No. 23-1209

IN THE

Supreme Court of the United States

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

Petitioners,

v.

TRUSTEES OF THE IAM PENSION FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. All parties were timely notified more than 10 days in advance of the intent to file this brief.

industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, like this one, involving issues of national concern to the business community.

The Chamber has a strong interest in promoting predictability and certainty for its many members who are now, or may be in the future, faced with withdrawal liability as contributing employers to a multiemployer pension plan. The decision below not only creates a direct and irreconcilable conflict with the Second Circuit on an important question of statutory interpretation, but also nullifies the ability of employers to make informed economic decisions about continued participation in multiemployer pension plans. Congress directed that a withdrawing employer's liability must be determined as of the end of the year before the withdrawal. Under the Second Circuit's rule, a plan must use the actuarial assumptions (and, in particular, its understanding of future interest rates) made as of that so-called "measurement date." But under the D.C. Circuit's decision, employers can no longer rely on the actuarial assumptions made by a plan's actuary by the end of a particular year. Instead, the decision allows the plan to make changes to such assumptions months or even years later, which can dramatically increase an employer's liability and effectively do so retroactively.

Even a small variation in the interest rate assumption can substantially alter the amount of withdrawal liability an employer owes upon exiting a plan. Timing is therefore critical because employers cannot withdraw from multiemployer pension plans

without agreement from their employees through negotiations with their collective-bargaining representative. An employer cannot meaningfully bargain for such an agreement without a fair estimate of its withdrawal liability, which is a critical factor in weighing the total cost of retirement benefits. And the circuit split guarantees not only that virtually every decision on employer withdrawal liability will be challenged, but also that employers will not be able to know in advance which legal rule will govern their liability. Given this direct circuit split and the importance to employers of accurately predicting the amount of withdrawal liability when making business decisions affecting them and their workforces, the Chamber urges the Court to grant certiorari to provide the certainty and stability that employers require.

SUMMARY OF THE ARGUMENT

The most important factor in determining an employer's withdrawal liability is the interest rate assumption used in calculating the unfunded vested benefits of a multiemployer pension plan. Even a small change in that rate can dramatically increase an employer's withdrawal liability, which can run into the millions—or even billions—of dollars. An employer's decision to withdraw requires careful analysis, using the latest information from the plan. Unexpected changes in withdrawal liability can effectively bankrupt small employers. It is therefore critical that employers be able to rely on the information and assumptions used and reported by the plan in advance of the actual withdrawal date. Yet in direct conflict with a decision of the Second Circuit, the D.C. Circuit held that the plan may use a different interest rate (or any other actuarial assumption) than that it adopted as of the end of the

prior year, which Congress mandated as the measurement date for the next year's withdrawal liability.

Without this Court's intervention, the current state of the law is untenable for the thousands of employers that participate in multiemployer pension plans and require predictability regarding the manner in which their potential withdrawal liability will be calculated. The D.C. Circuit's rejection of the Second Circuit's statutory interpretation undermines that predictability in two ways.

First, because the arbitrators who initially decide these disputes are not bound by any particular circuit's law, and because the broad venue provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") provide ample opportunities for forum-shopping in any judicial challenges to any arbitral decisions, the direct conflict between the D.C. and Second Circuits will ensure: that (1) virtually every decision on withdrawal liability will be challenged, and (2) employers cannot know in advance which rule will govern their liability. Further decisions from other courts will do nothing to rectify that unpredictability and, if anything, will only increase it.

Second, the D.C. Circuit's rule undermines much-needed certainty for employers by allowing enormous unforeseen withdrawal liability to be retroactively imposed potentially years *after* that withdrawal, in direct contravention of Congress's mandate that such liability be determined using actuarial assumptions as of the end of the year *before* that withdrawal. As the Second Circuit correctly held, such retroactive alteration in liability is contrary to Congress's intent. And it is untenable for employers, which need a predictable calculation of their potential withdrawal liability to make critical business decisions. Allowing

a plan to retroactively change course severely hampers a participating employer's ability to plan for the future. Participating in a multiemployer plan is a product of collective bargaining that involves give-and-take between the employer and the employees' bargaining representative. If a plan can retroactively change actuarial assumptions, then employers will be unable to effectively negotiate over crucial economic issues such as wages and benefits.

Finally, the issue is one of overriding importance to businesses with unionized workforces. Thousands of employers participate in multiemployer pension plans covering more than 10,000,000 workers. And the amount of potential withdrawal liability for underfunded plans is more than $87 billion, a number that could be many multiples higher depending on whether a plan is allowed, as the D.C. Circuit held, to change its actuarial assumptions after the measurement date. Moreover, the uncertainty in the law harms both employers and employees. It prevents employers from accurately predicting their withdrawal liability. This, in turn, requires employers to negotiate more conservatively with their workers, many of whom may wish to transition from a traditional defined benefit pension plan to a more flexible retirement plan such as a 401(k).

The Court should therefore grant certiorari, reverse the D.C. Circuit's judgment, and return predictability and certainty to this important legal issue affecting vast numbers of employers and employees and billions of dollars.

REASONS FOR GRANTING CERTIORARI

I. THE DIRECT CIRCUIT SPLIT WILL CAUSE INTOLERABLE UNCERTAINTY FOR EMPLOYERS AND EMPLOYEES.

A. The Circuits Are Irreconcilably Divided On A Pure Question Of Law.

Withdrawal liability is a statutory requirement, created when Congress amended ERISA through the Multiemployer Pension Plan Amendments Act ("MPPAA"). It was designed so that an employer exiting or withdrawing from a multiemployer pension plan would pay its fair share of any underfunding. *See Milwaukee Brewery Workers' Pension Plan* v. *Joseph Schlitz Brewing Co.*, 513 U.S. 414, 417-18 (1995). The withdrawal-liability scheme is meant to be fair to employers, to encourage them to join and stay in the plans while ensuring those who leave pay their share of liabilities. *See* Pet. App. 15a. There are limits to how much an employer has to pay, including allowances for installment payments that approximate the employer's annual contributions prior to withdrawing and a twenty-year limit on making such installment payments. *See* 29 U.S.C. § 1399(c)(1)(B), (C); U.S. Pension Benefit Guaranty Corporation ("PBGC"), Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014, 86 Fed. Reg. 1256, 1257 (Jan. 8, 2021).[2]

[2] To calculate unfunded vested benefits, an actuary must use certain assumptions about the rate of return on the assets, the mortality of plan beneficiaries, average age of retirement, and similar factors. *See United Mine Workers of Am. 1974 Pension Plan* v. *Energy W. Mining Co.*, 39 F.4th 730, 735 (D.C. Cir. 2022) ("*Energy West*"). These assumptions are referred to as "actuarial assumptions," of which the interest rate, also referred to as the discount rate, is the single biggest factor. *See id.* at 735-36.

The D.C. and Second Circuits decided the same pure question of statutory interpretation. Multiemployer plans can choose among certain reasonable methods of calculating withdrawal liability, but Congress decreed that the amount of unfunded vested benefits from which an employer's withdrawal liability is calculated must be determined "as of the end of the plan year preceding the plan year in which the employer withdraws." 29 U.S.C. § 1391(b)(2)(E)(i). This specified period is referred to as the "measurement date" and it can be up to a year before the employer's actual withdrawal date. *See Nat'l Ret. Fund* v. *Metz Culinary Mgmt., Inc.*, 946 F.3d 146, 148 (2d Cir. 2020) ("*Metz*").

At issue here is whether a plan (through its actuary) may select an actuarial assumption *after* the measurement date and retroactively apply it to an employer. The Second Circuit answered this question "no" and the D.C. Circuit answered it "yes." *Compare Metz*, 946 F.3d at 150-51, *with* Pet. App. 3a. The D.C. Circuit held that the Second Circuit's interpretation of the governing statute was "no[t] persuasive," and squarely rejected its holding in favor of a diametrically opposed one. Pet. App. 14a (citation omitted).

The conflict is thus clear, express, and irreconcilable. The Second Circuit held that the choice of actuarial assumptions must be made by the end of the measurement date, whereas the D.C. Circuit held that the choice of actuarial assumptions does not have to be made by the end of the measurement date. Employers, funds, and the arbitrators who initially decide these disputes are now faced with two wholly incompatible legal rulings.

B. The Circuit Split Makes It Impossible For Employers To Know Their Withdrawal Liability.

Only this Court can resolve this conflict, and awaiting further decisions from other courts will do nothing to provide the certainty that employers, plans, and arbitrators require. Disputes over withdrawal liability and, in particular, actuarial assumptions are subject to mandatory arbitration. *See* 29 U.S.C. § 1401(a)(1). Employers that wish to challenge an assumption, including its timing, cannot initiate that challenge in federal court. Rather, the process is drawn-out and requires the employer to initially request that the pension fund review any portion of the assessment. *See id.*; *see also id.* § 1399(b)(2). The employer then cannot proceed to mandatory arbitration until the plan responds to the request or four months have elapsed, whichever is earlier. *See id.* § 1401(a)(1). And employers cannot even start this challenge process until they receive the fund's withdrawal assessment, which can be years after the date of withdrawal.[3]

Even when the employer gets to arbitration, it will be impossible to predict how the arbitrator will rule on the timing issue. Arbitrators are not constrained by any particular appellate decisions, although they may view certain rulings as persuasive authority. The MPPAA's implementing regulations require arbitrators to "follow applicable law" but do not define the term "applicable" nor set forth a structure for

[3] For example, one pension fund sent an employer a notice of withdrawal-liability assessment nearly *seven years* after the employer's withdrawal. *See PACE Indus. Union-Mgmt. Pension Fund* v. *Troy Rubber Engraving Co.*, 805 F. Supp. 2d 451, 454 (M.D. Tenn. 2011).

applying precedent. *See* 29 C.F.R. § 4221.5(a). The regulations do, however, requires arbitrators to follow applicable law as embodied, in part, in "court decisions." *Id.* § 4221.5(a)(1). But unlike district courts, which must follow circuit precedent, arbitrators deciding withdrawal-liability cases are not so constricted. For example, in a recent arbitration decision, the arbitrator observed that he was not obligated to follow a holding reached by three separate circuit courts while noting that two district courts had held differently. American Arbitration Association Award at 23, *Pension, Hospitalization & Benefit Plan of the Elec. Indus. v. ConvergeOne Dedicated Servs., LLC*, No. 23-cv-8938 (S.D.N.Y. Oct. 11, 2023), ECF No. 1-1. And while the arbitrator gave the appellate rulings "considerable weight" in his decision, he also noted that there were no opposing appellate decisions. Now that there are two opposing circuit court decisions on the question presented here, the unpredictability of arbitrators' decisions on that issue has only increased.

That unpredictability is magnified by the fact that, although either party to an arbitration has the right to challenge the arbitrator's ruling in district court, it is impossible to know in advance where such an action will be brought. Under the MPPAA, a party has only thirty days to challenge or enforce an arbitration decision in federal court. *See* 29 U.S.C. §§ 1401(b)(2), 1451(c). Because this window of time is so brief, both the winner and loser are incentivized to seek judicial review in their preferred forum.

Under the MPPAA's dispute-resolution process, an arbitral award can be challenged or enforced in "an appropriate United States District Court in accordance with [29 U.S.C. § 1451]." 29 U.S.C.

§ 1401(b)(2). Section 1451, in turn, provides that for withdrawal-liability challenges, the federal district courts of the United States have exclusive jurisdiction. But the venue for such challenges is broad: Actions to enforce or vacate an award "may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found." *Id.* § 1451(d). In cases where the determination date for the discount rate makes a difference, this may result in a fight or rush to file for employers that do business throughout the country. Employers will want to file in the Second Circuit, and plans will want to file in the D.C. Circuit.

Unless this Court resolves the issue now, this uncertainty virtually ensures that all plan decisions on the timing issue will be challenged in arbitration and that all arbitrators' decisions will be challenged in court. And given the inability to predict an arbitrator's decision and the gamesmanship incentivized by ERISA's broad venue provision, there is no benefit to this Court awaiting further circuit court decisions before resolving the already-existing conflict. Regardless of how any future court might rule, no employer can know in advance which rule will govern its withdrawal liability. Moreover, because the multilevel dispute-resolution process can take years to resolve—often after significant delay in receiving a fund's decision on the amount of liability—employers must bear the risk of potentially enormous liability that could be retroactively imposed many years later.

In sum, given the diametrically opposed positions of the Second and D.C. Circuits, neither employers nor plans can know in advance which rule will ultimately

govern withdrawal liability. Further, given how such liability is challenged, arbitrated, and litigated, the ultimate resolution many take many years, wasting valuable employer resources and prolonging the uncertainty that prevents employers from effectively planning for the future. This Court should grant certiorari to establish certainty that will benefit employers and employees alike and reduce costly and time-consuming litigation.

II. THE D.C. CIRCUIT'S DECISION IS INCONSISTENT WITH CONGRESS'S INTENT TO PROVIDE EMPLOYERS A DATE CERTAIN FOR DETERMINING THEIR WITHDRAWAL LIABILITY.

In addition to creating intolerable unpredictability and uncertainty by breaking from the Second Circuit, the D.C. Circuit's decision will magnify that uncertainty by authorizing potentially enormous retroactive withdrawal liability on employers who will have no ability to plan for it. For example, in *Metz*, a pension fund made a post-year measurement change to the discount rate that nearly *quadrupled* the employer's withdrawal liability. 946 F.3d at 148-49.

Contrary to the Second Circuit, the D.C. Circuit focused, in part, on broad policy declarations of the MPPAA. *See* Pet. App. 14a. A closer review of these policies, however, actually undermines the D.C. Circuit's ruling. The MPPAA's objectives are to "foster and facilitate interstate commerce" and "alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans." 29 U.S.C. § 1001a(c)(1)-(2). Having a date certain upon which an employer can rely in determining the amount of withdrawal liability meets these objectives without sacrificing predictability.

The same cannot be said of the D.C. Circuit's decision, which allows plans to change key actuarial assumptions months or even years down the road.

When drafting the MPPAA, Congress considered several possibilities about the measurement date, moving it between the last day of the year before withdrawal to the last day of the withdrawal year before decidedly fixing it where it resides today: the end of the year preceding the withdrawal. *See Schlitz*, 513 U.S. at 429-430 (discussing legislative history relevant to the measurement date referred to by the Court as the valuation date). That Congress specifically chose to set the measurement date at a time *before* the withdrawal instead of setting it on the date of withdrawal or at the end of the year of withdrawal shows Congress's intent to fix a date certain for the measurement of an employer's withdrawal liability before the actual withdrawal. This allows employers to plan ahead with a reasonable estimate of their eventual withdrawal liability. Yet the D.C. Circuit held that a plan can change key actuarial assumptions that underlie a withdrawal-liability calculation *after* the measurement date has come and gone.

This rule undermines the predictability Congress intended when it set a date certain for the measurement of withdrawal liability. By specifically considering—and ultimately rejecting—a measurement date set at the end of the withdrawal year, Congress removed the uncertainty that would have resulted if an employer withdrew before knowing definitively the critical information needed to accurately estimate its withdrawal liability.

Employers need certainty when making business decisions. If the decision below is allowed to stand, it

will increase employer withdrawals and discourage future participation by new employers—which will further undermine the stability of multiemployer pension plans. No employer will want to join a multiemployer plan knowing that the plan can change the discount rate, and therefore increase withdrawal liability, after the measurement date and even after an employer's date of withdrawal. The change in discount rate is no small issue, as the amounts in the underlying cases demonstrate. *See, e.g.*, Pet. App. 23a-24a (decrease in discount rate increased unfunded vested benefits calculation from $448 million to $3 billion).

The MPPAA's withdrawal liability provisions were drafted so as not to surprise withdrawing employers. Employers are entitled not only to an estimate of their withdrawal liability every twelve months, but also to a vast array of relevant financial and actuarial information about a plan. *See* 29 U.S.C. § 1021(k)(1), (*l*). The MPPAA requires the use of specific methods of calculating withdrawal liability. *See generally id.* § 1391. Plans are not free to unilaterally impose their own method. *See id.* § 1391(a). The MPPAA also prohibits plans from retroactively applying plan rules and amendments after an employer's withdrawal and further requires those rules and amendments be applied uniformly to employers. *See id.* § 1394. While each of these provisions addresses a different part of withdrawal liability, they each demonstrate Congress's intent to give employers certainty in understanding and calculating withdrawal liability.

This desire for certainty underpins the MPPAA's entire system for calculating, assessing, and collecting withdrawal liability. As *Metz* demonstrates, an employer that withdraws in one year should be able to

rely, in calculating its expected withdrawal liability, on the discount rate adopted and unchanged by the plan as of the measurement date at the end of the prior year. *See* 946 F.3d at 150-51. It would contravene Congress's intent to foster certainty and predictability if a company suddenly faced a substantial increase in withdrawal liability because the plan retroactively applied a new discount rate to its calculation of an employer's liability, even where the discount rate changed long after the employer's withdrawal.

III. THE QUESTION IS IMPORTANT AND WILL AFFECT LARGE NUMBERS OF COMPANIES AND WORKERS AND BILLIONS OF DOLLARS IN POTENTIAL WITHDRAWAL LIABILITY.

The D.C. Circuit's decision to allow for retroactive discount rate assumptions undermines the stability of multiemployer plan participation, thereby harming both participating employers and the plans. As of 2017, there were more than 117,000 employers that contributed to multiemployer pension plans, and more than 60% of plans experienced withdrawals.[4] As of 2023, there were about 1,360 multiemployer plans covering approximately 11 million participants and beneficiaries.[5] These plans had an estimated aggregate total underfunding of $87 billion as calculated using minimum funding actuarial assumptions. *See* Tim Connor et al., *Multiemployer Pension Funding*

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[4] *See* Lisa Schilling et al., *Employer Withdrawal Activity Overview: U.S. Multiemployer Pension Plans*, Soc'y of Actuaries, at 3, 8 (Table 1) (Mar. 2019) (https://tinyurl.com/3ba7uj4p).

[5] PBGC, *2023 Annual Report* 3 (Nov. 15, 2023) (https://tinyurl.com/c9pvfc5k).

Study: Year-end 2023, Milliman at 1 fig.1 (Feb. 2024) (https://tinyurl.com/3mh5fkep). Given that many plans use lower discount rates to determine withdrawal liability, *see Energy West*, 39 F.4th at 743, that liability is even larger than the underfunding. And if plans are allowed to change those discount rates after the fact, as the D.C. Circuit has held, the total potential withdrawal liability could be far higher.

The D.C. Circuit's rule—and the fact that employers cannot know in advance whether their liability will be governed by it—will adversely affect the universal goal of stabilizing pension plans. The more uncertain continued participation in a plan becomes, the more likely it will be that employers will exit as soon as possible. In addition, this same uncertainty will strongly discourage any new employer participation in these plans. Both of these factors work against the stability of the plans, a key goal of Congress when it enacted the MPPAA.

Moreover, if the Court does not grant review and restore certainty to the law, there could be significant disruption to the desire of many union members to move away from the defined benefit pensions offered by their plans in favor of a defined contribution plan (such as a 401(k)). The trend towards defined contribution plans is driven by two issues: (1) the significant underfunding of traditional multiemployer pension plans, and (2) the desire of younger employees to have a portable benefit that they do not lose when they change jobs. *See* Lee Barney, *Challenges of Retirement Plans with Union Members*, Planadviser (June 16, 2015), (https://tinyurl.com/mr4dhvpx). The endemic underfunding necessarily leads to benefit cuts while at the same time requiring increasing levels of contributions for those reduced benefits.

Accordingly, to bargain over any desired changes, an employer has to know with reasonable certainty the cost of making the switch, *i.e.*, what will it cost to exit the multiemployer plan and how much that leaves to contribute to a defined contribution plan. The Second Circuit's decision allows for such planning to occur, to the benefit of employers and employees alike. The decision below, by contrast, does not. Not only does the D.C. Circuit's interpretation hinder bargaining in advance of the decision to terminate participation in the plan, but it also makes future bargaining difficult. There is no set statute of limitations for a plan's assessment of withdrawal liability. Rather, withdrawal liability is to be assessed "as soon as practicable." 29 U.S.C. § 1399(b)(1). Even if the MPPAA's six-year statute of limitations for actions to collect assessed withdrawal liability, 29 U.S.C. § 1451(f)(1), were applicable to the assessment of withdrawal liability, that is a considerable amount of time before a plan would require its actuaries to calculate withdrawal liability. And whether a withdrawal occurs is solely determined by the plan's trustees, who again may have at least six years to make their decision. Thus, under the D.C. Circuit's rule, an employer would have to bargain without knowing how much it will cost to leave the plan. And if those costs are unknown, it is more likely that an employer will need to be conservative in bargaining, leading to fewer benefits for employees and beneficiaries. Accordingly, without this Court's intervention, the ability of thousands of businesses to plan their operations will be impaired, and employee choices of alternative retirement options will be hindered.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari and reverse the judgment.

Respectfully submitted,

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