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

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

DONALD J. VOGEL
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.
30 W. Monroe St., Ste. 1600
Chicago, IL 60603

Counsel for Petitioner M & K Employee Solutions, LLC

MICHAEL E. KENNEALLY
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-3000
michael.kenneally@morganlewis.com

JONATHAN JANOW
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW, Ste. 300
Washington, DC 20006

Counsel for Petitioner Phillips Liquidating Trust

RANDALL C. MCGEORGE
MORGAN, LEWIS & BOCKIUS LLP
One Oxford Centre, 32nd Fl.
Pittsburgh, PA 15219

Counsel for Petitioners Ohio Magnetics, Inc. and Toyota Logistics, Inc.

(additional counsel on signature page)

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASE

STATUTE

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

The United States rightly concludes that "the petition for a writ of certiorari should be granted." U.S. Br. 1. The Court should "resolve the clear conflict between the decision below and *National Retirement Fund* v. *Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir.), cert. denied, 141 S. Ct. 246 (2020)." *Id.* at 8. There is no reason to let this clear circuit split persist. Respondents' contrary arguments rehash points from their brief in opposition that petitioners have already addressed. They are no more persuasive the second time around.

1. Respondents insist that this circuit split is "tolerable" for two main reasons. First, they say (at 3) that multiemployer plans typically have forum-selection clauses. They cite no support for that claim. But if true, it merely underscores the importance of uniformity. As petitioners have explained, plans' ability to unilaterally adopt forum-selection clauses allows them to channel disputes to the circuit whose precedent they find most favorable for them, like the D.C. Circuit here. Cert. Reply Br. 3-4. Respondents do not dispute that if plans want to do so, they can easily exploit this one-sided opportunity for forum-shopping. *Id.* at 4-5.

Respondents repeat (at 4) their assurance that actuaries can readily conform their practices to the Second Circuit's rule and already do. This claim, of course, shows the unsoundness of respondents' (and the government's) only textual argument against the Second Circuit's rule—which is that actuaries cannot

give their "best estimate" of anticipated plan experience under 29 U.S.C. 1393(a)(1) if they cannot adopt assumptions after the measurement date. See Pet. App. 13a; U.S. Br. 11. But if respondents *were* right to criticize the Second Circuit's rule, it would be inappropriate to let actuaries continue to feel pressure to conform to it. U.S. Br. 18. More importantly, every withdrawal liability determination will be open to challenge so long as the circuit split continues—as petitioners and the government agree. Cert Reply Br. 5; U.S. Br. 17. Respondents have no answer to this significant concern.

Respondents argue (at 2) that the split is unimportant because the actuaries who supported them as amici below did not file briefs in this Court in support of certiorari. But amici on the prevailing side of an appeal almost never file a brief asking this Court to review their victory. Far more telling is the business community's strong support for certiorari, which attests to the importance of this issue and the problems that the D.C. Circuit's rule creates for employers across the country. Chamber Amicus Br. 14-16.

2. In a last-ditch effort to avoid certiorari, respondents argue for the first time (at 6-7) that this case is a bad vehicle. Their argument is a misnomer, though, because they do not claim this case is a bad vehicle to resolve the *question presented*, the question on which the D.C. Circuit and Second Circuit are split. Instead, they object that this case does not present what they call "an important follow-up question": If actuaries are allowed to change their assumptions after the measurement date, may they consider factual developments after the measurement date?

Respondents' objection is baseless. Unlike the question that they unpersuasively dismiss as unimportant, there is no circuit conflict at all on respondents' purportedly "important follow-up question." No circuit allows an actuary to change actuarial assumptions based on facts that did not exist on the measurement date. That splitless question does not warrant the Court's attention. And if the Court sides with the Second Circuit on the question presented in this case, respondents' follow-up question will never need the Court's attention.

The only question that needs the Court's attention is the one on which the D.C. Circuit and Second Circuit disagree. This case is an ideal vehicle to confront that question. Contrary to respondents' suggestion (at 7), a larger factual record is neither necessary nor desirable. The question presented is a pure issue of statutory interpretation, and the lack of factual disputes in this case is a feature, not a bug.

3. While agreeing that review is warranted in this case, the United States suggests (at 19) reformulating the question presented to ensure the merits briefs focus on "[t]he real point of dispute between the parties and between the Second and D.C. Circuits." Petitioners agree that the focus should be on the question that divides those circuits. But the question presented in the petition for a writ of certiorari already has that focus, for reasons the United States itself identifies. The petition's question asks the Court to choose between the Second Circuit's view, under which actuarial assumptions remain in effect unless changed before the measurement date, see U.S. Br.

18-19, and the D.C. Circuit's view, which permits actuaries to calculate withdrawal liability using assumptions adopted after the measurement date, *id.* at 20.

In all events, petitioners do not object to the alternative formulation proposed by the United States. That formulation also tees up the issue that divides the circuits. The key point is that the question warrants this Court's review. And on that petitioners and the United States agree. Whichever formulation of the question the Court chooses, it should give its answer here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD J. VOGEL
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.
30 W. Monroe St., Ste. 1600
Chicago, IL 60603

R. JAY TAYLOR, JR.
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.
10 W. Market St., Ste. 1400
Indianapolis, IN 46204

Counsel for Petitioner M & K Employee Solutions, LLC

JONATHAN JANOW
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW, Ste. 300
Washington, DC 20006

WILLIAM P. LEWIS
BUCHANAN INGERSOLL & ROONEY PC
501 Grant St., Ste. 200
Pittsburgh, PA 15219

Counsel for Petitioner Phillips Liquidating Trust

MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-3000
michael.kenneally@morganlewis.com

RANDALL C. MCGEORGE
MORGAN, LEWIS & BOCKIUS LLP
One Oxford Centre, 32nd Fl.
Pittsburgh, PA 15219

DEBORAH S. DAVIDSON
MORGAN, LEWIS & BOCKIUS LLP
110 N. Wacker Dr.
Chicago, IL 60606

Counsel for Petitioners Ohio Magnetics, Inc. and Toyota Logistics, Inc.

JUNE 2025