No. 23-1209

IN THE

Supreme Court of the United States

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

Petitioners,

v.

TRUSTEES OF THE IAM
NATIONAL PENSION FUND,

Respondents.

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

SUPPLEMENTAL BRIEF

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Respondents submit this supplemental brief in response to the Brief for the United States as Amicus Curiae.

INTRODUCTION

The amicus brief submitted by the United States only underscores why certiorari should be denied. The United States devotes the vast majority of its brief to explaining why the decision below is correct—a point with which Respondents agree. It then spends only a few paragraphs arguing that the Court should review the decision below even though it was correctly decided. The short shrift given to the question of certworthiness is unsurprising because there is little to say in favor of review.

In arguing for certiorari, the United States does not dispute that the circuit split implicated by the Petition is as shallow as possible and that the Question Presented has been litigated just twice in the forty-five-year history of the Multiemployer Pension Plan Amendments Act ("MPPAA"). It also declines to endorse the Chamber of Commerce's misguided contention that review is necessary to allow employers to predict their liability prior to deciding whether to withdraw from a plan.

Instead, the United States argues that certiorari should be granted because the shallow circuit split supposedly "open[s] any determination of withdrawal liability to challenge" and thus creates "apprehension" for actuaries. U.S. Br. 17–18. Respectfully, that is not

correct. For one thing, the timing issue in this case has no bearing whatsoever on most withdrawal liability calculations because (as the United States acknowledges) actuarial assumptions tend to remain stable over time. In addition, because most multiemployer plans contain forum-selection clauses, actuaries will know in advance whether they are required to follow the Second Circuit's timing rule—a point made in the brief in opposition but ignored by the United States. What's more, actuaries are able to comply (and, in practice, have been complying) with *both* the Second Circuit's and the D.C. Circuit's timing rules. The Court's intervention is therefore not required to protect actuaries from conflicting legal duties. It is notable that the leading actuarial firms that work with multiemployer plans participated as amicus curiae in the case below but did *not* ask this Court to grant certiorari. That strongly suggests that the actuaries do not share the concerns that the United States attributes to them.

If the Court does grant review, Respondents agree with the United States that the Question Presented should be reformulated. Petitioners' formulation incorrectly presumes that the assumptions employed by an actuary when calculating withdrawal liability during one plan year remain in effect until the actuary selects different assumptions in a subsequent year. A more accurate formulation would eliminate that false premise and simply ask whether the actuarial assumptions used to assess withdrawal liability must be selected on or before the measurement date.

I. ANY CIRCUIT SPLIT IS SHALLOW AND TOLERABLE.

The United States does not dispute that the circuit split cited in the Petition is as shallow as possible. U.S. Br. 17. It is also recent. The Second Circuit became the first to address the Question Presented in 2020 (*see Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146 (2d Cir. 2020)), and the decision below was the first to create a split. The Second Circuit has not had the opportunity to reconsider its views in light of the D.C. Circuit's decision below or the position taken by the United States in its amicus brief. Nor has any other circuit weighed in on the Question Presented. There is no need for this Court to rush to resolve a new and shallow split that may resolve on its own.

The United States contends that further percolation is unnecessary because the answer to the Question Presented is "straightforward." U.S. Br. 18. But this Court favors percolation absent compelling circumstances, and the United States identifies no urgent need for this Court's intervention.

According to the United States, the Court should intervene now to "relieve[]" actuaries "of any apprehension that their assumptions would be invalidated if they failed to follow *Metz*." U.S. Br. 18. But any "apprehension" is illusory. Actuaries will usually know in advance whether their selection of assumptions is governed by the Second Circuit's *Metz* rule because multiemployer plans typically contain forum-selection clauses. *See* Br. in Opp. 13. Even for plans without forum-selection clauses, the MPPAA's

venue provision dictates whether withdrawal liability issues will be litigated in a venue governed by *Metz*. *Id.* at 14–15 (citing 29 U.S.C. § 1401(a)). Respondents made these points in their brief in opposition, and the United States has offered no response.

Actuaries also can comply with both the *Metz* timing rule and the decision below by selecting their assumptions in the weeks prior to the measurement date. In practice, this is what actuaries have been doing following the *Metz* decision. *See id.* at 16–17. Because actuaries can comply with both decisions, the Court's immediate intervention is not required.

II. THE QUESTION PRESENTED IS NOT EXCEPTIONALLY IMPORTANT.

The United States does not dispute that the Question Presented recurs infrequently. It could not argue otherwise because the question has been litigated only twice in the forty-five years since the MPPAA was enacted. Nor can the United States show that the question is likely to arise in future cases. The question of when an actuary must select its assumptions is relevant only where different assumptions are employed from one year to the next. But, as the United States acknowledges, "[a]ctuarial assumptions tend to remain relatively stable from year to year." U.S. Br. 16–17. Accordingly, the timing question raised in the Petition will not matter to most plans in most years.

In an effort to amplify the importance of the Question Presented, the United States contends that "even relatively small changes" in assumptions "can affect employers' withdrawal liability by millions of dollars." *Id.* at 17. That argument confuses the importance of assumptions generally with the specific timing question presented in this case. To be sure, the assumptions selected by an actuary can have a significant impact on an employer's withdrawal liability. But the United States cannot identify a single other case where the *timing* of *when* an actuary selected its assumptions affected the liability imposed on a withdrawing employer.

The United States correctly declined to adopt the Chamber's position that this case is important because the decision below supposedly prevents employers from predicting their liability prior to withdrawing from a plan. Chamber Br. 8–11. As Respondents previously explained, an employer can never forecast its liability prior to withdrawal regardless of whether the *Metz* timing rule or the rule handed down below applies. *See* Br. in Opp. 20–22. That is because withdrawal liability turns on inputs that are unknown at the time an employer is deciding whether to withdraw. *Id.* The fact that the United States chose not to adopt (or even mention) the Chamber's position confirms that the position is meritless.

III. THE UNITED STATES AGREES THAT THE DECISION BELOW IS CORRECT.

The United States agrees with Respondents that the decision below was correctly decided. U.S. Br. 8–16. As the United States recognizes, the MPPAA's text, structure, and purpose all confirm that an actuary need not select its assumptions on or before the measurement date. *Id.* *Metz*'s contrary rule is at odds with the statutory text, longstanding actuarial practice, and common sense. *Id.* Although the Court typically does not grant certiorari for the sole purpose of error correction, the fact that the decision below was correctly decided further weighs against review.

IV. THIS CASE IS A POOR VEHICLE.

Even if the Court were inclined to resolve the shallow circuit split cited in the Petition, this case is not an ideal vehicle for doing so. This case presents only the narrow question of whether an actuary is permitted to select its assumptions after the measurement date. But there is an important follow-up question that is *not* presented in this case: If an actuary is permitted to select its assumptions after the measurement date, is it limited to considering only the facts and circumstances that existed on the measurement date, or may it also consider factual developments that occurred after the measurement date?

As the United States concedes, that follow-up question "is not at issue here." U.S. Br. 16. Petitioners' sole contention here is that "[R]espondents' actuarial firm violated ERISA by

adopting its assumptions after the measurement date, not by relying on post-measurement-date developments in adopting the assumptions." *Id.*; *see also* Pet. i (Question Presented limited to the timing of the actuary's selection of assumptions). In fact, the parties stipulated below that the *only* issue in this case would be the timing of the actuary's selection of assumptions, and they therefore did not develop any record concerning what information the actuary considered when it made its assumptions. To the extent the Court is interested in the question of when an actuary must select its assumptions, it should await a case where the parties have developed a factual record that would allow the Court to resolve the related question of what information an actuary is permitted to consider when selecting its assumptions.

V. IF CERTIORARI IS GRANTED, THE QUESTION PRESENTED SHOULD BE REFORMULATED.

Respondents agree with the United States that if the Court were to grant certiorari, it should reformulate the Question Presented to reflect the correct legal framework. U.S. Br. 18–20. As drafted by Petitioners, the Question Presented presumes that actuarial assumptions carry over from year to year and continue to reflect the actuary's views until affirmatively revised. That premise is incorrect, as the United States and Respondents have explained. *Id.*; *see also* Br. in Opp. 25–26. The reality is that actuaries select assumptions at discrete points in time when they are required to make certain calculations. They do not continue to endorse those assumptions over the subsequent weeks and months after the calculations are completed.

Petitioners' Question Presented assumes a passive rollover regime in which stale assumptions persist unless formally updated. On that view, if an actuary fails to select assumptions before the measurement date, it must default to those most recently used, regardless of whether they remain accurate. That position cannot be reconciled with standard actuarial practice or the MPPAA's requirement that an actuary select assumptions that reflect its "best estimate of anticipated experience under the plan" as of the measurement date. 29 U.S.C. § 1393(a)(1). That standard demands fresh, reasoned evaluation—not rote reapplication of old assumptions.

Petitioners' formulation of the Question Presented is improper because it incorrectly presumes that the assumptions selected by an actuary for a particular purpose continue to reflect the actuary's views until new assumptions are formally selected. If the Court were to grant certiorari, it should reformulate the Question Presented to eliminate that false premise and ask simply whether the MPPAA requires an actuary to select the assumptions used in calculating withdrawal liability on or before the measurement date.

CONCLUSION

For the foregoing reasons and those in the brief in opposition, the Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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