No. 22-0227

In the Supreme Court of Texas

IN RE FIRST RESERVE MANAGEMENT, L.P.; FIRST RESERVE CORPORATION, L.L.C.; FR XII ALPHA AIV, L.P.; FR XII-A ALPHA AIV, L.P.; FR SAWGRASS, L.P.; AND SAWGRASS HOLDINGS, L.P,

Relators.

On Petition for Writ of Mandamus from the
128th District Court, Orange County, Texas
Cause No. A2020-0236-MDL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE TEXAS ASSOCIATION OF BUSINESS AS AMICI CURIAE SUPPORTING RELATORS

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Texas Association of Business ("TAB") is the Texas State Chamber, representing companies of every size and industry before the Texas and national government. TAB works vigorously to support business growth in Texas and to maximize employers' opportunities to grow jobs, increase wages, and give back to Texas communities. Both organizations regularly file amicus curiae briefs in cases, like this one, that raise issues of concern to the Texas and national business communities.

Amici write to explain the importance of limited liability for private-equity investors who maintain portfolio companies as separate legal entities while taking an active role in helping these companies grow and flourish. Amici further write to explain how subjecting private-equity companies to expensive litigation and potential liability because they engage in standard industry practices that create value for investors, employees, consumers,

and the public at large would put Texas out of step with corporate law across the country and drive private equity investment out of the State.[1]

SUMMARY OF THE ARGUMENT

This case threatens to stifle investments in Texas companies. Private-equity investors take industry-standard, long-accepted, and socially beneficial steps to help their portfolio companies grow. But these investments will disappear if investors are held liable for those companies' alleged torts.

Private equity plays a critical, ever-expanding role in the U.S. and Texas economies. "The U.S. private equity sector directly generated $1.4 trillion of gross domestic product (GDP) in the United States in 2020," which amounts to approximately 6.5% of the GDP. Am. Inv. Council, *Economic Contribution of the US Private Equity Sector in 2020* (May 2021), https://tinyurl.com/23a7esx3 (hereinafter "*Economic Contribution*"). And in Texas, the private-equity sector contributed $129 billion to the State's annual GDP, accounting for nearly 14% of the State's total. *Id*.

These outsized contributions are the result of private-equity investors' active management strategies. "A private equity fund's success depends upon its portfolio companies increasing in value, often substantially, after

[1] No counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici, their members, or their counsel made a contribution to the preparation or submission of this brief. *See* Tex. R. App. P. 11(c).

several years and the fund being able to dispose of its holdings." Thomas P. Lemke et al., *Overview of Private Equity Funds, Hedge Funds and Other Private Funds: Regulation and Compliance* § 13:1 (2021) (hereinafter "Lemke"). To maximize the value of portfolio companies on a compressed timeline, private-equity investors rely on longstanding and industry-standard practices. These include appointing board members to strategize and implement operational improvements, requiring investment companies to seek board approval before accruing major expenses, and providing business-area expertise and counsel. *See id*.

The petitioners here ("First Reserve Investors") allegedly engaged in precisely these common-place practices. The First Reserve Investors allegedly appointed a minority of directors to the governing board of a portfolio company, TPC Group LLC ("TPC"); had employees on the board that was responsible for approving TPC's significant expenses; and provided management advice. *See* Joint Petition for Writ, No. 22-0227 at 22-23. Such run-of-the-mill steps to build value in a portfolio company are nothing close to the exceptional circumstances required for holding investors liable for actions of companies in which they invest. In Texas and across the country, limited liability for investors is a "bedrock principle of corporate law." *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006); *see also United States v. Bestfoods*, 524 U.S. 51, 61 (1998). And this principle is only overcome by "fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

Nonetheless, the lower court permitted the plaintiffs in this matter to proceed with claims that First Reserve Investors are liable for TPC's alleged torts merely because First Reserve Investors allegedly engaged in standard investment practices. That decision is a dangerous departure from well-settled law and creates a gap in the State's limited liability doctrine. Moreover, it invites future plaintiffs to sue private-equity and venture-capital investors for alleged harms caused by their portfolio companies, target shareholders for alleged harms caused by corporations, and harass parent companies for alleged harms caused by subsidiaries. Saddling private-equity investors and other equity owners with the risk of burdensome litigation based on the actions of the companies in which they invest will make Texas a legal outlier. And it will weaken the Texas economy by driving investors to jurisdictions with less legal risk.

This Court should grant the petition for writ of mandamus, reaffirm the "bedrock principle" of limited liability, and hold that ordinary private-equity practices do not make investors liable for alleged torts of their portfolio companies.

ARGUMENT

I. Subjecting Private-Equity Investors to Liability for the Torts of Legally Distinct Companies Contradicts Fundamental Principles of Corporate Law.

A. Limited liability is a foundational principle of corporate law that is overcome only in extraordinary circumstances.

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co.*, 538 U.S. at 474. This longstanding principle of strict separation is "deeply 'ingrained in our economic and legal systems.'" *Bestfoods*, 524 U.S. at 61 (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929)). Intertwined with the notion of corporate separateness is the doctrine of limited liability: A shareholder is generally not liable for the acts of the corporation. *Id.*

Limited liability has long been considered "the corporation's most precious characteristic." William W. Cook, *The Principles of Corporation Law* 19 (1925). And limited liability has been referred to as the "most important legal development of the nineteenth century." David H. Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 371-72 (1982). The purpose of limited liability is "to promote commerce and industrial growth by encouraging shareholders to make capital contributions to corporations without subjecting all of their personal wealth to the risks of the business." *Id.* at 371; *see also* David K. Millon, *Piercing the Corporate Veil, Financial Responsibility, and the*

Limits of Limited Liability, 56 Emory L.J. 1305, 1307 (2007) ("[T]he best way to understand the purpose of limited liability is as a subsidy designed to encourage business investment.").

"Limited liability is the rule not the exception." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *see* Stephen B. Presser, *Piercing the Corporate Veil* § 1.1 (2017) (limited liability is "one of the first principles of American law"). Although legal tests and terminology vary somewhat by jurisdiction, courts rarely deviate from this rule absent "exceptional circumstances." *See Dole Food Co.*, 538 U.S. at 475.[2] To overcome the presumption of limited liability and pierce the corporate veil, courts generally require, at minimum, (1) "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" and (2) strong evidence "that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations Corp.* § 41.30 (hereinafter "*Fletcher*").

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[2] *See, e.g.*, *In re White*, 412 B.R. 860, 865 (Bankr. W.D. Va. 2009) (cautioning that, under Virginia law, "[t]he power to pierce the LLC veil must be exercised reluctantly"); *K.C. Properties of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC*, 280 S.W.3d 1, 11 (Ark. 2008) (declining to pierce the corporate veil despite indications that certain defendant entities had no assets or members of their own); *Chapman v. Field*, 602 P.2d 481, 484 (Ariz. 1979) (declining to pierce the corporate veil despite evidence that shareholders lent money without taking promissory notes when the corporation failed to file annual reports).

Mere allegations of "control" or "domination" cannot suffice to pierce the corporate veil. Even when a shareholder completely controls a company, liability exists only when two critical factors are *both* present.[3] First, there must be "direct intervention . . . in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored." *Billy v. Consol. Mach. Tool Corp.*, 412 N.E.2d 934, 941 (N.Y. 1980). Second, such control must be "used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights." *Fletcher* § 41.

Texas law on corporate veil piercing is consistent with the national consensus. This Court has long recognized as a "bedrock principle of corporate law" that "a legitimate purpose for forming a corporation is to limit

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[3] *See, e.g.*, *Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538 (Ohio 2008) (corporate veil cannot be pierced where corporate control exercised to commit inequitable acts that did not rise to the level of fraud or illegality); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1070 (C.D. Cal. 2002) (granting summary judgment for defendants where, even if plaintiff had demonstrated "unity of interest" between corporation and individuals, he failed to demonstrate that maintaining the corporate form would produce "inequitable results"); *TNS Holdings, Inc. v. MKI Secs. Corp.*, 703 N.E.2d 749, 751 (N.Y. 1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance."); *Simmons v. Clark Equip. Credit Corp.*, 554 So. 2d 398, 400 (Ala. 1989) (reversing veil piercing under Alabama law because "mere domination" is not enough; there must also be the "added elements of misuse of control").

individual liability for the corporation's obligations." *SSP Partners v. Gladstrong Inv. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (quoting *Willis*, 199 S.W.3d at 271). To that end, this Court has explained that "[t]here must be something more than mere unity of financial interest, ownership and control for a court to treat the subsidiary as the *alter ego* of the parent and make the parent liable for the subsidiary's tort." *Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 374 (Tex. 1984). "[T]here must also be evidence of abuse," such as "fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct [or] the like." *SSP Partners*, 275 S.W.3d at 455. Mere "centralized control, mutual purposes, and shared finances" have "never" been sufficient to abrogate limited liability, because the "[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace." *Id*.

B. Industry-standard private-equity practices—such as those allegedly employed by the First Reserve Investors—cannot abrogate limited liability.

Investors across the Nation and this State rely on these foundational principles of corporate law to manage and protect their investments. Private-equity investors are no exception. Subjecting private-equity investors like the First Reserve Investors to suit and potential liability for the alleged torts of their portfolio companies simply because they take an active role in growing those companies would contradict prevailing Texas law and make Texas a legal outlier.

"A private equity fund is a pooled investment vehicle where the adviser pools together the money invested in the fund by all the investors and uses that money to make investments on behalf of the fund." U.S. Secs. and Exch. Comm'n, *Private Equity Funds*, https://tinyurl.com/4yrek3ju (last visited Nov. 2, 2022) (hereinafter "*SEC Private Equity Funds*"). "A typical investment strategy undertaken by private equity funds is to take a controlling interest in an operating company or business—the *portfolio company*—and engage actively in the management and direction of the company or business in order to increase its value." *Id*. Put simply, rather than taking a stake in some specific transaction, line of business, or potentially lucrative litigation in which a company is involved, "[p]rivate equity firms buy companies and overhaul them to earn a profit when the business is sold again." James Chen, *Private Equity Explained*, Investopedia (July 28, 2022), https://tinyurl.com/4hf8ydy3. And they do so on a tight timeline: the average holding period for a portfolio company in 2021 was a mere five years. *See* Private Equity Info, *Private Equity Portfolio Company Holding Periods* (Dec. 8, 2021), https://tinyurl.com/4bm9f55f.

Because a private-equity fund's success depends on increasing its portfolio companies' value over relatively short timeframes, private-equity investors often use their business expertise and play "an active role" in the management of those companies. Lemke § 13:1. A vast majority of private-equity firms, for example, put a board of directors in place to "set strategy," "manage performance," and "dramatically improve the business." Conor

Kehoe & Tim Koller, *Climbing the Private-Equity Learning Curve*, McKinsey & Company (May 26, 2021), https://tinyurl.com/yy3ptph9 (hereinafter "*Kehoe & Koller McKinsey Report*").

A portfolio-company board is "typically comprised of the CEO, two directors from the private equity firm, and two or three outside directors." Theresa Boyce, *Why PE Firms Create Boards for Portfolio Companies—Voluntarily*, CEO Trust (Feb. 15, 2019), https://tinyurl.com/3rbktu5x; *see* Lemke at § 13:1 (investors negotiate a "minimum number of seats on the board of directors" to "protect [their] investment"). Directors from the private-equity firm often "focus on the details of the [portfolio-company] management's formulation and execution of strategy," and frequently "engage with the CEO . . . as well as those who report to the CEO." Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0 - An Introduction*, 74 Bus. Law. 351, 359 (2019). For investor-appointed directors, "oversight of the portfolio company" is their "day job, not just a fiduciary duty." Claudy Jules, et al., *A Playbook for Newly Minted Private Equity Portfolio-Company CEOs*, McKinsey & Company (Sept. 24, 2021), https://tinyurl.com/4m8axce4. They are often "actively involved" and, "in many ways, [work] more like a 'super management team.'" *Id.*

Private-equity investors, moreover, may lend expertise to a portfolio company's daily operations in numerous ways. This includes "negotiat[ing] better terms with suppliers, assisting with sales, developing new products, [or] reorganizing the portfolio company." Lemke § 13:1. They may also include "covenants or agreements" as "terms and conditions" of their

investment, requiring the portfolio company to obtain their "consent to various extraordinary transactions" and their "approval of significant expenditures." *Id*. These and other similar measures allow private-equity investors to protect and maximize the value of their investments.

Courts across the county do not use these standard operating procedures to pierce the corporate veil of portfolio companies and hold private-equity investors directly liable for the companies' alleged torts. As discussed above, jurisdictions across the country—including Texas—generally hold investors liable only when limited liability would perpetuate a fraud or injustice and where investors disregard or abuse the corporate form. *Id*.; *see supra* at 5-6 (citing 1 *Fletcher* §§ 41.10, 44.30). There is nothing fraudulent or unjust about private-equity investors protecting their investments by appointing portfolio-company board directors who will use their knowledge and experience to the company's benefit. Indeed, private-equity investors negotiate a "minimum number of seats on the board of directors" of portfolio companies precisely *because* they recognize that a portfolio company is a separate legal entity. *See* Lemke § 13:1. Nor is there anything fraudulent or inequitable about private-equity investors negotiating better terms for their portfolio companies or monitoring their expenditures to ensure those companies will increase in value. To the contrary, adding value to portfolio companies by providing industry expertise is the foundation of the private-equity model.

Under the lower court's view, plaintiffs may obtain discovery and potentially hold investors liable merely because those investors deployed these

and other standard corporate practices. By this measure, nearly every private-equity investor in Texas could be subjected to costly and burdensome discovery simply for following industry best practices in managing their investments.[4] And these harms are not limited to private-equity investors: The lower court's decision invites similar suits against parent companies, shareholders, and other stakeholders on the basis of alleged torts committed by legally distinct corporate entities.

II. Subjecting Investors to Burdensome Litigation Risk Will Significantly Harm the State's Economy by Discouraging Capital Investment.

Subjecting private-equity and other investors to unprecedented liability risks for industry-standard practices would also wreak havoc on the Texas economy.

Private equity contributes significantly to the United States and Texas economies. "[I]n 2020, the US private equity sector directly employed 11.7 million workers earning $900 billion in wages and benefits." *Economic Contribution*. Over 50% of private-equity investments go to businesses with 50

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[4] *See* Patricia Lenkov, *Boards of Private Equity Portfolio Companies: Ideas and Suggestions*, Forbes (Aug. 4, 2020), https://tinyurl.com/huyps42a ("With regards to boards of private equity portfolio companies, the very act of implementing good governance brings with it structure, accountability, process, discipline, and oversight that will facilitate growth and the achievement of goals."); *Kehoe & Koller McKinsey Report* (portfolio company boards typically include the "deal partner" and "one other member of the PE firm").

or fewer employees. *Private Equity Delivers the Strongest Returns for Retirees Across America*, Am. Inv. Council (2021), https://tinyurl.com/bd7rjk2y. Moreover, suppliers to U.S. private equity and consumer spending related to private equity contributed another 19.4 million jobs and $1.2 trillion in wages and related consumer spending. *Economic Contribution.* As a result of this economic activity, "[t]he US private equity sector generated" $142 billion in federal taxes and $76 billion in state and local taxes in 2020. *Id.*

Texas, in particular, benefits greatly from private equity. Texas has $60.44 billion of private-equity investments—the second highest statewide amount in the country. *Top States & Districts for Private Equity Investment*, Am. Inv. Council (2020), https://tinyurl.com/cpdrbrts (last visited Apr. 21, 2022).[5] The American Investment Council reported that in 2020, Texas was home to 1,061 private-equity-backed companies across various industries—including 106 companies in health care, 257 in energy, 188 in manufacturing, and 230 in technology. *Id.* Private-equity firms and their portfolio companies

[5] Texas also benefits greatly from venture capital, which is substantially similar to private equity in many ways but targets smaller and younger companies. "Over the past 30 years, venture capital has become a dominant force in the financing of innovative American companies. . . . VC-backed companies play an increasingly important role in the U.S. economy. Over the past 20 years, these companies have been a prime driver of both economic growth and private sector employment." Ilya Strebulaev & Will Gornall, *How Much Does Venture Capital Drive the U.S. Economy?*, Insights by Stanford Business (Oct. 21, 2015), https://tinyurl.com/yck8p4cw.

directly employed just over 1 million Texans who earned a combined $82 billion in wages and benefits. *Economic Contribution*.

The future of the private-equity industry appears equally bright: "Private equity dealmaking reached historic heights in 2021." *Private Equity: 2021 Year in Review and 2022 Outlook,* Harvard Law School Forum on Corporate Governance (Feb. 9, 2022), https://bit.ly/3TTqh2a. Experts predict that the "industry is poised for significant growth over the next five years." Patrick Henry et al., *The Growing Private Equity Market*, Deloitte (Nov. 5, 2020), https://bit.ly/3GQJR8q (emphasis removed).

The lower court's decision, however, calls into question Texas's role as a preferred forum for new investments. Limited liability is critical to a state's ability to attract investors. *See* Frank Easterbook & Daniel Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 97 (1985); *Piercing the Corporate Veil* § 1:9 ("The limited liability statutes had as their primary purpose the encouragement of investment in the state passing them."). "Corporations can"—and do—"shop around for attractive corporate domiciles by comparing the legal regimes offered by different states." Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435, 1442-43 (1992). Indeed, more than 89% of in-house general counsel and senior litigators polled consider a state's litigation environment either somewhat likely or very likely to impact important business decisions, such as "where to locate or do business." *2019*

Lawsuit Climate Survey: Ranking the States, U.S. Chamber Institute for Legal Reform (Sept. 2019), https://tinyurl.com/23kebwf3.

Texas has benefitted greatly from the private-equity sector in the past. But if Texas puts investors to the choice of risking liability—or even risking significant litigation expenses—for torts allegedly committed by their portfolio companies or else abandoning customary measures like director appointments to protect their investments, the industry will be substantially less likely to invest in Texas businesses. This will have devastating and cascading effects throughout the Texas economy.

CONCLUSION

The Court should grant the petition for writ of mandamus.

Respectfully submitted.

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