SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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M & K EMPLOYEE SOLUTIONS, LLC,)
ET AL.,)
Petitioners,)
v.) No. 23-1209
TRUSTEES OF THE IAM NATIONAL)
PENSION FUND,)
Respondent.)

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Washington, D.C.

Tuesday, January 20, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:03 p.m.

APPEARANCES:

MICHAEL E. KENNEALLY, JR., ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

JOHN E. ROBERTS, ESQUIRE, Providence, Rhode Island; on behalf of the Respondent.

KEVIN J. BARBER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:03 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1209, M & K Employee Solutions versus the Trustees of the IAM National Pension Fund.

Mr. Kenneally.

ORAL ARGUMENT OF MICHAEL E. KENNEALLY

ON BEHALF OF THE PETITIONERS

MR. KENNEALLY: Thank you, Mr. Chief Justice, and may it please the Court:

Section 1391 creates a clear timing rule. Withdrawal liability is based on the plan's unfunded vested benefits as of the end of the prior year. The statute then defines unfunded vested benefits as the value of the plan's non-forfeitable asset -- non-forfeitable benefits minus the value of the plan's assets. That first number is the present value of decades of future pension payments.

So the assumptions that the plan actuary makes about the future are a crucial part of what determines that number. Changing the assumptions changes the present value and thus changes the amount of unfunded vested benefits. But, under the statute's timing rule, that amount is frozen on the valuation date. Later changes in that amount cannot factor into the employer's liability. That's just as true for changes caused by new assumptions as it is for changes from any other component of the computation.

Respondents argue that, until recently, actuaries have often selected withdrawal liability assumptions after the valuation date. It's not clear if that's true, but even if it is, it doesn't alter the meaning of the statutory text. And Respondents themselves concede that plans and actuaries can readily comply with our reading of the statute and, in recent years, have started to do so.

That makes sense. Our reading promotes predictability and consistency through a clear and simple rule. Respondents' reading does the opposite. For them, actuarial assumptions can be changed anytime, including after the employer withdraws, even if the change triples or quadruples what the employer believed it would owe. There's no reason to read the statute as creating so much uncertainty.

I welcome the Court's questions.

JUSTICE THOMAS: Were Petitioners surprised by the valuation, or did they know about it before they withdrew?

MR. KENNEALLY: The record's not clear for all of the Petitioners. Several of the Petitioners did receive estimates in 2018 that used the new assumptions, but they were surprised when they received those estimates to see that the discount rate used was not the one that they understood the -- the plan to have had in the prior year.

JUSTICE THOMAS: So is the discount rate the -- the major factor in the price differential -- the cost differential?

MR. KENNEALLY: Yes, it is, Your Honor, and that's because of the compounding of -- of interest over time and it has an exponential effect on the amount.

JUSTICE THOMAS: The -- what is the exact language that you're relying on that pegs this as "the" date that the valuation -- of the valuation?

MR. KENNEALLY: It's the language in

1391, unfunded vested benefits as of the end of the -- as of the end of the plan year preceding the plan year in which the employer withdraws. There's also additional language setting the same date in different parts of the statute, but it's that "as of the end of the plan year" that -- that is the cutoff date under the statute.

CHIEF JUSTICE ROBERTS: What if -- I'm not even sure this applies to this thing, but let's say on January 31st, you know, the companies have given in all their information and -- I mean December 31st, and on January 1st, one of the companies mails in saying, you know, we forgot to count all of our accountants, you know, because they're based somewhere else. There are -- there are -- there are, you know, 55 of them. You should add them to the numbers we sent you.

Can the pension fund do that?

MR. KENNEALLY: Yes, Your Honor. The key -- the key point in our view of the statutory language is that all of the inputs that go into the computation of unfunded vested benefits have to be frozen or fixed on the

December 31st date.

And so there are objective facts out in the world, like the amount of plan assets or the number of retirees. Those are all just facts out in the world that can't be changed because of what someone thinks about them.

But actuarial assumptions are fundamentally unlike that. They are judgments not only about 10 to 40 years of future experience of the plan, but they can often embody normative judgments as well, such as how withdrawing employers should -- should bear the cost of the plan's underfunding relative to the employers who continue to contribute to the plan. And --

CHIEF JUSTICE ROBERTS: So numbers that should have been counted but weren't as of December 31st, you can go back and put those in, but an assumption about how you should calculate, for example, numbers of employees when you -- you can't just go by and count them, that you -- you can't change that?

MR. KENNEALLY: Well, I don't think there's an assumption about the -- the number of employees, but the -- the line I would draw is between the facts that are immutable that are out in the world, they're objective facts, and the things that are actually the product of the -- the mental judgment of a particular person, the actuary of -- that's hired by the plan to play this role.

And if that -- if that determination about, you know, what the plan's investments will return over 20 to 40 years into the future isn't made by the cutoff date, our view is that it shouldn't factor into the analysis because it's -- it would be changing what the unfunded vested benefits are after the valuation date.

JUSTICE GORSUCH: Mr. Kenneally, why would that be? Because you acknowledged to the Chief Justice that the facts can come in later so long as they're as of December 31st, and an actuary trying to figure out what the unfunded vested benefit is, you know, has to calculate out into the future given that set of information. He can't use different information.

So what's impermissible about that? I mean, he's trying to figure out what the appropriate discount rate is given the information on December 31st.

MR. KENNEALLY: I think the difficulty with that, Your Honor, is that it defines actuarial assumptions too narrowly. They don't only predict in an objective way what the plan's experience over decades will be. When, as here, the assumptions we're dealing with are specific to withdrawal liability, they also reflect the actuary and the plan's preferences for policy decisions, such as the bear -- relative burden borne by withdrawing employers versus contributing employers.

And so it's not simply an objective assessment of what's true out in the world. It's actually changing what the plan's approach normatively will be to --

JUSTICE JACKSON: Does that help you or hurt you? I mean, is it your argument that the actuary who is making these kinds of judgments that are themselves not really inputs because they're not just the hard data, I -- I see that, and I -- I think the other side would agree, but why then can't the actuary be making those judgments later? Isn't the "as of" only with respect to the hard data and the things that the actuary then needs to look at in order to be making his judgment?

MR. KENNEALLY: No, Your Honor. Under the text, unfunded vested benefits are the thing that's as of the measurement date. And unfunded vested benefits are defined by Section 1393(c) as the present value of non-forfeitable benefits minus the value of plan assets. No one thinks that changes in the value of plan assets after the measurement date could factor into an employer's withdrawal liability.

JUSTICE JACKSON: No, I understand, but the question here is whether the assumptions that the actuary is making in order to assess the value of the unfunded vested benefits have to be selected, those assumptions have to be made, during the plan year or whether those assumptions can come later.

And what -- what is confusing me about your argument is that I understood from the statute that the statute at times requires annual reporting of this information so actuaries are doing this on an ongoing basis, not just with withdrawal, and the statute gives, like, seven months after the end of the plan for this information about unfunded benefits to come in with respect to these annual reports, suggesting that even Congress understood that it was going to take a while, that there were going to be things that are assessed retrospectively in that seven-month period.

So why isn't that just what's happening here and -- and the fact that that is the way the statute works undermines your view that those calculations have to be -- and assumptions have to be made in the actual plan year?

MR. KENNEALLY: In the reporting requirements in ERISA, Your Honor, there is no specific valuation date that plans are required to use when preparing their Form 5500.

JUSTICE JACKSON: But they're doing annual reports, right, so it's not the previous year?

MR. KENNEALLY: They get to choose a valuation date within the previous year in the month before. So it's up to them. It's not specified in the statute. 1391 is very clear that there is a specific valuation date that has to govern the calculation of withdrawal liability.

And our view is that to apply that rule, that "as of" language consistently, all of the inputs that go into the computation, including the assumptions, which really are an input, they're part of what the actuary plugs into the model in determining --

JUSTICE JACKSON: No, but I -- but you said -- you -- you already said that the -- that the assumptions are something else, that they are the actuary's best judgment based on -- of what the future performance of this plan was going to be. I -- I was with you on that.

And so, as a result, it seems to me that this is something different than the inputs.

MR. KENNEALLY: Well, I think it is an input. It's kind of like the curve that a teacher might use in grading exams. It determines what the ultimate value will be, and in that respect, if you change that factor in the calculation, you'll end up with a different number.

But it is an input. It does predict 20 to 40 years of future experience. It also embodies, as in this case, the PowerPoint presentation that the actuary presented to the trustees says that on JA 176, that there's a tradeoff between providing more protection to contributing employers versus being harsher toward withdrawing employers.

And that has long-term implications for how the plan will conduct itself, but it's not simply an objective state of the world, and that's why different actuaries could look at the same set of objective facts and come up with very different actuarial assumptions.

JUSTICE KAVANAUGH: In Judge Moss's opinion, which picked up on Judge Lambert's opinion, Judge Moss said that if a major economic shock altered the return profile of the plan's assets before the measurement date but after the plan had issued its annual valuation for the prior plan year, the companies would prohibit the plan's actuary from considering those events when calculating withdrawal liability.

And he points out that that's in

tension with the word "reasonable," in tension with the statutory word "best estimate," and he says, under your view, the actuary would be reduced to admitting that its assumptions were wrong.

You want to respond to that?

MR. KENNEALLY: Sure, Your Honor. I think that that's an unrealistic view of how interest rate assumptions in this context work because we're talking about retirement payments for two to four decades into the future, even a shock such as the 2008 financial crisis here, which I think, if any market event would change actuarial assumptions, that would.

That -- the plan has had the same 7.5 percent funding rate -- and this is a point that the Chamber of Commerce makes in its amicus brief -- before and after that stock market event, that's still not the kind of event that's going to change investment returns for three to four decades into the future because, over, you know, as we saw, five years to 10 years, the markets rebounded.

So I think it's unrealistic to think that there will be a market event in the final days of the year that the actuary can't take into account if it really is the sort of world-changing event.

JUSTICE KAVANAUGH: But what about the -- the point about the statutory terms? I think the terms "reasonable" and "best estimate" are, you know, hurdles for your position because they don't imply something as specific as what you're articulating.

So how do you deal with those two specific statutory provisions?

MR. KENNEALLY: So we read the statute as -- as having two different requirements. The first requirement is a timing requirement that all of the inputs that go into calculating unfunded vested benefits must be as of the measurement date.

And then there's an additional requirement that the assumptions employed by the actuary have to be reasonable and the best estimate.

And if an actuary doesn't comply with both of those things in assessing withdrawal liability, it hasn't fully -- or he hasn't fully complied with the statute. But there's a reason why you don't have any retroactivity language in 1393. That's the provision that specifically deals with the actuarial assumptions.

But our timing rule applies not only to the actuarial assumptions but to all of the inputs that go into the calculation.

JUSTICE KAVANAUGH: One -- one more, which is the -- before the Second Circuit decision as I understand it, and you mentioned this in your opening, the other side's proposed methodology was the -- was commonplace and was the -- in place for several decades.

And you want to respond to that?

MR. KENNEALLY: Yeah. I don't think that's true, Your Honor. All of the arbitrators, the ERISA arbitrators that have dealt with this issue that we're aware of, and this goes back to 2008, have said that changing assumptions after the valuation date is inappropriate. We have the Embassy Industries decision in the Joint Appendix in this case.

They're relying a lot on a 2020 issue brief from the American Academy of Actuaries that seems to have been a direct response to the Second Circuit's decision. And they're also relying on the Actuarial Standards of Practice, which the relevant one, Number 27, was first released in 1996.

So there's absolutely no evidence at all before the Court that before 1996 at the very earliest actuaries were doing this. And as I said, all of the arbitrations where this has come out have -- have come out our way.

JUSTICE KAGAN: How far does your understanding of inputs go? 1393 talks not only about assumptions but also about methods, indeed, used that as one phrase, assumptions and methods.

So does your argument mean that an actuary also can't update the methods that they use?

MR. KENNEALLY: Well, they can always update them, of course. It's just a question of whether they can apply them in the initial year or --

JUSTICE KAGAN: Yeah, yeah, yeah.

MR. KENNEALLY: Yeah. I think that methods would be part of -- of the way that the computation is performed. There are additional requirements if the actuary is changing allocation methods. 1394 deals with that specific issue.

That doesn't govern the amount of the unfunded vested benefits, however. That -- that governs the proportion of those unfunded vested benefits that are allocated to a particular employer.

But I think our general position, and I think we're consistent about this across all the inputs, is that any decision that an actuary or plan makes that will change the amount of unfunded vested benefits has to be made before December 31st. And that really doesn't pose much of a practical problem for plans. If you have a clear deadline, you know how to comply with it.

And plans are the ones, of course, who hire actuaries and who can monitor whether or not they are sufficiently updating their assumptions. And in this case, there was an ad hoc meeting in January of 2018 where they had a back-and-forth about what the assumptions should be. It wasn't part of the annual reporting process that the actuary decided to change from 7.5 percent to 6.5 percent.

It's a very workable rule that we have, which is, if it happens before the end of the year, 1391 is complied with and we can move on.

The D.C. Circuit adopted this information available test, which I think is really going to create a lot of litigation and arbitration going forward whenever you have a change in assumptions because now the actuary will have to be deposed to figure out what exactly they were thinking about, whether what they were thinking about was available in the relevant sense on December 31st, whether they had their blinders on and didn't think about anything that happened after December 31st, and we know that the MPPAA was not designed to give rise to this sort of fact-bound, expensive-to-litigate controversy in -- in withdrawal liability cases.

I think the bright-line rule we're suggesting is the best for accomplishing that, and I --

JUSTICE JACKSON: But I -- I guess the thing that concerns me a little bit about the rule that you're suggesting is that it seems to focus on or suggest that a change is being made, and you've said that many times.

You've said, you know, any decision that will change the amount of the UVB as though that amount was something that was longstanding, preexisting, established by some other source or whatnot. And I guess I don't know why that's the case.

I thought, as you said originally, what is happening here is that when called upon, the actuary is looking at a certain set of facts, hard data about this plan, and making a judgment about how it's going to perform in the future, and for the purpose of the withdrawal liability, it's to tell people how much they need to pay.

Why then is that a change if it's being done after the plan year? I appreciate that they may have done it the previous year as a part of the annual report or whatnot, but it seems like each time they're doing it, they're making this kind of assessment on the basis of the state of the world at that point.

So -- so why -- your -- the thrust of

your rule or the -- the suggestion that you're making seems to be driven by this notion that what's happening is any change that the -- our actuary wants to make has to be done within the plan year. But he's not really changing. He's just looking at what happened in the previous year and making this kind of best judgment, right?

MR. KENNEALLY: Well, respectfully, Your Honor, I disagree with that characterization. I think the idea of a change in actuarial assumptions is well-rooted in ERISA in the minimum funding provision, which is 29 U.S.C. 1084.

One of the things the actuary is supposed to take into account when figuring out the life of the -- of the plan's finances over the course of a year is the change in actuarial assumptions that either causes a loss or gives rise to a credit to the plan. That's just the same concept applied in a different -- for a different substantive requirement.

JUSTICE JACKSON: I understand, but you're saying he has to do it within the year. The data is still coming in. I mean, isn't he making a judgment about how this plan is going to do? How could he possibly do it reliably and consistently and reasonably if we don't know what has happened for that entire year?

MR. KENNEALLY: Well, in practice, it's because the types of data that change at the end of the year don't have a 10- to 40-year effect on the plan's future experience, and so, you know, whether -- whether they have X number of retirees doesn't change how much the plan's investments are going to return.

If there were a major change in the plan's investment portfolio, as happens if a plan is about to go insolvent and they need to move everything into cash so they can continue to pay benefits as long as possible, that's the kind of major change that a plan trustee would know about and would be able to tell the actuary in December, January, whenever it happens, look, we're about to make this change and you need to account for it now.

JUSTICE JACKSON: What about COVID? COVID's a major change. Let's say it happens in January or February of the year after and it's going to make a difference, thinks the actuary, in terms of the plan's performance.

I think, under your rule, they -- they would have to ignore that, right, because it didn't happen during the plan year, and I guess how is that consistent with Congress's statement that the actuary is supposed to be making their best judgment?

MR. KENNEALLY: Well, I think, even under the D.C. Circuit's rule, if it happens in January, they can't take into account that for the December 31st assumption. That's -- that's how I read the D.C. Circuit's "as of" -- "information available as of" test.

I think that if the actuary ever thinks that something significant has happened enough that I need to revise my actuarial assumptions, they can always do that. It doesn't take a end-of-year process. It can happen at any point in time. It doesn't have to happen through particular formalities. And they will do that if there's something so major.

But COVID's a great example. The data is still unclear whether COVID has had any long-term effect on life expectancy. And experts go both ways on that. And we're years out from the original event.

Under Respondents' view, we would be fighting these fights for years into the future because there's nothing in the statute that requires a particular deadline for assessing withdrawal liability. They have to do it as soon as practicable, but sometimes, in practice, that's years down the road. And under their view, even years down the road, the actuary could be revising the actuarial assumptions even if some employers were charged withdrawal liability under those assumptions for a withdrawal during the same year. There's no limiting principle to that argument.

And given Congress's demonstrated concern about retroactive changes in such things as the de minimis reduction or switching between allocation methods -- and the de minimis reduction in Section 1389 is a question of about a hundred thousand dollars to a given employer -- the idea that they would have been completely unconcerned about millions of dollars of a delta by changing actuarial assumptions is really hard to swallow.

CHIEF JUSTICE ROBERTS: Does -- does that, your answer, apply -- I mean, as I understand it anyway, we're talking about companies leaving, and you're trying to calculate their liability. And let's say the calculation was done under a particular assumption. They -- they fund whatever it is they have to do. And then you find out in January that the numbers were -- were way off -- excuse me -- because a particular assumption was used when a different assumption should have been used or because the -- the accounting board, you know, issued a new report in January saying this is how you're supposed to calculate it to get the most accurate determination, not the way you did it.

And do you still stick with the numbers in January?

MR. KENNEALLY: I think you have to --

CHIEF JUSTICE ROBERTS: I mean, I take --

MR. KENNEALLY: In December?

CHIEF JUSTICE ROBERTS: In December, yeah.

MR. KENNEALLY: Yes, I think you have

to, Your Honor. Otherwise, there would be no limit to what information could be factored in retroactively even years down the road for an employer who thought they had withdrawn and thought that their liability would be X, it's actually 4 or 5X, depending on the -- on the change in assumptions that's made.

I don't think Congress designed the statute to work that way.

CHIEF JUSTICE ROBERTS: Well, what if the -- the assumptions that -- that -- whether the numbers that were used, it turned out to be, you know, grossly unfair given the -- the more accurate means of determining what those numbers should be that comes in in January?

MR. KENNEALLY: But I think that the -- the numbers we're talking about, again, are, like, what will the investment portfolio of the plan return over the next 20 to 40 years. Those numbers aren't necessarily fair or unfair. They're supposed to just be neutrally predicting the future. And actuaries do that year to year for all sorts of reasons under ERISA.

So they will be aware of what the

assumptions should be adjusted to do if -- if there are any assumption changes that need to be made. But, usually, assumptions -- and our friends on the other side admit this -- remain stable from year to year. These aren't things we're fine-tuning a little bit here and there all the time.

CHIEF JUSTICE ROBERTS: Well, and maybe I'm just repeating the question my colleague just asked, there must be situations where it is a more dramatic change, whether it's COVID or, you know, I don't know, the start of World War II, Pearl Harbor. I -- it seems to me that there ought to be some bases where the assumptions that were made are fairly -- are dramatically different and the liability is placed on the company as of the date -- time they depart, right?

MR. KENNEALLY: No, as of the date of the end of the prior year. Right.

CHIEF JUSTICE ROBERTS: December 31st?

MR. KENNEALLY: Right. Congress chose not to make it the date of the withdrawal, and I think they did that so that every withdrawing employer who withdraws in the same year will be charged the same amount of withdrawal liability. But, under Respondents' reading of the statute, there's no reason that has to be so. An actuary can always say: I actually have thought about it further and I think that the assumptions should be changed, so even though we've already assessed these employers, we're going to assess this new employer, this other employer, a higher amount.

That would be perfectly permissible under their rule. And the plan could even hire a new actuary because they don't like the assumptions that have been sent out in the prior bills for a given year. Nothing in -- in their reading of the statute would prohibit any of those things.

JUSTICE JACKSON: But you could also challenge those things in arbitration, correct?

MR. KENNEALLY: It's possible to, Your Honor, to challenge the reason --

JUSTICE JACKSON: Yes. So there's a mechanism, there's a remedy for the problem that you just addressed.

MR. KENNEALLY: Well, no, not if -- not -- I was imagining a scenario where the new actuary sincerely believes that the other assumptions are the right one --

JUSTICE JACKSON: No, I understand, but you -- you have the ability in the statute for any assessment of actuarial assumptions to be raised in arbitration. So you have the argument that this is unfair, other people were charged a different rate, this is a new actuary who doesn't know what he's doing.

You can raise all of those things in arbitration, right?

MR. KENNEALLY: Yes. And our point is just that we also think that the requirements in 1391 have to be raised, is something you can raise in arbitration as well.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE SOTOMAYOR: Counsel, there was no withdrawal liability here that was calculated based on post-withdrawal changes to assumptions, correct?

MR. KENNEALLY: Post-withdrawal changes, in this case, yes.

JUSTICE SOTOMAYOR: Right. In this case.

MR. KENNEALLY: The Metz case was different.

JUSTICE SOTOMAYOR: So that's -- and two of the four employers you represent got the correct calculation, correct, under the new assumption?

MR. KENNEALLY: They got a -- like, the prediction, a projection of withdrawal liability under the new assumption.

JUSTICE SOTOMAYOR: Using the new assumption?

MR. KENNEALLY: Yes. That's correct.

JUSTICE SOTOMAYOR: One didn't even ask, and only one who asked a year before got the -- the use of the old assumption, correct?

MR. KENNEALLY: That's correct, Your Honor.

JUSTICE SOTOMAYOR: All right. You're asking for a rule that they have to use a calculation or an assumption that has been previously arrived at before December 30th, correct?

MR. KENNEALLY: Correct.

JUSTICE SOTOMAYOR: But the calculation required is as of December 31st. So there will have been and can be changes that occur between that old assumption calculation and even under your best theory December 31st.

So, if the old assumption was done the prior summer, the prior January, as of December 31st, some things will have changed. Under your calculation -- under your theory, they can't look at that, correct?

MR. KENNEALLY: No, Your Honor. Our -- our theory is that things won't have changed enough to -- to warrant a revision in actuarial assumptions.

JUSTICE SOTOMAYOR: That -- that's an assumption on your part.

MR. KENNEALLY: But, if there is --

JUSTICE SOTOMAYOR: Reality could be mortality table.

MR. KENNEALLY: If that does happen, they can make the change throughout the end of the year. There's no reason they have to wait until January to make that change.

JUSTICE SOTOMAYOR: Why doesn't this sound like 1399(c)(1)(A)(ii)? There, the -- it requires a determine -- determination of the amortization period for paying withdrawal liability to be "based on the assumptions used for the most recent actuarial valuation of the plan."

Congress knew how to fix the use of assumptions to a particular date. It didn't do it here. Why shouldn't I assume it didn't mean to do that here?

MR. KENNEALLY: Well, I don't think in our view you have to use the last valuation assumptions when assessing or calculating unfunded vested benefits. You could change them in December if you're the actuary. That would be fine.

JUSTICE SOTOMAYOR: But Congress could have done that. Why should we do it?

MR. KENNEALLY: Well, I think that is what Congress did. And -- and they can't do that in 1399(c), as Your Honor was quoting. They have to use something that was previously reported to -- to the government regulators.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: In the Second Circuit opinion, Judge Winter explained that the other side's position presents a opportunity for manipulation. Can you just succinctly elaborate on what your concern is on that? Because there's a lot of debate in the amicus briefs on that point.

MR. KENNEALLY: Yes, Your Honor. So, under the statute, the assumptions are really supposed to be the actuary's own assumptions and they're not supposed to be the trustees' assumptions.

But, in practice -- and I think JA 175 is -- is illustrative of this -- actuaries know their clients have preferences about such things and so they solicit input from their client, the trustees, on what assumptions would be appropriate for withdrawal liability purposes.

In addition to that, which I think is one of the concerns, trustees can also hire a new actuary, as happened in Metz. They -- they had one actuary who had been in place using one set of assumptions for many years, and then, after the date of withdrawal, a newly hired actuary came and cut down the discount rate assumption by -- by almost half, and that quadrupled the amount that the employer owed. That could happen under Respondents' rule anytime.

JUSTICE KAVANAUGH: How do -- I think Justice Jackson alluded to this.

An employer could still challenge, for example, the switch from 7.5 to 6.5 as being unreasonable or not the best estimate, correct?

MR. KENNEALLY: They could, but it would be difficult in many cases because there's a range of acceptable assumptions that actuaries can use, and there --

JUSTICE KAVANAUGH: But they could. I just want to make sure they can.

MR. KENNEALLY: They could procedurally do that.

JUSTICE KAVANAUGH: They can and do regularly. Maybe not regularly.

MR. KENNEALLY: It's not that regular actually.

JUSTICE KAVANAUGH: Maybe not regularly. I shouldn't have added that. But they can do that.

MR. KENNEALLY: In -- in theory, they can -- they can do that.

JUSTICE KAVANAUGH: And then how much money is involved in this case for the four employers? Just --

MR. KENNEALLY: The total amount that they were assessed is about $10 million. And under the correct assumptions, in our view, the amount would have been something more like a third of that.

JUSTICE KAVANAUGH: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: No.

CHIEF JUSTICE ROBERTS: Justice Jackson?

Thank you, counsel.

Mr. Roberts. No relation.

(Laughter.)

ORAL ARGUMENT OF JOHN E. ROBERTS

ON BEHALF OF THE RESPONDENT

MR. ROBERTS: None at all.

Thank you, Mr. Chief Justice, and may it please the Court:

I -- I think the issue where the Court is getting caught up on is, as a textual matter, what the phrase "as of" means because that's the key phrase in this case.

What "as of" means is that an actuary determines at a later date the financial condition of the plan at an earlier date, the measurement date.

So the -- the phrase creates a reference point for performing work at a later date, not a deadline by which the work must be completed. It would be highly unusual for Congress to use a phrase like "as of" that contemplates work being done in the future to require actuaries to do work like select assumptions before the measurement date. That's just not what "as of" means. And that's how actuaries have interpreted the phrase for 40 years or so.

We have our amicus brief in which the actuaries talk about this. This is -- this is well-established practice, selecting assumptions after the measurement date.

The -- there are a couple of cases where this comes up, the Combs case that we cite. There's a UMW case that's cited in the HR policy brief. So there -- there's examples where actuaries have selected in the past assumptions after the measurement date.

The other thing I'll point out, our reading of "as of" that it requires work to be done in the future, not before the reference date, is consistent with how that phrase is used throughout the law.

So, for instance, in eminent domain cases, a calculation of the property value is done as of the date of the taking. Well, all of the work is done after that date, including making value judgments and selecting assumptions, including, by the way, selecting a discount rate because, in eminent domain cases, you need to account for the time value of money.

So everything that happened in this case in which the actuaries selected the assumptions a mere three weeks after the measurement date is consistent with the concept of the phrase "as of." It's consistent with longstanding actuarial practice. And it's consistent with other areas of the law that use the phrase "as of."

By grounding their assumptions on the plan's anticipated experience as of the measurement date, the actuary did what the statute requires, which is calculate UVBs as of the measurement date.

JUSTICE THOMAS: Is there any limit to that temporally or just volume-wise, quantitatively?

MR. ROBERTS: A limit in terms of when the assumptions can be selected?

JUSTICE THOMAS: Yes.

MR. ROBERTS: Yes. So the statutory scheme accounts for that. My brother here is talking about, you know, things happening years and years in the future. That's not how it would work under the statute. So -- so, first, under 13- -- Section 1399, the employer has to assess withdrawal liability within a practicable amount of time from the time of the withdrawal. That is a limit.

And -- and so, in order to assess liability, the actuary has to calculate the UVBs, which means the actuary has to select the assumptions. So, within a -- a basically reasonable time of -- of a withdrawal, the actuary has to select his assumptions.

There's another built-in limitation in the statute which the Court talked about in the Bay Area Laundry case, which is that plans have a strong incentive to assess liability as soon as possible so they can get paid as soon as possible.

The statute is set up so that even if an employer wants to dispute the calculation, they still have to pay first, right? This is all about maintaining the solvency of plans and -- and ensuring their survival. And so plans have an incentive to do these calculations quickly, and so that's a second limitation in the statute.

The other thing that I'll say is that there are these annual valuations that came up, which the actuary has to select assumptions before it can do these annual valuations.

So this idea that it's going to be, you know, 10 years in the future that these assumptions are being -- that's not how the statute works. The statute has built-in limiting principles to ensure that there is a reasonable time between the measurement date and the date of selection of the assumptions.

JUSTICE ALITO: Mr. Kenneally argued that the D.C. Circuit's rule leads to administrability problems. Is he correct on that?

MR. ROBERTS: I don't think so, Your Honor. So the -- the issue with the D.C. -- so the D.C. Circuit rule that's being referred to is addressing the secondary question in this case, right?

So the primary question is: Can an actuary -- is it permitted to select assumptions after the measurement date?

That's the primary question. And our position is yes.

The question that follows from that, which you're alluding to, Justice Alito, is: What information can the actuary use when making those selections after the measurement date?

Is it allowed -- does it have to sort of stop its body of knowledge on the measurement date, or can it consider subsequent events?

And what the D.C. Circuit said was you have to stop on the measurement date. So anything that happens after that the actuary should not consider even though it's allowed to select its assumptions after the measurement date.

I don't think that's an unworkable rule at all. This is the -- the type of thing that actuaries do all the time. They have a given set of data and they -- they exercise their professional judgment and make projections based on a given set of data.

All the D.C. Circuit rule is saying is to, you know, stop the data set at the -- the measurement date. This is the type of -- of thing that we ask parties to do in the law all the time.

So, for instance, if there's an issue of whether someone acted reasonably, right, a jury has to consider the facts and circumstances at the time of the action and it has to put out of its mind the subsequent, you know, potentially years' worth of things that happened in order to decide if the action was reasonable at the time.

Even under this statute, the arbitrator, who is -- can decide whether the assumptions selected were reasonable, has to think about were they reasonable at the time they were selected. So the arbitrator has to put out of its mind, you know, subsequent events.

So I don't think there's anything unworkable about asking an actuary, who's trained in exactly this type of -- of, you know, profession, to just consider events up through the measurement date.

JUSTICE JACKSON: In any event, what you're calling the primary question is the only question before us, isn't that correct?

MR. ROBERTS: That's our -- that's our position, Justice Jackson, absolutely. It's -- the question presented is -- is purely about whether it is permissible to select assumptions after the measurement date.

The question -- the secondary question on what information can be used, you know, the parties talk about it a little bit in the briefs.

Our position is and I think the United

States' position is, well, is that that question is not presented in this case. There's no circuit split on that issue.

And it's not an -- actually an issue that would matter at all to the outcome of this case because, you know, it's a very limited factual record here.

But what we do know is that the assumptions here were selected a mere three weeks after the measurement date. And there's no record on this, but it will show eventually if -- if the other side brings a challenge in arbitration following this case, it will show that nothing happened during that three-week period.

So it actually doesn't matter for this case whether the actuary based the assumptions on what it knew on January 1st or if it considered because it didn't consider subsequent events.

JUSTICE ALITO: Well, another argument that Mr. Kenneally made that concerns me is that your rule will lead to disparate treatment of -- of different employers depending upon the time when they withdraw.

MR. ROBERTS: So I -- I don't think that's a concern, Your Honor. The -- the way that the statute works is these incredibly complicated calculations are done once per year. And so this is the annual valuation. And the -- the UVBs are calculated as part of the annual valuation.

And so what happens is, when it's time to do the calculations, the actuary selects the assumptions, does the calculations, and then those calculations are used for with -- withdrawal liability for the rest of the year. That's -- that's -- we're not aware of any case in which someone has then gone back and redone all of those calculations. That's -- that's not really the way the statute's supposed to work. We're not aware of any case of that ever happening.

You know, could it happen? I -- I'd have to think about that. But it's certainly not the way the statute --

JUSTICE SOTOMAYOR: That -- that's what I want to know, meaning your rule or the one you want us to announce is they can change it. There's nothing in that rule that would stop them from changing it post-withdrawal.

MR. ROBERTS: That's correct, Your Honor.

JUSTICE SOTOMAYOR: All right. So tell me what protects against that gamesmanship?

MR. ROBERTS: Well, I think the statute already has protections built into it. So any employer who is -- wants to challenge its withdrawal liability assessment can -- can in arbitration argue that the assumptions that were used in the calculation were either unreasonable or they don't represent the actuary's best estimate of the plan's anticipated experience.

Now that second prong there, that's a subjective test. The point of that test is, if for some reason the actuary was pressured or, you know, made a decision that wasn't based purely on the actuary's professional judgment, well, then -- then there is an avenue for challenging that. So this concern about gamesmanship, the statute already accounts for concerns with gamesmanship. There's already a mechanism in place.

JUSTICE SOTOMAYOR: But, if the general rule is that the actuary can change assumptions, I don't know how we -- it -- it then becomes a fact-based fight in every situation.

MR. ROBERTS: It is a fact -- that would be a fact question for the arbitrator. That would be the employer would need to show that there was some sort of improper -- you know, impropriety in the selection process.

But that's how -- that's how Congress set this up. Congress -- and -- and I should point out, by the way, that the fact that Congress chose actuaries to make these decisions also addresses some of this concern about gamesmanship because, in -- in the Concrete Pipe case, the Court acknowledged that Congress views actuaries as unbiased professionals who are subject to professional standards, who have absolutely no incentive to come down hard on withdrawing employers.

So the -- the mere fact that we have actuaries is a built-in protection in the statute in and of itself.

And then you have these additional

provisions which Congress put in just in case something, you know, goes wrong in the selection process. If something unfair happens, there is the ability for the employer to challenge the -- the assumptions.

JUSTICE KAGAN: Mr. Kenneally was suggesting that those challenges aren't often made, that it's a very high bar, and that -- you know, that it's nice that people have that, but it's never going to be used, and a lot of manipulation can exist before you get to that point.

MR. ROBERTS: I -- I -- I don't agree with that, Your Honor. There are -- there are cases, the Sofco case, the Energy West case, in which courts have struck down or -- or asked actuaries to recalculate withdrawal liability because they found that the assumptions were either unreasonable or didn't satisfy the best estimate requirement. So this is not a toothless standard by any means.

JUSTICE KAVANAUGH: You said at the beginning your position represented the well-established practice. There was some pushback on that from the other side. Can you just elaborate on how we should think about that?

MR. ROBERTS: Yeah. So the -- what we have in terms of evidence to support that is we have the brief -- the amicus brief from the four largest actuarial firms who work in this space, and -- and they say that this is a longstanding practice. We cite in our brief to a -- an issue brief by the Academy of Actuaries in which they say this is how -- this is how we've always done it. The other side hasn't put any evidence to contradict any of that.

I also would point out just the two cases, you know, the reason there's -- there's not a lot of case law on this timing issue, because everyone knew this wasn't an issue. Until Metz came up, all the actuaries selected the assumptions after the measurement date and nobody thought twice about it. It's only been since Metz that this has become something that people talk about.

So there's not a lot of case law that talks about the timing. What we've been able to find are a couple of cases where, just in the background section, it tells you when the assumptions were selected. And the Combs case, if you look at the district court version -- we cite the Combs case in our brief, you have to go to the district court decision -- that shows that the actuary selected the assumptions after the measurement date. Nobody complained because that was standard practice. And that, by the way, was back in, I believe, 1981 or 1982, just a couple of years after the statute was passed.

There's another case that we found recently. It's the -- it's cited in the HR Policy amicus brief. It's the UMW case. And if you -- you have to dig through the record a little bit, but it shows that in September of 2014, the actuary selected assumptions for a June of 2014 measurement date, so three months after the measurement date. Again, nobody complained about the timing because everyone understood this is -- this is what it means to calculate something as of a measurement date. You need to look after.

JUSTICE KAVANAUGH: And you're casting Metz as -- as essentially creating the problem. I understand your position on that. Judge

Winter, who wrote that opinion, very wise judge, very knowledgeable about these kinds of topics. So where -- how did that get off track in your view?

MR. ROBERTS: I mean, I think what -- what Metz should have done, right -- the facts in Metz on their face looked bad, right? The -- the -- the plan replaced its actuary, and then the new actuary came in, and the new interest rate used by the new actuary was dramatically different, right, and all of that happened after the employers had withdrawn, right? All the facts were -- looked really bad in that case. We -- we don't have any of those facts in our case, right?

JUSTICE KAVANAUGH: So it's a bad facts case?

MR. ROBERTS: I -- I -- I think so, and I think the -- the right approach -- I mean, the -- the reason it went off the rails was because the arbitrator is the one who came up with the timing rule.

JUSTICE KAVANAUGH: Mm-hmm.

MR. ROBERTS: And then it went up on appeal so that that was the question in front of the Second Circuit, is whether there was a timing rule.

I think the -- the proper approach would have been to send it back to the arbitrator and -- and tell -- tell the parties to use the mechanisms that Congress gave them. Congress would allow the employer to argue that something improper happened in the selection process. The plan had some -- you know, had its hands all over this, you know, firing the actuary or whatever. Bring that kind of a challenge, which they're allowed to do in arbitration. Argue that the new rate is unreasonable. You're allowed to do that in arbitration. That's what should have happened in Metz. I think, you know, I -- that's just my view on that.

Instead, it came up with this rule that's completely atextual. I think it's very interesting that if you read the Metz opinion, Metz doesn't rely on the "as of" language. It's not -- there's really no textual holding at all in Metz. It's all about this idea that the legislative history of -- of Section 1394, which doesn't even deal with assumptions, you know, shows some general congressional interest in anti-retroactivity. It's -- it's exactly the opposite assumption that you would make normally when doing statutory construction.

So there are -- there are lots of problems with the -- with the Metz decision.

CHIEF JUSTICE ROBERTS: Anything further?

Thank you, counsel.

MR. ROBERTS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Barber.

ORAL ARGUMENT OF KEVIN J. BARBER

FOR THE UNITED STATES AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MR. BARBER: Mr. Chief Justice, and may it please the Court:

For decades, pension plan actuaries have selected their assumptions for withdrawal liability after the measurement date, until the Second Circuit in Metz became the first court to prohibit that practice. That decision is wrong, as various provisions of ERISA make clear.

Section 1391's "as of" language plainly contemplates a retrospective determination of withdrawal liability, and nothing in that section suggests a different rule for the underlying actuarial assumptions. Section 1393 explicitly governs the actuarial assumptions for withdrawal liability without saying anything about timing, whereas Section 1394 explicitly addresses retroactivity without saying anything about the assumptions.

Petitioners' policy concerns lack merit as well, particularly in light of the longstanding contrary practice, and could not justify their timing rule anyway.

This Court should abrogate Metz and affirm the judgment below.

I welcome the Court's questions.

JUSTICE THOMAS: Do you agree with Respondent that there wasn't a problem until Metz came along?

MR. BARBER: I do agree, and I would say to the point that was just being discussed about the extent to which this was common practice, we have all the evidence that my friend, Mr. Roberts, mentioned, but we also have evidence from other fields. All the various standards that we cite from the accounting field, appraisal field at page 17 of our brief, talk about how it's appropriate in some circumstances to rely on events postdating the valuation date or the date of the relevant assessment in formulating the kind of estimates and indeterminate inquiries that go into any kind of financial model or any kind of assessment.

So that's consistent with the general practice that Mr. Roberts was describing.

JUSTICE ALITO: You say that things were working well before Metz. Have very serious practical problems emerged since Metz or is it simply a matter of the fact that actuaries were used to doing things in a particular way and they don't want to change the way they've been doing it?

MR. BARBER: I think it may be too early to tell, Justice Alito. These cases do tend to move rather slowly through arbitration, so it's hard to say how disruptive the Metz rule has been.

But Metz's rule does necessarily deprive actuaries of the ability to account for certain year-end information that becomes available only after the measurement date, so it's clearly disruptive in that sense.

And it's also disruptive potentially in the sense that it requires actuaries to use necessarily stale assumptions. So, here, Petitioners' position is that the actuary was obliged to rely on actuarial assumptions that had been employed in November of 2017. Although November 2017 is only a little bit before the measurement date here, those assumptions were keyed to the measurement date from the previous plan year, so the end of 2016.

So one of the upshots and one of the anomalies in Petitioners' position is that it would require the use of stale assumptions, which, as we discuss in our brief, is inconsistent with Section 1393's best estimate requirement.

JUSTICE KAVANAUGH: You can understand, can't you, how an employer, though, might not appreciate if the discount rates changed after the withdrawal and jams them with many millions more dollars in withdrawal liability?

MR. BARBER: I certainly appreciate that, Justice Kavanaugh. A couple things on that.

JUSTICE KAVANAUGH: Because the decision to withdraw might be based in part on how much that liability is.

MR. BARBER: Yes. So, first of all, one thing to note is that Petitioners' position is limited -- their proposed timing rule is limited to the actuarial assumptions. So they accept the fact that all the other inputs into the withdrawal liability determination --

JUSTICE KAVANAUGH: Got that. But the discount range change itself could have many millions of dollars in impact for the withdrawing employer, correct?

MR. BARBER: That's certainly true. I think another important provision here is Section 1021(l). That's the provision that entitles each participating employer in the plan to an estimate of the withdrawal liability that would be assessed.

But I think it's quite important that that provision posits that the relevant employer withdrew in the previous year such that the acceptance --

JUSTICE KAVANAUGH: Yeah. So it's two years.

MR. BARBER: Correct. And --

JUSTICE KAVANAUGH: It's two years before. Yeah.

MR. BARBER: -- the reason why, Justice Kavanaugh, I think it's important is that it suggests that Congress intentionally chose not to force plans and their actuaries to prematurely select their assumptions too early in the year simply because an estimate request has been made.

JUSTICE KAVANAUGH: PBGC, what's going on with the proposed rule?

MR. BARBER: So, as far as I know, it remains pending. It does not go to the --

JUSTICE KAVANAUGH: Any -- any -- any sight -- any likelihood of an end to that?

MR. BARBER: I don't know. I think when --

JUSTICE KAVANAUGH: Don't say what you can't, but what can you tell us on that?

MR. BARBER: Well, whenever you have, like, a presidential transition, that affects the timeline for these things and rules do often gestate for quite a while.

For present purposes, the rule, at least as it was proposed, would have no impact on the issues in this case because it wouldn't affect the timing.

It would affect the substantive range of permissible discount rates to use, and that would be promulgated under a different provision of Section 1393 than the one that we're dealing with here.

I just wanted to add one quick point. I can -- I think I can offer the Court a -- a pretty basic hypothetical to show why Petitioners' position can't be correct.

If I were determining my life expectancy as of 2025 -- that's one of the most basic actuarial assumptions you can make -- I would have my choice of which mortality table to use. Mortality tables can vary in all kinds of ways. Demographically, they can be limited to men versus women, blue-collar versus white-collar workers. The mere fact that I made my choice of table in 2026 does not mean that I was failing to comply with the "as of" requirement of the inquiry.

And as long as you accept that, Petitioners' position simply cannot be correct. It all turns on the meaning of "as of." And as Mr. Roberts was explaining, that's not what "as of" means.

CHIEF JUSTICE ROBERTS: Anything further?

Thank you, counsel.

MR. BARBER: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Kenneally.

REBUTTAL ARGUMENT OF MICHAEL E. KENNEALLY
ON BEHALF OF THE PETITIONERS

MR. KENNEALLY: Thank you, Mr. Chief Justice.

I want to start with Mr. Roberts's point about there actually being a timing guardrail under their reading of the statute. That "as soon as practicable" language from 1399(c) is not much of a guardrail at all.

There are cases, including the Huber case, as this Court described in Milwaukee Brewery, where two-and-a-half years passed between the withdrawal and the assessment. In that two-and-a-half years, a lot can happen.

A new actuary can come in and think very sincerely that their own best view about what the plan's anticipated experience will be requires a much lower discount rate, and under their reading of the statute, that new actuary's views would have to control because that's what that actuary's best estimate would be.

I think that the administrability of our rule in comparison to theirs is evident just from looking at the facts of this case. I think that Mr. Roberts said that the actuary's assumptions have to solely be that actuary's own judgment about the plan's anticipated experience, but, here, the actuary's own presentation to the trustees reflected that the actuary wanted the trustees' input on how to calculate withdrawal liability.

If we lose here, on remand, we will have to litigate. We will have to depose the actuary and figure out what exactly happened in that meeting and what -- whether that actuary's views were affected at all by that meeting.

And because the actuary actually went

into the meeting proposing either a 7.5 percent or 7 percent rate, the fact that he came out of the meeting with a 6.5 percent rate, which had not been modeled in the presentation at all, will give rise to problems.

That's just one example of the fact-based litigation that will be necessary under my friend on the other side's view of the statute. And that won't be just in this case. It'll be in all the cases going forward where there's a change.

I think it's not a surprise that the four largest actuarial firms are in this Court advocating for plan flexibility. They're the -- the plans are the ones who hire the actuarial firms and obviously would prefer to have that flexibility as well.

Concrete Pipe did describe actuaries as neutral experts, but they're not immune to client pressure, as Professor Naughton describes in his amicus brief.

And, indeed, the trustees are, as Concrete Pipe describes, individuals with a statutory role and fiduciary obligation to look after the benefits of the plan, and that can readily and in good faith lead them to choosing actuaries that will increase withdrawal liability.

I think one of the reasons why there haven't been many cases and one of the reasons why I disagree with Mr. Roberts's characterization that withdrawal liability assumptions have often been changed after the measurement date is because actuarial assumptions tend not to change at all.

And I think that if we had seen anything to the contrary, the brief in opposition and the cert stage brief by the government wouldn't have admitted that actuarial assumptions hardly ever change.

The facts of Metz did look bad, but there's nothing in the D.C. Circuit's rule, let alone the broader rule, that my friends on the other side really -- really prefer that would prevent the max -- the facts from -- in Metz from re-occurring anytime an actuary -- a plan decided that it wanted to come down hard on withdrawing employers in the future.

There haven't been any problems since Metz. I think that the -- the best evidence of that claim is the brief in opposition, pages 16 through 17 and then the supplemental brief filed by Respondents at 2 and 4. They say that the plans and actuaries can readily comply with the clear rule that Metz sets.

The scenarios where actuarial assumptions change and require or need to be changed in order to deal with changes in mortality are very rare, and there aren't any concrete examples of that in front of the Court.

To -- to ask -- answer your question, Justice Kavanaugh, about the PBGC rule, I think it's important to recognize what that rule is proposing. That rule is proposing to give a range of assumptions that can be selected in any circumstances so that the safeguards that my friends identified -- reasonableness, best estimate of anticipated experience -- those wouldn't be implicated any any longer if the PBGC rule is enacted. That rule would abrogate the Sofco case that Mr. Roberts cited as his example for how those rule -- those standards have teeth.

The PBGC rule would replace that part

of the statutory inquiry, and the only thing that could protect a employer from getting a surprise bill months or even years after the withdrawal would be the timing rule that we argue is already inherent in the "as of" language in Section 1391.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:01 p.m., the case was submitted.)

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