No. 25-809

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents a clean, recurring question of exceptional importance: how to apply the statutory credit for prior partial withdrawal liability when an employer later incurs complete withdrawal liability.

Respondent emphasizes the lack of a live circuit split, but the scattered decisions on this issue reflect a lack of uniformity that confirms review by this Court is warranted. More importantly, the go-along-to-get-along procedural irregularity that led to the Eleventh Circuit majority's acquiescence to the weak opinion of the Ninth Circuit highlights rather than undermines the compelling need for this Court's review.

The Eleventh Circuit majority applied the credit as an adjustment to the "allocable amount of unfunded vested benefits" rather than as a reduction to the subsequent "withdrawal liability." That reading contradicts the plain text of 29 U.S.C. 1386(b)(1), the Pension Benefit Guaranty Corporation's (PBGC) authoritative 1985 interpretation (followed for decades by plans and employers), and the statute's purpose of preventing double-charging. It also exposes employers nationwide to the risk of multimillion-dollar overcharges.

This Court should grant the petition to resolve the alarming confusion swirling around the calculation of the prior partial credit and restore clarity to a complex statutory scheme that governs billions in pension liabilities.

A. The absence of a circuit split does not bar review in these unusual circumstances.

1. Respondent's lead and primary argument is that this Court should deny certiorari because "no

circuit split exists." Br. in Opp. 8. This argument is based on a factual premise that is true, barely.

In fact, the 2-1 majority below existed only because, despite harboring "residual doubts about the correct answer," Judge Jordan (in a four-sentence concurrence) purposely avoided a circuit split by relying on an improper consideration to the legal question before him, namely: "[w]hen another circuit has ruled on a point, we often follow it (even if we have some doubts about its correctness) unless we believe the decision to be plainly wrong." App. 16a.

But for that concurrence – which is fairly read as intentionally avoiding a circuit split – the plan would surely be petitioning this Court, and doing so with the benefit of a circuit split! Review of this important issue should not depend on whose ox is gored.

As it is, respondent suggests no review is warranted, because "there is uniformity among the only circuit courts that have reviewed the issue." Br. in Opp., p. 18. But there was not even uniformity in the three-judge panel below, which produced three separate opinions: Judge Newsom, emphasizing "[t]his is a hard case" and "a tough case" App. 8a, 15a, found that the partial credit is applied at the second of four potential adjustments, even though he acknowledged that "Perfection is right that the statute defines 'withdrawal liability' as 'the amount determined' by the four-step formula." App. 10a. "After much back and forth" and lamenting "[t]his is a difficult case," Judge Jordan concurred, but admitted "residual doubts" he said were "not sufficient to create a circuit split." App. 16a.[1]

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[1] The majority's "agreement" with the Ninth Circuit is limited to a single reference, in a footnote. App. 9a, n. 3.

Judge Brasher dissented, noting that "the majority opinion does not adopt the Ninth Circuit's analysis or lack thereof." App. 18a. He found the majority's "reading cannot be squared with three parts of the statute's text," App. 18-19a, and took direct aim at the Ninth Circuit, criticizing its reasoning in *Quad/Graphics* as "sparse and unpersuasive." App. 18a. He further condemned that case for "not address[ing] the fact that 'withdrawal liability' is a defined term," and "also fail[ing] to address the ordinary meaning of 'in the case of a partial withdrawal' or any of the statutory context." *Id.*

That respondent nowhere rebuts the dissent's harsh critique of *Quad/Graphics* by itself demolishes any claim of uniformity. In fact, the Brief in Opposition does not even mention the dissent, much less grapple with its reasoning – silent testament to its strength.

Respondent agrees that withdrawal liability "is important to multiemployer plans and employers," but claims "[a] question that arises twice in the circuit courts over a span of forty-six years can hardly be deemed 'important.'" Br. in Opp. 17-18. Of course, the paucity of litigation on this issue before *Quad/Graphics* stems from the fact that, as counsel candidly conceded to the Eleventh Circuit, the PBGC's Opinion Letter 85-4 "was generally followed" prior to the Ninth Circuit's decision in late 2018. Oral Arg. Recording, at 31:03–31:52 (September 26, 2024), https://www.ca11.uscourts.gov/sites/default/files/oral_argument_recordings/23-12533_09262024.mp3.[2]

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[2] The MPPAA's "pay now, dispute later" scheme also drastically reduces the amount of litigation that might otherwise ensue, to the detriment of employers and the benefit of pension funds. See Amicus Br. 20-21.

Thus, until the Ninth Circuit upended the prevailing consensus just over seven years ago, the issue had "percolated" without controversy for well over three decades under the PBGC's consistent view. Since then, the decisions of the courts to face the credit issue show a distinct lack of uniformity, although they do agree on one thing – no court has found persuasive the analysis ("or lack thereof," as Judge Brasher put it) of *Quad/Graphics*. App. 18a.

In fact, even the district court below found "a significant part of the Ninth Circuit's reasoning unpersuasive," and declined to adopt that court's "atextual interpretation of the statute[.]" App. 54a. Another district court twice declined to follow *Quad/Graphics*, declaring that decision "improperly conflates withdrawal liability – an umbrella term encompassing both complete and partial withdrawals – with unfunded vested benefits," and "simply do[es] not address th[e] nuance" that the second adjustment "applies only in the case of a partial withdrawal, [but] does not limit when the prior partial credit applies." *Consumers Concrete Corp. v. Central States*, 780 F.Supp.3d 754, 763 (N.D. Ill. 2025). See also *Kellanova v. Central States*, 2025 WL 1294408 at *5 (N.D. Ill. May 5, 2025) ("The court sees no reason to deviate from its *Consumers Concrete* opinion here.").

In sum, since the Ninth Circuit flipped the status quo the district court decisions on this issue have split 2-2, while the circuit court rulings consist of the fractured decision below and the unconvincing *Quad/Graphics* opinion that has persuaded no one. Given the high stakes in most withdrawal matters, this instability ought to be addressed and settled.[3]

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[3] Respondent says the entire Eleventh Circuit denied a petition for rehearing *en banc*, Br. in Opp. 8, but that is not so – there

2. Respondent does not dispute that the statutory interpretation issue presented here "is a pure question of law," Br. in Opp. 9, but suggests it "would benefit from further percolation[.]" Br. in Opp. 12. Respondent never explains what aspect of the issue could plausibly benefit from additional lower court study, nor could it – the issue is squarely presented with no procedural obstacles, and this case is an ideal vehicle to address it.

Moreover, staying out will only invite further opportunistic behavior from other pension funds, which will surely find in the Court's denial reason to follow respondent's example and swap their own existing methods to align with the supposed "uniform" view of the Ninth and Eleventh Circuits. App. 66a.

As the dissent noted, because both of petitioner's withdrawals pre-dated *Quad/Graphics*, "[a]t first" when calculating petitioner's complete withdrawal liability, consistent with Opinion Letter 85-4 and its longstanding practice, "the Fund's actuary applied the partial withdrawal credit after the twenty-year cap, as he has done for every such transaction over his thirty-one-year career." App. 22-23a. Then, even though respondent is not located in the Ninth Circuit and was not bound by the *Quad/Graphics* decision, immediately following its issuance respondent's trustees (both employer and union) directed the actuary to recalculate the complete assessment "based on the Ninth Circuit decision," which "differ[ed] from prior PBGC guidance and would result in an increase in the assessable amount," completely wiping out petitioner's credit of nearly $2 million dollars (at present value). App. 66a.

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was no such petition; the same three-judge panel that decided the merits denied a petition for panel rehearing. App. 34a.

Thus, the likely result of respondent's envisioned "percolation" will be more pension plans switching their calculation methods to take advantage of the two messy rulings now clouding this issue. In that unsurprising event, contributing employers who may have already incurred partial withdrawals will be threatened with additional uncertainty and massive unexpected and unwarranted increases in liability under a statute that demands uniformity and predictability.[4]

In short, allowing every other multiemployer pension plan in America to do to other employers the same thing respondent did to petitioner is the opposite of percolation that benefits the Court. The Court should nip these problems in the bud and resolve the issue now.

3. The Ninth and Eleventh Circuit's blatant disregard of and divergence from the settled opinion of the federal agency charged with overseeing the MPPAA creates an inter-branch conflict that pits the judiciary against the executive as to the proper meaning of the statute. That intolerable situation warrants this Court's attention as much as, if not more than, an intra-branch conflict involving only one branch of government.

That is especially the case here, since the PBGC's "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," including, initially, by the actuary in this case. App. 30a. Even after *Loper Bright* the long-held views of a respected federal agency should not be lightly cast aside. *Loper*

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[4] The stakes are significant; the risk is not hypothetical – some of *amici's* members have already incurred partial withdrawals and face the looming threat of double liability. Amicus Br. 2.

Bright Enters. v. *Raimondo*, 603 U.S. 369, 385 (2024) ("exercising independent judgment often include[s] according due respect to Executive Branch interpretations of federal statutes.").

But rather than giving "due respect" to the PBGC's interpretation, the Ninth Circuit waved away the opinion letter without analysis, declaring it "does not purport to rely on agency expertise, but merely misconstrues the plain language of §1381." *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, 1219 (9th Cir. 2018). Following suit, the majority below similarly dismissed the letter as "merely echo[ing]" or "anticipat[ing]" petitioner's main arguments. App. 15a.

Respondent acknowledges the direct "conflict between the Eleventh Circuit and the PBGC," but asserts that court's "conclusion that the PBGC guidance is unpersuasive does not provide a compelling reason for the Court to grant certiorari[.]" Br. in Opp. 16. However, the PBGC is standing by its interpretation of the statute. Two weeks ago, *Law360* interviewed the new PBGC Director, who stated that the PBGC had "gone through all the opinion letters that the agency has issued throughout its history" and "created a searchable database" to "mak[e] it clear when the opinion letter itself is no longer enforced."[5] Importantly, that new PBGC database shows Opinion Letter 85-4 has *not* been withdrawn; that letter is listed among those "currently in effect[.]" (https://www.pbgc.gov/employers-practitioners/legal-resources/opinion-letters/database).

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[5] "PBGC Keen On Dishing Out Opinion Letters, Director Says," *Law360* (March 17, 2026) (https://www.law360.com/articles/2453500/pbgc-keen-on-dishing-out-opinion-letters-director-says).

So the "agency split" here is real and abiding. Moreover, this is no minor quibble or nuanced disagreement – the views of the federal agency and the lower court are diametrically opposed: the Eleventh Circuit says the partial withdrawal credit must be applied at the second adjustment when calculating a complete withdrawal, while the Executive Branch's long-held and recently reaffirmed view of the same statute maintains such a method is "clearly erroneous." PBGC Opinion Letter 85-4, p. 1 (January 30, 1985).

Because only one of these positions can be correct, and the issue is of great importance to employers and multiemployer pension plans alike, the Court should grant review to resolve the serious inter-branch conflict and ensure the regulated community is not forced to make consequential decisions in the absence of an authoritative view of the statute.

This Court often grants review without awaiting the development of a circuit conflict and has done so in other ERISA cases implicating agency guidance. See *Advocate Health Care Network v. Stapleton*, 581 U.S. 468 (2017) (unanimously reversing decisions by three courts of appeal contrary to longstanding guidance, including opinion letters from PBGC and other federal agencies dating to 1982). And given the direct federal interest involved and the PBGC's recent reaffirmation of its policy guidance, respectfully, the Court should consider calling for the views of the Solicitor General. Amicus Br. 15, n.2.

B. The procedural irregularity that made the majority highlights the need for this Court's intervention.

Respondent perfunctorily addresses the second question presented, devoting only a few paragraphs to

it. Br. in Opp. 13-14. But this Court sees the judicial function a bit differently and has recently emphasized that "courts *must exercise independent judgment* in determining the meaning of statutory provisions." *Loper Bright*, 603 U.S. at 394 (emphasis added). In that case, Justice Gorsuch declared the obligation to exercise independent judgment perhaps "the defining characteristic of Article III judges." *Id.* at 430 (Gorsuch, J., concurring).

Judge Jordan's concurrence, without any analysis or discussion gives undue, even decisive, weight to a nonbinding out-of-circuit decision, and to that degree is fundamentally at odds with the role of an independent judge. As Judge Posner explained for the Seventh Circuit in *Colby v. JC Penney Co.*, 811 F.2d 1119 (7th Cir. 1987):

> Any decision may have persuasive force, and invite—indeed compel—the careful and respectful attention of a court confronted with a similar case. But unless the earlier decision is authoritative, the court that decides the later case does not discharge its judicial responsibilities adequately by merely citing the earlier decision and following it without so much as indicating agreement with it, let alone analyzing its merits. *Id.* at 1123.

Here, neither the concurrence (nor, for that matter, the majority) analyzed *Quad/Graphics*' merits or gave any indication of persuasion. Instead, *with the stated goal of avoiding a split*, Judge Jordan treated that outcome not as *persuasive* authority (which it was), but as effectively *binding*. But allowing out-of-circuit precedent to weaken a judge's independent duty to evaluate a statute contravenes the black-letter law that "[t]he decisions of the court of appeals for one circuit are not binding upon the

courts of appeal for other circuits." 18 *Moore's Federal Practice*, §134.02[1][c] (Matthew Bender 3d Ed.).

This abdication prevented the Eleventh Circuit from speaking with its own independent voice on a difficult statutory question and deprived petitioner the victory that may have naturally arisen from independent judicial analysis. More importantly, it effectively shielded the majority's reasoning from this Court's legitimate scrutiny, as it enabled respondent to claim (as it now does, with a straight face) that this case does not merit the Court's attention *because there is no circuit split*. But this is precisely why the Court *should* grant certiorari: that the second vote in the majority rested on the stated goal of avoiding a circuit split raises legitimate concerns that the majority fell short of its obligation to exercise independent judgment.

In these unusual circumstances, the lack of a circuit split underscores why this Court should grant certiorari now – if the belief ever takes hold that the reasoning of the second court to address a legal issue is far less likely to receive this Court's scrutiny if it matches the first court, the determination of important legal issues might depend on the order in which the cases arise. In this regard, one circuit has noted the "observable phenomenon" in courts of appeal "where decision makers who first encounter a particular issue (i.e., the first court to consider a question) are more likely to rely on the record presented to them and their own reasoning, while later courts are increasingly more likely to simply go along with the developing group consensus." *Pinpoint IT Servs., LLC v. Rivera*, 761 F.3d 177, 182-83 (1st Cir. 2014).

As this case vividly illustrates, courts of appeal are already "highly reluctant to adopt an interpretation of

a complicated federal statute that creates a circuit split." Amicus Br. 23. That reluctance thwarts true percolation and inhibits this Court's supervisory role. Although respondent calls the whole issue "baseless," Br. in Opp. 13, it is not at all clear that were Judge Jordan writing on a blank slate, he would have reached the same conclusion. And that is a distinct and important procedural question worthy of this Court's attention.[6]

C. The Eleventh Circuit's reading conflicts with the plain text and structure of the statute.

Briefly as to the merits, respondent's position places the credit in the middle of the calculation, which means it reduces unfunded vested benefits rather than "withdrawal liability," as the statute directs. 29 U.S.C. 1386(b)(1). Congress defined "withdrawal liability" as the final number *after* all four adjustments have been applied. 29 U.S.C. 1381(b)(1). The statute's sequential structure precludes respondent's view: the four adjustments in 1381(b)(1) operate on the "allocable amount of unfunded vested benefits" before the final "withdrawal liability" is fixed. The 1386(b)(1) credit, by contrast, expressly reduces the subsequent "withdrawal liability."

Finally, respondent claims petitioner's reading "undermines the finality of the calculation of

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[6] Given the lower court's apparently purposeful avoidance of a split, this Court could grant, vacate, and remand (GVR) the case to allow the Eleventh Circuit to consider the statutory question free of any artificial pressure to follow the Ninth Circuit. This step would ensure the panel exercises its own independent judgment and provide this Court the benefit of objective percolation among the circuits. See 28 U.S.C. 2106.

withdrawal liability." Br. in Opp. 25. Not so. The prior partial withdrawal liability is calculated and assessed when it arises. That credit amount simply offsets the later bill so the employer is not charged twice for the same unfunded benefits. That is the entire point of 1386(b)(1). See *Joint Explanation of S. 1076*, 126 Cong. Rec. 20,193 (July 29, 1980) (amount of any prior partial withdrawal liability "is applied as an offset against withdrawal liability for any future withdrawal[.]").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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