No. 20-155

IN THE

Supreme Court of the United States

NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR *AMICUS CURIAE* BETTER MARKETS, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Better Markets, Inc. ("Better Markets") is a non-profit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms aimed at creating a stronger and safer financial system; promoting the economic prosperity of all Americans; and protecting individual investors from fraud, abuse, and conflicts of interest.

Through its advocacy, Better Markets has sought to advance two especially important goals relevant to this case. First, one of Better Markets' foundational objectives has been to ensure that the regulatory framework governing our financial system is designed, implemented, and enforced to prevent government and taxpayer bailouts resulting from reckless or predatory conduct by financial firms. *See generally* Better Markets, http://www.bettermarkets.com (including archive of comment letters and briefs). Second, Better Markets has fought long and hard to protect Americans' retirement savings. For example, it has advocated for the adoption of strong fiduciary standards by the Department of Labor and the Securities and Exchange Commission to prevent financial

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[1] Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that counsel of record for all parties received timely notice of the intent to file this brief and that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* further states that no counsel for a party authored this brief in whole or in part; no counsel for a party, or any party, made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity, other than the *amicus curiae,* its members, or its counsel, made such a monetary contribution.

advisers from siphoning away billions of dollars a year from Americans' retirement accounts through the sale of overpriced and underperforming investments to their clients. *See, e.g.*, Better Markets Comment Letter on Regulation Best Interest (Aug. 7, 2018), *available at* https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20Reg%20BI%20%208-7-18%20Final.pdf; Better Markets Comment Letter on Proposed Fiduciary Duty Rule (Jul. 21, 2015), *available at* https://bettermarkets.com/rulemaking/better-markets-comment-letter-dols-proposed-fiduciary-duty-rule; Brief Amici Curiae of Better Markets, Inc., and Consumer Federation of America, *XY Planning Network v. SEC* (2d Cir., filed Jan. 3, 2020) (No. 19-2886), *available at* https://bettermarkets.com/sites/default/files/Reg_BI_-_Amicus_Brief_Final_As_Filed_%281-3-20%29.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, and National Employment Law Project Urging Affirmance of the District Court's Decision in its Entirety, *Nat'l Ass'n for Fixed Annuities v. Dept. of Labor* (D.C. Cir., filed Sept. 22, 2017) (No. 16-5345), *available at* https://bettermarkets.com/sites/default/files/NAFA_v.DOL_%28D.C.%20Cir%29-Amicus%20Brief-9-22-2017.pdf.

Both of those interests are at stake in this case. Unless reviewed and reversed by this Court, the First Circuit's decision will increase the likelihood that multiemployer pension plans will face shortfalls requiring a backstop by the Pension Benefit Guaranty Corporation ("PBGC"), further weakening the PBGC and bringing it closer to collapse or eventual bailout by taxpayers. The First Circuit's decision also threatens to reduce the monetary benefits that workers receive in retirement, as even with intervention by the PBGC, their minimum payments may fall well short of what they were entitled to receive under their employers' pension plans. Better Markets therefore has a strong interest in supporting the petition for certiorari and seeking reversal of the lower court's ruling.

SUMMARY OF ARGUMENT

Petitioners have ably demonstrated the legal errors in the First Circuit's decision and the multiple grounds for this Court's review. *See* SUP. CT. R. 10(a), (c). Here, Better Markets elucidates the First Circuit's policy analysis, which was flawed in at least three important respects.

First, the lower court rested its decision in part on the misconception that one of Congress's principal aims in the Employee Retirement Income Security Act of 1974 ("ERISA") and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") was to "encourage the private sector to invest in, or assume control of, struggling companies with pension plans." *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 943 F.3d 49, 60 (1st Cir. 2019). Yet the court cited no authority for this proposition. Moreover, it has no basis in ERISA or elsewhere in the law.

Second, encouraging private sector investment in struggling companies could not plausibly have been one of Congress's underlying rationales, at least with respect to investment by *private equity* funds. As demonstrated below, the private equity business model—of relatively recent vintage—is singularly opportunistic, profit-driven, and even predatory, often at the expense of a portfolio company's long-term financial health and the welfare of its employees and their retirement benefits. Moreover, the First

Circuit's decision will have the perverse effect of incentivizing private investment in struggling companies in just the wrong way. It will exacerbate the harm that private equity takeovers inflict on workers by allowing private equity firms that acquire companies to withdraw from multiemployer pension plans *without* paying their portion of the unfunded liabilities of those plans, increasing the likelihood that workers will lose a significant portion of the benefits they were promised. Thus, contrary to the First Circuit's naked supposition, encouraging private equity investment in distressed companies is more likely to imperil a multiemployer pension plan than to rescue it, especially if the lower court's ruling remains intact.

Finally, the First Circuit violated one of the fundamental axioms governing the interpretation of all remedial statutes, echoed again and again by this Court: Economic substance and reality must control over the formalities and contrivances that private parties may adopt to escape the application of laws intended to protect the public interest. While the First Circuit indeed acknowledged that corporate formalities can be misused to circumvent remedial statutory protections, it nevertheless allowed form to reign over substance in this case. If it stands, the First Circuit's decision will provide a roadmap allowing private equity funds and others to escape the requirements of ERISA and the MPPAA, which were each explicitly designed to protect the hard-earned retirement benefits of American workers.

At its core, the First Circuit's decision is profoundly inequitable. The largest and most powerful market participants in our financial system—from the too-big-to-fail banks on down—are too often allowed to privatize or retain for themselves any profits they squeeze from their clients, counterparties, and investors, while at the same time socializing any losses they might suffer by foisting them onto the government and ultimately the taxpayers at large. Here, the Respondents are following this unfair paradigm: After pocketing their management fees, they are now attempting to deflect their withdrawal liability, thus increasing the risk that it will fall upon the PBGC. This Court should prevent such an outcome in this case by reversing the First Circuit's decision.

ARGUMENT

I. THE PURPOSE OF ERISA IS TO PROTECT THE RETIREMENT BENEFITS AND ASSETS OF WORKERS AND RETIREES, NOT STIMULATE PRIVATE SECTOR INVESTMENT IN STRUGGLING COMPANIES.

The First Circuit based its decision in part on the misconception that in ERISA, as amended, Congress actually intended "to encourage the private sector to invest in, or assume control of, struggling companies with pension plans." The court's holding was ultimately grounded in the concern that "imposing liability would likely disincentivize much-needed private investment in underperforming companies with unfunded pension liabilities." *Sun Capital Partners III, LP*, 943 F.3d at 61; *see also id.* at 52 ("This chilling effect could, in turn, worsen the financial position of multiemployer pension plans.").

This analysis was erroneous. The court offered no support for its characterization of the Congressional purpose underlying ERISA as incentivizing private sector investment in struggling companies with employee benefit plans. In fact, there is no basis for that assertion. Rather, the underlying goal of ERISA is to protect Americans' retirement benefits and assets.

Congress enacted ERISA in 1974 to ensure that Americans' critically important employee benefit plans and retirement assets were protected with the highest possible standards of loyalty and care imposed on those who manage or administer such plans or give investment advice about retirement plan assets. In its findings, Congress detailed the core concerns requiring legislative action. It observed that "the continued well-being and security of millions of employees and their dependents are directly affected by" retirement plans and it further explained—

> that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a). The Congressional declaration of policy in ERISA goes further:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b). Nowhere in these extensive findings or declarations of purpose is there any indication that Congress intended to promote private sector investment in struggling companies as an end in itself or even as a means of achieving these statutory objectives.

The specific provisions in the MPPAA governing multiemployer pension plans were also animated by this overarching concern for the welfare of workers and retirees saving for a decent retirement. As this Court has recognized, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374 (1980). Essentially, Congress made a decision that after a lifetime of hard work, Americans are entitled to a safe, secure, and dignified retirement. *Id.* To that end, Congress passed ERISA and later amended it with the MPPAA to protect the hard-earned retirement benefits and savings of American workers.

In short, the purpose of ERISA is to protect workers' retirement benefits and savings, not promote private sector investments, and the First Circuit was not entitled to substitute its policy judgment for Congress's. *See United States v. Noland*, 517 U.S. 535, 541 (1996).

II. PRIVATE EQUITY FIRMS ARE STRUCTURED TO MAXIMIZE PROFITS FOR THEIR INVESTORS ABOVE ALL OTHER GOALS, OFTEN AT THE EXPENSE OF EMPLOYEES, AND ENCOURAGING PRIVATE EQUITY INVESTMENT WILL UNDERMINE RATHER THAN ADVANCE THE PURPOSES OF ERISA.

Even assuming that Congress intended to foster private sector investment in struggling companies to help shore up their pension plans, encouraging *private equity* investments in such companies is more likely to undermine rather than promote that goal. This conclusion follows from an appreciation of not only how private equity works and how private equity firms make money, but also how private equity operations effect their portfolio companies, the employees of those companies, and the broader community.

Private equity funds, as with other investment vehicles, are primarily set up to return profits to their investors. These private profits often come at the expense of other stakeholders in the companies that private equity funds take over—particularly employees who often face layoffs, reductions in benefits and salaries, and other adverse consequences.

A. Private equity funds serve wealthy investors, involve complex structures, and above all exist to generate profits, not advance the welfare of portfolio companies or their employees.

Private equity firms are typically made up of a small group of investment professionals who manage a pool of money from sophisticated institutional and accredited investors. *See* William Magnuson, *The Public Cost of Private Equity*, 102 MINN. L. REV. 1847, 1855 (2018). Typically, the fund is "organized as a limited partnership, with the private equity firm serving as the fund's general partner and making day-to-day management decisions, and the investors serving as passive limited partners." *Id.*

For a variety of reasons, the formal organizational structure of a private equity fund can be a complex array of legal entities and agreements, exemplified by the First Circuit's description of the capital structure of Sun Capital III, LP and Sun Capital IV, LP, (collectively, the "Sun Funds") in this case:

> Sun Funds III and IV each have one general partner, Sun Capital Advisors III, LP and Sun Capital Advisors IV, LP, respectively. These general partners each own respective subsidiary management companies, Sun Capital Partners Management III, LLC ("SCPM III") and Sun Capital Partners Management IV, LLC ("SCPM IV"). The two management companies act as intermediaries between SCAI and holding companies. The management companies contract with SCAI for the management services of SCAI's employees and consultants, and then with the

> holding company to provide these management services.
>
> Sun Funds III and IV, respectively, have 124 and 230 limited partners. Sixty-four of these limited partners overlap between the Funds. The limited partners include both individual and institutional investors, including pension funds, other private equity funds, family trusts, and universities.[3] The Sun Funds' limited partnership agreements vest exclusive control of the Funds in their respective general partners, assign the general partners percentages of the Funds' total commitments and investment profits, and require the Funds to pay their general partners an annual management fee.[4] The Sun Funds' general partners, which are themselves organized as limited partnerships, have limited partnership agreements, which vest exclusive control over the general partners' "material partnership decisions" in limited partnership committees. These limited partnership committees are each made up of two individuals, Marc Leder and Rodger Krouse. These two men also founded and serve as the co-CEOs and sole shareholders of SCAI. Leder and Krouse were the co-CEOs of the management company SCPM IV.

Sun Capital Partners III, LP, 943 F.3d at 53 (internal footnotes omitted). These convoluted arrangements serve to create an apparent distance between those in de facto control of the enterprise and the portfolio company. In this case, despite the complex formal organizational business structure of the Sun Funds' investment in SBI, in reality that investment, as well as the affairs of SBI, were managed by the two co-CEOs of Sun Capital Advisors, Inc. ("SCAI"). *Id.* at 59 ("The two men in control of the Funds' general partners, Leder and Krouse, essentially ran things for both the Funds and SBI.").

The basic business model of private equity funds is to identify companies that are "undervalued" for one reason or another, and to buy those companies, often with a significant amount of debt. William Magnuson*,* *The Public Cost of Private Equity*, 102 MINN. L. REV. 1847, 1855 (2018). As was the case here, the private equity fund will then typically assume an active role in the management of the acquired company. "Since a private equity fund usually takes fairly substantial equity and/or debt positions in the portfolio companies in which it invests, it is common for the fund manager's representatives to play an active role in management of the portfolio companies." MANAGERIAL OVERSIGHT OF PORTFOLIO COMPANIES, HEDGE FUNDS AND OTHER PRIVATE FUNDS: REGULATION AND COMPLIANCE § 13:17 (2019); *see also Sun Capital Partners III, LP*, 943 F.3d at 54 ("The Funds, through SCAI employees placed in SBI, jointly operated SBI.").

These are not in any sense passive investments; indeed, active management of acquired companies is a core feature of the private equity business model. Victoria Fleischer, *Sun Capital Court Ruling Threatens Structure of Private Equity*, N.Y. TIMES (Aug. 1, 2013) ("Of course, the entire private equity business model is premised on the fund's managers creating value through active management of portfolio companies."). Thus, notwithstanding whatever business formalities may accompany a private equity fund's takeover of a portfolio firm, the reality is that the operational decisions, including those that have an impact on stakeholders such as employees and customers, are made by the private equity fund itself.

Private equity funds derive revenue from at least two sources. For its "services" in managing portfolio companies, the private equity fund is typically paid a management fee. William Magnuson, *The Public Cost of Private Equity*, 102 MINN. L. REV. 1847, 1855 (2018) (explaining that portfolio companies "enter into a management agreement with the private equity firm, pursuant to which it will pay certain fees to the firm in return for management services."). Ultimately, a private equity fund will own and operate a portfolio company for a limited period of time, typically several years, with the intention of increasing the value of the company so that it can be sold off for a profit. *Sun Capital Partners III, LP*, 943 F.3d at 49 ("The Sun Funds then would attempt to sell a portfolio company for a profit, typically within two to five years of acquisition."); *see generally* David P. Stowell, INVESTMENT BANKS, HEDGE FUNDS, AND PRIVATE EQUITY 339-44 (3d ed. 2018).

B. Private Equity firms place significant financial burdens on the portfolio companies they control.

Private equity funds saddle portfolio companies with the debt they use to acquire them. Leveraging portfolio companies in this way can increase the potential profit to the private equity fund's investors, but burdening the company with that debt inevitably leaves it in a weaker financial position, closer to insolvency than it was before the private equity firm took it over. *See* Justin L. Browder, *The 2007 Private Equity Bust: Re-Contextualizing Material Adverse Change Clauses in A Credit-Stricken Market*, 63 U. MIAMI L. REV. 1151, 1176 (2009) ("PE acquirors place enormous financial burdens on their portfolio companies by concurrently requiring them to service acquisition debt and generate operational returns.")

Similarly, as noted above, once a private equity fund takes over the operations of the target company, it will typically pay itself a management fee, ensuring itself a stream of income at the expense of the company it is operating. Lloyd L. Drury, III, *Publicly-Held Private Equity Firms and the Rejection of Law As A Governance Device*, 16 U. PA. J. BUS. L. 57, 90 (2013). Even worse for the health of the portfolio company, private equity funds will also often cause portfolio companies to take out additional loans, on top of the acquisition debt, and use the proceeds from those loans to pay dividends to investors in the private equity fund. Thus, before the private equity firm has done anything to "improve" the operations of the portfolio company or otherwise unlock any value, it has already taken actions that enrich the private equity firm at the expense of the portfolio company.

C. Private equity funds are concerned with short- or medium-term profit, not long-term viability.

Despite the fact that private equity firms actively manage portfolio companies, they are not necessarily interested in the long-term future of the company. As noted above, their goal in acquiring a company is to sell it for a profit within a few years. This distinction has several implications. First, while private equity firms purport to identify companies that are underperforming, any particular company targeted by a private equity firm may only be "underperforming" in the short term; its supposed underperformance may actually be part of a sound, longer-term business strategy, which the private equity firm may be disrupting for its own medium- or short-term gain. According to one study, "private equity funds acquire healthy firms and increase their probability of default ten-fold." Brian Ayash & Mahdi Rastad, *Leveraged Buyouts and Financial Distress* (Working Paper, July 19, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423290.

Similarly, while the actions taken by a private equity firm in managing a portfolio company may temporarily increase the value of that company for purposes of enabling the private equity firm to sell it for a profit, this does not necessarily mean those actions have advanced the long-term health of the company or benefited other stakeholders. *See* Gordon Murray, et al., *The Operating Performance of Buyout IPOs in the UK and the Influence of Private Equity Financing* (School of Business and Economics University of Exeter Working Paper No. 06/10) (finding that the operating performance of firms taken over by private equity steadily declines subsequent to IPOs), *available at* https://ore.exeter.ac.uk/repository/bitstream/handle/10036/22156/0610.pdf?sequence=1.

Nor are private equity takeovers of companies always successful, at least not in the sense of putting the company on the path to becoming a financially healthy going concern. Not infrequently, companies taken over by private equity firms are driven to, rather than saved from, bankruptcy. And this is not necessarily because the company was already in dire straits when taken over—stories abound of relatively healthy companies acquired by private equity firms that are then driven into the ground by what appears to be mismanagement on the part of the private equity firm. *See* Jordan Weismann, *Why Private Equity Keeps Wrecking Retail Chains Like Fairway*, SLATE (JAN.

26, 2020), *available at* https://slate.com/business/2020/01/private-equity-retail-fairway-why.html.

D. Private equity funds and their investors benefit from a "heads I win, tails you lose" proposition when they take over a company.

For private equity funds, a corporate takeover is frequently a "heads I win, tails you lose" proposition. Emily Stewart, *What is Private Equity and Why Is It Killing Everything You Love*, VOX (Jan. 6, 2020), *available at* https://www.vox.com/the-goods/2020/1/6/21024740/private-equity-taylor-swift-toys-r-us-elizabeth-warren. One reason is that, as mentioned above, private equity funds use a significant amount of debt to purchase portfolio companies, debt that is then put on the balance sheet of the portfolio company itself. *Id.* If the investment works out, the private equity fund stands to make a significant amount of money; but if the investment fails, due to the formal separation of the portfolio company and the private equity fund, it is the portfolio company that suffers the bulk of the financial consequences of the failure, rather than the private equity fund. *Id.*

Moreover, private equity funds charge portfolio companies a management fee, guaranteeing the fund a stream of revenue regardless of whether the fund actually provides value to the portfolio company. And they may even saddle the company with additional debt in order to pay dividends to the private equity fund's investors. At the same time, the consequences of the failure of a portfolio company can be devastating for other stakeholders, particularly employees. Eileen Appelbaum & Rosemary Batt, *Private Equity Pillage: Grocery Stores and Workers At Risk*, AMERICAN PROSPECT (Fall 2018).

E. Other stakeholders, including employees, face a "heads you win, tails I lose" proposition from private equity takeovers.

Private equity funds attempt to frame their goals in glowing terms that portray them as little more than benevolent creators of value. For example, SCAI's website explains that it specializes in "identifying companies' untapped potential, and accelerating value through operational excellence." Sun Capital, About Us, https://suncappart.com/about/ (last accessed Sept. 8, 2020). But these portrayals often belie devastating consequences for their portfolio companies.

When private equity takeovers, as here, end in a bankruptcy for the target company, that is self-evidently devastating for that company's workers. Yet even when private equity funds are able to successfully sell a company for a profit—or in SCAI's terms "accelerat[e] value through operational excellence"—the PR-speak masks fundamentally unfair outcomes. The "accelerat[ed] value" accrues principally to the benefit of the private equity fund's managers and investors, while the path to a profitable sale is all too often littered with harsh consequences for other stakeholders, especially the company's employees. That path often includes employee layoffs, reductions in their salaries and benefits, and other actions that reduce worker welfare. Research shows "that PE-owned companies have higher productivity than comparable public companies in the acquisition year, and increase productivity primarily through downsizing, plant closings, divestitures and acquisitions, and production shifts to consolidated units—not to improvements in productivity in existing or 'brownfield' sites." EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 193 (2014). Multiple other studies have shown that private equity takeovers have a negative impact on various measures of employee welfare. Marc Goergen, et al., *The Consequences of Private Equity Acquisitions for Employees: New Evidence on the Impact on Wages, Employment and Productivity*, 24 HUM. RESOURCE MGMT. J. 145 (2014); *see also* Steven J. Davis, et al., *The Economic Effects of Private Equity Buyouts* at 26 (Harvard Business School Working Paper No. 20-046, Oct. 7, 2019) (employment declines by 12.6% after private equity firms acquire public companies), *available at* https://www.hbs.edu/faculty/Publication%20Files/20-046_ceb00b98-e62a-45db-8d5f-9793ffd0226e.pdf.

Layoffs, wage and benefit reductions, and other adverse employment actions taken at portfolio companies may "accelerate value" for the private profit of private equity fund investors, but they also inflict real and widespread harm on the lives of actual human beings. It has long been established that unemployment can have a devastating impact on the mental and physical health of workers, an effect that has a cascading effect on families and communities. *See* Margaret W. Linn, et al., *Effects of Unemployment on Mental and Physical Health*, 75 AM. J. PUB. HEALTH 502 (1985). In one striking example of how the gains to private equity investors can come at a huge cost to workers, a seminal Pulitzer Prize winning article on the private equity buyout of Safeway featured a striking contrast of images: On the one hand, there was the jubilant celebration of the private equity investors who made a mint on their investment; on the other hand, there was the devastation wrought on the life of a worker, one of 63,000 who lost their jobs as a result of the takeover, which ultimately led to the worker's death by suicide. Aaron Elstein, *Private Equity Seeks to Counter Bad PR with Report Showing its Contributions to the Economy*, CRAIN'S NEW YORK (Oct. 21, 2019).

F. Employees of target companies cannot protect themselves or their retirement benefits from the predations of private equity firms, and they must rely on the law to do so.

Private equity is also marked by a gross imbalance of power. Employees are severely limited in their ability to protect themselves from the impact of private equity takeovers. Investors in private equity funds can negotiate agreements that cover their investments, can choose how much money to invest in funds, and can withdraw money if funds underperform. Similarly, the banks that finance private equity takeovers can negotiate covenants and other protections to mitigate the various risks. In stark contrast, employees cannot fend off a private equity takeover. For employees fortunate enough to be members of a union, collective bargaining may somewhat limit the negative impact of a private equity takeover. However, outcomes will vary, and employees who are not members of a union are even more exposed.

None of this is to say that private equity firms are inherently "evil." Some might argue that they are doing what people and firms are expected to do in a free enterprise system—acting in their own self-interest to make money, albeit with an especially profitable and damaging business model. But this acknowledgement is a far cry from the mistaken notion, relied upon by the First Circuit, that private equity takeovers should be encouraged as a means of protecting the retirement security of a target company's employees. By design and in practice, that is not the goal of the private equity entrepreneur, and in this case certainly, that was not the outcome.

III. THE FIRST CIRCUIT ADOPTED AN OVERLY FORMALISTIC ANALYSIS IN VIOLATION OF THE PRINCIPLE THAT REMEDIAL STATUTES ARE TO BE INTERPRETED BROADLY.

As the First Circuit itself recognized, ERISA is a remedial statute and as such is to be construed liberally to effectuate it purposes. *Sun Capital Partners III, LP,* 943 F.3d at 55. This Court has articulated and applied this principle on innumerable occasions and in a variety of contexts involving financial regulation. For example, under the securities laws, whether an investment offering is a security hinges on the "economic reality" of the transaction, not the formal attributes of the contract. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("in searching for the meaning and scope of the word 'security' in the [Acts], form should be disregarded for substance and the emphasis should be on economic reality"); *id.* at 299 (the term security "embodies a flexible rather than a static principle" in order to meet the "variable schemes devised by those who seek the use of the money of others on the promise of profits"); *cf. S.E.C. v. Edwards*, 540 U.S. 389 (2004) ("We will not read into the securities laws a limitation not compelled by the language that would so undermine the laws' purposes.")

The specific provision of ERISA at issue here—the MPPAA—is also at its core a remedial provision, added to close what was essentially a loophole in the retirement system related to multiemployer pension plans. Prior to passage of the MPPAA, individual employers could withdraw without consequence from such plans, leaving a smaller contribution base for the plan to fund its past liabilities and forcing the remaining employers to pick up the slack. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984). Particularly in declining industries, such withdrawals by individual employers can trigger a cascade of additional withdrawals that threaten the ongoing viability of multiemployer plans. Those failures threaten the hard-earned retirement savings of workers and the guaranty fund maintained by PBGC. *Id.; see also* GOV'T ACCOUNTABILITY OFFICE, HIGH RISK SERIES: SUBSTANTIAL EFFORT NEEDED TO ACHIEVE GREATER PROGRESS IN HIGH-RISK AREAS 267 (Mar. 2019) ("While PBGC faces a long-term challenge with its single-employer program, it faces an immediate and critical challenge with its multiemployer program."). Congress passed the MPPAA to close the loophole in the previous statutory regime, and crucially included a common control provision that was specifically intended to ensure that state law corporate formalities could not be used as a means to prevent entities from "shirking their ERISA responsibilities." *Id*.

In this case, the First Circuit specifically acknowledged these principles but only in theory. For example, it recognized that ERISA is a remedial statute to be "construed liberally," *Sun Capital Partners III, LP*, 943 F.3d at 55-56; that the "common control provision, in effect, pierces the corporate veil and disregards formal business structures," *id.* at 56; and that ERISA requires courts "to look beyond how the parties label, or structure, themselves . . . [and] rather look to the substance of the relationships," *id.* at 59. However, the First Circuit nevertheless adopted a test that on its face and as applied resulted in a technical analysis exalting the form of the Respondents' business arrangements over their substance. Rather than following this Court's totality of the circumstances test for identifying partnerships, as set forth in *Commissioner v. Culbertson*, 337 U.S. 722 (1949), the First Circuit instead applied the more mechanical factors test set forth in *Luna v. Commissioner*, 42 T.C. 1067 (1964), a Tax Court case. In effect, the lower court simply tallied a list of factors on a scorecard rather than examining the underlying substance of the relationships involved. The First Circuit thus violated the core principle it professed to embrace, the edict that remedial statutes must be interpreted broadly and with an eye to substance, to advance their core purposes.

Epitomizing the point is the First Circuit's analysis of the parties' written disclaimers. The court seized on the fact that the Sun Funds "expressly disclaimed in their respective limited partnership agreements any partnership or joint venture with each other." *Sun Capital Partners III, LP*, 943 F.3d at 53. And this documentary sleight of hand dominated the court's analysis of the factors under *Luna*. *See Sun Capital Partners III, LP*, 943 F. 3d at 60 (citing the disclaimer as controlling three of the factors weighing against a partnership finding). In the end, labels and formalities did control the court's interpretation of the law, contrary to a firmly established canon of statutory construction.

In reality, of course, the existence of a de facto partnership was plain to see under the facts. All of the entities in question were controlled by the same two men—Marc Leder ("Leder") and Rodger Krouse

("Krouse"). Leder and Krouse, as the sole members of the limited partner committees, made all of the decisions (both before and after the purchase of SBI), acting through an LLC. The Sun Funds acquired SBI, which had a known unfunded liability to the pension plan, for the purposes of managing SBI; the Sun Funds in fact actively managed SBI; the Sun Funds were in active management of SBI when SBI sought bankruptcy protection; the Sun Funds owned and controlled SBI at the time SBI withdrew from the pension plan; and the Sun Funds, as the entities that legally owned and actively managed SBI, were responsible for withdrawing it from the plan. *Sun Capital Partners III, LP*, 943 F.3d at 60.

Furthermore, as the First Circuit found, there was never any disagreement among the two Sun Funds that owned SBI on what actions to take with regard to SBI, nor did SBI ever fail to do anything that that the Sun Funds directed it to do. *Id.* Despite the existence of three separate legal entities, there was never going to be any disagreement among them about the operation of SBI because all three legal entities were controlled by the same two individuals, i.e. the co-CEOs of SCAI. The reality of the transaction is that the Sun Funds owned and controlled SBI to make money for the funds' managers and investors. The existence of a partnership-in-fact could not be clearer where, as here, all of the relevant entities were operated by the same people for the same purpose. The First Circuit's holding to the contrary elevates form over substance, misapplies this Court's precedents, and undermines the remedial goals of ERISA and the MPPAA, all to the detriment of workers and their pension plan benefits.

CONCLUSION

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

Respectfully submitted,

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