No. 23-1007

In the Supreme Court of the United States

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

ON A 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).

TABLE OF CONTENTS

Question presented ... i
Parties to the proceeding ... ii
Related proceedings ... iii
Table of authorities ... vi
Introduction ... 1
Opinions below ... 7
Jurisdiction ... 7
Statutory provisions involved ... 7
Statement of the case ... 8
- A. Statutory framework. ... 8
- B. Factual background. ... 9
- C. Proceedings below. ... 10

Summary of argument ... 14
Argument ... 20
I. The Second Circuit's approach conflicts with the statutory text. ... 20
- A. Petitioners have satisfied the plain language of § 1106, and adding atextual elements to that language is inappropriate. ... 20
- B. Section 1108's exemptions are affirmative defenses to be pleaded and proven by the defendant ... 21
- C. Traditional tools of statutory construction confirm Petitioners' reading. ... 25
- D. The Second Circuit's reliance on § 1106(a)'s "except as provided" language is inapt. ... 27

E. The Second Circuit's reference to a narrow criminal law exception to the general rule is unavailing. 29

II. The Second Circuit's approach conflicts with the case law, the law of trusts, and government practice. 31

A. Section 1106 establishes a categorical rule for prohibited transactions. 31

B. The common law of trusts supports Petitioners' reading 35

C. Petitioners' reading of § 1106 and § 1108 tracks federal government practice. 38

III. The Second Circuit's approach is a "fix" to a non-existent problem. 41

A. The Second Circuit's reading is unworkable 41

B. A plain-language reading of the prohibited-transaction provisions is not absurd. 44

C. A plain-language reading of the prohibited-transaction provisions has not led to a needless rise in litigation. 46

Conclusion 49

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004).. 42

Albert v. Oshkosh Corp.,
47 F.4th 570 (7th Cir. 2022) ....i, 4, 21

Allen v. GreatBanc Tr. Co.,
835 F.3d 670 (7th Cir. 2016)..
....1, 19, 23, 32, 37, 47

Allen v. GreatBanc Tr. Co.,
2015 WL 5821772 (N.D. Ill. Oct. 1, 2015) 39

Atl. Richfield Co. v. Christian,
590 U.S. 1 (2020) 28

In re Bernard L. Madoff Inv. Sec. LLC,
12 F.4th 171 (2d Cir. 2021)........................5, 16, 29, 30

Boggs v. Boggs,
520 U.S. 833 (1997).. 40

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009).............1, 3, 5, 39, 42, 47

Bugielski v. AT&T Servs., Inc.,
76 F.4th 894 (9th Cir. 2023) 3, 20, 45

Chamber of Com. v. U.S. Dep't of Lab.,
885 F.3d 360 (5th Cir. 2018) 40

Comm'r v. Keystone Consol. Indus., Inc.,
508 U.S. 152 (1993) 3, 8, 17, 32

Conkright v. Frommert,
559 U.S. 506 (2010) 3, 6, 20, 42

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 26

Crooks v. Harrelson,
282 U.S. 55 (1930) 44

Cyan Inc. v. Beaver Cnty. Emps. Ret. Fund,
583 U.S. 416 (2018) 28

Dupree v. Prudential Ins.,
2007 WL 2263892 (S.D. Fla. Aug. 7, 2007) 43

Elec. Storage Battery Co. v. Shimadzu,
307 U.S. 5 (1939) 24

Est. of Cowart v. Nickols Drilling Co.,
505 U.S. 469 (1992) 20

Evankavitch v. Green Tree Servicing, LLC,
793 F.3d 355 (3d Cir. 2015) 5, 29

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 35

Fish v. GreatBanc Tr. Co.,
749 F.3d 671 (7th Cir. 2014) 48

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 2, 22

Gomez v. Toledo,
446 U.S. 635 (1980) 5

Haley v. Teachers Ins. & Annuity Ass'n of Am.,
54 F.4th 115 (2d Cir. 2022) 23, 37, 43

Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 1, 16, 17, 31, 32, 35, 36

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan,
751 F.3d 740 (6th Cir. 2014) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 14, 15, 20, 21

Hughes v. Nw. Univ.,
595 U.S. 170 (2022) 1

Hughes v. Nw. Univ.,
63 F.4th 615 (7th Cir. 2023) 9

Javierre v. Cent. Altagracia,
217 U.S. 502 (1910) 22

Jimenez v. Quarterman,
555 U.S. 113 (2009) 6, 7

John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank,
510 U.S. 86 (1993)..5, 47

Jones v. Bock,
549 U.S. 199 (2007)... 24

Jones v. Harris Assocs. L.P.,
559 U.S. 335 (2010).............................13, 14, 33, 34, 35

Kelly v. Johns Hopkins Univ.,
2020 WL 434473 (D. Md. Jan. 28, 2020) 46

LaRue v. DeWolff, Boberg & Assocs., Inc.,
552 U.S. 248 (2008)... 35

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984)..................................... 32

Lockheed Corp. v. Spink,
517 U.S. 882 (1996)...42, 45, 48

Lowen v. Tower Asset Mgmt., Inc.,
829 F.2d 1209 (2d Cir. 1987) 23

Marshall v. Kelly,
465 F. Supp. 341 (W.D. Okla. 1978) 43

Marshall v. Northrop Grumman Corp.,
2020 WL 5668935 (C.D. Cal. Sept. 18, 2020).....46, 47

McKelvey v. United States,
260 U.S. 353 (1922)... 22

McLaughlin v. Rowley,
698 F. Supp. 1333 (N.D. Tex. 1988) 43

Meacham v. Knolls Atomic Power Lab'y,
554 U.S. 84 (2008).................4, 5, 15, 24, 25, 26, 27, 45

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).. 8

Muldrow v. City of St. Louis,
601 U.S. 346 (2024)... 46

Nat'l Sec. Sys., Inc. v. Iola,
700 F.3d 65 (3d Cir. 2012) 27, 28

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001)..................................... 28

Pub. Citizen v. U.S. Dep't of Just.,
491 U.S. 440 (1989)..18, 44, 45

Ramos v. Banner Health,
1 F.4th 769 (10th Cir. 2021) 4

Ramos v. Banner Health,
461 F. Supp. 3d 1067 (D. Colo. 2020) 9

Ruan v. United States,
597 U.S. 450 (2022)... 22

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005)... 26

Schlemmer v. Buffalo, Rochester & Pittsburgh Ry.,
205 U.S. 1 (1907) 22

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983)..1, 46

Sweda v. Univ. of Pa.,
923 F.3d 320 (3d Cir. 2019) 3, 4, 21

Taylor v. Sturgell,
553 U.S. 880 (2008)...22, 24

Thole v. U.S. Bank,
590 U.S. 538 (2020)... 48

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985)...44, 45

United States v. Cook,
84 U.S. (17 Wall.) 168 (1872)...................16, 29, 30, 31

United States v. Cruikshank,
92 U.S. 542 (1875)... 30

United States v. Dickson,
40 U.S. (15 Pet.) 141 (1841).............................4, 15, 22

United States v. Just,
74 F.3d 902 (8th Cir. 1996)....................................... 29

United States v. McArthur,
108 F.3d 1350 (11th Cir. 1997)................................. 31

United States v. Reese,
92 U.S. 214 (1875) 16, 30

United States v. Vuitch,
402 U.S. 62 (1971) 30

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 26

Vance v. Terrazas,
444 U.S. 252 (1980) 24

Yates v. United States,
574 U.S. 528 (2015) 26

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. VI 30

RULES, STATUTES, AND REGULATIONS

11 U.S.C. § 550 29

15 U.S.C. § 80a-15 34

18 U.S.C. § 922 29

28 U.S.C. § 1254 7

29 U.S.C.
§ 623 .... 24, 25, 27
§ 1001 .... 7, 8, 42
§ 1002 .... i, 2, 8, 20, 38
§ 1104 1

§ 1106.................... i, 1–21, 24–28, 31–32, 35–42, 44–47
§ 1108........... 1, 2, 4–9, 11–19, 21–28, 33–34, 36–44, 46
§ 1132–1138.. 38
§ 1132.. 47
§ 1204.. 38

29 C.F.R. § 2550 ....33, 34, 38

77 Fed. Reg. 5632 (Feb. 3, 2012).................................. 38

FED. R. CIV. P. 8..23, 40

SECONDARY SOURCES

BLACK'S LAW DICTIONARY (5th ed. 1979)................... 29

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John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) 44

Lauren K. Valastro, *How Misapplying* Twombly *Erodes Retirement Funds*, 32 GEO. MASON L. REV. (forthcoming 2025)... 6

RESTATEMENT (THIRD) OF TRUSTS, § 78.................... 36

OTHER AUTHORITIES

120 CONG. REC. 29932 (1974) 19, 45

120 CONG. REC. 29954 (1974) 45

120 CONG. REC. 29957 (1974) 8

120 CONG. REC. 30106 (1974) 8

S. REP. NO. 93-127 (1973) 19, 45

Dep't of Labor, Class Exemptions,
https://perma.cc/G2NQ-XF28 40

Dep't of Labor, Individual Exemptions,
https://perma.cc/VW28-7N8Q 40

Gov. Br., *Chao v. Hall Holding*,
285 F.3d 415 (6th Cir. 2002) (No. 00-3041)........38, 39

Gov. Br., *Allen v. GreatBanc Tr. Co.*,
835 F.3d 670 (7th Cir. 2016) (No. 15-3569)...6, 17, 39, 40

Gov. Br. Opp'n Cert., *Chao v. Hall Holding*,
537 U.S. 1168 (2003) (No. 02-593)............................ 39

Prohibited Transaction Exemption 2008-14; D-11424,
73 Fed. Reg. 70378 (2008).. 40

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 and defendants pleading and proving an exemption from liability under a separate provision—is 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 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 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

to 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 Congress's vision of using the prohibited-transaction provisions to address 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 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-transaction claim. And because these additional requirements have no grounding in § 1106's text, they

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[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.

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).

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, those compelling reasons favor Petitioners, not Respondents.

For one, § 1108 is entitled "Exemptions from prohibited transactions," and the text therein repeatedly 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).

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 such a phrase 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).

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 pre-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.").

Further, 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 Labor Department 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, per Respondents, 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). 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.

Finally, there are few if any actual suits where plaintiffs plead only the bare elements of a prohibited-transaction claim. Neither the Second Circuit nor Respondents have identified any evidence of this happening, even though parties in the Eighth Circuit could have done so for the past fifteen years. That is because there are built-in guardrails against bringing needless litigation, from the costs and resources required to bring an ERISA action, to fee-shifting and sanctions, to 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 statutory exemptions, and § 1108(a) grants the Labor Secretary discretion to recognize 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 and the Cornell University Tax Deferred Annuity 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 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. Respondents also retained and paid two outside companies, TIAA and Fidelity, for investment management and recordkeeping services. P.A. 8a. 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 paid 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 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 "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 paid several times that: between $115 and $183 per participant in one plan, and between $145 and $200 per participant in the other. 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 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. 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," 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 potentially broad scope of such a reading. But they nevertheless 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 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," 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) nor § 1106(c) 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 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. Concerned that applying the text of 29 U.S.C. § 1106(a) as written would cast too wide a net for liability, the Second Circuit below joined several other circuits in imposing on plaintiffs additional pleading requirements not found in that statutory provision's plain language. But it did so in unique fashion—by incorporating § 1108's exemptions into the plaintiff's pleading burden. Thus, to state a claim, plaintiffs must not only plead liability under § 1106(a), but also negate the applicability of any exemptions from liability under 29 U.S.C. § 1108.

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 like 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 Congress could have explicitly written a reasonableness requirement into § 1106. It did neither.

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)). But rather than treating § 1106 as a categorical bar, the panel 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 while 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 often only they know.

II.C. 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 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. 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 says what it means and means what it says. As reflected in the 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).

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, the Federal Rules allow courts to impose sanctions against plaintiffs who bring suits without basis. There is not, in short, some surplus of plaintiffs waiting to bring test cases to delineate ERISA's outer reach. ERISA beneficiaries "sue only when . . . there is a reason to do so." *Allen*, 835 F.3d at 677. And the cases they bring 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, *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," *Hughes Aircraft*, 525 U.S. at 447, they cannot saddle plaintiffs with extratextual requirements.

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 for 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 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). 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).

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, *FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948); 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 v. United States*, 260 U.S. 353, 357 (1922).

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 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 panel, however, a 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 affirmative defenses—as understood by this Court—work. On the former, Rule 8(c) 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 any 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 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. But here, the most compelling reasons 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 the same principle when it enacted ERISA in 1974.

Second, according to the panel, "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). 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, the word "exemption" is peppered throughout § 1108's text. In other statutes and other contexts, Congress has referred to "exemptions" interchangeably with "affirmative defenses." *See 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). That "title" may be "especially valuable" where "it reinforces what the text's nouns and verbs independently suggest." *Id.* at 552 (Alito, J., concurring). 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 liability, 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. Here, ERISA's prohibitions and exemptions are not merely 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 a 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 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, § 1108 is 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"). On the other hand, a limited number of transactions with parties in interest may assist with the efficient functioning of a plan, so long as certain specific exemptions and conditions 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.

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. 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 Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 197 (2d Cir. 2021) (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 various 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 has recognized this point, explaining—in response to the sort of argument Respondents make here—that "*Cook* is inapposite [because] it is grounded in the interpretation of a criminal statute." *In re Madoff*, 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 that are absent in civil statutes. The Court has said 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).

Even so, courts have read and applied *Cook* narrowly. They have generally done so 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 directing the reader to a separate section

of the U.S. Code—signifies an affirmative defense to be pleaded and proven by the defendant.

And even if *Cook* were applied to civil cases, § 1106(a)(1)(C) would fail its test. That is because *Cook* 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 or 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.

"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 *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993)). In other words, § 1106 covers 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. And since "*per se* rules" are "much simpler" to 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. The former 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 survived summary judgment, too). *See, e.g.*, P.A. 85a, 100a.

2. In addition, the Second Circuit's prescription is neither a "bright-line rule[]" nor a "categorical[] bar." *Allen*, 835 F.3d at 676; *Harris Tr.*, 530 U.S. at 242. To the contrary, 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, the panel demands 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 remedial 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, 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" 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; 29 C.F.R. § 2550.408b-2(c)(1)(iv).

Both § 1108(b)(2)(B) and its regulatory counterpart further state that the service provider shall "disclose the information required" to "the responsible plan fiduciary." 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 this exchange of information to the beneficiary.

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 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 some "analogous" statute.

More importantly, the ICA and ERISA are not "analogous." 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)). But ERISA beneficiaries do not, as outlined above, have "all [the] information." *Id.*

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.'" *Id.* at 341. 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 thus not 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 this Court's instruction that § 1106 was meant to "categorically bar[]" certain transactions, *Harris Tr.*, 530 U.S. at 241–42, importing the ICA's 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.").

1. That law has long recognized an information asymmetry between the trustee, who acts as a fiduciary,

and the beneficiary. Namely, 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). Consequently, at common law, the duty of loyalty was "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 duty of loyalty. *Harris Tr.*, 530 U.S. at 241–42. It does so 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 their fiduciary entered a transaction with a party in interest for the "furnishing of goods, services, or facilities." But a beneficiary would have little reason to know whether that transaction was reasonable, necessary, and for reasonable compensation given the information asymmetry outlined.

Nor are service contracts unique. Take a loan between a plan and an interested party. It would be sensible, given ERISA's protective purpose, 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 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 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 a university retirement plan. 54 F.4th at 118. To defend itself against a § 1106(a) claim, TIAA invoked two § 1108(b) exemptions: (b)(1), which exempts 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, (b)(1) requires detailed information on at least five conditions. And (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 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 and enforcing ERISA. *See* 29 U.S.C. §§ 1002(13), 1132–1138, 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, the Department spoke in plain 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 sued various defendants

for "purchasing stock on the [plan's] behalf without adequate investigation and [for] overpaying for the stock." In relevant part, the Secretary noted 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 acknowledged 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 defendants in *Hall* 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). The Court denied review.

3. The Department followed the same course in *Allen v. GreatBanc*, where the plaintiff alleged 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. *Id.* at *4. The Secretary, in an amicus brief on appeal, disagreed. It instead endorsed the Eighth Circuit's reading 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 explained, "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. *Allen*, 835 F.3d at 677.

4. On top of the twenty-one exemptions in § 1108(b), § 1108(a)(2) authorizes the Labor Secretary "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 and 17 class exemptions. Dep't of Lab., Individual Exemptions, https://perma.cc/VW28-7N8Q; Dep't of Lab., 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). And it has granted exemptions where it "[did] not believe Congress intended to cover" certain relationships. *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 367 (5th Cir. 2018).

In short, if Respondents wish to avoid § 1106(a), ERISA provides them several ways to do so. They can

plead and later prove their actions fall under § 1108(b)(2). They can plead another applicable § 1108(b) exemption. They can seek clarification and coverage under § 1108(a). What they cannot do 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. Once those boxes are checked, defendants may plead and later offer evidence of the applicability of any relevant exemptions. And courts—as in any other case—evaluate the entirety of that evidence.

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); *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." *Conkright*, 559 U.S. at 517. After all, 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 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), a loan, § 1106(a)(1)(B), or a transfer of property, § 1106(a)(1)(D), can be potentially harmful.

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 must overcome to plead a claim under the Second Circuit's rule, starting with the "simplest" case: a defendant that invokes 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); (b)(3) (for stock ownership plans); (b)(15) (for block trades); and (b)(17) (for investment advice). None of these exemptions are straightforward; all involve facts outside a plaintiff's knowledge.

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 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 and then plead plausible allegations negating *each* such exemption even if these exemptions have conditions which themselves have sub-conditions. 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 does not hedge. The Second Circuit's asserted textual hook—"except as provided"—does not discriminate between the § 1108 exemptions.

Thus, if, as the Second Circuit claims, it "flows directly from the text" that some of § 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 because none exists. The *proper* limiting principle is already built into the text: Plaintiffs plead liability under one provision; 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 produce "absurd results." P.A. 16a. Absurdity, 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). A plain language reading is, put another way, 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). In like manner, leading commentators have argued 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. The ADEA, after all, "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.

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." 120 CONG. REC. 29932 (1974) (remarks of Sen. Williams).

3. 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 instead reflects 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, Respondents suggest, exacerbate a "dramatic rise in the number of ERISA lawsuits over recordkeeping fees in recent years." BIO at 15. 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 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). A statute that leads to more excessive fee lawsuits and subsequently 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 in *Braden*. P.A. 17a. In the fifteen years since, ERISA cases have not ground the Eighth Circuit to a halt. Nor has there been some proliferation of complaints with standalone § 1106 claims and threadbare allegations. Several reasons help explain that result.

First, bringing an ERISA case is expensive and time-consuming, involving multiple defendants and many potential exemptions. The prototypical plaintiff will, given such constraints, "sue only when . . . there is a reason to do so." *Allen*, 835 F.3d at 677. Plaintiffs do not sue 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 formally satisfy § 1106(a), they would get a plaintiff nowhere in practice.

Second, ERISA and the Federal Rules include several mechanisms to deter plaintiffs from bringing cases to test the waters of the theoretical outer boundaries of § 1106. ERISA, for instance, permits cost-shifting. 29 U.S.C. § 1132(g)(1). And the Federal Rules allow courts to impose sanctions when plaintiffs bring groundless

litigation. *See Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 687 (7th Cir. 2014). Both mechanisms—fees and sanctions—discourage plaintiffs from bringing lawsuits just to bring lawsuits. Indeed, the district court here, following approval of the settlement, 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.

Finally, *Thole v. U.S. Bank*, 590 U.S. 538, 542 (2020), dismissed an ERISA case for lack of standing. There are important distinctions between this case and *Thole*. *Thole* involved a different type of plan, a different remedy, and a different source of injury. 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.

* * *

When Congress enacted ERISA, it opened the door for beneficiaries to bring claims against fiduciaries for actions 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 do so only if the benefits outweigh the costs and risks in a particular case. And even if they jump through those hoops, there is no guarantee a plaintiff will carry the day. All it means is that defendants must plead and prove their own case, and a court must consider all the evidence to determine whether a claim should proceed.

Rather than applying this 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 is not what the text provides.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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