

# **SUPREME COURT OF THE UNITED STATES**

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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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Pages: 1 through 65

Place: Washington, D.C.

Date: January 20, 2026

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1           IN THE SUPREME COURT OF THE UNITED STATES  
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3        M & K EMPLOYEE SOLUTIONS, LLC,        )  
4        ET AL.,                                    )  
5    )  
6    ) No. 23-1209  
7        TRUSTEES OF THE IAM NATIONAL        )  
8        PENSION FUND,                            )  
9    )  
10    )  
11

12    Washington, D.C.

13    Tuesday, January 20, 2026

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

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1 APPEARANCES:

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

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

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

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# 1 PROCEEDINGS

2 (12:03 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next in Case 23-1209, M & K Employee  
5 Solutions versus the Trustees of the IAM  
6 National Pension Fund.

7 Mr. Kenneally.

8 ORAL ARGUMENT OF MICHAEL E. KENNEALLY

9 ON BEHALF OF THE PETITIONERS

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

19 That first number is the present value of  
20 decades of future pension payments.

21 So the assumptions that the plan  
22 actuary makes about the future are a crucial  
23 part of what determines that number. Changing  
24 the assumptions changes the present value and  
25 thus changes the amount of unfunded vested

1 benefits. But, under the statute's timing  
2 rule, that amount is frozen on the valuation  
3 date. Later changes in that amount cannot  
4 factor into the employer's liability. That's  
5 just as true for changes caused by new  
6 assumptions as it is for changes from any other  
7 component of the computation.

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

1       uncertainty.

2                   I welcome the Court's questions.

3                   JUSTICE THOMAS: Were Petitioners

4       surprised by the valuation, or did they know  
5       about it before they withdrew?

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

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

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

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

25                  MR. KENNEALLY: It's the language in

1       1391, unfunded vested benefits as of the end of  
2       the -- as of the end of the plan year preceding  
3       the plan year in which the employer withdraws.  
4       There's also additional language setting the  
5       same date in different parts of the statute,  
6       but it's that "as of the end of the plan year"  
7       that -- that is the cutoff date under the  
8       statute.

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

20                   Can the pension fund do that?

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

1 December 31st date.

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

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

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

23 MR. KENNEALLY: Well, I don't think  
24 there's an assumption about the -- the number  
25 of employees, but the -- the line I would draw

1 is between the facts that are immutable that  
2 are out in the world, they're objective facts,  
3 and the things that are actually the product of  
4 the -- the mental judgment of a particular  
5 person, the actuary of -- that's hired by the  
6 plan to play this role.

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

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

23                   So what's impermissible about that? I  
24 mean, he's trying to figure out what the  
25 appropriate discount rate is given the

1 information on December 31st.

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

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

17 JUSTICE JACKSON: Does that help you  
18 or hurt you? I mean, is it your argument that  
19 the actuary who is making these kinds of  
20 judgments that are themselves not really inputs  
21 because they're not just the hard data, I -- I  
22 see that, and I -- I think the other side would  
23 agree, but why then can't the actuary be making  
24 those judgments later? Isn't the "as of" only  
25 with respect to the hard data and the things

1       that the actuary then needs to look at in order  
2       to be making his judgment?

3                    MR. KENNEALLY: No, Your Honor. Under  
4       the text, unfunded vested benefits are the  
5       thing that's as of the measurement date. And  
6       unfunded vested benefits are defined by Section  
7       1393(c) as the present value of non-forfeitable  
8       benefits minus the value of plan assets. No  
9       one thinks that changes in the value of plan  
10      assets after the measurement date could factor  
11      into an employer's withdrawal liability.

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

19                  And what -- what is confusing me about  
20       your argument is that I understood from the  
21       statute that the statute at times requires  
22       annual reporting of this information so  
23       actuaries are doing this on an ongoing basis,  
24       not just with withdrawal, and the statute  
25       gives, like, seven months after the end of the

1 plan for this information about unfunded  
2 benefits to come in with respect to these  
3 annual reports, suggesting that even Congress  
4 understood that it was going to take a while,  
5 that there were going to be things that are  
6 assessed retrospectively in that seven-month  
7 period.

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

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

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

21 MR. KENNEALLY: They get to choose a  
22 valuation date within the previous year in the  
23 month before. So it's up to them. It's not  
24 specified in the statute. 1391 is very clear  
25 that there is a specific valuation date that

1 has to govern the calculation of withdrawal  
2 liability.

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

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

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

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

1                   But it is an input. It does predict  
2 20 to 40 years of future experience. It also  
3 embodies, as in this case, the PowerPoint  
4 presentation that the actuary presented to the  
5 trustees says that on JA 176, that there's a  
6 tradeoff between providing more protection to  
7 contributing employers versus being harsher  
8 toward withdrawing employers.

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

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

25                  And he points out that that's in

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

6 You want to respond to that?

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

15 That -- the plan has had the same  
16 7.5 percent funding rate -- and this is a point  
17 that the Chamber of Commerce makes in its  
18 amicus brief -- before and after that stock  
19 market event, that's still not the kind of  
20 event that's going to change investment returns  
21 for three to four decades into the future  
22 because, over, you know, as we saw, five years  
23 to 10 years, the markets rebounded.

24 So I think it's unrealistic to think  
25 that there will be a market event in the final

1 days of the year that the actuary can't take  
2 into account if it really is the sort of  
3 world-changing event.

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

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

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

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

22 And if an actuary doesn't comply with  
23 both of those things in assessing withdrawal  
24 liability, it hasn't fully -- or he hasn't  
25 fully complied with the statute. But there's a

1 reason why you don't have any retroactivity  
2 language in 1393. That's the provision that  
3 specifically deals with the actuarial  
4 assumptions.

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

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

14 And you want to respond to that?

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

23 They're relying a lot on a 2020 issue  
24 brief from the American Academy of Actuaries  
25 that seems to have been a direct response to

1 the Second Circuit's decision. And they're  
2 also relying on the Actuarial Standards of  
3 Practice, which the relevant one, Number 27,  
4 was first released in 1996.

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

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

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

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

22 JUSTICE KAGAN: Yeah, yeah, yeah.

23 MR. KENNEALLY: Yeah. I think that  
24 methods would be part of -- of the way that the  
25 computation is performed. There are additional

1 requirements if the actuary is changing  
2 allocation methods. 1394 deals with that  
3 specific issue.

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

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

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

1 change from 7.5 percent to 6.5 percent.

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

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

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

24 JUSTICE JACKSON: But I -- I guess the  
25 thing that concerns me a little bit about the

1 rule that you're suggesting is that it seems to  
2 focus on or suggest that a change is being  
3 made, and you've said that many times.

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

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

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

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

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

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

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

23                  JUSTICE JACKSON: I understand, but  
24          you're saying he has to do it within the year.  
25          The data is still coming in. I mean, isn't he

1 making a judgment about how this plan is going  
2 to do? How could he possibly do it reliably  
3 and consistently and reasonably if we don't  
4 know what has happened for that entire year?

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

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

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

1 actuary, in terms of the plan's performance.

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

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

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

23 But COVID's a great example. The data  
24 is still unclear whether COVID has had any  
25 long-term effect on life expectancy. And

1 experts go both ways on that. And we're years  
2 out from the original event.

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

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

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

17                   And do you still stick with the  
18    numbers in January?

19                   MR. KENNEALLY: I think you have to --

20                   CHIEF JUSTICE ROBERTS: I mean, I  
21    take --

22                   MR. KENNEALLY: In December?

23                   CHIEF JUSTICE ROBERTS: In December,  
24    yeah.

25                   MR. KENNEALLY: Yes, I think you have

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

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

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

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

25 So they will be aware of what the

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

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

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

21 CHIEF JUSTICE ROBERTS: December 31st?

22 MR. KENNEALLY: Right. Congress chose  
23 not to make it the date of the withdrawal, and  
24 I think they did that so that every withdrawing  
25 employer who withdraws in the same year will be

1 charged the same amount of withdrawal  
2 liability. But, under Respondents' reading of  
3 the statute, there's no reason that has to be  
4 so. An actuary can always say: I actually  
5 have thought about it further and I think that  
6 the assumptions should be changed, so even  
7 though we've already assessed these employers,  
8 we're going to assess this new employer, this  
9 other employer, a higher amount.

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

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

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

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

24 MR. KENNEALLY: Well, no, not if --  
25 not -- I was imagining a scenario where the new

1 actuary sincerely believes that the other  
2 assumptions are the right one --

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

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas?

19 Justice Alito?

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

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

1 JUSTICE SOTOMAYOR: Right. In this  
2 case.

3 MR. KENNEALLY: The Metz case was  
4 different.

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

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

12 JUSTICE SOTOMAYOR: Using the new  
13 assumption?

14 MR. KENNEALLY: Yes. That's correct.

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

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

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

25 MR. KENNEALLY: Correct.

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

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

11 MR. KENNEALLY: No, Your Honor.

12 Our -- our theory is that things won't have  
13 changed enough to -- to warrant a revision in  
14 actuarial assumptions.

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

17 MR. KENNEALLY: But, if there is --

18 JUSTICE SOTOMAYOR: Reality could be  
19 mortality table.

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

24 JUSTICE SOTOMAYOR: Why doesn't this  
25 sound like 1399(c)(1)(A)(ii)? There, the -- it

1        requires a determine -- determination of the  
2        amortization period for paying withdrawal  
3        liability to be "based on the assumptions used  
4        for the most recent actuarial valuation of the  
5        plan."

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

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

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

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

23                  JUSTICE SOTOMAYOR: Thank you.

24                  CHIEF JUSTICE ROBERTS: Justice Kagan?  
25                  Justice Gorsuch?

## 1 Justice Kavanaugh?

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

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

21                   In addition to that, which I think is  
22                   one of the concerns, trustees can also hire a  
23                   new actuary, as happened in Metz. They -- they  
24                   had one actuary who had been in place using one  
25                   set of assumptions for many years, and then,

1 after the date of withdrawal, a newly hired  
2 actuary came and cut down the discount rate  
3 assumption by -- by almost half, and that  
4 quadrupled the amount that the employer owed.  
5 That could happen under Respondents' rule  
6 anytime.

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

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

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

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

18 MR. KENNEALLY: They could  
19 procedurally do that.

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

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

24 JUSTICE KAVANAUGH: Maybe not  
25 regularly. I shouldn't have added that. But

1       they can do that.

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

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

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

12                  JUSTICE KAVANAUGH: Okay. Thank you.

13                  CHIEF JUSTICE ROBERTS: Justice  
14      Barrett?

15                  JUSTICE BARRETT: No.

16                  CHIEF JUSTICE ROBERTS: Justice  
17      Jackson?

18                  Thank you, counsel.

19                  Mr. Roberts. No relation.

20                  (Laughter.)

21                  ORAL ARGUMENT OF JOHN E. ROBERTS

22                  ON BEHALF OF THE RESPONDENT

23                  MR. ROBERTS: None at all.

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

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

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

9                   So the -- the phrase creates a  
10   reference point for performing work at a later  
11   date, not a deadline by which the work must be  
12   completed. It would be highly unusual for  
13   Congress to use a phrase like "as of" that  
14   contemplates work being done in the future to  
15   require actuaries to do work like select  
16   assumptions before the measurement date.  
17   That's just not what "as of" means. And that's  
18   how actuaries have interpreted the phrase for  
19   40 years or so.

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

24                  The -- there are a couple of cases  
25    where this comes up, the Combs case that we

1 cite. There's a UMW case that's cited in the  
2 HR policy brief. So there -- there's examples  
3 where actuaries have selected in the past  
4 assumptions after the measurement date.

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

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

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

1 use the phrase "as of."

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

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

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

12 JUSTICE THOMAS: Yes.

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

22 And -- and so, in order to assess  
23 liability, the actuary has to calculate the  
24 UVBs, which means the actuary has to select the  
25 assumptions. So, within a -- a basically

1 reasonable time of -- of a withdrawal, the  
2 actuary has to select his assumptions.

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

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

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

21 So this idea that it's going to be,  
22 you know, 10 years in the future that these  
23 assumptions are being -- that's not how the  
24 statute works. The statute has built-in  
25 limiting principles to ensure that there is a

1 reasonable time between the measurement date  
2 and the date of selection of the assumptions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25                  Our position is and I think the United

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

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

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

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

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

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

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

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

22                  JUSTICE SOTOMAYOR: That -- that's  
23                  what I want to know, meaning your rule or the  
24                  one you want us to announce is they can change  
25                  it. There's nothing in that rule that would

1 stop them from changing it post-withdrawal.

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

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

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

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

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

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

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

25 And then you have these additional

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

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

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

22 JUSTICE KAVANAUGH: You said at the  
23 beginning your position represented the  
24 well-established practice. There was some  
25 pushback on that from the other side. Can you

1 just elaborate on how we should think about  
2 that?

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

13 I also would point out just the two  
14 cases, you know, the reason there's -- there's  
15 not a lot of case law on this timing issue,  
16 because everyone knew this wasn't an issue.

17 Until Metz came up, all the actuaries selected  
18 the assumptions after the measurement date and  
19 nobody thought twice about it. It's only been  
20 since Metz that this has become something that  
21 people talk about.

22 So there's not a lot of case law that  
23 talks about the timing. What we've been able  
24 to find are a couple of cases where, just in  
25 the background section, it tells you when the

1 assumptions were selected. And the Combs case,  
2 if you look at the district court version -- we  
3 cite the Combs case in our brief, you have to  
4 go to the district court decision -- that shows  
5 that the actuary selected the assumptions after  
6 the measurement date. Nobody complained  
7 because that was standard practice. And that,  
8 by the way, was back in, I believe, 1981 or  
9 1982, just a couple of years after the statute  
10 was passed.

11 There's another case that we found  
12 recently. It's the -- it's cited in the HR  
13 Policy amicus brief. It's the UMW case. And  
14 if you -- you have to dig through the record a  
15 little bit, but it shows that in September of  
16 2014, the actuary selected assumptions for a  
17 June of 2014 measurement date, so three months  
18 after the measurement date. Again, nobody  
19 complained about the timing because everyone  
20 understood this is -- this is what it means to  
21 calculate something as of a measurement date.  
22 You need to look after.

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

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

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

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

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

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. ROBERTS: And then it went up on  
25 appeal so that that was the question in front

1 of the Second Circuit, is whether there was a  
2 timing rule.

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

18 Instead, it came up with this rule  
19 that's completely atextual. I think it's very  
20 interesting that if you read the Metz opinion,  
21 Metz doesn't rely on the "as of" language.  
22 It's not -- there's really no textual holding  
23 at all in Metz. It's all about this idea that  
24 the legislative history of -- of Section 1394,  
25 which doesn't even deal with assumptions, you

1 know, shows some general congressional interest  
2 in anti-retroactivity. It's -- it's exactly  
3 the opposite assumption that you would make  
4 normally when doing statutory construction.

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

7 CHIEF JUSTICE ROBERTS: Anything  
8 further?

9 Thank you, counsel.

10 MR. ROBERTS: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Barber.

12 ORAL ARGUMENT OF KEVIN J. BARBER  
13 FOR THE UNITED STATES AS AMICUS CURIAE,  
14 SUPPORTING THE RESPONDENT

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

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

24 Section 1391's "as of" language  
25 plainly contemplates a retrospective

1 determination of withdrawal liability, and  
2 nothing in that section suggests a different  
3 rule for the underlying actuarial assumptions.  
4 Section 1393 explicitly governs the actuarial  
5 assumptions for withdrawal liability without  
6 saying anything about timing, whereas  
7 Section 1394 explicitly addresses retroactivity  
8 without saying anything about the assumptions.

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

13 This Court should abrogate Metz and  
14 affirm the judgment below.

15 I welcome the Court's questions.

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

19 MR. BARBER: I do agree, and I would  
20 say to the point that was just being discussed  
21 about the extent to which this was common  
22 practice, we have all the evidence that my  
23 friend, Mr. Roberts, mentioned, but we also  
24 have evidence from other fields. All the  
25 various standards that we cite from the

1 accounting field, appraisal field at page 17 of  
2 our brief, talk about how it's appropriate in  
3 some circumstances to rely on events postdating  
4 the valuation date or the date of the relevant  
5 assessment in formulating the kind of estimates  
6 and indeterminate inquiries that go into any  
7 kind of financial model or any kind of  
8 assessment.

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

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

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

23 But Metz's rule does necessarily  
24 deprive actuaries of the ability to account for  
25 certain year-end information that becomes

1 available only after the measurement date, so  
2 it's clearly disruptive in that sense.

3 And it's also disruptive potentially  
4 in the sense that it requires actuaries to use  
5 necessarily stale assumptions. So, here,  
6 Petitioners' position is that the actuary was  
7 obliged to rely on actuarial assumptions that  
8 had been employed in November of 2017.

9 Although November 2017 is only a little bit  
10 before the measurement date here, those  
11 assumptions were keyed to the measurement date  
12 from the previous plan year, so the end of  
13 2016.

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

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

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

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

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

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

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

23                  But I think it's quite important that  
24 that provision posits that the relevant  
25 employer withdrew in the previous year such

1 that the acceptance --

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

4 MR. BARBER: Correct. And --

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

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

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

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

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

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

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

24 MR. BARBER: Well, whenever you have,  
25 like, a presidential transition, that affects

1 the timeline for these things and rules do  
2 often gestate for quite a while.

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

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

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

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

1 requirement of the inquiry.

2 And as long as you accept that,

3 Petitioners' position simply cannot be correct.

4 It all turns on the meaning of "as of." And as  
5 Mr. Roberts was explaining, that's not what "as  
6 of" means.

7 CHIEF JUSTICE ROBERTS: Anything  
8 further?

9 Thank you, counsel.

10 MR. BARBER: Thank you.

11 CHIEF JUSTICE ROBERTS: Rebuttal,  
12 Mr. Kenneally.

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

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

17 I want to start with Mr. Roberts's  
18 point about there actually being a timing  
19 guardrail under their reading of the statute.  
20 That "as soon as practicable" language from  
21 1399(c) is not much of a guardrail at all.

22 There are cases, including the Huber  
23 case, as this Court described in Milwaukee  
24 Brewery, where two-and-a-half years passed  
25 between the withdrawal and the assessment. In

1 that two-and-a-half years, a lot can happen.

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

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

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

25                  And because the actuary actually went

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

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

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

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

22 And, indeed, the trustees are, as  
23 Concrete Pipe describes, individuals with a  
24 statutory role and fiduciary obligation to look  
25 after the benefits of the plan, and that can

1 readily and in good faith lead them to choosing  
2 actuaries that will increase withdrawal  
3 liability.

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

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

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

24 There haven't been any problems since  
25 Metz. I think that the -- the best evidence of

1 that claim is the brief in opposition, pages 16  
2 through 17 and then the supplemental brief  
3 filed by Respondents at 2 and 4. They say that  
4 the plans and actuaries can readily comply with  
5 the clear rule that Metz sets.

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

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

25 The PBGC rule would replace that part

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

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 The case is submitted.

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

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[5] 909:9 910:9 915: 2 928:19 938:19 40-year [1] 924:7</p> <p style="text-align: center;"><b>5</b></p> <p>55 [1] 908:18 5500 [1] 913:17 5x [1] 928:6</p> <p style="text-align: center;"><b>6</b></p> <p>6.5 [3] 921:1 936:10 963:3</p> <p style="text-align: center;"><b>7</b></p> <p>7 [1] 963:2 7.5 [4] 916:16 921:1 936:10 963:1</p> <p style="text-align: center;"><b>A</b></p> <p>ability [3] 931:4 949:4 956:24 able [2] 924:18 950:23 abrogate [2] 955:13 965:21 absolutely [3] 919:5 944:17 948:20 academy [2] 918:24 950:9 accept [2] 958:11 961: 2 acceptable [1] 936:14 acceptance [1] 959:1 accomplishing [1] 921:22 account [6] 917:2 923: 16 924:21 925:10 939:17 956:24 accountants [1] 908: 16 accounting [2] 927:13 956:1 accounts [2] 940:14 947:23 accurate [2] 927:15 928:14 acknowledged [2] 910:15 948:17 across [1] 920:10 acted [1] 943:19 action [2] 943:21,24 actual [1] 913:12 actually [9] 910:3 911: 15 928:6 930:4 936: 23 945:4,16 961:18 962:25</p>	<p>actuarial [28] 906:20 909:7 911:4 915:14 916:14 918:3,6 919:2 923:12,18 925:16 926:11,24 931:5 933: 14 934:4 939:24 950: 6 955:3,4 957:7 958: 10 960:18 963:13,16 964:9,15 965:6 actuaries [30] 906:9, 14 912:23 915:12 916:14 918:3,6 919:2 923:12,18 925:16 926:11,24 931:5 933: 14 934:4 939:24 950: 6 955:3,4 957:7 958: 10 960:18 963:13,16 964:9,15 965:6 actuary [6] 910:5,18 911:9,19,23 912:1,14 913:2,19 914:21,24 915:1,18 916:1,19 917:1,20 918:21,23 919:1,22 920:1,23 921:1,24 922:1,25 923:1,26 924:1,27 925:1,28 926:1,29 927:1,30 928:1,31 929:1,32 930:1,33 931:1,34 932:1,35 933:1,36 934:1,37 935:1,38 936:1,39 937:1,40 938:1,41 939:1,42 940:1,43 941:1,44 942:1,45 943:1,46 944:1,47 945:1,48 946:1,49 947:1,50 948:1,51 949:1,52 950:1,53 951:1,54 952:1,55 953:1,56 954:1,57 955:1,58 956:1,59 957:1,60 958:1,61 959:1,62 960:1,63 961:1,64 962:1,65 963:1,66 964:1,67 965:1,68 966:1,69 967:1,70 968:1,71 969:1,72 970:1,73 971:1,74 972:1,75 973:1,76 974:1,77 975:1,78 976:1,79 977:1,80 978:1,81 979:1,82 980:1,83 981:1,84 982:1,85 983:1,86 984:1,87 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