No. 23-1007

IN THE

Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,

Petitioners,

v.

CORNELL UNIVERSITY, ET AL.,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF OF AT&T SERVICES, INC., AND AT&T BENEFIT PLAN INVESTMENT COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

AT&T Services, Inc., is a subsidiary of one of the world's leading telecommunications companies, and the AT&T Benefit Plan Investment Committee is responsible for administering AT&T's employee-benefit plan, which manages billions of dollars of participants' assets. That plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA).

Amici take seriously their obligation to safeguard those assets and produce the best possible outcomes for plan participants and beneficiaries. To that end, *amici* work with third-party service providers that provide vital assistance in operating AT&T's plan and maximizing its offerings to its employees. *Amici*'s agreements with these providers are negotiated at arm's length between independent parties.

As the decision below recognizes, ERISA provides that transactions with service providers can *sometimes* be unlawful and supplies a cause of action if plaintiffs can plead and prove that plan administrators harmed the plan through self-dealing. But the statute doesn't render routine transactions presumptively unlawful just because they occurred, as petitioners argue and the Ninth Circuit erroneously held in a parallel case involving AT&T now pending before this Court. See *AT&T Servs., Inc.* v. *Bugielski*, No. 23-1094.

The reading of ERISA adopted by the Ninth Circuit and advanced by petitioners here would impose

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

unreasonable harms on participants and plans alike by allowing claims to go forward to trial without requiring any actual evidence of self-dealing or unreasonable fees. Rather than endorsing that approach, this Court should affirm the decision of the Second Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress struck a careful balance in ERISA to encourage employers to plan for their employees' retirement while also protecting employees from potential abuses. To achieve this end, Congress crafted ERISA to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). At the same time, ERISA aims to ensure the "fair and prompt enforcement of rights" under employee-benefit plans. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004).

Preserving the balance between administrative burden and appropriate protection is crucial. That's because ERISA must incentivize employers to offer plans *and* entice employees to participate in plans. "Nothing in ERISA requires employers to establish employee benefits plans." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Instead, Congress drafted ERISA to "encourag[e] * * * the creation of such plans," *Aetna Health*, 542 U.S. at 215, by "alleviat[ing]" burdens on employers that impair plans' "maintenance and growth," 29 U.S.C. § 1001a(c)(2). Contorting ERISA to impose needless administrative burdens would thwart these goals and create incentives not to offer plans at all.

This case proves the point. Section 406(a), the central provision in this case, strikes a careful balance between protecting employees from abuse of the plan while also allowing the plan to make arm's-length deals that assist the operation of the plan.

In particular, Section 406(a) of ERISA strengthens the common-law fiduciary rules that had previously governed pension management and reviewed even self-dealing transactions between a plan and its sponsor under an arm's-length standard. *Comm'r* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993); *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 252 (2000). Section 406(a) proscribes transactions that threaten to divert funds from the plan and create a risk of underfunding or dissipation. It codifies restrictions on the activities of plan fiduciaries, including administrators. See 29 U.S.C. § 1106(a). Those restrictions "categorically ba[r] certain transactions deemed 'likely to injure the pension plan,'" *Harris Tr.*, 530 U.S. at 241-42 (citation omitted), including the sale of services, property, goods, or other assets between the plan and a "party in interest," defined to include plan service providers, 29 U.S.C. § 1106(a)(1)(A)-(E); *id.* § 1002(14)(A)-(B).

Read literally and in isolation, Section 406(a) would presumptively bar *every* transaction in which a plan procured any service—despite the virtual necessity (and ubiquity) of sizable plans entering such transactions. But "the good textualist is not a literalist." Antonin Scalia, *A Matter of Interpretation* 24 (1997). "After all, the meaning of a word depends on the circumstances in which it is used." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring). That principle of statutory construction applies with particular force where a statute as

comprehensive and reticulated as ERISA is concerned. Here, "literalism—the antithesis of context-driven interpretation—falls short." *Id.* at 2379. "It is a 'fundamental canon of statutory construction that the 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) (quoting *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

This Court has already interpreted Section 406(a) in light of the broader context of ERISA and held that the wooden construction petitioners propose is improper. Specifically, this Court held that Congress used the word "transaction" in Section 406(a) in a particular "sense"—to capture and bar only those "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Lockheed*, 517 U.S. at 893. *Lockheed* alone defeats petitioners' claims.

Petitioners contend that Section 406(a) sweeps in *any* service transaction between a plan and a party in interest—no matter whether it poses a risk of underfunding the plan or not. Pet'rs Br. 20-21. That's the upshot of petitioners' view that plaintiffs state a claim under Section 406(a) any time they plead that a service transaction occurred. But Section 406(a) can't logically encompass arm's-length transactions to procure plan services, which present no "special risk of plan underfunding." *Lockheed*, 517 U.S. at 893. That's why multiple courts of appeals have applied *Lockheed* and found no prohibition in Section 406(a)

barring arm's-length arrangements between the plan and third parties.[2]

Other provisions of ERISA (which *Lockheed* had no occasion to examine) confirm that petitioners' reading is untenable. Indeed, it defies the interplay between Section 406(a) and its companion provision, Section 408. Section 406(a) defines prohibited transactions "[e]xcept as provided" in Section 408. 29 U.S.C. § 1106(a). Section 408, in turn, states that "[t]he prohibitions" found in Section 406 "shall not apply" to necessary and reasonable transactions. *Id.* § 1108(b). So Section 408 plays a crucial role in determining how "transaction" as used in Section 406 must be understood—i.e., by reference to necessity and reasonableness. But petitioners never discharged their burden to plead that the transactions they targeted were anything other than arm's-length deals.

Moreover, under *Lockheed*'s and the Second Circuit's reading of Section 406(a), the relationship between Sections 406 and 408 requires plaintiffs to plead *and* prove the unreasonableness of any transactions they seek to challenge. "[T]he ordinary default rule [is] that plaintiffs" have "[t]he burdens of pleading and proof" "regarding the essential aspects of their claims," *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56-57 (2005) (citation omitted), which here includes the element of unreasonableness specified in Section 408. There's no reason to believe that Congress meant

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[2] See *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 338 (3d Cir. 2019) ("[A]bsent factual allegations that support an element of intent to benefit a party in interest, a plaintiff does not plausibly allege" a violation of Section 406(a)(1)(C).); *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022) (Section 406(a)(1)(C) prohibits transactions that "loo[k] like self-dealing," not "routine payments by plan fiduciaries to third parties in exchange for plan services.").

for the parties' burdens to flip midway through a case—and the Court should clarify as much here.

Finally, the real-world implications of petitioners' reading are significant (and severe). Petitioners concede that "ERISA litigation is costly and time-consuming," Pet'rs Br. 19, and that their reading of the statute would result in "more litigation," *id.* at 46. But plaintiffs can't turn that sow's ear into a silk purse by insisting that churning litigation is somehow an inexorable part of the statutory scheme, *ibid.*, or that bad outcomes are "irrelevant" to their legal arguments, *ibid.* Excessive-fee litigation harms plans and their participants, is demonstrably increasing, and would explode if the rules are loosened nationwide. These realities aren't abstract "policy concerns," *id.* at 41, but go directly to whether petitioners' reading is consistent with Congress's design to avoid "litigation expenses" and "alleviate" burdens on plans impairing their "maintenance and growth," *Varity Corp.*, 516 U.S. at 497; 29 U.S.C. § 1001a(c)(2). It isn't.

ARGUMENT

I. Section 406 Doesn't Prohibit Arm's-Length Transactions.

The best reading of Section 406(a)(1)(C) is that it doesn't prohibit reasonable, arm's-length transactions for necessary plan services. That reading follows directly from this Court's decision in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), which faithfully applied text in context—as textualism requires.

A. Section 406(a) Prohibits Arrangements That Present A Special Risk Of Plan Underfunding.

This Court's decision in *Lockheed* forecloses petitioners' reading of Section 406(a). Petitioners read

Section 406(a)(1)(C) to impose a categorical bar on every transaction between a plan fiduciary and a service provider—even those that occur at arm's length and for reasonable compensation. That reading may be "literally possible," *Samantar* v. *Yousuf*, 560 U.S. 305, 315 (2010), but textualism "do[es] not aim for 'literal' interpretations," *Niz-Chavez* v. *Garland*, 593 U.S. 155, 168 (2021). That's why this Court has eschewed "uncritical literalism" in interpreting other provisions of ERISA. *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). So too in *Lockheed*, where the Court read Section 406(a) to target only "commercial bargains that present a special risk of plan underfunding." 517 U.S. at 893. That construction is fatal to petitioners' rule.

1. Section 406(a)(1)(C) prohibits a fiduciary from "caus[ing] the plan to engage in a transaction" that it "knows or should know * * * constitutes a direct or indirect * * * furnishing of goods, services, or facilities between the plan and" "a person providing services to such [a] plan." 29 U.S.C. §§ 1002(14)(B), 1106(a)(1)(C).

Statutory text, context, and structure make clear that "transaction" in Section 406(a) refers to a commercial arrangement that presents a special risk of plan underfunding. Several textual clues in Section 406(a) point to this meaning. Each category of prohibited conduct concerns plan assets or other items of monetary value—"property," 29 U.S.C. § 1106(a)(1)(A); "money or other extension of credit," *id*. § 1106(a)(1)(B); "goods, services, or facilities," *id*. § 1106(a)(1)(C); "assets of the plan," *id*. § 1106(a)(1)(D); and "employer security or employer

real property," *id.* § 1106(a)(1)(E). Section 406(a)'s target is an arrangement that negatively affects plan finances.

The neighboring provision, Section 406(b), reinforces this reading. It prohibits a fiduciary from engaging in self-"deal[ing]" with respect to plan assets, "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan," and engaging in other similar self-interested conduct. 29 U.S.C. § 1106(b). Once again, the target is conduct that presents a special risk of harming plan finances.

Broader statutory context crystallizes the type of conduct that Congress was singling out in Section 406(a). Section 406(a)'s prohibitions on fiduciaries "supplemen[t] the fiduciary's general duty of loyalty to the plan's beneficiaries" embodied in Section 404, and should be read in harmony with that provision. *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000). Because Section 404 charges fiduciaries with "providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A)(i), it makes sense that Section 406(a) prohibits fiduciaries from endangering the plan's ability to pay out benefits.

In addition, because Section 404 requires fiduciaries to "defra[y] reasonable expenses of administering the plan," 29 U.S.C. § 1104(a)(1)(A)(ii), Section 406(a) doesn't prohibit routine transactions related to administering the plan. This Court is "reluctant to infer that ERISA bars conduct affirmatively sanctioned by other federal statutes"—much less affirmatively sanc-

tioned by another provision in ERISA itself. *Lockheed*, 517 U.S. at 894 n.6. Because "[n]othing in ERISA requires employers to establish employee benefits plans" in the first place, *id.* at 887, the statute is designed to "*induc[e]* employers to offer benefits by assuring a predictable set of liabilities," *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002) (emphasis added). Exposing fiduciaries to costly litigation merely for engaging in reasonable, arm's-length transactions to obtain services necessary to operate the plan cannot be reconciled with that carefully reticulated statutory design.

2. In *Lockheed*, the plan administrator paid out plan benefits to employees in exchange for their release of employment-related claims. 517 U.S. at 888, 892. The issue was whether this was barred by Section 406(a)(1)(D), which prohibits the "use * * * of any assets of the plan" "for the benefit of a party in interest." 29 U.S.C. § 1106(a)(1)(D); see *id.* § 1002(14)(C) ("party in interest" includes "employer"). The Court acknowledged that the payment of benefits was a "use of plan assets" and that the release of employment-related claims was a "benefi[t]" for the employer. 517 U.S. at 893-95. The Solicitor General likewise recognized that the transaction "f[ell] within the literal text of Section 406." U.S. Br. at 7, 15, *Lockheed*, 517 U.S. 882 (No. 95-809) (U.S. Mar. 1, 1996). Yet when "read[ing]" Section 406(a)(1)(D) "in the context of" the "surrounding" "prohibited transaction provisions"—including Section 406(a)(1)(C)—it "bec[a]m[e] clear" to the Court that this arrangement was "in fact not a 'transaction'" "within the meaning of § 406(a)(1)." 517 U.S. at 892-93, 895.

The Court's holding in *Lockheed* rested on its earlier decision in *Commissioner* v. *Keystone Consolidated Industries, Inc.*, which explained that Section 406(a) was "Congress' response to" certain "abuses" that threatened plan funding (such as a plan sponsor's "sale of property to the plan at an inflated price"). 508 U.S. 152, 160 (1993). "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan" by "jeopardiz[ing] the ability of the plan to pay promised benefits." *Ibid.*

Building on that understanding in *Lockheed*, the Court explained that "Congress used th[e] term" "transaction" in Section 406(a) only in a specific "sense"—namely, to refer to "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." 517 U.S. at 893. Section 406(a)(1)(C)—the provision at issue here—was one of the contextual clues the Court relied on in *Lockheed* to inform its construction of "transaction" as a deal that risks underfunding. *Id.* at 892.

Under *Lockheed* and *Keystone*, transactions prohibited by Section 406(a) share a "common" feature—"they generally involve uses of plan assets that are potentially harmful to the plan" because they "could 'jeopardize the ability of the plan to pay promised benefits.'" 517 U.S. at 893 (quoting *Keystone*, 508 U.S. at 160). The payment of benefits in *Lockheed*—which was "pursuant to the terms of" the plan itself—couldn't "reasonably be said to share that characteristic" of "present[ing] a special risk of plan underfunding," so it wasn't prohibited by Section 406(a). *Id.* at 892-93, 895 & n.8.

The Court emphasized that the case "might [have] present[ed] a different question" "[i]f the benefits payment" had been a "sham transaction" or "involved a kickback scheme," 517 U.S. at 895 n.8—that is, if plan assets were used in an abusive manner that *would* present a special risk of plan underfunding. But "whatever the precise boundaries of the prohibition in § 406(a)(1)(D)," the innocuous payment of benefits to employees in *Lockheed* was "one use of plan assets" that Section 406(a)(1)(D) "cannot logically encompass." *Id.* at 895.

Petitioners' reading of Section 406(a)(1)(C)—which would sweep in any service transaction between a plan and a party in interest, no matter whether it involved self-dealing or risked underfunding the plan—is irreconcilable with *Lockheed*. Just as Section 406(a)(1)(D) can't bar plan payments to plan beneficiaries, Section 406(a)(1)(C) can't logically bar arm's-length agreements for necessary plan services. Those agreements, like payments of benefits pursuant to plan terms, don't present a special risk of plan underfunding.

Two courts of appeals, applying *Lockheed*, came to the correct interpretation of Section 406(a). The Third Circuit rejected a theory similar to petitioners' here, reasoning that it's "improbable" that Section 406(a)(1)(C), "which was designed to prevent transactions deemed likely to injure the * * * plan and self-dealing, would prohibit ubiquitous service transactions and require a fiduciary to plead reasonableness as an affirmative defense." *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 336-37 (3d Cir. 2019) (quotation marks and citation omitted). That court read *Lockheed* to identify a "common thread" in Section 406(a)(1)—namely,

"a special risk to the plan from a transaction presumably not at arm's length." *Id.* at 338. *Lockheed*'s framing informed the court's reading of Section 406(a)(1) as a whole, leading to the conclusion that "transactions that do not share that common thread are permissible." *Ibid.* So the Third Circuit required plaintiffs to show an "element of intent to benefit a party in interest" to state a Section 406(a)(1)(C) claim. *Ibid.*

The Seventh Circuit similarly rejected petitioners' "circular" reading because it "would prohibit fiduciaries from paying third parties to perform essential services in support of a plan." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 584 (7th Cir. 2022) (citation omitted). Looking to *Lockheed* and the statutory context, that court held that Section 406(a)(1)(C) bars only those transactions that "loo[k] like self-dealing" and not "routine payments for plan services." *Id.* at 585.

Both the Third and Seventh Circuits correctly construed Section 406(a)(1)(C) to reach only "transactions" that, as this Court described in *Lockheed*, "present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." 517 U.S. at 893. Petitioners offer no reason to depart from the path this Court charted out in *Lockheed*.

3. Petitioners' construction of Section 406(a), though couched as a "plain-text reading" of ERISA's "clear structure," Pet'rs Br. 18, 21, in fact produces redundancy and circularity. On petitioners' reading, Section 406(a) bars *any* transaction between the plan and a party in interest. *Id.* at 22. But ERISA defines "party in interest" as any "person providing services

to such [a] plan." 29 U.S.C. § 1002(14)(B). So petitioners' reading would bar ERISA plans from making *any* service arrangements whatsoever absent an express statutory exemption because the transaction would become prohibited as soon as it was formed.

The upshot is that under "a literal reading," "ERISA would prohibit payments by a plan to an entity providing services for the plan." *Oshkosh*, 47 F.4th at 584. That's because under this circular reading, a provider would become a prohibited party by virtue of the transaction itself. That cannot be right. And it isn't. This Court has already rejected interpretations of ERISA like this one that are "infected with circularity." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 326 (1992). It should do so again here.

4. Petitioners' reading would mire plan administration in impracticable, needless restrictions without any commensurate benefit. If, as petitioners' reading requires, "routine payments by plan fiduciaries to third parties in exchange for plan services are prohibited," then Section 406 would put "plan participants and beneficiaries in a worse position" because plans "would no longer be able to outsource tasks like recordkeeping, investment management, or investment advising." *Oshkosh*, 47 F.4th at 586; see also *infra* § III. The result would be "lower returns for employees and higher costs for plan administration." *Oshkosh*, 47 F.4th at 586. By forcing that untoward (and unnecessary) result, petitioners' reading "would miss the balance that Congress struck in ERISA, because it would expose fiduciaries to liability for every transaction whereby services are rendered to the plan." *Sweda*, 923 F.3d at 337.

The more reasonable interpretation is the one adopted in *Lockheed*—the word "transaction" as used in Section 406(a) should be read to cover and thus bar deals between plans and plan insiders of the sort that threatens plan integrity. As the Court explained in *Keystone*, Congress designed Section 406(a) to expand the common-law standard governing "a transaction between a pension plan and its sponsor," which imposed an "arm's-length standard of conduct" on such insider deals. 508 U.S. at 160. Congress accomplished that design not by proscribing *all* arm's-length arrangements, as petitioners would have it, but by raising the threshold for those insider arrangements "likely to injure the pension plan." *Ibid*.[3]

B. Neighboring Statutory Provisions Confirm That Section 406 Doesn't Prohibit Arm's-Length Transactions.

Although *Lockheed*'s construction of Section 406(a) is enough to foreclose petitioners' reading, this is an even more straightforward case because a neighboring statutory provision—Section 408(b)(2)(A)—confirms that Section 406(a) doesn't prohibit arm's-

[3] The United States is wrong to suggest that reading Section 406(a) as *Lockheed* requires would offer "less protection to employees * * * than they enjoyed before ERISA was enacted." U.S. Br. 28 (citation omitted). The United States' own common-law authority—the Uniform Trust Code, *id.* at 19 n.3—constrains transactions between the trust and various interested parties defined to include the trustee's "spouse," other close family members, an "agent or attorney," or a business in which the trustee has an ownership interest—i.e., insider transactions. Nat'l Conf. of Comm'rs, *Uniform Trust Code* § 802(c), cmt. at 125, 128 (2003). So there's no basis to suggest that a proper construction of Section 406(a) would be less protective than the common law.

length agreements for necessary plan services. In *Lockheed*, the plan didn't "argue that any of" the "exceptions to the prohibitions in § 406" applied. 517 U.S. at 888 n.1. As a result, this Court had no occasion to explore the interplay between Sections 406 and 408. Section 408 further bolsters the reading of Section 406(a) advanced in *Lockheed* and adopted by the Third and Seventh Circuits.

Section 406(a) bars plan fiduciaries from causing a plan to engage in certain transactions "[e]xcept as provided in section [408]." 29 U.S.C. § 1106(a). By "directly incorporat[ing]" Section 408 "into the text" of Section 406(a), Congress designed Section 408 "to limit the scope of" Section 406(a)'s prohibitions. Pet. App. 18a-23a; see Resp'ts Br. 16-20.

Section 408 provides a number of specific exemptions from Section 406's restriction and authorizes the Secretary of Labor to grant specific exemptions. Among other exemptions, Section 408 permits plan fiduciaries to "[c]ontrac[t] or mak[e] reasonable arrangements with a party in interest for * * * 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).

Congress's deliberate choice to incorporate this provision by reference into Section 406(a) confirms that Section 406(a)(1)(C), properly read, is aimed at prohibiting the kind of self-dealing that endangers the plan. So the exemptions listed in Section 408 permit deals made "as an arm's length transaction," 29 U.S.C. § 1108(b)(15)(A)(iii), (iv); *id.* § 1108(b)(16)(C); *id.* § 1108(b)(18)(B), or agreements that "bear a reasonable rate of interest," *id.* § 1108(b)(1); see also *id.* § 1108(b)(3)(B).

But Section 408's exemptions are no substitute for a proper reading of Section 406. Section 408 hardly covers the waterfront of innocuous transactions that would be barred under petitioners' reading of Section 406. Section 408 doesn't, for example, exempt agreements for the "furnishing of goods" or "facilities" other than "office space," even though petitioners' reading would prohibit such agreements. In an attempt to avoid that outcome, the Department of Labor has interpreted "service[s]" to include "goods," 29 C.F.R. § 2550.408b-2(b), but Section 406(a)(1)(C) carefully distinguishes between the two. The better reading, as shown by Section 408's focus on reasonable terms and arm's-length arrangements, is this Court's in *Lockheed*—that Section 406 is aimed at "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." 517 U.S. at 893.

II. The Burden To Plead And Prove A Violation Should Remain On Plaintiffs Throughout The Litigation.

Importantly, the decision below recognizes that the burden rests on the plaintiff to allege the unreasonableness of a purportedly prohibited transaction. Pet. App. 6a. Just as importantly, that burden *remains* with the plaintiff throughout the case, requiring the plaintiff to *prove* that a transaction violates ERISA and gives rise to liability. Any other result would "turn the usual principles of civil liability on their head." *Pizarro* v. *Home Depot, Inc.*, 111 F.4th 1165, 1174 (11th Cir. 2024) (holding that plaintiffs bear burden of proof on ERISA Section 404 claims).

1. When allocating burdens of pleading and proof "under a statutory cause of action," the "touchstone"

of the "inquiry" is "the statute." *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). And it's well established that plaintiffs normally "bear the burden" of pleading (and proving) "the essential aspects of their claims." *Id.* at 57; see also Fed. R. Civ. P. 8(a)(2). Even when something is labeled as an "exception," the burden remains on the plaintiff "to plead and prove that the defendant is not within the exception" where, as here, "[the] exception is incorporated in the enacting clause of a statute." *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); see Resp'ts Br. 14-15, 23.

What's more, imposing the pleading burden on ERISA defendants would thwart the statutory scheme's design and purposes. Plaintiffs have the burden to plead a breach of fiduciary duty under Section 404 of ERISA. *Pizarro*, 111 F.4th at 1174; *Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 720 (2d Cir. 2013). To adequately allege that a fiduciary violated Section 404 by entering an imprudent service agreement, plaintiffs must plead that the cost of the service agreement was unreasonably high. See *Smith* v. *CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022). On petitioners' view, however, merely by relabeling a Section 404 duty-of-prudence claim as a Section 406 prohibited-transaction claim, plaintiffs could shift the burden on the reasonableness issue to the fiduciary. But Section 406(a) is designed to "supplemen[t]" Section 404, not subvert it. *Harris Tr.*, 530 U.S. at 241-42. Giving plaintiffs that dealer's choice would contravene ERISA's goal of "assuring" employers "a predictable set of liabilities" in their administration of benefit plans. *Rush Prudential HMO, Inc.*, 536 U.S. at 379.

This isn't to say that plaintiffs must plead every jot and tittle of a prohibited transaction. Facts peculiarly within the defendant's knowledge may be unavailable until a later stage of the case and it may suffice to plead allegations sufficient to infer that prohibited self-dealing occurred. But plaintiffs must be able to plausibly allege some "intent to benefit a party in interest" to state a Section 406(a)(1)(C) claim. *Sweda*, 923 F.3d at 337 (citation omitted).

Petitioners make much of analogy to the common law of trusts in attempting to place the pleading burden on defendants. But unlike common-law trustees, "ERISA fiduciaries lack the informational advantage that would justify shifting the burden of proof." *Pizarro*, 111 F.4th at 1175-76; cf. *Schaffer*, 546 U.S. at 60-61. ERISA goes well beyond the common law by imposing "a comprehensive set of 'reporting and disclosure' requirements" on plan fiduciaries, *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995), including an obligation to file an "annual report" containing "the amount of * * * compensation" paid to service providers, 29 U.S.C. § 1023(a)(1), (c)(3). That report is "made available and furnished to [plan] participants." *Id.* § 1023(a)(1)(A). "These disclosures, combined with [plaintiffs'] 'proper use of discovery tools,'" "mitigat[e]" any informational advantage that fiduciaries might otherwise have. *Pizarro*, 111 F.4th at 1176 (citation omitted).

Petitioners also argue (at 42, 47-48) that plaintiffs lack sufficient knowledge "to negate every conceivable [Section 408] exemption" in their pleadings. This concern is overstated. ERISA's comprehensive disclosure regime ensures that plan participants and beneficiaries have detailed information about service transactions at the pleading stage. And the vast majority of

cases involving routine plan services—such as the "recordkeeping and administrative services" at issue here, Pet. App. 25a—will not implicate many (if any) exemptions beyond Section 408(b)(2)(A). Petitioners claim (at 43) that defendants have taken a "kitchen-sink approach" to Section 408, but the cases they cite involved only two or three exemptions and largely didn't involve routine services. See, *e.g.*, *Haley* v. *Teachers Ins. & Annuity Ass'n of Am.*, 54 F.4th 115, 118 (2d Cir. 2022) ("collateralized loan products"); *McLaughlin* v. *Rowley*, 698 F. Supp. 1333, 1336 (N.D. Tex. 1988) ("lending [of] Plan assets to certain participants"). In the unusual case where defendants invoke exemptions that plaintiffs didn't anticipate, plaintiffs can seek to amend their pleadings. See Fed. R. Civ. P. 15(a)(1)(B), (2).

Section 408(b)(2)(A) reinforces what's already evident from this Court's holding in *Lockheed*: plan fiduciaries don't violate federal law when they arrange necessary plan services for reasonable compensation. Fiduciaries don't need to plead that this routine, innocuous conduct was justified—it's just not unlawful in the first place. Section 406(a)(1)(C), properly read, bars only transactions that present a special risk of underfunding to the plan, so a plaintiff must plead such a risk to state a claim. *Sweda*, 923 F.3d at 337. As the decision below correctly recognized, "it falls on the plaintiff * * * to allege * * * facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided." Pet. App. 24a.

2. Clarity is critically important not just as to the burden of pleading, but also as to the burden of proof.[4] That's because some courts have injected costly uncertainty and confusion into ERISA litigation by erroneously holding that Section 408's exemptions "must be proven by the defendant." *E.g.*, *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009).

The same principles that govern allocation of the burden of pleading also govern allocation of the burden of proof. The "touchstone" of the inquiry is "the statute," and "the ordinary default rule [is] that plaintiffs" have "[t]he burdens of pleading and proof" "regarding the essential aspects of their claims." *Schaffer*, 546 U.S. at 56-57 (citation omitted). Because the text and structure of the statute dictate that Section 408(b)(2)(A) sets out an essential "ingredient" of a Section 406(a)(1)(C) claim, Pet. App. 23a, plaintiffs should "bear the risk of failing to prove" unreasonable compensation under Section 408(b)(2)(A), *Schaffer*, 546 U.S. at 56.

That burden remains on plaintiffs, even if the requisite showing varies from the pleading stage (allegations) to summary judgment (production of evidence) to trial (persuasion of the factfinder). Indeed, the burden of proof—which "encompasse[s]" both "the 'burden of persuasion'" and "the 'burden of production'"—typically follows the burden of pleading. *Schaffer*, 546 U.S. at 56 (citation omitted). "[T]he party who has the burden of pleading a fact"—here, plaintiffs—generally "will have the burdens of producing evidence and of

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[4] The court below addressed the burden of proof, Pet. App. 23a-24a, and it's encompassed by the question presented, which asks what "a plaintiff must plead *and prove*" to make out a Section 406(a)(1)(C) prohibited-transaction claim, Pet. i (emphasis added).

persuading the jury of [that fact's] existence as well." 2 Robert P. Mosteller, McCormick on Evidence § 337, at 694-95 (8th ed. 2020) (hereinafter "McCormick"). It's common in the civil context for the burdens of production and persuasion to remain on a plaintiff that bears the pleading burden. See *Schaffer*, 546 U.S. at 57 (collecting cases, statutory schemes, and other contexts, such as Article III standing).[5]

This remains the case where, as here, an exception is incorporated as part of a claim's elements. Under the Fair Debt Collection Practices Act, for example, an element of a claim is the defendant's status as a "debt collector." *E.g.*, *Tavernaro* v. *Pioneer Credit Recovery, Inc.*, 43 F.4th 1062, 1067 (10th Cir. 2022). The definition of "debt collector," however, incorporates several exceptions. 15 U.S.C. § 1692a(6). The plaintiff still bears the burden of pleading and proving that the defendant doesn't come within those exceptions. See *Roth* v. *CitiMortgage Inc.*, 756 F.3d 178, 183 (2d Cir. 2014) (per curiam); *Goldstein* v. *Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 60 (2d Cir. 2004); see also A.M. Swarthout, Annotation, *Burden of Allegation and Proof in Civil Cases as Regards Exception in Statute*, 130 A.L.R. 440, 476 (1941) ("it has been held in a number of instances that the party relying upon a statute to establish a cause of action or defense must prove facts showing that his

[5] Moreover, as the United States acknowledges, U.S. Br. 21 n.4, the burden of proof may rest on the plaintiff even if the burden of pleading shifts to the defendant. Requiring a defendant to plead the relevant exemption may serve a notice function, for example, that is no longer relevant when the case has proceeded to the question of proof. See *id.* at 16 (emphasizing the importance of "giv[ing] notice of the particular exception upon which" the defendant "relies") (citation omitted).

case does not come within an exception to the statute which appears in the enacting clause thereof").

There's no "reason to believe that Congress intended" an unusual and illogical burden-shifting framework where the plaintiff would have the burden of alleging self-dealing or unreasonable compensation, but the defendant would have the burden of producing evidence of an arm's-length, reasonable arrangement, and persuading the factfinder of that fact. *Schaffer*, 546 U.S. at 57-58. Quite the opposite. Just as with the pleading burden, see *supra* at 17, shifting the burden of proof would create an end-run around plaintiffs' burden for Section 404 claims. A plaintiff bringing a Section 404 claim for excessive service fees has the burden to plead *and prove* that the fees are unreasonable. See *Pizarro*, 111 F.4th at 1173-74, 1177.

That burden would be meaningless if plaintiffs could simply shift it onto defendants by bringing a Section 406(a)(1)(C) claim for the same conduct. "[A]ssuring" employers of "a predictable set of liabilities" requires consistent burdens of pleading and proof. *Rush Prudential HMO, Inc.*, 536 U.S. at 379. And the experience under Section 404 dispels petitioners' concerns about fairness to plaintiffs. Plaintiffs bringing Section 404 claims already bear the burden of proving that fees are unreasonably high, yet petitioners have identified no informational disadvantage that is systematically preventing plaintiffs from carrying that burden.

Nor does the defendant's supposed "superior knowledge," Pet'rs Br. 36 (citation omitted), justify imposing the burden of proof on a defendant. "Very often one must plead and prove matters as to which his adversary has superior access to the proof." 2 McCormick § 337, at 698. Particularly after the close

of discovery, at summary judgment and trial, there's no unfairness in requiring a plaintiff to prove a fact that would impose substantial liability on the defendant.

In addition, a "frequently significant consideration in the fixing of the burdens of proof" is that the burden lies with "the party who contends that the more unusual event has occurred." 2 McCormick § 337, at 698. Here, the more unusual event is a service agreement for an unreasonable cost. Arm's-length service agreements are "ubiquitous" and "essential" to plan operation. *Sweda*, 923 F.3d at 336; *Oshkosh*, 47 F.4th at 584-85. These agreements are necessary for the smooth and cost-effective operation of plans, and they accrue significant benefits for plan participants. Indeed, ERISA affirmatively *expects* fiduciaries to "defra[y] reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A)(ii). The recent surge in opportunistic prohibited-transaction litigation is attributable to the favorable pleading standards in certain jurisdictions, see *infra* at 24-26, not because there's an epidemic of self-dealing or unreasonable service agreements.

The court of appeals here correctly held that plaintiffs bringing Section 406(a)(1)(C) claims have the burden to produce evidence supporting the same elements that they must plead. Pet. App. 24a. But the court also felt constrained by circuit precedent based on trust law "holding that it is ultimately the defendant fiduciary that bears the burden of persuasion with regard to the applicability of the § 1108 exemptions," *id.* at 23a. This Court isn't so constrained, and it's well settled that trust law doesn't "control" this Court's interpretation of ERISA. *Thole* v. *U.S. Bank N.A.*, 590 U.S. 538, 542 (2020). For much-

needed clarity's sake, the Court should hold that the burden of proof—including the burden of persuasion at trial—remains with plaintiffs at all stages of the litigation.

In sum, there's no basis for an "ERISA exception" to the "ordinary default rule" that plaintiffs bear the burden of pleading and proving the elements of their claims. *Thole*, 590 U.S. at 547 (first quote); *Schaffer*, 546 U.S. at 56 (second quote). The Court should hold that plaintiffs have the burdens of pleading, production, and persuasion regarding a Section 406 violation. But at minimum, the Court should confirm that plaintiffs have the burdens of pleading and production. Pet. App. 24a. That would at least ensure that plaintiffs have some obligation to adduce facts "calling into question the fiduciary's loyalty" before the burden shifts to defendants. *Ibid.*

III. Petitioners' Rule Would Harm Plan Participants And Administrators.

The serious practical consequences of petitioners' reading further counsel against extending it nationwide. Excessive-fee litigation is already on a "rapid" and "unprecedented" rise, and petitioners' approach would only fuel the fire. *Understanding the Rapid Rise in Excessive Fee Claims* 2 ("AIG Whitepaper"), AIG, https://tinyurl.com/3en7ppd8 (last accessed Jan. 1, 2025). Excessive-fee litigation was "historically infrequent" but has now become a mainstay of the class-action bar. *Excessive Litigation over Excessive Plan Fees in 2023*, at 1 ("Chubb Report"), Chubb, https://tinyurl.com/y6fs2x87 (last accessed Jan. 1, 2025). For example, the number of excessive-fee suits increased "five-fold" from 2019 to 2020 alone. AIG Whitepaper 2, *supra*. Adopting petitioners' reading

would only aggravate these trends—permitting litigants to frame virtually any excessive-fee claim under Section 404 as a prohibited-transaction claim under Section 406, and lowering the standards necessary to prove the claim. *Supra* § II.

These suits are also "expensive to defend" given their fact-bound nature—which petitioners' regime would only exacerbate. AIG Whitepaper 2, *supra*. Even now, this litigation is already so expensive that it often "cost[s] more" for plans "to defend" even meritless claims "than to settle," Chubb Report 3, *supra*, and plan insurers are often "forced to settle" to avoid subsequent bad-faith failure-to-settle claims, *Surge in Excessive Fee Litigation Is Impacting Fiduciary Liability Insurance* 2 ("CRC Report"), CRC Grp., https://tinyurl.com/5djejdsx (last accessed Jan. 1, 2025). As a result, settlements "increased six-fold from 2016 to 2022," with the size of settlements increasing each year. Chubb Report 2, *supra*. While "average settlement values" in 2020 hovered around $1.5 million, they nearly quadrupled to $5.9 million by 2022. *Id.* at 3. All told, excessive-fee litigation cost plans "more than $1 billion" in settlements from 2015 to 2020, "including $330 million in legal fees." AIG Whitepaper 2, *supra*.

Enterprising plaintiffs' attorneys are acutely aware of these trends. They commonly receive 33 percent of any settlement, providing powerful incentives to assert even tenuous claims. See, *e.g.*, *Marshall* v. *Northrop Grumman Corp.*, 2020 WL 5668935, at *1, *8 (C.D. Cal. Sept. 18, 2020). Indeed, suits are increasingly being leveled against plans with "robust plan practices and relatively low fees," Chubb Report 2, *supra*, and "much smaller retirement plans"

with only a few million dollars in assets, AIG Whitepaper 4, *supra*. "[N]o plan is too small to sue." CRC Report 2, *supra*.

Nor do plan administrators have a good way to respond. To avoid accusations of a prohibited "transaction," they can either attempt to perform all necessary services in-house (forgoing the comparative advantage offered by service providers), or forgo offering those services altogether. Constraining plans' ability to contract with service providers increases expenses (by impeding the most efficient service arrangements) or reduces returns (by blocking beneficial services). The net effect is to drain money from employees' retirement accounts. "Plan administration fees" are "deducted" from those accounts, either as "direct charge[s] or indirectly as a reduction of the account's investment returns." *Retirement Topics—Fees,* IRS, bit.ly/3TvJKZw (last updated Aug. 20, 2024).

The unfortunate result is a system that threatens serious liability for "essential" and "ubiquitous service transactions" and "miss[es] the balance that Congress struck in ERISA." *Oshkosh*, 47 F.4th at 585, *Sweda*, 923 F.3d at 336-37. This inevitably culminates in "higher costs for plan administration" and "lower returns for employees." *Oshkosh*, 47 F.4th at 586.

Petitioners insist that even the "worst" practical consequences their reading may produce are "irrelevant." Pet'rs Br. 46 (citation omitted). But this Court has frequently taken into account Congress's aims in enacting ERISA when construing the statute, including its desire to avoid a system where prohibitive "administrative costs" and "litigation expenses" unduly impede plan operations. *Varity Corp.*, 516 U.S. at 497.

Doing so is particularly appropriate given Congress's acknowledgement that it sought to "alleviate" burdens on plans that "discourage the[ir] maintenance and growth." 29 U.S.C. § 1001a(c)(2).

Petitioners alternatively assert that the practical consequences of their reading are salutary. They acknowledge (at 9, 19, 28) that "ERISA litigation is costly and time-consuming" and can target "necessary administrative expenses" paid for services that "assist with the efficient functioning" of plans. But they speculate (at 46) that somehow "more litigation" could result in lower plan fees—citing two district court fee orders drafted by plaintiffs' counsel in support of that counter-intuitive argument. Betraying that argument's inherent weakness, petitioners fall back on the claim that their reading wouldn't affect the number of suits filed. See, *e.g.*, Pet'rs Br. 46-47. But that speculation defies how pleading standards operate. Naturally, stiffer "pleading requirements * * * screen out" lawsuits, *Tellabs, Inc.* v. *Makor Issues & Rts., Ltd.*, 551 U.S. 308, 324 (2007), while "relaxed pleading standards * * * keep them in," *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting).

Petitioners' "guardrails" wouldn't even amount to speedbumps in practice. Pet'rs Br. 6. For instance, petitioners suggest that plaintiffs will eschew meritless claims over concerns that they may not "carry the day" at final judgment. *Id.* at 48. But that ignores the realities of excessive-fee litigation. Because these cases frequently "cost more to defend than to settle," Chubb Report 3, *supra*, plaintiffs' attorneys recognize that they can extract outsized settlements even if they couldn't ultimately persuade a jury.

Petitioners also suggest that some combination of Article III standing, Rule 11 sanctions, and the possibility of fee-shifting could "deter" mounting claims. Pet'rs Br. 47. But these ersatz checks would have little effect in practice. Take attorneys' fees. Petitioners cite the relevant statute (29 U.S.C. § 1132(g)(1)) but misstate the applicable standard. Pet'rs Br. 47-48. Section 1132(g)(1) doesn't impose a "prevailing part[y]" requirement—it permits plaintiffs' fees to be shifted to the defendant whenever they achieve "'*some degree* of success on the merits'"—even absent "an 'enforceable judgment'" or a "'court-ordered consent decre[e].'" *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 250, 254-55 (2010) (emphasis added; citations omitted). So long as ERISA plaintiffs prevail on any non-"'trivial'" aspect of the case, district judges retain "discretion" to award fees case-by-case. *Id.* at 256. That doesn't deter claims. It only sweetens the pot.

Petitioners' sanctions argument is even less plausible. Rule 11 sanctions are typically reserved for "rare and exceptional case[s] where the action is clearly frivolous" or "without legal foundation." *Operating Eng'rs Pension Tr.* v. *A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988); accord *Ario* v. *Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 272, 297 (3d Cir. 2010) ("Sanctions are to be applied only 'in the "exceptional circumstance" where a claim or motion is patently unmeritorious or frivolous.'") (citation omitted). It's difficult to see how a claim attacking routine transactions under petitioners' reading would be "patently unmeritorious" when its very point is to facilitate those attacks.

In any event, it's often difficult "to tell when an argument * * * is wholly groundless," *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019)—an inquiry that "would inevitably spark collateral litigation," *ibid.*, and compound the associated litigation fees that plans already strain to avoid.

It's also unlikely that Article III standing requirements would stem the tide of litigation. Petitioners cite a single ERISA case dismissing on standing grounds, Pet'rs Br. 48, but struggle to articulate its relevance—it involved a "different type of plan," "a different remedy," "a different source of [alleged] injury," and, petitioners stress, doesn't bar claims attacking routine transactions, *ibid.* It's "possib[le]," petitioners theorize, that standing concerns could deter certain claimants, *ibid.*, but if that were true, standing requirements already would have done so. Yet such claims continue to rise. See *supra* at 24-26.

Petitioners' "guardrails" ultimately reduce to the proposition that so long as plaintiffs can non-frivolously allege that a plan secured routine, necessary services, under petitioners' reading of the statute, they can extract sizeable settlements and secure attorneys' fees to boot. Cold comfort, indeed. Petitioners' reading should be rejected for that reason, too.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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