No. 23-1007

In the Supreme Court of the United States

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, prohibits a fiduciary from causing a plan to engage in certain transactions with a "party in interest," 29 U.S.C. 1106(a), which the statute defines to include any person that provides services to the plan, 29 U.S.C. 1002(14)(B). ERISA then specifies that a contract for "services necessary for the establishment or operation of the plan," at a "reasonable" cost, is not a prohibited transaction. 29 U.S.C. 1108(b)(2)(A).

The question presented is whether, to plausibly plead a prohibited-transaction claim challenging a contract for plan services, the plaintiff must allege only that the contract exists (as specified in 29 U.S.C. 1106(a)), or also that the service was unnecessary or that the compensation was unreasonable (as specified in 29 U.S.C. 1108(b)(2)(A)).

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Emp. Ben. Sec. Admin., U.S. Dep't of Lab., *Individual Exemptions* 40
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John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) 46

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BRIEF FOR RESPONDENTS

INTRODUCTION

Petitioners' position is that *any* transaction between a plan and a service provider is a prohibited transaction under ERISA. That means any time a plan uses an investment manager, recordkeeper, consultant, attorney, accountant, or any other routine service provider, the plan fiduciaries have violated ERISA. A plaintiff could sue the fiduciaries in their personal capacities and subject them to lengthy litigation. Pleading the mere fact of a service-provider transaction would allow the plaintiff to obtain burdensome discovery, and there is nothing the fiduciaries could do about it until (perhaps) summary judgment. That is a truly extraordinary position.

Nothing in ERISA's text, history, or purposes requires that absurd result. The statutory provisions at issue, 29 U.S.C. 1106(a)(1)(C) and 1108(b)(2)(A), work together to define the prohibited conduct. That is clear from Section 1106(a)'s express cross-reference to

Section 1108 – "[e]xcept as provided in Section 1108" – which incorporates the exception for necessary services at a reasonable cost as an element of the prohibited-transaction claim. That incorporation is needed to accurately define the wrongful conduct – which is not merely a transaction with a service provider, but one for unnecessary services or at an unreasonable cost. Several of this Court's decisions have interpreted similar statutory exceptions as elements of claims, as opposed to affirmative defenses. Petitioners' interpretation would make key language in Section 1106(a) superfluous and would create conflicts between the prohibited-transaction provisions and other provisions of ERISA that require or contemplate the use of service providers.

Not only is petitioners' position contrary to the statutory text, but it also would completely skew the balance Congress struck in ERISA. Congress enacted the prohibited-transaction provisions to target transactions that risk harming the plan. There is nothing inherently harmful about using service providers; they perform many necessary and beneficial functions for plans and participants. Petitioners' position would spawn massive litigation, where a plaintiff could merely plead the fact of a service-provider transaction and then use discovery as a fishing expedition to try to find something that plan fiduciaries did wrong. That ultimately would hurt plan participants and beneficiaries – the very people petitioners claim to protect.

Notably, the government recognizes that petitioners' regime is intolerable. The government's solution is to require a plaintiff to plead that the service provider's fees were unreasonable – which is essentially respondents' position. The fact that the government

lacks the courage of its convictions confirms that the Second Circuit got it right.

Requiring a plaintiff to plausibly plead that a service-provider transaction involved unreasonable fees or unnecessary services is sensible and workable. A plaintiff simply needs to plausibly allege a theory about what the fiduciary did wrong; those theories are located in Section 1108. In this case, as in most cases, the Section 1108 provision that applies is obvious. Further, ERISA's robust reporting and disclosure provisions ensure that participants and beneficiaries have ample information about their plans and services. Petitioners' complaints cannot be taken seriously when even the government acknowledges they should have to plead more than the mere fact of a service-provider transaction.

This Court should affirm.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-35a.

STATEMENT

Petitioners are current and former participants in two retirement plans sponsored by Cornell University that are governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. Petitioners sued respondents, alleging (*inter alia*) that they engaged in prohibited transactions under ERISA by causing the plans to use third-party recordkeepers. The district court dismissed that count for failure to state a claim, Pet. App. 106a-110a, and the court of appeals affirmed, *id.* at 14a-26a.

A. Legal Background

ERISA "represents a careful balancing" between protecting plan participants and beneficiaries and giving employers the flexibility they need to design and administer their plans. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted). ERISA does not require employers to provide any particular level of benefit, or even to offer benefit plans in the first place. *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Instead, it imposes duties on plan fiduciaries once an employer has decided to offer a plan. *Ibid.*

ERISA's duty of prudence requires a fiduciary to act "'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting 29 U.S.C. 1104(a)(1)(B)). ERISA's duty of loyalty requires a fiduciary to act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of" "providing benefits to participants and their beneficiaries" and "defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1).

ERISA supplements the duty of loyalty by "categorically barring certain transactions deemed likely to injure the pension plan." *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-242 (2000) (internal quotation marks omitted); see 29 U.S.C. 1106, 1108. As relevant here, ERISA prohibits certain transactions between a plan and a "party in interest." 29 U.S.C. 1106(a). A "party in interest" is broadly defined to include practically anyone connected to the employer or the plan, including any "person providing services" to the plan. 29 U.S.C. 1002(14). Separately, ERISA also prohibits certain

transactions between a plan and a fiduciary. 29 U.S.C. 1106(b).

ERISA addresses prohibited transactions with parties in interest in two steps. First, Section 1106(a) sets out a general rule: "Except as provided in section 1108," a plan fiduciary may not cause the plan to enter into five categories of transactions with a party in interest, including any transaction involving the "furnishing of goods, services, or facilities." 29 U.S.C. 1106(a)(1)(C).

Then Section 1108 provides exceptions to the general rule. It states that "[t]he prohibitions provided in section 1106 * * * shall not apply" to certain types of transactions, 29 U.S.C. 1108(b), including any contract "for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor," 29 U.S.C. 1108(b)(2)(A). Thus, ERISA permits a contract for necessary plan services at a reasonable cost.

B. Factual Background

The complaint pleaded the following facts, which are taken as true at the motion-to-dismiss stage.

Cornell University sponsors two retirement plans for eligible faculty and staff (the plans). Pet. App. 6a. The plans are tax-deferred defined-contribution plans. *Ibid.*; see 26 U.S.C. 403(b). In a defined-contribution plan, participants maintain individual accounts, and the value of each account depends on the amount contributed and the performance of the investments chosen. Pet. App. 6a-7a; see *Tibble*, 575 U.S. at 525.

Cornell University is the named administrator for the plans. Pet. App. 7a. It delegated administrative responsibilities for the plans to its then-chief human

resources officer, respondent Mary Opperman. *Ibid.* Opperman chaired respondent Retirement Plan Oversight Committee, which was responsible for overseeing the plans' investments. *Ibid.* In carrying out their respective roles, respondents (collectively, Cornell) served as fiduciaries under ERISA. *Ibid.*

Plan participants could choose from a menu of investment options from Fidelity and the Teachers Insurance and Annuity Association of America (TIAA). Pet. App. 8a. Those options included fixed annuities, variable annuities, and mutual funds. *Id.* at 8a-9a. TIAA and Fidelity provided recordkeeping services for the investments on their respective platforms. *Id.* at 8a. Recordkeeping services are "necessary administrative [services] such as tracking account balances and providing regular account statements." *Ibid.*

In addition to Fidelity and TIAA, the plans used other service providers. One is CapFinancial Partners, LLC (CAPTRUST), an investment advisor Cornell hired to help evaluate the performance of the plans' investment options and to help reduce fees and operational costs. Pet. App. 7a, 37a-38a, 40a-41a. Cornell also engaged an accounting firm, BCA Watson Rice, to audit its financial statements, as ERISA requires. C.A. J.A. A206; see 29 U.S.C. 1023(a)(3).

C. District Court Proceedings

1. Petitioners are a class of current and former Cornell University employees who participated in the plans between August 2010 and August 2016. Pet. App. 45a. In 2016, they sued Cornell, alleging a variety of ERISA violations. *Id.* at 88a-89a; see 29 U.S.C. 1132(a)(2).[1] This case was part of a wave of lawsuits

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[1] Petitioners also sued CAPTRUST. Pet. App. 9a. The district court dismissed or granted summary judgment to CAPTRUST on

raising near-identical claims filed against fiduciaries of dozens of large university retirement plans by the same few plaintiffs' firms. Pet. App. 36a n.15, 93a.

Petitioners brought two claims concerning recordkeeping fees. First, they alleged that Cornell breached its duty of prudence by failing to monitor and control recordkeeping fees. Pet. App. 100a. Second, they alleged that Cornell engaged in prohibited transactions simply by causing the plans to transact with Fidelity and TIAA for recordkeeping services. *Id.* at 108a; see J.A. 145-146 (¶¶ 229-231).

2. Cornell moved to dismiss the complaint. Pet. App. 89a. The district court denied the motion on the imprudence claim but granted it on the prohibited-transaction claim. *Id.* at 100a, 110a. The court permitted the imprudence claim to proceed because petitioners' allegations mirrored those in another case where the court permitted discovery. *Id.* at 100a.

The district court then held that, to plead a prohibited transaction under ERISA, a plaintiff must plead "self-dealing or other disloyal conduct," which petitioners had not alleged. Pet. App. 109a-110a. Otherwise, the court explained, a "pension plan's most basic operations" would be prohibited transactions. *Id.* at 109a (internal quotation marks omitted).

Following extensive discovery, the district court granted Cornell summary judgment on the imprudence claim. Pet. App. 44a, 55a-58a. It explained that petitioners could not obtain damages without showing plan losses, which meant showing that Cornell could have paid lower recordkeeping fees. *Id.* at 56a-57a.

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all claims, *id.* at 84a-85a, 110a-111a; the court of appeals affirmed on the one claim petitioners appealed, *id.* at 39a; and petitioners did not seek review of that holding in this Court, Pet. ii.

Petitioners relied on two experts to make that showing, but the court excluded their opinions under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because both lacked a reliable methodology – leaving petitioners with no evidence of loss. Pet. App. 57a-66a.

D. Court Of Appeals Proceedings

The court of appeals affirmed. Pet. App. 1a-41a.

1. On the prohibited-transaction claim, the court held that the district court applied the wrong legal standard, but that petitioners' claim fails under the correct standard. Pet. App. 18a-19a, 25a-26a. To plead a prohibited-transaction claim based on a service-provider transaction, the court explained, "it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services." *Id.* at 6a. "[R]ather, the complaint must plausibly allege that the services were unnecessary or involved unreasonable compensation." *Ibid.* (citation omitted).

The court of appeals explained that its rule "flow[ed] directly from the text and structure of the statute." Pet. App. 19a. Section 1106(a) "begins with the carveout: 'Except as provided in section 1108 of this title.'" *Ibid.* (quoting 29 U.S.C. 1106(a)). That language "incorporates" Section 1108's exemption for reasonable compensation for necessary services "directly into § 1106(a)'s definition of prohibited transactions." *Ibid.* That incorporation is necessary to "accurately and clearly describe[]" the conduct Congress intended to prohibit – "transactions that actually present a risk of harm to the plan." *Id.* at 22a-23a (internal quotation marks omitted). Otherwise, ERISA would prohibit "a vast array of routine transactions," such as "recordkeeping, investment manage-

ment, [and] investment advising." *Id.* at 21a-22a (internal quotation marks omitted). An ERISA plaintiff could proceed to discovery simply by pleading the fact of a service-provider transaction, without any allegation of wrongful conduct. *Id.* at 21a.

2. On the imprudence claim, the court affirmed summary judgment in favor of Cornell. Pet. App. 32a-34a. The court explained that petitioners failed to show any losses to the plans and abandoned any request for equitable relief. *Id.* at 32a-34a & 34a n.14.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that a plaintiff challenging a service-provider transaction under 29 U.S.C 1106(a)(1)(C) must plead that the transaction is not exempted under 29 U.S.C. 1108(b)(2)(A).

A. The statutory text makes clear that Section 1106(a) and Section 1108 together define a prohibited transaction.

In a series of decisions beginning with *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), this Court explained how to determine when a statutory exception is an element of a claim or an affirmative defense. This is a context-specific inquiry that depends on the provisions' text, structure, and substantive scope. The ultimate question is whether the wrongful conduct that Congress sought to prohibit can be accurately described without reference to the exception. If it cannot, then the exception is an element.

Applying that framework here shows that Section 1108(b)(2)(A) sets out an additional element of a Section 1106(a)(1)(C) claim, not an affirmative defense. Section 1106(a) expressly incorporates the Section 1108 exceptions into its definition of prohibited transactions; the prohibitions apply "[e]xcept as provided in

Section 1108." By itself, Section 1106(a)(1)(C) applies to all service-provider transactions, regardless of whether they threaten harm to the plan. Incorporating Section 1108(b)(2)(A)'s exception is necessary to limit the cause of action to the wrongful transactions Congress intended to prohibit. That conclusion fits comfortably within this Court's precedents, several of which treat similar statutory exceptions as elements.

Petitioners' principal argument is that every statutory exception is an affirmative defense. But *Cook* says the opposite, as do the Court's numerous decisions holding that statutory exceptions are elements. Petitioners rely on the statement from *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841), that when a "proviso carves special exceptions only out of the enacting clause," "those who set up any such exception[] must establish it." But that language addresses who has the burden of proof on an affirmative defense, not whether a provision is an affirmative defense in the first place.

Petitioners analogize the prohibited-transaction provisions to the anti-discrimination law in *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), but the statutory schemes have critical differences. Petitioners also argue that Section 1106(a)(1)(C) can be read grammatically on its own, but that ignores the crucial question whether doing so accurately captures the wrongdoing that Congress intended to target.

B. Petitioners' statutory interpretation makes no sense in context. Petitioners ignore the key textual differences between Section 1106(a), which applies broadly to many innocuous transactions, and Section 1106(b), which applies only to inherently conflicted transactions. Critically, only Section 1106(a) – and

not Section 1106(b) – begins with a cross-reference incorporating Section 1108's exemptions. Under petitioners' view, that key language would be superfluous.

Petitioners' view also would create conflicts between the prohibited-transaction provisions and the many provisions in ERISA that require or allow the use of service providers. Under petitioners' view, the very conduct that ERISA permits in one provision would be prohibited by another.

C. Petitioners' reading of Section 1106(a) would completely skew the balance Congress struck in ERISA. Service providers perform many necessary and valuable functions for plan participants and fiduciaries. They offer investment funds and platforms, investment assistance, and recordkeeping services. They also perform critical accounting and legal functions. Yet under petitioners' position, those are all prohibited transactions.

Under petitioners' view, virtually any fiduciary could be sued without any allegation of wrongdoing, and the lawsuit would proceed through expensive discovery, with summary judgment as the defendant's first opportunity to dismiss the case. The immense burden of litigation would be borne disproportionately by defendants. That ultimately would harm participants and fiduciaries, because fiduciaries could feel compelled to reduce investment options and services, or employers could decide to stop offering plans altogether to avoid that litigation.

In an attempt to avoid those problems, the government proposes that a plaintiff challenging a service-provider transaction should have to plead that the service provider's fees were not obviously reasonable. But that is essentially Cornell's position. And the government seeks to achieve that result by distorting the

pleading standard and the Federal Rules, rather than by simply treating the Section 1108(b) exception as an element of the Section 1106(a) claim.

D. Petitioners argue that Cornell's position is unworkable because a plaintiff may not know which Section 1108 exception applies. But all a plaintiff has to do is to plausibly plead what he or she thinks the fiduciary did wrong with respect to the transaction (from the options specified in Section 1108). In most cases – as in this one – the applicable Section 1108 provision will be obvious. ERISA's reporting and disclosure requirements ensure that a potential plaintiff has the information needed to bring a claim.

E. Petitioners rely on trust law. But nothing in trust law suggests that a plaintiff can bring suit to challenge a transaction without alleging any wrongdoing; in fact, the trust-law rule is the opposite. The government points to a common-law rule against delegation, but ERISA repudiates that rule.

F. The government argues that petitioners adequately alleged a prohibited transaction here. That issue is not within the question presented. In any event, petitioners did not adequately allege unreasonable fees, because they did not compare the fees to the services provided. And if petitioners' prohibited-transaction claim were allowed to proceed, it would fail on the merits, just like their imprudence claim, because after years of discovery, petitioners could not show unreasonable fees.

ARGUMENT

AN ERISA PLAINTIFF BRINGING A PROHIBITED-TRANSACTION CLAIM BASED ON A SERVICE-PROVIDER TRANSACTION UNDER 29 U.S.C. 1106(a)(1)(C) MUST ALLEGE THAT THE SERVICES WERE UNNECESSARY OR THAT THE COMPENSATION WAS UNREASONABLE UNDER 29 U.S.C. 1108(b)(2)(A)

A. The Text Makes Clear That Section 1108 Sets Out Elements Of A Section 1106(a) Claim

1. A statutory exception is an element when it is needed to define the prohibited conduct

In a series of decisions starting with *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), the Court set out a framework to determine whether a statutory exception is an element of a claim or an affirmative defense. The Court has applied this framework in both civil and criminal cases, see, *e.g.*, *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91-95 (2008); *United States* v. *Vuitch*, 402 U.S. 62, 69-70 (1971), and it has a long pedigree, see *Cook*, 84 U.S. at 173-181 (citing English and American decisions and treatises from the late 1600s to early 1800s).[2]

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[2] Contrary to petitioners' contention (Br. 29-30), *Cook*'s framework is not limited to criminal cases. *Cook* relied principally on two civil cases, *Steel* v. *Smith* (1817) 106 Eng. Rep. 35, and *Jones* v. *Axen* (1696) 91 Eng. Rep. 976. See 84 U.S. at 176-177. This Court often has applied *Cook*'s framework in civil cases. *E.g.*, *Meacham*, 554 U.S. at 92; *United States* v. *First City Nat'l Bank of Hous.*, 386 U.S. 361, 366 (1967); *Maxwell Land-Grant Co.* v. *Dawson*, 151 U.S. 586, 604-605 (1894).

Neither *United States* v. *Reese*, 92 U.S. 214, 232 (1876), nor *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1876), limited

The fundamental question, the Court explained, is whether the wrongful conduct that Congress sought to prohibit can be accurately described without reference to the exception. *Cook*, 84 U.S. at 173. When "the ingredients of the offence cannot be accurately and clearly described if the exception is omitted," then the exception is an element. *Ibid.* But if "the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception," then "the matter contained in the exception is matter of defence." *Id.* at 173-174. For example, a statute that forbids "[l]abor and travelling on the Lord's day, except from necessity and charity" is "an example where the exception is a constituent part of the offence, as it is not labor and travelling, merely, which are prohibited, but unnecessary labor and travelling, or labor and travelling not required for charity." *Id.* at 180 (emphasis omitted).

Determining whether an exception is an element or an affirmative defense is context-specific. *Cook*, 84 U.S. at 174-175. It depends on the language in the provisions at issue; the structure of the statute; and the scope of both the initial prohibition and the exception. See *Ruan* v. *United States*, 597 U.S. 450, 464 (2022); *Meacham*, 554 U.S. at 92; *Vuitch*, 402 U.S. at 69-71. The mere fact that Congress called something an "exception" or an "exemption" is not dispositive; the Court's decisions start with the recognition that provisions use that language, then ask whether the exception nonetheless describes an element rather than an affirmative defense. See *Cook*, 84 U.S. at 173-177.

Cook to criminal cases: Both simply cited *Cook* for the proposition that an indictment must "accurately and clearly" allege all elements.

When an exception is "laid out apart from the prohibitions," that tends to suggest that the exception is an affirmative defense. *Meacham*, 554 U.S. at 91. But "when an exception is incorporated in the enacting clause of a statute," the exception looks like an element. *Vuitch*, 402 U.S. at 68, 70-71 (when statute prohibited abortion unless "done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine," the exception was an element).

The key consideration is the breadth of the initial prohibition and the exception. If the initial prohibition captures a vast array of conduct, some of which is wrongful and some of which is beneficial, the exception likely is needed to limit the prohibition to wrongful conduct. See *Ruan*, 597 U.S. at 458-459. For example, in the Controlled Substances Act of 1970 (CSA), the prohibition on "knowingly or intentionally" distributing controlled substances applies "[e]xcept as authorized by this subchapter," 21 U.S.C. 841(a), including pursuant to a legitimate prescription, 21 U.S.C. 829; 21 C.F.R. 1306.04(a). The "except as authorized" clause operates "like an element," because "lack of authorization" is "what separates" "morally blameworthy" conduct (unauthorized distribution of controlled substances) from "socially necessary" conduct (physicians prescribing "medications that their patients need"). *Ruan*, 597 U.S. at 458-459, 464.[3]

[3] The CSA provides that the government need not "negative" an "exemption or exception" in an indictment. 597 U.S. at 462 (quoting 21 U.S.C. 885). But as the Court recognized, that unique provision does not diminish the "crucial role" the exception plays in defining the wrongful conduct. *Id.* at 464.

In contrast, when the initial prohibition addresses primarily wrongful conduct and the exception is narrow, the exception is more likely to be an affirmative defense. For example, the Clayton Act's prohibition of anticompetitive mergers is subject to an exception for bank mergers in the public interest, and the exception is an affirmative defense because it provides a narrow escape hatch from the "norm" that anticompetitive mergers are prohibited. *United States* v. *First City Nat'l Bank of Hous.*, 386 U.S. 361, 366 (1967) (citing 12 U.S.C. 1828(c)(5)(B)).

2. Section 1108 sets out elements of a Section 1106(a) claim

Section 1106(a) states that "[e]xcept as provided in section 1108," a fiduciary cannot cause a plan to engage in any transaction that "constitutes a direct or indirect * * * furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. 1106(a)(1)(C). Section 1108(b) then exempts "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. 1108(b)(2)(A).

Those provisions together define a prohibited transaction for plan services under ERISA. More generally, to plead a prohibited-transaction claim based on a transaction between a plan and a party in interest, a plaintiff must plead both that the transaction qualifies under Section 1106(a) and that the transaction is not allowed under Section 1108.

Section 1106(a) begins with a clause indicating that it should be read together with Section 1108: "Except as provided in section 1108," a fiduciary may not cause the plan to engage in five broad categories

of prohibited transactions. 29 U.S.C. 1106(a). That language "directly" "incorporate[s]" Section 1108 in defining the prohibited conduct. Pet. App. 19a; see *Cook*, 84 U.S. at 177 (exception's "incorporat[ion] in the enacting clause" by "words of reference" suggests the exception is an element (internal quotation marks and emphasis omitted)); *Vuitch*, 402 U.S. at 70 (similar).

Indeed, by placing this language at the very beginning of Section 1106(a), Congress immediately signaled that Section 1106(a)'s prohibitions can only be understood in conjunction with Section 1108's exemptions. See *United States* v. *English*, 139 F.2d 885, 886 (5th Cir. 1944) (when statute began "[e]xcept as otherwise provided in this section and in section 310a," "[t]his deliberate action must be construed to indicate the legislative intent that the exceptions referred to should be read into and construed with the affirmative definition of the offense" (internal quotation marks omitted)).

It is true that Section 1108 sets out the exceptions in a separate statutory section. See Pet'rs Br. 26-27. But that placement is not dispositive: An "exception" could be "in a subsequent clause or section, or even in a subsequent statute" and still would be an element if "it would be impossible to frame the actual statutory charge * * * without an allegation showing that the accused was not within the exception." *Cook*, 85 U.S. at 175. Indeed, this Court has held that exceptions contained in separate sections or subsections are elements. See, *e.g.*, *Ruan,* 597 U.S. at 460; *United States* v. *Behrman*, 258 U.S. 280, 287 (1922); *Ledbetter* v. *United States*, 170 U.S. 606, 610-611 (1898). Here, Congress had good reason to place the exceptions in Section 1108, as opposed to Section 1106: The exceptions apply to both Section 1106(a) and Section

1106(b), see pp. 26-27, *infra*, so by placing the exceptions in a separate section, Congress could list them just once.

Only together do Section 1106(a) and Section 1108 accurately define the wrongful conduct. Congress enacted the prohibited-transaction provisions to target transactions that are "likely to injure" the plan. *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-242 (2000) (quoting *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). On its own, Section 1106(a) "encompass[es] a vast array of routine transactions." Pet. App. 21a. It covers any "direct or indirect" transfer, loan, purchase, sale, exchange, or furnishing of money, goods, property, or services between a plan and a party in interest – without regard to the terms or circumstances of the transactions. 29 U.S.C. 1106(a)(1)(A)-(E). "Party in interest" is defined broadly to include virtually anyone connected to the plan, including all plan fiduciaries, counsel, and employees; plan participants (as "employees" of the "employer"); service providers; and close relatives of any fiduciary, employer, or service provider. 29 U.S.C. 1002(14).

The result is that Section 1106(a) covers virtually every plan transaction, regardless of whether it risks harming the plan. Petitioners identify (Br. 42) only *one* transaction with a party in interest not covered by Section 1106(a) – the payment of plan benefits, which this Court exempted in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 895 (1996).[4] The breadth of the routine, innocuous conduct covered by Section 1106(a) stands in

[4] Because a service provider becomes a party in interest by "providing services" to the plan, 29 U.S.C. 1002(14)(B), some courts of appeals have held that Section 1106(a) does not cover a fiduciary's initial transaction with a service provider. See *D.L.*

stark contrast to the inherently suspect conduct covered by Section 1106(b), all of which involves conflicts of interest. Pet. App. 23a; see p. 25, *infra*.

The particular Section 1106(a) provision at issue is incredibly broad. It covers any transaction that involves furnishing any services to a plan. 29 U.S.C. 1106(a)(1)(C). Service-provider transactions are not inherently risky; they are necessary for plans to function. Pet. App. 21a-22a. Plans rely on service providers for routine services such as investment management, recordkeeping, accounting, auditing, and legal services. See, *e.g.*, C.A. J.A. A206. ERISA requires fiduciaries to engage service providers in some instances and expressly contemplates it in others. See pp. 28-29, *infra*.

It makes no sense to say that merely engaging a service provider is prohibited under ERISA. As with the medical professionals in *Ruan*, *Vuitch*, and *Behrman*, a plan fiduciary that engages a service provider for essential plan services is just doing what ERISA requires and expects. That conduct benefits plan participants. The conduct that threatens the plan is engaging a service provider for services that are unnecessary or unreasonably expensive. The way to define the prohibition to reach only that conduct is to treat the Section 1108(b)(2) exception as an element of a

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Markham DDS, MSD, Inc. 401(K) Plan v. *Variable Annuity Life Ins.*, 88 F.4th 602, 609-610 (5th Cir. 2023), cert. denied, 144 S. Ct. 2525 (2024); *Ramos* v. *Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021); *Danza* v. *Fidelity Mgmt. Tr. Co.*, 533 F. App'x 120, 125-126 (3d Cir. 2013) (unpublished). Although that approach somewhat narrows the scope of Section 1106(a)(1)(C), it still prohibits new transactions with an existing provider, even though those transactions pose no inherent risk of harm to the plan.

prohibited-transaction claim that a plaintiff must plead and prove.

The breadth of the Section 1108(b)(2) exception confirms that it sets out an element, as opposed to an affirmative defense. When an exception is so broad that "in most cases" it removes the challenged conduct from the prohibition's scope, the exception more likely is an element. *United States* v. *Carey*, 929 F.3d 1092, 1101-1103 (9th Cir. 2019); see *Ruan*, 597 U.S. at 459, 462-464. That is true here: The norm is that ERISA fiduciaries fulfill their fiduciary duties by engaging service providers for routine, necessary services at a reasonable cost. See 29 U.S.C. 1104(a)(1).

3. Petitioners' arguments lack merit

a. Petitioners' primary argument (Br. 22, 25-26) is that any statutory "exception" or "exemption" necessarily is an affirmative defense. They rely (Br. 22) on the statement in *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841), that when a "proviso carves special exceptions only out of the enacting clause," "those who set up any such exception[] must establish it."

Petitioners' argument cannot be reconciled with *Cook*, which assumes that a provision is an "exception" or "exemption" but nonetheless asks whether it is an element or an affirmative defense. 84 U.S. at 173-177. It also cannot be reconciled with the many decisions holding that statutory exceptions are elements. *E.g.*, *Ruan*, 597 U.S. at 460; *Vuitch*, 402 U.S. at 70-71; *Behrman*, 258 U.S. at 287; *Ledbetter*, 170 U.S. at 610-611; *United States* v. *Britton*, 107 U.S. 655, 669-670 (1883).

Further, the *Dickson* language did not address the element-or-defense question here. It addressed (in *dicta*) which party must plead and prove "special exceptions" such as affirmative defenses. 40 U.S. at 165.

The answer is that the party who "set[s] up any such exception[] must establish it." *Ibid.* *Dickson* thus establishes that the defendant has the "burden of proving" an "affirmative defense," *Dixon* v. *United States*, 548 U.S. 1, 13-14 (2006) – not that every exception is an affirmative defense.

The other cited decisions (Pet'rs Br. 22; U.S. Br. 13) likewise address which party had the "burden of proving" an affirmative defense, rather than whether an exception was an affirmative defense (which was not disputed). *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); see *McKelvey* v. *United States*, 260 U.S. 353, 356-357 (1922); *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508 (1910).

Meacham is the same: Its language about needing "compelling reasons" to overcome a "longstanding convention" refers to *Dickson*'s rule that the defendant bears the "burden of persuasion" on an affirmative defense. 554 U.S. at 91-92. The Court already had determined that the exception at issue was an "affirmative defense." *Id.* at 91. The *Dickson* line of cases thus does not answer the question here. See *Carey*, 929 F.3d at 1097-1099.

b. Petitioners compare (Br. 24-25) the statute here to the provisions in *Meacham*, but they ignore key differences. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits age discrimination in employment, 29 U.S.C. 623(a)-(c), (e), with a narrow exception for decisions based on reasonable factors other than age, 29 U.S.C. 623(f). The initial prohibition there targets blameworthy conduct, whereas Section 1106(a)(1)(C) covers many routine and necessary plan transactions. Thus, unlike in the ADEA, the exception here is needed to reach only blameworthy conduct. Further, the ADEA's exception is separate from the prohibitions, with no cross-reference (like the one

here) to incorporate the exception. Compare 29 U.S.C. 623(a)-(c), (e), with 29 U.S.C. 1106(a). Those differences favor interpreting the Section 1108(b)(2)(A) exception as an element.

Petitioners assert (Br. 29) that no decision treats an "except as provided in" clause as an element. That is wrong. See, *e.g.*, *Ruan*, 597 U.S. at 464 ("except as authorized by this subchapter" functions as an element); *Ledbetter*, 170 U.S. at 610-611 (same for "otherwise than as hereinafter provided"); *English*, 139 F.2d at 886 (same for "[e]xcept as otherwise provided in this section and in section 310a"). There may be comparatively more decisions where courts have found exceptions to be affirmative defenses rather than elements. But that is because Congress generally does not write initial prohibitions in broad terms that cover an enormous amount of beneficial conduct, not because there is a thumb on the interpretive scale.

Petitioners cite (Br. 28) *Atlantic Richfield Co.* v. *Christian*, 590 U.S. 1 (2020), for the proposition that statutes that say "except as provided" all set out affirmative defenses. *Atlantic Richfield* addressed a different issue, which is whether the Court should use the scope of a particular exception to interpret the scope of the statute's initial prohibition. *Id.* at 16. The Court said no, because exception clauses "explain what happens in the case of a clash" with the initial prohibition; they "do not otherwise expand or contract the scope of either provision." *Ibid.* Cornell is not seeking to narrow the text of Section 1106(a)(1)(C), but to require a plaintiff to plead the additional element under Section 1108(b)(2).

c. That leaves petitioners and their *amici* with a hodgepodge of other arguments. None has merit.

Petitioners argue (Br. 31) that Section 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.'" But the question is not whether the provision makes grammatical sense; the question is whether the exception is needed to accurately describe the substance of the wrongful conduct. *Cook*, 84 U.S. at 173.

Petitioners (Br. 22-23) and the government (Br. 13-14) contend that Section 1108(b) must set out an affirmative defense because the defendant bears the burden of proof on it. That is backwards and wrong. Because Section 1108(b)(2)(A) sets out an element of a prohibited service-provider transaction, the burden is on the plaintiff to both plead and prove it. *Taylor* v. *Sturgell*, 553 U.S. 880, 907 (2008).

In the decision below, the court of appeals "le[ft] undisturbed" its precedent holding that the defendant bears the burden of proof on a Section 1108(b)(2) exception. Pet. App. 23a (citing *Lowen* v. *Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987)). The court of appeals' *dicta* is wrong, but the burden of proof issue is not within the question presented to this Court. Pet. i. On the question presented, the Second Circuit correctly held that Section 1106(a)(1)(C) and Section 1108(b)(2)(A) together define the prohibited transaction.

Petitioners (Br. 26) rely on the statutory headings. That is just a reprise of their (mistaken) argument that every exception is an affirmative defense. In any case, headings "cannot substitute for the operative text of the statute," *Florida Dep't of Rev.* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008), which here makes clear that Section 1108(b)(2)(A) is an element.

Some *amici* argue that Cornell seeks to impose a "heightened pleading standard" for Section 1106(a) claims. AAJ *Amicus* Br. 18; AARP *Amicus* Br. 10. That is wrong. The question is what provisions are elements to be pleaded by the plaintiff. Once those elements are determined, the usual pleading standard applies. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

Finally, petitioners note (Br. 22-23) that several courts of appeals called Section 1108's exemptions "affirmative defenses." Many did so in *dicta*, without considering the pleading-standard question here. Most courts that have considered that question have rejected petitioners' view. See pp. 29-30, *infra*.[5] So reliance on lower-court decisions gets petitioners nowhere.

B. Petitioners' Interpretation Makes No Sense In Context

1. Section 1106(b) confirms that petitioners' view is incorrect

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Here, Section 1106(b) confirms that Cornell's statutory interpretation is correct.

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[5] Petitioners cite (Br. 38) Department of Labor guidance, but that guidance does not address the pleading-standard question. See Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012). The government does not seek any deference, and none would be appropriate. See *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024).

a. Section 1106(a) covers transactions between the plan and a party in interest, while Section 1106(b) covers transactions between the plan and a fiduciary. Unlike the routine transactions set out in Section 1106(a), the transactions in Section 1106(b) all pose an inherent risk of harm to the plan, because they involve a fiduciary either personally benefitting from a plan transaction or acting on behalf of a party whose interests are adverse to the plan. Specifically, Section 1106(b) applies when a fiduciary deals with plan assets "in his own interest or for his own account," 29 U.S.C. 1106(b)(1); acts on behalf of a party "whose interests are adverse to the interests of the plan," 29 U.S.C. 1106(b)(2); or "receive[s] any consideration for his own personal account" from a party transacting with the plan, 29 U.S.C. 1106(b)(3).

That difference in scope is why Congress took different approaches to designating the elements a plaintiff must plead and prove to establish prohibited-transaction claims under Section 1106(a) and Section 1106(b). For a Section 1106(a) transaction, the plaintiff must plead that the conduct does not fall within the relevant Section 1108 exception to plead conduct likely to injure the plan. That is not needed for a Section 1106(b) transaction, because pleading only the elements in Section 1106(b) pleads wrongful conduct.

b. The key language at the beginning of Section 1106(a) shows that Congress wanted to treat the two subsections differently. The cross-reference at the beginning of Section 1106(a) – "Except as provided in section 1108" – is conspicuously missing from Section 1106(b).

The Section 1106(a) cross-reference is not needed to indicate that Section 1108 exempts transactions from the substantive reach of Section 1106, because Section 1108 already states that its exceptions apply

to "[t]he prohibitions provided in section 1106." 29 U.S.C. 1108(b); see pp. 26-27, *infra*. The cross-reference thus must be doing something more – which is to "incorporate[]" the exception as an element of the Section 1106(a) prohibition. *Cook*, 84 U.S. at 173. Petitioners' view would make that language superfluous, and it should be rejected for that reason. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001).

c. Petitioners argue (Br. 27-28) that the "[e]xcept as provided" language is only in Section 1106(a) because Section 1108's exemptions do not apply to Section 1106(b). That is wrong; Section 1108 is replete with language applying its exceptions to all of Section 1106.

Section 1108(a) authorizes the Secretary of Labor to grant exemptions "from all or part of the restrictions imposed by section[] 1106," including "from section 1106(a)" and "from section 1106(b)." 29 U.S.C. 1108(a). Section 1108(a) provides different procedures for exemptions under Section 1106(a) and Section 1106(b), showing that Congress contemplated both. *Ibid.*

Section 1108(b) also applies by its terms to Section 1106: "The prohibitions provided in section 1106 * * * shall not apply to any of the following transactions." 29 U.S.C. 1108(b).[6] Section 1108(c) uses similar language: "Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from" receiving certain benefits and compensation. 29 U.S.C. 1108(c).

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[6] One of the exemptions expressly states that it exempts "[a]ny transaction described in section[] * * * 1106(b)(2) involving [cross-trading]." 29 U.S.C. 1108(b)(19).

All of this shows that Section 1108 applies to Section 1106(b). That leaves petitioners with no explanation of what function the Section 1106(a) language performs.

d. The government makes a different argument (Br. 24-25), asserting that Section 1106(a)'s "[e]xcept as provided" language signals that Section 1108 has a "lesser application" to Section 1106(b) than to Section 1106(a). But Section 1108's references to Section 1106 indicate that substantively, it applies equally to Section 1106(a) and Section 1106(b). If a Section 1108 exemption applies to a Section 1106(b) transaction, ERISA permits that transaction to the same extent as it would permit an exempted Section 1106(a) transaction.

As a practical matter, Section 1108's exemptions may apply less often to Section 1106(b) than to Section 1106(a). U.S. Br. 24-25. But that has nothing to do with the cross-reference. It is because Section 1106(b) covers only inherently conflicted conduct, whereas Section 1106(a) covers routine and beneficial plan transactions. The cross-reference says nothing about the degree to which Section 1108 applies to Section 1106(a) versus Section 1106(b).

2. Petitioners' view creates conflicts with other provisions of ERISA

When two statutory provisions "touch[] on the same topic," the Court seeks to "harmonize[]" and "give effect to both." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510-511 (2018) (internal quotation marks omitted); see, *e.g.*, *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 680 (2010). Here, petitioners' view of Section 1106(a)(1)(C) creates conflicts with the ERISA provisions that require, permit, or contemplate the use of service providers.

a. To start, ERISA *requires* plans to use some service providers. It requires each plan with over 100 participants to file a public annual report (known as the Form 5500) that includes an audited financial statement. 29 U.S.C. 1023(a)(1), 1024(a)(3); see 29 C.F.R. 2520.104-20(b). It also requires each plan administrator to hire an auditor for that purpose: The administrator "shall engage, on behalf of all plan participants, an independent qualified public accountant" to opine whether the statement conforms to "generally accepted accounting principles." 29 U.S.C. 1023(a)(3).

ERISA separately requires most defined-benefit pension plans to engage actuaries to prepare actuarial statements: The administrator of such a plan "shall engage, on behalf of all plan participants, an enrolled actuary" to prepare the plan's actuarial statement. 29 U.S.C. 1023(a)(4). Under petitioners' view, a fiduciary has engaged in a prohibited transaction simply by hiring an accountant or actuary.

b. ERISA also expressly permits plans to use service providers. For example, ERISA allows fiduciaries to "appoint an investment manager" to "manage" the plan's assets. 29 U.S.C. 1102(c)(3); see 29 U.S.C. 1002(38). Indeed, ERISA encourages hiring investment managers by limiting trustees' liability for the managers' "acts or omissions." 29 U.S.C. 1105(d)(1)-(2). Those provisions show that Congress viewed hiring investment managers as beneficial, not inherently suspect.

Other ERISA provisions recognize that plans will engage service providers. A fiduciary's duty of loyalty, for example, requires the fiduciary to act for the "exclusive purpose" of providing benefits to participants and "defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A)(ii). Similarly,

every plan's annual report must list each party-in-interest transaction and the "expense incurred in connection with the transaction." 29 U.S.C. 1023(b)(3)(D). These provisions clearly "contemplat[e] that there would be expenses associated with plan administration." Pet. App. 22a n.9; see *Sweda* v. *University of Penn.,* 923 F.3d 320, 337 (3d Cir. 2019) ("[I]f we interpreted § 1106(a)(1) to prohibit every transaction for services to a plan, we would have to ignore other parts of the statute.").

Under petitioners' view, all of those uses of service providers would be prohibited transactions under Section 1106(a). That position is textually incoherent and should be rejected.

C. Petitioners' View Would Upset The Balance Congress Struck In ERISA

1. Under petitioners' view, nearly every fiduciary could be sued for prohibited transactions

Congress struck a balance in ERISA: to protect participants' benefits, while "assuring a predictable set of liabilities" for employers. *Conkright*, 559 U.S. at 517. Congress did not want a system under which "administrative costs" or "litigation expenses" would "unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

Petitioners' position would upset that balance by defining routine and beneficial plan transactions as prohibited transactions. *Sweda*, 923 F.3d at 337. Plans routinely use service providers such as recordkeepers, lawyers, accountants, investment managers, and consultants. See *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 585-586 (7th Cir. 2022). They provide the funds in which participants invest, see J.A. 20-21

(¶¶ 42-46); the platform for participants to manage their portfolios, see J.A. 28-29 (¶ 61); and the tools for participants to keep track of their account balances, see J.A. 19 (¶ 38). They audit the plans' financial statements, as ERISA requires. 29 U.S.C. 1023(a)(3). And they help fiduciaries ensure that the plans offer diverse portfolios of investments at reasonable fees. See Pet. App. 37a-38a. If petitioners were correct, all or virtually all ERISA plans would be constantly engaging in prohibited transactions.

Most courts to consider the issue have concluded that Congress could not possibly have intended that result. See Pet. App. 16a-17a (citing cases). It would be "absurd" to hold that a participant "could force any plan [fiduciary] into court for doing nothing more than hiring an outside company to provide recordkeeping and administrative services," *Ramos* v. *Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021), and then "require [the] fiduciary to plead reasonableness as an affirmative defense," *Sweda*, 929 F.3d at 336.

Petitioners try to justify their expansive rule (Br. 36, 45, 47-48) by pointing to ERISA's "protective purpose." But "[n]o statute pursues a single policy at all costs," *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023), and particularly not ERISA, which resolved "innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

Significantly, this Court already has interpreted ERISA's prohibited-transaction provisions to avoid a result like the one petitioners seek here. In *Lockheed Corp.* v. *Spink*, the Court held that the payment of plan benefits as part of an early-retirement program was not a prohibited transaction. 517 U.S. at 894-895. The Court explained that conditioning payments on "performance by plan participants" was an entirely

"permissible objective[]" and did not involve "uses of plan assets that are potentially harmful to the plan." *Id.* at 893-894. The Court accordingly held that the benefits payment was "wholly outside the scope of" Section 1106(a)(1)(D) because it was not the type of "transaction" Congress contemplated. *Id.* at 892, 895.

The same logic applies here: Section 1106(a)(1)(C) by itself encompasses every routine service-provider transaction, including those ERISA requires and permits. Reading it together with Section 1108(b)(2)(A) appropriately limits its reach to only those transactions that threaten the plan.

2. Petitioners' view would cause an avalanche of litigation

Under petitioners' position, it would be remarkably easy for a plaintiff to plead a prohibited-transaction claim under Section 1106(a)(1)(C), because ERISA generally requires plans to disclose service-provider transactions. 29 U.S.C. 1023(c)(3). A plaintiff could file a lawsuit and proceed to discovery merely by alleging the fact of a transaction, without plausibly pleading any wrongdoing. The plaintiff could then use discovery as a fishing expedition to try to find something a fiduciary did wrong, and there is nothing a fiduciary could do about it until summary judgment at the earliest. Petitioners' view thus would wipe out motions to dismiss as a tool for "weeding out meritless claims." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014).

a. Petitioners freely admit (Br. 46) that their goal is "more litigation." They claim (Br. 46-47) that would be beneficial because excessive-fee litigation can reduce fees. But their position is that a plaintiff could sue *without* alleging excessive fees. So their position

would not result in more meritorious excessive-fee litigation – just more litigation, period.

The burden of additional litigation would be immense, and nearly all of it would be borne by defendants. Discovery in ERISA cases is particularly "ominous," involving "probing and costly inquiries and document requests." *Pension Ben. Guar. Corp.* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Defense costs "can run well into the millions." Chubb, *Excessive Litigation Over Excessive Plan Fees In 2023*, at 3 (Apr. 2023) (Chubb), https://perma.cc/2VKQ-5TX2. In contrast, plaintiffs' costs would be slight – their pleading burden would be virtually nonexistent, and the burden of proof at summary judgment would be on defendants.

The predictable result would be meritless lawsuits filed solely to "extort settlements." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). An unduly low pleading standard would permit a plaintiff to bring "a largely groundless claim" hoping that its "*in terrorem*" effect will increase "the settlement value," without any "reasonably founded hope that the discovery process will reveal relevant evidence." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (alteration and internal quotation marks omitted).

Those costs would be borne not only by plan sponsors, but also by plan fiduciaries, who can be held "personally liable" under ERISA. 29 U.S.C. 1109(a). Individuals who serve on fiduciary committees often are named in ERISA lawsuits and then are forced to defend themselves through years of meritless litigation. *Sweda*, 923 F.3d at 341 (Roth, J., concurring in part). Here, for example, petitioners named as a defendant Cornell University's then-chief human resources officer, J.A. 12 (¶ 27), and threatened to name 29 other

individuals, all university administrators, professors, or other staff members, see D. Ct. Dkt. 122, at 1.

The mere fact of litigation can take a significant toll on a fiduciary. For example, the fiduciary "will be required to disclose [the] litigation in personal financial transactions." *Sweda*, 923 F.3d at 341 (Roth, J., concurring in part). Asserting claims against individual fiduciaries thus "has the tremendous power to harass." D. Ct. Dkt. 122, at 1.

b. This case is one of over two dozen ERISA lawsuits against fiduciaries of university plans that raise near-identical claims. Pet. App. 36a n.15, 93a. Nearly all included claims of excessive recordkeeping fees. *Ibid.*

Notably, not one of those cases has succeeded on the merits. The plaintiffs lost the two cases that went to trial. See Judgment, *Vellali* v. *Yale Univ.*, No. 16-cv-1345 (D. Conn. July 13, 2023), appeal pending, No. 23-1082 (2d Cir. argued Sept. 25, 2024); *Sacerdote* v. *New York Univ.*, 328 F. Supp. 3d 273, 306-307 (S.D.N.Y. 2018), aff'd in relevant part, 9 F.4th 95 (2d Cir. 2021). The risk of additional meritless litigation is real.

Further, under petitioners' view, it would be much easier to plead a claim for excessive fees as a prohibited transaction under 29 U.S.C. 1106(a) than as a breach of the duty of prudence under 29 U.S.C. 1104(a). In this case, which is typical of the university cases, petitioners filed both an imprudence claim and a prohibited-transaction claim to challenge recordkeeping fees and sought the same relief for both. See J.A. 142-146 (¶¶ 215-232).

To adequately allege imprudence, petitioners had to plead that respondents did not behave as prudent people would under like circumstances. 29 U.S.C.

1104(a)(1)(B). The focus is on the fiduciary's process, not the outcome. *Sweda*, 923 F.3d at 329. If petitioners' view prevailed, it would be much easier to bring an excessive-fees claim as a prohibited-transaction claim than as an imprudence claim. All a plaintiff would have to allege is the fact of a service-provider transaction. Thus, instead of "supplement[ing]" ERISA's fiduciary duties, *Harris Tr.*, 530 U.S. at 241-242, the prohibited-transaction provisions would swallow them up altogether.

c. Petitioners suggest (Br. 47-48) that the prospect of sanctions will deter "groundless" claims. But under petitioners' view, a Section 1106(a) claim based solely on the existence of a service-provider transaction would *not* be groundless, because the plaintiff would have pleaded a *prima facie* case. See Fed. R. Civ. P. 11(b).

Petitioners also rely (Br. 47-48) on the possibility of fee-shifting. See 29 U.S.C. 1132(g)(1). But to qualify for fee-shifting under ERISA – which is discretionary – a party must show "some degree of success on the merits." *Hardt* v. *Reliance Standard Life Ins.*, 560 U.S. 242, 255 (2010) (internal quotation marks omitted). A fiduciary thus would need to litigate through summary judgment before having any hope of seeking a fee award. In many cases it could be cheaper and faster to settle even a meritless claim.[7]

Petitioners obliquely suggest (Br. 48) that under their view, claims often will be dismissed for lack of standing. The argument appears to be that because a

[7] The district court awarded $13,000 in costs to Cornell, but that was not under Section 1132(g)(1), see D. Ct. Dkt. 471, at 5-6 (relying on Fed. R. Civ. P. 54(d)), and that award did not come close to compensating Cornell for the enormous expense of defending this litigation.

plaintiff would not have to allege anything wrong with the challenged transaction, many plaintiffs would not be able to show the injury required to establish standing. See *Thole* v. *U.S. Bank, N.A.*, 590 U.S. 538, 542-546 (2020). That is not a virtue of petitioners' position, but a vice. This Court should not choose a statutory construction that assumes a claim will have a constitutional defect, when a sensible alternative construction is available.

Left with nothing else, petitioners hope (Br. 47) that plaintiffs' lawyers would show restraint. That has not happened yet. ERISA litigation continues to increase year after year. Chubb 1. Petitioners say (Br. 47) that there has not been a noticeable uptick in prohibited-transaction litigation in the Eighth Circuit following *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). But the decision in *Braden* was far from clear. Br. in Opp. 17-18. If this Court accepted petitioners' position, it would be open season on ERISA fiduciaries. The only question would be which unlucky fiduciaries are sued.

3. Petitioners' view ultimately would harm plans, participants, and beneficiaries

Fiduciaries faced with the prospect of massive prohibited-transaction litigation may feel compelled to limit the number of plan service providers or perform certain tasks in-house. The likely outcome is "lower returns for employees and higher costs for plan administration." *Albert*, 47 F.4th at 586.

For example, fiduciaries may eliminate services such as personalized, in-person investment advising, which many participants want and which Cornell's plans provided. C.A. J.A. A2412. Fiduciaries also may conclude that they cannot hire outside recordkeepers. Petitioners allege that there is significant

competition among recordkeepers that provide high-quality services at a low cost. J.A. 2, 19 (¶¶ 3, 38). Petitioners' view would disincentivize plans from using those providers. Plan fiduciaries could attempt to perform some of those tasks in-house, but they may lack the necessary expertise or resources. Small plans would be most severely affected.

Further, petitioners' view would put fiduciaries in a no-win situation. Using a service provider would be a prohibited transaction, but not using that provider could be viewed as imprudent. See *Hughes* v. *Northwestern Univ.*, 595 U.S. 170, 175-176 (2022). For example, a plaintiff could argue that a fiduciary was imprudent for performing recordkeeping in-house, because a service provider could do so more efficiently. Or a plaintiff could argue that a prudent fiduciary would hire an expert investment advisor rather than relying entirely on in-house resources. Petitioners' position amounts to heads plaintiffs win; tails defendants lose.

The prospect of massive litigation also could dissuade people from serving as fiduciaries. That is true for all plans, but especially for university retirement plans, whose fiduciaries are "often staff members who volunteer to serve in these roles." *Sweda*, 923 F.3d at 341 (Roth, J., concurring in part). Without fiduciaries, a plan cannot operate. See 29 U.S.C. 1102(a)(1).

Finally, if the risks and costs of prohibited-transaction litigation become too great, some employers could stop offering plans altogether. "Congress did not require employers to establish benefit plans in the first place," and it recognized that uncertain liabilities and "litigation expenses" could discourage employers from offering plans. *Conkright*, 559 U.S. at 516-517. Petitioners' position thus threatens significant harm to the very people petitioners claim to protect.

4. The government agrees that a plaintiff must plead unnecessary services or unreasonable fees

The government recognizes that the implications of petitioners' position are intolerable. So it proposes (Br. 29-30) that a plaintiff challenging a service-provider transaction should have to allege that the fees are "not obviously unreasonable." *That is essentially Cornell's position.* That is, the government recognizes that petitioners' view is unacceptably broad, and its solution is for the plaintiff to plead the exception in Section 1108(b)(2)(A). The government stubbornly refuses to call that exception an "element," but that is exactly the implication of its position.

The government proposes two mechanisms to require plaintiffs to plead additional facts, but neither makes sense – and both confirm that pleading Section 1106(a)(1)(C) alone is not enough.

First, the government attempts to ground its rule in the *Twombly* pleading standard. According to the government (Br. 29), a plaintiff must account for any "obvious alternative explanation" for the challenged conduct, and for a service-provider transaction, the obvious alternative explanation is that the services are necessary and the fees are reasonable.

That misunderstands the "obvious alternative explanation" principle. It applies when a plaintiff seeks to draw an inference from the defendant's conduct to establish an element of the claim. *Twombly*, 550 U.S. at 567-570. The plaintiff must account for an "obvious alternative explanation" for the conduct that prevents a court from drawing that inference. *Ibid.* For example, a plaintiff may plead that because companies acted the same way, they were part of an antitrust conspiracy. But if there were an obvious alternative

explanation (*e.g.*, market forces incentivized each company to act that way), the plaintiff would have to plead additional facts to show a conspiracy. See *ibid.*

The "obvious alternative explanation" principle does not apply here, because the element (in the government's view) is the fact of a service-provider transaction. The reasonableness of that transaction is not an alternative explanation that prevents a plaintiff from showing the existence of the transaction; it is (in the government's view) an affirmative defense that provides a justification for why the transaction is permissible.

Second, the government invokes (Br. 30-31) Federal Rule of Civil Procedure 7(a). That rule does not change the elements of a claim or the pleading standard; it just permits a court to require the plaintiff to reply to the defendant's answer. See *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998). The government's apparent proposal is that a defendant should plead a Section 1108 exemption in an answer, then the district court should exercise its discretion to order the plaintiff to file a reply that addresses that exemption, and if the plaintiff fails to plead around the exemption, the defendant could move for judgment on the pleadings. See Fed. R. Civ. P. 12(c). This is just a repeat of the government's argument that a plaintiff should have to plead unreasonable fees to proceed to discovery – except it uses a much more convoluted process. The government does not explain why a court would require a plaintiff to plead facts to negate what the government labels an affirmative defense. Nor does it explain when the court should require that, or whether and how its proposed pleading standard ("not obviously reasonable") is different from the Section 1108(b)(2)(A) exemption.

At bottom, the government's position amounts to requiring the plaintiff to plead, before discovery, the unreasonableness of the fees. But instead of reaching that outcome the obvious way (by considering Section 1108(b)(2) an element and requiring the plaintiff to plead it in the complaint), the government distorts the pleading standard and the Federal Rules. It is not surprising that no court has endorsed its approach.

D. Reading Section 1106(a) And Section 1108 Together Is Entirely Workable

1. A plaintiff bringing a Section 1106(a) claim should not have difficulty determining which exception to plead

Petitioners contend (Br. 42-43) that it would be unworkable to require a plaintiff to plead the absence of a Section 1108 exception, because the plaintiff would have to guess at what exception applies. They are wrong. And their arguments are completely undercut by the government's arguments (Br. 29-31) that plaintiffs should have to plead the applicable exception, and that petitioners actually did so here.

a. A plaintiff does not bring a prohibited-transaction claim in the abstract. Rather, the plaintiff is complaining about a particular transaction that actually occurred. The plaintiff just needs to plausibly plead a theory about what the fiduciaries did wrong from the available theories specified in Section 1108(b).

For a given transaction, figuring out what exemption might apply is straightforward. Each exemption addresses a specific type of transaction, with little overlap. See 29 U.S.C. 1108(b)(1)-(21).[8] For example,

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[8] Similarly, the Secretary of Labor's "class" exemptions to Section 1106 each addresses a specific type of transaction. See Emp. Ben. Sec. Admin., U.S. Dep't of Lab., *Class Exemptions*, https://

Section 1108(b)(3) addresses loans to employee stock ownership plans (ESOPs), whereas Section 1108(b)(18) addresses foreign-exchange transactions. A plaintiff challenging an ESOP loan would need to account for Section 1108(b)(3), but not Section 1108(b)(18).

Here, for example, petitioners alleged a service-provider transaction. J.A. 145-146 (¶ 230). The parties knew which exemption potentially applied (the Section 1108(b)(2) exemption); the only question was who had to plead and prove it. See Pet. App. 16a. For other Section 1106(a) transactions, it likewise will be clear which exemption could apply. If a transaction involves a loan to a participant, then the Section 1108(b)(1) exception for participant loans might apply; if the transaction involves a block trade, then the Section 1108(b)(15) exception for those trades might apply. See 29 U.S.C. 1108(b)(1), (15).

Petitioners cite (Br. 43) a handful of cases over ERISA's 50-year history where a defendant raised more than one Section 1108 exemption. Their worst-case example involved only three exemptions – hardly an insurmountable pleading burden. See *Dupree* v. *Prudential Ins.*, No. 99-cv-8337, 2007 WL 2263892, at *39 (S.D. Fla. Aug. 7, 2007). In that case, it would have been obvious to the plaintiffs what exemptions were at issue. They sued an investment manager that also was an insurer, challenging fees it charged for managing investments in a pooled investment fund.

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perma.cc/TV5M-YPSA (accessed Dec. 26, 2024). The Secretary also has issued individual exemptions for specific transactions. See Emp. Ben. Sec. Admin., U.S. Dep't of Lab., *Individual Exemptions*, https://perma.cc/5BK7-RZXR (accessed Dec. 26, 2024). It would be a simple matter to review the regulatory exemptions to determine which might apply to a given transaction.

Id. at *38-*40. The defendant raised the exemptions for services, 29 U.S.C. 1108(b)(2); insurance products, 29 U.S.C. 1108(b)(5); and investments in pooled funds, 29 U.S.C. 1108(b)(8). 2007 WL 2263892, at *39.

A defendant could not surprise a reasonably diligent plaintiff. At the motion-to-dismiss stage, a district court considers only the facts pleaded in the complaint, incorporated by reference into the complaint, or in the public record and subject to judicial notice. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). A defendant can move to dismiss only based on an exception that is evident from those facts.

b. Petitioners note (Br. 43) that some Section 1108 exemptions have multiple requirements, which they say makes it more difficult for a plaintiff to bring a claim. That has it backwards: An exemption applies only if *all* of its requirements are satisfied. A plaintiff would need to plausibly plead only that *one* requirement is not met and would not even need to mention other requirements.

c. Petitioners (Br. 43) and the government (Br. 10, 31) assert that the court of appeals adopted a "gerrymandered" rule where only "some" of Section 1108's exemptions are elements of Section 1106(a) claims. That is not a fair reading of the decision. The only prohibited-transaction claim before the court of appeals was one for recordkeeping services, and the only issue was whether petitioners also had to plead that the services were unnecessary or the fees unreasonable under Section 1108(b)(2). Pet. App. 18a. After answering that question, the court did not go further to address other types of prohibited-transaction claims. The court should not be faulted for not issuing an advisory opinion on issues not before it. See *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 424 (2021).

Cornell's position merely requires the plaintiff to do basic diligence and have a plausible theory as to what the fiduciary did wrong under Section 1108(b). There is nothing difficult about that.

2. ERISA's disclosure and reporting requirements ensure that a plaintiff has the information needed to bring a Section 1106(a) claim

a. ERISA requires plans to publicly disclose a significant amount of information about party-in-interest transactions. Each plan must file an annual report (Form 5500) containing "a description of agreements and transactions with persons known to be parties in interest." 29 U.S.C. 1023(b)(1)-(2); see C.A. J.A. A193-A253 (Cornell's Form 5500). For service-provider transactions in particular, the plan must disclose any service provider who received $5,000 or more in compensation "for services rendered to the plan or its participants," "the amount of such compensation," and "the nature of his services." 29 U.S.C. 1023(c)(3); 29 C.F.R. 2520.103-1(b)(1); see Emp. Ben. Sec. Admin., U.S. Dep't of Lab., *Instructions for Form 5500* at 26 (2024), https://perma.cc/NM95-X54N. The Department of Labor publishes all plans' annual reports online. U.S. Dep't of Lab., *Form 5500 Search*, https://perma.cc/D8BN-JE87 (accessed Dec. 26, 2024).

ERISA also requires plan administrators to provide disclosures to participants. 29 U.S.C. 1024, 1104. An administrator must provide each participant with a summary plan description (and any updates to it) and make the annual report available to participants. 29 U.S.C. 1024(b). The summary plan description must be "written in a manner calculated to be understood by the average plan participant" and must be

"sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations." 29 U.S.C. 1022(a).

The Department of Labor's regulations supplement those disclosure requirements. They require individual-account plans to provide plan and investment notices to participants at least once a year. 29 C.F.R. 2550.404a-5; see, *e.g.*, J.A. 183-280 (Cornell's notices). That notice must explain all fees and expenses incurred by the plan, including all administrative fees and how they are calculated, 29 C.F.R. 2550.404a-5(c)(2); all individual fees that may be charged for participant services, 29 C.F.R. 2550.404a-5(c)(3); and all fees charged for managing investments and how they are calculated, 29 C.F.R. 2550.404a-5(d)(1)(iv).

Petitioners complain (Br. 33-34, 38) that ERISA requires service providers to provide fiduciaries, but not participants, with information about the providers' compensation. See 29 U.S.C. 1108(b)(2)(B)(iii). But fiduciaries use that information to prepare participant disclosures and annual reports. See, *e.g.*, C.A. J.A. A206. So participants have access to the relevant information. Petitioners never explain what additional information is needed.

b. A plaintiff thus has plenty of information to challenge a service-provider transaction. Here, for example, petitioners knew who Cornell's recordkeepers were and how much compensation they received. See, *e.g.*, J.A. 183-231; C.A. J.A. A206. Petitioners' counsel used that information to calculate (in the context of their imprudence claim) how much Cornell allegedly paid for recordkeeping per participant. J.A. 65 (¶ 136).

That information also was publicly available for other university ERISA plans. See, *e.g.*, Yale Univ., *Summary Annual Reports & Required Disclosures – Forms*, https://perma.cc/FX4W-QTPJ (accessed Dec. 26, 2024). Indeed, petitioners' counsel calculated many other university plans' alleged per-participant fees when they sued over those fees. See, *e.g.*, Am. Compl. ¶ 134, *Vellali* v. *Yale Univ.*, No. 16-cv-1345 (S.D.N.Y. Dec. 9, 2016) (ECF No. 57); Am. Compl. ¶ 133, *Sacerdote* v. *New York Univ.*, No. 16-cv-6284 (S.D.N.Y. Nov 9, 2016) (ECF No. 39).

Petitioners thus had sufficient information to evaluate the reasonableness of Cornell's fees compared to its peers. If they did not adequately allege that Cornell's fees are unreasonable, Pet. App. 25a-26a, it is because the data show that the fees are reasonable, see *id.* at 32a-33a – not because petitioners lacked necessary information.

c. Petitioners speculate (Br. 36-37) that a plaintiff may lack the information to challenge other types of transactions. They give only one example: participant-loan transactions. But plans are required to disclose detailed information about participant loans, including the interest rates, the basis for approval, and the limitations on the amounts of loans. 29 U.S.C. 1023(b)(3)(D); 29 C.F.R. 2550.408b-1(d)(2). Petitioners never say what information a plaintiff would be missing.

In any event, a plaintiff should not be bringing a lawsuit to challenge a loan if the plaintiff has no idea what, if anything, is wrong with the loan. All the plaintiff needs to do is plausibly plead that one of the requirements in the relevant exception, 29 U.S.C. 1108(b)(1), is not met.

E. Nothing In The Law Of Trusts Justifies Petitioners' Position

1. This Court has warned that often "trust law does not tell the entire story" when it comes to ERISA. *Varity*, 516 U.S. at 497. Congress enacted ERISA because it determined that trust law was not adequate for dealing with "the special nature and purpose of employee benefit plans." *Ibid.* (internal quotation marks omitted). Trust law thus "often will inform, but will not necessarily determine" the interpretation of ERISA. *Ibid.*

To the extent trust law is relevant, it supports the view that petitioners should have to allege some type of wrongdoing (from a Section 1108(b) exemption). Under the law of trusts, a trustee violates the duty of loyalty by engaging in a conflicted transaction. Restatement (2d) Trusts § 170 (1959). That includes any transaction in which the trustee has a personal interest on the other side of the transaction. *Id.* § 170 cmts. b-c. A transaction with a third party who is "related" to the trustee is not necessarily conflicted, unless "it is shown" that the trustee "was improperly influenced by his relationship to the [third party]" with respect to the transaction. *Id.* § 170 cmt. e.

Critically, under trust law, the onus is on the plaintiff to show that the trustee was conflicted, improperly influenced by the relationship with the third party, or otherwise breached a duty, and that the trust suffered harm as a result. See *Nedd* v. *United Mine Workers of Am.*, 556 F.2d 190, 211 (3d Cir. 1977); *Fulton Nat'l Bank* v. *Tate*, 363 F.2d 562, 564 (5th Cir. 1966). Nothing in trust law allows a plaintiff to sue *without* those allegations of wrongdoing. And the mere fact of a transaction with a third party is not a breach of the duty of loyalty. See Restatement (2d) § 170 cmt. e.

Petitioners note (Br. 35-36) that in some situations a trustee may have more information than a beneficiary. That information asymmetry could justify shifting the burden of proof to the trustee *after* the beneficiary had made out a *prima facie* case. See, *e.g.*, *Nedd*, 556 F.2d at 211. But it would not permit a beneficiary to bring suit without some allegation of wrongdoing. Besides, Congress addressed concerns about access to information through ERISA's reporting and disclosure requirements. See pp. 42-44, *supra*.

2. The government argues (Br. 18-19) that the prohibited-transaction provisions reflect a common-law rule that a trustee could not delegate tasks that the trustee reasonably could perform himself unless the trustee justified the delegation.

As an initial matter, it does not make sense to say Congress designed Section 1106(a)'s prohibited-transaction provisions based on a nondelegation rule, because most of the covered transactions have nothing do with delegation. See 29 U.S.C. 1106(a).

With respect to service-provider transactions, Congress rejected the nondelegation rule in ERISA. As the government acknowledges (Br. 19), ERISA expressly authorizes and encourages fiduciaries to delegate certain responsibilities. 29 U.S.C. 1105(c)(1); pp. 27-29, *supra*. Those provisions squarely "repudiat[e]" the traditional nondelegation rule. John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105, 112-113 (1994) (Langbein).

Congress had good reason to do that. The nondelegation rule stemmed from a time when a trustee could be expected to manage a simple trust alone. Langbein 110. That is no longer the case in trust law; "expecting

a trustee to personally perform every single act necessary to execute a modern trust not only is unreasonable but may not even be the best way to assure efficient and knowledgeable administration of the trust." George Gleason Bogert et al., *The Law of Trusts and Trustees* § 555 (2022) (Bogert). The Uniform Trust Code and the Third Restatement of Trusts both "reverse[]" the "old nondelegation rule." *Ibid.*; see Uniform Trust Code § 807 (2000); Restatement (3d) Trusts § 80 (2007). ERISA likewise reflects the modern rule; Congress recognized that a fiduciary may not have the skills and expertise needed to manage the entirety of a multibillion-dollar benefit plan with thousands of participants. Bogert § 555; John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 496 (1990).

The government's position does not account for the realities of modern trust administration or administration of a benefits plan under ERISA. Nor does it account for Congress's express approval of delegation to service providers.

F. Petitioners' Prohibited-Transaction Claim Fails

The government (Br. 32-34) argues that petitioners pleaded a prohibited-transaction claim because they plausibly alleged that the recordkeeping fees were unreasonable. That issue was not presented in the petition, Pet. i, and this Court should not address it, see *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Petitioners' allegations are not sufficient, and even if they were, petitioners' claim would fail on the merits.

1. Petitioners have not plausibly pleaded a prohibited-transaction claim

In their prohibited-transaction claim about recordkeeping fees (Count IV), petitioners pleaded only the fact of a service-provider transaction. They alleged that "TIAA-CREF and Fidelity are parties in interest" because they are "service providers to the Plans," and that by "caus[ing] the Plans to engage in transactions" that constituted "a direct or indirect furnishing of services" to the plans, Cornell violated Section 1106(a)(1)(C). J.A. 145-146 (¶¶ 229-230). Petitioners did not allege that the services were unnecessary or the fees unreasonable. Pet. App. 25a.

The government argues (Br. 32-34) that petitioners adequately pleaded unreasonable fees. It cites allegations petitioners made to support their imprudence claim. See J.A. 143-144 (¶¶ 223-225). Those allegations are insufficient to raise a plausible inference of unreasonable fees. As the court of appeals explained, "[w]hether fees are excessive or not is relative 'to the services rendered,'" because "it is not unreasonable to pay more for superior services." Pet. App. 26a (quoting *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). Many courts addressing excessive-fees claims have made the same point and dismissed claims that fail to make an appropriate comparison. See, *e.g.*, *Matousek* v. *MidAmerican Energy Co.*, 51 F.4th 274, 279 (8th Cir. 2022).

Here, petitioners never pleaded what services Cornell received or explained how the fees were excessive, such as by comparing the fees to those paid by comparable plans for comparable services. See J.A. 62-67 (¶¶ 122-141). The government notes (Br. 33) the allegation that Cornell's fees were higher than an unspecified "market benchmark." But as the court of appeals

explained, petitioners never alleged that the benchmark represented comparable services to those Cornell received. Pet. App. 25a-26a. They thus failed to plead unreasonableness.[9]

Petitioners argue (Br. 33-35) that in evaluating their allegations, the court of appeals inappropriately imported a reasonableness standard from the Investment Company Act of 1940 (ICA), 15 U.S.C. 80a-1 *et seq*. That is incorrect; the court merely cited an ICA case (*Jones*) to help explain that the reasonableness of fees must be assessed "relative 'to the services rendered,'" and that "disproportionately large fees" could raise an inference of unreasonableness. Pet. App. 26a (quoting *Jones*, 559 U.S. at 346). That approach to reasonableness is "common sense" and is not unique to the ICA. *Singh* v. *Deloitte LLP*, No. 23-1108, 2024 WL 5049345, at *4 n.7 (2d Cir. Dec. 10, 2024) (rejecting petitioners' argument here); see, *e.g.*, *Black's Law Dictionary* 301 (8th ed. 2004) (defining "unreasonable compensation" as "compensation [that] is out of proportion to the services actually rendered"). The court of appeals did not err by merely citing *Jones* for that common-sense proposition.

2. Petitioners' claim necessarily would fail on the merits

The district court gave petitioners the opportunity to prove unreasonable recordkeeping fees. After years of discovery on their imprudence claim, petitioners could not prove unreasonable fees. Pet. App. 57a-66a. That likewise dooms their prohibited-transaction claim.

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[9] The district court denied Cornell's motion to dismiss petitioners' imprudence claim, Pet. App. 11a-12a, but Cornell could not appeal that decision.

To obtain damages on their imprudence claim, petitioners had to show that the plans suffered a loss because Cornell could have paid lower fees than it actually paid. Pet. App. 30a-31a. Petitioners primarily relied on the opinions of two experts, who opined that Cornell should have paid $35-$40 per participant each year for recordkeeping services. *Id.* at 57a-66a. But their experts provided no justification for that number other than their say-so. *Id.* at 63a-64a. They did not explain how their proposed fees were justified for the services Cornell received, and they did not identify similar plans that were able to achieve those fees for the same services. The district court accordingly excluded their opinions under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 66a.

Without those opinions, petitioners had no evidence that Cornell could have achieved lower recordkeeping fees – so they necessarily could not show that Cornell's fees were unreasonable. In contrast, Cornell's expert explained that Cornell's fees were reasonable, because they were at or below the average fees paid by similarly sized plans offering similar investments and receiving similar services. See C.A. J.A. A2428-A2437.

The district court accordingly granted summary judgment to Cornell on petitioners' imprudence claim based on recordkeeping fees. Pet App. 58a. The court of appeals affirmed, *id.* at 32a-34a; and petitioners did not seek review of that holding in this Court, see Pet. i. Because petitioners cannot show unreasonable fees, they cannot prevail on their prohibited-transaction claim as a matter of law, regardless of which party has to plead unreasonableness. For that reason as well, this Court should affirm.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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1. 29 U.S.C. 1002 provides, in pertinent part:

Definitions

For purposes of this subchapter:

* * * * *

(14) The term "party in interest" means, as to an employee benefit plan –

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of –

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation[,]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of –

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section

501(c)(22) of title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

* * * * *

2. 29 U.S.C. 1104 provides, in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

* * * * *

3. 29 U.S.C. 1106 provides:

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know

that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not –

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

4. 29 U.S.C. 1108 provides, in pertinent part:

Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such

procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is –

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of title 26.

(2)

(A) Contracting 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.

(B)

(i) No contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such a contract or arrangement, is reasonable within the meaning of this paragraph unless the requirements of this clause are met.

(ii)

(I) For purposes of this subparagraph:

(aa) The term “covered plan” means a group health plan as defined section 1191b(a) of this title.

(bb) The term “covered service provider” means a service provider that enters into a contract or arrangement with the covered plan and reasonably expects $1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation, direct or indirect, to be received in connection with providing one or more of the following services, pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor:

(AA) Brokerage services, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), provided to a covered plan with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit

management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services.

(BB) Consulting, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services.

(cc) The term "affiliate", with respect to a covered service provider, means an entity that directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with, such provider, or is an officer, director, or employee of, or partner in, such provider.

(dd)

(AA) The term "compensation" means anything of monetary value, but does not include non-monetary compensation valued at $250 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or less, in the aggregate, during the term of the contract or arrangement.

(BB) The term "direct compensation" means compensation received directly from a covered plan.

(CC) The term "indirect compensation" means compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it

is received in connection with services performed under a contract or arrangement with a subcontractor.

(ee) The term “responsible plan fiduciary” means a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.

(ff) The term “subcontractor” means any person or entity (or an affiliate of such person or entity) that is not an affiliate of the covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive $1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation for performing one or more services described in item (bb) under a contract or arrangement with the covered plan.

(II) For purposes of this subparagraph, a description of compensation or cost may be expressed as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but

may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and explains the methodology and assumptions used to prepare such estimate. Any such description shall contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

(III) No person or entity is a "covered service provider" within the meaning of subclause (I)(bb) solely on the basis of providing services as an affiliate or a subcontractor that is performing one or more of the services described in subitem (AA) or (BB) of such subclause under the contract or arrangement with the covered plan.

(iii) A covered service provider shall disclose to a responsible plan fiduciary, in writing, the following:

(I) A description of the services to be provided to the covered plan pursuant to the contract or arrangement.

(II) If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as a fiduciary (within

the meaning of section 1002(21) of this title).

(III) A description of all direct compensation, either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I).

(IV)

(aa) A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I) –

(AA) including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan; and

(BB) not including compensation received by an employee from an employer on account of work performed by the employee.

(bb) A description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

(cc) Identification of the services for which the indirect compensation will be received, if applicable.

(dd) Identification of the payer of the indirect compensation.

(V) A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described in subclause (I) if such compensation is set on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on business placed or retained), including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor), regardless of whether such compensation also is disclosed pursuant to subclause (III) or (IV).

(VI) A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(iv) A covered service provider shall disclose to a responsible plan fiduciary, in writing a description of the manner in which the

compensation described in clause (iii), as applicable, will be received.

(v)

(I) A covered service provider shall disclose the information required under clauses (iii) and (iv) to the responsible plan fiduciary not later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, and extended or renewed.

(II) A covered service provider shall disclose any change to the information required under clause (iii) and (iv) as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vi)

(I) Upon the written request of the responsible plan fiduciary or covered plan administrator, a covered service provider shall furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under this chapter.

(II) The covered service provider shall disclose the information required under clause (iii)(I) reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vii) No contract or arrangement will fail to be reasonable under this subparagraph solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to clause (iii) (or a change to such information disclosed pursuant to clause (v)(II)) or clause (vi), provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(v)

(I) A covered service provider shall disclose the information required under clauses (iii) and (iv) to the responsible plan fiduciary not later than the date that is reasonably in advance of the date

on which the contract or arrangement is entered into, and extended or renewed.

(II) A covered service provider shall disclose any change to the information required under clause (iii) and (iv) as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vi)

(I) Upon the written request of the responsible plan fiduciary or covered plan administrator, a covered service provider shall furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under this chapter.

(II) The covered service provider shall disclose the information required under clause (iii)(I) reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless such disclosure

is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vii) No contract or arrangement will fail to be reasonable under this subparagraph solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to clause (iii) (or a change to such information disclosed pursuant to clause (v)(II)) or clause (vi), provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(viii)

(I) Pursuant to subsection (a), subparagraphs (C) and (D) of section 1106(a)(1) of this title shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required under clause (iii), if the following conditions are met:

(aa) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and rea-

sonably believed that the covered service provider disclosed the information required to be disclosed.

(bb) The responsible plan fiduciary, upon discovering that the covered service provider failed to disclose the required information, requests in writing that the covered service provider furnish such information.

(cc) If the covered service provider fails to comply with a written request described in subclause (II) within 90 days of the request, the responsible plan fiduciary notifies the Secretary of the covered service provider's failure, in accordance with subclauses (II) and (III).

(II) A notice described in subclause (I)(cc) shall contain –

(aa) the name of the covered plan;

(bb) the plan number used for the annual report on the covered plan;

(cc) the plan sponsor's name, address, and employer identification number;

(dd) the name, address, and telephone number of the responsible plan fiduciary;

(ee) the name, address, phone number, and, if known, employer identification number of the covered service provider;

(ff) a description of the services provided to the covered plan;

(gg) a description of the information that the covered service provider failed to disclose;

(hh) the date on which such information was requested in writing from the covered service provider; and

(ii) a statement as to whether the covered service provider continues to provide services to the plan.

(III) A notice described in subclause (I)(cc) shall be filed with the Department not later than 30 days following the earlier of –

(aa) The covered service provider's refusal to furnish the information requested by the written request described in subclause (I)(bb); or

(bb) 90 days after the written request referred to in subclause (I)(cc) is made.

(IV) If the covered service provider fails to comply with the written request under subclause (I)(bb) within 90 days of such request, the responsible plan fiduciary shall determine whether to terminate or continue the contract or arrangement under section 1104 of this title. If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, the responsible plan fiduciary shall

terminate the contract or arrangement as expeditiously as possible, consistent with such duty of prudence.

(ix) Nothing in this subparagraph shall be construed to supersede any provision of State law that governs disclosures by parties that provide the services described in this section, except to the extent that such law prevents the application of a requirement of this section.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if –

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if –

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the

plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is –

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if –

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if –

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is

maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if –

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2033, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer

permitted under section 420 of title 26 (as in effect on December 29, 2022).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if –

(A) the transaction is –

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)

(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a

party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if –

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length 3 transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if –

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by –

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either –

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length 3 transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)

(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means –

(i) in the case of a security for which there is a generally recognized market –

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f], taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked

prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) **Foreign exchange transactions.** – Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if –

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length 3 foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) **Cross trading.** – Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if –

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a–7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any af-

filiate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross

trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)

(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph –

(i) The term "security" has the meaning given such term by section 475(c)(2) of title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction –

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(21) The provision of a de minimis financial incentive described in section 401(k)(4)(A) or section 403(b)(12)(A) of title 26.

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from –

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * * * *

5. 29 U.S.C. 1109 provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.