendation in a certain case he has failed to exercise independent judgment. The Judge himself rejected any notion that he blindly followed government recommendations.”). Although Petitioner reaches for a basis to grant certiorari that places undue emphasis on one phrase in the concurrence in which Judge Jordan acknowledges

“residual” concerns, it is clear that the Eleventh Circuit properly exercised independent legal judgment.²

Beyond misconstruing Judge Jordan’s concurrence, Petitioner also alleges without foundation that the Eleventh Circuit employed a ‘first circuit to rule’ rule. Pet. Br. 27, 30. According to Petitioner’s theory, Judge Jordan impermissibly followed a ‘first circuit to rule’ rule by treating an out of circuit decision as binding rather than persuasive. *Id.* This inaccurate representation of the concurrence ignores the indisputable reason that Judge Jordan joined the majority opinion—because he believed the majority approach is the better one.³

This standard and ordinary practice does not provide the Court with a basis to grant certiorari in accordance with Sup. Ct. R. 10.

B. The Court Of Appeals’ Dismissal Of The PBGC’s Nonbinding Opinion Letter Does Not Present A Compelling Basis For Granting Certiorari

In the decision below, the majority opinion appropriately determined that the PBGC’s nonbinding opinion letter

² Any “residual doubt” that Judge Jordan expressed was secondary to his approval of the majority opinion. *Id.* Black’s law dictionary defines “residual” to mean “[r]elating to the residue; relating to the part remaining.” *Residual, Black’s Law Dictionary* (10th ed. 2014).

³ Petitioner states that if a judge’s “best reading” conflicts with another circuit, then they have an obligation to rule against that circuit’s finding. Pet. Br. 30. But Judge Jordan’s best reading of the dispute did not conflict with another circuit. He clearly articulated his belief that the majority opinion correctly interpreted the statute.

85-4 is not persuasive. *Id.* at 15a. The majority opinion stated: “The [Pension Benefit Guaranty] Corporation’s guidance can’t convert a losing position into a winning one.” *Id.* Judge Newsom clearly explained: “The agency’s reasoning doesn’t move the needle here because it merely echoes (or more accurately, anticipated) Perfection’s main arguments, which we have rejected as unpersuasive.” *Id.*; *see id.* at 60a–61a (explaining that PBGC Opinion Letter 85-4 did not alter the District Court’s analysis because it had independently found that the text of the relevant statute is clear and requires application of the partial withdrawal at step two of Section 1381’s four-step formula).

Still searching for a basis for this Court to grant certiorari, Petitioner alleges that the conflict between the Eleventh Circuit and the PBGC presents a legal question that is significant enough for this Court’s consideration.⁴ Pet. Br. 25–26. However, it is axiomatic that while agency opinions have the “power to persuade,” they possess no “power to control.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore* . . . [,] but only to the extent that those interpretations have the ‘power to persuade.’”);

⁴ *Amici* also focus on the PBGC regulations that federal courts have determined are unpersuasive. *Amici* cite to PBGC regulation 29 C.F.R. 4206.1(a) for their position regarding double charging. Amicus Br. 3–4, 16. The District Court specifically dismissed the relevance of this statement of purpose issued by an agency. Pet. App. 59a–60a. And, even if the regulations were relevant, the District Court concluded that the Petitioner did not establish it was double charged. *Id.* at 60a.

see also Christensen v. Harris County, 529 U.S. 576 at 587 (2000). Concluding that nonbinding agency guidance is unpersuasive is perfectly within an Article III court’s discretion, especially after this Court’s *Loper Bright* holding. 603 U.S. at 402. The Eleventh Circuit’s conclusion that the PBGC guidance is unpersuasive does not provide a compelling reason for the Court to grant certiorari in accordance with Sup. Ct. R. 10(a).

III. Petitioner and *Amici* Overstate The Importance Of The Question Presented

Since the MPPAA was enacted in 1980, the Question Presented has been reviewed only twice in the circuit courts—once with respect to the Fund in this case and once with respect to a fund in *Quad/Graphics*. A question that arises twice in the circuit courts over a span of forty-six years can hardly be deemed “important.”

Petitioner and *amici* overstate the importance of the Question Presented by conflating withdrawal liability in general and the specific application of the statutory reduction for a prior partial withdrawal presented in this case. Pet. Br. 32–33.⁵ To be sure, withdrawal liability as a

⁵ In an exercise in unjustified alarmism, *amici* in particular advance an exaggerated and speculative position that companies will be “unable to evaluate [] financial ramifications” and that it will be “impossible to engage in responsible long-term business planning.” *Amicus* Br. 2. 5. But instability is not at issue here—*amici* would simply prefer that one statutory framework be in effect rather than another. Employers like Petitioner—who created the factual landscape by first bargaining out partially and then completely—must comply with the regulatory framework that Congress created to ensure the funding of multiemployer pension

general matter is important to multiemployer plans and employers. But the specific question presented in this case of how to apply the statutory reduction for a prior partial withdrawal when there is a subsequent complete withdrawal is neither “fundamental” nor “recurring.”

This question has rarely arisen, and to the extent that it may arise in the future, the circuit courts have provided uniform holdings that the statutory reduction for a prior partial withdrawal must be applied at step two of Section 1381’s four-step formula. This Court regularly denies petitions arising under ERISA even when a circuit split exists. *See, e.g., Embarq Corp. v. Fulghum*, 577 U.S. 1007 (2015) (mem.) (denying certiorari to resolve circuit split concerning the construction of ERISA’s “fraud or concealment” exception). The basis for denying certiorari is even stronger here where there is uniformity among the only circuit courts that have reviewed the issue. In other instances, courts must balance the value of thorough review that percolation provides against short-term uncertainty. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir. 2021) (citing *Casa De Md. v. Trump*, 971 F.3d 220, 260 (4th Cir. 2020)) (explaining that short-term uncertainty “is justified by its producing a more thorough review of the issue, which in turn should provide a stable, more accurate body of law in the long run”). Here, the Court does not need to balance the value

funds. Moreover, as *amici* must be aware, some uncertainty is inherent in the MPPAA for a host of reasons unrelated to the Question Presented here. Employers can never precisely predict their liability in the event of a withdrawal because such liability is based on several inputs, including changing interest rates and financial market fluctuations.

of percolation against any short-term uncertainty, given that a circuit split does not exist.

IV. The Decision Below Was Correct

The Petition argues that the Court should grant certiorari because the decision below was supposedly decided incorrectly. But this Court is not “a court of error correction.” *City & County of S.F. v. Sheehan*, 575 U.S. 600, 621 (2015) (Scalia, J., concurring in part); *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (same). An alleged error in statutory interpretation is simply not a compelling basis for granting review. *See Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from grant of stay) (“[E]rror correction is outside the mainstream of the Court’s functions and not among the compelling reasons that govern the grant of certiorari.”) (citation modified)).

In any event, review is unwarranted because the Eleventh Circuit correctly held that the statutory reduction for prior partial withdrawal liability pursuant to 29 U.S.C. § 1386(b)(1) must be applied under 29 U.S.C. § 1381(b)(1)(B), the second step of the four-step statutory process for determining withdrawal liability. In challenging the Eleventh Circuit’s decision, Petitioner argues that the statutory reduction for a prior partial withdrawal should instead only be applied after the completion of the entire four-step process under Section 1381(b)(1). *See* Pet. Br. 10–12. Petitioner’s methodology would have the effect of substantially decreasing its withdrawal liability, even though the 20-year cap already provides a reduction of Perfection’s liability in the amount of nearly \$10 million. Pet. App. 14a. But, the Eleventh

Circuit scrutinized and rejected this methodology and the arguments that Petitioner reasserts here in a well-reasoned, thorough decision, as did the Ninth Circuit.⁶

A. The Eleventh Circuit Correctly Held That The Plain Language Of The Statute Requires The Fund To Apply The Statutory Reduction For Prior Partial Withdrawal Liability At Section 1381(b)(1)'s Second Step

1. Section 1381(b)(1)(B) Encompasses The Entirety Of Section 1386

The Eleventh Circuit determined that the plain meaning of the statute requires the application of the prior partial withdrawal liability reduction at step two of Section 1381's four-step formula. To determine the meaning of the statute, the Eleventh Circuit applied the ordinary meaning of the words, and it evaluated the words in the entire statutory context. *Id.* at 7a–8a. The court reasoned that the plain language of the statute is “expressly sequential,” and that Section 1381 “directs that the second adjustment be made ‘in accordance with Section 1386.’” *Id.* at 8a. The court held that the Fund properly applied the statutory reduction for a prior partial withdrawal at 1381(b)(1)(B). *Id.* at 15a.

As the Eleventh Circuit further determined, the statutory text is clear that the entirety of Section 1386—

⁶ In considering *amici's* submission with reference to Sup. Ct. R. 37, it is worth noting that much of *amici's* brief simply echoes arguments made by Petitioner with respect to the statutory interpretation issue. Amicus briefs that reiterate arguments offered in the Petition are disfavored by this Court. Sup. Ct. R. 37.

including its reduction for an employer’s prior partial withdrawal—is included in the second step of the four-step process under Section 1381(b)(1). *Id.* at 8a–9a. Section 1381(b)(1)(B) states that an adjustment is made “in the case of a partial withdrawal, in accordance with section 1386 of this title.” 29 U.S.C. § 1381(b)(1)(B).

Yet Petitioner claims that this subparagraph refers to *only half* of Section 1386—applying it only to Section 1386(a) and erasing Section 1386(b) from its purview. Pet. Br. 14–15. As the Eleventh Circuit correctly observed: “Significantly, Subsection 1381(b)(1)(B) refers on its face to all of ‘section 1386’—not just half of it. Accordingly, by its plain terms, step two incorporates Subsection 1386(b)’s credit for previous partial withdrawals just as much as Subsection 1386(a)’s proration for current partial withdrawals.” Pet. App. 8a–9a; *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 250 F. Supp. 3d 551, 563 (C.D. Cal. 2017) (“[B]y its very terms, [Section 1381(b)(1)(B)] is not limited to adjustments only under certain subsections of § 1386.”).

Petitioner nonetheless contends that the phrase “in the case of a partial withdrawal” means that this second step cannot apply where, as here, a pension plan is calculating a complete withdrawal. Pet. Br at 14-15. Petitioner devotes a substantial amount of space to this argument, but neither the Eleventh Circuit nor the Fund is expanding the definition of “partial withdrawal.” Indeed, there is no dispute whatsoever over the meaning of a “partial withdrawal.”

A prior partial withdrawal undeniably falls under 29 U.S.C. § 1385 (the section of the statute that defines

“partial withdrawal”), just as does a current one. As the Eleventh Circuit found, “by its plain terms, step two incorporates Subsection 1386(b)’s credit for previous partial withdrawals just as much as Subsection 1386(a)’s proration for current partial withdrawals.” Pet. App. 8a–9a. Further, as the Eleventh Circuit pointed out, the phrase “in the case of a partial withdrawal” is clarified by the words that immediately follow, “in accordance with section 1386 of this title.” 29 U.S.C. § 1381(b)(1)(B); Pet. App. 11a–13a. As the Eleventh Circuit summarized, “Subsection 1381(b)(1)(B) expressly incorporates *all* of § 1386, and so do steps three and four.” *Id.* at 12a–13a. Further, “[i]n words that parallel Subsection 1381(b)(1)(B)’s preface, Subsection 1386(b)(1) states that the credit applies ‘[i]n the case of an employer that has withdrawal liability for a partial withdrawal from a plan.’” *Id.* at 13a; see *Quad/Graphics*, 250 F. Supp. 3d, at 563–564 (“[T]he congruity in the language between § 1381(b)(1)(B) and § 1386(b)(1) convinces the Court that Congress affirmatively intended for the former to refer to the latter.”). Contrary to Petitioner’s claim, the Fund’s reading of Section 1381(b)(1)(B) does not conflate a partial withdrawal and a complete withdrawal; rather, it adheres to the straightforward meaning of the relevant statutory provisions.⁷ The Eleventh Circuit correctly held that

⁷ Petitioner argues that the second step of Section 1381(b)(1) cannot allow for the application of prior partial withdrawal liability to a current complete withdrawal. Pet. Br. 18–19. Yet, Section 1386(b)(1), by its own terms, accounts for this exact circumstance: where “an employer [] has withdrawal liability for a partial withdrawal from a plan,” then “any withdrawal liability for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability.” 29 U.S.C. § 1386(b)(1). Thus, the text of Section 1386(b)(1)

Subsection 1381(b)(1)(B) expressly incorporates *all* of Section 1386, as did the Ninth Circuit.

2. Additional Textual Clues Further Confirm That All Of Section 1386—Including The Reduction For The Previous Partial Withdrawal—Should Be Brought To Bear At Step Two

The Eleventh Circuit found that the plain reading of the statute is buttressed by textual clues in the statutory formula and additional relevant provisions that refer to all of Section 1386 as part of step two. Pet. App. 9a. Notably, this includes the specification of a single sub-sub-section in step three but not in step two of Section 1381(b)(1). *Id.* The Eleventh Circuit explained: “[I]n describing step three, Subsection 1381(b)(1)(C) conspicuously directs that the 20-year cap be applied according to ‘section 1399(c)(1)(B) of this title.’ *Id.* § 1381(b)(1)(C) (emphasis added). That specification of a single sub-sub-subsection indicates, on balance, that step two’s incorporation of *all* of ‘section 1386’ was intentional.” *Id.*; *Quad/Graphics*, 250 F. Supp. 3d at 563 (“[T]he very next subsection of the same statute (i.e., § 1381(b)(1)(C)) specifically identifies the particular subsection of the statute to which it is referring (i.e., § 1399(c)(1)(B)), thus making clear that Congress’ failure to do so under § 1381(b)(1)(B) was not simply an oversight.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here 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

explicitly accounts for a case where there is a *partial* withdrawal followed by a *complete* withdrawal, which is what occurred here.

Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citation modified)).

If the statute’s drafters had intended for the reduction for a prior partial withdrawal under Section 1386(b) to be applied only after the completion of Section 1381(b)(1)’s four adjustments, they could easily have provided that direction in the statute itself. The fact that they did not do so speaks volumes—particularly when Congress explicitly included a cross reference to a specific subsection of Section 1399 in Section 1381’s third step. As the District Court in this case determined, “Congress could also have included a fifth potential adjustment if it had intended for the credit to be applied at a different part of the calculation.” Pet. App. 56a.

Textual clues at step three and step four of Section 1381’s statutory formula further support the Eleventh Circuit’s correct interpretation of the statute. Pursuant to Petitioner’s interpretation, the reduction for the prior partial withdrawal would come after the application of the statutory 20-year cap (29 U.S.C. § 1399(c)(1)(B)), which all agree is applied at the third step of Section 1381(b)(1). 29 U.S.C. § 1381(b)(1)(C). But, as the Eleventh Circuit cogently explained, “step three also refers back to § 1386 in its entirety: Before applying the 20-year cap, the provision requires a plan sponsor to adjust the employer’s liability ‘first under section 1389 of this title and then under section 1386 of this title.’ *Id.* § 1399(c)(1)(A)(i).” Pet. App. 9a. Petitioner’s misreading of the statute directly conflicts with Congress’s instruction.

The Eleventh Circuit also understood the significance of the finality set forth in 1381(b)(1)(D), the section

governing the fourth and final adjustment made in accordance with Section 1405 of this title.⁸ 29 U.S.C. § 1381(b)(1)(D). Section 1405 (to which § 1381(b)(1)(D) refers) emphasizes its finality relative to any sections of the statute that numerically precede it—stating that it applies only “after the application of all sections of this part having a lower number designation than this section.” 29 U.S.C. § 1405(a)(1). Because Section 1386—including both of its subsections—has a lower number designation than Section 1405, the Eleventh Circuit concluded, “[t]he text thus requires ‘application’ of all of § 1386—the entirety of which is a ‘section’ with a ‘lower number designation’ than § 1405—before step four.” Pet. App. 9a.

Taken together, these cross-references confirm what the statute’s four- step structure dictates: that the prior partial withdrawal liability should be applied at step two—not as its own tacked-on, extratextual step *five*.

3. Petitioner’s Misreading Of The Statute Undermines The Finality Of The Calculation Of Withdrawal Liability

Petitioner argues not only that the prior partial withdrawal cannot be applied at the second step, but that it must operate only after all four steps of Section 1381(b)(1) have been completed. Petitioner contends that the statutory reduction for a prior partial withdrawal cannot be applied at Section 1381(b)(1)’s second step

⁸ Section 1405 addresses limitations on an employer’s withdrawal liability in the event of an asset sale, liquidation, or dissolution. 29 U.S.C. § 1405.

because Subsection 1386(b)(1) reduces the amount of “withdrawal liability” not the allocable amount of unfunded vested benefits. Pet. Br. 20–21.

The Eleventh Circuit provides a more common-sense reading of Section 1386(b)(1) that is consistent with the unequivocal import of Section 1381(b)(1). In short, the reference in Section 1386(b)(1) to the reduction of withdrawal liability by the amount of a prior partial withdrawal simply means that the prior partial is one of the adjustments that generate the final calculation of withdrawal liability. Indeed, each of the steps in Section 1381(b)(1)—including Section 1386(b)(1)’s reduction for a prior partial withdrawal and the 20-year cap under Section 1399(c)(1)(B)—is an adjustment necessary to calculate the withdrawal liability, which is only fully calculated once all four adjustments have been applied.

As the Eleventh Circuit notes, it is clear from the statutory language that the reduction of an employer’s withdrawal liability is referenced prior to the conclusion of the four steps of Section 1381(b)(1), i.e., during the four-step process, which “conforms with common sense and usage.” Pet. App. 11a. Significantly, “step three, § 1399 [] states that ‘the employer’s *liability* shall be limited to the first 20 annual payments.’ *Id.* (quoting 29 U.S.C. § 1399(c)(1)(B)) (emphasis added).” *Id.* And there is no dispute that the 20-year cap is applied at step three of the four-step process. 29 U.S.C. § 1381(b)(1)(C). Accordingly, at the third step of Section 1381(b)(1)’s four-step formula, there is already reference to an employer’s liability that is being limited. 29 U.S.C. § 1399(c)(1)(B).

As the Eleventh Circuit further explained:

Perfection is right that the statute defines ‘withdrawal liability’ as ‘the amount determined’ by the four-step formula. 29 U.S.C. § 1381 a). But the same provision also says that ‘withdrawal liability’ is the ‘amount’ for which the employer ‘is liable to the plan.’ *Id.* And that presents a problem for Perfection’s reading: If the partial-withdrawal credit isn’t deducted until *after* the completion of the four-step process, then the process doesn’t yield the ‘amount’ for which the employer ‘is liable to the plan’—or that the plan sponsor must ultimately ‘collect.’ *See id.* §§ 1381(a), 1382(3).

Pet. App. 10a.

Under Petitioner’s misreading, whenever there has been a prior partial withdrawal, the “withdrawal liability” calculated pursuant to Section 1381(b)(1) is merely a provisional amount for which an employer is not actually liable and which cannot actually be collected. Thus, according to Petitioner, whenever there was a prior partial withdrawal, there must be one additional step—that is mentioned nowhere in Section 1381 or anywhere else in the statute—that yields some new “amount” that must be collected instead of the withdrawal liability calculated under Section 1381(b)(1).

By contrast, the Eleventh Circuit’s holding—by following the unambiguous statutory language and performing Section 1386(b)(1)’s statutory reduction for a prior partial withdrawal at the second step of Section

1381(b)(1)—yields a final withdrawal liability amount for which an employer is actually liable and that a pension fund can collect. This holding accords with the relevant statutory language that emphasizes the finality of the process provided under Section 1381(b)(1) for the determination of withdrawal liability, and it explicitly forecloses the possibility that the Section 1386(b)(1) reduction could be applied after the four steps are complete.

B. Petitioner Misunderstands The Operation Of The 20-Year Cap

While Petitioner flatly states that the Fund’s withdrawal liability calculations “eliminated Petitioner’s credit,” the Eleventh Circuit correctly points out that application of prior partial withdrawal at the second step does not “frustrate the operation of step three’s 20-year cap.” Pet. Br. 7; Pet. App. 13a. The Court explained that the “20-year cap operates independently of the other adjustments. . . . And that cap certainly redounded to Perfection’s benefit, reducing its liability by nearly \$10 million.” *Id.*

Moreover, the Eleventh Circuit also pointed out that the partial withdrawal credit is not “illusory”—for example, the statute “also contemplates situations in which the 20-year cap doesn’t apply, like mass withdrawals. *See* 29 U.S.C. § 1399(c)(1)(D). In short, Perfection’s complaint about its own case doesn’t translate to every circumstance, let alone change what the statute says.”⁹ *Id.* at 14a.

⁹ The 20-year cap does not apply at all for employers whose liability can be amortized over fewer than 20 years. As the

Moreover, unambiguous statutory language cannot be rewritten by a court to address a policy concern. As the District Court emphasized, “even if the formula mandated by Congress were unfair or inconsistent, it is not the place of the court to rewrite or interpret the statute purposively to correct a perceived flaw in it.” *Id.* at 59a (citing *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020)) (“[A] policy concern cannot justify supplanting the text’s plain meaning. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”) (citation modified)).

regulations also make clear, the statute does not promise an actual reduction of more than zero for the prior partial withdrawal. 29 C.F.R. § 4206.3. The fact that Petitioner received a larger discount from the 20-year cap that subsumed the smaller discount from the prior partial withdrawal liability does not render the latter illusory. It is simply the functioning of the balance between the interests of plans and employers that ERISA anticipated, which can result in different outcomes for different employers depending upon their particular circumstances. *Amici* similarly protest about the potential for the prior partial withdrawal liability to be offset by the 20-year cap. Amicus Br. 14. Yet, *amici* also acknowledge that in other cases withdrawal liability may be reduced by the prior partial withdrawal before application of the 20-year cap. *Id.* Like their other grievances, this amounts to nothing more than a disagreement with the balance of interests that Congress addressed in the four-step statutory formula. In failing to acknowledge this balance of interests, *amici* focus on the \$2 million that Petitioner did not receive as a result of the prior partial withdrawal rather than the \$10 million that Petitioner gained from the 20-year cap.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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