No. 23A_____

IN THE

# Supreme Court of the United States

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AT&T SERVICES, INC., AND AT&T BENEFIT PLAN INVESTMENT COMMITTEE,

*Applicants*,

v.

ROBERT J. BUGIELSKI AND CHAD SIMICEK,
INDIVIDUALLY AS PARTICIPANTS IN THE AT&T RETIREMENT SAVINGS PLAN
AND AS REPRESENTATIVES OF ALL PERSONS SIMILARLY SITUATED,

*Respondents*.

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**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

AT&T Services and AT&T Benefit Plan Investment Committee respectfully request a 30-day extension of time, to and including Thursday, March 7, 2024, in which to file a petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit.* S. Ct. R. 13.5. The Ninth Circuit entered its judgment reversing the district court in relevant part on August 4, 2023. *Bugielski* v. *AT&T Servs., Inc.*, 76 F.4th 894 (9th Cir. Aug. 4, 2023) (attached as Exhibit A). On November 8, 2023, the Ninth Circuit denied AT&T's timely petition for rehearing en banc. Order, *Bugielski*, No. 21-56196 (9th Cir. Nov. 8, 2023) (attached as Exhibit B). Unless extended, the time in which to file a petition for a writ of certiorari will expire on February 6, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case involves an important, recurring issue about the proper interpretation of Section 406(a) of the Employee Retirement Income Security Act of 1974 (ERISA)—whether that section bars employee-benefit plans from entering *any* contract for services, even when those services are necessary to administer the plan and are procured in an arms-length transaction.

2. ERISA requires plan fiduciaries—like employers who sponsor 401(k) plans for their employees—to act prudently, including with respect to fees paid to third-party service providers like recordkeepers or financial advisers. 29 U.S.C.

* AT&T Services, Inc., a Delaware corporation, is a wholly owned subsidiary of AT&T Inc. AT&T Inc., a Delaware corporation, is publicly traded on the New York Stock Exchange. No one person or group owns 10% or more of the stock of AT&T Inc. AT&T Benefit Plan Investment Committee is composed of individual employees of AT&T Services, Inc., or its affiliated entities.

§ 1104(a). Section 406(a) of ERISA, codified at 29 U.S.C. § 1106(a)(1), also categorically prohibits (subject to statutory exemptions) certain types of transactions between plans and third parties, including the "furnishing of goods, services, or facilities between the plan and a party in interest." ERISA defines a "party in interest" to include "a person providing services to such plan." *Id.* § 1002(14)(B).

3. As this Court explained in *Lockheed Corp.* v. *Spink*, "Congress enacted § 406 'to bar categorically a transaction that [is] likely to injure the pension plan.'" 517 U.S. 882, 888 (1996). But Congress didn't mean to proscribe literally *any* transaction for services with plans—only transactions "in the sense that Congress used that term in § 406(a)." *Id.* at 893. Congress's particular concern was with "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Ibid.* So the sort of "transactions" Section 406(a) targets "generally involve uses of plan assets that are potentially harmful to the plan." *Ibid.*

a. AT&T administers a 401(k) defined-contribution plan offered to eligible AT&T employees. *Bugielski*, 76 F.4th at 897. To administer that plan, AT&T contracts with service providers that furnish services critical to the plan's operation. *Id.* at 898. One of those service providers is Fidelity Workplace, which provides recordkeeping services like tracking participant contributions. *Id.* at 897-98. Fidelity offers plan participants an additional service called BrokerageLink, which provides further recordkeeping and shareholding services to plan participants in exchange for additional compensation from those participants. *Id.* at 898. The plan also contracts

with an investment adviser called Financial Engines, which participants may opt to pay for additional investment-management services. *Ibid*. Financial Engines, in turn, pays Fidelity a fee for access to participants' information so that Financial Engines can advise participants and execute trades on their behalf. *Ibid*.

b. Respondents are former AT&T employees who qualified for the Plan and filed an ERISA class action. *Bugielski*, 76 F.4th at 897. As relevant here, they allege AT&T engaged in prohibited transactions under Section 406(a)(1) by amending its recordkeeping agreement with Fidelity to permit plan participants to receive services from BrokerageLink and Financial Engines. *Id.* at 898. The district court rejected plaintiffs' claims, concluding that a statutory exemption to Section 406 applied, and granted AT&T summary judgment. *Id.* at 899-900.

c. The Ninth Circuit reversed in relevant part. *Bugielski*, 76 F.4th at 901. It held that a prohibited transaction occurs under Section 406(a)(1) *any time* a plan enters an agreement with a service provider—even when that agreement secures necessary services and is negotiated at arms' length. *Ibid*. The panel applied that expansive rule to hold that AT&T caused the plan to enter a prohibited transaction when it amended the plan's contract with Fidelity so that it could offer the services of BrokerageLink and Financial Engines to plan participants. *Id.* at 901-903, 909. The panel then held that the district court reversibly erred in its consideration of the statutory exemption and remanded for re-analysis of that issue. *Id.* at 909-13.

3. The Ninth Circuit's decision warrants this Court's review because it expressly conflicts with decisions from the Third and Seventh Circuits, is inconsistent with *Lockheed*, and threatens serious practical consequences for plan administration.

*First*, the Ninth Circuit's decision openly conflicts with decisions from the Third and Seventh Circuits. Confronting materially similar allegations, the Third Circuit held that it would be "absurd" to read Section 406(a) as "prohibit[ing] necessary services." *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 337 (3d Cir. 2019). The Seventh Circuit has also held that "[i]t would be nonsensical to read [Section 406(a)] to prohibit transactions for services that are essential" for plans, like "recordkeeping and administrative services." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022). The Ninth Circuit deemed these decisions "unpersuasive" and "simply disagree[d]" with their approach. *Bugielski*, 76 F.4th at 905, 908.

*Second*, the Ninth Circuit's reading of Section 406(a) is irreconcilable with this Court's decision in *Lockheed*. The Ninth Circuit reasoned that because Section 406 appears to proscribe plan transactions with parties in interest (defined to include service providers), AT&T must have caused a "prohibited transaction" simply by entering a contract for needed administrative services. *Bugielski*, 76 F.4th at 901. That is precisely the sort of wooden literalism *Lockheed* rejected. Congress didn't mean to proscribe literally *any* plan transaction for services. Instead, its concern was with insider transactions that don't occur "at arm's length" and that are "potentially harmful to the plan" because they present a "special risk of plan underfunding." *Lockheed*, 517 U.S. at 893. The Ninth Circuit disregarded that critical caveat.

*Third*, the Ninth Circuit's decision threatens severe negative consequences for plans. Plans routinely "outsource tasks like recordkeeping, investment management, or investment advising" to outside service providers specializing in those areas. *Albert*, 47 F.4th at 586; see ERISA Industry Committee *et al.*, C.A. *Amici* Br. 4 ("It is common for defined contribution plans to engage third-party service providers."). Yet the Ninth Circuit's rule will unleash a wave of new litigation against plan administrators—simply for obtaining the services required to operate the plan. The Ninth Circuit's open conflict with the Third and Seventh Circuits also undermines the "uniform body of benefits law" ERISA was enacted to establish. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020).

4. Additional time is warranted to allow counsel sufficient time to prepare and file a petition for a writ of certiorari that would be helpful to the Court. AT&T's counsel have significant professional responsibilities in other pending matters, including *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, No. 22-1079 (U.S.); *Carey v. United States*, No. 23-401 (U.S.); *Public Utility Commission* v. *Luminant Energy Co.*, No. 23-0231 (Tex.); *A.B. v. Salesforce*, No. 23-20604 (5th Cir.); *M.D. ex rel. Stukenberg* v. *Abbott*, No. 2:11-cv-84 (S.D. Tex.); *Regeneron* v. *Amgen*, No. 22-697 (D. Del.); and *Energy Transfer Equity, L.P.* v. *Greenpeace International*, 2019-cv-00180 (N.D. Dist. Ct.). AT&T is unaware of any party that would be prejudiced by a 30-day extension.

Applicants respectfully request that an order be entered extending the time to file a petition for a writ of certiorari by 30 days, to and including Thursday, March 7, 2024.

Respectfully submitted.

*/s/ Allyson N. Ho*

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