No. _____

IN THE

Supreme Court of the United States

SUN CAPITAL PARTNERS III, LP;
SUN CAPITAL PARTNERS III QP, LP; AND
SUN CAPITAL PARTNERS IV, LP,

Petitioners,

v.

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

John F. Hartmann, P.C.
Marla Tun
Jeffrey S. Quinn
KIRKLAND & ELLIS LLP
300 N LaSalle Street
Chicago, IL 60654
(312) 862-2000

Theodore J. Folkman
MURPHY & KING P.C.
1 Beacon Street
Boston, MA 02108

Patrick F. Philbin
Counsel of Record
Kellen S. Dwyer
KIRKLAND & ELLIS LLP
655 Fifteenth Street,
Washington, DC 20005
pphilbin@kirkland.com
(202) 879-5000

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QUESTIONS PRESENTED

When an employer withdraws from a multiemployer pension plan and ceases making contributions, ERISA, as amended by the Multiemployer Pension Plan Amendments Act (MPPAA), imposes so-called "withdrawal liability," which requires the employer to pay the pension plan for the employer's proportionate share of the plan's unfunded vested liabilities. If the withdrawing employer is insolvent, its withdrawal liability may be collected from any "trade or business" that is part of the same control group as the withdrawing employer, as defined in 29 U.S.C. § 1301(b)(1).

The questions presented are:

1. Did the First Circuit err by holding (contrary to decisions of the Seventh and D.C. Circuits) that "trade or business" status under ERISA should be governed by a novel, multi-factor "investment plus-like" test rather than by this Court's decisions defining "trade or business" status for purposes of section 162(a) of the Internal Revenue Code?
2. Did the First Circuit err by holding, contrary to *Whipple v. Commissioner*, 373 U.S. 193, 202 (1963), that an entity that solely makes investments and manages the businesses in which it has invested is a "trade or business"?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Sun Capital Partners III, LP states that it has no parent corporation and that no publicly held company has a 10% or greater ownership interest in it; Petitioner Sun Capital Partners III QP, LP states that it has no parent corporation and that no publicly held company has a 10% or greater ownership interest in it; and Petitioner Sun Capital Partners IV, LP states that it has no parent corporation and that no publicly held company has a 10% or greater ownership interest in it.

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INTRODUCTION

The decision below deepens a conflict in the circuits on the question whether this Court's precedents interpreting the phrase "trade or business" under section 162(a) of the Internal Revenue Code ("IRC") should govern interpretation of the same phrase under a provision of ERISA. The Seventh Circuit and the D.C. Circuit have long held that this Court's precedents under section 162(a) control. In the decision below, the First Circuit joined the Ninth Circuit in rejecting that view and instead invented a multi-factor "investment plus" test for assessing trade-or-business status. This Court should resolve the circuit conflict and reject the First Circuit's novel and erroneous approach.

For seventy years, this Court has held that an entity is not a "trade or business" under section 162(a) if its only activity is making and managing investments and its only income is a return on investments. *See Higgins v. Comm'r*, 312 U.S. 212 (1941); *Whipple v. Comm'r*, 373 U.S. 193 (1963). When Congress enacted the Employee Retirement Income Security Act (ERISA), it borrowed the well-defined concept of a "trade or business" in mandating that trades or businesses that are part of the same control group should be treated as a single employer and that members of a control group would be liable for the obligations of another member that becomes insolvent. In particular, under the Multiemployer Pension Plan Amendments Act (MPPAA), when an employer stops contributing to a multiemployer pension plan and incurs "withdrawal liability," other members of the same control group are responsible for that withdrawal liability.

This Court's section 162(a) decisions draw a clear line between conducting a "trade or business" and "investing," and using that line for ERISA makes sense. It prevents an employer from breaking apart business operations into separate entities to shirk pension obligations while preserving the limited liability for investors that is essential for capital formation.

Recognizing the fit between "trade or business" as used under section 162(a) and that concept in ERISA's control-group provision, the Seventh and D.C. Circuits have held that this Court's decisions under section 162(a) govern the meaning of "trade or business" under ERISA. *See, e.g.*, *Cent. States Se. & Sw. Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874, 878 (7th Cir. 2013); *Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993).

In the decision below, the First Circuit rejected that approach, endorsing instead an unpublished Ninth Circuit opinion that provided no analysis. Freed from this Court's precedents, the First Circuit invented what it termed "some form of an 'investment plus' approach," under which an entity that earns solely investment returns *might* be a "trade or business" if its activity managing its investments is sufficient to constitute an undefined "plus" factor. The First Circuit refused to provide "guidelines for what the 'plus' is." App. 23a. It simply declared that, based on the facts here, Petitioner Sun Capital Partners IV, LP, a private equity fund, was a "trade or business" that could be responsible for the withdrawal liability of a bankrupt company in which it had invested. And it remanded for a determination whether Petitioners Sun Capital Partners III, LP and Sun Capital Partners III QP, LP (which had invested

in the same company) were also trades or businesses. The record shows, however, that each of the Sun Funds received solely investment income. Thus, under this Court's section 162(a) decisions (which supply the rule in the Seventh Circuit and the D.C. Circuit), Petitioners could *not* be trades or businesses.

Even apart from the circuit conflict, review is warranted given the uncertainty the First Circuit's novel test has inflicted on a large and critically dynamic sector of the economy. In 2012 alone, private equity funds invested $347 billion in 2,083 U.S. companies, and the rate of job growth in private equity-backed businesses has outpaced the rate in the economy as a whole by a factor of three. Because the First Circuit refused to "set forth general guidelines for what the 'plus' is" in its novel "investment plus" test, App. 23a, its decision provides no guidance for lower courts and leaves investment funds guessing as to whether they may be exposed to withdrawal liability as a "trade or business" when they make a given investment.

Only one thing is certain: for ERISA purposes, the First Circuit has obliterated this Court's clear line between an investor and a "trade or business" and replaced it with a multifactor test that is wholly unpredictable. The resulting uncertainty will spawn needless litigation for both pension funds and investment entities. It will also deter investment in distressed companies with pension obligations, a result directly contrary to ERISA's "goal of encouraging the private sector to assume control of failing companies and their pension plans." *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146, 150 (6th Cir. 1983). The Court should grant certiorari and reject the First Circuit's mistaken test.

OPINIONS BELOW

The opinion of the court of appeals is reported at 724 F.3d 129 and reprinted in the Appendix ("App.") at 1a-43a. The opinion of the district court appears at 903 F. Supp. 2d 107, App. 48a-83a.

JURISDICTION

The court of appeals rendered its decision on July 24, 2013, App. 2a, and denied Petitioners' petition for rehearing and petition for rehearing en banc on August 23, 2013, App. 46a. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes and regulations are 29 U.S.C. § 1301(b)(1), 26 U.S.C. § 414(c), 29 C.F.R. § 4001.2, and 29 C.F.R. § 4001.3. They are reproduced in relevant part in the Appendix, 86a-88a.

STATEMENT OF THE CASE

A. Statutory Framework

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amended ERISA to reduce incentives for employers to abandon financially weak multiemployer pension plans. Under prior law, a withdrawing employer could escape liability to a troubled plan by withdrawing before the plan became insolvent. As a result, any sign of financial difficulty at a plan prompted a rush for the exits by employers seeking to get out before the plan became insolvent. *See Cent. States Se. & Sw. Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874, 878 (7th Cir. 2013). To eliminate that incentive for a quick exit, the MPPAA requires an employer that withdraws from a plan to pay "withdrawal liability" equal to the

employer's proportionate share of the plan's current unfunded vested benefits. *See* 29 U.S.C. § 1381 *et seq*.

ERISA also provides that all "trades or businesses … which are under common control shall be treated as … a single employer" for purposes of certain liabilities, including withdrawal liability. 29 U.S.C. § 1301(b)(1). ERISA thus makes "trades or businesses" under common control jointly and severally liable for each other's withdrawal liability. As relevant here, control requires an 80% ownership interest. *See* 26 C.F.R. § 1.414(c)-2(b)(1). The purpose of this control-group provision is "to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities." *Messina Prods.*, 706 F.3d at 878 (internal quotations omitted).[1]

B. The Sun Funds and the Investment in Scott Brass, Inc.

Petitioners Sun Capital Partners III, LP, Sun Capital Partners III QP, LP (together, "Sun

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[1] Section 1301(b)(1) also expressly provides that regulations promulgated by the Pension Benefit Guaranty Corporation (PBGC) implementing the section "shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26." 29 U.S.C. § 1301(b)(1). Section 414(c) establishes a similar control-group provision applying to "trades or businesses" with respect to certain requirements for retirement plans under the IRC. The Treasury has not issued regulations further defining "trade or business" under section 414(c), nor has the PBGC issued regulations further defining the term under section 1301(b)(1).

Fund III"),[2] and Sun Capital Partners IV, LP ("Sun Fund IV") (collectively, "the Sun Funds" or "the Funds"), are private equity funds. Each is a limited partnership that serves as a vehicle for pooling the money of its partners (the investors in the Fund) and investing that money.

The Sun Funds are organized by Sun Capital Advisors, Inc., a private equity firm that finds investors for the Funds, researches investment opportunities, and (through affiliated entities) provides management services for a fee to improve performance of companies in which the Funds invest. App. 5a. The Sun Funds themselves perform none of those functions. They have no offices or employees, do not make or sell goods, and report no income on their tax returns other than investment income. *Id.* at 6a.

Each Sun Fund has a general partner ("GP") with the authority to make investment decisions for the Fund. *Id.* at 8a-9a. In return for the services they provide each Fund, each GP receives an annual fee and a percentage of the Fund's investment returns. *Id.* Each Fund typically invests by forming a limited liability company, or "LLC," which, in turn, invests in a holding company that acquires a controlling interest in the operating "portfolio company." *Id.* at 9a. The GPs each have a subsidiary management company. *Id.* The management companies contract with the holding company to

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[2] Sun Capital Partners III, LP and Sun Capital Partners III QP, LP are "parallel funds." They have the same general partner and typically invest in the same opportunities in the same proportions. App. 6a n.3. For convenience they are referred to collectively as "Sun Fund III."

provide management services for a fee, and contract with Sun Capital Advisors, Inc., to provide the necessary employees and consultants. *Id.* To ensure that the GP is not effectively paid twice for the same management services, the Sun Funds' limited partnership agreements provide that, when portfolio companies pay fees to the management companies, the Sun Funds may be eligible to receive an offset against fees they would otherwise pay their GPs. *Id.*

When promoting the Funds to potential investors through Private Placement Memoranda, Sun Capital Advisors, Inc. highlights its ability to guide the management of the portfolio companies in which the Sun Funds invest. As the arrangements described above illustrate, after a Fund acquires an interest (indirectly) in a portfolio company, it can exercise its shareholder authority to appoint professionals from Sun Capital Advisors, Inc. (or one of its affiliates) to the board of the portfolio company in which the Fund has indirectly invested. Like any other board member, those professionals can influence the management of the portfolio company.

This lawsuit arises out of investments the Sun Funds made, indirectly, in Scott Brass, Inc. ("SBI"), a Rhode Island manufacturer of brass and copper coil. *Id.* at 9a-10a. In December 2006, the Sun Funds formed Sun Scott Brass, LLC ("SSB-LLC") to invest in SBI. *Id.* at 10a-11a. Fund III acquired a 30% interest in SSB-LLC (for $900,000) and Fund IV acquired a 70% interest (for $2.1 million). *Id.* SSB-LLC then invested the $3 million in Scott Brass Holding Corporation ("SB Holdco"), which, in turn, purchased all of SBI's stock. *Id.* SSB-LLC exercised its shareholder rights in SB Holdco to appoint two professionals from Sun Capital Advisors,

Inc. to SB Holdco's board. *See id.* at 11a. SB Holdco then retained a subsidiary of the GP of Fund IV to provide management and consulting services to SBI for a fee. *Id.* That subsidiary, in turn, had contracted to receive advisory services from Sun Capital Advisors, Inc. *Id.* Pursuant to these contracts, professionals from Sun Capital Advisors, Inc. provided advisory services to SBI's management to help them improve the company's efficiency and financial health. *Id.* at 11a-12a.

C. SBI's Bankruptcy and the Ensuing Litigation

In spite of these efforts, SBI went bankrupt in 2008 due to the declining price of copper. *Id.* at 12a. When SBI ceased operations and stopped making contributions to Respondent, the New England Teamsters & Trucking Industry Pension Fund ("Respondent" or "the Teamsters' Fund"), SBI incurred "withdrawal liability" under ERISA, as amended by the MPPAA. *Id.* at 12a-13a. As a result of the bankruptcy, the Sun Funds lost their entire investment in SBI and the Teamsters' Fund was forced to pursue its claim for withdrawal liability in bankruptcy court. *Id.*

The Teamsters' Fund subsequently sought to collect SBI's withdrawal liability from the Sun Funds, demanding payment of $4,516,539—more than 150% of the Sun Funds' combined original investment (which had already been completely lost). *Id.* at 13a. The Sun Funds responded by seeking a declaratory judgment in district court that each was not a "trade or business" under "common control" with SBI and therefore not liable for SBI's withdrawal liability under section 1301(b)(1). *Id.* The Teamsters' Fund

counterclaimed seeking to collect SBI's withdrawal liability.[3] *Id.* The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). On cross-motions for summary judgment, the district court held that the Sun Funds were not "trades or businesses" and thus were not liable. App. 48-49.

D. The First Circuit's Decision

The First Circuit held that Sun Fund IV was a "trade or business" under section 1301(b)(1). The First Circuit rejected the view that this Court's decisions interpreting the phrase "trade or business" under section 162(a) of the IRC provide the test for interpreting the same phrase in ERISA. *See* App. 30a ("[W]e reject the proposition that … interpretations of other provisions of the Internal Revenue Code are *determinative* of the issue of whether an entity is a 'trade or business' under § 1301(b)(1).") (emphasis in original).

Instead, the First Circuit adopted "some form of an 'investment plus' approach." *Id.* at 23a. The "investment plus" approach originated in an unpublished letter opinion issued by the PBGC holding that an investor can be a "trade or business" if its management of its investments crosses some threshold that constitutes a "plus" factor. *Id.* at 19a-

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[3] The Teamsters Fund also claimed that Sun Fund III and Sun Fund IV had engaged in a transaction to evade or avoid liability prohibited under 29 U.S.C. § 1392(c) by investing (indirectly) in 30% and 70% stakes in SBI, respectively, so that each would fall short of the 80% ownership necessary to constitute "control." App. 5a. Both the district court and the First Circuit correctly rejected that claim, and it is irrelevant here. *Id.*

20a.[4] The First Circuit did not endorse the PBGC's analysis, but in announcing a distinct "'investment plus'-*like* analysis," the court also refused to provide any "guidelines for what the 'plus' is," or to go any "further than to say that on the undisputed facts of this case, Sun Fund IV is a 'trade or business' for purposes of § 1301(b)(1)." *Id.* at 23a. The court's analysis apparently focused on two factors. First, it repeatedly noted that the Sun Funds "and their affiliated entities" were "intimately involved in the management and operation of the company." *Id.* at 25a.[5] Second, the First Circuit asserted that Sun Fund IV received a "direct economic benefit" from this management activity in the form of "an offset against the management fees it otherwise would have paid its GP for managing the investment in SBI." *Id.* at 26a.[6] The First Circuit concluded "the sum of all of these factors," *i.e.*, the factors above and others, "satisfy the 'plus' in the 'investment plus' test." *Id.* at 27a.

The court remanded for the district court to consider whether Sun Fund III was also a "trade or business" under the new "investment plus-like" test

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[4] The PBGC appeared as an amicus below and sought deference for the analysis in its letter ruling, but the First Circuit rightly refused deference on multiple grounds. *See* App. 18a-22a.

[5] In stating that the Sun Funds themselves were involved in managing SBI, the First Circuit erroneously ignored distinctions between the Sun Funds and the separate entities that contracted to provide management services to SBI. Petitioners do not rely on that error for purposes of this Petition.

[6] This assertion was contradicted by undisputed evidence in the record showing that Sun Fund IV, in fact, did *not* receive the offset the First Circuit described. *See infra* p.25.

and whether the Sun Funds and SBI were "under common control" within the meaning of section 1301(b)(1) even though neither Fund held the requisite 80% ownership interest. *Id.* at 4a-5a. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Deepens a Circuit Conflict Over Whether this Court's Cases Construing the Term "Trade or Business" in Section 162(a) Apply to ERISA.

The Petition should be granted first and foremost because the First Circuit's decision deepens a conflict among the circuits. The Seventh Circuit and D.C. Circuit have held that this Court's cases interpreting the phrase "trade or business" under section 162(a) of the IRC apply equally for determining "trade or business" status under the control-group provision in section 1301(b)(1) of ERISA. The First Circuit followed the Ninth Circuit in rejecting that approach and adopted a novel "form of an investment plus test" for trade or business status. This Court should resolve the conflict and reject the First Circuit's mistaken approach.

A. There Is a Conflict in the Circuits.

Over the course of more than 70 years, in a line of cases beginning with *Higgins v. Commissioner*, 312 U.S. 212 (1941), and culminating in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), this Court has developed a clear jurisprudence interpreting the concept of a "trade or business" for purposes of provisions in the IRC permitting business to take certain deductions from income. In *Higgins*, the Court held that an individual could not deduct

expenses incurred in managing his extensive investments as a business expense because, no matter how much time or money he devoted to the task, managing investments to secure an investment return did not qualify as a trade or business. *See* 312 U.S. at 218.

Similarly, in *Whipple v. Commissioner*, 373 U.S. 193 (1963), the Court considered an individual who provided substantial managerial services to a corporation in which he had invested. The Court held that, as long as the only remuneration the individual received was the return on his investment (as opposed to a salary for his services), providing services to a corporation in an effort to enhance investment returns was not a trade or business: "[F]urnishing management and other services to corporations for a reward not different from that flowing to an investor in those corporations is not a trade or business." *Id.* at 203.[7]

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[7] *Whipple* addressed a deduction for a "business bad debt," not a business expense as in *Higgins*. At the time, however, the two types of deductions appeared in two subsections of the same section (section 23) of the IRC. *See Whipple*, 373 U.S. at 194, 199. The *Whipple* Court made clear that it took the same approach to interpreting "trade or business" in both subsections. *See Whipple*, 373 U.S. at 200-01 (applying *Higgins*). Today, the provision addressing business expenses (former section 23(a)) is codified in section 162(a), and the bad business debt provision (former section 23(k)), is codified in section 166. Given that it originally interpreted the term "trade or business" in the same section, *Whipple* is universally recognized as applying to section 162(a). *See, e.g.*, *Groetzinger*, 480 U.S. at 35 (applying *Whipple* to section 162(a)); *Green v. Comm'r*, 507 F.3d 857, 870 (5th Cir. 2007) (same). For ease of reference, this Petition refers to *Whipple* as one of this Court's cases interpreting "trade or business" for purposes of section 162(a).

Lastly, in *Groetzinger*, the Court faced a slightly different question as it had to decide whether gambling was a trade or business (as opposed to a hobby). The Court articulated a test focused on (i) whether the primary purpose of the activity was profit and (ii) whether the activity was engaged in with "continuity and regularity." 480 U.S. at 35. In formulating that test, the Court emphasized that it adhered to its earlier decisions distinguishing investing from a trade or business and explained that it did not "cut back on the Court's holding in *Higgins*." *Id.* *Groetzinger* thus stands as the culmination of a line of decisions establishing that, as long as one receives only investment returns, activity devoted to managing the entities in which one has invested does not constitute a trade or business. The Court also noted that the term "trade or business" could have a different meaning elsewhere in the IRC and confined its decision to section 162(a). *See id.* at 27 & n.8.

The Seventh Circuit has made clear that the principles announced in this Court's section 162(a) cases also govern "trade or business" status under the control-group provision of ERISA. In *Central States, Southeast & Southwest Areas Pension Fund v. Personnel*, 974 F.2d 789 (7th Cir. 1992), the Seventh Circuit applied "the definition of trade or business under § 162(a) of the Internal Revenue Code" as explained in *Groetzinger* to construe section 1301(b)(1). *Id.* at 794 (citing a passage of *Groetzinger* quoting *Whipple*). At the time, that decision created an intra-circuit conflict with *Central States, Southeast & Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992). The *Ditello* panel had concluded that, since the term "trade or

business" could have different meanings in different provisions of the tax code, *id.* at 889, there was no way to tell "which Code section interpretation we should choose" for purposes of construing ERISA, and the "wisest course is to abandon the Internal Revenue Code as an interpretive tool." *Id.* at 890. The Seventh Circuit "resolved this dispute" by rejecting *Ditello* in favor of *Personnel* and explained: "In *Personnel*, in interpreting the phrase 'trade or business,' this court looked to Internal Revenue Code Section 162(a) … and to the Supreme Court's decision in [*Groetzinger*] interpreting that tax code section." *Cent. States, Se. & Sw. Areas Pension Fund v. White*, 258 F.3d 636, 642 (7th Cir. 2001) (citing *Groetzinger* and *Higgins*).

Later Seventh Circuit decisions have reduced that result to the rule that, "[t]o apply the term [trade or business] under the MPPAA, we have adopted the test adopted by the Supreme Court for other tax purposes in … *Groetzinger*." *Messina Prods.*, 706 F.3d at 882; *see also Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 550 (7th Cir. 2013). As the Seventh Circuit has explained, "[w]hile *Groetzinger* was interpreting only a specific provision in the tax code, its test comports with the common meaning of trade or business and thus can be used more generally." *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001).

The D.C. Circuit has similarly adopted *Groetzinger*'s analysis of the "meaning of the phrase 'trade or business' as it appears in section 162(a) of the Internal Revenue Code" to interpret section 1301(b)(1). *Connors*, 995 F.2d at 250. As the D.C. Circuit explained, *Groetzinger*'s "construction of

'trade or business' is the most authoritative pronouncement available, and we therefore rely on it." *Id.* at 251. The *Connors* court also expressly rejected the contention from *Ditello* that tax cases were unhelpful for interpreting ERISA because "the term 'trade or business' has different meanings depending upon the statutory provision in which it is used." *Id.* at 251 & n.8 (internal quotations omitted). The D.C. Circuit recognized that focusing on section 162(a) provided a single definition and failing to use this Court's section 162(a) cases would leave courts "without guidance" as to the proper construction of "trade or business." *Id.* at 251. The court even cited additional tax precedents applying section 162(a) to guide application of section 1301(b)(1). *Id.*[8]

The Ninth Circuit, in contrast, has rejected the "argument that the district court should have applied [*Groetzinger*'s] definition of 'trade or business'" to section 1301(b)(1). *Carpenters' Pension Tr. Fund for N. Cal. v. Lindquist*, 491 F. App'x 830, 831 (9th Cir. 2012). Although the court provided no real analysis, it apparently rejected *Groetzinger* on grounds similar to those offered in *Ditello*, as it parenthetically noted that *Groetzinger* limited its construction solely to section 162(a) (implying that varying interpretations within the tax code counseled against using *Groetzinger* for ERISA purposes). *See also Bd. of Trustees of the W. Conf. of Teamsters Pension Tr.*

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[8] District courts in the Second Circuit have uniformly followed the approach of the Seventh and D.C. Circuits. *See, e.g.*, *Nat'l Integrated Grp. Pension Plan v. Dunhill Food Equip. Corp.*, 938 F. Supp. 2d 361, 372 (E.D.N.Y. 2013) ("The appropriate starting point for this analysis is the test enunciated by the Supreme Court in [*Groetzinger*] defining trade or business for purposes of section 162(a) of the Internal Revenue Code.").

Fund v. Lafrenz, 837 F.2d 892, 894-95 & n.6 (9th Cir. 1988) (describing "trade or business" test as an "essentially factual inquiry" without reference to tax precedents).

In the decision below, the First Circuit expressly sided with the Ninth Circuit and "reject[ed] the proposition that, apart from the provisions covered by 26 U.S.C. § 414(c),[9] interpretations of other provisions of the Internal Revenue Code are *determinative* of the issue of whether an entity is a 'trade or business' under § 1301(b)(1)." App. 30a (emphasis in original). Indeed, the court made clear that it was taking the Ninth Circuit's view by citing *Lindquist's* holding "rejecting [the] argument that [the] *Groetzinger* test must be used in interpreting § 1301(b)(1)." *Id.*

The First Circuit also attacked a straw man by offering essentially the same argument from *Ditello* that the Seventh and D.C. Circuits have rejected. It noted that there is not a "uniform definition" of trade or business "even within the Code," *id.* (citing *Groetzinger*), and asserted that the Sun Funds' position would require holding that "cases interpreting the phrase 'trade or business' as used *anywhere* in the Internal Revenue Code are binding" in the ERISA context. *See* 29a-30a (emphasis added). That is not the Sun Funds' position, nor is it the position of the Seventh or D.C. Circuits. Those circuits applied this Court's precedents interpreting "trade or business" in a specific provision—section 162(a)—because, as explained below, the term serves

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[9] As noted, *see supra* note 1, section 1301(b) cross-references the control-group provision in section 414(c) of the IRC.

effectively the same purpose in that context and in section 1301(b)(1).[10]

Where the Seventh Circuit and D.C. Circuit have announced that they interpret section 1301(b)(1) by "us[ing] the test developed by the Supreme Court in … *Groetzinger* … for applying" section 162(a), *Nagy*, 714 F.3d at 550, and the First Circuit "reject[s] [the] argument that [the] *Groetzinger* test must be used," App. 30a, there is clearly a conflict between the circuits.

At the same time, the First Circuit strained to portray its novel "investment plus" approach as "consistent" with the Seventh Circuit's decisions. *See id.* at 27a-29a. Its claims on that score do not withstand scrutiny. To start with, the assertion that the Seventh Circuit has applied an "'investment plus'-like analysis," *id.*, is incorrect. The Seventh Circuit's announced rule is that it applies this Court's decisions construing section 162(a) to section 1301(b)(1).

In addition, the Seventh Circuit has never suggested (as the First Circuit held here) that an owner of a company that has incurred withdrawal liability could be treated as a "trade or business"

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[10] Even as it rejected this Court's section 162(a) precedents, the First Circuit repeatedly cited articles arguing for changes in the tax law to treat private equity funds *for tax purposes* as "trades or businesses." *See* App. 7a, 9a. n.7, 34a, 37a n.30 (citing Rosenthal, *Taxing Private Equity Funds as Corporate 'Developers'*, Tax Notes, Jan. 21, 2013). That suggests a backwards approach under which the court refused to accept relevant guidance from tax cases but simultaneously used its analysis under ERISA to support a *change* in tax law that the court tacitly sought to endorse. That is not a proper approach to interpreting the statute or construing this Court's precedents.

solely due to activity managing the very company that incurred withdrawal liability. To the contrary, *all* of the Seventh Circuit's decisions involve owners engaged in *separate* activity (almost invariably renting real estate) that may amount to a distinct trade or business. As a result, the Seventh Circuit has never confronted the issue here, which squarely raises the rule from *Whipple* that merely providing management services to a company one owns does not convert an investment into a trade or business.

There is certainly no basis to think that the Seventh Circuit would abandon the rule of *Whipple*. In fact, the Seventh Circuit has consistently emphasized that the "trade or business" test ensures precisely that owners are *not* subjected to withdrawal liability due to their status as owners. *Messina Products*, 706 F.3d at 880. The First Circuit's approach, in contrast, makes *every* owner (with the requisite control) potentially subject to withdrawal liability if it crosses some unstated line in participating in management of the company in which it has invested. And given that 80% ownership is required even to cross the threshold to control-group liability, it is hard to imagine any owner with an 80% or greater stake that would not have some participation in directing the management of a company that, by definition, it controls.

The First Circuit's theory for claiming consistency crumbles further on inspection. According to the First Circuit, it looked at the same *types* of information as the Seventh Circuit in assessing trade or business status—things such as the "stated intent in the creation of the enterprise," the legal form, and "how it was treated for tax purposes." App. 28a. But looking at the same *types*

of information does not show consistency where the First Circuit treats the *substance* of that information differently. In the Seventh Circuit's *Messina* case, for example, the entity's operating agreement announced that it was formed to "produc[e], s[ell], and market[] gravel,"706 F.3d at 885, which plainly created a trade or business earning business income. In addition, the entity filed a tax return reporting trade or business income and reported its principal business as "real estate rental." *Id.*

Here, in contrast, the Sun Funds' formation documents state that the Funds exist to make investments and (according to the First Circuit) assist in managing those investments. *See* App. 7a. But under this Court's section 162(a) precedents (*Whipple* in particular), such management activity does *not* create a trade or business. Moreover, it was undisputed here that the Sun Funds had *no* trade or business income on their tax returns—a point the First Circuit conceded in a footnote, but ignored. *Id.* at 28a n.22. Similarly, the First Circuit itself noted that in *Central States, Southeast & Southwest Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 879 (7th Cir. 2011), the entity at issue "earned rental income," a distinction that made it a "trade or business" and wholly unlike the Sun Funds.

There also can be no question that, if this Court's section 162(a) cases were applied, the Sun Funds would not be trades or businesses. The Sun Funds received no income other than investment returns. And *Whipple* dictates that even if the Sun Funds played a role in managing the companies in which they invested, that would not make them trades or businesses. *See infra* pp. 23-24.

The First Circuit's decision to join the Ninth Circuit's side of this conflict has not been lost on lower courts. After explaining that the Ninth Circuit "has provided little guidance" on section 1301(b)(1), one district court has already cited the First Circuit's decision to support "declin[ing] to apply *Groetzinger's* definition of 'trade or business.'" *Pension Plan for Pension Trust Fund for Operating Eng'rs v. Galletti Concrete, Inc.*, 2013 WL 5289017, at *3 & n.4 (N.D. Cal. Sept. 19, 2013).

B. The First Circuit's Approach Is Erroneous.

This Court should grant review to resolve the circuit conflict and reject the First Circuit's erroneous "investment plus" approach. When Congress enacted ERISA, it recognized that it was borrowing the phrase "trade or business" from the tax context. In fact, ERISA explicitly mandates that the "trade or business" provision should be interpreted according to Treasury Regulations, and should be given the same meaning as "trade or business" in a control-group provision in the tax code (26 U.S.C. § 414(c)) that was part of the same bill.[11] Although that provision does not expressly direct using the definition of "trade or business" from other provisions in the tax code, it clearly establishes that the "trade

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[11] *See* 29 U.S.C. § 1301(b)(1) (requiring that "regulations prescribed" to interpret the control-group provision "shall be *consistent and coextensive* with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414 (c) of title 26.") (emphasis added); An Act To Provide for Pension Reform, Pub. L. No. 93-406, § 1015, 88 Stat. 829, 926 (1974) (adding what would become 26 U.S.C. § 414(c)).

or business" concept is linked to certain uses in the tax code.

Looking to this Court's interpretations of the term under section 162(a) makes sense because the "trade or business" test in that provision serves essentially the same function as in section 1301(b)(1). Section 1301(b)(1)'s "trade or business" requirement is designed to distinguish between mere owners of an enterprise (*i.e.*, investors) and those that also operate a separate trade or business. While section 1301(b)(1) is designed to prevent an employer from circumventing ERISA obligations by divvying up its *business* into separate entities, it was not meant to be an end run around the fundamental principle of limited liability for investors. As the Seventh Circuit has explained, "[t]he purpose of limiting controlled group membership to persons engaged in trades or businesses is to protect the *owners* of corporations from having to dig into their pockets to make good the withdrawal liability of their corporations." *Messina Products*, 706 F.3d at 880 (emphasis added); *Fulkerson*, 238 F.3d at 896 ("§ 1301(b)(1) was not intended to impose automatic personal liability on individuals who own companies that are required to contribute to pension funds.").

The phrase "trade or business" in section 162(a) polices the same line between an owner/investor and a business. *See Groetzinger*, 480 U.S. at 30-31; *Whipple*, 373 U.S. at 202. Accordingly, the Seventh and D.C. Circuits are correct in holding that this Court's interpretation of the phrase should apply in both contexts. *See, e.g.*, *Fulkerson*, 238 F.3d at 895 (applying *Groetzinger* to section 1301(b)(1) because "[o]ne purpose of the *Groetzinger* test is to

distinguish trades or business[es] from investments").[12]

II. The Decision Below Conflicts with This Court's Precedents by Holding that Managing Investments Can Make an Entity a Trade or Business.

After refusing to apply this Court's section 162(a) precedents, the First Circuit asserted (as an alternative holding or in extensive *dicta*) that its analysis was, nevertheless, consistent with those decisions. *See* App. 31a-39a. That is not correct.

The First Circuit asserts that, even under this Court's decisions, an entity that solely "make[s] investments, manage[s] those investments, and earn[s] only investment returns" *can be* a trade or business. *Id.* at 31a. In the First Circuit's view, such an entity becomes a "trade or business" if its management role rises to some undefined level. In fact, the court below made clear that the dividing line it was establishing rested on the distinction between a "passive investor" and an investor that engaged in some amount of management activity in its investment. *See, e.g.*, *id.* at 4a (Sun Fund IV "was not merely a 'passive' investor, but sufficiently operated, managed, and was advantaged by its relationship

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[12] Given that this Court's section 162(a) decisions comport with the plain and ordinary understanding of "trade or business," an affirmative reason *not* to follow them under section 1301(b) should be required before they can be rejected. *Cf. Fulkerson*, 238 F.3d at 895 n.2 ("*Groetzinger* states the common, ordinary definition of trade or business and is thus appropriately used to interpret § 1301(b)(1)."); *Connors*, 995 F.2d at 251 (noting that, "the parties have offered no *better* interpretation" than that applied under section 162(a) "and we can imagine none").

with its portfolio company," that it should be considered a trade or business); *id.* at 22a-23a (framing the "issue" as "whether there is mere passive investment to defeat pension withdrawal liability"). In the First Circuit's view, "[i]t is one thing to manage one's investments in business. It is another to manage the businesses in which one invests." *Id.* at 7a. That approach cannot be reconciled with this Court's cases under section 162(a), which make clear that an entity is *not* engaged in a "trade or business" even where it manages the businesses in which it invests, as long as the only income it earns is a return on its investments.

That is precisely the teaching of *Whipple*. That case involved a taxpayer who managed a corporation he owned, but who received no salary or other remuneration for his services. This Court rejected an effort to treat that management activity as a trade or business. It explained that "[d]evoting one's time and energies to the affairs of a corporation is not of itself … a trade or business" and that while "such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment, this return is distinctive to the process of investing" and does not arise from a "trade or business of the taxpayer." *Whipple*, 373 U.S. at 202. This Court thus made clear that, even when an individual is active in managing a business, "[w]hen the only return is that of an investor," the individual is not engaged in a trade or business. *Id.*; *see also id.* at 203 (stating it was "untenable" to claim that "one who actively engages in serving his own corporations for the purpose of creating future income through those enterprises is in a trade or business"). The rule

in *Whipple* is thus diametrically opposed to the First Circuit's view that "manag[ing] the businesses in which one invests," App. 7a, is somehow enough to cross the "trade or business" line.

Indeed, even the First Circuit has recognized, when applying *Whipple* in the tax context, that extensive involvement in managing the entity in which one has invested cannot convert an investment into a trade or business. *See, e.g.*, *French v. United States*, 487 F.2d 1246, 1249 (1st. Cir. 1973) (sole owner of car dealership who was "rendering management services" to the dealership was not engaged in trade or business because the management activity "was done primarily to protect or enhance his investment rather than to earn a salary"). Other Courts of Appeals have similarly recognized that "[t]he management of investments … is not a trade or business, regardless of how extensive or complex the investment portfolio or how much time is required to manage investments." *Zink v. United States*, 929 F.2d 1015, 1021 (5th Cir. 1991); *see also Dagres v. Commissioner*, 136 T.C. 263, 281-82 (2011). Indeed, courts have specifically held that where a limited partnership is invested in a business and its general partners have "active involvement" with the business, including "apply[ing] … knowledge and experience to insure that an investment is successful," the partnership is not engaged in a trade or business where the partners' involvement did "not exceed that of an interested and active investor." *Lewin v. Comm'r*, 335 F.3d 345, 349, 350 (4th Cir. 2003); *see also Kantor v. Comm'r*, 998 F.2d 1514, 1520 (9th Cir. 1993).

Nor can the First Circuit reconcile its approach with this Court's cases by pointing to supposed

management fee off-sets between Sun Fund IV and its GP. *See* App. 26a-27a. The First Circuit claimed that fee offsets provided an "economic benefit" that distinguished Sun Fund IV from an investor earning only investment returns. *Id.* There are two critical flaws with that analysis.

First, it is factually not true. Undisputed record evidence shows that the GP of Sun Fund IV had *waived* its fees during the entire time of the SBI investment, and thus Sun Fund IV received no fee offset. *See* App. 114a-116a (redacted to avoid filing under seal). Indeed, the Teamsters' Fund itself admitted in filings below that the GP had waived all fees. *See* App. 92a. The First Circuit ignored those undisputed facts.

Second, and more important, even if Sun Fund IV had received a fee offset, that would still not make it a trade or business. A *discount* on fees is not income. And that is especially so where the discount ensured that the GP would not be paid twice for the same services—once by the underlying portfolio company that received the services (here SBI) and again by Sun Fund IV.[13] Such an offset would not alter the fact that the only income Sun Fund IV received from any arguable management activity was "in the form of dividends or enhancement in the value of [its] investment[s]," which makes the Fund an

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[13] *Cf. In re Salpietro*, 492 B.R. 630, 639 (Bankr. E.D.N.Y. 2013) (holding that "a reduction of expenses … is not contemplated by [11 U.S.C.] section 1322(a)(1)," which allows a modification of a confirmed bankruptcy plan if the debtor's "income" increases); *In re Hughey*, 380 B.R. 102, 106 (Bankr. S.D. Fla. 2007) ("[A] reduction in expenses is not equivalent to an increase in income.").

investor, not a trade or business. *Whipple*, 373 U.S. at 202.

III. The First Circuit's "Investment Plus" Test Will Generate Needless Uncertainty and Deter Investment.

Entirely apart from the conflict described above, the First Circuit's decision also warrants review because it has inflicted needless uncertainty on a large and dynamic sector of the Nation's economy. In 2012 alone, private equity funds invested $347 billion in 2,083 U.S. companies,[14] and in the last 10 years, they have invested over $3.6 trillion in the U.S.[15] In addition, the rate of job creation in private equity-backed firms over the last 15 years has outpaced the rate in public companies by a factor of three. Assoc. for Corporate Growth, *Driving Capital* 2 (2013). The First Circuit's vague "investment plus" test, however, will deter investment by this sector in any companies with pension obligations—especially distressed companies—a result counter to Congress's objectives.

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[14] Private Equity Growth Capital Council, *Private Equity: Top States and District in 2012*, http://www.pegcc.org/wordpress/wp-content/uploads/2012-Private-Equity-Top-States-and-Districts.pdf.

[15] Private Equity Growth Capital Council, *Private Equity at Work: Investors*, http://www.privateequityatwork.com/who-benefits/the-economy/.

A. The Vague "Investment Plus" Test Exposes Potential Investors to Broad and Unpredictable Liability.

Although the First Circuit expressed "dismay" at the lack of existing guidance concerning trade-or-business status under section 1301(b)(1), it studiously avoided providing any useful guidance itself. Instead, it declared that it saw "no need to set forth general guidelines for what the 'plus' is" in its particular "form of an investment plus approach" and, stressing that it was "tak[ing] account of a number of factors," went "no further than to say that on the undisputed facts of this case, Sun Fund IV is a 'trade or business' for purposes of § 1301(b)(1)." App. 23a. This multifactor, "we know it when we see it" test provides no clear rules either for lower courts or for investment entities.[16]

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[16] As one indication of both the significance of the ruling below and the uncertainty it has generated, a Google search reveals that more than 30 law firms and all major accounting firms have issued client alerts on the decision. As one assessment put it: "Unless the Supreme Court takes this issue up, private-equity funds may never have clarity or closure on the matter [of whether such funds are 'trades or businesses']." Association of Corporate Counsel, *First Circuit Decision Emits Sudden Shockwaves to Private Equity Sector* (Oct. 16, 2013), http://www.inhouseaccess.com/2013/10/16/first-circuit-decision-emits-sudden-shockwaves-to-private-equity-sector/; *see also e.g.*, Akin Gump, *Appeals Court Reverses ERISA "Trade or Business" Ruling Favoring Private Equity Funds, Creates Uncertainty on Controlled Group Liability* (July 29, 2013), www.akingump.com/en/news-publications/appeals-court-reverses-erisa-trade-or-business-ruling-favoring.html; Davis Polk LLP, *First Circuit Sun Capital Decision Increases ERISA Exposure for Private Equity Funds* (Aug. 6, 2013), www.davispolk.com/sites/default/files/08.06.13.Sun_.Capital.pdf (the First Circuit's decision creates "uncertainty" and does not

That result pushes the development of the law in precisely the wrong direction. It replaces a well-established and readily applied test from *Whipple* with a fact-intensive, multi-faceted morass of considerations. As this Court has explained, where settled decisions have developed a test for applying a statutory term that is "familiar and relatively easy" to apply, it makes no sense to "jettiso[n] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

The First Circuit's amorphous test exposes *every* entity that plans to take a controlling interest in a target company and to exercise managerial oversight to potential withdrawal liability. Indeed, the opinion repeatedly suggests that venturing at all beyond being a "passive" investor creates a risk of being deemed a "trade or business." *See, e.g.*, App. 4a. But virtually every entity that secures a

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provide any "sensible and realistic advice" as to how funds "might manage their portfolio investments to avoid a trade or business finding"); Proskauer Rose LLP, *Private Investment Funds May Be Liable for Portfolio Company's Underfunded Pension Liabilities under First Circuit Ruling* (July 31, 2013), http://www.proskauer.com/publications/client-alert/investment-funds-potentially-liable-for-portfolio-companys-underfunded-pension-liabilities-under-first-circuit-ruling/ ("[T]he broader implications of this decision for employers and their employee benefit plans remains uncertain."); *see also* J. Scott, *Sun Capital Might Be Bigger Than You Think*, FORBES (Sept. 25, 2013), http://www.forbes.com/sites/taxanalysts/2013/09/25/sun-capital-might-be-bigger-than-you-think/ ("Practitioners, commentators, and taxpayers have spent weeks trying to figure out the importance of the First Circuit's decision in *Sun Capital*.").

controlling interest in an operating company does so with the expectation of exercising management oversight. That is part of the very purpose of investing in a controlling stake.

Worse still, the First Circuit's decision logically suggests not only that the investment entity itself is exposed to withdrawal liability, but also that every other portfolio company in which it has a controlling interest is equally exposed as a sibling in the same control group. Several courts have held that, for imputing withdrawal liability, "no economic nexus is required between the obligated organization and trades or business under common control." *Fulkerson*, 238 F.3d at 895 n.1; *see also Connors*, 995 F.2d at 249. Accordingly, under a logical extension of the decision below, wholly unrelated enterprises may be liable for one company's withdrawal liability simply because all happened to be owned by the same investor.[17]

That expansion of withdrawal liability has nothing to do with Congress's objective of "prevent[ing] businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities." *Messina Products*, 706 F.3d at 878 (internal quotations omitted). An entity that invests in unrelated businesses in diverse industries is not "fractionalizing operations" to "shirk" ERISA

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[17] Private equity funds routinely invest in companies from diverse industries. *See, e.g.*, Dawn Wotapka, *Carlyle Jumps Into Niche Space*, Wall. St. J. (Oct. 15, 2013) (describing a "private-equity firm that has interests in everything from an oil refinery to a vitamin maker").

obligations. Imposing withdrawal liability on such an entity—and each of its portfolio companies—simply maximizes the number of unrelated pockets a pension fund can dip into to cover one company's withdrawal liability. "There is no congressional mandate," however, "to engage in legal gymnastics in order to guarantee pension plans at all costs." *Teamsters Pension Trust Fund v. Cent. Mich. Trucking, Inc.*, 857 F.2d 1107, 1109 (6th Cir. 1988).

B. The Decision Below Also Implies Vastly More Burdensome Obligations Under the Tax Code.

The expansive new burdens created by the First Circuit potentially go even further. As the First Circuit pointed out, the terms used in section 1301(b) of ERISA are expressly tied to section 414(c) of the tax code, which also contains a control group provision. Under section 414(c), for the pension plans of members of the same control group to receive favorable tax treatment, they must meet certain requirements for covering employees, *see* 26 U.S.C. § 410(b), and providing employees equal treatment ("antidiscrimination"), *see id.* § 401(a)(4).

With some exceptions, Congress intended entities that were treated as being part of the same "control group" under section 414(c) to also be treated as part of a control group under section 1301(b). The First Circuit's decision thus raises the specter that its novel "investment plus" test will be imported into section 414(c) as well.

That outcome would be wholly unworkable. It would mean that *all* employees of *all* the disparate portfolio companies in which one entity has a controlling stake would have to be considered

employees of a single employer for purposes of assessing the coverage and non-discrimination of pension plans. As a result, variations in the pension plans of different portfolio companies—which for decades have been evaluated separately for section 414(c) purposes—could suddenly run afoul of non-discrimination requirements.

That result makes no sense. Investment funds may (and frequently do, *see supra* note 17) invest in disparate businesses in different sectors of the economy with different mixes of employees in vastly different sorts of jobs. It is unexceptional that such disparate companies may have different pension plans to meet their specific needs. The happenstance that one entity secures a controlling interest in such unrelated businesses provides no basis for demanding that their pension plans should suddenly be treated as if they were part of a single enterprise.

The linchpin for avoiding that result has always been the principle that an investment entity is *not* engaged in a trade or business. Given the textual link between section 414(c) and section 1301(b), however, the decision below could throw that settled law into turmoil.

C. The Decision Below Will Spawn Needless Litigation and Stifle Investment in Companies with Pension Obligations.

The uncertain liability arising from the decision below will have two inevitable consequences, both of which this Court should prevent by granting review now.

First, it will spawn a tidal wave of litigation. The First Circuit's refusal to provide concrete

guidance as to what, exactly, satisfies its multi-factor "investment plus-like" test invites years of litigation as pension funds and investment funds must attempt to sort out what puts an investment fund over the ill-defined "investment plus-like" line. But litigation will not be limited to that issue. Given the textual link between section 1301(b) and section 414(c) of the tax code, claims will inevitably arise that the same "trade or business" test the First Circuit has applied under section 1301(b) (and the same implications for the scope of a control-group) must apply under section 414(c). That issue will generate its own cottage industry of litigation.

This Court should not condemn the entire investment fund industry to a decade or more of needless litigation where the fundamental question the First Circuit was addressing—whether managing a company in which one has invested converts the investment into a "trade or business"—was already decided by this Court more than 40 years ago in *Whipple*. There is no need for further percolation in the courts of appeal where the essential issue at stake was long considered by this Court. *See, e.g.*, *Swarthout v. Cook*, 131 S. Ct. 859, 862 (2011) (summarily reversing the Ninth Circuit where prior Supreme Court precedent "should have been the beginning and the end of the … inquiry"). Instead, the Court should grant the writ and make clear that this Court's section 162(a) precedents, including *Whipple*, provide the rule of decision for trade or business status under section 1301(b).

Second, the decision below will frustrate the purposes of ERISA by deterring investment in any company—and certainly any distressed company—that has pension obligations. Under the First

Circuit's vague "some form of investment plus test," *every* investment entity that intends to exercise control over the businesses in which it invests is at risk of being treated as a "trade or business." The clear message to private equity funds, hedge funds, and any other investment entities that might secure a controlling stake in a target company is this: do not invest in distressed companies with pension obligations because, no matter how careful you are, you and all your other portfolio companies can be held liable for that company's withdrawal liability. Indeed, commentators have already observed that the First Circuit's holding "if sustained, has the potential to adversely affect the willingness of private equity firms to invest in operating companies that have significant underfunded pension plans." *Private Equity Firm Found to Be Member of Controlled Group for Withdrawal Liability Purposes*, 41 Tax Mgmt. Compensation Plan. J. 258, 259 (2013).

That result will frustrate ERISA's objective of promoting the financial stability of pension plans. Investors such as venture capital, hedge funds, and private equity funds are a critical source of capital injections that can help turn around distressed employers and prevent them from becoming *failed* employers—who cease contributing to pension funds and put strains on the funds due to their unfunded liabilities.[18] By significantly deterring investment

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[18] Especially given the hugely expanded role that private equity funds and hedge funds have played in all sectors of the economy in recent decades, deterring them from providing the capital to turn around distressed companies would deprive such companies of a primary avenue for avoiding bankruptcy. *See, e.g.*, Marco Trbovich, *Responsible Private Equity Investors Revitalizing U.S. Manufacturing*, Huff Post Business (May 17, 2012) (noting that KPS Capital Partners, a private equity fund,

funds from providing that source of financing to distressed companies with multiemployer pension plan obligations, the First Circuit's opinion will deprive such companies of their primary avenue for avoiding bankruptcy. As the District Court recognized, this result "clearly conflicts with the congressional purpose of ensuring financially sound multiemployer pension plans." App. 82a; *see also In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146, 150 (6th Cir. 1983) (noting that the unreasoned expansion of MPPAA liability "actually frustrate[s] the goal of encouraging the private sector to assume control of failing companies and their pension plans."). The Court should avoid that result by granting review now and reversing the First Circuit.

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turned around five bankrupt firms that were facing liquidation to establish HHI Group Holdings LLC, which is now "among the most profitable auto parts compan[ies] in the world on a cash flow margin" and employs workers represented by the United Steel Workers and the United Auto Workers).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

Patrick F. Philbin
Counsel of Record
Kellen S. Dwyer
KIRKLAND & ELLIS LLP
655 Fifteenth Street,
Washington, DC 20005
pphilbin@kirkland.com
(202) 879-5000

John F. Hartmann, P.C.
Marla Tun
Jeffrey S. Quinn
KIRKLAND & ELLIS LLP
300 N LaSalle Street
Chicago, IL 60654
(312) 862-2000

Theodore J. Folkman
MURPHY & KING P.C.
1 Beacon Street
Boston, MA 02108

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