No. 13-648

In the Supreme Court of the United States

SUN CAPITAL PARTNERS III, LP, ET AL., PETITIONERS

v.

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND

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

MOTION FOR LEAVE TO FILE BRIEF OF THE PRIVATE EQUITY GROWTH CAPITAL COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2(b) of the Rules of this Court, the Private Equity Growth Capital Council ("PEGCC") moves for leave to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondent has declined to grant consent.

The issues presented by the petition—whether an entity that solely makes investments and manages the businesses in which it has invested is a "trade or business" for purposes of the Employee Retirement Income Security Act of 1974, and whether the First Circuit erred by departing from Internal Revenue Code precedents holding that the making of such investments is not a "trade or business"—are of profound importance to the private equity industry in the United States. *Amicus curiae* PEGCC is an advocacy, communications, and research organization, as well as a general resource center that develops, analyzes, and distributes information about the private equity and growth capital investment industry and its contributions to the national and global economy. Formerly known as the Private Equity Council, PEGCC was established in 2007 and is based in Washington, D.C. Its members consist of the world's leading private equity and growth capital firms, united by their commitment to growing and strengthening the businesses in which they invest.

As an industry-level trade association, PEGCC has a special interest in the outcome of this case, which involves a question of exceptional importance both to PEGCC members and to the larger U.S.

economy. The First Circuit's sweeping liability rule has the potential to effect a major shift in the liabilities to which private equity funds and their portfolio companies are exposed for existing and future investments in core U.S. businesses. The confusion and uncertainty spawned by the First Circuit's decision is of grave concern to *amicus*, which respectfully submits that the implications of the decision are serious enough to warrant this Court's immediate review. *Amicus* should therefore be granted leave to file the attached brief.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The First Circuit held that private equity funds may be "trades or businesses" for purposes of withdrawal liability, and thus on the hook for millions of dollars *beyond their investments* for the unfunded pension obligations of the companies in which they invest, merely for organizing their investments the way private equity funds have for years. That opinion disregards over a half century of Supreme Court precedent interpreting the Internal Revenue Code, and in doing so departs from the decisions of several other courts of appeals. The First Circuit's decision is not only wrong: the sea change in the law occasioned by the court's decision will interfere with the reasonable investment-backed expectations of private equity investors.

Instead of the longstanding "trade or business" test from tax law, the court puts in place an amorphous, multifactor test it terms "some form of an 'investment plus' approach." Pet. App. 23a. While the court refused to provide meaningful guidance about what could expose private equity investments to

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission.

withdrawal liability, the factors on which the court relied here to find the requisite "plus" are common to most forms of private equity investment, like management involvement and management fee offsets, which only shows that the court misunderstood the way private equity investment works.

The issue is an important one. The effects of the First Circuit's decision will be immediate and devastating for private equity investment. The specter of being held liable for unfunded pension plans (and of having that liability hinge on the application of a standardless multifactor test) will discourage funds from investing in companies with multiemployer pension plans—the very companies, in sectors like manufacturing, that are most in need of investment. Particularly in the past two decades, private equity has been an engine driving the turnaround in vital sectors of the national economy, bringing benefits not only to fund investors but also the companies (and their employees) in which funds invest. The harm from the resulting chill in investment will be similarly widespread—reaching even the purported beneficiaries of the First Circuit's ruling, since pension funds have been major investors in private equity, and private equity has played a vital role in improving the financial health of employers supporting those pension funds.

ARGUMENT

The First Circuit held that a private equity fund can be subject to potentially millions of dollars in liability for the unfunded pension obligations of a portfolio company in which it invests, merely for having the sort of management involvement common for such investors. The court reached that conclusion by applying what it termed "some form of an 'investment plus' approach," Pet. App. 23a, an amorphous multifactor test of the kind this Court has long criticized for "jettisoning 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 panel's decision sows confusion in an area of the law that demands predictability, creating the potential for unforeseen withdrawal liability for existing private equity investments, and discouraging private equity funds from investing in the very industries most in need of their financial support. Further review is urgently warranted to prevent significant disruption in a critical sector of the American economy.

I. The First Circuit's Holding Disrupts Private Equity Investors' Reasonable Investment-Backed Expectations

Private equity is a leading source of capital, contributing to recent years' economic growth. In the last decade alone, private equity funds have invested over $3.6 *trillion* in the economy. PEGCC, *Who Benefits? How Private Equity Helps The Economy*, slide 4, http://www.privateequityatwork.com/who-benefits/the-economy/. They have done so in reliance on the existence of stable legal rules governing the making of investments. One of investors' most significant considerations involves forecasting their exposure to a company's liabilities, including for employee benefits under the Employee Retirement Income Security Act of 1974 ("ERISA")—the federal statute governing retirement plans. Private equity funds that have invested in recent years have done so in reliance on the longstanding interpretation of the term "trade or business" in Section 162(a) of the Internal Revenue Code, which has commonly been applied analogously in the ERISA context. See, *e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund* v. *White*, 258 F.3d 636, 642 (7th Cir. 2001); *Connors* v. *Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993); *Nat'l Integrated Grp. Pension Plan* v. *Dunhill Food Equip. Corp.*, 938 F. Supp. 2d 361, 372 (E.D.N.Y. 2013).

A. The First Circuit's Decision Is Wrong

The court of appeals erred when it departed from the settled understanding of "trade or business" in tax law to fashion its own novel and distinct conception of "trade or business" strictly for ERISA. For over half a century, limited partnership investors have relied on the fact that making and deriving income from investments, and paying general partners or affiliated firms to manage those investments, does not constitute a "trade or business" for purposes of the Internal Revenue Code.

In *Whipple v. Commissioner*, for instance, the Supreme Court held that "[d]evoting one's time and energies to the affairs of a corporation is not of itself * * * a trade or business." 373 U.S. 193, 202 (1963). This Court reached that conclusion even though the time devoted was substantial, and even though "such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment." *Ibid.* In *Higgins v. Commissioner*, the Court recognized that a taxpayer with "extensive investments in real estate, bonds and stocks, [who] devoted a considerable portion of his time to the oversight of his interests and hired others to assist him in offices rented for that purpose" was merely exercising "managerial attention for his investments," and did not constitute a "trade or business" for purposes of the Internal Revenue Code. 312 U.S. 212, 213, 218 (1941); see also *Comm'r* v. *Groetzinger*, 480 U.S. 23, 35 (1987) (applying *Whipple* to Section 162(a)). Because the meaning of "trade or business" under the Internal Revenue Code was already well established at the time Congress enacted ERISA in 1974, it is most naturally understood to have the same meaning in the ERISA context. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (where "Congress borrows terms of art, * * * it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word[s]"); cf. *Metro. Life Ins Co.* v. *Taylor*, 481 U.S. 58, 65 (1987) (noting "presumption that similar language in two labor law statutes has a similar meaning").

The First Circuit casually brushed aside the long-understood meaning of "trade or business" from the Internal Revenue Code in favor of an unpredictable and standardless ERISA-specific definition of "some form of an 'investment plus' approach." See Pet. App. 23a. In doing so, the First Circuit has taken the wrong side in a well-developed split among the courts of appeals. The Seventh and D.C. Circuits have expressly recognized that the Tax Code "trade or business" test discussed in *Groetzinger* is applicable in the ERISA context. See, *e.g.*, *Cent. States*, 258 F.3d at 642 ("[T]he *Groetzinger* test is the test for determining whether entities are 'trades or businesses' under section 1301(b)(1). There is no more uncertainty; that issue is settled."); *Connors*, 995 F.2d at 250 ("[T]he Court's construction of 'trade or business' [in *Groetzinger*] is the most authoritative pronouncement available, and we therefore rely on it * * *.")—a reading the First Circuit explicitly "reject[s]," Pet. App. 30a (citing *Carpenters Pension Trust Fund for N. Cal.* v. *Lundquist*, 491 F. App'x 830, 831 (9th Cir. 2012)).

The First Circuit's decision represents a sea change in the law, creating confusion where previously there was certainty, at least among binding court of appeals precedent.[2] Even the court of appeals itself recognized the uncertainty its test would generate. It acknowledged, for instance, that its test involved "a very fact-specific approach" (Pet App. 23a) that "leaves open many questions about exactly where the line should be drawn between a mere passive investor and one engaged in a 'trade or business,'" *id.* at 39a.

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[2] The First Circuit's departure from the long-established meaning of "trade or business" in Section 162(a) not only parts ways with the decisions of other courts of appeals, see Pet. 14-15, it frustrates Congress's intent that terms in the Internal Revenue Code and ERISA are to be interpreted *in pari materia*. Compare, *e.g.*, 26 U.S.C. § 414(c) ("all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer"), with 29 U.S.C. § 1301(b)(1) ("all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer"); cf. *IUE AFL-CIO Pension Fund* v. *Barker & Williamson, Inc.*, 788 F.2d 118, 123 (3d Cir. 1986) ("ERISA incorporates the Internal Revenue Code's 'controlled group' standards for determining whether two related corporations are within a controlled group and therefore deemed to be a single employer.").

B. The First Circuit's Test Imposes Withdrawal Liability Based on Common Industry Practices

The First Circuit has deviated from the bedrock understanding of what constitutes a "trade or business," exposing investors to potentially crippling withdrawal liability for engaging in conduct common to private equity investment. The factors on which the court of appeals relied to find the requisite "plus" in its "investment plus" test—investor involvement in management, see Pet App. 24a-26a, and management fee offsets, see *id.* at 26a-27a—are common to most forms of private equity investment. Those factors are not only inappropriate bases for imposing liability; by focusing on those common practices as the basis for imposing staggering withdrawal liability, the court of appeals adopted a rule that unsettles reasonable investment-backed expectations and disrupts an industry that is critical to national economic well-being.

Private equity is a specialized form of investing designed to provide a company with a carefully managed infusion of capital and expertise, usually over a three-to-seven year period, with the goal of improving the company's performance and allowing investors to turn a profit. See generally, *e.g.*, Boston Consulting Group, *Equity Capital in Emerging Domestic Markets and Its Critical Role in Driving Growth in the Broader U.S. Economy*, 11 (July 2009) ("BCG Study"), http://www.pegcc.org/wordpress/wp-content/uploads/naic-bcg-main-study-07-28-09-final-for-release1.pdf. By its very nature, then, the private equity model contemplates *some* investor involvement in management affairs, at least "transition[ally]."

Ulrich Hege et al., *Asset Sales and the Role of Buyers: Strategic Buyers versus Private Equity*, SSRN Working Paper (Feb. 25, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787465. Private equity investment is at its most useful in improving an underperforming target company precisely because investors can "identify areas for improvement and to support companies through a period of transformation, as well as to strengthen portfolio management teams." Ernst & Young, *Clear direction, focused vision: How do private equity investors create value? A study of 2011-12 North American exits*, 8 (2013), http://www.pegcc.org/wordpress/wp-content/uploads/How-PE-investors-create-value-N.-America-EY-2013.pdf. That is, by "monitoring managers," "private equity-backed firms are able to improve operations in the firms they back." Shai Bernstein et al., *Private Equity and Industry Performance*, NBER Working Paper No. 15632, at 3 (Jan. 2010), http://www.nber.org/papers/w15632.pdf?new_window=1. Funds have long engaged in such practices, cf., *e.g.*, Pet. App. 21a n.15 (noting the long history of private equity investment), without having such management "[i]nvolvement" (*id.* at 25a) transform funds from investors into "trades or businesses," see, *e.g.*, *Lewin* v. *Comm'r*, 335 F.3d 345, 349, 350 (4th Cir. 2003) (investor not a "trade or business" for tax purposes where "active involvement" in management was merely "to insure that an investment is successful").

The First Circuit's reliance on management fee offsets as a factor weighing in favor of finding a "trade or business" (Pet. App. 26a-27a) is similarly misguided—and similarly disruptive to settled expectations. Widespread industry practice supports the view that sharing an expense (*e.g.*, a management fee offset) is consistent with the role of an investor. See, *e.g.*, Tax Analysts Discussion, *Private Equity as a Trade or Business: The* Sun Capital *Decision* (Washington D.C., Sept. 27, 2013) (statement of Patrick B. Fenn), http://www.taxanalysts.com/www/features.nsf/Articles/879FF396A916DFDC85257BF70043F439?OpenDocument (activities are ones "the investor undertakes to protect, manage, and enhance the value of its investment"), Pricewaterhouse-Coopers, *12th Annual Alternative Investments Seminar*, 498 (Nov. 2012), http://www.pwc.com/us/en/alternative-investment/assets/pwc-e-binder-2012.pdf ("Private equity funds often use management fee offsets * * *."); accord BCG Study, *supra*, at 11. Indeed, even the court of appeals recognized that "[t]his sort of fee arrangement is common in private equity funds." Pet. App. 9a n.7.

A management fee offset does not provide a "direct economic benefit" to the investment fund. See Pet. App. 33a. Rather, the fee merely covers costs for routine aspects of private equity investing. See, *e.g.*, Amanda N. Persaud & Adrienne Atkinson, *Private Equity Funds: Legal Analysis of Structural, ERISA, Securities and Other Regulatory Issues*, Investment Advisor Reg. 2, § 47:2.2 (Oct. 2012), http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.21704.12.pdf. The offsets do not provide any benefit to fund managers: any benefits accrue to the limited partner investors (such as pension funds). Investors pay a management fee to the general partner, but the investors get an offset against that fee for the fees that the portfolio company pays the fund. *E.g.*, Tax Analysts Discussion, *supra* (statement of John C. Hart). This does not change the enterprise's character as a simple investment rather than a "trade or business." The purpose of private equity investing is not to collect management fees, or to arrange offsets, which represent a negligible sum in the overall investment. Rather, the goal is "to make the business as attractive as possible to potential buyers" in order to secure a higher return on investment. Ernst & Young, *supra*, at 13; cf. *Higgins*, 312 U.S. at 218 (even extensively managing investments to grow them is not a "trade or business").

The negative effect of the First Circuit's error is magnified by the fact that what is at issue is withdrawal liability, an unusual feature of statutory law that cuts against the "deeply ingrained" notion that courts will respect the separate identity of business entities. *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted). By applying ERISA's withdrawal-liability rule—which was intended as an exception to the usual rule of respecting corporations' separate entities applicable only to a limited class of business conglomerates, see 26 C.F.R. § 1.414(c)-2(b)(1) (applicable to "chains of organizations * * * connected through ownership" of 80 percent of the total value, profits, or voting power of the corporation)—to an investment fund, the court of appeals treats the investors' pool of assets as if they were a corporate holding company. That view is not consistent with reality. The operation of the Sun Capital funds is limited in ways that corporate conglomerates are not, see Pet. 6-7, 19, demonstrating that the purpose of the funds is investment.

The panel's for-ERISA-only definition of "trade or business," see Pet. App. 22a-24a, treats the liabilities of the independent portfolio companies in which a private equity fund invests as one conglomerate based solely upon the fact that those companies have a common owner in the private equity fund. Exposing these entities to the pension-fund withdrawal liability of separate portfolio companies undercuts the very foundation of private equity investment. See, *e.g.*, PEGCC, *Private Equity: Top States and Districts in 2012*, 6, http://www.pegcc.org/wordpress/wp-content/uploads/2012-Private-Equity-Top-States-and-Districts.pdf (noting wide range of industries in which investments are made).

II. The First Circuit's Decision Will Have Immediate, Devastating Effects On Investment

By raising the specter of potentially ruinous withdrawal liability for private equity investors based on its unpredictable and ill-defined "investment plus" test, the court of appeals decision will have immediate, devastating consequences for investment across a broad swath of the U.S. economy. For years, private equity funds have provided the funding and expertise necessary to turn companies around, often serving as the only sources of capital for companies most in need of investment—such as those in construction, mining, food, trucking and maritime-transportation industries that are most likely to participate in underfunded multiemployer pension plans.[3] Such investments present significant

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[3] See Pension Benefit Guaranty Corp., *Introduction to Multiemployer Plans*, http://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html.

risks even under a stable legal regime, as investors' stake in a company may result in a complete loss if turnaround efforts are unsuccessful. The risk of staggering withdrawal liability on top of capital losses from a failed investment—here, for instance, $4.5 million in withdrawal liability exceeds the loss of the entire $3 million investment, see Pet. 7-8—together with the lack of predictability because of the First Circuit's standardless rule, will severely chill private equity investment in those industries. Though the court of appeals' decision may *appear to* be a short-term benefit for the particular pension fund involved here, it is purely illusory; the decision is a long-term detriment to union members and pension participants as a class, as the decision unquestionably will deter the investments necessary to promote their employers' financial health, and may reduce the income of such pension funds, which make up a disproportionately large share of private equity investors. See, *infra*, pp. 20-21.

A. Private Equity Investment Has Significant Economic Benefits

Private equity capital plays a major role in the U.S. economy. As of June 2013, there were nearly 18,000 private equity-backed companies ("portfolio companies") headquartered in the United States, employing over 7.5 million people worldwide. PEGCC, *PE by the Numbers* (June 2013), http://www.pegcc.org/education/pe-by-the-numbers/. Last year alone, private equity funds invested $347 billion in more than two thousand U.S. companies. *Ibid.*

Private equity investment has significant economic benefits. Put simply, the infusion of capital and expertise that private equity brings turns failing companies around. Recent studies have confirmed that, when measured by nearly any metric—*e.g.*, total production, wages, employment—"[i]ndustries where [private equity] funds have been active in the past five years grow more rapidly than other sectors." Bernstein et al., *supra*, at 2. "[T]he bulk of the evidence suggests private equity sponsors create value." Jarrad Harford & Adam Kolasinski, *Evidence on how private equity sponsors add value from a comprehensive sample of large buyouts and exit outcomes*, 1 (Aug. 31, 2010), http://www.foster.washington.edu/academic/departments/finance/Documents/HK_100831_ack.pdf. (discussing Steven N. Kaplan & Per Stromberg, *Leverages Buyouts and Private Equity*, 23 J. Econ. Persp. 121-146 (Winter 2009)); *accord* Shourun Guo et al., *Do Buyouts (Still) Create Value?*, J. Fin. (2011). Indeed, a survey of over 4,000 international firms found that "private-equity backed firms are on average the best-managed ownership group in the sample." Bernstein et al., *supra*, at 4.[4] Such investments benefit both private equity investors and the companies receiving the investments—and by implication, their employees. Private equity investment thus provides significant benefits to the national economy. See, *e.g.*, Harford & Kolasinski, *supra*, at 4 (conducting a comprehensive

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[4] See also PEGCC, *PEGCC Annual Private Equity Bankruptcies and Rescues* (Sept. 2013) (noting the very small number of companies with private equity investments that went bankrupt compared to total bankruptcies); Steven Miller, "Romney, Private Equity & Defaults: What the Record Shows," *Forbes* (Jan. 2012) http://www.forbes.com/sites/janetnovack/2012/01/23/Romney-private-equity-and-defaults-what-the-record-shows/ (showing lower rate of bankruptcies among companies with private equity investments).

empirical study of nearly a decade of private equity buyouts, and finding uniformly positive effects).

The nature of private equity investment lets funds provide capital to sectors of the economy most in need of investment. Private equity investors are able to pursue such investments because, unlike potential corporate acquirers or traditional investors, they do not face quarterly pressure from shareholders and thus are ready to take on greater (but still measured and appropriate) risk, are willing to make a substantial investment of time and money, and do not seek to turn a quick profit on stock. See, *e.g.*, Ernst & Young, *supra*, at 2.

As a result, private equity provides a unique source of funding for "traditionally under-capitalized businesses." *E.g.*, BCG Study, *supra*, at 1, 13. In fact, funds are increasingly investing in distressed companies, with the percentage of such investments as a total share of funds' portfolios rising three-fold in recent years. *Preqin Special Report: Distressed Private Equity*, at 3 (Oct. 2011), https://www.preqin.com/docs/reports/Preqin_Special_Report_Distressed_Private_Equity.pdf. Private equity provides a particularly welcome source of capital to traditional industries like manufacturing. See, *e.g.*, Douglass Gore, *Nearly 1 in 5 Private Equity Lenders Are Targeting Manufacturing Sector*, News & Events, Pepperdine University Graziadio School of Business and Management (Nov. 6, 2012), http://bschool.pepperdine.edu/newsroom/index.php/2012/11/lenders-target-manufacturing/ (discussing study by Pepperdine Private Capital Markets Project); Marco Trbovich, *Responsible Private Equity Investors Revitalizing U.S. Manufacturing*, Huffington Post Blog (posted May 17, 2012, 10:57 am), http://www.huffingtonpost.com/marco-trbovich/responsible-private-equit_1_b_1524210.html. Private equity funds also have invested hundreds of billions of dollars in companies in economic sectors most likely to participate in underfunded pension plans: sectors such as construction, entertainment, food, mining, trucking and maritime transportation.[5] By working to make companies that participate in foundering multiemployer pension plans successful, private equity investment helps to achieve Congress's goal of "alleviat[ing] certain problems which tend to discourage the maintenance and growth of multiemployer pension plans." 29 U.S.C. § 1001a(c)(2).

Of course, not all private equity investment is in industries with multiemployer pension plan troubles. At any one time, a typical private equity fund will have investments in companies across a wide variety of industries. See, *supra*, p. 11. But whatever the industry, private equity consistently leaves companies that were once foundering stronger, and thus better able to provide good jobs, that "pa[y] higher salaries and provide[] better benefits than the national average." BCG Study, *supra*, at 12; *id.* at 13 ("These new jobs paid an average salary * * * 15 percent higher than the U.S. mean income * * * for full-time civilian workers.").

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[5] According to data in the PitchBook private equity database, during 2003-2013, private equity invested $38 billion in construction, $83 billion in entertainment, $60 billion in food, $13 billion in mining, and $31 billion in trucking and maritime transportation.

B. The Court's Decision Will Deter Investment In Distressed Sectors Of The Economy

By fashioning a novel, open-ended, and indeterminate legal standard—"some form of an 'investment plus' approach"—while "see[ing] no need to set forth general guidelines for what the 'plus' is," Pet. App. 23a, the First Circuit's decision creates a perfect storm of uncertainty for private equity investment. At the same time the court of appeals exposes investors to the risk of potentially crippling withdrawal liability, it refuses to provide any meaningful guidance about what steps private equity investors can take to limit their exposure to that liability, in addition to the existing downside risk of capital loss from an unsuccessful investment. The resulting uncertainty will immediately deter private equity investment in sectors of the economy with multiemployer pension plans—industries like manufacturing that are most in need of capital investment.

Potential withdrawal liability is huge. One recent study determined that "U.S. multiemployer pension plans are now $369 billion underfunded." Credit Suisse, *Crawling Out of the Shadows: Shining a Light on Multiemployer Pension Plans*, 2 (Mar. 26, 2012), http://goo.gl/OXsbbL; see also Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink*, 21 Cornell J.L. & Pub. Pol'y 77, 87 n.67 (2011-2012) (describing the high costs and variability of U.S. multiemployer pension obligations), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1770943. It is no secret that there is an epidemic of underfunded multiemployer pension plans. See, *e.g.*, Ellen E. Schultz, *Signs Your Pension Plan Is in Trouble*, Wall St. J. (Feb. 11, 2012) (describing trends in unfunded pension-plan reductions). This year alone, 210 pension plans reported that they are now in "critical" status, see U.S. Dep't of Labor, Employee Benefits Security Administration, *Critical, Endangered and WRERA Status Notices* ("DOL Notices"), http://www.dol.gov/ebsa/criticalstatusnotices.html, which generally means the plan is less than 65 percent funded and has experienced or will soon experience a funding deficiency, see 26 U.S.C. § 432(b)(2). Another 133 are "endangered," see DOL Notices, *supra*, meaning they are only 80 percent funded, 26 U.S.C. § 432(b)(1). These numbers have skyrocketed in recent years as pension plans continue to feel the effects of the 2008 recession. See, *e.g.*, Reuters, *U.S. public pension funding remained weak in 2012—study* (Nov. 21, 2013), http://www.reuters.com/article/2013/11/21/usa-states-pensions-idUSL2N0J41C420131121; Randy G. De Frehn & Joshua Shapiro, *Multiemployer Pension Plans: Main Street's Invisible Victims of the Great Recession of 2008*, 17 (2009), http://www.nccmp.org/publications/pdfs/booklets/59101_NCCMP_SurveyRpt.pdf.

Absent review by this Court, the negative effects of the decision below will be immediate. Rational investors considering investment in ailing industries will have to consider the risk of staggering losses as a result of withdrawal liability based on practices that the court of appeals recognized are "common" among private equity funds. Pet. App. 9a n.7. Unless investors can say with confidence that they will not be subject to withdrawal liability, the prospect of such a massive obligation will deter investment in industries that run the risk of such liability (*i.e.*, distressed businesses with unfunded multiemployer pension plans). Such confidence will be elusive under the First Circuit's amorphous rule, under which a fund's liability hinges on the outcome of "a very fact-specific [test]" that "take[s] account of a number of factors," "none [of which] is dispositive in and of itself." *Id.* at 23a. This non-standard was virtually guaranteed to sow confusion, and has, in an industry that relies on identifying and assessing risks before investing. See, *e.g.*, Michael Boskin, *Investors Want Clarity Before They Take Risks*, Wall St. J. (Jan. 23, 2009); see also Pet. 27-28 n.16 (cataloging some of the dozens of articles discussing the impact of the First Circuit's decision); cf. *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) (discussing, in the regulatory context, the "chilling effect on investments caused by uncertainties") (internal quotation marks omitted). Even if, after years of litigation, courts eventually identify what types of management involvement cause a fund to cross the "investment plus" line that exposes them to withdrawal liability, so that investors will be able to avoid that liability in the future, the damage will already have been done.

The sectors of the economy that most need capital would be the ones hardest hit by the resulting chill. If investment in a target company creates exposure to that company's unfunded pension liabilities, private equity investors will have a strong incentive to avoid companies with underfunded pension plans, including traditional manufacturing industries central to the health of the U.S. economy. See, *e.g.*, Mary M. Chapman, *Retirees Wrestle With Pension Buyout From General Motors*, N.Y. Times (July 18, 2012), at B1 (describing GM's pension plan, "underfunded by about $25 billion," as a "cloud over the company's finances"). This, in turn, could ripple through the larger economy as, ultimately, reduced private equity investment results in lower company valuations. Cf. Ernst & Young, *supra*, at 14 (finding that where "corporates [have] become more circumspect" in investing, private-equity has filled in the gap). Those funds still providing capital in such a climate will inevitably demand tougher terms as a condition for taking on more risk.

The court of appeals decision, moreover, could have nationwide effects, as investors across a broad range of jurisdictions may become subject to suit under the standard. The chilling effect on investment may be widespread because "forum-shopping by both retirees and employers * * * is facilitated by ERISA's liberal jurisdiction and venue provisions." Gregory C. Braden & Christopher A. Weals, *Retiree Welfare Benefits Litigation*, ERISA Compliance & Enforcement Library, BNA, Inc., 15 (July 2009). "ERISA's liberal venue provision" (*Boilermaker-Blacksmith Nat'l Pension Fund* v. *Bay City Boiler & Eng'g Co.*, No. 11-2598-JAR-KMH (D. Kan. Apr. 10, 2010)) provides that an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found," 29 U.S.C. § 1132(e)(2). As courts have noted, this gives potential plaintiffs a "wide choice of venue[s]" in which to bring an action, *French* v. *Dade Behring Life Ins. Plan*, No. 09–394–C–M2, 2010 WL 2360457, *3 (M.D. La. Mar. 23, 2010), increasing the likelihood that plaintiffs will choose to litigate such cases where they will have the benefit of the First Circuit's sweeping rule.

C. The First Circuit's Rule Harms Pension Beneficiaries

The irony of the First Circuit's decision is that it will harm the very class of people—pension beneficiaries—that it seeks to protect. Although the immediate impact of the decision might, in the short term, help members of the New England Teamsters & Trucking Industry Pension Fund in this particular matter, the benefits of this ruling will prove fleeting as the judgment below discourages private equity funds from investing in industries with underfunded pension plans. Because the decision below will discourage investments that can put their employers on a sounder footing, it is quite plain that it is pension fund beneficiaries who will be harmed by the resulting chill in investment.

There is a second sense in which the decision below hurts pension beneficiaries: Private capital investors increasingly consist of pension funds. In 2012, pension funds made up 46 percent of all private equity investment. PEGCC, *Who Benefits? How Private Equity Helps Pensions and Foundations*, slide 3, http://www.privateequityatwork.com/who-benefits/investors/. Thus, the returns that private equity provides play a critical role in helping pension funds meet their obligations to retirees. Over 60% of revenues raised by public pension funds come from investment returns. See Bronwyn Bailey, *The Interdependence of Pension Security and Private Equity* (July 31, 2013), http://www.pegcc.org/newsroom/newsletters/the-interdependence-of-pension-security-and-private-equity/. Over the last decade, in fact, private equity investments were among the few bright spots in public pension portfolios, consistently outperforming all other asset classes. According to an August 2013 study, over the last decade, the median public pension portfolio received annualized returns of 10% from their private equity investments, compared to 5.8% annualized returns from their public equity investments and 6.5% annualized returns on their total portfolios. PEGCC, *Private Equity at Work: Strengthening Retirement for Millions of Americans*, http://www.privateequityatwork.com/wp-content/uploads/2013/10/PEGCC_Infographic_PublicPensionFund.pdf.

By imposing the threat of withdrawal liability on private equity funds, the panel's opinion ensures that funds will feel the impact. In the immediate term, reduced private equity returns will lead to a decrease in investment returns for pensions, which on average invest around 10% of their overall assets in private equity. See Bailey, *supra*. Over the longer term, the pension funds' reduction in returns from private equity will require additional funding from other sources, *i.e.*, employers and employees, to make up the deficit, *ibid.*—at a time when employers are already struggling just to keep pension funds afloat, see, *e.g.*, Michael Corkery, *Fears on Teamsters Pension*, Wall St. J. (Apr. 4, 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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