Nos. 25-1765 & 25-1766

IN THE
United States Court of Appeals for the Seventh Circuit

CONSUMERS CONCRETE CORP.,
Plaintiff-Appellee,

v.

CENTRAL STATES FUND, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Nos. 1:23-cv-02695, 1:23-cv-03005
Honorable LaShonda A. Hunt, District Judge, Presiding

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE AND AFFIRMANCE

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September 26, 2025

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1.1, counsel of record for *amicus curiae* states as follows:

1. I represent *amicus curiae* the Chamber of Commerce of the United States of America (the "Chamber").

2. The Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent company and has issued no stock.

3. Attorneys for the Chamber in this Court are Gregory Ossi of Norton Rose Fulbright LLP and Jordan Van Bokern and Mariel A. Brookins of the U.S. Chamber Litigation Center.

September 26, 2025

/s/ Gregory Ossi
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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[2] 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 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 fairness 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. Affirming the District Court's ruling ensures that employers will pay, and plans will receive, their fair share of assessed withdrawal liability. Employers that have partially withdrawn from a plan will be appropriately credited for such partial withdrawal in a subsequent partial or complete withdrawal. A reversal of that decision means that employers will be charged twice or more for the same liability and plans will receive an unintended windfall. In

2 No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

addition, when a contributing employer is suffering through economic difficulties that could result in the significant downsizing of its workforce, a reversal of the District Court's ruling will force employers to cease operations altogether and incur a complete withdrawal rather than continuing with reduced operations and incurring successive partial withdrawals that cost the employer double or triple the cost of the complete withdrawal. This result also harms the plan in the long-term as it suffers a permanent reduction in its contribution base. The Chamber has a strong interest in promoting fairness in assessing withdrawal liability, which will benefit plans and employers alike. It therefore urges the Court to affirm the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important question of statutory interpretation that two other Circuits have gotten wrong. Some parts of the law addressing multiemployer plans can be dense and difficult to understand, but stripped to its core, this particular issue is not, and it should be an easy decision. By analogy to tax law, the Employee Retirement Income Security Act ("ERISA")'s credit for partial withdrawal liability is akin to deciding whether to apply a tax credit against taxable income or the taxes owed on that income. Instead of taxable income and taxes, this case involves unfunded vested benefits and withdrawal liability. But the credit should work similarly. A taxpayer entitled to a tax credit applies that credit against the taxes it would otherwise owe, not the income that was used to calculate those taxes.

Similarly, ERISA provides that a partial withdrawal liability credit is applied to an employer's total withdrawal liability. *See* 29 U.S.C. § 1386(b)(1). Applying a partial withdrawal credit against unfunded vested benefits, as Defendant-Appellant Central States, Southeast and Southwest Areas Pension Fund (the "Fund") did here, is like applying a tax credit against a preliminary step in calculating your current obligation, which makes no sense.

In this statutory scheme, an employer withdrawing from a multiemployer pension plan calculates its obligations by starting with its share of the pension fund's "unfunded vested benefits," then "adjust[s]" that figure to arrive at what "[t]he withdrawal liability … is" as the final figure after those adjustments. 29 U.S.C. § 1381(b)(1). If the prior withdrawal was only partial and the employer engages in another withdrawal from the plan, the employer's new "withdrawal liability"—not its share of unfunded vested benefits—"shall be reduced by the amount of any partial withdrawal liability" from a previous year. 29 U.S.C. § 1386(b)(1). So, the employer's share of unfunded vested benefits is similar to your taxable income—a figure you arrive at before determining your taxes owed—whereas an employer's "withdrawal liability" is the end product of calculating its obligations, similar to your taxes owed. If the tax code gives you a credit against your taxes owed, do you reduce your taxable income by that credit amount, or do you reduce your taxes owed?

The tax code states that you apply a tax credit against your taxes. Similarly, ERISA states that you apply a partial withdrawal liability credit against your withdrawal liability. 29 U.S.C. § 1386(b)(1). Applying a partial withdrawal credit against unfunded vested benefits is exactly like applying a tax credit against your taxable income—effectively meaningless. And just as the IRS agrees that tax credits apply against taxes, so too does the Pension Benefit Guaranty Corporation ("PBGC")—the agency that interprets laws relating to withdrawal liability—agree that a partial withdrawal liability credit should apply to withdrawal liability.

The partial withdrawal liability credit is a feature of the intricate laws that govern participation in multiemployer pension plans. Based on a multitude of factors, an employer's participation level in a multiemployer pension plan can drop over time. If the drop is steep enough (29 U.S.C. § 1385(b)(1), referred to as a "70-percent decline"), or in a certain area where the employer continues to work but no longer contributes to the plan for such work (*id.* § 1385(b)(2), referred to as a "partial cessation"), the employer may incur what is called a "partial withdrawal," resulting in the employer owing partial withdrawal liability to a plan. In contrast, an employer that no longer has any obligation to contribute to a plan incurs what is called a "complete withdrawal." Often, based on how a partial withdrawal is triggered, an employer may face a series of partial withdrawals for several years in a row. Because a series of partial withdrawals would otherwise result in the withdrawing employer paying for the same unfunded vested benefits again and again for each partial withdrawal, Congress created the partial withdrawal credit.

The partial withdrawal liability credit is determined based on the amount of prior partial withdrawal liability. 29 U.S.C. § 1386(b)(1). That prior withdrawal liability was calculated by using the employer's share of unfunded vested benefits as a starting point and then "adjust[ing]" the figure in several ways, most notably by amortizing the sum and capping both the monthly payment and the number of payments. *Id.* § 1381(b)(1)(C). The significance of this is that the prior withdrawal liability—and thus the credit amount against a subsequent withdrawal liability—is not the same as the employer's prior share of unfunded vested benefits. This can be a significant difference, such as in this case: Plaintiff-Appellee Consumers Concrete Corp. ("Consumers Concrete")'s partial withdrawal liability for 2017 was the present value of 240 monthly payments of $42,212.04, or between $6.4 million and $7.7 million, while its share of the unfunded vested benefits was $19.8 million adjusted by the partial prorate to $11.3 million. Appellee's Br. at 9-10.

Certain plans, like the Fund, disregard the plain language of the law and apply the credit for a prior partial withdrawal against the employer's allocation of unfunded vested benefits—that is, at the beginning of the process for calculating withdrawal liability, before the adjustment process that sets what the employer's withdrawal liability is. This guarantees that the employer will receive little or no value for the credit, because it will reduce only the pre-amortization figure in the calculation process, and that amortization step so substantially cuts down potential liability that an employer is unlikely to benefit from a credit that reduces only the pre-amortization figure. It is the proverbial apples to oranges comparison. The Fund applies the past result of all four steps of § 1381(b)(1) against the current results of only the first two steps of § 1381(b)(1).

The Fund defends this position by ignoring the plain language of the statute and PBGC's interpretation. Instead, it relies on contrary decisions by the Ninth and Eleventh Circuits. However, those opinions serve to demonstrate that the other Circuits fundamentally failed to understand the specific nature of the partial withdrawal liability credit—<u>the withdrawing employer does not have to pay for the same liabilities more than once</u>. A concept so clear that it is explicit in the statute and the regulations. The PBGC spells it out succinctly: "The purpose of the credit is to protect a withdrawing employer from being charged twice for the same unfunded vested benefits of the plan." 29 C.F.R. § 4206.1(a); *see also* 126 Cong. Rec. 20193 (July 29, 1980) ("[I]f withdrawal liability is determined on account of a partial withdrawal, the amount of the liability … <u>is applied as an offset against withdrawal liability</u> for any future withdrawal from the plan, whether partial or complete.") (emphasis added).

This Court and the Fund understood exactly how the credit worked in an earlier case about the calculation of the credit. *See generally Cent. States, Se. & Sw. Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605 (7th Cir. 2000) ("*Safeway*"). This Court recognized that the instructing statute for the application of the partial credit—29 U.S.C. § 1386(b)(1)—provided a "dollar-for-dollar credit." *Id.* at 612.[3] But in this case, the Fund completely ignores the mechanics of that partial credit statute and instead subverts the plain language of 29 U.S.C. § 1381(b)(1)(B) ("next, in the case of a partial withdrawal, in accordance with section 1386") into an order that the partial credit is to be applied to an employer's share of the unfunded vested benefits in order to determine its withdrawal liability. What Congress and ERISA require is that when there is a partial withdrawal, the plan must calculate what is referred to as the "partial prorate." The partial prorate is simply the fraction of unfunded vested benefits that should be used to determine the employer's partial withdrawal liability. But the Fund interprets this same provision to mean that it should also apply the partial credit at this stage of determining an employer's withdrawal liability. This makes absolutely no sense, and, as the District Court stated below: "[t]he Fund's reading [of § 1381(b)(1)(B)] renders that clause ["in the case of a partial withdrawal"] meaningless." Op. at 9 (CSPF Appx. at 012).

[3] PBGC regulations would change this to a credit that phases out over time but the concept of reducing withdrawal liability dollar for withdrawal liability dollar is the same. *See Safeway*, 229 F.3d at 612.

There should be no argument about how the credit is applied under the statute, but the Fund and other similarly situated multiemployer plans ignore the plain text of the law to collect more withdrawal liability than they are actually owed. They do this by applying the partial withdrawal credit to the employer's allocation of unfunded vested benefits rather than to the employer's withdrawal liability. For plans like the Fund, an employer's allocated unfunded vested benefits is a significant multiple of the employer's actual withdrawal liability—mainly because withdrawal liability is paid by annual installments set by statutory formula to mimic the employer's average annual contribution amounts to the plan and limited to twenty years of total payments (referred to as the "20-year cap").

The MPPAA defines withdrawal liability as the allocated unfunded vested benefits reduced by four steps, including the 20-year cap. See 29 U.S.C. 1381(b)(1). The plain language of § 1386(b)(1) requires that the partial withdrawal credit be applied to withdrawal liability. The Fund argues that the partial withdrawal credit is applied to the employer's allocated unfunded vested benefits. But such argument effectively eliminates the partial withdrawal credit. Again, by analogy, it is just like the difference between a tax deduction and a tax credit. A tax credit is not applied to taxable income; the credit is applied to the actual tax. This is a case where the law, basic fairness, and sound policy all point in the same direction—affirmance of the decision below and rejection of partial credit manipulation.

ARGUMENT

I. THE FUND'S POSITION UNDERMINES ERISA'S STRUCTURAL PROTECTIONS FOR EMPLOYERS INCURRING A PARTIAL WITHDRAWAL

The Chamber agrees with Consumers Concrete's statutory analysis, which demonstrates that the Fund is not permitted to apply the credit for prior partial withdrawals against the unfunded vested benefits of the plan. The Fund's decision to apply the credit at this stage effectively minimizes or eliminates the credit altogether.

The Chamber writes separately to explain that the Fund's position fundamentally alters ERISA's design. Congress created an appropriate balance for withdrawing employers, requiring payments for the employer's share of underfunding but not to the employer's complete detriment. The Fund, however, would have this Court depart from ERISA's plain text and enact a regime where the employer has to pay twice or more for the same unfunded vested benefits. The Court should reject the Fund's approach and apply the statute as intended and written: the credit for a prior partial withdrawal should apply to the employer's current amount of withdrawal liability, whether partial or complete, not the employer's share of unfunded vested benefits. Withdrawal liability and an employer's share of unfunded vested benefits are not the same thing. As defined by statute, withdrawal liability is the employer's share of the unfunded vested benefits that have been adjusted in accordance with certain steps, including a 20-year payment cap. Under the Fund's reading, there is no difference in meaning between two different terms: "unfunded vested benefits" and "withdrawal liability." The statute provides otherwise. The credit for partial withdrawal liability is unambiguously applied to the employer's total withdrawal liability, not the markedly different calculation of unfunded vested benefits.

A. Statutory Background.

The history of withdrawal liability starts with the passage of the Multiemployer Pension Plan Amendments Act ("MPPAA") to ERISA. Before the MPPAA, an employer could often exit an underfunded multiemployer pension plan without paying any additional amounts. The MPPAA created the concept of withdrawal liability—a statutory requirement for exiting plan employers to pay their fair share of any underfunding of the plan.

Applicable to this case, the MPPAA also created partial withdrawal liability to define those instances in which an employer had not fully exited the plan, but its diminished participation was sufficient enough that it be allocated a portion of its fair share of the underfunding of the plan. A partial withdrawal can occur through (i) a 70% decline in participation as measured in contribution base units (units of employee activity), *see* 29 U.S.C. § 1385(a)(1); or (ii) a partial cessation caused by the expiration of a collective bargaining agreement or cessation of contributions at a particular facility, where the employer continues to perform work in the jurisdiction covered by the plan, *see id.* § 1385(b). Importantly, with one rare exception not applicable here, Congress also capped an employer's withdrawal liability—*both* its partial withdrawal liability and its complete withdrawal liability—at no more than 20 annual payments, even if the full liability would otherwise require a longer amortization period. *See id.* § 1399(c)(1)(B); Appellee's Br. at 5-6.

As for the 70% decline rule, it reflects Congress's understanding there could be significant variation in participation from year to year, and accounts for such ups and downs while recognizing when the decline is more permanent. The 70% decline is measured over three consecutive years (the "testing period"), comparing what is called a "high base year" to each successive year. The high base year is the average of the two highest years of contributions in a five-year period immediately preceding the testing period. A partial withdrawal occurs if, during the testing period, each year's participation is less than 70% of the high base year's participation. Importantly, under the 70% decline rule employers often incur a succession of partial withdrawals. *See, e.g.*, *Safeway*, 229 F.3d at 617 (noting the possibility of successive partial withdrawals under a 70% decline). That is because the 70% decline is measured over a moving three-year window. Thus, an employer could trigger a partial withdrawal in one year due to a significant drop in participation, and then trigger subsequent partial withdrawals in later years if the decline for those years also meets or exceeds the 70% threshold over the new three-year period, as compared to the same high base year.

B. The Fund's Application of the Credit for Partial Withdrawals Eviscerates the Protection Against Double- or Triple-Charging the Employer for the Same Share of Unfunded Vested Benefits

A key purpose of the partial withdrawal liability credit is to avoid charging a withdrawing employer more than once for its share of the unfunded vested benefits of a plan. *See N.Y. Times Co. v. Newspaper & Mail Deliverers'-Publishers Pension Fund*, 303 F. Supp. 3d 236, 256 (S.D.N.Y. 2018) (ERISA created "a credit mechanism computation … to reduce a withdrawing employer's *withdrawal liability* by any liability incurred the previous year.") (emphasis added). However, the method used by the Fund, which applies the credit to the employer's share of the unfunded vested benefits instead of its withdrawal liability, will overcharge the employer for the same unfunded vested benefits, thereby resulting in the employer paying a higher amount for one or more partial withdrawals that end in a complete withdrawal than the employer would pay if it had completely withdrawn all at once. In other words, under the Fund's interpretation, the sum of an employer's partial withdrawals would exceed that of a complete withdrawal. That is nonsensical and contravenes § 1386(b)(1)'s plain language.

The absurdity of the Fund's position is illustrated by the facts of a recent case involving the Fund in the Northern District of Illinois, where an employer experienced several partial withdrawals followed by a complete withdrawal. *See generally Cent. States, Se. & Sw. Areas Pension Fund v. Allied Aviation Fueling Co. of St. Louis, LLC*, No. 21 CV 2821, 2025 WL 2524492 (N.D. Ill. Sept. 2, 2025). In that case, the employer (Allied) incurred a series of four partial withdrawals from a fund beginning in 2015. *See* Central States' Brief in Support of its Motion to Enforce in Part and Modify in Part the Award ("Central States' Br. ISO Mot. to Enforce"), Ex. A at 1 (Dkt. No. 67-1, PageID#724), *Cent. States*, No. 21 CV 2821 (N.D. Ill. Oct. 9, 2023) (attached as Exhibit 1).[4] For 2015, the Fund calculated Allied's partial withdrawal liability at approximately $56,000 per month for 20 years, applying the statutory 20-year amortization cap. *Id.*, Ex. C at 5 (Dkt. No. 67-3, PageID#761). The following year, 2016, Allied incurred another partial withdrawal, which resulted in additional liability of more than $48,000 per month, again for 20 years. *See id.*, Ex. D at 4-5 (Dkt. No. 67-4, PageID#773-74). Allied incurred yet another partial withdrawal in 2017, which resulted in additional liability of approximately $40,000 per month for 20 years. *Id.*, Ex. E at 5 at (Dkt. No. 67-5, PageID#788).

As in this case, the Fund did not credit Allied's withdrawal liability in any year with any prior partial liability amounts for prior years. Thus, the total liability for these three partial withdrawals was calculated at nearly $144,000 per month. *See*

[4] This case only involved the first three partial withdrawals and neither included the fourth partial nor the complete withdrawal liability details.

id., Central States' Br. ISO Mot. to Enforce at 5, 24 (Dkt. No. 67, PageID#702, 721). But Allied's liability for each year was based on the *same* unfunded vested benefits; the successive partial withdrawals were triggered only because Allied's participation for each year remained less than 70% of the same high base year. Indeed, Allied's withdrawal liability of $56,000 per month for 2015 reflected a *90%* drop in its participation for that year alone—nearly a complete withdrawal. *See id.*, Ex. C at 5 (Dkt. No. 67-3, PageID#761) (partial prorate fraction was .9047447879). And if Allied had incurred a complete withdrawal in 2015, its liability for that complete withdrawal would have been only $54,000.[5]

Yet using the same flawed methodology it used in this case, the Fund assessed Allied $144,000 per month for three partial withdrawals resulting in a near-complete withdrawal over three years, which is *two and a half times* the liability that Allied would have incurred if it had completely withdrawn in the first year. The Fund's interpretation thus results in exactly what Congress intended to prevent when it mandated credits for prior partial withdrawal liability: an employer paying multiple

5 A complete withdrawal in plan year 2015 is determined as of the end of plan year 2014. *See Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995) (employers withdrawal liability is calculated as of the last day of the plan year preceding the year of withdrawal). In 2014, Allied's highest contribution rate was $148.8, and its highest 3-year average of CBUs was 4,318.67. *See* Central States' Br. ISO Mot. to Enforce, Ex. E at 5 (Dkt. No. 67-5, PageID#788), *Cent. States*, No. 21 CV 2821 (N.D. Ill. Oct. 9, 2023). Multiplying these two numbers results in $642,618.1 which divided into 12 equal monthly payments is $53,552.

times for the *same* unfunded vested benefits. It cannot be that a succession of three partial withdrawals requires an employer to pay significantly more than if the employer incurred a complete withdrawal in that same three-year period. As next shown, the statute unambiguously precludes that unfair result.

C. The Plain Language of the Statute Requires an Employer's Credit for Prior Partial Withdrawals to Be Applied to Its Withdrawal Liability, Not Its Share of Unfunded Vested Benefits.

1. Section 1386(b)(1) Has Clear Instructions For How and When the Credit Is to be Applied.

The statutory language makes clear that past withdrawal liability offsets new withdrawal liability, not merely the unfunded vested benefits that are eventually adjusted to be withdrawal liability. The partial withdrawal liability credit is established under § 1386(b)(1), which reads in pertinent part: "In the case of an employer that has *withdrawal liability* for a partial withdrawal from a plan, any *withdrawal liability* of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any *partial withdrawal liability* (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year." (emphasis added). Nowhere in this section is the term "unfunded vested benefits" used—only withdrawal liability. Yet, the Fund improperly read into this language that the unfunded vested benefits are to be reduced by the credit for prior partial withdrawal. It is simply wrong.

In creating the MPPAA as a new part of ERISA, Congress carefully distinguished the two concepts of allocable unfunded vested benefits and withdrawal liability. They do not mean the same thing and are not interchangeable. As the court in *Board of Trustees of IBT Local 863 Pension Fund v. C&S Wholesale Grocers Inc./Woodbridge Logistics LLC*, explained while reviewing the legislative history, "an employer's withdrawal liability and allocable amount of unfunded vested benefits are not synonymous." 5 F. Supp. 3d 707, 724 (D.N.J. 2014), *aff'd*, 802 F.3d 534 (3d Cir. 2015). When Congress uses a specific word, it does so intentionally. *See, e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what is says there."); *Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 395 (2015) (holding that "when Congress used the phrase 'specifically prohibited by law' instead of 'specifically prohibited by law, rule, or regulation,'" it did so purposely and "meant to exclude rules and regulations").

That these two terms are not used interchangeably under ERISA is reinforced by other withdrawal liability determinations, such as the amount an employer must pay if it is held to be in default. In the event of a default, a plan "may require immediate payment of the outstanding amount of an employer's *withdrawal liability*." 29 U.S.C. § 1399(c)(5) (emphasis added). In a recent case, the Fund defaulted an employer and demanded the immediate payment of the defaulted employer's entire allocation of unfunded vested benefits, labeling the entire amount of the unfunded vested benefits as the accelerated "withdrawal liability" due in that case. *See In re Yellow Corp.*, No. 23-11069, 2024 WL 4925124, at *15-16 (Bankr. D. Del. Nov. 5, 2024), *aff'd*, --- F.4th ---, 2025 WL 2647752 (3d Cir. Sept. 16, 2025). The court, however, rejected the Fund's contention, holding that the two terms are not synonymous. The court held instead that withdrawal liability is only determined after adjusting the unfunded vested benefits according to 29 U.S.C. § 1381. *Id.*[6] In *Yellow*, the court held that the employer's withdrawal liability was determined only after applying the 20-year cap (step three as required by § 1381(b)(1)(C)). *Id.* This is exactly what Consumers Concrete and the Chamber are arguing: that the credit from the partial withdrawal must be applied to Consumers Concrete's withdrawal

6 The *Yellow* decision appears to mistakenly refer to the steps as part of § 1399, but the correct citation is § 1381.

liability, *i.e.*, the liability after applying all four steps under § 1381(b)(1), including the 20-year cap to the unfunded vested benefits (step three).[7]

In its briefing, the Fund does not address the difference between the terms "withdrawal liability" and "unfunded vested benefits." Rather, it attempts to explain this difference away by noting that § 1386(a) does not reference unfunded vested benefits but rather the more generic term "liability." *See* Appellant's Br. at 18. It argues that the fact that § 1386(b)(1) specifically references withdrawal liability is of no consequence because under 1386(a), "'withdrawal liability' is the 'amount' for which the employer is 'liable to the plan.'" *Id.* (citing *Perfection Bakeries Inc v. Retail Wholesale & Dep't Store Int'l Union & Indus. Pension Fund,* 147 F.4th 1314, 2025 WL 2180489, at *5 (11th Cir. 2025)). This is incorrect. Nowhere in § 1386 does the statute say "liable to the plan" or anything close to that. Rather, § 1386(a) provides that the amount of an employer's partial withdrawal liability is initially calculated "before the application of sections 1399(c)(1) and 1405 of this title" (*i.e.*, before the application of steps three and four under § 1381(b)(1)). If the Fund were correct in that § 1386(a) sets forth the "amount for which the employer is liable to

[7] The dissent in *Perfection Bakeries* states that, reading the text of §§ 1386, 1381, and the rest of the statute together as a plan sponsor, there can be no doubt that "in a statute as complex as this one, Congress used the words 'withdrawal liability' as it had defined the term—to refer to the amount calculated after the application of the four steps in section 1381." 147 F.4th at 1327 (Brasher, J., dissenting).

the plan," then § 1386(a) would also need to have a specific reference to the credit as determined by § 1386(b)(1), which it does not.

2. The Fund Ignores the Plain Instruction of Section 1381(b)(1) And Its Intent to Require Prorating the Unfunded Vested Benefits Based on a Fractional Equivalent of the Employers Reduction in Contributions

Section 1381(b)(1) is, at its heart, a mathematical equation. Withdrawal liability *equals* the employer's share of unfunded vested benefits *minus* any de minimis reduction *multiplied* by the partial prorate (but only if there is partial withdrawal) *minus* the amount greater than the 20-year cap *minus* any amount greater than liquidation value (but only for extremely limited circumstances not relevant here). What the Fund and the arbitrator have done is to change this equation (and rewrite the statute) for purposes of applying any credit for a prior partial withdrawal. Under that flawed interpretation, withdrawal liability *equals* the employer's share of unfunded vested benefits, period.

The Fund argues that when Congress stated in step two of § 1381 "in the case of a partial withdrawal" it also meant, without any explicit instruction, that the partial credit should be applied at this step, notwithstanding its careful and clear instruction in § 1386(b)(1) that the credit applies against an employer's *withdrawal liability*.

This argument makes no sense in context with the whole of the MPPAA. First, there is no question that the Fund cannot ignore "in the case of a partial withdrawal" the partial prorate required by § 1386(a) and simply require the withdrawing employer pay as if it completely withdrew from the Fund. Rather, the Fund, following § 1381(b)(1)(B), applies a prorated fraction to the unfunded vested benefits as set forth in the statute.

This is an important distinction because the Fund relies on Ninth and Eleventh Circuit cases for the proposition that the partial credit is taken at step two of the process of determining an employer's withdrawal liability. *See* Appellant's Br. at 12. (citing *GCIU-Emp. Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, 1219 (9th Cir. 2018); *Perfection Bakeries,* 147 F.4th at 1322). The courts in *Quad/Graphics* and *Perfection Bakeries* simply got it wrong. For example, the *Quad/Graphics* court stated that "[t]he statute unambiguously provides that first after calculating the employer's complete withdrawal liability (and making any adjustment required under § 1381(b)(1)(A) …), any adjustment for a partial withdrawal required by § 1386 comes 'next.'" 909 F.3d at 1218. But the court's paraphrasing misses the all-important modifier "in the case of a partial withdrawal." The court reads this modifier out of the statute and breaks an important canon of statutory construction that all of the words in a statute must be given effect. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ….") (citation omitted).

Similarly, the Eleventh Circuit in *Perfection Bakeries* erroneously held that "[s]ubsection 1381(b)(1)(B) refers on its face to all of 'section 1386'—not just half of it." 147 F.4th at 1318. It made this determination through the use of "textual clues." *Id.* But what the court ignored, as the dissent makes clear, is that to apply the credit at step two means that the credit will not be used to "directly 'reduc[e]' the employer's 'withdrawal liability.'" *Id.* at 1327 (Brasher, J., dissenting). The majority in *Perfection Bakeries* missed entirely the reason behind the credit—not to double charge the employer for the same unfunded vested benefits.

Step two of § 1381(b)(1) only applies "in the case of a partial withdrawal." To read this requirement out of the statute would render it superfluous, as the language would then be the same as just saying: "next, in the accordance with § 1386." So, there must be meaning attributable to the phrase "in case of a partial withdrawal" and the only possible meaning is that § 1386 applies at step two only if the plan is determining the partial prorate for a partial withdrawal. This is because Congress has stated that the partial credit applies equally to partial and complete withdrawals. 29 U.S.C. § 1386(b)(1) ("[A]ny withdrawal liability of that employer <u>for a partial or complete withdrawal</u> from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability.") (emphasis added).

This is the only logical conclusion that gives meaning to the phrase. If the credit were to be applied at this step, § 1381(b)(1)(B) would need to read "next, in the accordance with § 1386" so that it would include complete withdrawals or "next, in the case where the employer has a partial withdrawal liability credit." But it does not. The Fund argues that § 1381(b)(1)(B)'s reference to § 1386, without specifying 1386(a), in contrast to § 1381(b)(1)(C)'s specific reference to § 1399(c)(1)(B), means that Congress meant to include § 1386(b)(1) as part of step two. Appellant's Br. at 14-15 (citing *Perfection Bakeries*, 2025 WL 2180489, at *4; *Russello*, 464 U.S. at 23). But, using the same logic of the Fund, to give meaning to Congress's direction "in the case of a partial withdrawal" means that step two, the whole of § 1386, does not apply in the case of a complete withdrawal. But such a reading is in direct contradiction to the instruction of § 1386(b)(1) that requires the partial credit be applied to both partial and complete withdrawals. Thus, the only way to give meaning to all of applicable statutes is to only apply the partial prorate of § 1386(a) at step two of § 1381(b)(1).

II. THE PBGC ITSELF AGREES THAT THE PARTIAL WITHDRAWAL LIABILITY CREDIT IS TO BE APPLIED ONLY AFTER APPLYING THE ADJUSTMENTS REQUIRED BY SECTION 1381(B)(1).

It is telling that the PBGC, the agency charged with issuing opinion letters on the interpretation of the MPPAA, has long agreed with the position taken by Consumers Concrete. The PBGC issues opinion letters to advise the public of its views of the meaning of the provisions of Title IV of ERISA,[8] and the PBGC has unequivocally stated that the credit for a prior partial withdrawal is to be applied after all of the other steps under Section 1381 have been taken. Pension Benefit Guar. Corp., Opinion Letter No. 85-4, 1985 WL 32704 (Jan. 30, 1985) ("PBGC Opinion Letter 85-4"). Specifically, the PBGC explains that the term "withdrawal liability" is the result of adjusting the employer's share of the unfunded vested benefits the four steps in 1381. PBGC Opinion Letter 85-4 at *1. The PBGC then goes on to explain why the partial credit must be applied to withdrawal liability to comply with the instructions set out by Congress in 1386(b)(1). *Id.* The PBGC has never presented any guidance, authored any brief, or taken any position that contradicts this opinion in the nearly 40 years since it was published. The Fund proposes to unsettle these long-held employer expectations in favor of a textual interpretation of the statute that undermines the statutory structure and produces a windfall for the Fund.

Moreover, Segal, an actuarial firm that "provides actuarial services to more multiemployer pension plans than any other consulting firm,"[9] followed the PBGC

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[8] *See Opinion letters*, Pension Benefit Guar. Corp., https://tinyurl.com/msdknrzx (last updated June 2, 2021).

[9] *See* Letter from Susan L. Boyle et al., Segal, to Regul. Affairs Div., Off. of the Gen. Couns., Pension Benefit Guar. Corp. (Dec. 13, 2022), https://tinyurl.com/ycwwkdz5.

guidance for the plan until the *Quad/Graphics* decision. *See Perfection Bakeries*, 147 F.4th at 1323 (Brasher, J., dissenting); *see also* Ex. 8B, Minutes of the Pension Fund Board of Trustees meetings: December 10-12, 2018 (Dkt. No. 31-16), *Perfection Bakeries, Inc. v. Retail Wholesale & Dep't Store Int'l Union & Indus. Pension Fund*, No. 22-cv-00573, 2023 WL 4412165 (N.D. Ala. July 7, 2023) (attached as Exhibit 2). After *Quad/Graphics*, Segal advised the plan to change their long-established method of crediting prior partial withdrawal liability <u>after</u> the adjustment for the 20-year cap to crediting prior partial withdrawal <u>before</u> the adjustment for the 20-year cap. *Id.*

This demonstrates why the Fund's method for applying the credit to the unfunded vested benefits is directly contrary to the law and this Court's prior decision in *Safeway*. 229 F.3d at 605. As this Court stated, "[i]n order to deal with the possibility that withdrawing employer could be overburdened by application of the MPPAA partial withdrawal formula, Congress provided a credit mechanism for partial withdrawal liability." *Id.* at 612. This was initially a simple dollar-for-dollar credit that became a dollar-for-phased-out-dollar after the PBGC issued final regulations in 1992. *Id.* The phase-out occurs so that it "roughly captures" the change in unfunded vested benefits. *Id.* If the credit were to be applied to the unfunded vested benefits, as the Fund argues here, then there would be no need to capture any changes to the unfunded vested benefits.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling requiring the Fund to apply the credit for Consumers Concrete's prior partial withdrawal against Consumers Concrete's complete withdrawal liability which is calculated only after the four adjustments in § 1381(b)(1) have been applied to the unfunded vested benefits.

September 26, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

September 26, 2025

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Seventh Circuit Rule 29 because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6105 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman typeface.

September 26, 2025

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