

IN THE SUPREME COURT OF THE UNITED STATES

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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 Petitioners,)
6 v.) No. 23-1209
7 TRUSTEES OF THE IAM NATIONAL)
8 PENSION FUND,)
9 Respondent.)
10 - - - - -

11
12 Washington, D.C.

13 Tuesday, January 20, 2026

14
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 P R O C E E D I N G S

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:

12 Section 1391 creates a clear timing
13 rule. Withdrawal liability is based on the
14 plan's unfunded vested benefits as of the end
15 of the prior year. The statute then defines
16 unfunded vested benefits as the value of the
17 plan's non-forfeitable asset -- non-forfeitable
18 benefits minus the value of the plan's assets.
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.

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

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.

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

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.

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

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(1). 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 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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