No. 23-1209

IN THE

Supreme Court of the United States

M & K EMPLOYEE SOLUTIONS, LLC, *et al.*,

Petitioners,

v.

TRUSTEES OF THE IAM
NATIONAL PENSION FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When an employer withdraws from an underfunded multiemployer pension plan, it must pay "withdrawal liability" pursuant to a statutory formula. *See* 29 U.S.C. §§ 1381, 1391. Congress entrusted the task of calculating withdrawal liability to a plan's actuary because actuaries are "unbiased professional[s], whose [professional and regulatory] obligations tend to moderate any claimed inclination to come down hard on withdrawing employers[.]" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 635 (1993).

When calculating an employer's withdrawal liability, an actuary must employ certain assumptions about the pension plan's anticipated experience. Congress imposed only two requirements for those assumptions: (*i*) they must be reasonable; and (*ii*) they must "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

The Question Presented is:

Did Congress *sub silentio* impose an additional timing requirement that plan actuaries must select the assumptions they use in calculating withdrawal liability before the so-called "measurement date," which is the last day of the plan year prior to the year in which the employer withdraws?

RULE 29.6 STATEMENT

Respondents the Trustees of the IAM National Pension Fund are not nongovernmental corporations and are therefore not required to submit a statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 11

I. ANY CIRCUIT SPLIT IS BOTH EXCEEDINGLY NARROW AND TOLERABLE 11

A. Only Two Circuits Have Addressed the Question Presented 11

B. Any Circuit Split Is Tolerable 13

II. THE QUESTION PRESENTED IS NOT EXCEPTIONALLY IMPORTANT 16

A. The Question Has Rarely Arisen and Is Unlikely to Arise in the Future 16

B. Petitioners and *Amicus* Exaggerate the Importance of the Question Presented 19

III. THE DECISION BELOW WAS CORRECT 22

A. The Decision Below Is Compelled by the MPPAA's Text 23

B. Petitioners' Criticism of the Decisions Below Is Misguided 25

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Arizona v. Evans,
514 U.S. 1 (1995) 11

Barnes v. Ahlman,
140 S. Ct. 2620 (2020) 22

Care Alts. v. United States,
141 S. Ct. 1371 (2021) 12

City & Cnty. of S.F. v. Sheehan,
575 U.S. 600 (2015) 22

Combs v. Classic Coal Corp.,
No. 84-cv-1562, 1990 WL 66583
(D.D.C. Apr. 6, 1990) 18, 25

Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.,
508 U.S. 602 (1993) .... i, 5, 27

Conkright v. Frommert,
559 U.S. 506 (2010) 19

Fulghum v. Embarq Corp.,
577 U.S. 1007 (2015) 19

In re Becker,
993 F.3d 731 (9th Cir. 2021) 13

In re Mathias,
867 F.3d 727 (7th Cir. 2017) 13

Maslenjak v. United States,
582 U.S. 335 (2017) 11

Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.,
513 U.S. 414 (1995) 4, 5

Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.,
946 F.3d 146 (2d Cir. 2020) 1, 12

Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.,
No. 16-cv-2408, 2017 WL 1157156 (S.D.N.Y. 2017) 17

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 4, 5

Rutledge v. Pharm. Care Mgmt. Ass'n,
592 U.S. 80 (2020) 19

Sandoz Inc. v. Amgen Inc.,
582 U.S. 1 (2017) 26

Smith v. Aegon Cos. Pension Plan,
769 F.3d 922 (6th Cir. 2014) 13

Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund,
15 F.4th 407 (6th Cir. 2021) 12

United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.,
39 F.4th 730 (D.C. Cir. 2022) 4, 6, 26

Visa Inc. v. Nat'l ATM Council, Inc.,
144 S. Ct. 1381 (2024) 12

STATUTES

26 U.S.C. § 431(c)(7)(A) 5

29 U.S.C. § 1002(37) 4

29 U.S.C. § 1021(l)(1)(A) 21, 22

29 U.S.C. § 1381 i

29 U.S.C. § 1381(a) 5

29 U.S.C. § 1381(b) 5, 20

29 U.S.C. § 1391 .... i, 20, 24

29 U.S.C. § 1391(b)(2)(A)(ii) 5

29 U.S.C. § 1393(a) 1, 23, 26

29 U.S.C. § 1393(a)(1) .... i, 2, 6, 10, 23, 27

29 U.S.C. § 1393(a)(2) 6

29 U.S.C. § 1401(a) 8, 14

29 U.S.C. § 1401(b)(2) 14

29 U.S.C. § 1451 14

ERISA § 4221(b)(2) 13

OTHER AUTHORITIES

Actuarial Standards Bd., *Actuarial Standard of Practice No. 27*, § 3.5.5 (2020) 24

Brief of Four Leading Actuarial Firms as Amici Curiae, *Trs. of IAM Nat'l Pension Fund v. M & K Emps. Sols., LLC*, No. 22-7157 (D.C. Cir. Mar. 30, 2023) 6, 18

Harriet Weinstein & William J. Wiatrowski, Bureau of Lab. Stats., *Multiemployer Pension Plans*, *in* Compensation & Working Conditions (Spring 1999) 14

Pension Benefit Guar. Corp., *Introduction to Multiemployer Plans*, https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans (last updated Feb. 17, 2022) 14

William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983) 11

BRIEF IN OPPOSITION

Respondents respectfully submit that the Petition for a writ of certiorari should be denied.

INTRODUCTION

Petitioners ask the Court to review an esoteric question concerning the timing of when an actuary must select the assumptions it uses to calculate withdrawal liability in a pension plan governed by the Multiemployer Pension Plan Amendments Act ("MPPAA"). In the forty-four years since the MPPAA was enacted, this question has been litigated in the courts just twice: once in the cases consolidated below, and once in a case decided by the Second Circuit in 2020. *See Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir. 2020). The Petition should be denied primarily because the Question Presented has had almost no opportunity to percolate in the lower courts. And the fact that the question rarely arises undercuts any notion that it is "important" in the relevant sense.

The issue in this case is whether Congress intended to require actuaries to select their assumptions on or before the so-called "measurement date"—that is, the last day of the plan year prior to an employer's withdrawal. As the three courts below recognized, the statutory text clearly says "no." The MPPAA imposes only two requirements for the assumptions at issue: The assumptions must be reasonable, and they must represent the actuary's best estimate of the plan's anticipated experience. 29 U.S.C. § 1393. The statute imposes no restrictions

on *when* assumptions must be selected. Moreover, a rule requiring actuaries to select assumptions on or before the measurement date would conflict with the MPPAA's requirement that assumptions represent the actuary's "best estimate" of a plan's anticipated experience as of the measurement date. *Id.* § 1393(a)(1). As a matter of simple logic, an actuary should not be required to make its "best estimate" of a plan's anticipated experience as of the measurement date before it has complete information about the plan through the end of the measurement date. The lower courts thus correctly declined to impose a deadline for actuarial assumptions that runs counter to the MPPAA's text. The courts further recognized that the deadline proposed by Petitioners is unnecessary to prevent the manipulation of assumptions because the MPPAA already provides a remedy should any manipulation occur.

The gravamen of the Petition is that the decision below conflicts with the Second Circuit's decision in *Metz*, which imposed the deadline proposed by Petitioners here. But any split is exceedingly narrow: Only the D.C. and Second Circuits have addressed the Question Presented because the question arises so infrequently. The question has not even been raised in any district court case outside those two Circuits.

A narrow split over an issue that almost never arises is tolerable. Moreover, there is little risk of forum shopping because the forum-selection clauses found in most multiemployer plans, as well as the MPPAA's venue provision, dictate where disputes over withdrawal liability must be litigated. Nor is there any serious risk of multi-circuit actors being

subject to conflicting duties: The decision has no impact whatsoever on the legal duties of employers participating in multiemployer plans, and most plans (including the plan here) have already eliminated any uncertainty concerning the governing law by implementing forum-selection clauses.

Petitioners greatly exaggerate the importance of the Question Presented. The reality is that the timing question in this case almost never arises, and it is unlikely to present itself in any future case for the reasons explained below. While withdrawal liability in general may be important to multiemployer plans, the specific issue raised in this case is not.

Amicus pretends that the decision below will prevent employers from making informed decisions about whether to withdraw from a plan because they will be unable to predict their withdrawal liability in advance. But that uncertainty is inherent in the MPPAA and has nothing to do with the decision below. Under the statutory scheme enacted by Congress, employers can *never* calculate their withdrawal liability before withdrawing because liability is based on various inputs that typically are not known to the employer (or even the plan) at the time of a withdrawal. That would be true even if the Court granted certiorari and reversed the decision below. The timing rule proposed by Petitioners would not create any additional certainty for employers because even if actuaries were required to select their assumptions before the measurement date, an employer still would not learn which assumptions were selected until after it withdraws and liability is imposed.

The bottom line is that there is no reason for the Court to intervene in this case to answer a question that almost never arises, is unlikely to arise in the future, and was correctly decided by the courts below. If the Question Presented does somehow present itself in a future case, the Court can address it at that point after further percolation in the lower courts.

STATEMENT OF THE CASE

1.a. A multiemployer pension plan is one to which more than one employer is required to contribute pursuant to a collective-bargaining agreement. 29 U.S.C. § 1002(37).

In the late 1970s, multiemployer plans were experiencing "extreme financial hardship" precipitated by employer withdrawals. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984). The problem was that employers could withdraw from insolvent plans "without triggering the plan-termination provisions of ERISA and thereby avoiding obligations to make ongoing contributions." *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 734 (D.C. Cir. 2022). That incentivized employers to withdraw from financially troubled plans rather than "pay [their] fair share of underfunding," which triggered a death spiral for some plans. *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 417 (1995).

To address that problem, Congress enacted the MPPAA, which imposes "withdrawal liability" on any employer that withdraws from an underfunded

multiemployer plan. *See* 29 U.S.C. § 1381(a). Withdrawal liability represents a withdrawing employer's proportionate share of the plan's unfunded vested benefits ("UVBs"). *See id.* § 1381(b). UVBs are the difference between the value of the benefits a plan owes to its participants and the value of the plan's assets. *Id.* § 1393(c); *Gray*, 467 U.S. at 725.

1.b. An employer's withdrawal liability is based on a plan's UVBs "as of" the last day of the plan year prior to the plan year in which the employer withdraws. *See, e.g.*, 29 U.S.C. § 1391(b)(2)(A)(ii). For example, an employer that withdraws from a plan in the 2024 plan year would owe withdrawal liability based on its share of the plan's UVBs as of the end of the 2023 plan year. *See id.* The last day of the plan year prior to an employer's withdrawal is known as the "measurement date."

Congress chose this timing as a matter of "administrative convenience." *Milwaukee Brewery*, 513 U.S. at 418. Plans are required to calculate their UVBs for each plan year as part of a mandatory annual valuation. *See* 26 U.S.C. § 431(c)(7)(A). The MPPAA allows a plan to use those annual UVB calculations when assessing withdrawal liability rather than requiring new UVB calculations each time an employer withdraws. *Milwaukee Brewery*, 513 U.S. at 418.

1.c. Congress entrusted actuaries with calculating a plan's UVBs (and, thus, an employer's withdrawal liability). *Concrete Pipe*, 508 U.S. at 635. To perform those calculations, an actuary must make certain assumptions about the plan's anticipated

experience, including assumptions about how long plan participants will work and live. Pertinent to this appeal, the actuary must assume a "discount rate," which is used to calculate the present value of the plan's liabilities. *See Energy W.*, 39 F.4th at 735.

The MPPAA sets forth two requirements for the assumptions that actuaries employ when calculating withdrawal liability: "Withdrawal liability . . . shall be determined . . . on the basis of actuarial 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). No provision of the MPPAA (or ERISA generally) imposes a deadline by which an actuary must select the assumptions it uses when calculating UVBs or withdrawal liability.[1]

1.d. For decades following the MPPAA's 1980 enactment, actuaries of multiemployer plans selected their assumptions after the end of the plan year (*i.e.*, after the measurement date) to fully account for the plan's experience during the plan year. *See* Brief of Four Leading Actuarial Firms as Amici Curiae, *Trs. of IAM Nat'l Pension Fund v. M & K Emps. Sols., LLC*, No. 22-7157, Doc. 1992529 at 2 (D.C. Cir. Mar. 30,

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[1] The MPPAA alternatively permits an actuary to employ assumptions promulgated by the Pension Benefit Guaranty Corporation ("PBGC"). 29 U.S.C. § 1393(a)(2). The PBGC has not promulgated any such assumptions that would apply to Petitioners' withdrawals.

2023) ("Actuaries Br.").[2] Nevertheless, in 2020, the Second Circuit became the first (and only) court to rule that actuaries must calculate withdrawal liability using assumptions selected *before* the end of the prior plan year—that is, before 11:59 PM on the measurement date. No subsequent court has followed *Metz*'s holding.

2. The IAM National Pension Plan (the "Plan") is a multiemployer pension plan that provides retirement benefits to members of the International Association of Machinists and Aerospace Workers, AFL-CIO and affiliated local districts and lodges. The Plan's assets are held in a fund (the "Fund"), which is governed by an agreement and declaration of trust (the "Trust"). JA19–20.[3] The Fund's year runs from January 1 to December 31. *Id.*

Cheiron, Inc. has served as the Fund's actuary since March 2014. JA20. In that role, Cheiron prepares valuations of the Fund's assets and liabilities and calculates the liability owed by withdrawing employers. JA21.

Cheiron determined that, as of the end of the 2016 plan year, the Fund had nearly $450 million in UVBs. *Id.* That was the first time in several years that the

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[2] The four actuarial firms—the Segal Group, Inc., Milliman, Inc., Horizon Actuarial Services, LLC, and Cheiron, Inc.—that submitted an *amicus* brief in support of Respondents below collectively provide actuarial services to the vast majority of multiemployer plans in the United States.

[3] Citations to "JA__" refer to the Joint Appendix filed below in Appeal No. 22-7157.

Fund's assets were projected to be insufficient to cover vested benefits. *Id.* That meant that employers withdrawing from the Fund beginning in 2017 would be required to pay withdrawal liability. In calculating the UVBs for the 2016 plan year, Cheiron assumed a discount rate of 7.5%. *Id.*

At a meeting on January 24, 2018, Cheiron selected the assumptions it would use to calculate the Fund's UVBs for the 2017 plan year—and, thus, the liability for employers withdrawing in 2018. JA21–22. Pertinent to this case, Cheiron selected a discount rate assumption of 6.5%. *Id.*

3. Each Petitioner is an employer that previously contributed to the Fund pursuant to a collective-bargaining agreement. Pet. App. 8a–11a & n.9. Each Petitioner withdrew from the Fund in 2018 after Cheiron had already selected a 6.5% discount rate in January.

In April 2019, Cheiron calculated the Fund's UVBs for the 2017 plan year using the assumptions it selected at the January 2018 meeting. JA457–59. Based on those UVB calculations, the Fund assessed withdrawal liability to each Petitioner.

4. Each of the four Petitioners commenced a separate arbitration challenging the calculation of its withdrawal liability. Pet. App. 9a–11a & n.9; *see also* 29 U.S.C. § 1401(a) (providing that disputes over withdrawal liability determinations "shall be resolved through arbitration"). In each arbitration, Petitioners argued that Cheiron improperly employed the 6.5% discount rate assumption it selected in January 2018

(three weeks after the December 31, 2017 measurement date) rather than the 7.5% rate it had used to calculate UVBs for the 2016 plan year prior to the measurement date.

Each arbitrator sided with Petitioners, ruling that Cheiron was not permitted to calculate withdrawal liability using the 6.5% discount rate assumption that it selected three weeks after the measurement date. Pet. App. 9a–11a & n.9. In so ruling, the arbitrators relied heavily on the Second Circuit's holding in *Metz*. One of the arbitrators proclaimed that *Metz* was the "law of the land" and that he was "bound" to follow it. JA370–71.

5. The Trustees brought four separate lawsuits in the United States District Court for the District of Columbia to challenge the four arbitration decisions. Three of the cases were consolidated before Judge Moss. The fourth was assigned to Judge Lamberth, who was already overseeing a different case involving the withdrawal liability owed by one of the Petitioners.

Both district judges vacated the arbitrators' decisions and held that the MPPAA does *not* require actuaries to select their assumptions on or before the measurement date. Pet. App. 18a–119a. The judges relied primarily on the MPPAA's text, observing that the statute "is silent as to the [timing] limitation" proposed by Petitioners. Pet. App. 98a; *see also* Pet. App. 59a–60a. The "clear takeaway from that silence: Congress did not impose any such limitation." Pet. App. 98a. "Although Congress could have required actuaries to [select assumptions before the

measurement date], the Court will not strain to reach such a result in the face of a much more obvious reading of the statute." Pet. App. 96a.

The two judges also cited the statutory requirement that actuaries select assumptions that offer their "best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). The judges explained that an actuary should not be required to make its "best estimate" of a plan's anticipated experience before the measurement date, when it does not yet have complete information about the applicable plan year. Pet. App. 95a–96a; Pet. App. 54a–55a. The judges also noted that, under Petitioners' proposed timing rule, actuaries who fail to select new assumptions before the measurement date could be forced to employ stale assumptions that are "disconnected from reality" and that do not reflect the actuary's "best estimate" of the plan's anticipated experience. Pet. App. 96a.

6. A unanimous panel of the court of appeals affirmed the two district court decisions. Pet. App. 1a–17a. The court of appeals largely reiterated the cogent analyses of the two district court judges. Pet. App. 12a–15a. As the court of appeals explained, "[i]t would be contrary to 29 U.S.C. § 1393(a)(1)'s requirement that an actuary use its 'best estimate' of the plan's anticipated experience as of the measurement date to require an actuary to determine what assumptions to use before the close of business on the measurement date." Pet. App. 13a.

Petitioners did not seek rehearing. The Petition followed.

REASONS FOR DENYING THE PETITION

I. ANY CIRCUIT SPLIT IS BOTH EXCEEDINGLY NARROW AND TOLERABLE.

A. Only Two Circuits Have Addressed the Question Presented.

The Petition concedes that any split is limited to "two courts of appeals" because only the Second and D.C. Circuits have addressed the Question Presented. Pet. 2. The question has not arisen in any other Circuit or even in any other district court case beyond the cases reviewed by the Second and D.C. Circuits. Any Circuit split is therefore as shallow as possible, and the issue in this case has had almost no opportunity to percolate in the lower courts. If the Court is interested in resolving the Question Presented, it should stay its hand until the lower courts have had an adequate opportunity to address the question in the first instance. *See, e.g.*, *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring) ("[T]he experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights."); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[P]eriods of 'percolation' in, and diverse opinions from, . . . federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) (noting the Court's "policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question").

The Petition argues that "further percolation is unnecessary" because supposedly "[n]umerous arbitrators and judges have addressed these issues." Pet. 18. Respectfully, a handful of arbitration decisions does not constitute percolation—particularly given that the arbitrators below did not engage in any meaningful analysis but instead mistakenly thought they were bound to follow the Second Circuit's decision in *Metz*. JA370–71 (arbitrator below referring to *Metz* as "clearly controlling" and "the law of the land").[4] The reality is that the lower courts have had almost no opportunity to address the Question Presented. This Court has declined to resolve much deeper Circuit splits raising more important issues that had significantly more opportunity to percolate. *See, e.g.*, *Visa Inc. v. Nat'l ATM Council, Inc.*, 144 S. Ct. 1381 (2024) (mem.) (denying certiorari to resolve 4–3 split concerning a fundamental question of class certification under Federal Rule of Civil Procedure 23); *Care Alternatives v. United States*, 141 S. Ct. 1371 (2021) (mem.) (declining certiorari to resolve 3–2 split concerning the meaning of "falsity" under the False Claims Act).

Amicus speculates without support that the decision below will result in "virtually every decision on withdrawal liability [being] challenged." Amicus

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[4] Petitioners' criticism of the courts below for not deferring to the flawed reasoning of certain arbitrators is not well taken. Pet. 17–18 n.3. It is universally accepted that courts do not defer to arbitrators on questions of law in disputes over withdrawal liability. *See, e.g.*, Pet. App. 12a; *Metz*, 946 F.3d at 149; *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 418 (6th Cir. 2021).

Br. 4; *see also* Pet. 16–17. That is false for the reasons explained below. *See* Point II.A, *infra*. But assuming it were true, that would be a reason to *deny* certiorari because it would mean that the Court will have ample opportunity to review the Question Presented in a future case after further percolation.

B. Any Circuit Split Is Tolerable.

The Court's intervention is particularly unwarranted because none of the problems that make a Circuit split intolerable is present here.

For one thing, there is little risk of forum shopping because multiemployer plans typically adopt forum-selection clauses that dictate where disputes over withdrawal liability must be litigated. For example, the Trust in this case provides: "All arbitrations involving assessments of withdrawal liability by the Fund shall be conducted in Washington D.C., and any actions pursuant to ERISA § 4221(b)(2) to enforce, vacate, or modify any award entered in such arbitrations shall be filed in the United States District Court for the District of Columbia." JA67. The parties (and the arbitrators) thus knew that any dispute over withdrawal liability would be governed by D.C. Circuit law, and they had no opportunity to shop for a more favorable venue. It is standard practice to include forum-selection clauses in ERISA plans, and such clauses are enforceable. *See In re Becker*, 993 F.3d 731, 733 (9th Cir. 2021); *In re Mathias*, 867 F.3d 727, 734 (7th Cir. 2017); *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 931 (6th Cir. 2014). These clauses eliminate any opportunity for plans or employers to leverage a Circuit split by strategically

selecting the forum in which to litigate a dispute over withdrawal liability.

Even if a multiemployer plan does not have a forum-selection clause, the MPPAA's venue provision eliminates nearly every opportunity for forum shopping. The MPPAA provides that disputes over withdrawal liability must be resolved in arbitration in the first instance. 29 U.S.C. § 1401(a). Upon issuance of an award, a party may sue in district court to vacate or enforce the arbitrator's award "in accordance with" 29 U.S.C. § 1451. *Id.* § 1401(b)(2). Section 1451, in turn, limits venue to three locations: (*i*) where the plan is administered; (*ii*) where a defendant resides; or (*iii*) where a defendant does business. *Id.* § 1451(d).

As a result of this venue provision, an employer suing to challenge or enforce an arbitrator's withdrawal liability ruling cannot engage in forum shopping: It must sue where the plan is administered, which is the same location as where the plan resides and does business.

Meanwhile, if a plan sues to challenge or enforce an arbitrator's withdrawal liability ruling, it, too, will have little choice of venue because employers participating in multiemployer plans tend to be small companies that reside and conduct business in a single jurisdiction. *See* Harriet Weinstein & William J. Wiatrowski, Bureau of Lab. Stats., *Multiemployer Pension Plans*, *in* Compensation & Working Conditions, at 19–20 (Spring 1999); Pension Benefit Guar. Corp., *Introduction to Multiemployer Plans*, https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans (last updated Feb. 17,

2022). Accordingly, a plan can sue only in the venue where it is administered or where the withdrawing employer resides or does business, which will often be a single jurisdiction.

The upshot is that the alleged disagreement between the D.C. and Second Circuits could encourage forum shopping only if an unusual confluence of factors is present: (*i*) there is a dispute over the timing of the selection of actuarial assumptions (an issue that almost never arises, *see* Point II.A, *infra*); (*ii*) the plan has not adopted a forum-selection clause; and (*iii*) the MPPAA's limited venue provision allows for suit in both the District of Columbia and a venue within the Second Circuit. Needless to say, that perfect storm is highly unlikely to occur.

For similar reasons, there is little risk of multi-Circuit actors being subject to conflicting legal duties. The decision below concerns only the duties of plan actuaries—specifically, when an actuary must select the assumptions it uses to calculate withdrawal liability. The decision does not in any manner affect the legal duties of the employers who participate in multiemployer plans. And to the extent there is any possibility of a plan's actuary being subject to different rules in the D.C. and Second Circuits, a plan can easily eliminate any uncertainty (as most plans have) through a forum-selection clause.

II. The Question Presented Is Not Exceptionally Important.

A. The Question Has Rarely Arisen and Is Unlikely to Arise in the Future.

Since the MPPAA was enacted in 1980, the Question Presented has been litigated only twice—once with respect to the Plan in this case and once with respect to the plan in *Metz*. A question that arises twice in the span of forty-four years can hardly be deemed "important."

Nor is the issue likely to present itself in future cases. Actuarial assumptions tend to remain stable over time, meaning that in most years, a plan actuary will calculate an employer's liability using the same assumptions that it used to calculate withdrawal liability during the prior year. Accordingly, in the mine run of withdrawal liability cases, there can be no dispute over timing because the actuary will have used assumptions that it first selected before the measurement date. It is only where an actuary uses one set of assumptions in the prior year and a different set of assumptions in the subsequent year that any dispute over timing could potentially arise.

Moreover, since *Metz* was decided four years ago, actuaries of multiemployer plans have acceded to *Metz*'s timing rule by formally selecting their assumptions before the measurement date to avoid any argument that the assumptions were untimely adopted. As a result, it is exceedingly unlikely that an employer will be able to bring a *Metz* challenge to the timing of the selection of assumptions in the future.

The only reason why the timing issue arose in this case is that the withdrawals at issue occurred in 2018, prior to the Second Circuit's *Metz* decision, when everyone understood the MPPAA to permit actuaries to select their assumptions after the measurement date.[5] If the actuary in this case had any inkling that the timing of its selection of assumptions would be an issue, it would have selected its assumptions in December 2017 rather than waiting for the meeting that was scheduled for January 2018.[6]

For these reasons, *amicus*'s contention that "virtually every decision on withdrawal liability will be challenged" as a result of the decision below is demonstrably false. Amicus Br. 4. The timing of when an actuary selects its assumptions will rarely ever be litigated because assumptions tend to be stable over time and because actuaries currently comply with the *Metz* deadline out of an abundance of caution. In all events, if *amicus* were somehow right that the timing issue will arise frequently going forward, the Court will have the opportunity to take up the Question Presented in a future case after further percolation.

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[5] At that point, the district court in *Metz* had ruled that actuaries were permitted to select assumptions after the measurement date. *See Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, No. 16-cv-2408, 2017 WL 1157156, at *9–13 (S.D.N.Y. 2017), *rev'd*, 946 F.3d 146 (2d Cir. 2020).

[6] An actuary that complies with *Metz*'s deadline necessarily also complies with the decision below, which imposes no deadline.

Petitioners get things backwards when they try to explain why disputes over the timing of actuarial assumptions almost never arise. Pet. 16–17. In Petitioners' telling, actuaries historically knew they had to select their assumptions before the measurement date, which is why timing challenges have rarely arisen. *Id.* In reality, the opposite is true. In the court below, the four actuarial firms that perform the vast majority of withdrawal liability calculations nationwide explained that "for decades, actuaries for multiemployer pension plans have selected their actuarial assumptions *after* the end of the plan year in order to fully account for the plan's experience during the year." Actuaries Br., *supra* page 6, at 2 (emphasis added). "And for decades, this widespread actuarial practice, blessed by Supreme Court precedent, was carried out without even the slightest hint of controversy." *Id.* The case law confirms this assertion by showing that actuaries have long selected their assumptions after the measurement date. *See, e.g.*, *Combs v. Classic Coal Corp.*, No. 84-cv-1562, 1990 WL 66583, at *1, *7 (D.D.C. Apr. 6, 1990) (actuary selected assumptions in December 1980 for withdrawal liability based on June 1980 measurement date), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991). The real reason why disputes over the timing of the selection of actuarial assumptions have rarely arisen is because (at least prior to *Metz*) everyone understood the MPPAA not to impose any timing requirement. And now that actuaries are complying with the *Metz* rule out of an abundance of caution, it is unlikely that any such disputes will arise again.

B. Petitioners and *Amicus* Exaggerate the Importance of the Question Presented.

Petitioners overstate the importance of the Question Presented by conflating withdrawal liability in general and the specific timing question presented in this case. *E.g.*, Pet. 15–16. To be sure, withdrawal liability as a general matter is important to multiemployer plans and employers. But the specific question presented in this case of when actuaries must select their assumptions is neither "fundamental" nor "recurring." *Contra* Pet. 16. As already explained, the timing question has rarely arisen and is unlikely to present itself in the future.

There is no support for Petitioners' contention that "uniformity" interests make the Question Presented important. *See* Pet. 15. Petitioners cite inapposite authority discussing ERISA preemption, which ensures that retirement plans are not subject to a patchwork of state laws. *Id.* (citing *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80 (2020); *Conkright v. Frommert*, 559 U.S. 506 (2010)). However, nothing in those cases suggests that this Court must resolve every ERISA-related conflict among the lower courts, no matter how narrow and unimportant. This Court regularly denies petitions presenting Circuit splits on questions arising under ERISA, which undercuts any notion that "uniformity" requires certiorari. *See, e.g.*, *Fulghum v. Embarq Corp.*, 577 U.S. 1007 (2015) (mem.) (denying certiorari to resolve Circuit split concerning the construction of ERISA's "fraud or concealment" exception).

The thrust of the *amicus* brief is that the decision below will prevent employers from making informed decisions about whether to withdraw from a plan because they will be unable to predict how much liability they owe. Amicus Br. 8–11; *see also* Pet. 16. That argument fundamentally misrepresents how withdrawal liability works. Under the MPPAA, employers can *never* predict prior to withdrawing how much liability they will owe—regardless of whether Petitioners' proposed timing rule applies.

That is because withdrawal liability calculations turn on numerous inputs that are not determinable until after an employer withdraws from a plan. Those inputs include the value of the plan's assets and liabilities as of the measurement date, the employer's percentage share of contributions to the plan relative to all other employers, and the applicability of various statutory reductions and exceptions. *See* 29 U.S.C. § 1381(b)(1) (describing reductions and exceptions to withdrawal liability), § 1391 (prescribing the formulas for calculating withdrawal liability). The plan itself typically does not know the value of its assets and liabilities as of the measurement date until many months (or, often, more than a year) after the measurement date, when all of the relevant information has been compiled and an actuary has calculated the plan's UVBs. Accordingly, an employer will certainly not have all that information at the time it is deciding whether to withdraw from a plan. That has nothing to do with the decision below but results

from the nature of how withdrawal liability is calculated.[7]

It was never Congress's intention for employers to know their withdrawal liability when deciding whether to withdraw from a plan. Although the MPPAA permits employers to request an estimate of their withdrawal liability, that estimate is *one year out of date*. *See* 29 U.S.C. § 1021(l)(1)(A). Specifically, the statute requires plans to provide an employer with an estimate of its withdrawal liability "if such employer withdrew on the last day of the plan year preceding the date of the request." *Id.* That means that an employer considering whether to withdraw in 2024 would receive an estimate of what its liability would have been had it withdrawn in 2023. Such an estimate is of limited utility because it is based on data that is one year out of date and assumptions the actuary had selected for the prior plan year. If Congress had wanted employers to know their liability before withdrawing, it would have set up the statute differently. While *amicus* might wish that the MPPAA provided greater "predictability and certainty" for employers (Amicus Br. 2), that was not a priority for Congress. In any event, the uncertainty about which *amicus* complains arises from the statute itself, not the decision below.

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[7] For the same reasons, an employer cannot predict its withdrawal liability when it is negotiating a collective-bargaining agreement that could result in a withdrawal, either. *Contra* Pet. 16. Again, this has nothing to do with the decision below.

To the extent *amicus* contends that employers should know before withdrawing which assumptions will be used to calculate their liability, their proposed timing rule would not help. The facts of this case illustrate why. In *amicus*'s view, the Fund's actuary should have selected its assumptions by December 31, 2017, rather than three weeks later. But even if the actuary had complied with that proposed timing requirement, the withdrawing employers still would not have known before withdrawing which assumptions the actuary selected. An actuary's assumptions are not disclosed at the time of selection, so an earlier selection will not provide employers with any additional information.[8]

III. THE DECISION BELOW WAS CORRECT.

The Petition argues that the Court should grant certiorari because the decision below was supposedly decided incorrectly. Pet. 18–23. But this Court is not "a court of error correction." *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 621 (2015) (Scalia, J., concurring in part). An alleged error in statutory interpretation is simply not a compelling basis for granting review. *See Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from

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[8] In this case, the Fund went above and beyond what the MPPAA requires by telling Petitioners who requested a withdrawal liability estimate under 29 U.S.C. § 1021(l)(1)(A) about the assumptions that Cheiron selected in January 2018. That fact is irrelevant to the Question Presented, which concerns the legal requirements of the MPPAA. Regardless of when Cheiron selected its assumptions, Petitioners had no way of learning about those assumptions prior to withdrawing absent the Fund's voluntary disclosure.

grant of stay) ("[E]rror correction is outside the mainstream of the Court's functions and not among the compelling reasons that govern the grant of certiorari." (punctuation omitted)).

In all events, the three courts below correctly held that the MPPAA does not require an actuary to select before the measurement date the assumptions it uses to calculate an employer's withdrawal liability.

A. The Decision Below Is Compelled by the MPPAA's Text.

The MPPAA enumerates two requirements for actuarial assumptions: An actuary must employ assumptions that (*i*) "in the aggregate, are reasonable," and (*ii*) "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). The statute imposes no timing requirement concerning when an actuary must select its assumptions. Presumably, when Congress expressly enumerated the requirements for actuarial assumptions in § 1393, it did not intend for courts to imply an additional timing requirement not provided for in the statute.

Petitioners' proposed timing rule not only lacks textual support, but it also runs afoul of the MPPAA's requirement that assumptions reflect an actuary's "best estimate of anticipated experience under the plan." *Id.* § 1393(a). In Petitioners' view, an actuary that fails to select assumptions before the measurement date should be forced to use whatever stale assumptions it most recently employed, even if those old assumptions no longer represent the

actuary's best estimate of the plan's anticipated experience. That would be contrary to what the statute demands.

What's more, an actuary often cannot make its "best estimate" of a plan's anticipated experience as of the measurement date until *after* the measurement date, when it has more complete information about the plan through the end of the plan year and time to digest that information. *See* Pet. App. 13a. Petitioners' proposed timing rule therefore cannot be correct because it would require an actuary to select its assumptions before it has all of the information it may need to make its "best estimate."

Petitioners stake their entire textual argument on two words—"as of"— buried in sub-sub-subsections of 29 U.S.C. § 1391—a section that mentions neither actuaries nor their assumptions. *See* Pet. 18–19. Petitioners' position is that because an actuary must calculate withdrawal liability "as of" a measurement date, that necessarily means that the actuary must select its assumptions on or before that measurement date. But that logic does not follow. Actuaries are perfectly capable of selecting assumptions after the measurement date based on the circumstances that existed on the measurement date. In fact, the professional standards governing actuaries and the precedent show that it is standard practice for actuaries to select assumptions after a measurement date. *See* Actuarial Standards Bd., *Actuarial*

Standard of Practice No. 27, § 3.5.5 (2020)[9]; *see also Combs*, 1990 WL 66583, at *7.

B. Petitioners' Criticism of the Decisions Below Is Misguided.

The three decisions below persuasively explain in significant detail why Petitioners' proposed timing rule contravenes the MPPAA's text, precedent, and common sense. Pet. App. 1a–119a. Petitioners try to minimize those cogent analyses by criticizing a single sentence in one opinion referencing the MPPAA's general statement of purpose. Pet. 21–22 (citing Pet. App. 14a). If the decisions below turned exclusively on the MPPAA's general statement of purpose, perhaps that criticism would be warranted. But the analyses of the courts below go well beyond any statement of purpose. *See* Pet. App. 1a–119a. The court of appeals cited the statement of purpose merely as one part of its larger discussion of why the Second Circuit's decision in *Metz* was wrong. Pet. App. 14a.

Petitioners mischaracterize the decisions below as permitting the Fund's actuary to employ assumptions that it "disbelieved" on the measurement date. Pet. 20 (emphasis omitted). That is false. The actuary in this case used a 7.5% discount rate when calculating the plan's UVBs for the 2016 plan year. Pet App. 7a. In other words, a 7.5% discount rate was a component of the assumptions representing the actuary's best estimate of the plan's anticipated experience as of December 31, 2016. *Id.* That does

[9] *Available at* http://www.actuarialstandardsboard.org/standards-of-practice

not mean that on the December 31, 2017 measurement date, the actuary continued to believe that a 7.5% discount rate represented its best estimate of the plan's anticipated experience. It was not until January 2018 that the actuary addressed the appropriate assumptions for the 2017 plan year, and at that point, it selected a 6.5% discount rate. Pet. App. 7a–8a. Petitioners seem to think that once an actuary selects an assumption, it continues to "believe" in that assumption until it selects a different one. But that is not how the MPPAA works. Actuaries select assumptions when they calculate a plan's UVBs as of a certain date, 29 U.S.C. § 1393(a), but those assumptions do not "remain in effect" after the calculations are completed.

Petitioners suggest that their timing rule is necessary to prevent plans from manipulating actuaries into selecting assumptions that will maximize withdrawal liability. *E.g.*, Pet. 11–12. But the MPPAA already provides a remedy if any such manipulation occurs: An employer can challenge its withdrawal liability calculation on the ground that it was based on assumptions that do not represent the actuary's best estimate of the plan's anticipated experience. *See* 29 U.S.C. § 1393(a); *Energy W.*, 39 F.4th at 738. Where "a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies," such as the deadline proposed by Petitioners here. *Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 16 (2017). In all events, Congress rejected any notion that actuaries are prone to manipulation, observing that they are "unbiased professional[s] whose [professional and regulatory]

obligations tend to moderate any claimed inclination to come down hard on withdrawing employers[.]" *Concrete Pipe*, 508 U.S. at 635.

Finally, the Petition's analogy to picking the winners of NCAA Tournament games after knowing the final scores of those games is inapt. *See* Pet. 22. An actuary's job is not to predict the outcome of a binary event but to select assumptions representing its best estimate of a plan's anticipated experience given the data in existence on a particular date. 29 U.S.C. § 1393(a)(1). A more apt analogy is asking a statistician to opine on the likelihood of a particular outcome after the final score is known. While the statistician may know the final score, he can still analyze what the most likely outcome would have been notwithstanding the actual result.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

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