No. 15-1118

IN THE

Supreme Court of the United States

MICHAEL'S FLOOR COVERING, INC.,
Petitioner,

v.

RESILIENT FLOOR COVERING PENSION FUND,
AND BOARD OF TRUSTEES OF THE
RESILIENT FLOOR COVERING PENSION FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The petition presents no questions meriting review by this Court. If the Court were to grant the petition, however, the questions should be restated as follows:

1. Whether this Court should grant certiorari regarding a "Question Presented" that is not ripe for review because there has not yet been any finding that, for purposes of determining whether withdrawal liability has accrued under 29 U.S.C. section 1383(b), the business enterprise originally known as Studer's Floor Covering, Inc. has continued to perform work in the pertinent jurisdiction by means of a substantial continuation of the business under the new name Michael's Floor Covering, Inc., and where no judgment has been entered yet imposing withdrawal liability.

2. Whether this Court should grant certiorari regarding a "Question Presented" that is not ripe for review because there has not yet been any finding with regard to whether or not Petitioner acquired (whether by purchase or any other means) a substantial portion of the assets of Studer's Floor Covering, Inc., including, without limitation, its customer base and good will, and where no judgment has been entered yet imposing withdrawal liability on Petitioner.

3. Whether it was proper for the court of appeals to tailor the successorship factors and the weight to be given those factors, as required by this Court's decision in *Howard Johnson*

Co. v. Detroit Local Joint Executive Bd., *Hotel & Rest. Emp. & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249, 262 n. 9 (1974), by taking into account the interests of a new employer and the employees and the policies of the labor laws in light of the facts of the case and the particular legal obligation at issue, i.e. a construction industry employer's obligation to pay withdrawal liability when it no longer has an obligation to contribute to a multiemployer pension plan but continues performing work in the pertinent jurisdiction.

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INTRODUCTION

The petition for certiorari in this case does not raise any question that warrants review by this Court. The Ninth Circuit's decision does not conflict with the decision of any other court of appeals. Nor does it conflict with any decision of this Court. Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court.

This case arises out of a claim for payment of withdrawal liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1001, *et seq.*, including provisions added by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381, *et seq*.

ERISA requires withdrawing employers to pay their proportionate share of a pension fund's vested but unfunded liabilities ("withdrawal liability"). *See*, ERISA §§ 4201, 4211, 29 U.S.C. §§ 1381, 1391. Petitioner, Michael's Floor Covering, Inc. ("Michael's"), is a construction industry employer. Respondents, Resilient Floor Covering Pension Trust Fund and its Board of Trustees (collectively "the Pension Fund"), is seeking to collect withdrawal liability from Petitioner as a successor employer to Studer's Floor Covering, Inc. ("Studer's"), which was a participating employer in the Pension Fund until December 31, 2009. (*See*, App. 4a-5a.)[1]

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[1] As used herein, "App." refers to the Appendix to Petition for Writ of Certiorari attached to the Petition for Writ of Certiorari filed herein by Petitioner.

STATEMENT OF THE CASE

I. Factual Background

This is not a case where someone who has no connection to a company that is going out of business buys less than half of that company's assets and starts a new business from scratch. In this case a company insider, Ronald Michael Haasl ("Haasl"), in addition to buying four of Studer's vehicles and 30% of Studer's equipment and supplies, intentionally acquired[2] and/or simply exploited substantial intangible assets of Studer's for the express purpose of "continuing" the business. (*See*, App. 5a–7a and Resp.App.[3] 19ra.) Those intangible assets include the lease on the location where Studer's had been located, Studer's phone numbers, and Studer's goodwill – including its invaluable relationships with numerous existing commercial customers. (*See*, App. 5a–6a and Resp.App. 19ra.) In addition, in Michael's first two years of operation, 63% of the installers it employed were former Studer's employees. (*See*, App. 7a.)

Prior to 2010, Studer's was a participating employer in the Pension Fund. (*See*, App. 4a.) In late 2009, Stud-

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[2] Michael's incorrectly asserts that it is undisputed that Michael's did not acquire all or any substantial part of Studer's business assets. (*See*, Pet. 10.) However, while the Pension Fund does not dispute that Michael's did not purchase a substantial part of Studer's business assets (*see*, App. 57a), it does contend that Michael's acquired a substantial part of those assets, including Studer's good will and customer base.

[3] As used herein, "Resp.App." refers to Respondent's Appendix to Brief in Opposition to Petition for Writ of Certiorari, filed herewith.

er's sold most of its tangible assets. (*See*, App. 6a.) The lease for its storefront and warehouse expired on December 31, 2009, and the company ceased doing business as Studer's Floor Covering, Inc. (*See*, App. 5a.)

When Studer's announced it planned to close, Haasl, one of Studer's longtime salesmen, seeing an opportunity to fill the void, incorporated Michael's, obtained a lease on the commercial space Studer's was vacating, obtained Studer's authorization to take over Studer's telephone numbers, started soliciting Studer's customers, and drew up a business plan designed to take over Studer's customer base. (*See*, App. 5a–7a and Resp.App. 12ra—19ra.) He took all of these actions before Studer's closed, and while he was still employed by Studer's, so that Michael's could take Studer's place the day after Studer's closed. (*See*, *id.*) Michael's even replaced the signage with signs that looked substantially like Studer's signs. (*See*, App. 5a–6a.)

Studer's actively helped Michael's take over the business.[4] For example, Studer's authorized the

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[4] Michael's asserts "It is also undisputed that Michael's, the alleged successor, is not an alter ego of Studer's and that Studer's ownership plays no role whatsoever in Michael's business," noting that neither the appeals court nor district court made any such finding. (*See*, Pet. 8.) However, a lack of finding by a court does not make a contention "undisputed." Similarly, Michael's asserts that "the defunct business owner here played no role in the ownership, management, or acquisition of customers by the alleged successor." (*See*, Pet. 12.) In fact, Studer's *did* play a role in helping Michael's obtain business. Among other things, it allowed Haasl to solicit Studer's customers while he was still employed by Studer's. And it gave its affirma-

transfer of its phone numbers to Michael's. (*See*, App. 6a.) And Studer's made an official decision not to sell its goodwill. (*See*, Resp.App. 23ra at ¶ 4.) This left Haasl free to solicit Studer's customers.

Michael's business plan shows that Michael's intended to be a continuation of Studer's. It states that "Michael's Floor Covering, Inc. has personal and business relationships with many of the trade partners. These relationships are vital to *continued* success." (*See*, Resp.App. 19ra (emphasis added).) Given the timing, the "business relationships" and "continued success" refer to Studer's business relationships and the continued success of the business enterprise previously known as Studer's.

During Michael's first two years of operation, five of the eight installers on its payroll previously worked for Studer's. (*See*, App. 7a.) Thus, of the eight installers Michael's employed in 2010, at least 63% had previously worked for Studer's.

Michael's efforts to take over Studer's customer base worked exceptionally well. Although Michael's did no advertising or marketing during its first three months in business, it sent out dozens of invoices to business customers[5] totaling $289,572.97 for work

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tive consent for the phone company to transfer its phone numbers to Michael's.

[5] It is apparent from the face of almost all of Studer's and Michael's invoices whether the customer was a business entity purchasing flooring for installation in connection with its business activities or else a consumer purchasing flooring for his or her own home. While Michael's disagreed that the invoices could be so characterized, it did not present any evidence to show that

done in those first three months. (*See*, Resp.App., 5ra–10ra.)[6] Of the 30 business customers who patronized Michael's in its first three months of operations, all but seven had been Studer's customers during Studer's last year in business. (*See*, App. 7a and Resp.App. 10ra.) The 23 former business customers of Studer's accounted for over 95% of the $289,572.97 in invoices Michael's issued to business customers in its first 3 months. (*See*, Resp.App. 10ra.)

Michael's continued to work many of the same home development projects on which Studer's had worked. (*See*, App. 6a-7a.) Michael's also captured other Studer's customers by use of the same location, same phone numbers and similar looking signs as Studer's had used. (*See*, App. 33a.)

II. Proceedings Below

The District Court granted summary judgment in favor of Michael's. The Pension Fund appealed. The Ninth Circuit reversed and remanded for further proceedings, finding that the District Court "took an erroneously narrow view of the successorship inquiry, applied the successorship factors acontextually, mis-

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Appellants' characterization of the invoices in the proceedings below was in any way incorrect, and the trial court did not make any finding that Appellants' characterization of the invoices in the proceedings below was in any way incorrect.

[6] The invoices underlying these demonstrative exhibits were filed under seal due to confidentiality designations Petition made when the documents were produced in discovery. In response to Respondent's request that the information be de-designated, Respondent agreed to de-designate the demonstrative exhibits (with customer names redacted), but not the invoices.

calculated the continuity of the workforce factor, and imposed the unwarranted requirement that the change of ownership be merely 'technical in nature.'" (App. 36a.) The Ninth Circuit held that, in the context of withdrawal liability in the construction industry, the District Court must "apply the *Jeffries/Fall River Dyeing*[7] successorship factors, with special emphasis on substantial continuity as measured by customer retention." (*Id.*)(Footnote added). The Ninth Circuit based its holding on its analysis of the policy considerations underlying the MPPAA's special rule for withdrawal liability in the construction industry, which is premised on an assumption that when a union construction industry employer closes, the related multiemployer pension fund does not usually lose any of its funding base because the employees generally take jobs with other union employers who continue to contribute to the pension fund for those employees. (*See*, App. 14a–16a.)

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because a Final Judgment Has Not Been Rendered by the Court Below

This Court has made clear that "we generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *See*, *VMI v. United States*, 508 U.S. 946 (1993) (citing cases). The fact that the decision of a district court is not final alone is "suffi-

[7] *See*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), and *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985).

cient ground for the denial of the application." *See*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, the Ninth Circuit decided only the parameters of the standard to be applied when making a successorship determination in the context of withdrawal liability in the construction industry. The Ninth Circuit remanded the case for further proceedings, and there is currently no operative judgment determining whether or not Petitioner is a successor to Studer's and liable for withdrawal liability.

Simply put, because there is no final judgment and the record is not fully developed, certiorari should be denied. Once a final judgment is rendered, if Petitioner is found liable it can then raise its current claims along with any additional claims in another petition for a writ of certiorari. *See*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Nothing in the Ninth Circuit's decision would justify any departure from this sensible, well-established procedure.

II. The Court of Appeals Decision Does Not Create a Conflict with Other Circuits or with the Holdings of this Court

A. There is No Conflict in the Circuits

Petitioner cites two circuit level cases in support of its contention that there is a conflict in the circuits: *Upholsterers' Int'l Union Pension Fund v. Artistic*

Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990) and *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (3d Cir. 2011). However, both of the foregoing cases involved liability for delinquent contributions, ***not*** withdrawal liability. Withdrawal liability and plan contributions are different obligations with different policy considerations: "One obligation is created by statute, the other by contract." *See*, *Carpenters Pension Trust Fund for N. California v. Moxley*, 734 F.3d 864, 870 (9th Cir. 2013). Because neither circuit case cited by Petitioner dealt with the issue of how the successorship doctrine should be applied in the context of withdrawal liability in the construction industry–which was the issue decided by the Ninth Circuit in the present case–neither creates a split among the Circuits.

Whether an employer is a "successor employer" for a particular purpose "requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue." *See*, *Howard Johnson Co.*, 417 U.S. at 262 n. 9. "There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." *Id.* Here, the Ninth Circuit applied the successorship standard in a unique legal context and tailored the factors accordingly.

B. The Decision by the Ninth Circuit is Consistent with the Holdings of this Court

As noted above, this Court has held that the determination of whether one company is a "succes-

sor employer" of another company depends on the "interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue." *See*, *Howard Johnson*, 417 U.S. at 262 n. 9. Petitioner's argument that the Ninth Circuit's opinion in this case conflicts with how this Court has applied successorship factors in contexts *other than* withdrawal liability in the construction industry ignores this Court's admonition that "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context." *Id.*

In attempting to calcify this Court's successorship decision from one context into a "one size fits all" standard for all contexts, Petitioner misstates the holding in *Golden State*. Nowhere in *Golden State* did this Court state that the circumstances therein were the *only* circumstances in which a court could find a new employer was a successor that can be held liable for an obligation of its predecessor. On the contrary, the Court in *Golden State* understood that the labor law doctrine of successorship is broad, and "so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served." *See*, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 at 182 n. 5 (1973).

CONCLUSION

The case has been remanded to the district court for further factual and legal determinations. There is no reason to review this issue without a final judgment and a fully developed record.

Petitioner—a construction industry employer—expects to reap windfall rewards by continuing its predecessor's business activities with the most lucrative of its predecessor's customers, but seeks protection from this Court against the risks posed under the MPPAA from engaging in such conduct. Such protection from withdrawal liability, unavailable to employers in other industries, must be weighed against the purpose for which Congress enacted the MPPAA: "to protect the viability of defined pension benefit plans, to create a disincentive for employers to withdraw from multiemployer plans, and also to provide a means of recouping a fund's unfunded liabilities." *See*, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720-22, (1984). A reversal of the Ninth Circuit's decision would be contrary to that purpose. Thus, certiorari is not warranted.

There is no decision from any other Circuit that conflicts with Ninth Circuit's decision in this case. The Ninth Circuit's analysis is consistent with this Court's holdings in the *Howard Johnson*, *Golden State*, and *Fall River Dyeing* cases. The decision is no more than an analysis of how the longstanding successorship doctrine should be applied in the specific context of withdrawal liability in the construction industry.

Respectfully Submitted,

/s/ George M. Kraw

/s/ Donna L. Kirchner

/s/ Katherine McDonough

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[8] Donna L. Kirchner was originally admitted into the U.S. Supreme Court under her maiden name Donna L. Timmerman. A letter notifying the Court of Ms. Kirchner's name change was mailed to the U.S. Supreme Court's Admission Office on March 29, 2016 via UPS and was delivered/submitted on March 31, 2016 for processing.

[9] Katherine A. McDonough's Application for Admission to Practice in the Supreme Court is pending. Ms. McDonough sent an Admissions Application on March 30, 2016 (via UPS Next Day Air Service) that was delivered/submitted to the Court for processing on March 31, 2016.