No. 18-1265

IN THE

Supreme Court of the United States

SEPTEMBER ENDS CO.; BACK IN BLACK CO.,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The petition does not present a question meriting review by this Court. If the Court were to grant the petition, however, the question should be restated as follows:

When an underfunded pension plan terminates, Respondent Pension Benefit Guaranty Corporation ("PBGC") must pay benefits up to the limits in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). When PBGC becomes trustee of that underfunded plan, it may seek to collect termination liabilities from responsible parties. In this case, after the plan terminated with insufficient assets to pay promised benefits, PBGC sued to collect the plan's termination liabilities of more than $33 million from responsible parties, including petitioners as successors. The petitioners were owned by the former officer and owner of the plan sponsor, had notice of the termination liabilities, bought the business at a substantial discount, and essentially duplicated it. The Sixth Circuit held that the federal common law doctrine of successor liability can apply to pension plan termination liabilities under ERISA. "All that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply." Pet. App. 29a.

The Question Presented is:

Was the court of appeals correct in holding that when there is a sale that is not conducted at arm's length, federal common law successor liability can apply to Title IV liabilities?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent PBGC opposes certiorari. Petitioners Back in Black Co. and September Ends Co. (the "Petitioners") ask this Court to review the Sixth Circuit's decision that held successor liability under federal common law can apply to ERISA Title IV claims involving a single-employer plan, where the successor, an insider of the sponsor with notice of the plan liabilities, purchased the sponsor's assets and substantially continued the business. Contrary to Petitioners' arguments, the Sixth Circuit's decision does not conflict with this Court's precedents or decisions of other courts of appeals, and merely applies an established principle in Title IV to a very narrow set of facts. Also contrary to Petitioners' contention, and as the court of appeals recognized, 29 U.S.C. § 1369 does not address successor liability. Finally, Petitioners erroneously contend that the decision should be reviewed because it has broad repercussions across American industry. The Sixth Circuit applied a well-known test in the context of a narrowly-targeted statute that is enforceable only by PBGC. The Petitioners do not show any conflict with a statute or decision of this Court or any other circuit court or any important question of federal law that this Court should settle. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory and Factual Background

This case involves Petitioners' efforts to avoid successor liability resulting from their purchase of assets from the sponsor of an underfunded pension plan terminated by the sponsor's agreement with PBGC. Petitioners, owned by the former Chief Executive Officer and partial owner of the pension plan sponsor, bought the business at a substantial discount, and essentially duplicated it, using the same plants and equipment, hiring many of the same employees, and selling to the sponsor's largest customer. After the pension plan terminated with insufficient assets to pay promised benefits to participants, PBGC sued to collect more than $33 million in underfunding and termination premiums from responsible parties, including Petitioners as successors. In vacating the district court's grant of Petitioners' motion to dismiss, the Sixth Circuit Court of Appeals followed other circuits in applying the federal common law of successor liability to ERISA, and specifically, to Title IV liability.[1] Pet. App. 1a.

PBGC is the United States government corporation, and federal agency, that administers the nation's pension plan termination insurance program under Title IV of ERISA. When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC assumes responsibility for the plan and ensures the

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[1] 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2017).

timely and uninterrupted payment of statutorily guaranteed pension benefits to participants and their beneficiaries.[2] In fiscal year 2018, PBGC paid $5.8 billion to more than 861,000 retirees from 4,919 failed single-employer defined benefit pension plans.[3]

Findlay Industries, Inc. ("Findlay") sponsored the Findlay Industries, Inc. Pension Plan ("Plan"), a single-employer pension plan which is covered under Title IV, and thus insured by PBGC. Michael Gardner ("Michael") was Findlay's Chief Executive Officer, a director, and owner of almost 45 percent of Findlay's stock. Dist. Ct. Doc. 3 (First Amended Complaint "Complaint") at 10-11, 35.

In December 2008, FI Asset Acquisition LLC ("FIAA"), which Michael owned, made an offer to purchase Findlay's assets. As a Findlay director and officer, and a bidder for its assets, Michael was on notice of Plan liabilities of more than $18 million through Findlay's financial statements. *Id.* at 35. And in March 2009, Michael was informed of another bidder's request for assurances regarding Plan liabilities, including a letter from PBGC and indemnification from Findlay's shareholders. *Id.* at 35-36.

In April 2009, FIAA made another offer to purchase Findlay's assets, explicitly excluding assumption of the Plan liabilities. *Id.* at 36. That offer clinched the sale and on May 8, 2009, FIAA

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[2] 29 U.S.C. § 1302(a)(2).

[3] PBGC 2018 Annual Report at p.2, available at https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf.

purchased Findlay's assets for approximately $2.2 million in cash and $1.2 million in assumed trade liabilities. *Id.* at 34. The assets were transferred from Findlay to FIAA, and ultimately to Petitioners. *Id*. When Petitioners acquired Findlay's assets,[4] Michael was the President of each of the Petitioners and the owner, with his minor sons, of all stock of the Petitioners. *Id.* at 34-35. At that time, Petitioners were on notice of Findlay's Plan liabilities through Michael. *Id.* at 34-37.

Michael's companies, the Petitioners, used Findlay's former plants, machinery and equipment, suppliers, and employees to make products for Findlay's former customers. *Id.* at 37-39. From May 2009 through December 2013, the Petitioners' net income was $11,925,725 -- over three times greater than the price paid for Findlay's assets. *Id.* at 34, 36. Because Michael had notice of the potential Plan liabilities, they presumably were reflected in the discounted purchase price. *Id.*

This is not a case where an unsuspecting purchaser saves a failing company. This is a case where Michael, an insider fully aware of the Plan's liabilities, swoops in to buy the company's business at a substantial discount in a non-arms' length sale, and then essentially duplicates that business and personally benefits to the tune of nearly $12 million in less than five years.

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[4] The Petitioners allege that they purchased assets associated with "just two of Findlay's plants", from "the much-larger Findlay company". Petition at 5. At one time, Findlay was much larger, but by the time of the sale, Findlay owned little of value besides what Petitioners acquired. Complaint at 36.

Meanwhile, the Plan's liabilities sat in a shell entity with no operations. By an agreement dated December 20, 2012, between PBGC and Findlay, the Plan was terminated pursuant to 29 U.S.C. § 1342(c). The agreement established July 18, 2009, as the plan termination date under 29 U.S.C. § 1348, and appointed PBGC as statutory trustee pursuant to 29 U.S.C. § 1342(c). PBGC is paying the benefits under the Plan, up to certain statutory limits.

Upon PBGC becoming trustee of a terminated plan, PBGC uses the plan's assets and the agency's insurance funds to pay benefits to current and future retirees and their beneficiaries. In addition, PBGC seeks to collect the Plan's liabilities from responsible parties. The Plan's liabilities include (i) unfunded benefit liabilities as of the termination date, plus interest, and (ii) termination premiums, plus interest and penalties (the "Termination Liabilities"), which together are approximately $33 million.[5]

B. Procedural History

On July 17, 2015, PBGC filed its complaint against ten defendants, all connected to Findlay. Dist. Ct. Doc. 1. PBGC asserts that Michael's companies, the Petitioners, are liable for the Plan's liabilities under the federal common law of successor liability. Complaint 34-39.

The Petitioners moved to dismiss, arguing that PBGC does not have a successor liability claim under federal common law. Dist. Ct. Doc. 22. The district court agreed and granted the motion to dismiss. Pet.

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[5] 29 U.S.C. §§ 1362(a)(1), (b)(1)(A), 1306(a)(7)(A), 1307(e); 29 C.F.R. § 4007.13(g); Complaint 8-10.

App. 60a, 62a. PBGC moved the district court to certify its opinion for interlocutory appeal. Dist. Ct. Doc. 64, 64-1, 64-2. The district court granted the motion to certify, finding that its opinion meets the requirements of 28 U.S.C. § 1292(b). Dist. Ct. Doc. 68. On May 17, 2017, the court of appeals granted PBGC's petition for permission to appeal. App. Ct. Doc. 7-1.

On September 4, 2018, the Sixth Circuit vacated the district court opinion, concluding that the federal common law of successor liability applies to pension plan termination liabilities under ERISA. Pet. App. 1a. The court agreed with the district court that the creation of common law under ERISA is proper only in narrow circumstances, but concluded that creation and application of federal common law doctrine of successor liability is necessary in this case because it serves fundamental ERISA policies. *Id.* at 23a-24a. The court also noted that refusal to apply the principles of successor liability here would frustrate ERISA policies as it would provide "an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability." *Id.* at 26a.

The Sixth Circuit applied the federal common law of successor liability, found in decades of employment and labor cases, rather than the state common law as proposed by Petitioners. *Id.* at 27a-29a. The court noted that by applying the federal common law of successor liability, it aligned itself with the Seventh and Ninth Circuits, which applied the doctrine in Title IV cases involving multiemployer plans. *Id.* at 28a.

Last, the Sixth Circuit rejected Petitioners' argument that applying successor liability will disrupt commercial expectations. The court acknowledged the narrow facts alleged here – "Michael Gardner underpaid for the profitable parts of Findlay – the company he ran – turned a hefty profit using those assets, and knowingly left the government to pay millions of dollars in Findlay's unkept pension promises." *Id.* at 29a. The court noted that if true, these actions do not reflect commercial expectations that the court should ever protect, certainly not under ERISA. *Id.* The court of appeals noted the narrow application of successor liability in this case: "All that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply." *Id.*

The court of appeals rejected the Petitioners' petition for panel rehearing or rehearing *en banc*. Pet. App. 65a-66a. This petition followed.

REASONS FOR DENYING THE PETITION

Petitioners fail to show a conflict between the court of appeals' decision and those of this Court or of other circuits; they fail to show that ERISA has addressed the applicability of successor liability in a way that obviates the need to look to common law; and they fail in their suggestion that the court of appeals' decision will trigger an economic crisis.

I. The decision of the court of appeals does not conflict with precedents of this Court or other courts of appeal.

Petitioners argue that the Sixth Circuit decision conflicts with cases of this Court and other circuits regarding two issues: whether successor liability under Title IV should be drawn from federal or state common law, and what form of successor liability should be applied. Petition at 9-21. There are no conflicts on either issue.

The Sixth Circuit was the first circuit court to apply successor liability to single employer termination liability under Title IV. So, by definition, there is no conflict on the precise issue decided by that court. Moreover, as discussed below, there is no conflict on even the broader Title IV issue, as every circuit court to consider the application of successor liability to withdrawal liability under Title IV has adopted federal common law.

A. All courts applying successor liability under Title IV of ERISA have held that federal common law applies.

The Sixth Circuit concluded that the application of the federal common law of successor liability to ERISA in the context of the complaint is required to promote fundamental ERISA policies. Pet. App. 24a-25a. Petitioners assert that applying the federal common law of successor liability here conflicts with decisions of this Court and other circuits holding that federal common law should be based on state common law. Petition at 9-20.

But over the last 45 years, federal courts have developed federal common law successor liability to protect important employment law policies. The doctrine was first applied in labor-management

relations law, beginning with *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). This Court upheld a ruling of the National Labor Relations Board ("NLRB") that an arms-length purchaser of a business, acquiring with knowledge that the seller's unfair labor practice set forth in the NLRB order remained unremedied, was liable as a successor under the National Labor Relations Act. *Id.* at 174-85. The Court noted that since the successor must have notice before liability can be imposed, its potential liability for remedying the unfair labor practice can be reflected in the price it pays for the predecessor's business. *Id.* at 185.

Since then, federal courts have applied federal common law successor liability to protect important employment-related policies under several other federal statutes. Petitioners admit as much, citing cases under ERISA and four other such statutes. Petition at 16-17.[6]

Most pertinently to this case, courts have uniformly held that federal common law successor liability applies to multiemployer plan withdrawal liability under ERISA. *See, e.g., Resilient Floor Covering Pension Trust Fund Bd. Of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-95 (9th Cir. 2015); *Tsareff v. ManWeb Servs.,* 794 F.3d 841, 844-47 (7th Cir. 2015); *Members of the Bd. of Admin. of the Toledo Area UAW Ret. Income Plan v. OBZ, Inc.*, No.

[6] In their attempt to fabricate a conflict, Petitioners cite cases under CERCLA along with those under employment-related statutes. *Id.* The courts have distinguished employment-related statutes from others, however. *See, e.g., Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501, 510 *et seq.* (6th Cir. 2005) (distinguishing cases that "arose in the context of labor law and pension litigation" from the enforcement of a patent judgment).

3:15CV00756, 2017 WL 4759031, at *5 (N.D. Ohio Oct. 20, 2017); *New York State Teamsters Conference Pension & Ret. Fund by its Trs. v. C&S Wholesale Grocers, Inc.,* No. 5:16-CV-84, 2017 WL 1628896, at *3-5 (N.D.N.Y. May 1, 2017); *RP Baking LLC v. Bakery Drivers & Salesmen Local 194 & Indus. Pension Fund & its Trs.,* No. 10-3819, 2011 WL 2912861, at *3 (D.N.J. July 18, 2011); *Cent. Penn. Teamsters Pension Fund v. Bear Distrib. Co.,* No. 07-CV-3554, 2009 WL 812224, at *8-9 (E.D. Pa. Mar. 26, 2009). Far from a circuit conflict, no reported Title IV case has ever accepted Petitioners' argument.

Application of federal common law successor liability to multiemployer plans supports application of the same doctrine to single employer plans. Multiemployer plan withdrawal liability occurs when an employer participating in a multiemployer plan withdraws from the plan and the withdrawing employer is liable for its portion of unfunded vested benefits pursuant to 29 U.S.C. § 1381. Termination liability, which is at issue here, occurs when a single-employer plan terminates with insufficient funds to pay promised benefits. *See* note 5, supra.

There are several significant similarities between the Termination Liabilities and withdrawal liability. The persons subject to the two types of liabilities are very similar.[7] The amount by which

[7] The sponsor's "controlled group" is liable for the Termination Liabilities. See note 5 *supra*. The "employer" is liable for withdrawal liability. 29 U.S.C. § 1381(a). Both "controlled group" and "employer" are defined as "trades or businesses" under "common control"; the latter term refers to common ownership under Treasury regulations. 29 C.F.R. § 4001.3. The provisions applicable to transactions intended to evade each type

benefit liabilities exceed assets is the basis of the amount of one of the two Termination Liability claims, as well as the amount of withdrawal liability. 29 U.S.C. §§ 1301(a)(18), 1362(b)(1)(A), 1381(b)(1), 1393(c). And the statute of limitations for actions to collect Termination Liabilities are almost indistinguishable from that applicable to withdrawal liability. 29 U.S.C. §§ 1303(e)(6) (PBGC), 1451(f) (withdrawal liability).

The policies behind ERISA are applicable to both types of liability. In fact the reasons for applying successor liability apply with even more force for single-employer plans. PBGC insures both single-employer and multiemployer plans. But while multiemployer plans have two layers of backstops when an employer fails – first the remaining employers who participate in the plan, and only secondly the PBGC – single employer plans have only the PBGC as a backstop when the plan sponsor fails.

Thus, as explained in Section I.C below, the Sixth Circuit appropriately followed the federal common law of successor liability applied in multiemployer plan cases. Pet. App. 28a.

B. The cases cited by Petitioners do not conflict with the court of appeals decision.

Faced with these precedents in ERISA liability cases, Petitioners seek to create a conflict by

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of liability are very similar. 29 U.S.C. §§ 1369(a), 1392(c). And liability upon certain corporate reorganization applies to both types of liabilities. 29 U.S.C. §§ 1369(b), 1398(1)(A).

attempting to expand the holding beyond the circumstances addressed by the Sixth Circuit, citing three Supreme Court cases regarding other statutes, one circuit court case arising under ERISA but not involving successor liability, no cases arising under other federal labor or employment law statutes, and a multitude of lower court cases regarding other statutes. Petition at 9-20. None of the cited Supreme Court or circuit court cases are in conflict with the court of appeals decision here.

1. *Kimbell Foods*

Petitioners cite three non-ERISA holdings of this Court, starting with *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Petition at 9-10. In *Kimbell Foods*, this Court held that state law should be used to create federal common law to determine the priority of consensual liens of federal agencies. *Kimbell Foods*, 440 U.S. at 718. This Court gave three reasons for applying state law in *Kimbell Foods*, none of which apply here.

First, the agencies' argument for a uniform rule was undermined by the agencies' own manuals or regulations referring to different state laws regarding lien priority. *Id.* at 729-33. No analogous manuals or regulations exist here. More importantly, this Court has stressed the need for a uniform federal common law of ERISA.[8]

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[8] *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56 (1987) ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop … would make little sense if the remedies available to ERISA participants and

Second, this Court noted that "when the United States acts as a lender or guarantor," as it did in *Kimbell Foods*, "it does so voluntarily, with detailed knowledge of the borrower's financial status." *Id.* at 736. PBGC is an involuntary creditor of the sponsors of pension plans that terminate with underfunding.

Third, this Court noted the reliance of businesses on state commercial law in structuring financial transactions. *Id.* at 739. But federal successor liability was first applied—by this Court—in 1973. *Golden State*, 414 U.S. at 174-85. Since then, courts have applied successor liability to fill gaps in federal labor and employment law statutes without exception, including ERISA since 1987, as Petitioners acknowledge (Petition at 16-17, 27-28). *See Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987).

Thus, businesses have been relying on federal law in considering successor liability under such statutes for many years. If this Court were to uproot federal successor law, asset sellers subject to the obligations to which it had been applied—and their creditors—could rightly complain that the purchasers had underpaid for the assets.[9] The record here is

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beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.")

[9] See, e.g., *Tsareff v. Manweb Services, Inc.*, 794 F.3d 841, 849 (7th Cir. 2015) (buyer, having knowledge of seller's potential withdrawal liability, could have required seller to obtain an estimate of its withdrawal liability, in order to negotiate a lower purchase price). Findlay and its creditors certainly could complain, since in the first 56 months of their existence, the Petitioners derived net income of $11,925,725 from Findlay's

devoid of any stakeholder reliance on state common law in the context of ERISA pension plan liability.

2. Kamen

Next, Petitioners cite a securities law case, *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991). Petition at 10. In *Kamen*, this Court declined to displace state law with a uniform rule because it was the incorporating state's prerogative to "allocat[e] governing powers within the corporation." *Id.* at 92. Successor liability does not allocate governing powers within a corporation. In fact, its application is not limited to corporations.[10]

Moreover, while business organization governance is subject to state law, business organization liability under ERISA is subject to federal law, not only according to the courts applying federal successor liability to ERISA claims, but also under the statute itself. Notwithstanding that state law generally limits liability for debts of a corporation or limited liability company to the corporation or limited liability company, ERISA provides for "controlled group" liability, *i.e.* that business

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assets, over three times greater than the price paid for them. Dist. Ct. Doc. 3 at 34, 36.

[10] See, e.g., *Allied Invs. v. Lee Pacific, LLC*, No. D050164, 2007 WL 4395689 (Cal. App. Dep't Super. Ct. Dec. 18, 2007) (limited liability companies); *Case v. Paul Troester Maschinenfabrik*, 139 F. Supp. 2d 428, 432 (W.D.N.Y. 2001) (partnerships); *Tift v. Forage King Indus., Inc.*, 322 N.W.2d 14, 15-16 (Wis. 1982) (sole proprietorship).

organizations that share certain levels of common ownership with the sponsor of a terminating plan are jointly and severally liable with the sponsor for the Termination Liabilities.[11]

3. Bestfoods

Petitioners also cite a case arising under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), *United States v. Bestfoods*, 524 U.S. 51 (1998). Petition at 11-12. Petitioners assert that "[a]s in this case, the Government asked the courts to create a different federal common law rule that would broaden its ability to extract payment from related corporations." *Id.* at 11. Petitioners state that in *Bestfoods*, this Court "rejected that argument out of hand," by saying that nothing in CERCLA indicates "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action

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[11] When a plan terminates, the contributing sponsor and the members of its "controlled group" are jointly and severally liable for the Termination Liabilities. 29 U.S.C. §§ 1307(e), 1362(a)(1). A person's controlled group consists of the "person and all other persons under common control with such person." 29 U.S.C. §— 1301(a)(14)(A); 29 C.F.R. § 4001.3(b)(1). Persons are under common control if they are members of a "controlled group of corporations" or "two or more trades or businesses under common control," as defined in Treasury regulations under 26 U.S.C. §§ 414(b) and (c) respectively. 29 C.F.R. § 4001.3(b)(2). Both sets of Treasury regulations require certain levels of common ownership for controlled group membership. 26 C.F.R. § 1.414(b)-1(a) (incorporating 26 U.S.C. § 1563(a)); 26 C.F.R. § 1.414(c)-2.

is based upon a federal statute." Petition at 11, quoting *Bestfoods*, 524 U.S. at 63.

First, in this case PBGC has not asked the courts to "create a different federal common law rule" at all, much less to replace "the entire corpus of state corporation law." Instead, it has asked the courts on these limited facts to apply the same federal common law rule to Termination Liabilities that they already have applied over the last 45 years to other federal labor and employment law statutes, and other ERISA provisions, including multiemployer plan withdrawal liability, which is very similar, as described above. And that is all the Sixth Circuit did on the narrow facts of this case.

The second major problem with Petitioners' attempt to apply *Bestfoods* is that the government didn't ask the courts to "create a different federal common law rule" (much less to replace "the entire corpus of state corporations law") in *Bestfoods*, either. This Court said "[t]he Government has indeed made no claim that a corporate parent is liable … simply because its subsidiary is subject to liability." *Bestfoods*, 524 U.S. at 62. Instead, the issue was definitional, *i.e.* whether parent corporations "operated" the facility so as to incur liability under CERCLA's provision for "operator" liability. *Id.* at 64-73. Thus, in *Bestfoods*, this Court did not reject an argument for a federal common law rule.

4. <u>Superior General Contractors</u>

In the one ERISA case cited by Petitioners, the Eighth Circuit declined to apply a separate doctrine developed under federal labor law, alter ego. *Greater*

Kansas City Laborers Pension Fund v. Superior Gen. Contractors, Inc., 104 F.3d 1050, 1055 (8th Cir. 1997). But no courts outside of the Eighth Circuit have followed *Superior General Contractors*. Several courts adopted the labor law standard without mentioning *Superior General Contractors*.[12] Federal courts in the District of Columbia "have unanimously rejected the use of the Eighth Circuit's corporate law standard and instead adopted the First Circuit's labor law standard when evaluating alter ego status of corporations" for ERISA liability.[13] In any event, a single circuit court case dealing with alter ego liability and having nothing to do with successor liability does not create a conflict with the Sixth Circuit decision here.

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[12] See, e.g., *Ret. Plan of the UNITE HERE Nat'l Ret. Fund v. Kombassan Holding A.S.*, 629 F.3d 282, 288-89 (2d Cir. 2010); *Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp.,* 139 F.3d 304, 307-09 (1st Cir. 1998); *Lance v. Ford Motor Co.*, No. 08-13829, 2009 WL 1133456 (E.D. Mich. April 27, 2009); *Maryland Elec. Indus. Health Fund v. Kodiak Util. Constr.*., 289 F. Supp. 2d 698, 701-02 (D. Md. 2003).

[13] *Boland v. Ace Masonry, Inc.*, No. 12-1375, 2016 WL 9825778, at *9 (D.D.C. July 14, 2016) (collecting cases).

5. *There is no reason to limit federal successor law to labor law.*

Next, Petitioners suggest that courts never should have extended federal successor law beyond its origins in labor law, citing *New York v. National Services Industries, Inc.*, 352 F.3d 682, 686 (2d Cir. 2003). Petition at 19. In *National Services Industries*, the Second Circuit held that its previous opinion replacing the traditional state law "mere continuation" exception to successor non-liability with the "substantial continuity test"—the test for substantial continuity under federal successor law—for the purposes of CERCLA, was no longer good law after *Bestfoods*. *Nat'l Servs. Indus.*, 352 F.3d at 685. The Second Circuit reasoned that

> the labor law cases are particular to the labor law context and therefore have not been and cannot easily be extended to other areas of federal common law. In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that section 301 of the Labor Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of [ ] collective bargaining agreements."

Id., citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

But section 301 of the Labor Management Relations Act ("LMRA") contained no explicit authorization to fashion common law. *Lincoln Mills*, 353 U.S. at 449-50. Instead, this Court found

that authorization in the law's purpose and legislative history. *Id.* at 452-56. Similarly, while ERISA contains no explicit authorization to fashion common law, this Court has found authorization to do so, in part from ERISA legislative history referring to section 301 of the LMRA.[14] Thus, whether or not federal successor law can easily be extended to cases arising under CERCLA, it can and has easily been applied to cases arising under ERISA because of the similarities between ERISA and other labor laws.

Petitioners also imply that extending federal successor law is inappropriate because "the relief sought under the statutes involved in the *Golden State* line of cases 'is *typically* nonmonetary and can be effective only if directed against the workers' current employer.'" Petition at 19-20, quoting *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 826 (D.C. Cir. 2001) (Sentelle, J., concurring) (emphasis in the original) (case under Coal Act). Neither Petitioners nor the *Holland* concurrence

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[14] *Pilot Life,* 481 U.S. at 55, quoting H.R. Rep. No. 93-1280, at 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5107 (all actions under section 502 of ERISA "*are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*") (emphasis added by Supreme Court). See also *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), quoting *Pilot Life,* 481 U.S. at 56 ("Given this [statutory] language and [legislative] history, we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'")

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explain why only nonmonetary relief should be facilitated by federal successor law. Asset sales often follow the seller's distress, such that damages also can be effective only if awarded against the successor. And it's likely that in many if not most cases, profit-seeking business organizations resist nonmonetary relief precisely because it can have monetary consequences.

Moreover, the relief awarded in *Golden State* itself included backpay. *Golden State Bottling Co. v. NLRB.*, 414 U.S. 168, 186-89 (1973). The concurrence in *Holland* distinguishes the Coal Act from other statutes under which damages have been awarded based on specific performance not being available under the Coal Act, without explaining why that distinction matters. *Holland*, 256 F.3d at 826. In any case, specific performance is available under Title IV of ERISA. See 29 U.S.C. § 1303(e)(1) (PBGC may bring actions for equitable as well as legal relief).

C. There is no "circuit-split" on the federal successor liability test.

Petitioners also attempt to construct a conflict among the circuits regarding the test for federal successor liability, misstating the law in the Third, Sixth, Seventh, and Ninth Circuits. Petition at 20-21. But the Third, Seventh, and Ninth Circuits are in agreement regarding the elements in application of successor liability to ERISA and the Sixth Circuit incorporates these elements in its balancing test.

The latest ERISA opinions by the Third, Seventh, and Ninth Circuits require two elements in

applying federal successor liability: the successor's notice of the predecessor's liability before the sale, and substantial continuation of the business.[15] Regarding the latter element, "courts look to, *inter alia,* the following factors: continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers."[16]

In an earlier Seventh Circuit ERISA case, *Artistic Furniture,* a third element, "whether the

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[15] *Indiana Elec. Workers Pension Benefit Fund v. ManWeb Services, Inc.*, 884 F.3d 770, 777 (7th Cir. 2018); *Michael's Floor Covering, Inc.*, 801 F.3d at 1095; *Einhorn v. M.L. Ruberton Constr. Co.,* 632 F.3d 89, 99 (3d Cir. 2011).

[16] *Einhorn,* 632 F.3d at 99, citing *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 43 (1987). See also *Michael's Floor Covering*, 801 F.3d at 1095, citing *Fall River Dyeing*, 482 U.S. at 43 ("*Fall River Dyeing* determined "substantial continuity" by examining, inter alia, 'whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.'"); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1329 (7th Cir. 1990) ("Continuity of operations is easily established here. Artistic employed substantially all of Pontiac's workforce and it appears, supervisory personnel as well. It used Pontiac's plant, machinery, and equipment and manufactured the same products. Work orders not completed by Pontiac prior to its termination were completed by Artistic. Artistic also agreed to honor warranty claims for goods sold by Pontiac. Finally, both Pontiac's Vice President of Finance, Larry Bork, and Vice President of Manufacturing, Richard Mahon, stayed on in the same positions under Artistic's management.").

predecessor is able, or was able prior to the purchase, to provide the relief requested," was mentioned as a critical factor in the Seventh Circuit *Wheeler* case arising under Title VII of the Civil Rights Act ("Title VII").[17] *Wheeler* in turn cited a Sixth Circuit case under Title VII, *MacMillan Bloedel*.[18] *MacMillan Bloedel* identified nine factors relied upon in labor law cases—mostly decisions of this Court—to determine whether a successor was liable under federal common law:

> 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

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[17] *Artistic Furniture*, 920 F.2d at 1327-29, citing *Wheeler v. Snyder Buick, Inc.,* 794 F.2d 1228, 1236 (7th Cir.1986). While Wheeler referred to "factors," *Artistic Furniture* referred to "predicates." *Artistic Furniture*, 920 F.2d at 1329.

[18] *Wheeler*, 794 F.2d at 1236, citing *Equal Emp't Opportunity Comm'n v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086 (6th Cir.1974).

MacMillan Bloedel, 503 F.2d at 1094 (citations omitted). Factors 1-3 correspond to the three elements of federal successor liability according to *Artistic Furniture*. Factors 4-9 are similar to the factors cited in *Einhorn*, *Michael's Floor Covering*, and *Artistic Furniture* as relevant to the substantial continuity element, see *supra* note 16, unsurprisingly, since *Wheeler* merged Factors 4-9 into Factor 3,[19] *Artistic Furniture* cited *Wheeler*, and *Einhorn* and *Michael's Floor Covering* cited *Artistic Furniture*.[20]

In this case, the Sixth Circuit, citing *Cobb v. Contract Transport Inc.,* 452 F.3d 543, 554 (6th Cir. 2006), which applied federal successor law to the Family and Medical Leave Act ("FMLA"), described successor liability as "an equitable doctrine that requires the court to balance (1) the interests of the defendant, (2) the interests of the plaintiff, and (3) 'the goals of federal policy, in light of the particular facts of a case and the particular legal obligation at issue.'" Pet. App. 28a. But that balancing test incorporates the same nine factors identified in *MacMillan Bloedel*,[21] eight of which are consistent with the current test in the Third, Seventh, and Ninth Circuits, see *supra* page 21-22.

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[19] *Wheeler*, 794 F.2d at 1236 n.7, citing *MacMillan Bloedel,* 503 F.2d at 1094.

[20] *Einhorn,* 632 F.3d at 93-99; *Michael's Floor Covering*, 801 F.3d at 1095 n.4.

[21] *Cobb,* 452 F.3d at 554.

Moreover, the other three circuits also refer to the equitable nature of federal successor law, and the need to balance the parties' interests and federal policies.[22] Accordingly, one paragraph after citing *Cobb*, the Sixth Circuit specifically stated that it was aligning itself with the Seventh and Ninth Circuits.[23]

And the equitable nature of federal successor law should apply here, where an insider was involved in both sides of the sale transaction. As the Sixth Circuit states "[a]ll that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply." Pet. App. 29a.

II. ERISA does not address successor liability.

Petitioners' second major argument is based entirely on their repeated assertion that 29 U.S.C. § 1369(b) contains express rules governing successor liability for unpaid pension liabilities. Petition at 21-26. But, as the Sixth Circuit noted, section 1369(b) pertains only to certain corporate reorganizations, not asset sales as occurred here. Pet. App. 25a. Thus, while the courts cannot look to federal common law supplementing a statute "to overcome the words of its text regarding the *specific* issue under

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[22] See, e.g., *Michael's Floor Covering*, 801 F.3d at 1091; *Tsareff*, 794 F.3d at 848; *Einhorn,* 632 F.3d at 99 ("inquiry should be effectuated on a case by case basis balancing the equities presently before the court").

[23] Petition at 28a, citing *Michael's Floor Covering*, 801 F.3d at 1095, *Artistic Furniture*, 920 F.2d at 1327.

consideration,"[24] there is no such text in ERISA regarding successor liability to overcome.

> In its entirety, section 1369(b) provides:
> (b) **Effect of corporate reorganization.** For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:
>
> (1) Change of identity, form, etc. If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.
>
> (2) Liquidation into parent corporation. If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.
>
> (3) Merger, consolidation, or division. If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or

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[24] Petition at 22-23, quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (emphasis in original).

> corporations shall be treated as the person to whom this subtitle applies.

That section 1369(b) concerns corporate *reorganizations* is indicated by its heading; its introductory clause; the references to corporations in each of its three paragraphs; and the statutory provision that incorporates it into the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA"), which refers to "a change in corporate structure described in section 1369(b)." 29 U.S.C. § 1398(1)(A). In enacting section 1369(b), Congress merely confirmed the applicability of standard corporate law on the enumerated types of *reorganizations*. *Centra Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 578 F.3d 592, 601 (7th Cir. 2009) (citing Jayne E. Zanglein & Susan J. Stabile, *ERISA Litigation* 1474 (3d ed. 2008)). In doing so, it twice used the phrase "successor corporation," for lack of a better description. That should not be mistaken for an intent to foreclose common law successor liability.

And because section 1369(b) applies to withdrawal liability, *see* 29 U.S.C. § 1398(1)(A), each court considering successor liability for withdrawal liability necessarily agreed, expressly or implicitly, by holding that the federal successor law applies.[25]

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[25] *Michael's Floor Covering,* 801 F.3d at 1093-95; *Tsareff*, 794 F.3d at 844-47; *OBZ,* 2017 WL 4759031, at *5; *C&S Wholesale Grocers*, 2017 WL 1628896, at *3-5; *RP Baking LLC,* 2011 WL 2912861, at *3 (predicting holding of Third Circuit); *Bear Distrib.*, 2009 WL 812224, at *8-9 (same); *Cent. States, Se. & Sw. Areas Pension Fund v. Hayes,* 789 F. Supp. 1430, 1435-36 (N.D. Ill. 1992)(based on Court of Appeals' application of Federal Successor Doctrine to unpaid multiemployer plan

III. The questions raised by Petitioners do not merit review by this Court.

Petitioners assert that the "questions in this case are of broad practical and doctrinal importance." Petition at 27. They are not.

A. The decision of the court of appeals is not a threat to American industry.

Petitioners contend that the decision below should be reviewed because it will have repercussions across American industry. Petition at 27-31. But the Sixth Circuit applied a well-known test in the context of a narrowly targeted statute that is enforceable only by PBGC. And the narrow facts presented here do not have widespread application. It bears repeating that the Sixth Circuit stated "[a]ll that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply." Pet. App. 29a.

To support their assertion of broad impact on the nation, Petitioners cite 24 cases, "just … from the ERISA context." Petition at 27-28. Yet none of those 24 cases, six of which date from the last millennium,

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contributions). Another district court, in the Sixth Circuit, said that based on the posture of the case before it, it didn't need to decide whether to apply state or federal successor law to withdrawal liability; it didn't mention section 1369(b) as a third alternative. *Local 109 Bd. of Trs. of the Operative Plasterers & Cement Masons Pension Fund v. All Am. Acoustic and Drywall Inc.*, No. 5:15-cv-2361, 2016 WL 5232828 at *4 (N.D. Ohio Sept. 22, 2016).

held that federal successor liability was inapplicable. Thus, the repercussions of federal successor ERISA liability, whatever they were, already have been absorbed.

Next, Petitioners allege that federal successor liability will chill asset sales. Petition at 30-31. If so, there should be evidence of that, since federal successor liability has been applied to labor law since 1973, *see Golden State*, 414 U.S. 168; and to ERISA since at least 1987, *see Waiola*, 823 F.2d at 289. Petitioners cite no evidence that it has prevented asset sales. And, importantly, the facts of this case do not involve all asset sales, but the small subset where an insider is purchasing the assets at a discount and largely continuing the same business.

Moreover, as the Third Circuit noted, "[t]he requirement of notice and the ability of the successor to shield itself during negotiations temper concerns that imposing successor liability might discourage corporate transactions." *Einhorn,* 632 F.3d at 96. The buyer, having knowledge of the seller's potential ERISA liability, can negotiate a lower purchase price. *Tsareff*, 794 F.3d at 849. In addition, the buyer and seller could negotiate with the holder of the ERISA claim, which will have an incentive to receive partial payment, rather than none in the event that no sale occurs. Thus, in the context of single-employer plans and sales to an insider, the Sixth Circuit's application of federal successor law merely levels the playing field between PBGC and the trade creditors that successors prefer (as Petitioners did, Complaint at 34) -- by inducing parties to a sale to negotiate with PBGC, rather than simply dumping pension liabilities on PBGC.

The Petitioners further allege that the "business community has reacted to the decision in this case with alarm." Petition at 30. But the evidence of "business community" "alarm" consists of three articles by attorneys in the business of representing employers or asset purchasers.[26] And one of those articles was not reacting to this decision at all, as it pre-dated the decision by three years.[27] The other two focused as much on the court of appeals' decision on Findlay's controlled group as on its decision on successor liability, and could not reasonably be described as "alarmed" by the latter.

Petitioners assert that "businesses deserve a clear answer" regarding potential successor liability. Petition at 29. But as noted above, the waters of federal successor law are clear, and Petitioners are trying to muddy them. Businesses already had a clear answer regarding other types of labor and employment obligations. In *Findlay,* the Sixth Circuit clarified the law further by confirming that federal successor law applies in limited circumstances to single-employer plan termination liability, logically

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[26] Petition at 30-31, citing *Third Parties Face Pension Liability Under Controlled-Group and Successorship Theories*, McGuireWoods, Sept. 18, 2018, *available at* http://bit.ly/2Wq8UIU; Robert R. Perry, *A Troubling Expansion of Successor Liability*, JacksonLewis, Employee Benefits for Employers Winter 2015, 1, 4, *available at* http://bit.ly/2FDzSah; Michael J. Kaczka & Maria G. Carr, *Buyer Beware: Sixth Circuit Expands PBGC's Ability to Recover Underfunded Pension Liabilities—Is Expansion of Successor Liability Next*, Turnaround Times Nov./Dec. 2018), 5, 6, *available at* http://bit.ly/2uyMLff.

[27] Robert R. Perry, *A Troubling Expansion of Successor Liability*, JacksonLewis, Employee Benefits for Employers Winter 2015, 1, 4 , *available at* http://bit.ly/2FDzSah.

given its great similarity with multiemployer plan withdrawal liability, to which federal successor law already had been applied.

And courts are able to provide a clear answer by proper application of federal common law of successor liability to the facts of each case. It is evident that courts can competently do so, as they have found successor liability inapplicable in some circumstances. *See e.g., New Orleans Emp'rs. Int'l Longshoremen's Assoc., AFL-CIO Pension Fund v. Maritime Sec., Inc.*, No. 17-7430, 2019 WL 342440 (E.D. La. Jan. 28, 2019) (citing *PBGC v. Findlay Indus., Inc.*, 902 F.3d 597 (6th Cir. 2018)).

B. **The decision of the court of appeals does not present questions of substantial doctrinal importance**.

Finally, Petitioners assert that issues regarding the creation of federal common law "arise frequently and across a broad spectrum of statutes." Petition at 31. As discussed above, this case involves federal common law created decades ago, and applied to a narrow set of facts here. There is no reason to revisit that law now.

CONCLUSION

The petition for writ of certiorari should be denied.

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