No. 22-432

IN THE

Supreme Court of the United States

RIETH-RILEY CONSTRUCTION CO., INC.,
Petitioner,

v.

OPERATING ENGINEERS' LOCAL 324
FRINGE BENEFIT FUNDS, ET. AL.,
Respondents.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Applying *Laborers Health & Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the Sixth Circuit held that federal courts have jurisdiction under ERISA § 515 over Respondents' claims premised on good faith assertions that independent, live agreements bind Petitioner, and that the question whether an enforceable contract exists is a "merits" issue to be decided on remand. Petitioner seeks review based primarily on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) and the *Garmon* preemption doctrine. The questions presented are:

1. Whether the question presented and arguments in the petition were not raised, preserved, or developed in the lower court, where *Garmon* and *Garmon* preemption were not even argued by Petitioner in the Court of Appeals?

2. Whether the Court of Appeals engaged in a correct and straightforward analysis and application of *Advanced Lightweight* consistent with other circuit courts of appeals faced with the same issue?

3. Whether this case is an inappropriate vehicle to review Petitioner's question presented, where (a) post-remand discovery has conclusively established that a factual conclusion underpinning the district court's prior decision (*i.e.* that the Funds allegedly already were pursuing contribution claims against Petitioner before the NLRB) is incorrect, (b) the case has not yet been decided on the merits, but will be on remand, where discovery already has been completed and Rule 56 summary judgment motions are pending; and (c) the conclusion of the district court proceedings will moot the Petition and be appealable at that time on the complete record?

CORPORATE DISCLOSURE STATEMENT

None of the Respondents is a subsidiary or affiliate of a publicly owned corporation, and no publicly held company owns 10% or more of the stock of any of the Respondents. No other publicly owned corporation or its affiliate has a substantial financial interest in the outcome of the litigation.

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STATEMENT OF THE CASE

A. Relevant facts and procedural history

The Respondents, Operating Engineers' Local 324 Fringe Benefit Funds (the "Funds"), brought this action against Petitioner, a contributing employer to the Funds, after Petitioner refused to comply with a fund audit. Pet. App. 6-7. The Funds' claims were brought under § 502 and § 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 and § 1145, and § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and seek to compel Petitioner to comply with the audit and to pay any delinquent contributions determined to be owing by the audit. Pet. App. 7, 25. Multiemployer fund audit rights are important and enforceable. *Cent. States Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559 (1985).

Although the collective bargaining agreement ("CBA") at issue in this case expired effective May 31, 2018, Petitioner continued to contribute to the Funds from and after that date. Along with each of its contribution payments after expiration of the CBA, Petitioner submitted separate Fringe Benefit Reports ("Reports") to the Funds which stated the names of employees, the hours they worked, and the wages they earned. Pet. App. 22. Each of the Reports also included a certification by Petitioner certifying the accuracy of the information in the Report and an *express agreement* to be bound by the payment terms of the expired CBA[1] and to all terms of the Funds' Trust

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[1] Each Report was completed by Petitioner to identify the labor agreement and corresponding contribution rates under which contributions were being submitted. After expiration of the CBA, Petitioner continued to identify in the Reports the then expired CBA at issue, by name ("MITA Road"), and its corresponding contribution rates. *See, e.g.,* Exhibits to Funds' 6-22-

Agreements (which contain detailed fund audit obligations and procedures). The certifications in the Reports stated:

> By filing this report, the above-named Employer certifies the accuracy of information on the report and agrees to be bound by all terms of payment to the foregoing named Funds, as set forth in the current applicable Collective Bargaining Agreements between Operating Engineers Local 324 and Employer Associations, and to all the terms of the Trust Agreements of these funds.

Pet. App. 22-23.[2] It is undisputed that the Funds have accepted *all* Petitioner's contributions and Fringe Benefit Reports from and after the date of the CBA expiration. Pet. App. 7, 23-24.

There was a period of approximately four months after the CBA expired during which all the parties were operating under a mutually mistaken belief that the bargaining relationship between the parties had altogether terminated, and during which the Funds had refused to accept the contributions. Pet. App. 6-7, 23-24. It is undisputed that the Funds retroactively accepted all Petitioner's contributions and Re-

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21 Response to Motion to Dismiss, District Court Doc. 27-3–27-9, Page ID# 758–1493 & Funds' 12-19-22 SJ Motion, District Court Doc. 77-13 through 77-15, PageID# 3674-3928 (E.D. Mich. Case No. 20-10323).

[2] At the time of the district court decision at issue in the petition, Petitioner had submitted Reports and certifications with all its contribution payments to the Funds. From and after the time frame of the district court's opinion, Petitioner continued to submit contributions and Reports to the Funds, as set forth in the Funds' Rule 56 motion for summary judgment filed with the district court on remand on December 19, 2022. Fund SJ Motion, District Court Doc. 77, PageID# 3406-3434.

ports for that period without complaint (and has continued to do so going forward) after an old agreement was discovered stating that a 9(a) relationship existed between the Local 324 Union and Petitioner. Pet. App. 7, 23-24.

The Funds have *never* alleged in this case that Petitioner engaged in an unfair labor practice or violated the National Labor Relations Act ("NLRA"), but have *always* maintained that, post-CBA-expiration, Petitioner violated its contractual obligations (not simply those set forth in the expired collective bargaining agreement but also those in Fringe Benefit Reports executed by Petitioner and Trust Agreements to which Petitioner was bound). *E.g.,* Pet. App. 12, 22-23, 31, 33. The Funds have not alleged a violation of the NLRA's status quo obligation, Pet. App. 12, as Defendant *did* continue paying contributions after expiration of the CBA. The Funds simply seek an audit to determine if the contributions were made on behalf of the proper employees. *E.g.,* Pet. App. 7.

Before discovery had been completed, Pet. App. 37-38, Petitioner filed a motion to dismiss for lack of subject matter jurisdiction. Petitioner argued that there was no contractual basis for a contribution obligation for periods from June 1, 2018 forward, that the only contribution duty arose from statutory NLRA status quo obligations, and that under *Laborers Health & Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the National Labor Relations Board ("NLRB") had exclusive jurisdiction over the Funds' claims. Pet. App. 7.

The Funds opposed Petitioner's jurisdictional challenge. The Funds did not dispute that under *Advanced Lightweight*, federal courts lack jurisdiction to determine whether an employer's refusal to make contribu-

tions after expiration of a CBA violates the NLRA. *Advanced Lightweight* held that ERISA § 515 provides a remedy for a fund to collect "promised contributions," but not to enforce NLRA obligations. *Id.* at 549. The Funds argued that their claims were premised solely on promises and contractual obligations independent of Petitioners' NLRA obligations, Pet. App. 8, and that the Sixth Circuit, and other circuits, have consistently applied *Advanced Lightweight* to permit post-CBA-expiration ERISA claims in district courts where independent, contractual obligations or manifestations of assent continued to bind the employer after expiration. *E.g.,* Pet. App. 8, 10-11, 28-33; *Cent. States, Se. & Sw. Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454 (6th Cir. 1989); *Brown v C. Volante Corp*, 194 F.3d 351 (2d Cir. 1999); *Auto. Mech. Loc. 701 Welfare & Pension Funds v Vanguard Car Rental USA. Inc.,* 502 F.3d 740 (7th Cir. 2007); *Greater Kan. City Laborers Pension Fund v Superior Gen. Contractors, Inc.*, 104 F.3d 1050 (8th Cir. 1997).

The district court granted the motion to dismiss for lack of jurisdiction, rejected the Funds' argument that the motion was premature because discovery had not yet been provided or completed, and dismissed the Funds' pending motions on discovery issues as moot. Pet. App. 37-39. The district court held that the existence of a live contract was an "essential jurisdictional fact" that it had to "determine before proceeding forward." Pet. App. 8. The district court weighed the evidence and made judicial findings of fact. In doing so, the district court concluded and emphasized (by stating at *three* separate points in its opinion), that the Funds *already were pursuing post-contract contribution claims against Petitioner before the NLRB.* Pet. App. 18, 25, 32 (Petitioners have since *admitted* in discovery responses on remand that this conclusion

was *incorrect*). The district court also found that the certifications in Petitioner's post-expiration Fringe Benefit Reports were "boilerplate" and did not create post-CBA-expiration contract obligations. Pet. App. 22, 31-32. The district court concluded there was no independent agreement binding the parties, and that the only post-expiration contribution duty arose from Petitioner's statutory duty under the NLRA which *Advanced Lightweight* holds can be enforced only before the NLRB. Pet. App. 8, 26, 30-36.

The Funds appealed, arguing, *inter alia*, that it was inappropriate to dismiss the case for lack of jurisdiction and that their claims are expressly rooted in enforceable promises and agreements, not statute. Pet. App. 8.

In the Court of Appeals, Petitioner again relied on *Advanced Lightweight* as the foundation for its arguments. Petitioner did not cite or argue *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and did not argue *Garmon* preemption or "artful pleading" in its brief to the Court of Appeals. *See* Petitioner's Brief on Appeal, Sixth Cir. Doc. No. 25.

On August 8, 2022, the Court of Appeals reversed the district court's dismissal for lack of jurisdiction and remanded the case for further proceedings consistent with its opinion. Pet. App. 15. The Court of Appeals stated that the appeal "turns on a straightforward question: Is 'the presence of a live contract' an 'essential jurisdictional fact' in a § 515 ERISA action?" Or, "does the presence of a live contract go to the merits of the[Funds'] ERISA claim, not the district court's jurisdiction to hear it?" Pet. App. 8-9. The Court analyzed and applied *Advanced Lighweight* to answer that question as follows:

> We read *Advanced Lightweight* to stand for a simple proposition: ERISA grants federal district courts jurisdiction to hear breach-of-contract claims, not unfair-labor-practice claims. The scope of this proposition is limited. It signifies only that a plaintiff cannot use ERISA to get around the well-accepted rule that an NLRA claim belongs in the NLRB. And in practice, it plays out as follows. If a plaintiff brings an ERISA claim for "promised [contractual] contributions," a federal district court has jurisdiction to hear the suit. *Id.* Put another way, as long as a plaintiff's claim rests on good-faith assertions that independent, live agreements bind the employer, *Advanced Lightweight* does not enter the picture.

Pet. App. 10.

The Court of Appeals addressed the district court's factual finding that there are no contracts covering the post-expiration time period, concluding that "those findings go to the merits of the Funds' ERISA claim, not our jurisdiction to hear it. To the extent that the district court concluded otherwise, it erred." Pet. 11-12. In other words, the Court of Appeals ruled that the disputed factual issue of the existence of a post-CBA-expiration contractual obligation should be decided as a "merits" issue (*e.g.*, by a Rule 56 summary judgment motion after completion of discovery) not as a jurisdictional finding that had to be made before asserting jurisdiction over the case. In this regard, the Court of Appeals stated:

> [A]ssume Rieth-Riley is right about the contracts: they don't exist. Even so, a deficient contract claim by itself doesn't "convert[] the Funds' complaint into an unfair labor practice claim" and "divest[]" this court of jurisdiction. Rather, it would mean

> what a deficient claim always does in this context: The Funds lose on the merits.

Pet. App. 14.

On August 25, 2022, Petitioner filed a motion asking the Court of Appeals to put its decision on hold pending Petitioner's forthcoming petition for certiorari. Motion to Stay Mandate, Sixth Cir. Doc. No. 40. The Court of Appeals summarily denied that motion on September 1, 2022. Sixth Cir. Doc. No. 41-2.

Since the Court of Appeals' remand order, the case has continued in the district court. After a September 8, 2022, status conference, discovery was conducted and completed as of November 30, 2022. Discovery conclusively established that a primary factual conclusion underpinning the district court's opinion that the NLRB has exclusive jurisdiction over this matter, *i.e.* its finding that the Funds already were pursuing claims for contributions against Petitioner in the NLRB, was *incorrect*. Petitioner's Request for Admission Responses, District Court Doc. No. 77-17, PageID# 3934-3936 (E.D. Mich. Case No. 20-10323). On December 19, 2022, the Funds and Petitioner each filed a Rule 56 motion for summary judgment. The Funds' motion seeks to compel a fund audit as requested in the Complaint, going back to periods as early as January 1, 2016 or 2017 for certain Petitioner locations, and to subsequently collect any shortfalls discovered by the audit. Funds' SJ Motion, District Court Doc. No. 77, PageID# 3412, 3422-3423, 3427-3428. Petitioner's summary judgment motion requests dismissal of the complaint, arguing, like its prior motion to dismiss for lack of jurisdiction, that there is no enforceable contract supporting the Funds' claims. Pet. SJ Motion, District Court Doc. No. 75, PageID# 2464. Both motions

remain pending in the district court as of the date of the Funds' present brief in opposition.

B. Mischaracterizations in the petition

In accordance with Supreme Court Rule 15(2), the Funds point out the following mischaracterizations or inaccuracies in the Petition bearing on the questions presented.

Petitioner repeatedly represents that it is "undisputed" or a matter of "undisputed fact" that there is no contractual basis for the post-CBA-expiration obligations the Funds seek to enforce and that the obligations allegedly arise solely under statutory duties. *E.g.*, Pet. i, 19, 23-24. This is incorrect. The Funds' do *not* allege or rely on a violation of the NLRA or statutory duties and expressly premise their claims solely on independent contractual obligations. The Court of Appeals expressly acknowledged that "the Funds argue[] that independent agreements continue to bind the parties" after the expiration of the CBA. Pet. App. 8.

Petitioner represents and premises the petition on the claim that the Funds' ERISA claims are based on "mere labels". *E.g.,* Pet. ii, 18. This is incorrect. The Funds' ERISA claims are expressly premised on enforceable agreements independent of NLRA obligations, including *hundreds* of written Fringe Benefit Reports and certifications (quoted above) submitted by Petitioner post-expiration, in which Petitioner *expressly* agreed that each Fringe Benefit Report was accurate, and *expressly* agreed to comply with the payment terms of the expired CBA and the Funds' Trust Agreements containing clear and express Fund audit rights and obligations. Pet. App. 22-23.

Petitioner asserts or suggests it is undisputed that none of Petitioner's contract offers to continue contrib-

uting to the Funds in accordance with the expired CBA were "accepted." Pet. 24. In fact, the Funds specifically argued to the Court of Appeals that the Funds accepted the post-expiration contributions and Fringe Benefit Reports submitted by Petitioner. *E.g.*, Funds' Brief on Appeal, Sixth Cir. Docket No. 22, p. 52 (Petitioner "continued to submit contributions with written certifications of assent to the benefit provisions of the expired CBA and Trust Agreements—which the Funds accepted—and to which neither the Union nor the Funds objected").[3]

Petitioner repeatedly suggests in the Petition that it specifically argued *Garmon* in the Court of Appeals and/or that the Court of Appeals inappropriately disregarded *Garmon*. Pet. i-ii (Questions Presented), 3, 22-23, 24. In fact, Petitioner did not cite *Garmon* or argue *Garmon* preemption in the Court of Appeals. *Garmon* is not even listed in the index of authorities in Petitioner's brief to the Court of Appeals. Sixth Cir. Docket No. 25, p. v-ix.

Petitioner disingenuously suggests that the Court of Appeals *agreed* with the district court's factual findings that no enforceable contract exists, when Petitioner states: "the Sixth Circuit did not disagree with any of the district court's factual findings and, in fact 'assume[d] Rieth-Riley is right about the contracts; they do not exist.'" Pet. 18. In fact, the Court of Appeals did not opine on the correctness of the district court's factual findings as to the contract issue. The

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[3] The Funds similarly argue in the present district court proceedings that each of the post-expiration certifications by Petitioner, and accepted by the Funds, establish independent agreements to permit the Fund to audit Petitioner and to collect any shortfalls discovered by audit. Fund SJ Motion, District Court Doc. 77, PageID# 3413-3414.

Court of Appeals held that the contract issue should not have been decided as a "jurisdictional fact" before exercising jurisdiction over the Funds' ERISA claims, and remanded the case for it to be decided as a merits issue. Pet. App. 11-12. The point in the opinion where the Court of Appeals "assume[d]" the district court was "right" about the contracts quite obviously was made *for the sake of argument*—not as a statement of agreement. Pet. App. 14.[4]

SUMMARY OF ARGUMENT

The Funds respectfully request that the Court deny the petition for a writ of certiorari and permit this matter to continue in the normal course before the district court.

The question Petitioner requests that this Court review was not raised in or addressed by the Court of Appeals. *See E.E.O.C. v. Fed. Lab. Rels. Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"). The question as Petitioner *now* presents it involves *Garmon*, the *Garmon* preemption doctrine, and alleged "artful pleading" to avoid *Garmon* preemption. Pet. i-ii. But *Garmon* preemption and "artful pleading" were not argued by Petitioner in the Court of Appeals. Indeed, the bulk of

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[4] The Court of Appeals summarized its decision on the disputed contract issue by stating: "as long as a plaintiff's claim rests on 'good faith' assertions that independent, live agreements bind the employer, *Advanced Lightweight* does not enter the picture." Pet. App. 10. Thus, although the Court of Appeals did not expressly evaluate the strength of the evidence or arguments on the disputed post-expiration contract issue, by remanding the case over Petitioner's *Advanced Lightweight* arguments, the Court clearly believed at the very least that a good faith basis exists for the Funds' contention that independent contracts bind Petitioner.

Petitioner's legal arguments as to why a writ of certiorari should be granted, including those based on *Garmon* and *Garmon* preemption, Pet. 18-28, and its arguments based on the complete preemption doctrine and the Railway Labor Act, Pet. 30-33, were not made to the Court of Appeals and, thus, not addressed in the Court of Appeals' decision.

The questions *actually* raised in and addressed by the Court of Appeals do not involve an important issue warranting review by the Court. This case involves a routine multiemployer fund collection case which includes periods after expiration of a CBA and the Court of Appeals engaged in a straightforward and correct analysis and application of *Advanced Lightweight*—consistent with other circuit courts of appeals faced with the same issue. Decisions in multiple Circuits consistently hold that post-CBA-expiration contribution claims may be pursued under ERISA in federal courts without interfering with *Advanced Lightweight's* ruling where, as here, a fund's claims do not claim a violation of the NLRA and are based on promises or obligations of an employer independent of the expired collective bargaining agreement. *E.g., Cent. States, Se. & Sw. Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454 (6th Cir. 1989); *Brown v C. Volante Corp*, 194 F.3d 351 (2d Cir. 1999); *Auto. Mech. Loc. 701 Welfare & Pension Funds v Vanguard Car Rental USA, Inc.,* 502 F.3d 740 (7th Cir. 2007); *Greater Kan. City Laborers Pension Fund v Superior Gen. Contractors, Inc.*, 104 F.3d 1050 (8th Cir. 1997).

The Court of Appeals' decision does *not* create a circuit split with the Seventh Circuit as argued by Petitioner. Pet. 28-30. The Court of Appeals' decision, like decisions from other circuits, merely holds that post-CBA-expiration claims that expressly seek to en-

force statutory NLRA duties belong before the NLRB; while post-expiration claims that seek to enforce contractual obligations may be brought in federal courts under ERISA.

Petitioner's request for summary reversal should be denied. In addition to all the other reasons discussed herein, it is now clear that the district court's opinion which Petitioner requests the Court to summarily reinstate through summary reversal was premised on an erroneous factual conclusion that the Funds already were pursing contribution claims against Petitioner in the NLRB.[5]

ARGUMENT

I. THE COURT SHOULD DECLINE TO REVIEW THE COURT OF APPEALS' DECISION

For all the reasons below, the Funds respectfully request that the Court deny the petition for a writ of certiorari and allow the case to play out in the district court in the normal course.

A. The question presented and arguments in the petition were not raised or developed in the Court of Appeals

The Court should decline to review the question presented in the petition because it was not properly raised or preserved for review in the lower court, and thus not developed in the judicial decisions below. *See E.E.O.C. v. Fed. Lab. Rels. Auth.*, 476 U.S. 19, 24

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[5] Petitioner now admits that this finding was incorrect and that the Funds were *not* pursuing claims for audit or contributions against Petitioner before the NLRB. 10-26-22 Request for Admission Responses, District Court Doc. 77-17.

(1986). Petitioner argued in the Court of Appeals that *Advanced Lightweight* was controlling. Pet. App. 10. After the Court of Appeals rejected Petitioner's *Advanced Lightweight* argument, Defendant filed this Petition based primarily on *San Diego Building Trades Council v Garmon*, 359 U.S. 236 (1959), a case that Petitioner did not even cite in its brief to the Court of Appeals. *See, e.g.,* Index of Authorities to Petitioner's Brief, Sixth Cir. Docket No. 25, p. 5-8. The question presented in the Petition centers around *Garmon*, the *Garmon* preemption doctrine, and arguments of alleged "artful pleading" in avoidance of *Garmon* preemption. Pet. i-ii (Question Presented), 3, 22-23, 24. But Petitioner did not argue *Garmon* preemption or "artful pleading" in its brief to the Court of Appeals. Even if Petitioner had specifically relied on *Garmon* below, it would not have affected the outcome of the Court of Appeals' decision.

Similarly missing from Petitioner's brief to the Court of Appeals were Petitioner's present arguments that the jurisdictional question in this case should be decided through application of the complete preemption approach applicable to state law claims for violation of a labor agreement under the LMRA, or for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), or the approach to jurisdictional disputes under the Railway Labor Act, 45 U.S.C. § 151-165 ("RLA"). Pet. 30-33.

B. The Court of Appeals' decision was correct, consistent with the Court's precedent, and did not create a circuit split

The Court of Appeals in this case simply applied the Court's own analysis as set forth in *Advanced Lightweight* in determining that there is federal court juris-

diction in this matter. The Court of Appeals rejected Petitioner's jurisdictional argument because the plaintiffs in *Advanced Lightweight* alleged that the employer's unilateral decision to stop contributing to employee benefit funds constituted an unfair labor practice and was therefore a violation of the NLRA. Because the argument of the fund in *Advanced Lightweight* was based on an employer's *statutory* duty under the NLRA to maintain the status quo upon expiration of a collective bargaining agreement rather than a contractual duty under ERISA, the Court ruled in *Advanced Lightweight* that there was no federal court jurisdiction but that the matter fell under the exclusive jurisdiction of the NLRB.

Here, the Funds have never alleged that Petitioner engaged in an unfair labor practice or violated the NLRA, but have always maintained that Petitioner violated post-CBA-expiration *contractual* obligations. Under *Advanced Lightweight*, if the underlying claim at issue constitutes an unfair labor practice, the NLRA preempts other laws and the NLRB has exclusive jurisdiction. The NLRA does not automatically preempt ERISA, however, when the underlying claim arises under ERISA and is *contractual*.

Petitioner also has changed its argument before the Court of Appeals by asserting repeatedly in the Petition that the issue now is whether a plaintiff can "artfully plead" in order to convert an unfair labor practice claim into a breach of contract claim to get around the analysis in *Advanced Lightweight*. In doing so, Petitioner ignores the undisputed fact that the Funds have *never* asserted an unfair labor practice or violation of the NLRA but have *always* maintained that, post-CBA-expiration, Petitioner violated its contractual obligations (not simply those set forth in the

expired collective bargaining agreement but also those in Fringe Benefit Reports executed by Petitioner and the Funds' trust agreements to which Petitioner was bound). Petitioner cannot get around the undisputed facts in the record that the Funds simply *haven't* alleged any such violation, as Defendant *did* continue paying contributions after expiration of the collective bargaining agreement. The Funds simply seek an audit to determine if the contributions were made on behalf of the proper employees. Pet. App. 7. *See Cent. States Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569, 581 (1985) (upholding fund's right to conduct random audits as provided for in trust agreements—"Given Congress' vision of the proper administration of employee benefit plans under ERISA . . . the audit requested by [the fund] is well within the authority of the trustees as outlined in the trust documents" and "highly relevant to legitimate trustee concerns").

Petitioner alleges a circuit split with the Seventh Circuit, citing *RiverStone Group, Inc. v Midwest Operating Eng'rs Fringe Benefit Funds*, 33 F.4th 424 (7th Cir. 2022). Pet. 28-30. *Riverstone*, however, involved a situation—as in *Advanced Lightweight*—where plaintiffs alleged violations of "labor law" in connection with an employer's refusal to maintain the status quo after expiration of a collective bargaining agreement. The courts in *Riverstone* did nothing different from the Court of Appeals here and simply applied the same analysis. The Court of Appeals in the present case specifically addressed and distinguished *RiverStone* in its decision, observing:

> [The Funds in *Riverstone*] didn't argue a breach of the CBA or other written instrument, but asserted that 'labor law' required *RiverStone* to 'honor the

> terms of an expired agreement.' Here, the Funds bring a contract claim, not a 'labor law' claim. So their suit differs from those brought in *Advanced Lightweight* or *RiverStone*. In those cases, the plaintiffs tried to use an ERISA cause of action to air their unfair-labor-practice claims in federal courts. Here, the Funds do not such thing; they alleged contract claims only.

Pet. App. 14-15.

The Court of Appeals also cited decisions from both the Second and Seventh Circuits (as well as other circuits) upholding federal court jurisdiction when—as here—the plaintiff alleged post-CBA-expiration contractual ERISA violations, rather than statutory NLRA violations. Pet. App. 11-12. *See Automobile Mec. Loc. 701 Welfare & Pension Funds v Vanguard Car Rental USA, Inc.,* 502 F.3d 740 (7th Cir. 2007) (jurisdiction proper where Funds did not rely on any alleged statutory NLRA duty employer had to continue contributing during post-expiration status quo period but claimed violation of contractual duty); *Brown v. C. Volante Corp.*, 194 F.3d 351, 354 (2d Cir. 1999) (affirming ERISA jurisdiction over action for unpaid contributions after CBA expiration where fund did not argue an unfair labor practice, observing that *Advanced Lightweight* "stands only for the unremarkable proposition that the [NLRB] generally has exclusive jurisdiction over unfair labor practice claims"); *Greater Kan. City Laborers Pension Fund v Superior Gen. Contractors, Inc.*, 104 F.3d 1050, 1058 (8th Cir. 1997) ("Defendants' reliance on *Advanced Lightweight* is misplaced, because the Funds, unlike the plaintiff trustees in *Advanced Lightweight*, did not claim that defendants' failure to make fringe benefit contributions constituted an unfair labor practice").

C. The errors argued by Petitioner primarily involve factual disputes and are not sufficiently important to warrant review

Petitioner's arguments boil down to a routine factual dispute as to whether there is sufficient evidence of independent post-CBA-expiration contract obligations. This dispute is in the process of being addressed by the district court on remand under Rule 56 summary judgment standards and thereafter will be subject to appeal of right on the complete record. It is not an issue of sufficient importance to warrant review of the present Court of Appeals decision. *E.g.,* Supreme Court Rule 10 ("A petition . . . is rarely granted when the asserted error consists of erroneous factual findings . . . .").

D. The Court of Appeals' decision does not present a complete, final, or clean slate on which to decide the question presented

The district court opinion which Petitioner ultimately seeks to reinstate through the Petition is premised in part on factual conclusions that have been shown by Petitioner's discovery responses on remand to be incorrect. Contrary to the findings in the district court opinion at issue before the Court of Appeals, the Funds have *not* pursued contribution claims against Petitioner in the NLRB.

Moreover, this case involves not only claims of contributions owing after expiration of a collective bargaining agreement, which was the focus of the Court of Appeals' decision. It also involves multiemployer fund audit rights. The Funds' claims expressly request to compel an audit, Pet. App. 6-7, 25, which is a well-established right, extremely important to proper administration of multiemployer benefit funds, en-

forceable under ERISA and the Court's precedent. *Cent. States Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559 (1985). The audit must be completed in order to determine the nature and extent to which there are delinquent contributions, if any, and to identify the nature and dates of any delinquent contributions. Pet. App. 7; Funds' Appeal Brief, Sixth Cir. Doc. No. 22, p. 44-46.

Post-remand discovery and motions in the district court more clearly define the evidence and issues involved in this case. Further, the Funds' summary judgment motion currently pending in the district court expressly seeks to enforce the Funds' audit right regarding time periods *prior* to the May 31, 2018 expiration of the CBA.[6] These pre-expiration time periods are subject to unexpired contract obligations under the CBA and are not subject to the *Advanced Lightweight* arguments focused on in the Court of Appeals decision at issue in the petition.

II. SUMMARY REVERSAL IS NOT WARRANTED

As acknowledged by Petitioner, Pet. 23, "[a] summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

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[6] The Funds' complaint and claims seek to enforce the Fund auditor's October 1, 2019, audit request letter, which covers periods going back as far as January 2016 and January 2017 for certain of Petitioner's business locations. Complaint, District Court Doc. 12, PageID# 68, 70-71; Funds SJ Motion, District Court Doc. 77, PageID# 3406 & audit letter, District Court Doc. 77-10, PageID# 3663.

Petitioner's request for summary reversal *clearly* is without merit for all the reasons herein. As discussed above, the Court of Appeals decision was correctly decided and there are factual issues yet to be decided on remand. And of particular significance, the district court decision which Petitioner seeks to reinstate through summary reversal is premised on factual findings which are now undisputed to be incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 6, 2023