No. 23-1007

In the Supreme Court of the United States

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

ON A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Table of authorities ii
Introduction 1
Argument 4
I. Respondents' reading flouts, rather than follows, text and structure 4
A. The party who benefits from an exception bears the burden of pleading and proof. 5
B. *Cook* is a special rule of criminal pleading. 6
C. Section 1106(a)'s "except as provided" language does not incorporate all of Section 1108. 11
D. Petitioners' reading does not conflict with other ERISA provisions. 13
II. Respondents' reading conflicts with precedent. 15
III. Respondents' policy arguments lack merit. 19
Conclusion 23

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. GreatBanc Tr. Co.,
835 F.3d 670 (7th Cir. 2016) 15

Atlantic Richfield Co. v. Christian,
590 U.S. 1 (2020) 12, 13

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 14

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 16, 20, 21

Bugielski v. AT&T Servs., Inc.,
76 F.4th 894 (9th Cir. 2023) 14

Corner Post, Inc. v. Bd. of Govs. of Fed. Res. Sys.,
603 U.S. 799 (2024) 3, 22

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 15

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 5

Haley v. Teachers Insurance & Annuity Association of America,
54 F.4th 115 (2d Cir. 2022) 18

Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 2, 3, 15, 16, 19, 20

Hughes v. Nw. Univ.,
63 F.4th 615 (7th Cir. 2023) 3, 4, 22

John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank,
510 U.S. 86 (1993) 4

Jones v. Axen,
91 Eng. Rep. 976 (1696) 7

Kelly v. Johns Hopkins Univ.,
2020 WL 434473 (D. Md. Jan. 28, 2020) 3, 21

Kruger v. Novant Health, Inc.,
2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) 21

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 19

Ledbetter v. United States,
170 U.S. 606 (1898) 8, 9

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 15

Lockheed Corp. v. Spink,
517 U.S. 882 (1996)..2, 3, 13

Maxwell Land-Grant Co. v. Dawson,
151 U.S. 586 (1894)..7, 10

McKelvey v. United States,
260 U.S. 353 (1922).. 5

Meacham v. Knolls Atomic Power Lab'y,
554 U.S. 84 (2008)..1, 6

Mitchell v. Kentucky Fin. Co.,
359 U.S. 290 (1959).. 14

Nat'l Sec. Sys., Inc. v. Iola,
700 F.3d 65 (3d Cir. 2012) 11

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987).. 4

Ruan v. United States,
597 U.S. 450 (2022)..9, 10

Sacerdote v. New York University,
9 F.4th 95 (2d Cir. 2021)... 21

Schlemmer v. Buffalo, Rochester & Pittsburgh Railway,
205 U.S. 1 (1907) 12

Steel v. Smith,
106 Eng. Rep. 35 (1817).. 7

United States v. Behrman,
258 U.S. 280 (1922) 8, 9

United States v. Britton,
107 U.S. 655 (1883) 2, 8, 9

United States v. Cook,
84 U.S. (17 Wall.) 168 (1872) 2, 6, 7, 8, 9

United States v. Dickson,
40 U.S. (15 Pet.) 141 (1841) 1, 5

United States v. English,
139 F.2d 885 (5th Cir. 1944) 13

United States v. First City National Bank of Houston,
386 U.S. 361 (1967) 6, 7

United States v. Reese,
92 U.S. 214 (1875) 2, 6

United States v. Vuitch,
402 U.S. 62 (1971) 8, 9

United States v. W.J. Dillner Transfer Co.,
315 F.2d 107 (3d Cir. 1963) 13

RULES, STATUTES, AND REGULATIONS

12 U.S.C.
§ 1828 7

29 U.S.C.
§ 206 14
§ 207 14
§ 213 14
§ 1106 .... 1–2, 4–5, 7–20
§ 1108 .... 1–2, 4–12, 14–19

29 C.F.R.
§ 2550.408b 11

Federal Rules of Civil Procedure
Rule 7 19

OTHER AUTHORITIES

Dep't of Labor, Instructions for Form 5500 (2023) ... 17

Haley v. TIAA,
No. 17-cv-00855, Dkt. 35 & 74 (S.D.N.Y.) 18, 19

Resp. Br., *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022) (19-1401) 20

Resp. Br., *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136 (2016) (No. 14-723) 20

Lauren K. Valastro, *How Misapplying* Twombly *Erodes Retirement Funds*, 32 GEO. MASON L. REV. (forthcoming 2025) 3

INTRODUCTION

Respondents admit § 1106(a) bars ERISA fiduciaries from entering certain transactions with parties in interest. Resp. Br. at 5. They acknowledge § 1108 "provides exceptions" to that prohibition. *Id.* And they concede, consistent with *United States v. Dickson* and *Meacham v. Knolls Atomic Power Laboratory*, that "the party who 'set[s] up any such exception[] must establish it.'" *Id.* at 20–21 (quoting 40 U.S. (15 Pet.) 141, 165 (1841), and citing 554 U.S. 84, 91–92 (2008)). Given these admissions, how do Respondents escape the conclusion that, because they seek shelter through a § 1108 exception, they should have to plead and prove that exemption? By mischaracterizing precedent, improperly borrowing a criminal doctrine, and misconstruing the relationship between § 1106 and § 1108.

First, Respondents claim *Dickson* and *Meacham* address only "which party had the 'burden of proving' an affirmative defense, rather than whether an exception was an affirmative defense." *Id.* at 21. Not so. This Court did not take up *Dickson*, *Meacham*, or any other case from that line simply to restate the truism that defendants prove affirmative defenses. Rather, the parties in these cases disputed who bore the burden of pleading and proving an exception. And the Court resolved that dispute by applying the rule that "those who set up any such exception, must establish it," *Dickson*, 40 U.S. at 165, because "the burden of proving justification or exemption . . . rests on one who claims its benefits," *Meacham*, 554 U.S. at 91. That logic maps onto the situation here exactly: Respondents hope to benefit from § 1108(b)(2), which would exempt them from liability for a transaction

otherwise prohibited by § 1106(a)—so Respondents should plead and prove that exception.

Respondents resist this understanding and try to instead analogize this case to *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872). But *Cook* is a special "rule of criminal pleading," applicable only when exception and liability are so substantively intertwined that "the ingredients of the offense cannot be accurately and clearly described if the exception is omitted." *United States v. Reese*, 92 U.S. 214, 232 (1875); *Cook*, 84 U.S. at 173. That situation arises when "the exceptions themselves are stated" in the same "sentence of the statute" providing for liability. *United States v. Britton*, 107 U.S. 655, 669–70 (1883). Nothing from Respondents challenges that understanding. Indeed, despite many rounds of briefing, Respondents have still not identified a single case where this Court has applied *Cook* to a civil statute or to a situation where prohibition and exception did not sit right next door to one another.

Having foundered on text, Respondents turn to structure, asserting that Petitioners' view "creates conflicts with [other] ERISA provisions that require, permit, or contemplate the use of service providers." Resp. Br. at 27. That contention might hold water if § 1106 and § 1108 actually worked to bar all service provider transactions. But that is not what they do. A plan's fiduciaries can hire any service provider that they want. They simply must plead and prove the reasonableness of that transaction when challenged under § 1106(a). There is no inconsistency in that. To the contrary, it tracks this Court's understanding that § 1106 prescribes simple, straightforward "categorical[]" prohibitions, while § 1108 "enumerates specific exceptions to the[se] prohibitions." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*,

530 U.S. 238, 241–42 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 n.1 (1996).

Outside of text and structure, Respondents fall back on a raft of policy arguments. If Petitioners are correct, Respondents contend, "all or virtually all ERISA plans would be constantly engaging in prohibited transactions"—and "Congress could not possibly have intended that result." Resp. Br. at 30. But this Court has explained many times over that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Corner Post, Inc. v. Bd. of Govs. of Fed. Res. Sys.*, 603 U.S. 799, 815 (2024) (citing cases).

In any event, such arguments are not well taken. According to Respondents, embracing Petitioners' view "would cause an avalanche of litigation." Resp. Br. at 31. But the Eighth Circuit has embraced Petitioners' understanding for over fifteen years, and Respondents admit no avalanche has occurred. Respondents similarly claim Petitioners' theory would result in "higher costs" for plan members. *Id.* at 35–36. But again, case law and scholarship buck that assertion, finding instead that "excessive fee litigation" has "dramatically brought down fees" and "protect[ed] participants' retirement savings." *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020); Lauren K. Valastro, *How Misapplying* Twombly *Erodes Retirement Funds*, 32 GEO. MASON L REV. (forthcoming 2025) (manuscript at 17).

So too here. Petitioners allegedly paid up to $200 per year in recordkeeping, against an industry benchmark of $35. P.A. 25a–26a. Respondents do not challenge this first calculation and, in a similar case involving a university ERISA plan, the Seventh Circuit recently accepted a $35 recordkeeping fee as a suitable benchmark at the pleading stage. *Hughes v. Nw. Univ.*, 63 F.4th 615,

631–32 (7th Cir. 2023). Petitioners, in short, may have paid several times more for recordkeeping than they should have. But that would not be enough for Respondents. Instead, under their theory, to prevail on a § 1106(a) claim, Petitioners must identify a § 1106(a) transaction *and* negate any applicable § 1108 exemption in their complaint *and* disprove those exemptions at summary judgment and trial. Resp. Br. at 23. That is a radical proposal, which no court has adopted. For good reason: requiring beneficiaries to plead and prove exemptions based on information residing with the fiduciary would upend ERISA's "comprehensive civil enforcement scheme" and undercut ERISA's "broadly protective purposes." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993).

The more sensible approach is to follow the text as written: plaintiffs seek redress under § 1106(a), and defendants may, where applicable, invoke § 1108's exceptions to justify the transactions they entered.

ARGUMENT

I. RESPONDENTS' READING FLOUTS, RATHER THAN FOLLOWS, TEXT AND STRUCTURE.

"ERISA," Respondents assert, "addresses prohibited transactions with parties in interest in two steps." Resp. Br. at 5. "First, Section 1106(a)" bars fiduciaries from "enter[ing] into five categories of transactions with a party in interest." *Id.* "Then Section 1108 provides exceptions to the general rule." *Id.* All agree a plaintiff must plead step one—i.e., a transaction which falls within the "general rule"—and that Petitioners have done so

here. The only question is who carries the burden at step two, of establishing the "exceptions to the general rule."

A. The party who benefits from an exception bears the burden of pleading and proof.

United States v. Dickson, *McKelvey v. United States*, and *FTC v. Morton Salt* answer that question. *Dickson* holds that (1) "where the enacting clause is general in its language and objects," and (2) "a proviso is afterwards introduced" that "carves special exceptions only out of the enacting clause," (3) "those who set up any such exception, must establish it." 40 U.S. (15 Pet.) 141, 165 (1841). *McKelvey* adds that a pleading "need not negative . . . an exception." 260 U.S. 353, 357 (1922). And *Morton Salt* says the party who must prove an "exemption" to the "prohibitions of a statute" is the "one who claims its benefits." 334 U.S. 37, 44–45 (1948).

Remarkably, Respondents concede each of these points. They describe § 1106 as a "general rule," Resp. Br. at 5, mirroring *Dickson*'s description of an enacting clause that is "general in its language and objects," 40 U.S. at 165. They acknowledge § 1108 provides "exceptions to th[is] general rule." Resp. Br. at 5. And they admit § 1108 "benefits" Respondents by potentially exempting from liability a transaction they entered into. *Morton Salt*, 334 U.S. at 45. Section 1108 obviously does nothing to "benefit" Petitioners.

Respondents try to gloss over these points, by claiming that these cases "address which party had the 'burden of proving' an affirmative defense, rather than whether an exception was an affirmative defense (which was not disputed)." Resp. Br. at 21. But whether an exception was an affirmative defense was *not* the point of these cases; most of the decisions never even use the term

"affirmative defense." Rather, these cases addressed which side held the burden of establishing an exception, a question the parties actively contested. This Court answered that question by embracing the rule that it outlined in *Dickson* and which it has followed many times since.

Meacham provides a particularly salient application of that rule given its parallels to this case. 554 U.S. at 87. *Meacham* addressed the same U.S. Code title at issue here (Title 29). *Id.* And like the prohibited-transaction framework, *Meacham* involved a general prohibition—age-based employment discrimination—and a separate exception for reasonableness. *Id.* The ADEA did not refer to that exception as an affirmative defense. Yet "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such)," the Court held that ADEA defendants "must not only produce evidence raising the defense, but also persuade the factfinder of its merit." *Id.* at 87, 91.

B. *Cook* is a special rule of criminal pleading.

In lieu of this authority, Respondents lean on *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), which Respondents claim shows that § 1108 describes "an element" of the offense, "rather than an affirmative defense." Resp. Br. at 14. That view lacks merit for four reasons.

1. To start, *Cook* is a "rule of criminal pleading." *United States v. Reese*, 92 U.S. 214, 232 (1876). Indeed, Respondents identify only three civil cases where, they say, this Court applied *Cook*. Resp. Br. at 13 n.2. But the first two, *Meacham* and *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967), don't

even cite *Cook*, much less apply its framework. And in any event, they both disfavor Respondents: *Meacham* for the reasons outlined, and *First City* because it examined "whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U.S.C. § 1828(c)(5)(B) or whether it is on the Government." *Id.* at 366. Its resulting conclusion was clear: "We think it plain that the banks carry the burden. That is the general rule where one claims the benefits of an exception to the prohibition of a statute"—i.e., the rule from *Dickson* and *Meacham*. The final matter, *Maxwell Land-Grant v. Dawson*, 151 U.S. 586 (1894), dealt not with a statute, but a land deed. That circumstance renders it irrelevant here, for reasons discussed below.[1]

2. *Cook* is not just a rule of criminal law, but a particularly distinctive one, applicable only when the exception is so substantively intertwined that the "ingredients of the offence cannot be accurately and clearly described if the exception is omitted." 84 U.S. at 173. From this holding, Respondents extrapolate that "[t]he key consideration [must be] the breadth of the initial prohibition and the exception." Resp. Br. at 15. If the prohibition and exception are broad, Respondents assert, the prohibition incorporates the exception. *Id.*

The problem with that extrapolation is that it finds no support in the case law, which is why Respondents never

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[1] Respondents also claim *Cook* "relied principally on two civil cases, *Steel v. Smith* (1817) 106 Eng. Rep. 35, and *Jones v. Axen* (1696) 91 Eng. Rep. 976." Resp. Br. at 13 n.2. Neither case helps Respondents. Here is how *Cook* describes *Jones*: "[W]hen there is a clause for the benefit of the pleader"—e.g., § 1106—"and afterwards follows a proviso which is against him"—e.g., § 1108—"he shall plead the clause and leave it to the adversary to show the proviso." 84 U.S. at 177; *see also id.* (describing *Steel* similarly).

explain how a court should determine when something is broad or narrow. They cannot say, for instance, why the reasonableness exception in *Meacham* was narrow, but § 1108's reasonableness exception is broad. Nor can they explain how to interpret the other parts of § 1106 or § 1108. If § 1106(a)(1)(C) is a broad prohibition, for example, what about § 1106(a)(1)(A), which bars property leases between plans and parties in interest? And if § 1108(b)(2) is a broad exception, what about § 1108(b)(19), which exempts cross trades, or § 1108(b)(18), which covers foreign transactions?

3. The answer to these questions is found in the actual language of *Cook* and its progeny; that language articulates several key principles.

First, for an exception to be intertwined with the offense itself, structure is paramount: An exception may be an element when the "statute defining an offence contains an exception[] in [its] enacting clause." 84 U.S. at 173. Second, *Cook* applies where necessary "to enable the accused to know the nature and cause of the accusation"—in other words, to give notice of what conduct defendants must answer to, a right uniquely guaranteed in criminal cases by the Sixth Amendment. *United States v. Behrman*, 258 U.S. 280, 288 (1922). And finally, courts ask whether a defendant can "show [a proviso with] greater particularity," or whether the prosecution is in a better position to do so. *Ledbetter v. United States*, 170 U.S. 606, 612 (1898). These considerations address each of the cases Respondents cite.

Start with structure. Respondents cite *United States v. Britton*, 107 U.S. 655 (1883), and *United States v. Vuitch*, 402 U.S. 62 (1971), as examples where the Court treated an exception as an element rather than an

affirmative defense. But in both situations, "[t]he very . . . sentence of the statute which" outlined the offense also "contain[ed] the exception." *Britton*, 107 U.S. at 669; *accord Vuitch*, 402 U.S. at 67–70.

Compare that to *Cook*, *Ledbetter*, and *Behrman*. In *Cook*, the law separated its prohibitions from its exceptions. 84 U.S. at 177–78. From that, this Court concluded that the indictment did not need to negate these exceptions, because the law's prohibitions and exceptions were not sufficiently intertwined. *Id.* Similarly, in *Ledbetter*, the law at issue contained a short enacting clause, punishing "retail liquor dealer[s]" who did not "pay a special tax," followed by a much longer set of exceptions. 170 U.S. at 609. That mirrors the circumstances here: § 1106(a) succinctly lists five types of prohibited transactions, P.A. 120a; and § 1108 enumerates a much longer set of exemptions, P.A. 123a–60a. And critically, *Ledbetter* rejected the argument that the indictment must charge the enacting clause and negate any exceptions: "[I]f it were necessary to aver that the defendant was not within . . . these exceptions, the indictment might be drawn out to an intolerable length." 170 U.S. at 611. "[I]t is" instead on "the defendant to show" an exception's applicability. *Id.* at 612. Finally, *Behrman* held that a Narcotic Drug Act indictment need not negate that a prescription was made "in the course of [a physician's] professional practice." 258 U.S. at 287. That is because, as Justice Alito recently outlined, "the course of professional practice" proviso has long been treated as "an affirmative defense" to be shouldered by the defendant. *Ruan v. United States*, 597 U.S. 450, 477–78 (2022) (Alito, J., concurring).

Next, the unique nature of criminal law explains *Ruan.* True, the Court held there that the government

bore the burden of persuasion when it comes to "proving a lack of authorization" under the Controlled Substances Act. *Id.* at 463–64. But *Ruan* concerned "interpret[ation]" of a "criminal statute[]," and the opinion's many references to a defendant's mens rea and the beyond-a-reasonable-doubt standard underscore the unique differences between criminal and civil law. *See id.* at 457–58. Were that not enough, *Ruan* also distinguished between the burdens of pleading and proof, and held that the government does not "hav[e] to allege, in an indictment, the inapplicability of every statutory exception." *Id.* at 463. Rather, "a defendant [must] meet[] the burden of producing evidence that his or her conduct was 'authorized.'" *Id.* at 457. Respondents relegate this part of *Ruan* to a footnote. Resp. Br. at 15 n.3. But the straightforward conclusion is that, under *Ruan*'s logic, plaintiffs need not negative "every [§1108] exception." 597 U.S. at 463. The burden falls instead on defendants to "produc[e] [such] evidence." *Id.* at 457.

The last tenet, which side can better prove an exception, resolves *Maxwell Land-Grant v. Dawson*. Plaintiff there sought to eject a defendant from a tract of land. 151 U.S. at 594. To bring his case, plaintiff presented a deed, but the deed's opening paragraph contained "an exception [for] such tracts of land" that had been sold previously to another party. *Id.* at 604. This Court held that "it was incumbent upon [the plaintiff] to show that the land it sued to recover had not been previously conveyed." *Id.* But that was because the plaintiff—as deed holder—was in the best position to prove or negate the exception.

Notably, none of the above principles helps Respondents. Section 1106 defines the prohibition and, like *Ledbetter* and *Cook* itself, its exceptions are set out

elsewhere. Unlike *Ruan*, there is no problem here with notice: Petitioners identified the transaction at issue (recordkeeping), and § 1108 gives Respondents ample opportunity to exempt that transaction from liability. And Respondents are in a better position to prove any applicable § 1108 exemption, since § 1108 requires parties in interest to disclose relevant information to plan fiduciaries (but not beneficiaries). *See, e.g.*, § 1108(b)(2)(B)(iii).

C. Section 1106(a)'s "except as provided" language does not incorporate all of Section 1108.

Respondents' remaining textual argument is that § 1106(a)'s "except as provided" clause must incorporate § 1108's exemptions, as no such language precedes § 1106(b). Resp. Br. at 25. But the "except as provided" language only shows that § 1108 has limited application to § 1106(b)—no more, no less.

1. The exemption in this case illustrates that point. While applicable to § 1106(a) transactions, § 1108(b)(2) "does not" cover any transactions described in § 1106(b). *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 94 (3d Cir. 2012); 29 C.F.R. 2550.408b-2(a). That is true of several other § 1108 exemptions. *See, e.g.,* 29 U.S.C. § 1108(b)(17), (b)(20). Hence, when Congress wanted to "extend" any § 1108 exemptions to § 1106(b), it did so by "signal[ing] [through] the text of § 1108." P.A. 19a; *see also* 29 U.S.C. § 1108(b)(19), (f). On the other hand, for § 1106(a) claims, a defendant can invoke any relevant § 1108 exemption.

2. Respondents criticize this understanding, calling Petitioners' view "wrong" and rejecting the government's assertion that § 1108 has a "lesser application" to § 1106(b). Resp. Br. at 26–27. But Respondents themselves acknowledge that "[a]s a practical matter,

Section 1108's exemptions may apply less often to Section 1106(b) than to Section 1106(a)." *Id.* at 27. And their own brief explains why the text embraces a "lesser application" approach. As Respondents observe, "the transactions in Section 1106(b) all pose an inherent risk of harm to the plan" because they involve a fiduciary "personally benefitting." *Id.* at 25. Meanwhile, some § 1106(a) transactions could benefit plan beneficiaries—if certain conditions and exemptions are met. *Id.* at 36. That is why defendants have the entire set of available § 1108 exemptions to draw on for a § 1106(a) claim, but only a subset of these exemptions for a § 1106(b) claim.

3. Precedent corroborates this understanding of § 1106(a)'s "except as provided" clause. *Schlemmer v. Buffalo, Rochester & Pittsburgh Railway*, 205 U.S. 1, 10 (1907), explains that "[t]he word 'provided'" "merely creates an exception," which need "not [be] negatived by the plaintiff." *Atlantic Richfield v. Christian*, 590 U.S. 1, 16 (2020), adds that when Congress uses the words "except as provided," it does not "expand or contract the scope" of either the liability or exemption provisions—it just explains what happens when these provisions cross paths. And Petitioners' opening brief included several cases where courts have, faithful to *Schlemmer* and *Atlantic Richfield*, read an "except as provided" clause as establishing exceptions for a defendant to plead and prove. Pet. Br. at 29.

Respondents offer no persuasive rebuttal to this authority. On *Schlemmer*, they say nothing; the case isn't mentioned in their brief. On *Atlantic Richfield*, Respondents claim "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)." Resp. Br. at 22. Yet by any measure, adding a pleading

element outside of § 1106(a)'s text does "contract the scope" of § 1106(a). 590 U.S. at 16. Finally, rather than rebutting Petitioners' examples, Respondents freely admit "[t]here may be comparatively more decisions where," given an "except as provided" clause, "courts have found exceptions to be affirmative defenses." Resp. Br. at 22. At most, Respondents offer their own cases: *Ruan*, *Ledbetter*, and *United States v. English.*, 139 F.2d 885 (5th Cir. 1944). But *Ruan* and *Ledbetter* do not support Respondents. In *English*, the court did hold that the government should have negated a separate exception. *Id.* at 885–86. But even at the time, *English* was criticized as "unsound." *United States v. W.J. Dillner Transfer Co.*, 315 F.2d 107, 109 (3d Cir. 1963). It "ha[s] not been followed" since and, regardless, concerns a law no longer on the books. *Id.* There is no reason for the Court to embrace it here.

D. Petitioners' reading does not conflict with other ERISA provisions.

1. Respondents also contend that a plain-text understanding of § 1106(a)(1)(C) conflicts with other ERISA provisions that mandate or contemplate the use of outside service providers. But that argument misunderstands how the prohibited-transaction provisions work.

Section 1106 establishes a *presumption* of impropriety for transactions Congress has deemed inherently suspect, including third-party service provider transactions. That is why this Court has stated that "[w]hat the 'transactions' identified in § 406(a) thus have in common is that they generally involve uses of plan assets that are *potentially* harmful to the plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (emphasis added). But while service

transactions are presumptively improper, § 1108 makes clear not all such transactions will ultimately result in liability. Put differently, "we know that Congress recognized that § 406(a)(1)(C) would prohibit necessary services; that is why it created an exemption." *Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 907 (9th Cir. 2023). Section 1108, indeed, permits service transactions in many situations, from the twenty-one specific statutory exemptions in § 1108(b) to the hundreds of administrative exemptions issued under § 1108(a). That result resolves Respondents' imagined conflict, by exempting the very kinds of transactions Respondents contend would be uniformly prohibited by § 1106(a).

2. Furthermore, this structure—of plaintiffs invoking a broad prohibition and defendants responding by invoking and proving one of many available exemptions—is hardly novel. *Meacham*'s age-discrimination prohibition provides one such example. So does the Fair Labor Standards Act, which broadly prohibits employers from failing to pay employees minimum wage and overtime. *See* 29 U.S.C. §§ 206, 207. But like ERISA, the FLSA then separately outlines dozens of exemptions in a different provision. *See* 29 U.S.C. § 213(a)–(b).

This Court has long held, given this framework, that "[t]he burden is, of course, upon [defendants] to establish that they are entitled to the benefit of" any exemption under § 213. *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 291 (1959); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 393 (1960) (same). A fisherwoman paying below minimum wage, for example, would presumptively violate § 206, but could avoid liability by pleading and proving an applicable affirmative defense under § 213(a). So too under ERISA. A fiduciary who transacts with a service provider presumptively violates the law but can avoid liability by

pleading and proving reasonableness. Respondents' purported conflict between § 1106(a) and ERISA's references elsewhere to the use of service providers is illusory.

II. RESPONDENTS' READING CONFLICTS WITH PRECEDENT.

The Court's ERISA cases further reinforce Petitioners' position. As Petitioners' opening brief outlines, these cases treat § 1106(a) as prescribing "categorical[]" rules that "supplement[]" the fiduciary duties outlined in § 1104 and which embrace the common law of trusts. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42 (2000); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Respondents say almost nothing about these precedents—because their theory contravenes, rather than follows, them.

1. Section 1106 aims to "categorically bar[]" certain transactions, *Harris Tr.*, 530 U.S. at 241–42, with Congress using "simple[]," "bright-line rules" to do so, *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016). Petitioners' theory tracks that understanding: To plead a claim, plaintiffs identify a transaction from one of § 1106(a)'s five categorical prohibitions. P.A. 120a.

There is, in contrast, nothing simple or categorical about Respondents' view. Under their theory, a plaintiff must not only identify a § 1106 transaction but also articulate "a plausible theory as to what the fiduciary did wrong under Section 1108(b)" and prove that theory at summary judgment and trial. Resp. Br. at 23, 42. That

innovation converts § 1106's categorical rules into qualified ones. And the task is particularly challenging given the Second Circuit's holding that only "some" of § 1108's exemptions are incorporated into § 1106, without specifying which ones. P.A. 18a. Respondents, for their part, decline to clarify this aspect of the panel's ruling, thereby transforming what should be a categorical analysis into an unpredictable, context-dependent, and gerrymandered rule.

2. Petitioners' view of § 1106 also "supplement[s]" ERISA's fiduciary-duty provisions because, for Petitioners, a plaintiff need not show harm nor "make any allegation of unreasonableness" to bring a claim. *Harris Tr.*, 530 U.S. at 241–42; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009). That is how § 1106 might reach conduct a fiduciary-duty claim does not, consistent with *Harris Trust*.

On the other hand, Respondents assert that ERISA's fiduciary-duty provisions require fiduciaries to act in the interest of beneficiaries by "defraying reasonable expenses." Resp. Br. at 4. But to succeed on a prohibited-transaction claim, Respondents also argue that a beneficiary must plead and prove that certain "compensation was unreasonable." *Id.* at 13. Under such a theory, there is no meaningful daylight between a prohibited-transaction and fiduciary duty claim—and Respondents do not argue otherwise. Far from supplementing ERISA's fiduciary duties, Respondents' view would make the prohibited-transactions provisions redundant, reducing § 1106 and § 1108 to surplusage.

3. On trust law, both Petitioners and the government observe that, for some transactions, there is an information asymmetry between fiduciaries and

beneficiaries. Respondents do not challenge this point in theory. Instead, they argue there is no asymmetry in practice because "ERISA's disclosure and reporting requirements ensure that a plaintiff has the information needed to bring a Section 1106(a) claim." *Id*. at 42.

That isn't right. Start with § 1108(b)(2). Respondents insist, based on the Form 5500 and other public notices, that Petitioners "have access to the relevant information" to negate this exemption. *Id*. at 43. Yet nowhere on the Form 5500 or any other public filing did Respondents state how much Fidelity or TIAA charged for recordkeeping. That is no accident. Form 5500 distinguishes between (1) direct compensation, (2) ineligible indirect compensation, and (3) eligible indirect compensation. J.A. 161. Cornell's Form 5500 lists TIAA and Fidelity as "receiving only eligible indirect compensation." *Id.* And the Form 5500 instructions specify that "eligible indirect compensation" need not be publicly disclosed but is subject instead to an "alternative reporting option"—an option which involves information going from TIAA and Fidelity to Respondents, but not Petitioners. Dep't of Labor, Instructions for Form 5500 at 29 (2023). Respondents, in other words, did not need to and did not in fact disclose how much was paid to TIAA or Fidelity. Petitioners estimated these fees by triangulating the information Respondents disclosed with intelligence from industry experts and data on TIAA and Fidelity's investment options. J.A. 64–65.

Worse, Respondents insist—much like the Second Circuit here, P.A. 25a–26a—that plaintiffs must provide more than an estimate of fees paid. They must also specify how fees correspond to "services rendered," since "it is not unreasonable to pay more for superior services."

Resp. Br. at 48. But that requires plaintiffs to plead the very information they lack before discovery and which they seek discovery to obtain. After all, rather than describe what services Petitioners' recordkeeping fees cover (much less break down what services correspond to what fees), Cornell's investment and plan notices simply lump recordkeeping into a larger "general administrative services" bucket, alongside accounting, legal, and other services. J.A. 184–85. The Form 5500 and summary plan descriptions say even less. There is no conceivable way that Congress, when drafting ERISA's prohibited-transaction framework, intended to impose this impossible burden on plaintiffs.

Respondents' no-information-asymmetry argument becomes even more untenable in situations where defendants invoke more than one § 1108(b) exemption. Respondents all but acknowledge this point, peppering their brief with plenty of caveats: Plaintiffs will have the necessary information in "most cases," Resp. Br. at 3, 12, for instance, and Petitioners' and the government's approach are "essentially respondents' position," *id.* at 2, 37. Respondents then cherry-pick a single case from the decisions Petitioners cite to show that it was "obvious" which "exemptions were at issue." *Id.* at 40.

Even if that were true there, Respondents' theory is belied by many other cases, including *Haley v. Teachers Insurance & Annuity Association of America*, 54 F.4th 115 (2d Cir. 2022). The *Haley* plaintiffs did exactly as Respondents propose. They brought a § 1106 claim and, in their complaint, anticipated and negated two potentially applicable exemptions: § 1108(b)(1) and § 1108(b)(2). *Haley v. TIAA*, No. 17-cv-00855, Dkt. 35 at 13–15, 17, 23 (S.D.N.Y.). But they did not anticipate and

negate § 1108(b)(17), an exemption the defendants first raised in the answer. Dkt. 74 at 19. In fact, for plaintiffs' theory of liability, it is unclear whether they even could have anticipated that exemption. Under Petitioners' and the government's approach, the *Haley* plaintiffs would have had a chance to reply, Fed. R. Civ. P. 7(a), if not an opportunity to obtain discovery. Under Respondents' theory, the case would have been dismissed. Those approaches are not "essentially" the same.

III. RESPONDENTS' POLICY ARGUMENTS LACK MERIT.

Lacking counterarguments on text and precedent, Respondents jump to policy. They claim that most ERISA suits against universities (including this one) are "meritless," so reversal would only produce "additional meritless litigation." Resp. Br. at 31–33. Their amici echo that refrain. *See, e.g.*, Encore Fiduciary Br. at 5.

Such concerns are misdirected. "[T]he sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Whether ERISA's prohibited-transaction framework is too broad or too narrow is a legislative question, not a judicial one. And it is a question Congress has taken up many times. On six prior occasions, Congress has amended § 1108, adding in total eleven additional statutory exemptions, often in response to concerns raised by plans and industry groups. *Compare, e.g.*, § 1108 (1974), *with* § 1108 (2006) (adding (b)(14) exemption for investment advice). Congress has not, on the other hand, touched § 1106 since ERISA's enactment, leaving its "categorical[]"

prohibitions in their original form. *Harris Tr.*, 530 U.S. at 242. There is no reason now for the Court to contort text and dislodge precedent to fix a purported policy problem.

At any rate, we've heard this story before. Defendants have trotted out the flood-of-litigation specter in nearly every ERISA case before this Court over the past decade. *See, e.g.*, *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136 (2016) (No. 14-723), Resp. Br. at 50 (reversal will produce "dramatic[] increase [in] litigation"); *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022) (19-1401), Resp. Br. at 47 ("Allowing the flawed complaint at issue to proceed will subject ERISA fiduciaries to an avalanche of damages claims."). Yet there has been no flood. According to Respondents' own amici, there were 56 excessive fee lawsuits in 2016—and 48 in 2023 and 66 last year. Encore Fiduciary Br. at 6.

1. Respondents' fearmongering that Petitioners' theory would mean that "*any* transaction between a plan and a service provider is a prohibited transaction" is particularly unfounded. Resp. Br. at 1. Just because a party can be sued does not mean it will be. After all, as Respondents acknowledge, Cornell uses many different providers for many different services. *Id.* at 6. Petitioners brought claims only as to TIAA and Fidelity's recordkeeping. There are many guardrails—sanctions, fee-shifting, standing—that counsel against plaintiffs filing lawsuits just to file them.

The Eighth Circuit, which has embraced Petitioners' understanding for over fifteen years, proves the point. Neither Respondents nor their amici offer evidence that this circuit has been overrun by § 1106 cases. Instead, Respondents claim that the rule from *Braden v. Wal-*

Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009), was "far from clear." Resp. Br. at 35. But here is *Braden*'s rule: "[T]he statutory exemptions established by § 1108 are defenses which must be proven by the defendant." 588 F.3d at 601. The plaintiff, in other words, "does not bear the burden of pleading facts showing that the revenue sharing payments were unreasonable in proportion to the services rendered." *Id.* Nothing about that rule or how it operates is unclear.

2. Respondents' contentions about the underlying merits are similarly unavailing. They call attention to two university cases that went to trial, asserting that plaintiffs lost both. Resp. Br. at 33. But in one case, *Sacerdote v. New York University*, the Second Circuit in fact reinstated several claims the trial court erroneously dismissed. 9 F.4th 95, 122–23 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022). Those claims remain in active litigation.

Trial outcomes are, moreover, an incomplete measure because ERISA cases—like complex civil litigation generally—often do not reach trial. Cases that settle provide monetary relief and structural improvements, ensuring that "employees and retirees will be provided with state-of-the-art retirement plans with fiduciary best practices assured." *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *1, *3 (M.D.N.C. Sept. 29, 2016). That includes settlements in university cases. *See, e.g.*, *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020).

3. Finally, as to the specific claim here, Petitioners allegedly paid several times more for recordkeeping than the benchmark rate of $35 per participant per year. J.A. 65. That is not some meritless allegation; to the contrary,

other courts have denied dismissal on similar allegations for similar claims. *Hughes v. Nw. Univ.*, 63 F.4th 615, 633 (7th Cir. 2023).

Moreover, on remand, the court below would need to apply a reasonableness standard anchored in ERISA itself, rather than the Investment Company Act. Respondents do not even seriously defend this aspect of the panel's decision, trying instead to couch the Second Circuit as using the ICA "to help explain" how "reasonableness" should work. Resp. Br. at 49. But such an "argument disregards [ERISA's] text in favor of alleged congressional intent divined from *other* statutes with very different language." *Corner Post, Inc. v. Bd. of Govs. of Fed. Res. Sys.*, 603 U.S. 799, 815 (2024). There is no need to do that. ERISA's text already outlines what to consider when analyzing reasonableness, doing so in § 1108(b)(2). ERISA's text and structure also provide that Respondents, rather than Petitioners, need to plead and prove that exemption, along with any other applicable exemption. Taken together, such circumstances suggest—contra Respondents—that remand would produce a different result on the merits.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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