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 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PETITIONERS

LOUIS LOPEZ
Counsel of Record
WILLIAM ALVARADO RIVERA
STEFAN SHAIBANI
VICTORIA WILLIAMSON
AARP FOUNDATION
601 E STREET NW
Washington, DC 20049
(202) 434-6666
llopez@aarp.org

November 26, 2024 *Counsel for Amici Curiae*

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans age 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health and financial security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works for and with vulnerable people over 50 to end senior poverty and reduce financial hardship by building economic opportunity.

AARP and AARP Foundation seek to increase the financial security of older individuals' retirement, pension, and other employee benefit plans through participation as amicus curiae in federal and state courts. One of amici's main objectives is to ensure that plan participants receive all the benefits they are entitled to in retirement. To achieve this goal, amici work to ensure that fiduciaries manage and administer plans loyally and prudently in accordance with the requirements outlined in the Employee

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[1] Pursuant to Supreme Court Rules 37.2 and 37.6, no counsel for any party authored the brief in whole or in part. In addition, no person or entity, other than amici, their members, and their counsel, has made any monetary contribution to the preparation or submission of this brief. Counsel for all parties were given timely notice of our intent to file this brief.

Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, *et seq*.

SUMMARY OF ARGUMENT

ERISA established broad protections against mismanagement and abuse in retirement and pension plans. The statute's plain text and remedial purpose foreclose attempts to impose a heightened pleading requirement on plan participants to identify and negate a fiduciary's myriad affirmative defenses to transactions that are deemed prohibited under the statute. Imposition of such an onerous standard is also contrary to the common law of trusts, which undergirds ERISA's statutory framework. Requiring that plan participants plead information that lies solely within the control of fiduciaries at the outset of a case improperly shifts the burden in ERISA cases and will effectively exclude potentially meritorious claims and absolve plans for breaches of their fiduciary duties under the statute.

Now, more than ever, the amount of retirement income being saved is insufficient for an increasing segment of the U.S. population. Older Americans need strong statutory safeguards, including protections against breaches of fiduciary obligations. Imposing roadblocks for plan participants to bring causes of action to protect their retirement and pension plans is contrary to what Congress intended when enacting ERISA. Perhaps more telling, a heightened pleading standard will result in significant financial losses to retirement savers, many of whom already face substantial financial hurdles as they age, including

the ability to work and earn additional income during their retirement.

ARGUMENT

I. ERISA'S PLAIN TEXT AND PURPOSE FORECLOSE THE SECOND CIRCUIT'S HEIGHTENED PLEADING STANDARD FOR PROHIBITED TRANSACTION CLAIMS UNDER SECTION 1106(a).

Fifty years ago, Congress enacted ERISA to address public concern that the funds of private pension plans were being mismanaged and abused. The statute's detailed framework recognizes that "the continued well-being and security of millions of employees and their dependents are directly affected by [such employee benefit] plans." 29 U.S.C. § 1001(a). To protect the interest of employees and their beneficiaries, ERISA's plain language imposes duties of loyalty and prudence on fiduciaries who manage these plans. *See* 29 U.S.C. § 1104. ERISA's fiduciary standards were intended to "prevent abuses of the special responsibilities borne by those dealing with plans." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 15 (1987) (quoting 120 Cong. Rec. 29197 (1974)).

ERISA's remedial purpose is "to protect the interests of participants and beneficiaries by establishing standards of conduct, responsibility and obligations for fiduciaries and providing for appropriate remedies and ready access to federal courts." *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996)

(cleaned up) (quoting 29 U.S.C. § 1002(b)). Accordingly, one of ERISA's core enforcement goals is to remedy participants' injuries resulting from a breach of one of these duties by plan fiduciaries. *See* 29 U.S.C. § 1001(b). ERISA seeks to "ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); s*ee also Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 374-75 (1980) (ERISA was enacted to prevent the "great personal tragedy" suffered by employees whose retirement benefits were not paid). Given this broad remedial purpose, the imposition of extra-textual heightened pleading requirements on plan participants to simply bring a prohibited transaction claim would be inconsistent with the plain language of section 1106(a) and congressional intent.

A. Under a Plain Reading of Section 1106(a) of ERISA, Plan Participants State a Plausible Prohibited Transaction Claim Without Pleading or Negating the Applicability of Section 1108(b)'s Exemptions.

When interpreting remedial statutes, courts start with the statutory language. "In ERISA cases, as in any case of statutory construction, our analysis begins with the language of the statute." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000). Congress enacted "broad language" in the statute to "bar categorically [any] transaction that was likely to injure the pension plan." *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508

U.S. 152, 160 (1993). More specifically, section 1106(a) enumerates various prohibited transactions between an employee benefit plan and a party in interest. As relevant in this case, this provision bars transactions that constitute a "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). ERISA defines "party in interest" broadly to include a variety of parties that may contract with or provide services to a plan. 29 U.S.C. § 1002(14)(B). Notably, "Congress defined 'party in interest' to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." *Harris Tr.*, 530 U.S. at 242.

In a separate provision of ERISA, Congress enumerated various exemptions to the prohibited transactions listed in section 1106(a). In section 1108(b), and as relevant in this case, Congress provided an exemption for "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2)(A). These exemptions are considered affirmative defenses to the prohibited transactions set forth in section 1106(a). *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009) ("the statutory exemptions established by §1108 are defenses which must be proven by the defendant"); *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996) ("A fiduciary who engages in a self-dealing transaction . . . has the burden of proving that he fulfilled his duties of care and loyalty."); *Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209, 1215

(2d Cir. 1987); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 675 (7th Cir. 2016); *Perez v. Bruister*, 823 F.3d 250, 262 (5th Cir. 2016).

Thus, ERISA's plain language provides that a plaintiff may bring a prohibited transaction claim by alleging that a plan fiduciary engaged in a prohibited transaction constituting the "furnishing of goods, services, or facilities between the plan and a party in interest[.]" 29 U.S.C. § 1106(a)(1)(C). At the initial pleading stage, it is generally "sufficient for a plaintiff to plead facts indirectly showing unlawful behavior," in part because "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 595, 598. This standard is typically met "if the complaint alleges facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 718 (2d Cir. 2013). This approach enables plan participants who have been injured due to a breach of fiduciary duty to fulfill ERISA's remedial purpose while still requiring that they provide more than "mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Here, Petitioners met their burden under the statute by alleging that because TIAA and Fidelity are service providers and hence parties in interest, their furnishing of recordkeeping and administrative services to the plans is a prohibited transaction unless

Cornell University proves an exemption. J.A. 145-146.In Petitioners further asserted that Cornell "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." J.A. 143. In support of their claims, Petitioners specifically alleged that the market rate for recordkeeping fees is "$35 per participant" whereas Cornell paid Fidelity and TIAA between "$115 and $183 per participant" in the retirement plan. J.A. 65. Petitioners also contended that Cornell's failure to address the excessive recordkeeping fees was a breach of the duty of loyalty and that participants were harmed as a result. These allegations are sufficient to state a plausible claim under the statute and shift the burden to Cornell to establish that "no more than reasonable compensation [was] paid" for TIAA and Fidelity's services. 29 U.S.C. § 1108(b)(2)(A); *see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) ("We must enforce plain and unambiguous statutory language in ERISA, as in any statute, according to its terms.").

Yet the Second Circuit rejected this plain and common-sense reading of ERISA. Instead, that court held that to state a prohibited transaction claim under section 1106(a), "it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services; rather, the complaint must plausibly allege that the services are unnecessary or involved unreasonable compensation, [section] 1108(b)(2)(A), thus supporting an inference of disloyalty." *Cunningham v. Cornell Univ.*, 86 F.4th

961, 968 (2d Cir. 2023). The court's extraordinary finding that the exemption for reasonable and necessary services under section 1108(b)(2)(A) is incorporated into a plan participant's initial burden when pleading a section 1106(a) claim—and not an affirmative defense to be asserted by a plan fiduciary—is contrary to the express text and remedial purpose of ERISA.

First, nowhere in section 1106(a) is there any statutory requirement that a plaintiff seeking to state a prohibited transaction claim must *plead and then negate* the myriad possible affirmative defenses that may be asserted by plan fiduciaries. *See Allen*, 835 F.3d at 676 ("ERISA plaintiff need not plead the absence of exemptions to prohibited transactions"). Indeed, the Second Circuit's approach effectively requires a plan participant to allege the absence of "at least some of" the exemptions under section 1108(b) when filing suit. *See Cunningham*, 86 F.4th at 975. However, at the pleading stage, a plaintiff does not know which of the 21 possible exemptions a defendant is going to assert as affirmative defenses in order to negate them. Such a heightened pleading standard would seemingly absolve a plan fiduciary of liability for engaging in a prohibited transaction under section 1106(a) merely because a plaintiff incorrectly guesses the exemption asserted by the fiduciary.

Second, by grafting a heightened pleading requirement on to section 1106(a), the Second Circuit improperly shifts the burden to plan participants to plead and prove that a plan's prohibited transaction does not fall under an applicable exemption. In doing

so, the court effectively forecloses meritorious claims by demanding that plaintiffs meet an unattainable standard: to plead information such as the processes and methods that fiduciaries used to arrive at the challenged decision. This burden cannot be met without the benefit of discovery as the information needed to plead fraud or disloyalty lies within the control of plan fiduciaries. As the court recognized in *Braden*, "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." 588 F.3d at 598.

Underlying the Second Circuit's refusal to follow a plain reading of section 1106(a) is its belief that such an interpretation would lead to "absurd results" by "prohibit[ing] payments by a plan to any entity providing it with any services." *Cunningham*, 86 F.4th at 973. But this analysis ignores the separate statutory provision in ERISA that allows plan fiduciaries to assert and prove affirmative defenses, which would avoid much of the court's so-called "absurd results." *Id.*; 29 U.S.C. § 1108(b). As such, the court's extra-textual reading of section 1106(a) should be rejected. *See Harris Tr.*, 530 U.S. at 254; *see also Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990) ("As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text."). Because ERISA was enacted to protect employees' retirement and pension plans, the statute's fiduciary duties must be applied consistently with its plain text and with a

breadth that fulfills Congress's remedial intent. *See Varity Corp.*, 516 U.S. at 496.

B. A Heightened Pleading Standard for Prohibited Transaction Claims under Section 1106(a) Is Contrary to the Common Law of Trusts, on Which ERISA's Framework is Built.

In enacting ERISA, "Congress invoked the common law of trusts to define the general scope of" the "authority and responsibility" of fiduciaries. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). The statute states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(A). Because "the common law of trusts . . . serves as ERISA's backdrop," *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007), this Court often turns to the common law of trusts to interpret the statute. *Tibble v. Edison Int'l*, 575 U.S. 523, 528-29 (2015); *Cent. States*, 472 U.S. at 571*; see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

The Second Circuit's new heightened pleading standard for section 1106(a) claims alleging prohibited transactions is contrary to the common law of trusts, which requires the plan fiduciary—not a plan participant—to justify the transactions in question and establish the applicability of any defenses. *See Braden*, 588 F.3d at 602 ("At common law, the fiduciary bears the burden of justifying such

transactions."). Requiring plan participants to state their claims with greater specificity—including the plan fiduciary's potential defenses—is at direct odds with both congressional intent and the basic principles of fiduciary duties in the common law of trusts. *See Tibble*, 575 U.S. at 530 (interpreting the fiduciary duty of prudence in ERISA based on the common law of trusts).

Participants in trusts regulated by ERISA enjoy a rich array of legal rights, which include the right to have all plan assets used exclusively for their benefit and invested prudently. *See* 29 U.S.C. § 1104(a)(1)(B); *see also Hughes v. Northwestern Univ.*, 595 U.S. 170, 172-73 (2022). Participants also have the right to membership in a plan free of the types of fiduciary imprudence, fraud, and self-dealing that predated ERISA. Fiduciaries who, through breach of their statutorily imposed duties, impinge on any one of these rights cause harm and, thus, injury-in-fact to the legal rights of plan participants in trusts regulated under ERISA.

Building on the common law of trusts, the statute's fiduciary duty provisions seek to protect the best interests of participants and beneficiaries against the mismanagement and abuse of plan assets. *See* Restatement (Third) of Trusts § 78 (2007) ("trustee has a duty to administer the trust solely in the interest of the beneficiaries"). This purposeful approach guarantees, to the extent possible, a plan free from fiduciary malfeasance. Diverting from congressional intent with respect to pleading standards for breaches of fiduciary duty creates unwarranted limitations that

could cause great harm to plan participants. Indeed, adoption of the Second Circuit's stringent pleading standard would unnecessarily burden and restrict participants from the statutory means created to protect their plans should they suspect a breach of fiduciary duty. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (ERISA was intended to "ensur[e] fair and prompt enforcement of rights under a plan"). Thus, this Court should reject any effort to shift to participants the plan's well-established fiduciary duty—rooted in the common law of trusts—to assert defenses for any prohibited transactions at issue in section 1106(a) claims.

II. THE SECOND CIRCUIT'S HEIGHTENED PLEADING STANDARD FOR PROHIBITED TRANSACTION CLAIMS UNDER SECTION 1106(a) UNDERMINES ERISA'S ENFORCEMENT SCHEME AND HURTS RETIREMENT INVESTORS.

When enacting ERISA, Congress "set forth a comprehensive civil enforcement scheme." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). This detailed scheme provides plan participants with an avenue of relief for both individual and collective losses. *See* 29 U.S.C. § 1132(a)(1)(b), (2). The statute expressly empowers the Secretary of Labor, participants, beneficiaries, and fiduciaries to bring civil actions for relief. *Id.* § 1132(a)(2). Section 1109(a) establishes liability for a plan fiduciary "who breaches *any* of the responsibilities, obligations, or duties" under the statute. *Id.* § 1109(a) (emphasis added). Adopting the Second Circuit's new standard could

result in having the carefully crafted enforcement mechanism Congress created for addressing potential mismanagement and abuse of pensions fall apart.

As "one of the essential tools for accomplishing the stated purposes of ERISA," its civil enforcement scheme depends greatly on the ability of plan participants to initiate civil actions to protect their retirement security. *Pilot Life*, 481 U.S. at 52. Yet studies show that retirement income is now, more than ever, likely to be insufficient for an increasing number of older Americans. As such, it is vitally important that plan participants not be held to such high pleading standards that they are effectively prevented from suing for ERISA violations and robbed of their savings at the time they need it most.

A. ERISA's Enforcement Scheme Relies on Plan Participants' Ability to Enforce Fiduciary Duties Without Having to Surmount Unnecessarily High Pleading Standards.

To further ERISA's statutory scheme and remedial purpose of "strengthen[ing] and improv[ing] the protections and interests of plan participants," Congress sought to "remove jurisdictional and procedural obstacles" to "effective enforcement of fiduciary responsibilities." S. Rep. No. 93-127 (1973); H.R. Rep. No. 93-533 (1974). The Secretary of Labor agreed, "express[ing] concern over the erection of 'unnecessarily high pleading standards' in ERISA cases" because of the statute's reliance on private litigation. *Braden*, 588 F.3d at 597 n.8 (citing Brief for

the Secretary of Labor as Amicus Curiae Supporting Plaintiff–Appellant Braden and Requesting Reversal, at 2). This Court thus should reject the Second Circuit's new heightened pleading standard for section 1106(a) claims because it would add unnecessary obstacles to plan participants' ability to protect their interests as well as run afoul of Congress's intent to establish a robust enforcement scheme under the statute.

ERISA expressly empowers four distinct classes of persons—the Secretary of Labor, participants, beneficiaries, and fiduciaries—to bring civil actions for relief when fiduciary duties have been breached in violation of the statute. 29 U.S.C. §§ 1132(a)(2), 1109(a). While the Department of Labor (DOL) is tasked with administering ERISA, Congress intended the "principal focus of the enforcement effort" to be civil litigation initiated by all four classes of plaintiffs. H.R. Rep. No. 93-533 (1974). Indeed, the statute's enforcement provisions "provide both the Secretary and participants and beneficiaries with broad remedies for redressing" ERISA violations. S. Rep. No. 93-127 (1973); H.R. Rep. No. 93-533 (1974). Participants' power to bring a cause of action for breach of fiduciary duty under the statute has been unambiguously affirmed by the Supreme Court. *See Pilot Life*, 481 U.S. at 53. Thus, all four classes alike share a "common interest . . . in the financial integrity of the plan." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).

Under ERISA, DOL "is charged with protecting the rights of participants in employer-sponsored

benefit plans" and may refer cases to its Office of the Solicitor for civil litigation.[2] But DOL's resources are inadequate to enforce the statute on its own.[3] Because of the expense of litigation, DOL regularly declines to initiate civil litigation.[4] In 2013, DOL changed its strategy to focus on "major cases," which require more resources and yield larger recoveries for participants.[5] As a result, "the total number of investigations that were closed dropped by more than 62 percent."[6]

More recently, in fiscal year 2023, DOL reported responsibility for overseeing "approximately 2.8 million health plans, 619,000 other welfare benefit plans, and 765,000 private pension plans," which cover 153 million people and an estimated $12.8 trillion in assets.[7] In 2024, nearly a quarter of civilian

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[2] U.S. Gov't Accountability Office, GAO-21-376, EMPLOYEE BENEFITS SECURITY ADMINISTRATION: ENFORCEMENT EFFORTS TO PROTECT PARTICIPANTS' RIGHTS IN EMPLOYER-SPONSORED RETIREMENT AND HEALTH BENEFIT PLANS (2021) [hereinafter, GAO-21-376].

[3] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION—ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 10, 28 (2007); U.S. Gen. Accounting Office, 4 GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION—OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. Dep't of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992).

[4] GAO-21-376 at 18.

[5] *Id*. at 22, 24.

[6] *Id*. at 24.

[7] U.S. Dep't of Labor, *EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries*, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-

workers had access to defined benefit retirement plans.[8] The Secretary of Labor "depends in part on private litigation to ensure compliance with" ERISA. *Braden*, 588 F.3d at 597 n.8. The empowerment of participants to bring actions against plan fiduciaries arising from breaches of their duties is thus integral to the successful enforcement of the fiduciary obligations in ERISA.

That ERISA extended civil enforcement rights for breach of fiduciary obligations related to plan management to participants and beneficiaries is noteworthy. 29 U.S.C. § 1132(a); *Varity Corp.,* 516 U.S. at 512. This enforcement regime—if allowed to work as intended—is both fair and effective, as no one will police a plan more diligently than the participants who have a vital stake in the proper management of their retirement and pension funds. Imposing a heightened pleading standard on participants, however, would curtail their rights to bring meritorious prohibited transaction claims because while they possess the same statutory authority as DOL to bring such actions, they lack that agency's investigatory and administrative compliance tools to obtain the necessary information to meet any heightened pleading requirements.

Thus, the successful enforcement of ERISA depends on plan participants' ability to initiate class

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activities/resource-center/fact-sheets/ebsa-monetary-recoveries.pdf (last visited Oct. 29, 2024).

[8] Bureau of Labor Statistics, *EBS Latest Numbers*, https://www.bls.gov/ebs/latest-numbers.htm (last visited Oct. 29, 2024).

and other civil actions to vindicate their rights under the statute. And such lawsuits have been effective. For example, they have reduced the management and recordkeeping fees charged by interested parties rendering services to retirement plans.[9] Several class actions alleging excessive fees have also explicitly provided for prospective relief in the form of employers taking steps toward reducing management and recordkeeping fees via settlement agreements.[10] Thus, this Court should reject the Second Circuit's attempt to thwart a fair and effective enforcement scheme set up to protect against mismanagement and abuse of retirement and pension plan assets.

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[9] *See* Mark Debofsky, *Expert Insights—Hughes v. Northwestern University—the Seventh Circuit Upholds Plaintiffs' Excessive Fee Claims*, Empl. Benefits Mgmt. 4903361 (2023) (*Hughes* "imposed a powerful incentive on employers to exercise far greater scrutiny . . . to monitor . . . the fees paid by employees"); *Hughes v. Northwestern Univ.*, 63 F.4th 615, 637 (7th Cir. 2023) (plan participants stated ERISA claim for breach of duty of prudence due to excessive recordkeeping fees), on remand from *Hughes*, 595 U.S. at 172-73.

[10] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for an Order: Finally Approving Class Action Settlement; Approving the Plan of Allocation; Approving Case Contribution Awards to Plaintiffs; and Awarding Attorneys' Fees and Costs at 6-7, *Daugherty v. Univ. of Chi.*, No. 1:17-cv-03736 (N.D. Ill. Aug. 15, 2018), ECF No. 67; Final Approval Order and Final Judgment at 2, *Short v. Brown Univ.*, No. 1:17-cv-00318-WES-PAS (D.R.I. Aug. 2, 2019), ECF No. 55; Plaintiffs' Memorandum in Support of Unopposed Motion for Final Approval of Class Settlement at 4-5, *Clark v. Duke Univ.*, No. 1:16-cv-01044, (M.D.N.C. June 4, 2019), ECF No. 163.

B. Imposing a Heightened Pleading Standard on Plan Participants Would Harm Retirees Who Rely Heavily on Plan Funds for Financial Security Now More Than Ever.

Ensuring that ERISA's robust safeguards remain in place is crucial to an individual's retirement security. A cornerstone of these statutory protections lies in the participants' ability to preserve the plan's assets and their financial well-being by challenging prohibited transactions based on breaches of fiduciary obligations. *See Pilot Life*, 481 U.S. at 52-53; 29 U.S.C. § 1001(b). If plan participants are required to meet onerous pleading requirements, these protections will lose their efficacy and, equally important, many older Americans who no longer have the ability to earn income will face greater retirement insecurity.

A strong fiduciary standard is based on the core principle that financial and other professionals who provide personalized investment advice to customers must always act in the sole interest of those customers.[11] If plan fiduciaries fail to manage a retirement or pension plan carefully, their actions could be disastrous for participants. Even a small increase in the fees charged by plan administrators can make a very significant difference in the amount in employees' retirement accounts when they retire. For instance, DOL has explained:

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[11] *See Investigating Challenges to American Retirement Security Before the Subcomm. On Social Security, Pensions, and Family Policy*, *S. Fin. Comm.*, 116th Cong. (2020) (statement of AARP).

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7% and fees and expenses reduce your average returns by 0.5%, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5%, however, your account balance will grow to only $163,000. The 1% difference in fees and expenses would reduce your account balance at retirement by 28%.[12]

The Government Accountability Office (GAO) also cautions plan participants about the effects that may result from fiduciary mismanagement of fees. GAO estimated that a 401(k) account that had a one percentage point higher fee for 20 years would result in a more than 17% reduction in the account balance. Even a difference of only half a percentage point would reduce the value of the account by 13% over 30 years.[13] Consequently, holding plan fiduciaries accountable for failing to prune investment options with excessive fees

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[12] Holly Yeager, *Mutual Fund Fees Still Hard to Challenge*, AARP Bulletin, Apr. 2010, https://www.aarp.org/content/aarpe/en/home/politics-society/advocacy/info-04-2010/mutual_fund_fees_still_hard_to_challenge.html.

[13] *Public Hearing on Improving Investment Advice for Workers and Retirees: Prohibited Transaction Class Exemption Before the U.S. Dep't of Labor Employee Benefits Security Administration* (2020) (oral testimony of David Certner, AARP).

is crucial to ERISA's effectiveness in the modern retirement landscape.

Currently, most employers offer defined contribution plans, which require participants to put great trust in the quality of the plan investments for their retirement savings. Defined contribution plans, which now constitute most retirement funds, involve a fundamental reallocation of investment risk. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 n.5 (2008). With the increasing number of defined contribution plans, more participants bear the risk associated with the performance of the funds in which their money is invested.[14] Although defined contribution plans may have accumulated millions of dollars in the aggregate, individual accounts tend to be modest, and plan participants rely on them heavily. The quality of plan performance hugely affects the income that participants receive upon retirement. *See Tibble*, 575 U.S. at 530.

Now, more than ever, the amount of retirement income being saved is likely to be insufficient for an increasing portion of the U.S. population. "Last year, Americans held about $18 trillion in IRAs and 401(k) retirement accounts—more than triple the figure from

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[14] *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004) ("The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee[.]").

2005."[15] According to the Federal Reserve, households headed by people ages 65 to 74 held a median of $164,000 in retirement accounts in 2019, up from $60,000 (in inflation-adjusted dollars) in 1998.[16] Older Americans relying primarily on Social Security for their retirement savings will be acutely affected:

> Of 23 million households ages 60 to 69, 16 million have less than $250,000 in financial assets . . . most of their income likely will be Social Security—and hopefully a little wiggle room. The unpleasant truth [] is that for many older Americans, there is not a lot of wiggle room in their budgets. Roughly one out of every five Americans 65 and older rely on Social Security for more than three-quarters of their income, according to the latest estimates from the Social Security Administration. Fourteen percent of older Americans rely on Social Security for more than 90 percent of their income, and 11 percent are living near or below the poverty line.[17]

These statistics are even more troubling because older Americans are retiring at record rates.

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[15] Mindy Fetterman, *How Older Adults Are Changing America*, AARP Bulletin, Sep. 2023, https://www.aarp.org/politics-society/history/info-2023/older-adults-changing-america.html?msockid=1d9456174635606a340b42fc47ac61af.

[16] *Id.*

[17] *Id.*

As the Baby Boomer generation ages, approximately 10,000 individuals retire each day.[18] By 2030, 20% of the U.S. population will be at typical retirement age.[19] However, Americans are financially unprepared for retirement. Since the Covid-19 pandemic began, retirement insecurity has increased dramatically: 55% of Americans had insufficient savings to retire securely as of July 2020, a 5% jump in only three months.[20] Given the absence of pensions and the modest amount available in Social Security benefits, saving money through work—usually through defined contribution plans—is the only way for most Americans to have any hope of a secure retirement.[21]

Yet many older Americans are no longer able to work or earn income because of their age or other factors. When they learn that their retirement or pension plan has been mismanaged by a fiduciary through a prohibited transaction, they should not be required to meet a heightened pleading standard that effectively restricts their protections under ERISA

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[18] Surv. Rsch. Ctr., Inst. for Social Rsch., Univ. of Mich., *The Health and Retirement Study: Aging in the 21st Century* 8 (2017).

[19] *Id.*

[20] *See* Alicia H. Munnell, Anqi Chen, & Wenliang Hou, *How Widespread Unemployment Might Affect Retirement Security*, Ctr. for Ret. Rsch. at B.C., July 2020, at 4, https://crr.bc.edu/wp-content/uploads/2020/06/IB_20-11.pdf.

[21] *See* Alicia H. Munnell, Wenliang Hou, and Geoffrey T. Sanzenbacher, *How Would More Saving Affect the National Retirement Risk Index?*, Ctr. For Ret. Rsch. at B.C., Oct. 2019, at 1, https://crr.bc.edu/wp-content/uploads/2019/10/IB_19-16.pdf ("[I]ncreasing saving is a realistic option only for those workers who have access to a retirement plan at work").

because—as described earlier—they do not have access to the information needed to meet such an arduous standard. Imposing an onerous burden at a time when many retirees are already facing retirement insecurity is neither what Congress intended nor what the statute requires. As such, this Court should reject the Second Circuit's new heightened pleading standard.

CONCLUSION

For the foregoing reasons, amici respectfully request the Court to reverse the Second Circuit's decision.

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LOUIS LOPEZ
Counsel of Record
WILLIAM ALVARADO RIVERA
STEFAN SHAIBANI
VICTORIA WILLIAMSON
AARP FOUNDATION
601 E Street NW
Washington, DC 20049
(202) 434-6666
llopez@aarp.org

Counsel for Amici Curiae