No.

In the Supreme Court of the United States

M & K EMPLOYEE SOLUTIONS, LLC, ET AL., PETITIONERS

v.

TRUSTEES OF THE IAM PENSION FUND

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act imposes "withdrawal liability" when an employer withdraws from an underfunded multiemployer pension plan. This withdrawal liabilty covers the employer's share of the plan's underfunding. Because a plan's amount of underfunding hinges on projections about its projected liabilities and assets decades into the future, withdrawal liability computations are partly a product of actuarial assumptions about anticipated interest rates and other predictions. Withdrawal liability must be computed "as of the end of the plan year preceding the plan year in which the employer withdraws." *E.g.*, 29 U.S.C. 1391(b)(2)(E)(i). The question presented is:

Whether 29 U.S.C. 1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year.

PARTIES TO THE PROCEEDING

Petitioners M & K Employee Solutions, LLC, Ohio Magnetics, Inc., Phillips Liquidating Trust, and Toyota Logistics Services, Inc. were defendants in the district court and appellants in the court of appeals.

Respondents Trustees of the IAM National Pension Fund were plaintiffs in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

M&K Employee Solutions, LLC, is an Illinois Limited Liability Company wholly owned by individuals Chad and Jodi Boucher. No publicly held corporation owns 10% or more of M&K Employee Solutions, LLC.

Ohio Magnetics, Inc. is a wholly owned subsidiary of Peerless-Winsmith, Inc. Peerless Winsmith, Inc. is a wholly owned subsidiary of HBD Industries, Inc. No publicly held corporation owns 10% or more of the stock of HBD Industries, Inc.

Phillips Liquidating Trust, as successor in interest to the Phillips Corporation, d/b/a Equipco, certifies that to the best of counsel's knowledge and belief, there are no parents, subsidiaries and/or affiliates of Phillips Liquidating Trust, as successor in interest to the Phillips Corporation, d/b/a Equipco, that have issued shares or debt securities to the public.

Toyota Logistics Services, Inc. is a wholly owned subsidiary of Toyota Motor Sales, U.S.A., Inc. Toyota Motor Sales, U.S.A., Inc. is a wholly owned subsidiary of Toyota Motor North America, Inc. Toyota Motor North America, Inc. is a wholly owned subsidiary of

Toyota Motor Corporation, which is a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of Toyota Motor Corporation.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Trs. of the IAM Nat'l Pension Fund v. *Ohio Magnetics, Inc.*, No. 21-cv-928 (Feb. 6, 2023)

Trs. of the IAM Nat'l Pension Fund v. *Toyota Logistics Servs., Inc.*, No. 21-cv-931 (Feb. 6, 2023)

Trs. of the IAM Nat'l Pension Fund v. *Phillips Liquidating Tr.*, No. 21-cv-2132 (Feb. 6, 2023)

Trs. of the IAM Nat'l Pension Fund v. *M & K Emp. Sols., LLC*, No. 21-cv-2152 (Sept. 28, 2022)

United States Court of Appeals (D.C. Cir.):

Trs. of the IAM Nat'l Pension Fund v. *M & K Emp. Sols., LLC*, Nos. 22-7157, 22-7158 (Feb. 9, 2024)

Trs. of the IAM Nat'l Pension Fund v. *Ohio Magnetics, Inc.*, No. 23-7028 (Feb. 9, 2024)

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INTRODUCTION

This case presents a narrow but very important question on which there is a clear and acknowledged conflict among the courts of appeals. Under the Employee Retirement Income Security Act of 1974 (ERISA), employers who participate in a multiemployer pension plan may generally exit the plan. But if the plan is underfunded, an exiting employer must make a "withdrawal liability" payment to cover its share of the underfunding. The statute sets forth a detailed framework to compute withdrawal liability and "instructs a plan to make the withdrawal charge calculation, not as of the day of withdrawal, but as of the last day of the plan year preceding the year during which the employer withdrew." *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417-418 (1995) (emphasis omitted); see 29 U.S.C. 1391(b)-(c). The question here is whether, despite this instruction, the plan may base withdrawal liability on actuarial assumptions that it adopted after the prior plan year and that contradict the assumptions it found reasonable and appropriate at the end of the prior year.

The court below held that a plan may do that. App., *infra*, 12a. It recognized, however, that this holding conflicts with the only other court of appeals decision on point. See *Nat'l Ret. Fund* v. *Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020). In *Metz*, the Second Circuit interpreted ERISA in accord with its language: the plan must calculate withdrawal as of the last day of the prior year, using the assumptions in effect on that day. *Id.* at 152. But the court below found *Metz*'s reading "no[t] persuasive," highlighting ERISA's objective of protecting plans and their beneficiaries. App., *infra*, 14a (citation omitted); see 29 U.S.C. 1001a(c). The court rejected *Metz*'s bright-line rule and held instead that actuaries may base their calculations on assumptions adopted after the end of the prior plan year, so long as the assumptions are "based on the body of knowledge available up to [that] date." App., *infra*, 13a (citation omitted).

This sharp disagreement between two courts of appeals on ERISA's proper interpretation deserves this Court's review. Congress designed ERISA to create "a uniform body of benefits law." *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020). But after the decision below, plans and employers are subject to contradictory rules in different parts of the country. This disuniformity creates severe uncertainty for plans, employers, and employee representatives. Multiemployer pension plans are, by definition, the result of collective bargaining between employers and unions. See 29 U.S.C. 1002(37)(A). Without a settled set of ground rules, employers and unions cannot make informed decisions at the bargaining table on fundamental questions like whether to move from one multiemployer pension plan to an alternative retirement benefit.

The Court should end this uncertainty promptly and restore uniformity to the nation's benefit laws. The issue presented is a pure question of law and this case is an excellent vehicle to resolve it. The petition should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 92 F.4th 316. The opinion of the district court in *M & K* (App., *infra*, 18a-72a) is not published in the Federal Supplement but is available at 2022 WL 4534998. The opinion of the district court in *Ohio Magnetics* (App., *infra*, 73a-119a) is reported at 656 F. Supp. 3d 112.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 120a-138a.

STATEMENT

A. Background

A multiemployer pension plan is a retirement plan to which multiple employers contribute through collective bargaining agreements. *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 605 (1993); 29 U.S.C. 1002(37)(A). Employers' contributions "are pooled in a general fund available to pay any benefit obligation of the plan." *Concrete Pipe*, 508 U.S. at 605. In the typical case, "[a]n employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for participating employers." *Id.* at 606.

Congress passed ERISA "to provide comprehensive regulation for private pension plans." *Connolly* v. *PBGC*, 475 U.S. 211, 214 (1986). A few years later, it amended ERISA through the Multiemployer Pension Plan Amendments Act (MPPAA). The MPPAA obligates employers that withdraw from an underfunded multiemployer pension plan to pay withdrawal liability. See 29 U.S.C. 1381. "This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984) (citing 29 U.S.C. 1381, 1391).

Withdrawal liability helps solve a flaw in ERISA's original design. *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416 (1995). ERISA originally gave employers strong incentives to exit a multiemployer pension plan as soon as it seemed to be heading toward insolvency. *Id.* at 416-417. Before the MPPAA, rational employers would withdraw in the hope that they could avoid having to foot the bill for the plan's underfunding. See *ibid.* Under this regime, "a plan's financial troubles could trigger a stampede for the exit doors, thereby ensuring the plan's demise." *Id.* at 417; see also *R.A. Gray*, 467 U.S. at 722 n.2. The MPPAA solved this problem by requiring all withdrawing employers to pay their share of the plan's underfunding. *Milwaukee Brewery*, 513 U.S. at 417.

The MPPAA provided a detailed set of rules—and four possible methods—for computing withdrawal liability. 29 U.S.C. 1391. Each method has a key common feature: the plan must "make the withdrawal charge calculation, not as of the day of withdrawal, but *as of the last day of the plan year preceding the year during which the employer withdrew*—a day that could be up to a year earlier." *Milwaukee Brewery*, 513 U.S. at 417-418 (citing 29 U.S.C. 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), (c)(4)(A)). The last day of the plan year preceding the year of the employer's withdrawal is often called the "measurement date."

Much of the complexity in calculating withdrawal liability arises from the need to determine the plan's ability to pay future retirement benefits based on the plan's current assets. Because of the time value of money, this analysis "requires the actuary to make certain assumptions about the income the assets will generate." *Sofco Erectors, Inc.* v. *Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 418-419 (6th Cir. 2021). "If the actuary assumes that the fund's investments will have a higher long-term growth rate, then the fund will not need as many assets today to pay liabilities in the future." *Id.* at 419. Conversely, "if the actuary assumes a lower long-term growth rate, the fund will need more assets now to pay those liabilities in the future," and plan underfunding increases. *Ibid.* For this reason, the actuary's "interest-rate assumption is a critical factor in determining the present value of future liabilities." *Ibid.* A change of only a percentage point or two can have a massive effect on the plan's calculated amount of underfunding. See, *e.g.*, *Chi. Truck Drivers, Helpers & Warehouse*

Workers Union (Indep.) Pension Fund v. *CPC Logistics, Inc.*, 698 F.3d 346, 353 (7th Cir. 2012) (discussing stylized example in which decreasing the interest-rate assumption from 8% to 6% increased the hypothetical plan's funding shortfall from $9,482 to $505,971).

B. Facts and procedural history

1. Petitioners are employers that withdrew from the IAM National Pension Fund in 2018. App., *infra*, 2a-3a, 10a n.9. The IAM National Pension Fund provides benefits to employees covered by collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO. *Id.* at 6a. Because the plan year matches the calendar year, *id.* at 6a-7a, the measurement date for petitioners' withdrawal liability was December 31, 2017, *id.* at 9a.

In November 2017, the plan actuary used a 7.5% interest rate or "discount rate" to value the plan's underfunding. App., *infra*, 7a. The actuary did not change this assumption before the measurement date. See *ibid.* When the actuary calculated petitioners' withdrawal liability, however, it used a 6.5% discount rate. *Id.* at 7a-9a, 11a. The actuary changed several of its actuarial assumptions as a result of a January 24, 2018 meeting with respondents (the plan's trustees). *Id.* at 7a.[1]

It is undisputed that this interest-rate reduction did not occur until after petitioners' measurement

[1] In addition to changing the interest-rate assumption, the actuary also decided at the January 24, 2018 meeting to begin imposing a new administrative expense load assumption in its withdrawal liability computations. App., *infra*, 8a, 11a.

date. Respondents conceded below that "[a]s of December 31, 2017, neither the Fund nor its actuary * * * had changed the 7.5% discount rate assumption" that the plan had just used to calculate its unfunded vested benefits in November 2017. 22-7157 C.A. App. 644; 23-7028 C.A. App. 700. Indeed, the actuary's PowerPoint presentation for the January 24, 2018 meeting notes that at the start of the meeting, the plan's "Current Policy" for withdrawal liability was to use the "7.5%" rate. 22-7157 C.A. App. 118, 134; 23-7028 C.A. App. 223, 239. The presentation thus confirmed that the 7.5% interest rate remained in effect on the December 31, 2017 measurement date.

The actuary's post-measurement date revision of its interest rate assumption dramatically increased the plan's estimated underfunding. Using the 7.5% rate, the actuary calculated the plan's underfunding for the 2016 plan year as just over $448 million. App., *infra*, 7a. Using the 6.5% rate, the underfunding ballooned sixfold, to over $3 billion, for the 2017 plan year. 22-7157 C.A. App. 161, 458; 23-7028 C.A. App. 266, 707. The actuary's post-measurement date change in assumptions generated a commensurate increase in the withdrawal liability assessed against petitioners. One petitioner, for example, would have been charged $1,797,781 using the actuarial assumptions in effect on December 31, 2017, but was instead charged $6,158,482 using the assumptions adopted in January 2018. 22-7157 C.A. App. 398-401, 443-444.

Petitioners followed the MPPAA's arbitration procedures for challenging their withdrawal liability assessments. See 29 U.S.C. 1401(a). Under those procedures, all four of petitioners' arbitrators determined that the plan's actuary violated ERISA by calculating petitioners' withdrawal liability using actuarial assumptions adopted after the measurement date. App., *infra*, 9a-11a & n.9. The arbitrators largely based this conclusion on the holding of *National Retirement Fund* v. *Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020), which held that actuaries must calculate withdrawal liability using the actuarial assumptions that they endorsed as of the measurement date. App., *infra*, 11a-12a.

2. Respondents challenged these arbitral awards by filing four actions in federal district court. See 29 U.S.C. 1401(b). Three of the actions were consolidated before one district court judge, while the fourth proceeded separately before a different judge in the same district. See App., *infra*, 4a. The two district court judges vacated the arbitral awards before them for similar reasons. *Id.* at 19a, 75a.

The district courts decided that the arbitrators erred in following the Second Circuit's decision in *Metz*. App., *infra*, 58a-64a, 106a-115a. The judges stated that they "disagree[d] with the Second Circuit's reasoning" and did not find it "persuasive." *Id.* at 59a, 106a. The district courts disregarded *Metz*'s application of the MPPAA's plain language and ruled that actuaries may use actuarial assumptions adopted after the measurement date—so long as the new assumptions are adopted based on "information available" on the measurement date. *Id.* at 92a & n.3; see also *id.* at 43a.

3. The court of appeals affirmed, largely adopting the district courts' reasoning. App., *infra*, 3a, 12a-

15a. It agreed "that the arbitrator[s] erred in concluding that an actuary must use 'the assumptions and methods in effect' on the relevant measurement date when calculating withdrawal liability." *Id.* at 12a. In so ruling, the court construed 29 U.S.C. 1393(a)(1) as "requir[ing] that an actuary use its 'best estimate' of the plan's anticipated experience as of the measurement date." *Id.* at 13a. Like the district courts, the court of appeals construed the statutory provisions as requiring actuaries to base their assumptions "on the body of knowledge available up to the measurement date." *Ibid.*

The court of appeals agreed with the district courts that the Second Circuit's *Metz* decision was "neither controlling in [the D.C. Circuit's] jurisdiction nor persuasive." App., *infra*, 14a (citation omitted). The main problem, according to the D.C. Circuit, was that "*Metz*'s reasoning is counter to the text of the MPPAA, which protects [multiemployer pension plans] and their beneficiaries." *Ibid.* (citing 29 U.S.C. 1001a(c)).[2]

REASONS FOR GRANTING THE PETITION

This petition is an ideal vehicle to resolve the circuit split created by the decision below. As the courts below all acknowledged, their interpretation of ERISA's timing requirement for withdrawal liability

[2] The court of appeals also addressed a second issue—one petitioner's ability to limit its withdrawal liability through the statute's "free-look exception." App., *infra*, 15a-17a. The court of appeals resolved that issue in the petitioner's favor, and petitioners do not seek review of that aspect of the decision below.

actuarial assumptions contradicts that of the Second Circuit. In the Second Circuit, actuaries may not retroactively change their actuarial assumptions after the measurement date to increase a withdrawing employer's withdrawal liability. In the D.C. Circuit, they may.

The circuits' disagreement over the proper interpretation of ERISA on this point is fundamental, recurring, and important. Actuarial assumptions are a key input for withdrawal liability calculations and have an enormous effect on the amount of withdrawal liability. The Court should not let this disagreement continue. This case cleanly presents the issue as a pure question of statutory interpretation with all the pertinent facts undisputed. Declining to resolve the circuit split in this case would defeat ERISA's aim of uniformity—not to mention basic principles of treating like cases alike. Petitioners should not have to pay millions of more dollars in withdrawal liability based solely on respondents' choice of forum.

A. The decision below creates a conflict among the courts of appeals.

As every judge below acknowledged, their view that actuaries may change their withdrawal liability assumptions after the measurement date conflicts with the rule in the Second Circuit. Only this Court can restore uniformity in this important area of federal benefits law.

1. The Second Circuit decided this question in *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020). There, as here, the district court read 29 U.S.C. 1393 as implying that actuaries need not

"calculate withdrawal liability based on interest rate assumptions used prior to an employer's withdrawal." *Id.* at 147.

The Second Circuit disagreed with that view. It viewed 29 U.S.C. 1391, rather than 29 U.S.C. 1393, as "[c]ritical to the [timing] dispute." *Metz*, 946 F.3d at 148. And Section 1391 "directs plans to calculate the withdrawal charge, not as of the date of withdrawal or sometime later, but as of the last day of the plan year preceding the year during which the employer withdrew," the measurement date. *Ibid.* Section 1393, on the other hand, is "silent" on this question. *Id.* at 150.

The plan in *Metz*, much as here, had tried to inflate the employers' withdrawal liability by cutting the interest rate assumption after the measurement date. Before the measurement date, the plan actuary used a 7.25% interest rate. *Metz*, 946 F.3d at 148. The plan replaced that actuary, and the new one decided after the measurement date to start using a 3.25% interest rate. *Ibid.* This change in interest rates nearly quadrupled the employer's withdrawal liability—from $254,644 to $997,734. *Id.* at 148-149.

The Second Circuit agreed with the arbitrator that this retroactive use of a lower interest rate violated the statute. The statute "require[d] that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability," and without a change in assumptions before then, the former actuary's "existing assumptions and methods remained in place as of December 31, 2013." *Metz*, 946 F.3d at 149 (citation omitted). The court therefore "h[e]ld that interest rate assumptions for withdrawal liability purposes must be determined as of the last day of the year preceding the employer's withdrawal." *Id.* at 152. In other words, the statute required the actuary to use the assumptions and methods "in effect as of the Measurement Date," not "retroactive[ly] select[ed]" ones. *Id.* at 151.

That conclusion not only carried out the statute's clear instruction to calculate withdrawal liability "as of" the measurement date, 29 U.S.C. 1391, but also served other objectives of the statutory scheme. In other provisions, the statute seeks to "protect employers from the retroactive application of rules relating to the calculation of withdrawal liability." *Metz*, 946 F.3d at 150; see 29 U.S.C. 1394. Employers also have a statutory right to obtain specified estimates of their withdrawal liability, which would be pointless if the plan had free rein to change actuarial assumptions after the measurement date. *Metz*, 946 F.3d at 151; see 29 U.S.C. 1021(*l*)(1). Allowing later changes in actuarial assumptions also increased plan trustees' ability "to pressure actuaries to assess greater withdrawal liability * * * than would have been the case if the prior assumptions and methods actually in place on the Measurement Date were used." *Metz*, 946 F.3d at 151. "Actuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent." *Ibid.*

2. Below, the D.C. Circuit consciously rejected the Second Circuit's bright-line rule. On its reading of ERISA, an actuary need not "use 'the assumptions and methods in effect' on the relevant measurement date when calculating withdrawal liability." App., *infra*, 12a.

Rather, under the D.C. Circuit's rule, "an actuary may base their assumption[s] on information after the measurement date 'so long as those assumptions are "as of" the measurement date.'" App., *infra*, 13a (citation omitted). By that, the court of appeals meant that "the assumptions must be based on the body of knowledge available up to the measurement date." *Ibid.* (citation omitted).

The court of appeals rooted this standard on what it described as "Congress' dual directives that unfunded vested benefits be determined 'as of' the measurement date and that actuarial assumptions be generated by 'taking into account the experience of the plan and reasonable expectations' such that they 'offer the actuary's best estimate of anticipated experience.'" App., *infra*, 13a (citation omitted). The court of appeals thus derived its rule not just from 29 U.S.C. 1391, but also 29 U.S.C. 1393, which the court characterized as "requir[ing] that an actuary use its 'best estimate' of the plan's anticipated experience as of the measurement date." App., *infra*, 13a.

Like the district courts, the D.C. Circuit rejected *Metz*'s contrary reasoning as not "persuasive." App., *infra*, 14a. The "main point" of the court's disagreement with *Metz* was its assessment that the Second Circuit's reasoning ran "counter to the text of the MPPAA, which protects [multiemployer pension plans] and their beneficiaries." *Ibid.* (citing 29 U.S.C. 1001a(c)). The court highlighted the statute's general policy statement that the statute aims "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans," "to provide reasonable protection for the interests of participants and beneficiaries of financially distressed [plans]," and "to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans." 29 U.S.C. 1001a(c). Finally, the court believed that 29 U.S.C. 1394 cut against the Second Circuit's interpretation by showing that Congress could expressly prohibit retroactive actuarial assumptions when it intended to do so. App., *infra*, 14a-15a.

3. There is no way to reconcile the Second Circuit and D.C. Circuit rulings. The former creates a bright-line rule that withdrawal liability computations must use the actuarial assumptions that the plan actuary embraced on the measurement date. The latter gives plans wide latitude to inflate withdrawal liability by changing those assumptions in the face of a pending withdrawal.

The conflict between these decisions has not gone unnoticed. Numerous commentators have observed that the decision below created a circuit split. *E.g.*, Jaclyn Wille, *Pension Actuary's Win Creates Circuit Split on Exit Liability*, Bloomberg Law News (Feb. 9, 2024), https://www.bloomberglaw.com/bloomberglawnews/employee-benefits/X4RO43DK000000; *Panel Doesn't Follow* Metz *in Deciding MPPAA Withdrawal Liability Disputes*, Mealey's Litigation Report—ERISA (Feb. 14, 2024), https://www.lexislegalnews.com/mealeys/articles/1797824/panel-doesn-t-follow-metz-in-deciding-mppaa-withdrawal-liability-disputes; Sarah Bryan Fask & Lorenzo B. Riboni, *D.C. Circuit Breaks from Second Circuit, Finds Pension Fund May Retroactively Change Its Interest Rate Assumptions*, Littler.com (Feb. 16, 2024), https://www.littler.com/publication-press/publication/dc-circuit-breaks-second-circuit-finds-pension-fund-may-retroactively.

B. The question presented is important and warrants review in this case.

The ground rules for calculating withdrawal liability are tremendously important to multiemployer pension plans and the unions and employers who establish them. The very purpose of the MPPAA's additions to ERISA was to ensure that all parties understand and are required to operate under the same ground rules. So when two circuits adopt opposite approaches to one of the most basic of those ground rules, it creates a big problem. This case presents an ideal vehicle to fix that problem.

1. The existence of any circuit split on the basic requirements for calculating ERISA withdrawal liability is a serious concern. As this Court has previously underscored, one of ERISA's objectives is "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (citation omitted). Uniformity is central to ERISA's purpose. The statute does "not require employers to establish benefit plans in the first place." *Conkright* v. *Frommert*, 559 U.S. 506, 516 (2010). Instead, it "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Id.* at 517.

And the circuit conflict here does not involve a tangential or obscure part of the statute's withdrawal liability requirements. It implicates the fundamental and recurring question whether plans are committed to the actuarial assumptions they have announced or instead can rethink those assumptions months or years later—even after the employer has announced a decision to withdraw.

Given the nature of collective bargaining over pension benefits, the current circuit split generates significant problems. When employers and unions sit down to work out a new collective bargaining agreement and turn to the hot-button topic of pensions, neither side can accurately assess the pros and cons of moving from an existing multiemployer pension plan to some other arrangement if the costs of leaving the current plan are uncertain. Here, as just one illustration, the courts' willingness to allow the plan to change its discount rate after the measurement date inflated one petitioner's withdrawal liability by over $4.3 million, more than tripling its cost of switching pension benefits. See p. 7, *supra*. Now that different circuits have staked out diametrically opposed positions on using retroactive assumptions, employers can no longer make rational, informed decisions about multiemployer pension plans in their contract negotiations. Some will surely make suboptimal decisions for their businesses and their employees because they cannot reliably predict what assumptions would govern their possible withdrawal.

Although only two courts of appeals have addressed the question presented so far, that is likely because the retroactive application of actuarial assumptions is a recent phenomenon. Until *Metz* a few years ago, no court had found an occasion to address the issue. *Metz* seemed to shut the door. The D.C. Circuit, however, has now reopened the door and made it possible for plans to expediently increase their charges to withdrawing employers through post-measurement date manipulations of their actuarial assumptions. And employers' decisions to enter, remain in, or withdraw from a given multiemployer pension plan will be clouded by legal and financial uncertainty so long as the circuit conflict persists. The Court should not let the uncertainty continue.

2. This case is an ideal vehicle to resolve the question presented. There are no pertinent disputes of fact. The arbitrations, district court proceedings, and court of appeals decision rested on the parties' stipulations and a few basic documents.

Nor is there any question that the outcome of this case would flip under *Metz*'s approach. As one of the district courts acknowledged, the actuary's calculations here unquestionably "ran afoul" of *Metz*'s "bright-line rule" requiring use of the measurement date actuarial assumptions. App., *infra*, 85a. And "this issue proved dispositive to the withdrawal liability assessments." *Ibid.* That is why all four arbitrators, in following *Metz*, reached the same conclusion that petitioners' withdrawal liability had to be recalculated using the assumptions in effect on December 31, 2017.[3]

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[3] The D.C. Circuit's rejection of the reasoned judgment of four seasoned ERISA arbitrators (five, including the arbitrator in *Metz*) flies in the face of that court's prior admonitions that such decisions are entitled to significant deference. The deference owed to arbitrators under ERISA reflects Congress's "preference for initial resolution of the dispute in a non-judicial forum" by

3. Finally, further percolation is unnecessary. Numerous arbitrators and judges have addressed these issues. And the parties in this case alone have briefed them numerous times. Only a handful of statutory provisions and judicial precedents are relevant to the narrow statutory interpretation question presented. This Court can, and should, interpret those provision and precedents for itself and restore clarity and uniformity to the law.

C. The decision below is incorrect.

The novel rule adopted by the courts below is substantively flawed. It contravenes the most natural reading of the statutory text. It does not serve the statute's underlying purposes. And it is wildly impractical.

1. As for text, the meaning of the key provision is straightforward. Plans must calculate a plan's underfunding "as of the end of the plan year preceding

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"an arbitrator skilled in pension and labor matters" who is "likely to fashion superior resolutions of disputes within the arbitrator's area of expertise." *I.A.M. Nat'l Pension Fund Ben. Plan C.* v. *Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). This, in turn, "promotes judicial economy both because an arbitrator's decision may dispose of the dispute, and because, even if one party appeals the arbitral decision, courts will have the benefit of the arbitrator's sifting of the facts." *Ibid.* And while the D.C. Circuit was not bound by the arbitrators' legal determinations, cases like this "undoubtedly benefit from the 'special knowledge and expertise of a skilled labor and pension law arbitrator.'" *Crown Cork & Seal Co.* v. *Cent. States Se. & Sw. Areas Pension Fund*, 881 F.2d 11, 19 (3d Cir. 1989) (citation omitted). Indeed, "even pure issues of statutory interpretation under [29 U.S.C.] sections 1381-99 are interpretations * * * Congress envisioned would be made by the arbitrator in the first instance." *Ibid.*

the plan year in which the employer withdraws." 29 U.S.C. 1391(b)(2)(E)(i); see also 29 U.S.C. 1391(c)(2)(C)(i), (c)(3)(A), (c)(4)(A). Under this Court's own summary of these provisions, "the withdrawal charge for an employer withdrawing from an underfunded plan * * * equals that employer's fair share of the underfunding as calculated on December 31" the year before. *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995).

Everyone agrees, moreover, that plan underfunding as calculated on a given date is not some purely historical fact that an investigator could go back in time and objectively measure. Rather, because plan underfunding on a given date reflects the plan's anticipated ability to pay its future pension liabilities using current assets, it is inevitably the product of actuarial assumptions about interest rates, life expectancy, and other predictions, in addition to the objective, historical facts about the number of plan participants, the amounts of their vested benefits, and so forth. The actuarial assumptions themselves are the product of judgment rather than objective truth. See *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 635-636 (1993) (explaining that "imprecision inheres in the choice of actuarial methods and assumptions" because actuarial practice is more art than science). Actuaries must use "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. 1393(a)(1). So determining plan underfunding as of the measurement date requires using both the historical facts that existed on that date and the assumptions that the actuary actually believed on that date.

Any approach that uses assumptions that the actuary *disbelieved* on the measurement date is inherently anachronistic. Such an approach does not reflect the actuary's view of the plan's underfunding on the measurement date but instead reflects later developments in the actuary's thinking. Yet this anachronism is what the courts below approved in allowing respondents' actuary to use the 6.5% rate adopted in January 2018 rather than the 7.5% rate that the actuary endorsed as of the measurement date.

The courts below believed that their approach was more faithful to 29 U.S.C. 1393(a)(1)'s requirement that assumptions reflect the actuary's "best estimate of anticipated experience under the plan." But there is no basis for that belief. On December 31, 2017, as during the period before and the days immediately after, the actuary's best estimate of anticipated plan experience was that its current assets would yield a 7.5% rate of return. It was only at the January 2018 meeting that the actuary decided to reconsider its best estimate of plan experience. And, in the actuary's own words, this reconsideration was driven in part by "input from the Trustees." 22-7157 C.A. App. 131.

The courts below also believed that an actuary cannot give its "best" estimate as of the measurement date unless it can collect all information available on that date, study it, and then form an estimate. That too is incorrect. In everyday English, people are often asked for their best judgment on a subject at a particular moment. If such a person asks for more time to gather and assess all existing data, that person is declining to offer a best judgment as of that moment and instead asking for an extension of the deadline. Similarly, asking for an actuary's best estimate as of a specific date naturally asks for the actuary's actual best estimate as of that date.

2. The court of appeals placed considerable emphasis on the MPPAA's general statement of purpose and general objective of "protect[ing] [plans] and their beneficiaries." App., *infra*, 14a. This reasoning is unpersuasive for two reasons.

First, a statute's "general statement of purpose" does not override its specific provisions. *Sturgeon* v. *Frost*, 587 U.S. 28, 55 (2019). The normal rule of statutory construction is that "the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). And that normal rule has particular force where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Ibid.* (citation omitted). This Court has often remarked that ERISA is a "comprehensive and reticulated statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (citation omitted). So the MPPAA's generalized objectives of stabilizing multiemployer pension plans, see 29 U.S.C. 1001a(c), do not override its specific instructions for computing withdrawal liability—including its instruction to base computations on underfunding "as of" the measurement date.

Second, the D.C. Circuit's understanding of the MPPAA's purposes was too one-sided. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam). Neither the MPPAA nor ERISA more broadly single-mindedly prioritizes protecting pension plans and beneficiaries above all other objectives. Both enactments also seek to set legal rules that avoid unduly discouraging the establishment of employee benefit plans in the first place, which is accomplished, in part, by ensuring a predictable set of liabilities. See 29 U.S.C. 1001a(c)(2); *Conkright*, 559 U.S. at 517. Granting actuaries unchecked authority to retroactively apply unfavorable changes undermines that goal.

3. Finally, the position adopted by the court of appeals—ostensibly limiting actuaries to the information available on the measurement date—is impractical. It will be time-intensive and costly for arbitrators or reviewing courts to determine what information was realistically available on the New Year's Eve before the date of withdrawal. And even if they can do that much, it is even harder to ascertain whether an actuary later adopted a particular set of assumptions relying *only* on that available information and not more recent developments.

This project is like asking a college basketball fan to fill out a March Madness bracket after watching two rounds of matchups—but using only knowledge that the fan possessed before the start of the tournament. Not even the most disciplined person could put that newly gained information out of mind. And no outside observer could police the restriction. Yet that is what the D.C. Circuit's approach requires.

The Second Circuit's bright-line rule, in contrast, avoids this practical problem. It further the objectives of the MPPAA. And, most importantly, it respects Section 1391's instruction to calculate plan underfunding as of the measurement date, not through a mishmash of measurement date facts and post-measurement date judgment calls.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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