No. 23-1007

In the Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,
PETITIONERS,
v.
CORNELL UNIVERSITY, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1)(C), prohibits a plan fiduciary from "engag[ing] in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest." The statute elsewhere defines "party in interest" broadly to include a variety of parties that may contract with or provide services to a plan. *See* 29 U.S.C. § 1002(14)(B).

The Eighth and Ninth Circuits have applied the text of this prohibition as written. On the other hand, several other circuits, including the Second, Third, Seventh, and Tenth Circuits, have required plaintiffs to allege additional elements to state a claim because a "literal reading" of § 1106(a)(1)(C) would purportedly produce "results that are inconsistent with ERISA's statutory purpose." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022). The question presented is:

Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in § 1106(a)(1)(C)'s text.

PARTIES TO THE PROCEEDING

Petitioners Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman were defendants in the district court proceedings and appellees in the court of appeals proceedings. CapFinancial Partners, LLC d/b/a CAPTRUST Financial Advisors was a defendant in the district court proceedings and appellee in the court of appeals proceedings, but Petitioners do not seek relief before this Court on claims as applied to CapFinancial.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Cunningham v. Cornell University, No. 1:16-cv-06525, 2017 WL 4358769 (Sept. 29, 2017).

Cunningham v. Cornell University, No. 1:16-cv-06525, 2019 WL 4735876 (Sept. 27, 2019).

United States Court of Appeals (2d Cir.):

Cunningham v. Cornell University, No. 21-88, 86 F.4th 961 (2d Cir. 2023).

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INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). To deliver on that goal, the Act imposes duties of loyalty and prudence on the fiduciaries who manage ERISA plans and, through its prohibited-transaction provisions, "categorically bar[s] certain transactions" altogether. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 (2000).

These mechanisms—fiduciary duties on the one hand, prohibited transactions on the other—work together to protect employees. To bring a fiduciary duty claim, for example, a beneficiary must show the fiduciary's failure to act in the beneficiary's interest or to "discharge their duties 'with the care, skill, prudence, and diligence under the circumstances then prevailing [of] a prudent man acting in a like capacity.'" *Hughes v. Nw. Univ.*, 595 U.S. 170, 172 (2022) (quoting 29 U.S.C. § 1104(a)(1)(B)). For a prohibited-transaction claim, on the other hand, a beneficiary need not show harm nor "make any allegation of unreasonableness" because Congress has already determined that such transactions are "likely to injure the pension plan." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 600–01 (8th Cir. 2009) (quoting *Harris Tr.*, 530 U.S. at 242). All a plaintiff must do is plead the elements of 29 U.S.C. § 1106; doing so satisfies the "bright-line rule[]" Congress created for determining whether a transaction is prohibited. *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016). Once such a showing is made, the plan fiduciary may invoke, if applicable, one or more of the exemptions set forth in 29 U.S.C. § 1108. A fiduciary

might, for example, plead and prove facts showing that a particular transaction was a permissible block trade, § 1108(b)(15); a permissible cross trade, § 1108(b)(19); or constituted a "reasonable arrangement[] with a party in interest for . . . legal, accounting, or other services necessary for . . . the plan," § 1108(b)(2)(A).

This framework—of plaintiffs pleading and proving liability under one provision (here § 1106) and defendants pleading and proving an exemption from liability under a separate provision (here § 1108)—is entirely unexceptional. Congress routinely writes laws in this way, and courts, when interpreting them, apply "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

Moreover, what is remarkable here is that Respondents themselves agree that the transactions identified in the complaint satisfy § 1106. That is because § 1106(a)(1)(C) provides that a "[1] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, [2] if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities [3] between the plan and a party in interest." Respondents acknowledge they are fiduciaries to Cornell's retirement plans. BIO at 3. They agree that the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA") and Fidelity Investments Inc. ("Fidelity") are parties in interest, as defined by 29 U.S.C. § 1002(14). J.A. 291, 301. And it is undisputed that Respondents transacted with TIAA and Fidelity for the furnishing of services—specifically, recordkeeping services—to the

plans. BIO at 4. Petitioners, for their part, allege that as beneficiaries of Cornell's plans, they paid TIAA and Fidelity between four and five times more each year for recordkeeping than industry standards. J.A. 65. That allegation, if true, would mean that the 30,000 participants in Cornell's ERISA plans paid millions more than they should have for recordkeeping. Affording such participants a cause of action tracks fully with Congress's vision of using the prohibited-transaction provisions to mitigate the abuses of plan assets that were pervasive pre-ERISA. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993).

Both the Eighth and Ninth Circuits have endorsed this understanding of § 1106. As the Eighth Circuit has observed, "the language of the statute is plain, and it allocates the burdens of pleading and proof." *Braden*, 588 F.3d at 602. The Ninth Circuit embraced this same understanding, while adding that it was "particularly reluctant to adopt an atextual interpretation of § 406 because ERISA is 'an enormously complex and detailed statute.'" *Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 901 (9th Cir. 2023) (quoting *Conkright v. Frommert*, 559 U.S. 506, 509 (2010)).[1]

On the other hand, several circuits have held that a literal reading of § 1106 would be too "broad" and would end up "prohibit[ing] ubiquitous service transactions." *Sweda v. Univ. of Pa.*, 923 F.3d 320, 335–37 (3d Cir. 2019). These courts have thus required plaintiffs to plead additional, atextual elements to bring a prohibited-

[1] Unless otherwise noted, statutory citations in this brief are to the U.S. Code. Many cases, however, refer interchangeably to the ERISA section number. The most relevant section numbers for this case are ERISA § 406 and § 408, which correspond to 29 U.S.C. § 1106 and § 1108, respectively.

transaction claim. And because these additional requirements have no grounding in the text of § 1106, they have differed across every circuit. *See, e.g.*, *id.* at 340 (requiring plaintiff to "plead an element of intent to benefit the party in interest"); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022) (stating that transactions must "look[] like self-dealing"); *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021) (requiring showing that the plan and party in interest had a "prior relationship").

The Second Circuit expressed the same concern that, "when read in isolation from its exemptions, § 1106(a) would encompass a vast array of routine transactions." P.A. 21a. But its holding charted a different course from that of the Third, Seventh, and Tenth Circuits. Instead, it held that "at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions." P.A. 18a. Thus, "to plead a violation of § 1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the furnishing of services between the plan and a party in interest" *and* that the "transaction was unnecessary or involved unreasonable compensation." P.A. 18a–19a (cleaned up); *see also* P.A. 24a ("[I]t falls on the plaintiff in the first instance to allege—and, at the summary judgment stage, to produce evidence of—facts . . . challenging the necessity of the transaction or the reasonableness of the compensation provided.").

That is a policy fix under the guise of a quasi-textual solution. It fails as both.

On text, "the general rule of law, which has always prevailed," is "that where the enacting clause is general in its language and objects, and a proviso is afterwards

introduced," the "proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it." *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841). The Court has followed this rule absent "compelling reasons to think" otherwise. *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008). Yet here, the most compelling reasons only point in Petitioners' favor, not Respondents'.

For one, § 1108 is titled "Exemptions from prohibited transactions," and time and again the statutory provision's plain language refers to "exemption[s]." This Court has, in turn, held that references in federal law to "exemptions" are "affirmative defenses," *Meacham*, 554 U.S. at 91, for which "the burden of pleading . . . rests with the defendant," *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also* FED. R. CIV. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.").

Next, § 1106(a) begins by referencing § 1108—"[e]xcept as provided in section 1108 of this title"—before specifying the elements for proving a prohibited-transaction claim. Courts have uniformly held that the phrase "except as provided" signals an "affirmative defense" that the defendant must plead and prove. *See, e.g.*, *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 363 (3d Cir. 2015); *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 196–97 (2d Cir. 2021). Respondents have not identified, and Petitioners have not found, any cases to the contrary.

Third, the liability and exemptions provisions are in different sections of the U.S. Code. Such a structure, "with exemptions laid out apart from the prohibitions," again reflects an affirmative defense. *Meacham*, 554 U.S. at 91. That is doubly true where, as here, many of § 1108's

exemptions require pleading facts that plaintiffs would not know before discovery. *See Braden*, 588 F.3d at 602 ("It would be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing.").

Finally, as the agency with "enforcement responsibility for ERISA," *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 107 n.14 (1993), the Department of Labor has consistently interpreted § 1108's "exemptions [as] affirmative defenses on which the defendant has the burden of proof," Gov. Br. at 9, *Allen*, 835 F.3d 670 (No. 15-3569).

The Second Circuit's approach is also a poor policy fix. In its view, a plain text reading would encompass "a vast array of routine transactions," P.A. at 21a, which (as Respondents argue) could exacerbate "a dramatic rise in the number of ERISA lawsuits over recordkeeping fees," BIO at 15. But it is unclear why a rise in lawsuits alone should be cause for alarm. After all, "[m]ultiple federal courts have acknowledged the important role excessive fee litigation has played to depress fees and protect participants' retirement savings over the past several years." Lauren K. Valastro, *How Misapplying* Twombly *Erodes Retirement Funds*, 32 GEO. MASON L. REV. (forthcoming 2025) (manuscript at 17); *see also Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *6 (D. Md. Jan. 28, 2020) (reduction in recordkeeping costs provided nearly $20 million in benefits to class). That result is consistent with ERISA's purpose to "ensure that employees . . . receive the benefits they ha[ve] earned." *Conkright*, 559 U.S. at 516.

Further, there are few if any suits in the real world where plaintiffs plead only the bare elements of a

prohibited-transaction claim. Neither the Second Circuit nor Respondents have identified (and Petitioners have not found) any evidence of this happening in the Eighth or Ninth Circuits, even though plaintiffs in the Eighth Circuit could have done so for the past fifteen years. That is because there are many built-in guardrails against bringing needless litigation, from the significant costs and resources required to bring an ERISA action, to fee-shifting and sanctions, to Article III standing.

The Second Circuit's "solution," in short, searches for a nonexistent problem. At bottom, the issue here is how to read § 1106. The answer to that question, "[a]s with any question of statutory interpretation," "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). And "when the statutory language is plain," the result is equally straightforward: "[W]e must enforce it according to its terms." *Id.* So too here. The Court should reverse.

OPINIONS BELOW

The opinion of the Second Circuit is published at 86 F.4th 961 (2d Cir. 2023) and is reproduced in the petition appendix at P.A. 2a–41a. The order of the district court addressing Defendants-Respondents' motion for summary judgment is unpublished and is reproduced at P.A. 43a–86a. The order of the district court addressing Defendants-Respondents' motion to dismiss is unpublished and is reproduced at P.A. 88a–115a.

JURISDICTION

The Second Circuit issued its opinion on November 14, 2023. It denied a petition for rehearing on December 20, 2023. The petition for a writ of certiorari was filed on March 11, 2024, and granted on October 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, including 29 U.S.C. § 1106 and § 1108, are reproduced at P.A. 120a–160a.

STATEMENT OF THE CASE

A. Statutory framework.

ERISA is "the product of a decade of congressional study" and its "comprehensive and reticulated" framework recognizes that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993); 29 U.S.C. § 1001(a).

The prohibited-transaction provisions are central to that framework. Pre-ERISA, transactions between plans and interested parties were governed by "the customary arm's-length standard of conduct." *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). But that standard "all too frequent[ly]" led to the "misuse, manipulation, and poor management of pension trust funds" by plan sponsors and administrators. 120 CONG.

REC. 29957 (1974) (remarks of Sen. Ribicoff). Congress responded by "establish[ing]" "[s]tringent standards for plan fiduciaries, including a broad definition of fiduciary and detailed prohibited transactions." 120 CONG. REC. 30106 (1974) (remarks of Rep. Erlenborn).

As relevant here, § 1106(a) sets out five types of prohibited transactions, and § 1106(a)(1)(C) specifically bars "[a] fiduciary with respect to a plan" from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest." Another provision, § 1002(14)(B), defines a "party in interest" to include, among other groups, "a person providing services to [an employee benefit] plan." Finally, § 1108 specifies exemptions to § 1106(a)'s prohibited transactions. Section 1108(b) provides twenty-one specific statutory exemptions, and § 1108(a) gives the Labor Secretary the discretion to grant additional administrative exemptions as appropriate.

B. Factual background.

Petitioners comprise a class of current and former employees who participated in Cornell University's two retirement plans: the Cornell University Retirement Plan for Employees of the Endowed Colleges at Ithaca ("Retirement Plan") and the Cornell University Tax Deferred Annuity Plan ("TDA Plan") (together, "the Plans"). P.A. 5a–6a. These defined-contribution, tax-deferred plans serve over 30,000 participants and manage approximately $3.34 billion in assets. P.A. 6a. Due to their substantial size and assets, the Plans are considered "jumbo plans," with significant bargaining power in the retirement plan services market. P.A. 90a; *Hughes v. Nw. Univ.*, 63 F.4th 615, 635 (7th Cir. 2023).

Respondents are Cornell University, Cornell's Retirement Plan Oversight Committee, and the Oversight Committee chairperson. Each respondent is a Plan fiduciary.[2] Respondents also retained two investment providers, TIAA and Fidelity. P.A. 8a. Cornell paid these providers investment management and recordkeeping fees. Investment management fees "are associated with the services of buying, selling, and managing investments." *Id.* Recordkeeping fees "cover necessary administrative expenses such as tracking account balances and providing regular account statements." *Id.*

There are two common recordkeeping models. First, plans can pay a flat fee indexed to the number of plan participants. *Id.* Because of economies of scale, jumbo plans generally obtain lower flat fees than smaller plans. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1102 (D. Colo. 2020). Second, plans can pay through revenue sharing, with fees calculated based on a set portion of plan assets. P.A. 8a. As assets grow, fees grow, even if the number of participants and the services provided do not increase. Respondents here opted to pay recordkeeping fees through a revenue sharing model. *Id.*

C. Proceedings below.

In February 2017, Petitioners filed a complaint in the Southern District of New York, asserting that Respondents had engaged in transactions prohibited by § 1106(a). Specifically, "because TIAA and Fidelity are service providers and hence parties in interest, their

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[2] Respondents selected CapFinancial Partners, LLC "to serve as a fiduciary under ERISA with regard to the selection of mutual funds available to the Plans." P.A. 7a. Although Petitioners brought claims against CapFinancial below, Petitioners do not seek review before this Court of their claims as applied to CapFinancial.

furnishing of recordkeeping and administrative services to the Plans is a prohibited transaction unless Cornell proves an exemption." P.A. 25a (cleaned up). Petitioners also alleged that Respondents had "failed to seek bids from other recordkeepers," "neglected to monitor the amount of revenue sharing received" by TIAA and Fidelity, and "paid substantially more than . . . a reasonable recordkeeping fee." *Id.* (internal quotation marks omitted); J.A. 63. According to Petitioners, a reasonable recordkeeping fee for the Plans would have been "$35 per participant." P.A. 25a; J.A. 65. Petitioners instead paid several times that, between $115 and $183 per participant in the Retirement Plan, and between $145 and $200 per participant in the TDA Plan. P.A. 26a; J.A. 65.

Petitioners also brought several related claims. Petitioners alleged that Respondents' failure to address TIAA and Fidelity's recordkeeping fees breached the fiduciary duties of loyalty and prudence. P.A. 10a. Petitioners further claimed that Respondents imprudently offered, selected, or retained investment options with "high fees and poor performance relative to other investment options that were readily available." P.A. 11a.

In September 2017, the district court granted Respondents' motion to dismiss the prohibited-transaction claims. The district court held that, to plead a § 1106 violation, plaintiffs must allege "some evidence of self-dealing or other disloyal conduct." P.A. 109a. But Petitioners had, in the court's view, "offered only conclusory allegations." *Id.* The court also dismissed Petitioners' duty of loyalty claims. P.A. 98a, 115a. A

subset of Petitioners' duty of prudence claims survived dismissal. P.A. 100a–104a, 115a.

At summary judgment, the district court ruled for Respondents "on nearly all the remaining claims." P.A. 12a. Only one claim, regarding the duty of prudence, survived. P.A. 13a. In December 2020, the district court approved a settlement of this remaining claim. *Id.* The settlement left the previously dismissed claims available for appeal.

Petitioners subsequently appealed to the Second Circuit, seeking review of the district court's disposition of (1) the prohibited-transaction claim, (2) the breach of fiduciary duty claim for "failing to monitor and control recordkeeping fees," and (3) the claim over the retention of certain high-cost or underperforming investment options. P.A. 10a.

On November 14, 2023, the Second Circuit affirmed the district court's judgment. P.A. 41a. The court began by observing that if § 1106(a)(1)(C) were read "in isolation of the exemptions in § 1108," it would "appear to prohibit payments by a plan to any entity providing it with any services." P.A. 16a. It further noted that the Third, Seventh, and Tenth Circuits had, given this possible outcome, "adopted different means of narrowing the statute" by imposing atextual requirements on plaintiffs seeking to proceed under § 1106(a). *Id.* "[O]n the other hand," as the Second Circuit recognized, two courts of appeals "have embraced the expansive reading of the statute that these other circuits have rejected as absurd." P.A. 17a. Those courts—the Eighth and Ninth Circuits—acknowledged the potential scope of such a broad reading. In the view of the Second Circuit, these two circuits adopted their more "expansive" reading by looking to "the

language of the statute and [to] traditional principles of trust law." *Id.*

After outlining the various approaches, the Second Circuit reached for a purported middle ground. It agreed with the Eighth and Ninth Circuits that "the language of § 1106(a)(1) cannot be read to demand explicit allegations of self-dealing or disloyal conduct." P.A. 18a (internal quotation marks omitted). But it disagreed with the Eighth Circuit that "the § 1108 exemptions should be understood merely as affirmative defenses." *Id.* Instead, "at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions." *Id.*

Under the Second Circuit's rule, to plead a violation of § 1106(a)(1)(C), a complaint must not only show that a transaction involved the "furnishing of services between the plan and a party in interest," but also that the "transaction was unnecessary or involved unreasonable compensation," so as to fall outside the scope of § 1108(b)(2). P.A. 18a–19a (ellipses omitted). The court added that, should plaintiffs survive a motion to dismiss, they must continue marshaling facts negating § 1108's exemptions: "[A]t the summary judgment stage," for instance, plaintiffs must "produce evidence . . . challenging the necessity of the transaction or the reasonableness of the compensation provided." P.A. 24a.

The Second Circuit gave three reasons for its decision. First, it pointed to the statute's structure. Section 1106(a)'s text "begins with [a] carveout: 'Except as provided in section 1108 of this title.'" P.A. 19a (quoting 29 U.S.C. § 1106(a)). Neither § 1106(b), which covers transactions between a plan and its fiduciaries, nor

§ 1106(c), which covers transfers of property to a party in interest, contains such language. The Second Circuit concluded, from this difference, that "the exemptions set out in § 1108" are "incorporated directly into § 1106(a)'s definition of prohibited transactions." *Id.*

Second, drawing from a handful of criminal cases, the Second Circuit claimed that § 1108's exemptions are so "integral to the offense" that they have become "part of the offense's ingredients." P.A. 20a (cleaned up). The court reasoned that one cannot "articulate what the statute seeks to prohibit without reference to the exception," and therefore "the exception should be understood as part of the definition of the prohibited conduct." P.A. 21a.

Finally, the court acknowledged that its decision might appear in tension with common law trust principles, which generally require the fiduciary to prove exemptions to liability. P.A. 24a. But the court observed that in an "analogous" context—i.e., claims under the Investment Company Act—plaintiffs must first plead that a fee is "so disproportionately large that it bears no reasonable relationship to the services rendered." P.A. 22a (quoting *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). That same framework, the panel ruled, should apply to § 1106(a) claims: ERISA plaintiffs must first allege "facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided," before fiduciaries have to carry the burden of persuasion. P.A. 24a.

In applying this understanding to Petitioners' complaint, the Second Circuit acknowledged that § 1106(a) claims might ultimately face a higher bar than breach of fiduciary duty claims. Here, Petitioners alleged "Cornell failed to seek bids from other recordkeepers and

neglected to monitor the amount of revenue sharing," which was sufficient to "state [a] claim for a breach of the duty of prudence." P.A. 25a. But because Petitioners had not shown that the recordkeeping fees were "disproportionately large," they could not state a claim under § 1106(a)(1)(C). P.A. 26a (quoting *Jones*, 559 U.S. at 346). After disposing of the prohibited-transaction claim, the Second Circuit affirmed the district court's judgment as to Petitioners' remaining claims. Petitioners filed a petition for certiorari on March 11, 2024, which this Court granted on October 4, 2024.

SUMMARY OF ARGUMENT

I.A. Petitioners have pleaded the elements of a prohibited-transaction claim under § 1106(a)(1)(C). They have shown that Respondents are fiduciaries who caused the Plans to engage in transactions constituting the "furnishing of . . . services" with TIAA and Fidelity, and that TIAA and Fidelity are "part[ies] in interest" because they "provid[e] services to" the Plans. 29 U.S.C. § 1002(14)(B). Neither the panel below nor Respondents argue otherwise.

Nevertheless, concerned that applying the text of § 1106(a)(1)(C) as written would cast too wide a net for liability, the Second Circuit joined several courts in adding more pleading requirements to § 1106(a). But it did so in unique fashion—incorporating § 1108's exemptions as part of the plaintiff's pleading burden. Specifically, to state a claim under § 1106(a)'s prohibitions, a plaintiff must negate § 1108's exemptions. That instruction, however, violates the fundamental understanding that when "the statutory language

provides a clear answer," a court's inquiry "ends." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). There is no need to add to one statutory provision's text by searching for and piling on additional requirements from a different provision.

I.B. Congress, moreover, wrote § 1108's exemptions as affirmative defenses for a defendant to plead and prove, rather than as something a plaintiff must negate. This follows from the "general rule of law" that when an "enacting clause is general," as § 1106(a) is, and "a proviso is afterwards introduced" qualifying the enacting clause, as § 1108(b) is, "that proviso . . . carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it." *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841). The Court has applied this familiar framework many times, including to statutes with a text and structure similar to the one here. In *Meacham v. Knolls Atomic Power Laboratory*, for instance, the statute at issue laid out "general prohibitions . . . subject to a separate provision . . . creating exemptions,'" including for reasonableness. 554 U.S. 84, 91 (2008). This Court did not equivocate: "Given how the statute reads, with exemptions laid out apart from the prohibitions . . . it is no surprise that" those exemptions are "affirmative defenses" to be pleaded and proven by the defendant. *Id.*

I.C. Traditional statutory construction principles further support Petitioners' view. Congress wrote ERISA bearing in mind the "longstanding convention" that plaintiffs plead liability and defendants plead exemptions to liability. *Id.* If Congress wished to deviate from that convention, it knew how to do so. It could have specified that § 1108 provided additional conditions

necessary for plaintiffs to make out a claim for liability. Or, even more simply, it could have explicitly written a reasonableness requirement into § 1106. It did none of those things. Instead, it put ERISA's prohibitions in a section entitled "Prohibited transactions," 29 U.S.C. § 1106, and carveouts in a separate section entitled "Exemptions from prohibited transactions," *id.* § 1108.

I.D. The Second Circuit's reliance on § 1106(a)'s "except as provided" language lacks merit. The courts of appeals have uniformly interpreted the phrase as creating affirmative defenses. Neither the Second Circuit nor Respondents have pointed to any countervailing authority.

I.E. The Second Circuit's use of criminal cases also misses the mark. The panel leaned most heavily on a rule from *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), but as this Court has explained, that rule is a "rule of *criminal* pleading." *United States v. Reese*, 92 U.S. 214, 232 (1875) (emphasis added). It applies in a narrow subset of criminal cases because of tenets—the rule of lenity, the presumption of innocence, the Sixth Amendment—that are "inapposite" to the civil context. *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 197 (2d Cir. 2021). Even if the *Cook* rule did apply to civil cases, it holds no force here. That is because, unlike *Cook*, where a prohibition could not be applied without reference to an exemption, the prohibited-transaction provisions here plainly "articulate what the statute seeks to prohibit without reference to the exception," P.A. 21a: namely, the "furnishing of goods, services, or facilities between the plan and a party in interest," 29 U.S.C. § 1106(a).

II.A. The Second Circuit's reading also contravenes the case law. As this Court has said, "Congress enacted

ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), [to] categorically bar[] certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–42 (2000) (quoting *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993)). The panel below did not respect this understanding because, rather than treating § 1106 as a categorical bar, the Second Circuit's rule reduces it to a reasonableness analysis—exactly what *Harris Trust* counsels against. Worse, the court ties § 1108(b)(2)'s "reasonableness" to the standard from § 36(b) of the Investment Company Act, a different statute drafted based on different conditions and different relationships between the parties. Indeed, no plaintiff has ever managed to prove a § 36(b) claim. That result cannot be what Congress contemplated when drafting § 1106(a), when it wanted to give plaintiffs a cause of action to redress the myriad abuses of plan assets rife pre-ERISA.

II.B. The common law of trusts reinforces a plain-language reading of § 1106. That law has long acknowledged an information asymmetry in a trust between the fiduciary and beneficiary. Put simply, the fiduciary knows things the beneficiary does not. The interplay between § 1106 and § 1108 recognizes and reflects this asymmetry. Before discovery, beneficiaries do not know which exemptions a fiduciary might invoke or how to show that an exemption is not in play. This is why, to bring a claim, a beneficiary need only plead the elements of § 1106—i.e., information that it reasonably might know. Fiduciaries must then show the applicability of any exemptions based on information that, pre-discovery, often only they know.

II.C. As the agency responsible for administering ERISA, the Department of Labor has repeatedly treated § 1106(a) as establishing categorical prohibitions and § 1108 as establishing affirmative defenses that defendants must plead and prove. *See* Gov. Br. at 9, 19–20, *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670 (7th Cir. 2016) (No. 15-3569). It has espoused that understanding in litigation and through regulation and guidance.

III.A. A plain-text reading of § 1106 and § 1108 is also more functional than the Second Circuit's rule. For the former, plaintiffs must satisfy the requirements of § 1106, defendants must plead and present evidence supporting any exemption under § 1108, and the court must evaluate the evidence in its entirety. That framework both embraces the text and exemplifies how liability and exemption provisions work throughout the law.

On the other hand, the Second Circuit's rule is both vague and, by its own implicit admission, ill-defined. The court tells plaintiffs to negate "at least some" of the § 1108 exemptions, even before discovery. P.A. 18a. But it does not say which ones. It also says nothing about what should happen when a defendant invokes more than one § 1108 exemption. *See Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 54 F.4th 115, 120 (2d Cir. 2022) (invoking § 1108(b)(1) and § 1108(b)(17) exemptions). And it offers no guidance on how a plaintiff could obtain the necessary information to plausibly negate the many § 1108 exemptions—particularly when much of the information related to the exemptions resides in the hands of the fiduciary. Consequently, to satisfy the Second Circuit's rule, a plaintiff would need to correctly predict which exemptions a defendant might invoke *and* correctly plead

the negative of each such exemption, all from facts outside an ordinary plaintiff's knowledge.

III.B. Applying the plain language of § 1106 and § 1108 does not, contra the Second Circuit, produce absurd results. Invoking absurdity is an extreme recourse, proper only in the unusual circumstance "where it is quite impossible that Congress could have intended the result." *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring). But here, the legislative history affirms that the text indeed says what it means and means what it says. As reflected in the contemporaneous record, Congress sought to provide "the maximum degree of protection to working men and women covered by private retirement programs," S. REP. NO. 93-127, at 18 (1973), by "prohibit[ing] fiduciaries from engaging in transactions involving the transfer of assets between the plan and parties in interest," 120 CONG. REC. 29932 (1974) (remarks of Sen. Williams). Finally, while § 1106(a)'s prohibition could encompass some necessary, reasonable services, § 1108(b)(2)(A) ensures that such services are ultimately protected from ERISA liability. *See Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 907 (9th Cir. 2023). There is no tension, let alone absurdity, in that framework.

III.C. A plain-text reading of § 1106 and § 1108 will not produce a flood of needless litigation. The Eighth Circuit provides a case in point. That court adopted a plain-text approach to § 1106 over fifteen years ago. In the years since, ERISA litigation has not ground the court to a halt. That is because ERISA litigation is costly and time-consuming, involving multiple defendants, multiple plaintiffs, multiple pre-trial motions, and a sprawling set of possible exemptions. Moreover, under ERISA's fee-

shifting provision, losing parties risk bearing significant costs for bringing cases just to bring them. And were that not enough, courts may, under the Federal Rules, impose sanctions against plaintiffs who bring suits without basis. ERISA beneficiaries thus "sue only when . . . there is a reason to do so." *Allen*, 835 F.3d at 677. There is not, in short, some surplus of plaintiffs waiting to bring test cases to delineate ERISA's outer reach. Instead, the actual cases that are brought reflect an important step toward promoting ERISA's broadly protective purpose.

ARGUMENT

I. THE SECOND CIRCUIT'S APPROACH CONFLICTS WITH THE STATUTORY TEXT.

A. Petitioners have satisfied the plain language of § 1106, and adding atextual elements to that language is inappropriate.

Here, "[a]s in any case of statutory construction, our analysis begins with 'the language of the statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Est. of Cowart v. Nickols Drilling Co.*, 505 U.S. 469, 475 (1992)). "And where the statutory language provides a clear answer, it ends there as well." *Id.* That command should, as the Ninth Circuit underscored, hold especially true for ERISA, since it "is 'an enormously complex and detailed statute.'" *Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 901 (9th Cir. 2023) (quoting *Conkright v. Frommert*, 559 U.S. 506, 509 (2010)).

This instruction—to apply the text as written so long as the language is clear—should make this a straightforward case. After all, no one thinks

§ 1106(a)(1)(C) is ambiguous. The language speaks for itself. It prohibits "[a] fiduciary" from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest." And each of those elements is met here: (1) Respondents are fiduciaries; (2) TIAA and Fidelity "provid[e] services to" the Plan, making them "part[ies] in interest"; and (3) Cornell caused the plan to engage in transactions with TIAA and Fidelity that constitute a "furnishing of . . . services." *Id.* § 1002(14)(B); *id.* § 1006(a)(1)(C).

Yet concerned that such a reading "would prohibit fiduciaries from paying third parties to perform essential services," *Albert v. Oshkosh Corp.*, 47 F.4th 570, 584 (7th Cir. 2022), several circuits have grafted additional atextual pleading requirements onto § 1106(a) for plaintiffs seeking to bring such claims. *Id.* And unsurprisingly, since these requirements are atextual, they differ across the courts that have imposed them. *See, e.g.*, *id.* at 583 (demanding allegations of self-dealing); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 338 (3d Cir. 2019) (demanding an "intent to benefit a party in interest").

This Court, though, has already explained why such a move is inappropriate. After all, if courts cannot "supplement[]" ERISA plaintiffs with "extratextual remedies," they cannot saddle plaintiffs with "extratextual" requirements. *Hughes Aircraft*, 525 U.S. at 447. "[O]nly the words on the page constitute the law adopted by Congress," and judges are not to "add to" or "remodel" a statute's text. *Bostock v. Clayton County*, 590 U.S. 644, 654 (2020).

B. Section 1108's exemptions are affirmative defenses to be pleaded and proven by the defendant.

The Second Circuit, to its credit, disclaimed the atextual approaches taken by these other courts, seeking instead a textual hook for dismissing Petitioners' § 1106 claim. P.A. 19a. But its supposed middle ground—to remodel § 1106(a) by (1) scaffolding onto it "at least some of th[e] exemptions" from § 1108, (2) particularly § 1108(b)(2), which exempts reasonable arrangements for necessary services, and (3) then requiring plaintiffs to plead the negative of "at least some of" these exemptions—is just as unavailing. P.A. 18a.

That is because ERISA's prohibited-transaction provisions already establish a clear structure: § 1106 sets out general prohibitions and § 1108 provides specific exceptions. Even the Second Circuit recognized that point. *See* P.A. 14a, 16a (explaining that § 1106 "consists of three provisions restricting the set of transactions in which plan fiduciaries may engage," while § 1108 "provides certain exemptions from prohibited transactions") (cleaned up).

What the panel failed to recognize, however, was "the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes." *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841). That general rule provides "that where the enacting clause is general in its language and objects"—as it is here—and where "a proviso is afterwards introduced"—again, as is the case here—the "proviso . . . carves special exceptions only out of the enacting clause; and *those who set up any such exception, must establish it* as being within the words as well as

within the reasons thereof." *Id.* (emphasis added). Put differently, "the burden of proving [a] justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948). When the party relying on an exemption is a defendant, the exemption is an "affirmative defense," and it is "incumbent on the defendant to plead and prove such a defense." *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). The plaintiff "has no duty to negative" an "affirmative defense." *Ruan v. United States*, 597 U.S. 450, 473 (2022) (Alito, J., concurring) (internal quotation marks omitted); *accord McKelvey v. United States*, 260 U.S. 353, 357 (1922).

The Court has applied this familiar framework many times over many years for many laws, including rules on employee compensation, *Dickson*, 40 U.S. at 143; transportation safety, *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry.*, 205 U.S. 1, 10 (1907); antitrust, *Morton Salt*, 334 U.S. at 44; agricultural policy, *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910); claim and issue preclusion, *Taylor*, 553 U.S. at 907; and (with a narrow exception, discussed below) criminal law, *McKelvey*, 260 U.S. at 357.

In this same vein, every court of appeals that has addressed the specific statutory provisions in this case has—until the decision below—uniformly referred to § 1108 as delineating affirmative defenses. As Judge Wood observed, writing for the Seventh Circuit in *Allen v. GreatBanc Trust Co.*, "the exemptions from prohibited transactions do not provide alternative explanations; they assume that a transaction in the prohibited group occurred, and they add additional facts showing why that particular one is acceptable." 835 F.3d 670, 676–77 (7th

Cir. 2016). "That is how affirmative defenses work." *Id.* at 677. *Allen* then cited five other circuits that "agree with the position that section 408 exemptions are affirmative defenses," including—notably—a case from the Second Circuit. *Id.* at 676 (citing *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987)). And just one year before the panel's decision here, the Second Circuit reaffirmed that understanding. *See Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 54 F.4th 115, 121–22 (2d Cir. 2022) ("It is well settled that this exercise includes any affirmative defenses, such as the § 408 exemptions.") (footnote omitted).

The panel below said nothing about *Haley*. On *Lowen*, it claimed that its decision would "leave undisturbed" the understanding that "the defendant fiduciary . . . bears the burden of persuasion with regard to the applicability of the § 1108 exceptions." P.A. 23a. According to the Second Circuit, however, an ERISA plaintiff must nevertheless bear the burden of pleading the negative of a § 1108 exemption, even if the burden of persuasion remains on the defendant.

That, however, is not how either the Federal Rules or this Court understands affirmative defenses to work. On the former, Rule 8(c) of the Federal Rules specifically provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense"—i.e., they must plead it. And were there doubt on that point, this Court has consistently described "an affirmative defense" as that "which must be pleaded and proved." *Elec. Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 16 (1939); *accord Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980); *Jones v. Bock*, 549 U.S. 199, 204 (2007); *Taylor*, 553 U.S. at 907.

Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84 (2008), is particularly instructive, given the similarities between the text and structure there with the provisions here. At issue in *Meacham* was "[t]he ADEA's general prohibitions against age discrimination, 29 U.S.C. §§ 623(a)–(c), (e), [which] are subject to a separate provision, § 623(f), [that] create[es] exemptions for employer practices 'otherwise prohibited under subsections (a), (b), (c), or (e).'" *Id.* at 91. Like this case, the parties in *Meacham* disagreed over which side should plead and prove a particular exemption. And like this case, the exemption at issue outlined a "reasonableness" exception to liability. *Compare* 29 U.S.C. § 623(f)(1) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . based on reasonable factors other than age."), *with* 29 U.S.C. § 1108(b)(2)(A) ("The prohibitions provided in section 1106 . . . shall not apply to . . . reasonable arrangements.").

Faced with these circumstances, *Meacham* held that the defendant "must not only produce evidence raising the defense"—i.e., the burden of pleading—"but also persuade the factfinder of its merit"—i.e., the burden of persuasion. 554 U.S. at 87. As *Meacham* explains, "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such)," it should be "no surprise that" § 623(f)(1) presents an "affirmative defense[]" under the ADEA. *Id.* at 91. "[M]ost lawyers would accept that characterization as a matter of course," since "there is no hint in the text that Congress meant § 623(f)(1) to march out of step" with the "default rule[] [of] placing the burden of proving an exemption on the party claiming it." *Id.* at 91–93.

C. Traditional tools of statutory construction confirm Petitioners' reading.

To be sure, *Meacham* says that courts should apply this "default rule[]" unless there are "compelling reasons to think that Congress" meant otherwise. *Id.* at 91–93. There were no such reasons in *Meacham*. And here too traditional tools of construction tip in Petitioners' favor.

First, that plaintiffs plead liability and defendants plead exemptions to liability is, as *Meacham* notes, a "longstanding convention" that forms "part of the backdrop against which the Congress writes laws." *Id.* at 91. But if Congress knew about and legislated against that convention when it passed the ADEA in 1967, it knew about and legislated against the same principle when it enacted ERISA in 1974.

Second, according to the panel here, "to plead a violation of § 1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the 'furnishing of services between the plan and a party in interest' *where that transaction was unnecessary or involved unreasonable compensation*." P.A. 18a–19a (cleaned up) (emphasis in original). That last clause—*where that transaction was unnecessary or involved unreasonable compensation*—is not part of § 1106(a)(1)(C), but imports language from § 1108(b)(2)(A). Yet Congress knows how to write a reasonableness requirement. It wrote one seven years prior in the ADEA and wrote one in § 1108(b). Congress likewise "knows how to assign [evidentiary] burden[s]" between parties. *Pereida v. Wilkinson*, 592 U.S. 224, 232 (2021). So if Congress wanted § 1106(a)(1)(C) to include the words "*where that transaction was unnecessary or*

involved unreasonable compensation," it could have just done so. It did not.

Third, and relatedly, the word "exemption" is peppered throughout § 1108, from subsection (a), which allows fiduciaries to seek an individual or class exemption from the Labor Secretary, to subsection (b), which enumerates twenty-one statutory exemptions a fiduciary may invoke. In other statutes and other contexts, Congress has referred to "exemptions" interchangeably with "affirmative defenses." *See, e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005). It has rarely, if ever, understood "exemptions" as imposing additional requirements plaintiffs must negate.

Fourth, "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Yates v. United States*, 574 U.S. 528, 540 (2015) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)). That "title" may be "especially valuable" where "it reinforces what the text's nouns and verbs independently suggest." *Id.* at 552 (Alito, J., concurring); *accord Dubin v. United States*, 599 U.S. 110, 120 (2023). Here, § 1106's title is plain: "Prohibited transactions." Not "Necessary conditions for prohibited transactions." Not "Necessary but not sufficient conditions for prohibited transactions." And not "Potentially prohibited transactions." Just "Prohibited transactions." Section 1108's title is also clear: "Exemptions from prohibited transactions." These titles affirm what the text's nouns and verbs already suggest: § 1106 creates a pathway for plaintiffs to plead proscribed transactions, and § 1108 creates specific avenues for defendant fiduciaries to avoid liability.

Finally, "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013). In *Meacham*, the Court underscored that the ADEA laid out its exemptions in a provision separate from the general prohibitions: the former was in 29 U.S.C. § 623(f)(1), the latter in 29 U.S.C. § 623(a)–(c) and (e). 554 U.S. at 91. The circumstances of this case weigh even more strongly in Petitioners' favor. Here, ERISA's prohibitions and exemptions are not laid out in different parts of the same section, as they were in *Meacham*. They are spread across different sections altogether—§ 1106 and § 1108. That is the very sort of deliberate structural choice that courts should (but the Second Circuit did not) respect.

D. The Second Circuit's reliance on § 1106(a)'s "except as provided" language is inapt.

Against this backdrop, the panel below marshaled two primary arguments in response. Both fail.

First, the panel asserted that its reading "flows directly from the text and structure of the statute," because "[t]he text of § 1106(a) begins with the carveout: 'Except as provided in section 1108 of this title.'" P.A. 19a. Thus, in the panel's view, "the exemptions set out in § 1108—including, most pertinently, the exemption for 'reasonable compensation' paid for 'necessary services,' § 1108(b)(2)(A)—are incorporated directly into § 1106(a)'s definition of prohibited transactions." *Id.* In support of that conclusion, the panel drew a "contrast to the language of § 1106(b), governing 'transactions between plan and fiduciary,' which makes no direct reference to . . . § 1108." *Id.*

But that misreads § 1106(a) and § 1106(b). As the Sixth and Third Circuits have explained, "the majority of courts that have examined this statutory interpretation issue have held that § 1108 applies only to transactions under § 1106(a), not § 1106(b)." *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 750 (6th Cir. 2014), *cert. denied*, 575 U.S. 959 (2014). That is how best to "give meaning to this discrepancy in the § 406 subsections." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 95 (3d Cir. 2012). "By expressly limiting liability under § 406(a) by reference to the exemptions in § 408, then removing the same limiting principle from § 406(b), Congress cast § 406(b) as unyielding." *Id.*

That division makes sense. Section 1106(a) addresses transactions between a plan and party in interest, whereas § 1106(b) covers transactions between a plan and fiduciary. It is reasonable to believe that for the latter—i.e., transactions with a fiduciary—§ 1108's exemptions are unavailable because these sorts of transactions carry an even higher risk of abuse. *See, e.g.*, *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (holding that § 1108 "does not provide a safe harbor to fiduciaries who self-deal"). That circumstance would give Congress reason to make § 1106(b) "unyielding." *Iola*, 700 F.3d at 95. On the other hand, a limited number of transactions with parties in interest may be necessary for or may assist with the efficient functioning of the plan, so long as certain specific exemptions are satisfied.

The Second Circuit's reference to the words "[e]xcept as provided," and its corresponding claim that such language means § 1108 is "incorporated directly" into § 1106(a), is likewise unavailing. *See* P.A. 19a–20a.

To start, "[t]housands of statutory provisions use the phrase 'except as provided in . . . ' followed by a cross-

reference" without "otherwise expand[ing] or contract[ing] the scope" of the section. *Atl. Richfield Co. v. Christian*, 590 U.S. 1, 16 (2020) (internal quotation marks omitted). An "except as provided" proviso only "indicate[s] that one rule should prevail over another in any circumstance in which the two conflict." *Cyan Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 428 (2018). It does not, as the Second Circuit claims, "incorporate[]" the provisions of one section into another. P.A. 19a. If Congress wanted to do that, it could have written the statute that way to begin with.

Next, "except" is another way of saying "exception," and "[a]n exception in a statute is a clause designed to reserve or *exempt* some individuals from the general class." BLACK'S LAW DICTIONARY (5th ed. 1979) (emphasis added). Exemptions, in turn, are affirmative defenses that defendants plead, rather than something plaintiffs negate. Thus, when an "except as provided" proviso qualifies a "general prohibition" and then references a "separate" exception, that is just another form of the general rule that the party claiming an exception must plead and prove it. *Meacham*, 554 U.S. at 91. Supporting examples abound.

In *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 364 n.11, 367–68 (3d Cir. 2015), for instance, the Third Circuit held that exceptions in the section mentioned by an "except as provided" clause in the Fair Debt Collection Practices Act constituted defenses that defendants must plead and prove. The Second Circuit reached the same conclusion interpreting substantially identical language in § 550(b) of the Bankruptcy Code, ruling that a trustee need not "negate [the] exception in § 550(b) to state a claim." *In re Madoff*, 12 F.4th at 197 (cleaned up). And in *United States v. Just*, 74 F.3d 902,

904 (8th Cir. 1996), the Eighth Circuit held that the "except as provided" clause in 18 U.S.C. § 922(o)—prohibiting possession of a machinegun—created an affirmative defense for those possessing machineguns "by or under the authority of, the United States."

There are, in short, many cases interpreting "except as provided" that support Petitioners' reading. Respondents have identified none, and Petitioners have found none, supporting the Second Circuit's contrary reading.

E. The Second Circuit's reference to a narrow criminal law exception to the general rule is unavailing.

The panel's second argument leans on a handful of criminal cases, starting with *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), for the understanding that "when one cannot articulate what the statute seeks to prohibit without reference to the exception, then the exception should be understood as part of the definition of the prohibited conduct." P.A. 21a.

But that reliance is misplaced. *Cook* created "a rule of criminal pleading," applicable where necessary to prevent defects in criminal indictments. *United States v. Reese*, 92 U.S. 214, 232 (1875). The Second Circuit itself recognized this point in *Madoff*, explaining—in response to the very sort of argument Respondents make here—that "*Cook* is inapposite [because] it is grounded in the interpretation of a criminal statute." 12 F.4th at 197.

There are several reasons why a different rule (or, more precisely, an exception to the general rule) is appropriate in a narrow subset of criminal cases. Substantive canons like the rule of lenity, background principles like the presumption of innocence, and

constitutional provisions like the Sixth Amendment impose unique requirements in criminal law and on criminal statutory interpretation that are absent for civil statutes. The Court has acknowledged as much; in a case decided three years after *Cook*, it explained that its discussion in *Cook* was tied to a defendant's "constitutional right 'to be informed of the nature and cause of the accusation.'" *United States v. Cruikshank*, 92 U.S. 542, 557–58 (1875) (quoting U.S. CONST. amend. VI); *accord United States v. Seeger*, 303 F.2d 478, 482 (2d Cir. 1962). That right, of course, is unique to criminal prosecutions.

Even so, courts have read and applied *Cook* narrowly. They have generally done so, for instance, when the exception is not just in the same section but in the same sentence as the liability provision, treating that placement as a signal of legislative intent. *See United States v. Vuitch*, 402 U.S. 62, 68 (1971). But as *Just* reflects, in the mine-run criminal matter, an "except as provided" provision—especially one that directs the reader to a separate section of the U.S. Code—signifies an affirmative defense to be pleaded and proven by the defendant. *See also United States v. Carey*, 929 F.3d 1092, 1098–99 (9th Cir. 2019) (declining to extend *Vuitch* based on the separation of an offense and exception in different subsections).

And even if *Cook* were applied to civil cases, § 1106(a)(1)(C) would fail its test. *Cook*—by its own terms—applies only "[w]here a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted." 84 U.S. at 173. But § 1106(a)(1)(C)

can be read on its own, barring transactions that involve a "furnishing of goods, services, or facilities between the plan and a party in interest." No one disputes what those words mean and, for that matter, that Respondents' actions fall within their ambit. *See, e.g.*, *United States v. McArthur*, 108 F.3d 1350, 1353 (11th Cir. 1997) ("[W]here one can omit the exception from the statute without doing violence to the definition of the offense, the exception is more likely an affirmative defense.").

II. THE SECOND CIRCUIT'S APPROACH CONFLICTS WITH THE CASE LAW, THE LAW OF TRUSTS, AND GOVERNMENT PRACTICE.

By stitching § 1106 and § 1108 together, the Second Circuit's decision also contravenes how this Court has understood ERISA's prohibited-transaction provisions, trust law principles, and federal government practice.

A. Section 1106 establishes a categorical rule for prohibited transactions.

Time and again, the Court has said that "Congress enacted ERISA § 406(a)(1)" to "supplement[] the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr.*, 530 U.S. at 241–42 (quoting *Keystone Consol. Indus.*, 508 U.S. at 160). In other words, § 1106 is meant to cover transactions that a breach of fiduciary duty claim cannot; there would otherwise be nothing to "supplement[]." *Id.* Section 1106 reaches those transactions because "Congress saw fit in ERISA to create some bright-line rules," *Allen*, 835 F.3d at 676—i.e., the "categorical[] bar[]" this Court underscored in

Harris Trust, 530 U.S. at 242. And because "[t]he *per se* rules of section 406" are "much simpler" to understand and apply, *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984), "a complaint may fail to state sufficient facts to support a breach of fiduciary duty claim, yet survive a motion to dismiss as to a companion prohibited transaction claim notwithstanding those same deficient facts," *Allen*, 835 F.3d at 676.

To see why the Second Circuit's approach turns that understanding on its head, look no further than this case.

1. For one, Petitioners' prohibited-transaction claims did not "supplement[]" their fiduciary-duty claims. *Harris Tr.*, 530 U.S. at 241. The former, which focused on Fidelity's and TIAA's recordkeeping services, were dismissed on a motion to dismiss. P.A. 108a–110a. Several of Petitioners' breach of fiduciary duty claims, on the other hand, survived the motion to dismiss and proceeded to summary judgment (and one claim survived summary judgment, too). *See, e.g.*, P.A. 85a, 100a.

2. In addition, the Second Circuit's prescription is not a "bright-line rule[]," nor "categorical[] bar," nor "*per se* rule[]." *Allen*, 835 F.3d at 676; *Harris Tr.*, 530 U.S. at 242; *Leigh*, 727 F.2d at 123. By requiring plaintiffs to plead "a transaction that constitutes the 'furnishing of services between the plan and a party in interest' *where that transaction was unnecessary or involved unreasonable compensation*," the panel eschewed a categorical rule for a context-dependent reasonableness analysis. P.A. 19a (ellipses omitted). That is exactly what *Harris Trust* counsels against.

3. Not done, the Second Circuit piles on by anchoring § 1108(b)(2) reasonableness to a near-impossible-to-satisfy and entirely inappropriate standard. P.A. 22a.

Importing a standard from the Investment Company Act ("ICA"), *id.*, the panel demands that future plaintiffs plead that any service provider compensation be "so disproportionately large that it bear[] no reasonable relationship to the services rendered," before defendants need turn over anything in discovery, *id.* (citing *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). "[F]ees," in other words, must be "excessive . . . 'to the services rendered.'" P.A. 26a (quoting *Jones*, 559 U.S. at 346). But that standard lacks any basis—textual, precedential, or otherwise—and would cripple ERISA's prohibited-transaction framework.

To begin, ERISA *already* defines what reasonableness is supposed to mean under § 1108(b)(2). Namely, § 1108(b)(2)(B) provides, for group health plans, that "[n]o contract or arrangement for services between a covered plan and a covered service provider . . . is reasonable within the meaning of [§ 1108(b)(2)] unless the requirements of this clause are met." P.A. 124a (footnote omitted). A substantially identical regulation, 29 C.F.R. § 2550.408b-2, extends those requirements to pension plans.

Importantly here, both 29 U.S.C. § 1108(b)(2)(B) and 29 C.F.R. § 2550.408b-2 enumerate a long list of definitions, formulas, and requirements. *See* P.A. 124a–133a. Those include "[a] description of all direct compensation, either in the aggregate or by service" and "[a] description of all indirect compensation," "including compensation from a vendor to a brokerage firm based on a structure of incentives," but "not including compensation received by an employee from an employer." P.A. 128a; *accord* 29 C.F.R. § 2550.408b-2(c)(1)(iv). Both § 1108(b)(2)(B) and its regulatory

counterpart state, further, that the service provider shall "disclose the information required" to "the responsible plan fiduciary reasonably in advance of the date on which the contract or arrangement is entered into." P.A. 129a–130a; *accord* 29 C.F.R. § 2550.408b-2(c)(1)(v)(A). If the information is insufficient, the "service provider shall furnish" additional information "[u]pon the written request of the responsible plan fiduciary." P.A. 130a; *accord* 29 C.F.R. § 2550.408b-2(c)(1)(vi)(A). At no point does § 1108(b)(2)(B) or § 2550.408b-2 contemplate an exchange of information to the beneficiary (or even a process by which a beneficiary could request such information).

In other words, if the Second Circuit had wanted to impose a reasonableness requirement, it could have used the standard already built into § 1108(b)(2)(B), rather than borrowing the understanding of reasonableness from a wholly separate statute. Of course, such a requirement would ignore the fact that § 1108(b)(2)(B) expressly contemplates that service providers will give fiduciaries, not beneficiaries, the requisite information to plead reasonableness. Even so, such an approach would at least respect the definition of reasonableness that Congress already established in ERISA, rather than an "analogous" statute.

More importantly, the ICA and ERISA are not "analogous" at all. The mutual funds regulated by the ICA are evaluated by "disinterested directors" that are privileged with "all [the] information 'reasonably . . . necessary to evaluate the terms' of the adviser's contract." *Jones*, 559 U.S. at 348 (quoting 15 U.S.C. § 80a-15(c)). By contrast, ERISA beneficiaries do

not have "all [the] information"—there is disclosure from service providers to fiduciaries, but not beneficiaries.

Furthermore, as *Jones* recognizes, Congress drafted the ICA provision at issue to be "more favorable" to shareholders in some ways (e.g., by making available some previously unavailable remedies) but made clear that the ICA would "*not permit a compensation agreement to be reviewed in court for 'reasonableness.'*" *Jones*, 559 U.S. at 341 (emphasis added). By holding in *Jones* that ICA plaintiffs may plead a claim only if they can show a fee was "so disproportionately large that it bears no reasonable relationship to the services rendered," *id.* at 346, the Court was not, thus, delineating a reasonableness standard. It was setting the outer bounds of what a plaintiff must do, in the absence of a standard, to proceed with a fiduciary duty claim.

The reality of how that standard has played out crystallizes the point: "[N]o plaintiff ever has prevailed on a Section 36(b) claim." David Kotler et al., *Navigating the Recent Wave of Section 36(b) Litigation: What Have We Learned?*, 29 INVESTMENT LAWYER 1, 2 (2022). Thus, contrary to Congress's remedial design for ERISA and this Court's instruction that § 1106 was meant to "categorically bar[]" certain transactions, *Harris Tr.*, 530 U.S. at 241–42, importing the ICA standard would categorically shield fiduciaries from liability.

B. The common law of trusts supports Petitioners' reading.

The Court has also said that Congress "codif[ied] and ma[de] applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989);

accord LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 253 n.4 (2008) ("The common law of trusts . . . informs our interpretation of ERISA's fiduciary duties."). To be sure, trust law does not supplant the statutory text. *See Thole v. U.S. Bank*, 590 U.S. 538, 549 (2020) (Thomas, J., concurring). But where, as here, trust law and the statutory text march in the same direction, examining common law trust principles can help explain why Congress chose to enact the prohibited-transaction framework that it did.

1. The common law has long recognized an information asymmetry between the trustee, who acts as a fiduciary, and the beneficiary. These "fiduciary relationships lend themselves to exploitation" because "the trustee's position gives him superior knowledge of all the facts and circumstances." Robert W. Hallgring, *The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility*, 41 WASH. L. REV. 801, 810–11 (1966). Such imbalances lead naturally to "secrecy and concealment," encouraging the fiduciary to hide any potential mischief. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543. Consequently, at common law, the duty of loyalty is "particularly intense so that, in most circumstances, its prohibitions are absolute for prophylactic reasons." RESTATEMENT (THIRD) OF TRUSTS, § 78 cmt. b.

These principles map well onto the provisions at hand. As noted, § 1106(a) was "enacted [to] . . . supplement[]" the fiduciary duty of loyalty. *Harris Tr.*, 530 U.S. at 241–42. It does so just as the Restatement instructs: through "absolute" prohibitions. RESTATEMENT § 78 cmt. b. And given the information asymmetry between beneficiary and fiduciary, the prohibitions are written broadly so that

a beneficiary may bring a claim based on what they would reasonably know, rather than on information they do not reasonably have access to.

2. Accordingly, a beneficiary may bring a § 1106(a)(1)(C) claim when they can show that their fiduciary entered a transaction with a party in interest for the "furnishing of goods, services, or facilities." But a beneficiary would have no reason to know whether that transaction was reasonable, necessary, and for reasonable compensation under § 1108(b)(2)(A). That is particularly so since § 1108(b)(2)(B) and its regulatory counterpart, 29 C.F.R. § 2550.408b-2, outline in detail what information is required to show a "[r]easonable contract or arrangement," and then specifically provide that disclosure of that information go from interested party to fiduciary, but not beneficiary.

Nor are service contracts unique. Take a loan between a plan and an interested party. It would be sensible, given the law governing trusts and the protective purpose behind ERISA, for Congress to empower plaintiffs to bring a claim when they know such a loan has been extended. Section 1106(a)(1)(B) provides as much. *See* 29 U.S.C. § 1106(a)(1)(B) (barring the "lending of money or other extension of credit between the plan and a party in interest"). Section 1108(b)(1), in turn, lays out an exemption for certain loans. But that exemption imposes at least five separate requirements: (1) reasonable equivalence, (2) non-preferential treatment of highly compensated employees, (3) compliance with plan provisions, (4) reasonable interest rates, and (5) adequate security. It is "implausible," as the Seventh Circuit has put it, "that any would-be defendant would voluntarily turn over confidential financial information" of this kind—

which is exactly why, under both text and trust law, defendants would need to plead and prove the exemption. *Allen*, 835 F.3d at 677.

3. These concerns are not merely hypothetical. Consider *Haley v. Teachers Insurance & Annuity Ass'n of America*. There, TIAA offered "collateralized loan products" to beneficiaries of the Washington University retirement plan. 54 F.4th at 118. To defend itself against a § 1106(a) claim, TIAA invoked two different § 1108(b) exemptions: (b)(1), which exempts certain loans, and (b)(17), which separately "permits transactions . . . as long as the plan pays no more and receives no less than 'adequate consideration.'" *Id.* at 120. As laid out above, the first of these exemptions, (b)(1), requires detailed information on at least five conditions. The second, (b)(17), is no different. Indeed, TIAA argued at class certification—and the Second Circuit largely agreed—"that individualized proof must be marshalled from non-party plan fiduciaries showing how each plan fiduciary valued the assets and whether, given other options available to the plan, the fiduciary exercised good faith in selecting the terms offered by TIAA." *Id.* at 122.

There is no scenario where a beneficiary would have this information—what the party in interest shared with the fiduciary, how the fiduciary valued certain assets, and whether the fiduciary exercised good faith—before discovery. More to the point, Congress was not blind to that dilemma. To the contrary, it understood fiduciaries would have the information to plead and prove § 1108 exemptions. In fact, in many instances, it *ensured* they would, requiring disclosure to fiduciaries of relevant information. *See* 29 U.S.C. § 1108(b)(2)(B)(iii). Consistent with the common law, it then placed the onus

on fiduciaries to present such information through one or more affirmative defenses under § 1108.

C. Petitioners' reading of § 1106 and § 1108 tracks federal government practice.

The Department of Labor has primary authority for administering ERISA, *see* 29 U.S.C. §§ 1002(13), 1132–1138, and shares responsibility with the Treasury Department for enforcing the Act, *see* 29 U.S.C. § 1204(a). It has, in these roles, often had occasion to address the Act's prohibited-transaction provisions. Its views dovetail with Petitioners' understanding.

1. On the exemption at issue, for over thirty years the Department has tasked "[t]he appropriate fiduciaries" with determining "whether the conditions of section 408(b)(2) are satisfied." U.S. Dep't of Labor, Wage & Hour Div., Advisory Opinion 1992-08A (Feb. 20, 1992). It spoke in even plainer terms more than a decade ago when it issued a regulation stating that "a service relationship between a plan and a service provider would constitute a prohibited transaction." 77 Fed. Reg. 5632 (Feb. 3, 2012) (to be codified at 29 C.F.R. pt. 2550). It later issued 29 C.F.R. § 2550.408b-2, which specified what parties in interest must disclose to fiduciaries as a prerequisite to claiming a § 1108(b)(2) exemption.

2. The Department has espoused a similar understanding in litigation. In *Chao v. Hall Holding, Co.*, 285 F.3d 415, 419 (6th Cir. 2002), *cert. denied*, 537 U.S. 1168 (2003), the Labor Secretary brought suit against various defendants for "purchasing stock on the [plan's] behalf without adequate investigation and [for] overpaying for the stock." Akin to Petitioners here, the Secretary asserted prohibited-transaction and fiduciary

duty claims. As to the former, the Secretary noted before the Sixth Circuit that "Hall Holding was a party in interest because it was a fiduciary and because it owned more than 10% of Hall Chemical, the employer of plan participants." Gov. Br. at 24, *Hall Holding*, 285 F.3d 415 (No. 00-3041). "The stock sale between the plan and Hall Holding was therefore a prohibited transaction under 29 U.S.C. [§] 1106(a)(1)." *Id.* The government noted that "Section 408(e) of ERISA creates an exemption from Section 406 for 'the acquisition or sale by a plan of qualifying employer securities.'" *Id.* But it emphasized that defendants "bear the burden of proving that they meet this exception." *Id.* at 24–25. The Sixth Circuit agreed. 285 F.3d at 437.

And when the *Hall* defendants subsequently sought cert., the Secretary reiterated that ERISA "prohibited the [fiduciaries'] stock sale [at issue] unless an exemption permitted it." Gov. Br. Opp'n Cert. at 13, *Hall Holding*, 537 U.S. 1168 (No. 02-593). But defendants in *Hall* had "failed to establish that the stock sale was exempt." *Id.*

3. The Department followed the same course in *Allen v. GreatBanc*, where the plaintiff alleged that a defendant had entered a prohibited transaction because it had engaged in a sale and loan with a party in interest. 2015 WL 5821772, at *3 (N.D. Ill. Oct. 1, 2015). The district court, much like the Second Circuit here, reasoned that pleading that fact alone was insufficient: A plaintiff needed to plead facts negating the applicability of the exemptions set forth in § 1108(e)(1)(A) and § 1108(b)(3). *Id.* at *4. The Secretary, in an amicus brief on appeal, disagreed. It instead endorsed the Eighth Circuit's reading of § 1106 from *Braden v. Wal-Mart*, 588 F.3d 585 (8th Cir. 2009), stating that "the only obligation imposed

on a plaintiff asserting a prohibited transaction claim is to plead and prove the existence of a transaction prohibited by section 406(a)." Gov. Br. at 18, *Allen*, 835 F.3d 670 (No. 15-3569).

As the Secretary's brief explains, "the section 408 exemptions are affirmative defenses on which the defendant has the burden of proof," and "it is [thus] a defendant's obligation to plead the applicability of an affirmative defense, and to do so consistent with the requirements of Rule 8(a)." *Id.* at 9, 19–20. "[A] plaintiff is not required to negate an affirmative defense in his complaint." *Id.* at 19. The Seventh Circuit reversed the district court and, in so doing, substantially embraced the Secretary's understanding. *See Allen*, 835 F.3d at 677.

The Department of Labor has subsequently reaffirmed the position it took in *Hall* and *Allen* in cases before the Fourth, Fifth, and Ninth Circuits. *See* Gov. Br. at 48, *Acosta v. Cal. Pac. Bank*, 706 F. App'x. 429 (9th Cir. 2017) (No. 16-17055) ("Defendants have the burden to establish an exemption to a prohibited transaction."); Gov. Br. at 12, *Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763 (4th Cir. 2019) (No. 17-1873) ("Some transactions otherwise prohibited are exempt if they meet the conditions of an exemption in ERISA section 408, 29 U.S.C. § 1108, but the fiduciary bears the burden of proving that the transaction satisfies those conditions."); Gov. Br. at 20, *D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins. Co.,* 88 F.4th 602 (5th Cir. 2023) (No. 22-20540) ("[S]ection 408(b)(2) . . . being an exemption, the burden of proof lies with the party claiming entitlement to it (*i.e.*, the fiduciary).").

4. On top of the twenty-one specific exemptions in § 1108(b), § 1108(a)(2) authorizes the Secretary of Labor

"to create exemptions to ERISA's prohibition on certain plan holdings, acquisitions, and transactions, but only if doing so is in the interests of the plan's 'participants and beneficiaries.'" *Boggs v. Boggs*, 520 U.S. 833, 846 (1997).

Parties have not been shy about availing themselves of this procedure. Since 1996, the government has granted more than 800 individual exemptions. Dep't of Labor, Individual Exemptions, https://perma.cc/VW28-7N8Q. It granted seventeen class exemptions during the same period. Dep't of Labor, Class Exemptions, https://perma.cc/G2NQ-XF28. It has granted those exemptions to service providers like Fidelity. *See* Prohibited Transaction Exemption 2008-14; D-11424, 73 Fed. Reg. 70378, 70381 (2008); Grant of Individual Exceptions; PTE 2002-55 Fidelity Management Trust Company and Its Affiliates, 67 Fed. Reg. 79655 (2002). And it has granted exemptions where it "[did] not believe Congress intended to cover" particular relationships. *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 367 (5th Cir. 2018) (quoting 81 Fed. Reg. 20948 (Apr. 8, 2016)).

In short, if Respondents wish to avoid § 1106(a) liability, ERISA provides them several ways to do so. They can plead and later prove that their actions fall under § 1108(b)(2), marshaling information that parties in interest must provide them. Or they could plead another applicable § 1108 exemption. Or they can seek clarification and coverage from the Labor Secretary under § 1108(a). What they cannot do, though, is compel plaintiffs to plead facts they do not know and which they do not, absent discovery, have access to.

III. THE SECOND CIRCUIT'S APPROACH IS A "FIX" TO A NON-EXISTENT PROBLEM.

Lacking support from the statutory text, case law, or prior government practice, the Second Circuit turns to a last redoubt: policy concerns. As the panel below outlines, it eschewed a "literal reading" of § 1106 in favor of a rule that, it insists, is more workable and less "absurd." P.A. 17a. It is neither of those things.

A. The Second Circuit's reading is unworkable.

1. To start, ERISA already sets out a workable framework for plaintiffs, defendants, and courts for prohibited-transaction claims.

For plaintiffs, § 1106 imposes certain bright-line requirements: e.g., allege a transaction, identify a party in interest, and show how that transaction constituted a "furnishing of goods, services, or facilities" between the plan and that party in interest. 29 U.S.C. § 1106(a)(1)(C). That is exactly as Congress intended.

Once those boxes are checked, defendants must come forward under § 1108 to plead and offer evidence of the applicability of any relevant exemptions. And courts—as in any other case—evaluate the entirety of that evidence at summary judgment, class certification, or other pretrial proceedings.

Such a framework "protect[s] . . . the interests of participants in employee benefit plans" by "provid[ing] [them with] appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b); *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). At the same time, the framework does not "unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517. After all, as this

Court has pointed out, not every transaction provides a cause of action under § 1106(a). *Lockheed Corp. v. Spink*, 517 U.S. 882, 895 (1996), for example, held "that the payment of benefits" to current and former employees "does not constitute a prohibited transaction." That is so even if the payment is large, as was the case in *Spink*.

What § 1106(a) targets is not the amount of money that changes hands, but "commercial bargains that present a special risk . . . because they are struck with plan insiders." *Id.* at 893. These transactions naturally "involve uses of plan assets that are potentially harmful to the plan." *Id.* In Congress's judgment, a service contract between an interested party and a plan fiduciary, § 1106(a)(1)(C), is one such potentially harmful transaction, just as a sale of securities, § 1106(a)(1)(A), or a loan, § 1106(a)(1)(B), or a transfer of property, § 1106(a)(1)(D), between a fiduciary and an interested party could be potentially harmful.

When plaintiffs have done their part under § 1106(a), defendants must then show, per § 1108, whether a "potentially harmful" transaction is or is not harmful. In short, § 1106(a) transactions remain available; fiduciaries merely carry the burden of defending them.

2. On the other hand, requiring plaintiffs to marshal and plead evidence to negate every conceivable exemption would paralyze ERISA enforcement. To see why, consider the hurdles a plaintiff would need to overcome to plead a claim under the Second Circuit's rule, starting with the "simplest" case: a defendant that plaintiffs somehow know will invoke only a single § 1108 exemption.

That would still leave plaintiffs in a bind because, "[n]o matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their

claims in detail unless and until discovery commences." *Braden*, 588 F.3d at 598. The preceding sections cover all that a plaintiff would need to do to negate an exemption under (b)(1) (for loans); (b)(2) (for services, goods, and facilities); (b)(3) (for employee stock ownership plans); (b)(15) (for block trades); and (b)(17) (for investment advice). None of these exemptions are straightforward; all involve some facts outside a plaintiff's knowledge. That common thread runs through the other § 1108(b) exemptions, too. Say, for instance, that a plaintiff knows a defendant will claim that a particular transaction represented a permissible cross trade, per § 1108(b)(19). But § 1108(b)(19) requires a party to plead "nine specific conditions . . . , some of which have further exceptions contained within them." *Allen*, 835 F.3d at 677.

Worse yet, when defendants are sued, many invoke more than one get-out-of-jail-free card. That happened in *Haley* when TIAA invoked § 1108(b)(1) and § 1108(b)(17). 54 F.4th at 120. In *Dupree v. Prudential Insurance*, 2007 WL 2263892, at *39 (S.D. Fla. Aug. 7, 2007), the defendant claimed three: § 1108(b)(2), § 1108(b)(5), and § 1108(b)(8). Defendants have, indeed, been taking this kitchen-sink approach to § 1108(b) for decades. *See Martin v. Nat'l Bank of Alaska*, 828 F. Supp. 1427, 1432, 1438 (D. Alaska 1992) (§ 1108(b)(2) and § 1108(b)(8)); *McLaughlin v. Rowley*, 698 F. Supp. 1333, 1339–40 (N.D. Tex. 1988) (§ 1108(b)(1) and § 1108(b)(2)); *Marshall v. Kelly*, 465 F. Supp. 341, 351–52 (W.D. Okla. 1978) (same).

To reiterate: Under the Second Circuit's rule, plaintiffs must correctly predict *every* exemption that could apply (requiring information they do not know) and then plead plausible allegations negating *each* such exemption (requiring information they do not know) even

if these exemptions have conditions which themselves have sub-conditions (requiring information they do not know). If they fail at any junction, they have no claim, and defendants need not turn over anything in discovery.

3. To deflect against this concern, the Second Circuit tries to hedge: "[A]t least some [§ 1108] exemptions," it says, must be pleaded by plaintiffs, including § 1108(b)(2). P.A. 18a. But that obviously does not make the statutory provisions more workable; it just leaves parties in the dark about what "some" is supposed to encompass. More importantly, the text itself does not hedge. The Second Circuit's asserted textual hook—"except as provided"—does not discriminate between the § 1108 exemptions and does not specially single out § 1108(b)(2). Thus, if, as the Second Circuit claims, it "flows directly from the text" that § 1108 exemptions "are incorporated into § 1106(a)'s prohibitions," P.A. 18a–19a, then they *all* are. The Second Circuit does not identify a limiting principle to its rule in the text because none exists. The *proper* limiting principle is already built into the text and structure: Plaintiffs plead liability under one part of the statute; defendants plead any applicable exemption from liability under another.

B. A plain-language reading of the prohibited-transaction provisions is not absurd.

Following the text as written does not, contrary to the Second Circuit's view, produce "absurd results." P.A. 16a. That is because the absurdity doctrine, as this Court has explained, should apply in the "rare and exceptional circumstance[]" where embracing the plain language would be "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). In like manner, members of the Court have

emphasized that a plain reading is absurd only "where it is quite impossible that Congress could have intended the result." *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring). And leading commentators have asserted that courts "should permit such displacement" of the text "only when the legislature's action violates the Constitution." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2486 (2003). This case presents none of those circumstances.

1. There is nothing "rare" or "exceptional" about Congress writing a law with, in the Second Circuit's words, a "broad scope" followed by a set of specific exemptions. P.A. 22a. It writes such laws all the time. To give just two examples, the ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985). But as *Meacham* demonstrates, that broad prohibition is subject to several specific exemptions, including a reasonableness exemption—and those exemptions fall on the defendant to plead and prove. 554 U.S. at 87. The Copyright Act likewise grants expansive, "exclusive rights" to the copyright holder, including the exclusive right to reproduce the copyrighted work, to prepare derivative works, and to distribute the work. 17 U.S.C. § 106. But the broad grant of rights is subject to specific limitations, including the affirmative defense of fair use. *See* 17 U.S.C. § 107. There is no basis for such conditions to be considered absurd.

2. Next, it is not "impossible that Congress could have intended the result." *Pub. Citizen*, 491 U.S. at 471. To the contrary, the legislative history shows that it "intended that coverage under the Act be construed

liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose[s]." S. REP. NO. 93-127, at 18 (1973). Consistent with these intentions, Congress wanted, through the prohibited-transaction provisions, to "substantially strengthen[]" pre-ERISA protections by "establish[ing] new rules that define the transactions that are prohibited." 120 CONG. REC. 29954 (1974) (remarks of Sen. Nelson). And it sought to do so by "prohibit[ing] fiduciaries from engaging in transactions involving the transfer of assets between the plan and parties in interest; or transactions in which the fiduciary . . . acts on behalf of a party whose interests are adverse to those of the plan." 120 CONG. REC. 29932 (1974) (remarks of Sen. Williams).

3. And finally, there is nothing unconstitutional about Congress writing a law providing for broad liability for prohibited transactions. That is especially so when the law provides multiple offramps from liability. Section 1106 does not, for instance, cover all transactions and payments. *Spink*, 517 U.S. at 895. Nor does it "prohibit necessary services or impede necessary service transactions." *Bugielski*, 76 F.4th at 907 (internal quotation marks omitted). At most, it requires interested parties to disclose relevant information about potentially prohibited transactions to the fiduciary, outlines how a fiduciary can ask for more information if it needs to, and lets a fiduciary avail itself of any potentially applicable statutory and administrative exemptions. 29 U.S.C. § 1108(b)(2)(B). There is nothing absurd about that. It is instead reflective of a "statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

C. A plain-language reading of the prohibited-transaction provisions has not led to a needless rise in litigation.

Underlying the Second Circuit's contorted textualism and invocation of absurdity is a pragmatic concern: that a plain-language reading of § 1106 would "encompass a vast array of routine transactions." P.A. 21a. Opening that window would, as Respondents suggest, exacerbate a "dramatic rise in the number of ERISA lawsuits over recordkeeping fees in recent years." BIO at 15. Yet that concern is both irrelevant and unfounded.

1. It is irrelevant because, "even supposing [Respondents'] worst predictions come true, that would be the result of the statute Congress drafted." *Muldrow v. City of St. Louis*, 601 U.S. 346, 358 (2024). And the result here—more litigation—is consistent with what Congress had in mind when it enacted ERISA. Indeed, as various lower courts have observed, "excessive fee litigation . . . has significantly improved [retirement] plans, brought to light fiduciary misconduct that has detrimentally impacted the retirement savings of American workers, and dramatically brought down fees." *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020). This has "led to enormous fee savings for plan participants." *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *4 (C.D. Cal. Sept. 18, 2020); *accord* Lauren K. Valastro, *How Misapplying* Twombly *Erodes Retirement Funds*, 32 GEO. MASON L. REV. (forthcoming 2025) (manuscript at 19–20) (discussing how excessive fee litigation has led to lower fees). A statute that leads to more excessive fee lawsuits and ultimately results in less excessive fees does not contravene ERISA's "broadly protective purposes." *John Hancock*

Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 96 (1993). It reinforces them.

2. It is also unfounded because there is little indication needless lawsuits are being filed. After all, the parties and the Second Circuit agree that the Eighth Circuit has "embraced the expansive reading of" § 1106 since *Braden*. P.A. 17a. In the fifteen years post-*Braden*, ERISA cases have not ground the Eighth Circuit to a halt. Nor has there been some proliferation of complaints in the Eighth Circuit of standalone § 1106 claims supported by threadbare allegations. Although every case is different, several reasons help explain that result.

First, bringing a case is expensive and time-consuming, particularly an ERISA matter involving multiple defendants, multiple plaintiffs, and many potential exemptions. The prototypical plaintiff will, under such constraints, "sue only when . . . there is a reason to do so." *Allen*, 835 F.3d at 677. Plaintiffs do not sue and have not sued when they have strong "reason to believe [a] transaction was exempt under [§ 1108]" or, for that matter, over "something as trivial as a chair for a person to sit in." *Id.* Though these conditions might, like a routine service contract, formally satisfy § 1106(a), they would get a plaintiff nowhere in practice. Plaintiffs are not bringing cases to test the waters on the theoretical outer boundaries of § 1106. They bring cases when they suspect that plan assets are being used in a way that is "potentially harmful to the plan"—identifying transactions between a fiduciary and a party in interest and then bringing the fiduciary to the table to explain its actions. *Spink*, 517 U.S. at 893.

Second, ERISA and the Federal Rules include separate but interrelated deterrent mechanisms. ERISA,

for instance, provides that a court "in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). And "[i]n deciding whether sanctions should be imposed on plaintiffs who filed unfounded cases," courts have read the Federal Rules to require, when appropriate, "plaintiffs and their attorneys . . . to examine whether any *obvious* affirmative defenses bar the case." *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 687 (7th Cir. 2014) (cleaned up). Both of these mechanisms—attorney's fees and Rule 11 sanctions—counsel against plaintiffs bringing lawsuits just to bring lawsuits. Indeed, the district court here, following approval of the settlement agreement, determined that defendants were prevailing parties (even though one of Petitioners' claims survived summary judgment) and awarded them over $25,000 in costs. D. Ct. Dkt. 471 at 7.[3]

Finally, *Thole v. U.S. Bank*, 590 U.S. 538, 542 (2020), dismissed an ERISA case for lack of standing. Of course, there are several important distinctions between this case and *Thole*. *Thole* involved a different type of plan (a defined-benefit plan rather than the defined-contribution plans at issue here), a different remedy, and a different source of alleged injury. Accordingly, the point is not that *Thole* bars prohibited-transaction claims based on seemingly "routine transactions." P.A. 21a. It is that, recognizing the possibility of dismissal, few if any plaintiffs will bring such suits to begin with.

Put another way, when Congress enacted ERISA's prohibited-transaction provisions, it opened the door for beneficiaries to bring claims against fiduciaries for actions

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[3] These costs were split roughly evenly between Respondents and CapFinancial. They totaled more than 10% of the final settlement amount.

that could be "potentially harmful to the plan." *Spink*, 517 U.S. at 893. But just because it opened that door does not mean every plaintiff will walk through it. Instead, as experience instructs, plaintiffs have done so only if the benefits outweigh the costs, risks, and pitfalls of doing so in a particular case. And even if they get through all those hoops, there is no guarantee that a plaintiff will carry the day. All it means is that defendants must plead and prove their own case, and a court must then consider all the evidence to determine whether a claim should move forward.

Rather than applying that sensible framework, the Second Circuit chose to close the door entirely for all but the handful of plaintiffs who can guess which exemptions a defendant might invoke (based on information that plaintiffs do not have) and plead the negative of those exemptions (based on information that plaintiffs do not have). That cannot be what Congress envisioned and it is not what the text provides.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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November 22, 2024