

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-1007

CASEY CUNNINGHAM, ET AL., PETITIONERS

v.

CORNELL UNIVERSITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS
FOR LEAVE TO PARTICIPATE IN AND FOR DIVIDED ORAL ARGUMENT

Pursuant to Rule 28 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae and for divided argument, and respectfully requests that the United States be allowed ten minutes of argument time. The United States has filed a brief as amicus curiae supporting petitioners. Petitioners have consented to this motion and agreed to cede ten minutes of their argument time to the United States.

This case concerns the prohibited-transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. Among the “[p]rohibited transactions” is the “furnishing of goods, services, or facilities between the plan and a party in interest.” 29 U.S.C. 1106(a)(1)(C). The term “party in interest” includes “person[s] providing services to the plan.” 29 U.S.C. 1002(14)(B). ERISA elsewhere enumerates various transactions that are “exempted from” Section 1106’s “prohibitions,” including “[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.” 29 U.S.C. 1108(b)(2). The question presented asks whether petitioners -- participants in two defined-contribution ERISA plans -- were required to plead facts negating the reasonable-arrangements exemption in Section 1108(b)(2) in order to state a claim for relief against those plans’ fiduciaries (respondents) for violating Section 1106(a)(1)(C) by engaging in prohibited transactions for recordkeeping services.

The United States has filed a brief as amicus curiae in support of petitioners, arguing that the court of appeals erred in holding that the reasonable-arrangements exemption in Section 1108(b)(2) is incorporated into ERISA’s prohibitions against party-in-interest transactions in Section 1106(a); rather, the

exemptions enumerated in Section 1108 are defenses to liability that a defendant fiduciary must set up and prove. The United States has a substantial interest in this case. The Secretary of Labor has primary authority for administering ERISA, see 29 U.S.C. 1002(13), 1132-1138, and the question presented here can arise in both private suits and government enforcement actions.

The government has previously presented oral argument in other cases involving the interpretation and application of ERISA. See, e.g., Hughes v. Northwestern Univ., 595 U.S. 170 (2022); Intel Corp. Inv. Policy Comm. v. Sulyma, 589 U.S. 178 (2020); Retirement Plans Comm. of IBM v. Jander, 589 U.S. 49 (2020); Tibble v. Edison Int'l, 575 U.S. 523 (2015); Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014). In light of the substantial federal interest in the question presented, the United States' participation at oral argument would materially assist the Court in its consideration of this case.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

DECEMBER 2024