



1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   CASEY CUNNINGHAM, ET AL.,                    )  
4                                    Petitioners,                    )  
5                                    v.                                    ) No. 23-1007  
6   CORNELL UNIVERSITY, ET AL.,                )  
7                                    Respondents.                )  
8   - - - - -

9  
10                                   Washington, D.C.  
11                                   Wednesday, January 22, 2025

12  
13                   The above-entitled matter came on for  
14                   oral argument before the Supreme Court of the  
15                   United States at 11:22 a.m.

16  
17                   APPEARANCES:

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25                   behalf of the Respondents.

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P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1007, Cunningham versus Cornell University.

Mr. Wang.

ORAL ARGUMENT OF XIAO WANG

ON BEHALF OF THE PETITIONERS

MR. WANG: Mr. Chief Justice, and may it please the Court:

When Congress enacted ERISA, it identified a number of prohibited transactions and codified that understanding in 29 U.S.C. Section 1106. In Congress's view, these transactions posed a special risk of being potentially harmful to the plan, generally because they involved a party in interest, which includes a fiduciary's relative or an officer or an owner of the plan or a person providing services to the plan.

Petitioners here have identified a transaction that falls within the text of Section 1106, and the Second Circuit's decision to dismiss that claim prior to discovery was incorrect for three reasons.

1                   First, text and structure. Congress  
2 frequently writes laws where it puts liability  
3 in one part of the statute and exceptions to  
4 liability in another, and when it does so, this  
5 Court has time and again held that plaintiffs  
6 plead and prove liability and defendants plead  
7 and prove exceptions to liability.

8                   Second, precedent. In *Keystone*  
9 *Consolidated* and *Harris Trust*, this Court made  
10 clear that the prohibited transaction provisions  
11 provide for categorical rules. But what the  
12 Second Circuit's approach does is it converts  
13 those categorical rules into qualified ones.

14                   And that brings me to the final reason  
15 for reversal, which is that they're not just  
16 qualified prohibitions, but they're qualified  
17 based on exemptions that involve information  
18 that plaintiffs cannot know and do not know  
19 prior to discovery, information like who the  
20 counterparties are in a cross-trade or how large  
21 a block trade is or what asset classes are in a  
22 block trade, which is exactly why, when Congress  
23 wrote these provisions, it intended for  
24 petitioners to plead and prove under Section  
25 1106 and for defendants to plead and prove under

1 Section 1108.

2 For these reasons, Your Honor, we ask  
3 this Court to reverse the judgment of the Second  
4 Circuit.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: What exact -- if you  
7 were -- if we were to read your complaint as it  
8 is, what exactly is the injury?

9 MR. WANG: The injury is that the --  
10 with regard to the prohibited transaction  
11 provisions, Your Honor, the injury is that the  
12 plans here engaged Fidelity and TIAA, who are  
13 parties in interest, and that violates Section  
14 1106(a)(1)(C).

15 JUSTICE THOMAS: So how did that harm  
16 the plan?

17 MR. WANG: It harmed the plan because  
18 Fidelity and TIAA didn't simply just provide  
19 recordkeeping services to the plan. They  
20 bundled them with investment products, and those  
21 investment products, in turn, had operating  
22 expenses, and those operating expenses were then  
23 shared via revenue sharing to the plan to pay  
24 for recordkeeping.

25 Now that bundling resulted in Fidelity

1 and TIAA pushing -- this is on page 22 of the  
2 Joint Appendix -- pushing its own products, its  
3 own actively managed products, leading to higher  
4 expense ratios and, therefore, greater  
5 recordkeeping fees in the -- in the result.

6 JUSTICE KAVANAUGH: Your theory means,  
7 I think, or at least the other side says that  
8 it's a prohibited transaction just to have  
9 recordkeeping services.

10 MR. WANG: Correct, Justice Kavanaugh.  
11 I think our theory --

12 JUSTICE KAVANAUGH: And that seems  
13 nuts, right? That's what they say. And it does  
14 to me seem nuts too. So what do we do with  
15 that?

16 MR. WANG: Well, Justice Kavanaugh,  
17 let me try to unpack that. I think the starting  
18 point would be to look at the text of the  
19 statute in this, and I think, for outside  
20 service providers, that would fall under  
21 1106(a)(1)(C), something that the fiduciary  
22 shall not do.

23 Now that doesn't sort of provide a  
24 per se bar, and we don't think it provides a  
25 per se bar. Instead, it says, look, that gives

1 plaintiffs an opening to open the door to plead  
2 a claim. That doesn't mean that they'll succeed  
3 on liability. 1108, that's the purpose of 1108.

4 JUSTICE KAVANAUGH: Of course, but  
5 just to state what's obvious from the amicus  
6 briefs and we've heard before in other contexts,  
7 they're worried about the expense of litigating  
8 this past the motion to dismiss. So it's not  
9 enough, they say, at the motion to dismiss to  
10 say you're not alleging -- to Justice Thomas's  
11 question, you're not alleging excessive or  
12 unreasonable amounts paid for these  
13 recordkeeping services; you're just alleging  
14 that we had them. Well, of course, we have  
15 them, right? Everyone has them. You have to  
16 have them.

17 So it's -- it's an automatic ticket,  
18 pass go, go immediately to discovery, summary  
19 judgment, huge expense. These universities,  
20 other defendants are saying that's just  
21 completely absurd and ridiculous, which is --  
22 you know, the starting point of Judge  
23 Livingston's analysis was -- was looking at  
24 trying to make sense of all this in context, I  
25 think.



1                   Now maybe there's a good answer to  
2                   that, but is it kind of an automatic ticket when  
3                   you assert that a plan has recordkeeping  
4                   services to get past the motion to dismiss?

5                   MR. WANG: Well, Your Honor, maybe I  
6                   can back up on that, Justice Kavanaugh, and sort  
7                   of answer it in two ways.

8                   The first way is to say that I think,  
9                   as we recognize on page 19 of the Joint  
10                  Appendix, recordkeeping is a necessary service.  
11                  And there may be certain moments where you want  
12                  to outsource that to an outside service  
13                  provider. You don't have to, but you might want  
14                  to.

15                  But, if you do that, if the fiduciary  
16                  does that, then the fiduciary -- then it's not a  
17                  blank check. What 1106 and 1108 say is it's not  
18                  a blank check. And if that -- and if that  
19                  transaction is subject to challenge, then 1108  
20                  provides the necessary exemption for you to  
21                  marshal.

22                  Now I think the sort of policy --

23                  JUSTICE KAVANAUGH: But you can't --  
24                  you can't just say -- sorry to interrupt and I  
25                  want you to continue, but just to get this

1 point, you can't just say and you're -- you're  
2 not alleging that the fees were excessive at  
3 this point on this claim?

4 MR. WANG: So cert --

5 JUSTICE KAVANAUGH: That's not going  
6 to be enough for you to get it dismissed,  
7 correct?

8 MR. WANG: Well, I -- I think that, as  
9 we note in our --

10 JUSTICE KAVANAUGH: And -- and you've  
11 really suffered no harm, to Justice Thomas's  
12 point, either.

13 MR. WANG: Well, Justice Kavanaugh,  
14 and I think this is consistent with Justice  
15 Thomas's point as well, that there are other  
16 guardrails that we point to, things like fee  
17 shifting and standing and the enormous expense  
18 of even bringing a case that would deter this.

19 And I think the best practical proof  
20 of this is that the Eighth Circuit has embraced  
21 this rule for 15 years. And we don't see any  
22 evidence of it -- of it happening. The  
23 Respondents and their amici provide no --

24 JUSTICE KAVANAUGH: But, in the amicus  
25 briefs, maybe -- you know, amicus briefs might

1 engage in puffery, understandably. I mean, I  
2 understand that. I'm not saying understandably.

3 (Laughter.)

4 JUSTICE KAVANAUGH: But they're  
5 painting a pretty bleak picture, the American  
6 Benefits Council, the universities who are  
7 saying this is a huge problem for the  
8 universities. This expanded litigation threat  
9 would be near limitless because every college  
10 and university relies on third-party service  
11 providers. And because the contract's mere  
12 existence, mere existence, would be enough to  
13 force these defendants to proceed through  
14 expensive discovery, it risks opening the  
15 floodgates to burdensome -- right?

16 And then they say, rightly, the burden  
17 of these suits takes away money from -- you  
18 know, it's tuition, it's faculty, et cetera.  
19 The money comes from somewhere.

20 So that's just in one context. It's  
21 other contexts according to the benefits  
22 council.

23 MR. WANG: Well --

24 JUSTICE KAVANAUGH: And maybe they're  
25 all wrong, but, you know, I take it seriously.

1 I listened to what they say and want to at least  
2 get your response.

3 MR. WANG: Certainly, Justice  
4 Kavanaugh, and two responses to that.

5 The first is I think the Court has, in  
6 fact, dealt with a similar issue in Harris  
7 Trust. In Harris Trust, that was a case about  
8 whether, for a prohibited transaction claim, one  
9 could hold not simply just the fiduciary liable  
10 but also the party in interest. And many amicus  
11 briefs were filed in that case, and the  
12 respondents themselves made the point that,  
13 look, if you can hold us liable, hold parties in  
14 interest liable, then that's going to create  
15 these devastating policy consequences.

16 And the Court rejected that. The  
17 Court said on page 254 that Salomon, the  
18 defendant, submits that the policy consequences  
19 could be devastating. Faced with the prospect  
20 of liability for dealing with the plan, parties  
21 in interest could refuse altogether to transact  
22 with plans.

23 But we know that that hasn't happened.  
24 Since 2000, when Harris Trust was decided, we've  
25 seen Respondents themselves agree on this point,

1 that there are, in fact, more ERISA plans being  
2 offered, there are more -- Your Honor?

3 JUSTICE ALITO: But --

4 JUSTICE JACKSON: Mr. Wang --

5 JUSTICE ALITO: -- you have a -- you  
6 have a formal argument, all right, and maybe  
7 you're going to win on your formal argument.  
8 These are exceptions, and exceptions are usually  
9 affirmative defenses. And, you know, we could  
10 write an opinion that says that, end of case.  
11 It could be a nice, short opinion. But it  
12 really does seem to close its eyes to the  
13 reality of what's going on, and that's what I'd  
14 really like you to address.

15 Every -- every -- I don't know why  
16 this would be confined to universities, but all  
17 sorts of employee -- employers with defined  
18 contribution plans offer the employees a menu of  
19 funds in which they can invest. And so every --  
20 every employer who does -- and -- and there's --  
21 there are always going to be recordkeeping  
22 expenses relating to these funds. And I don't  
23 know whether it would be possible, realistic,  
24 reasonable for Cornell or any other employer to  
25 do the recordkeeping for -- for Fidelity and for

1 TIAA. They have -- these are their funds.  
2 They're going to do the recordkeeping for it.

3 So all you need to do in your  
4 submission is plead something that is perfectly  
5 innocuous in and of itself. Now maybe the fees  
6 are too high. Maybe they're not. That's a  
7 different question. But all you need to do is  
8 plead something that seems to be on the surface  
9 completely innocuous. That's enough to get you  
10 beyond the motion to dismiss.

11 And then, you know, how many -- how  
12 many lawsuits just like this one did the  
13 Schlichter Bogard law firm in St. Louis file  
14 against universities?

15 MR. WANG: Well -- well, Justice  
16 Alito, let me try to unpack that.

17 JUSTICE ALITO: Well, answer the  
18 second question first.

19 MR. WANG: As to how many lawsuits  
20 were filed?

21 JUSTICE ALITO: Yeah. How many  
22 lawsuits just like this did that law firm file  
23 against different universities?

24 MR. WANG: I -- I think it's filed a  
25 significant number. I don't have the specific

1 number off the top of my head, but I would say  
2 that -- 12, excuse me, and -- but I -- I would  
3 say, in the complaint itself --

4 JUSTICE ALITO: I -- I thought it was  
5 20, but it doesn't matter.

6 So, you know, you file all these  
7 lawsuits, and maybe the universities are going  
8 to say: Look, it's going to cost us a lot of  
9 money to go through the discovery, we're just  
10 going to settle. And so there's a payday for  
11 the law firm.

12 Now maybe this is not something that  
13 we should worry about, but --

14 MR. WANG: Cert -- cert -- certainly,  
15 Justice Alito. Well, I -- I think, first of  
16 all, in the amended complaint, we point out that  
17 not every university is subject to suit. There  
18 are examples, such as Loyola Marymount,  
19 California Institute of Technology, Purdue, that  
20 have, in fact, I think, consolidated to a single  
21 recordkeeper of -- had the recordkeeping fees  
22 below or at the industry benchmark. That's not  
23 the case here.

24 JUSTICE JACKSON: Mr. Wang --

25 JUSTICE GORSUCH: Let me ask you this,

1 counsel. So you have a complaint. You've got  
2 to file it. And my colleagues make a very good  
3 point about how it can be easy to overcome a  
4 motion to dismiss.

5 But, if you're -- if you're  
6 referencing a contract in a complaint, there's a  
7 lot of case law out there that allows district  
8 courts to review the contract, and perhaps, with  
9 the full contract before it, it could as a  
10 matter of law find that the affirmative defenses  
11 apply.

12 Would you agree with that?

13 MR. WANG: I think so, Your Honor.  
14 And I think this is --

15 JUSTICE GORSUCH: Okay. And then  
16 there's also a lot of case law that says that  
17 a -- a district court can convert a 12(b)(6)  
18 into a summary judgment when defendants request  
19 it at the outset of a case in appropriate  
20 circumstances.

21 Would you agree that that would be  
22 appropriate in some cases too?

23 MR. WANG: I think that would be  
24 appropriate. That's within a district court's  
25 discretion.



1 JUSTICE GORSUCH: Thank you.

2 MR. WANG: And --

3 JUSTICE BARRETT: Oh. I -- I just  
4 wanted to ask you: So, you know, obviously,  
5 there's some concern about why on earth Congress  
6 would have structured it that way. Do you want  
7 to address that?

8 MR. WANG: Yes, certainly, Justice  
9 Barrett. I think it was because pre-ERISA -- as  
10 Keystone Consolidated points out, pre-ERISA, the  
11 standard was the arm's-length standard of  
12 conduct. But that proved difficult to police.  
13 It led to a rife of abuses. Abuses were  
14 pervasive.

15 And so I think Congress wanted to  
16 prescribe these simple and categorical and  
17 straightforward rules and prohibitions that  
18 provide plaintiffs a cause of action and  
19 recognize the information asymmetry between the  
20 fiduciary and their beneficiary.

21 JUSTICE JACKSON: And --

22 MR. WANG: I think this is a --

23 JUSTICE JACKSON: Sorry. Keep going.

24 MR. WANG: Sorry. I think this is  
25 just one example of that.

1           As we point out, even with respect to  
2 the specific exemption at issue here,  
3 1108(b)(2), (b)(2) includes another provision,  
4 (b)(2)(B), which specifically says and  
5 contemplates that information regarding  
6 compensation regarding a necessary arrangement  
7 goes from the party in interest to the  
8 fiduciary. It never goes to the beneficiary.

9           JUSTICE JACKSON: Mr. Wang, following  
10 up on Justice Gorsuch's points, is there  
11 anything in this statute or in the rules that  
12 would prevent a defendant in one of these cases  
13 from seeking an expedited summary judgment  
14 ruling from the court?

15           MR. WANG: No, there would -- there --  
16 there would not be, Justice Jackson.

17           JUSTICE JACKSON: So the -- so the  
18 university or whoever could simply respond: No,  
19 we really do have reasonable fees, attach some  
20 documents, and that could be the end of the  
21 case. We're not necessarily talking about the  
22 kind of case that would go on and on and be a  
23 big expense like that.

24           MR. WANG: Certainly, certainly,  
25 that's -- that's correct, Justice Jackson. I

1 think district courts have the discretion to  
2 have limited discovery, to order an expedited  
3 motion for summary judgment.

4 JUSTICE KAVANAUGH: Can they do that  
5 with no discovery?

6 MR. WANG: Pardon me? Can you --

7 JUSTICE KAVANAUGH: Can they do that  
8 with no discovery?

9 MR. WANG: I think that would be a  
10 harder call, Justice Kavanaugh.

11 JUSTICE JACKSON: But they could do  
12 limited discovery --

13 MR. WANG: Correct.

14 JUSTICE JACKSON: -- that's just  
15 targeted to that issue, and the defendant can  
16 start the ball rolling by moving for summary  
17 judgment to include documents that would prove  
18 that it's reasonable and necessary, correct?

19 MR. WANG: Entirely correct.

20 And, Justice Kavanaugh, if I can just  
21 respond to your question about why doing it with  
22 no discovery may not be appropriate in this  
23 particular case. Because, in this particular  
24 case, what the Second Circuit faulted  
25 Petitioners for being unable to do was to show

1     how services rendered corresponded with fees and  
2     how -- how you could benchmark one with the  
3     other.

4                     And I think that it's reasonable to  
5     say: Well, if you're going to ask that  
6     question, at least give us the contract. Give  
7     us the contract so we can understand what --  
8     what fees and what services were available.

9                     And that's not turned over prior to  
10    discovery. That's something the defendants  
11    routinely do not turn over.

12                    JUSTICE KAVANAUGH: Following up --

13                    JUSTICE JACKSON: Can't --

14                    JUSTICE KAVANAUGH: Oh, go ahead.

15                    JUSTICE JACKSON: Sorry.

16                    JUSTICE KAVANAUGH: Keep going.

17                    JUSTICE JACKSON: No, I was just going  
18    to ask about the information asymmetry and those  
19    concerns and also the sort of bigger structural  
20    concern. We're focusing here on one type of  
21    transaction and one exemption, but, as I look at  
22    this statute, there are 21 separate exemptions  
23    in 1108(b).

24                    And I guess I'm trying to figure out  
25    if there's any principled basis for saying the

1 burdens are different here in this kind of  
2 service-provider contract, but they would be --  
3 than they would be in -- with respect to other  
4 exemptions.

5 Do you understand what I'm saying?

6 MR. WANG: Yes, yes, Justice.

7 JUSTICE JACKSON: Wouldn't we have  
8 to -- wouldn't we have to have a consistent rule  
9 about whether the plaintiffs bear the burden or  
10 the defendants bear the burden of proving  
11 exemptions?

12 MR. WANG: Entirely so, Justice  
13 Jackson. I -- I entirely agree. And I think  
14 that this statute provides the reason why, which  
15 is to say: Look, there is information  
16 asymmetry. The information asymmetry might be  
17 lessened as to some exemptions, maybe (b)(2),  
18 maybe (b)(1), but there -- it -- it does exist.  
19 And given the text and structure --

20 JUSTICE JACKSON: And some of the  
21 exemptions, I mean, it would be really, really  
22 hard for us to determine that the plaintiff has  
23 to plead them because they don't have the  
24 information, correct?

25 MR. WANG: Correct. Exactly so.

1 Correct.

2 JUSTICE KAVANAUGH: What do you think  
3 of the government's point about -- and this is  
4 following up on Justice Gorsuch's suggestions --  
5 the government's point about Rule 7(a)(7) and  
6 that use? The Chamber's amicus brief says even  
7 the most ardent scholar of civil -- civil  
8 procedure has likely never heard of that, but it  
9 is cited in the government's brief as -- as a  
10 tool to mitigate the problems that have been  
11 identified.

12 What do you think?

13 MR. WANG: Certainly, Justice  
14 Kavanaugh. I think this goes to Justice  
15 Gorsuch's understanding that the district courts  
16 can do a wide -- can have a wide variety of  
17 tools at their disposal.

18 And I think Justice Jackson as well  
19 said perhaps it's limited discovery, perhaps  
20 it's an expedited motion for summary judgment,  
21 perhaps it is this, according to the Chamber,  
22 arcane rule of civil procedure, or perhaps it is  
23 additional -- an additional sort of pleading.

24 But I think that these are all sorts  
25 of tools that are within a district court's

1 discretion given the complaint and the specific  
2 pleadings at issue and the circumstances between  
3 the parties.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas?

7 JUSTICE THOMAS: Before Varsity, were  
8 there any suits like this?

9 MR. WANG: I am not aware of that --  
10 of any suits like this.

11 CHIEF JUSTICE ROBERTS: How do the  
12 factors the Court emphasized in cases like  
13 Twombly and Iqbal come into play here?

14 We seem -- we were interested and did  
15 seriously tighten up the pleading standards  
16 there, and I wonder if that's something we  
17 should take into account in deciding how to  
18 allocate the -- the burden going forward here.

19 MR. WANG: Certainly, Justice -- Chief  
20 Justice Roberts. I think that the way that we  
21 would see it, if you will, is to imagine if you  
22 have sort of three boxes of types of complaints.

23 Box 1 is the bare-bones complaint that  
24 says: I'm going to sue you because you did  
25 recordkeeping.

1           And Box 2 is, I think, something more  
2     like what we see here, is to say: Look, I'm  
3     going to bring a suit because I see that  
4     recordkeeping is tied to revenue sharing, and  
5     revenue sharing is itself tied to the investment  
6     management products that you offer, and you  
7     happen to offer products that -- that promote  
8     your own services. That -- that's Box 2.

9           And then Box 3 is everything in Box 2,  
10    plus give us allegations as to the services and  
11    the fees and benchmarks then based on  
12    information you don't know.

13           I think what we would say -- and I  
14    think this is -- this comes through in the  
15    government's brief -- is that we would say that  
16    we don't see any in Box 1. We don't see any  
17    cases in the Eighth and Ninth Circuit, and that  
18    is because of the guardrails that we talk about.  
19    But, if we were to start seeing them, I think,  
20    within the many tools in a district court's  
21    discretion, whether it's limited discovery,  
22    Iqbal and Twombly, Rule 7, there's a number of  
23    ways to manage that litigation to make sure that  
24    Box 1 does not get out of hand.

25           And if I could -- I could briefly sort



1 of respond to -- to one point that you made in  
2 your -- in your question, Justice Thomas. I  
3 would say that before Varsity, I think Congress  
4 was nonetheless concerned with these types of  
5 transactions and not simply the -- necessarily  
6 just a service provider transaction but I think  
7 more broadly as regarding the parties in  
8 interest, which is a fiduciary's relative, a  
9 officer, an owner, and it combined this corpus  
10 and said, look, these are prohibited.

11 And I think those types of lawsuits --  
12 I don't have a specific number off my top of my  
13 head -- but could have happened pre- and  
14 post-Varsity.

15 CHIEF JUSTICE ROBERTS: Justice Alito,  
16 anything further?

17 JUSTICE ALITO: Yeah. What are the  
18 guardrails that you think are in play here?

19 MR. WANG: Certainly. As we point  
20 out, I think there are a few. One -- one is  
21 simply the expense of litigating one of these  
22 and bringing one of these cases. Some more  
23 formal guardrails include fee shifting,  
24 standing, sanctions. So -- so those that we  
25 outline in our -- in our briefing all provide, I

1 believe, a -- various deterrent mechanisms to  
2 the bare-bones allegation that -- that I think  
3 the Court has expressed some concerns about.

4 JUSTICE ALITO: So Rule 11 is one.  
5 Standing is another one. What do you think you  
6 have to plead to establish standing? Do you  
7 have to plead anything more than that I am -- I  
8 am being charged for recordkeeping services? Do  
9 you think you have to prove that the charge is  
10 excessive or do you -- in order to have standing  
11 at the pleading stage?

12 MR. WANG: Well, Justice Alito, I  
13 think that that's a little bit of an open  
14 question after this Court's decision in Thole.  
15 Certainly, I think, with Thole, perhaps one  
16 take-away is that, yes, you would have to show,  
17 because simply showing record -- simply alleging  
18 recordkeeping would be pleading an injury at law  
19 and rather than injury at fact.

20 So I think that that is a possibility.  
21 I'm not --

22 JUSTICE ALITO: So all you have to  
23 plead -- you have to plead I was charged too  
24 much, and that's -- that's enough to establish  
25 standing?

1                   MR. WANG: I think, in the appropriate  
2 case, yes. However, I think that, again, this  
3 goes back to -- to -- to the other guardrails  
4 that might be there, which are fee shifting  
5 and -- and -- and questions about the -- the --  
6 sort of the expense of even bringing one of  
7 these cases.

8                   So -- so I think these all work  
9 together to explain why, in the Eighth Circuit  
10 and the Ninth Circuit, we don't see cases that  
11 have these sort of bare-bones threshold  
12 complaints.

13                   JUSTICE ALITO: And what do you think  
14 about the procedure that the Solicitor General  
15 recommended involving Civil -- Rule of Civil  
16 Procedure 7?

17                   MR. WANG: I think --

18                   JUSTICE ALITO: Is that -- do you  
19 think that's a possible -- that that is  
20 something we should say is a -- is a good  
21 practice?

22                   MR. WANG: I think that that is one of  
23 several options that would be available to a  
24 district court to address perhaps these concerns  
25 over a bare-bones complaint. But it is --

1                   JUSTICE ALITO: A district court could  
2 do that? A district court could say, after the  
3 answer is filed, I want a reply, and then rule  
4 on whether it can be determined based on the  
5 pleadings if the defendant is entitled to  
6 judgment on the pleadings?

7                   MR. WANG: Certainly, Your Honor. I  
8 think that's how we would see it. Of course, a  
9 district court could have other options  
10 available to it, such as limited discovery or an  
11 expedited summary judgment motion, as well.

12                   JUSTICE ALITO: Do you think that  
13 that's -- that should be mandatory for the  
14 district court to go through that -- well, I'll  
15 ask the Solicitor General that. I have no more  
16 questions. Thank you.

17                   CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor?

19                   JUSTICE SOTOMAYOR: I do. This isn't  
20 that easy a case in my mind. You're right about  
21 the general rules we've set, but this statute is  
22 slightly different because many of the cases  
23 that we've seen before, the prohibitions were on  
24 one page and the exemptions were in a different  
25 section, but the prohibition didn't reference

1 the exceptions the way this statute does. It  
2 says, except for the exemptions in 1108, you  
3 can't do the following.

4 On the other hand, there's 21  
5 exemptions within 1108, but I also understand  
6 there's dozens, if not a hundred more, that have  
7 been passed by the Department of Labor. And if  
8 we accept the other side's position that you  
9 have to prove the case and say there's no  
10 exemption, I don't know how you'd know that.

11 You're right, how will you know which  
12 exemptions are pertinent or not, correct?

13 MR. WANG: Correct. Correct.

14 JUSTICE SOTOMAYOR: And so that's  
15 really the problem in this case, which is  
16 either -- whatever we decide, someone's going to  
17 be potentially unfairly treated because you  
18 have -- no plaintiff has a way of knowing what  
19 all the exemptions are and what potential  
20 exemptions the other side could pick.

21 MR. WANG: Certainly, Justice  
22 Sotomayor. And I think that we --

23 JUSTICE SOTOMAYOR: The -- let me go  
24 on --

25 MR. WANG: Sorry.

1 JUSTICE SOTOMAYOR: -- okay? Yeah.

2 I'm --

3 MR. WANG: Apologies.

4 JUSTICE SOTOMAYOR: Okay. That's a  
5 given. But, here, it's pretty clear that you  
6 alleged and you thought you had some sort of  
7 burden because I read your very extensive  
8 complaint, and you basically point to a lot of  
9 other industry --

10 MR. WANG: Correct.

11 JUSTICE SOTOMAYOR: -- fees and that  
12 the fees were unreasonable. You allege it's  
13 unreasonable. You show a lot of other fees.  
14 I'm not quite sure still, and I will ask the  
15 government this, under normal pleading  
16 standards, I would have thought this was enough.

17 I think that the Second Circuit was  
18 thinking that it has to be pled with Twombly and  
19 Iqbal as a fraud and that you needed more  
20 particularized information relating to the  
21 nature of the services in total, some  
22 information that you say you couldn't have  
23 known.

24 MR. WANG: Yes.

25 JUSTICE SOTOMAYOR: You just knew how

1 much was being paid and you compared it to what  
2 other people were paying.

3 MR. WANG: Comparable plans, yes.

4 JUSTICE SOTOMAYOR: Exactly. So, if I  
5 have a problem with that part of it, that the  
6 Second Circuit may have asked for more than you  
7 needed to plead, what do I do?

8 MR. WANG: Well, I think you would --

9 JUSTICE SOTOMAYOR: Even if I accepted  
10 their proposition that you need to allege for  
11 whatever reason a pleading standard, injury  
12 standard, that you have to allege something more  
13 than that they have a transaction, do I get to  
14 address that or I don't, or what am I doing  
15 here?

16 MR. WANG: Certainly, Justice  
17 Sotomayor. I think that what you're doing here  
18 is -- is, first, I think you would reverse.  
19 We -- we would ask this Court to reverse the  
20 judgment of the Second Circuit. And it would  
21 reverse by saying, look, you -- if these are  
22 enough under Iqbal and Twombly and it involves  
23 unreasonableness, then whatever rule you apply,  
24 we would still say that there was a legal error  
25 here.

1           But, if I can get back to what I think  
2     may be the first part of your question, which is  
3     perhaps the relative weakness of our -- of our  
4     decision about the "except as otherwise  
5     provided" language at the top, well, first, I  
6     think that precedent answers this point, and  
7     precedent answers this point in a couple  
8     different ways.

9           One is Respondents have provided no  
10    cases where that actually changes the calculus.  
11    It turns except -- the words "except as  
12    otherwise provided" magically turns the word --  
13    the exempt -- exemptions into elements. There's  
14    no case on that point. In fact, the cases like  
15    Atlantic Richfield and Schlemmer make fairly  
16    clear that all that's doing is saying what  
17    happens when things clash. It doesn't expand or  
18    contract the liability provisions at all.

19           And I think, sort of maybe as a  
20    concluding point on this point, that is  
21    reinforced by the structure and the complexity  
22    and the nuance that's provided in 1108 that  
23    involves an information asymmetry that -- that,  
24    again, cannot be addressed prior to discovery.

25           JUSTICE SOTOMAYOR: I'm going to ask



1 the other two about the Second Circuit factual  
2 ruling, which was that with respect to this  
3 provision, you have the burden of showing  
4 unreasonableness, but it reserved consideration  
5 of whether there were other exemptions that you  
6 didn't bear the burden about proving. I don't  
7 know how it got there at all.

8 MR. WANG: Right.

9 JUSTICE SOTOMAYOR: And I'll ask the  
10 government and your adversary how we do that.  
11 But Cook did say that -- established a narrow  
12 ruling for criminal pleadings. I don't think  
13 there's any case that ever has applied it to  
14 civil exemptions, correct?

15 MR. WANG: Correct.

16 JUSTICE SOTOMAYOR: So it's hard to  
17 rely on Cook, but the essence of its thinking  
18 was, if a prohibition looks like -- if a  
19 prohibition looks like it's -- you can't really  
20 tell it's illegal or not because the exemption  
21 here says you can have these relationships, you  
22 can just have them with reasonable fees, then  
23 you need for the -- for the government -- for  
24 the government to prove they were unreasonable.

25 MR. WANG: I --

1 JUSTICE SOTOMAYOR: Why wouldn't that  
2 apply here, that concept?

3 MR. WANG: Why wouldn't Cook's apply  
4 here?

5 JUSTICE SOTOMAYOR: Observation.

6 MR. WANG: Yeah. I -- I -- I think it  
7 wouldn't apply not simply just because of the  
8 criminal/civil distinction that we talked about  
9 but also for the information asymmetries that  
10 you mention. And it doesn't sort of -- really,  
11 I think the Respondents are asking this Court to  
12 sort of carve out the statute in a few different  
13 ways, to -- to try to gerrymander it by saying:  
14 Look, we'll put the (b)(2) exemption, we'll  
15 treat that as an element and we'll try to carve  
16 out service providers, and then we'll stitch  
17 together 1106 and 1108. But that's not how the  
18 statute is written.

19 And, certainly, that might lead to  
20 some results. We don't see that happening in  
21 the Eighth or Ninth Circuits, but, if it does, I  
22 think that's in Congress's province to address.

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 Justice Gorsuch, anything?

1 JUSTICE KAVANAUGH: Just in terms of  
2 the litigation in the Second Circuit and the  
3 district court, there were other counts, right,  
4 so the complaint -- and correct me if I'm wrong,  
5 I might be mistaken on this -- there are other  
6 counts about unreasonable or excessive fees, but  
7 this count, Count IV, was just prohibited  
8 transactions, and that's the only issue we are  
9 addressing here, correct?

10 MR. WANG: Correct, Justice Kavanaugh.

11 JUSTICE KAVANAUGH: Okay. Thanks.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 Justice Jackson?

15 JUSTICE JACKSON: You've been asked a  
16 few questions that indicate concerns about the  
17 expanded litigation threat in this circumstance,  
18 and I guess I'm wondering whether those concerns  
19 are really consistent with what Congress itself  
20 was thinking in the context of this ERISA  
21 statute.

22 You know, Congress set up fiduciary  
23 duties. It created a series of remedies for  
24 plan participants to enforce those obligations.  
25 And at the beginning of the statute, it says

1 that it was "providing for appropriate remedies,  
2 sanctions, and ready access to the federal  
3 courts."

4 So it appears that Congress did not  
5 really share the concern about the litigation in  
6 this area that the amici in this case have  
7 raised.

8 MR. WANG: That's right, Justice  
9 Jackson. I think that with respect to Congress  
10 and this Court's understanding of Congress's  
11 intent in ERISA, it's to provide a broadly  
12 protective and remedial statute and provide an  
13 avenue for plaintiffs to -- to enforce ERISA's  
14 terms and conditions.

15 And I think it's telling that simply  
16 that Respondents and their amici, especially  
17 their amici, have, in fact, advocated for  
18 changes to 1106 several times in the halls of  
19 Congress. Congress has declined to do that.  
20 It's kept the scheme as it is.

21 And I think applying the text as  
22 written is appropriate in this instance.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Ms. Dubin.

2 ORAL ARGUMENT OF YAIRA DUBIN

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONERS

5 MS. DUBIN: Mr. Chief Justice, and may  
6 it please the Court:

7 The text and structure of this statute  
8 demonstrate that the 21 exemptions in 1108(b)  
9 are the fiduciary's responsibility to plead and  
10 prove, but, as already discussed this morning,  
11 that straightforward reading raises a practical  
12 concern for the subset of claims that are at  
13 issue here, that plaintiffs could obtain  
14 discovery simply by alleging a routine service  
15 provider transaction.

16 Importantly, that theoretical concern  
17 has not materialized in the real world, likely  
18 because courts have the necessary tools to weed  
19 out and deter bare-bones complaints. And in all  
20 events, we don't think that concern justifies  
21 adopting Respondents' strange reading.

22 Critically, service providers are just  
23 one of the nine categories of parties in  
24 interest. The rest are plan insiders with whom  
25 transactions carry obvious risks of favoritism

1 and abuse.

2 All the usual interpretive rules  
3 indicate that Congress intended the fiduciary to  
4 justify such transactions. Respondents'  
5 elements-based approach would thus undermine the  
6 prohibited transaction provisions as a whole  
7 based on pragmatic concerns about one sliver of  
8 party-in-interest transactions. That approach  
9 is fundamentally unsound.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Why would Congress  
12 find -- say it's unlawful for existing service  
13 providers to be employed in this way?

14 MS. DUBIN: Sure. I don't think  
15 Congress was saying it's unlawful for service  
16 providers to be employed in this way. What  
17 Congress set up is a scheme, and this Court has  
18 recognized that several times, including in your  
19 decision in Harris Trust, that these types of  
20 transactions have a potential of injuring the  
21 plan.

22 It's very easy to see that with  
23 respect to insiders, as I just mentioned, but  
24 it's also true with respect to service  
25 providers. You can pay service providers

1 excessive fees with people's retirements money.

2           So the scheme Congress set up set out  
3 specific transactions that are prohibited and  
4 then exemptions from those transactions that you  
5 can show that a particular transaction was  
6 reasonable and necessary.

7           And, in that context, it makes perfect  
8 sense to put the burden on the fiduciary to show  
9 that the transaction was justified and  
10 reasonable. The fiduciary is the one who enters  
11 into the transaction. The fiduciary is the one  
12 who has the information about the transaction.  
13 And the fiduciary is the one who's charged under  
14 trust law with ensuring that these transactions  
15 are an appropriate use of people's retirement  
16 money.

17           JUSTICE KAGAN: So do you think this  
18 is just a mistake on Congress's part? In other  
19 words, you're saying this scheme makes perfect  
20 sense with respect to insiders.

21           But, when you apply it with respect to  
22 these third-party providers, service providers,  
23 you know, all of a sudden you're potentially  
24 making libel a -- a really big category of  
25 innocuous conduct. Is this something Congress

1 just didn't understand it was doing, or, you  
2 know, do you have a theory for why Congress  
3 wanted to go that far?

4 MS. DUBIN: We don't think it was a  
5 mistake. We think it was entirely deliberate.  
6 And that's because, at trust law, the fiduciary  
7 had the burden to justify delegations to a third  
8 party. The fiduciary was hired for his skill  
9 and for his ability to manage resources  
10 appropriately.

11 He is allowed to delegate. That's  
12 consistent with the Restatement (Second) of  
13 Trusts. But, when he does so, he's the one who  
14 has the burden to justify it. And that's all  
15 1106 and 1108 do, which is you can engage in  
16 this transaction, but it's the fiduciary who  
17 carries the burden to justify it.

18 So I don't think it's a mistake at all  
19 that these service providers were included among  
20 the other parties in interest, who are all  
21 obvious insiders to the plan.

22 JUSTICE JACKSON: Your broader  
23 argument or the sort of remarks that you made  
24 initially seemed to suggest or assume that there  
25 has to be consistency in the rules about burdens



1 across the different kinds of parties in  
2 interest and across the different exemptions.

3 Can you say more about why you think  
4 that's the case?

5 MS. DUBIN: Absolutely. I don't see  
6 any textual basis here to slice and dice the way  
7 the Second Circuit suggested where it just  
8 focused on this one particular sliver of  
9 transactions. The textual hook that they're  
10 using, except as provided in 1108, equally  
11 applies to all the exemptions, so I don't see  
12 how you would single out one exemption.

13 That said, we are very concerned with  
14 the effect on the other types of parties in  
15 interest. And we do think that's a useful tool  
16 for interpreting all of the exemptions as a  
17 whole.

18 So the bottom line on that is I don't  
19 see a basis for why the Second Circuit did what  
20 it did, but it is really important that if the  
21 Court is inclined to do something more similar  
22 to the Second Circuit, even though I can't see  
23 exactly a doctrinal basis, it wouldn't let that  
24 expand to other parties in interest.

25 JUSTICE SOTOMAYOR: So how -- how do

1 we write this opinion? Let's assume we start  
2 with, as you want us to, it is the fiduciary's  
3 responsibility to -- to prove the reasonableness  
4 of their fee. That -- that's their burden,  
5 okay?

6 But what do we say about the  
7 plaintiffs' pleading, and -- and how do we say  
8 it? Meaning, is it enough just to say it  
9 violated 1106? You seem to suggest not. And  
10 then how do I explain why not?

11 MS. DUBIN: Sure. Absolutely.

12 JUSTICE SOTOMAYOR: And then my last  
13 question, and you heard it before, was this  
14 pleading enough?

15 MS. DUBIN: Sure. Absolutely. Let me  
16 address both pieces, and if I -- if I don't get  
17 to the second -- if -- if I don't get to the  
18 second piece, just let me know.

19 We think that this is a  
20 straightforward opinion to write, along the  
21 lines Justice Alito was suggesting. This is a  
22 straightforward prohibition and exemption  
23 structure, and these are affirmative defenses.

24 We think that district courts already  
25 have the tools to deal with bare-bones

1 allegations in Category 1 that we were talking  
2 before that just suggest a routine service  
3 provider transaction. They already have the  
4 tools.

5 And if the Court wanted, it could just  
6 leave them to continue doing and applying the  
7 plausibility framework that they're already  
8 applying. But, if the Court did want to say  
9 something about it --

10 JUSTICE SOTOMAYOR: I will say the  
11 following. They may get it. But I also know  
12 plaintiffs' counsel often will come in with the  
13 minimum, and if the minimum is just these --  
14 they have this prohibition, how do we avoid  
15 that?

16 MS. DUBIN: Sure. If the Court were  
17 to --

18 JUSTICE SOTOMAYOR: What do we have to  
19 say to avoid that?

20 MS. DUBIN: Yeah. If the Court were  
21 to say something about it to address the "that's  
22 nuts" example from Justice Kavanaugh, I think  
23 the way to -- to address it would be to explain  
24 that the plausibility framework precludes such  
25 complaints, and I think that's because that

1 complaint on its face obviously implicates an  
2 affirmative defense.

3 And the plaintiffs haven't said  
4 anything to suggest why the underlying conduct  
5 will ultimately be found unlawful. This isn't  
6 treading or breaking new ground. This is  
7 already done in various cases and various  
8 statutory schemes involving affirmative defense  
9 where a petitioner or a plaintiff fails to give  
10 any -- any explanation of what's going on.

11 JUSTICE SOTOMAYOR: Give me -- give --  
12 give me some examples.

13 MS. DUBIN: Sure. So I think *Nayab*  
14 versus *Capital One*, which I'll give you the  
15 cite, is 942 F.3d 480, is a great example. It's  
16 dealing with an analogous structure in the Fair  
17 Credit Reporting Act where the exemptions are  
18 affirmative defenses, but a plaintiff still has  
19 the burden to say something about their theory  
20 of why it doesn't apply.

21 I think another helpful context is  
22 that in the sanctions context, courts already,  
23 many, many circuits look to whether a plaintiff  
24 failed to investigate an obvious alternative  
25 explanation, including an affirmative defense.

1 JUSTICE KAGAN: Well, to the extent  
2 that you're saying that the plaintiff is going  
3 to need to present an alternate -- an  
4 affirmative defense and say something about why  
5 it doesn't apply, it seems to me that you're  
6 three-quarters of the way to Ms. Saharsky's  
7 position. So I -- I guess I don't see that as a  
8 typical Iqbal maneuver.

9 MS. DUBIN: So this is absolutely  
10 critical. Our position is not three-quarters of  
11 the way to my friend on the other side's  
12 position, and there are two big reasons why.

13 The first big reason is that my  
14 friend's position makes these exemptions into  
15 elements. That turns them into the plaintiff's  
16 burden to plead and prove all the way through,  
17 and they forthrightly admit that.

18 That would be a sea change in the way  
19 that these provisions are applied. No court of  
20 appeals, including the Second Circuit below, has  
21 adopted that approach, and we think it would  
22 strongly undermine these provisions.

23 But, even as to the pleading standard  
24 even as to these service provider transactions,  
25 our approaches are meaningfully different. And

1 I think, here, it's very helpful to think about  
2 the complaint at issue in this case, which, as  
3 we were talking about earlier, does allege  
4 excessive fees that were far above the industry  
5 benchmark and gives reasons to think that those  
6 fees were excessive, including that the  
7 plaintiff -- that the defendants used multiple  
8 service providers when they could have used one.

9 We think that's sufficient to say that  
10 this explanation is not obvious. However, what  
11 Respondents think and what the Second Circuit  
12 held below is that this complaint failed because  
13 they didn't go on to explain why that excessive  
14 fees charge weren't justified by the quality of  
15 the services provided. And the theory is  
16 something like, if the recordkeeper is providing  
17 the Cadillac of services, maybe these excessive  
18 fees are justified.

19 We don't think that plaintiffs carry  
20 that burden. We don't think they carry the  
21 burden to negate the exemption in that fulsome  
22 way.

23 JUSTICE ALITO: I -- I -- I don't --

24 JUSTICE GORSUCH: I -- please go  
25 ahead.

1                   JUSTICE ALITO: I'm a little puzzled  
2 by what I've understood you to say, but maybe I  
3 don't understand it. Why should the plaintiff  
4 have to do anything more than plead the elements  
5 of 1106? So, in a case like this, the plaintiff  
6 simply has to plead that the fiduciary with  
7 respect to the plan shall not cause the plan --  
8 cause the plan to engage in a transaction if the  
9 fiduciary knows or should know that such  
10 transaction constitutes a direct or indirect  
11 furnishing of goods, services, or facilities  
12 between the plan and the party in interest.

13                   So all they have to plead is that --  
14 that the fiduciary here caused the plan to  
15 engage in the furnacing -- the furnishing of  
16 goods, services, or facilities by TIAA and  
17 Fidelity, end -- end of the elements. That's  
18 all you have to plead.

19                   Why would anything more be required?

20                   MS. DUBIN: Sure. It's because I  
21 don't think that complaint plausibly alleges  
22 entitlement to relief. I think the problem with  
23 that complaint is that you're alleging a routine  
24 transaction with a service provider for services  
25 that they provide on the market.

1                   JUSTICE GORSUCH: See, that's the  
2 problem I have too, which is, in *Twiqbal*, there  
3 was an obvious explanation that would negate the  
4 existence of a cause of action with -- forget  
5 about affirmative defenses. You didn't even get  
6 out of the gate. You know, was there a contract  
7 combination conspiracy under the Sherman Act or  
8 was it unilateral action in parallel?

9                   Okay. That's one thing. Here, you're  
10 asking for somebody to plead essentially away an  
11 affirmative -- what you're calling an  
12 affirmative defense, not its elements. And I  
13 think that's what Justice Alito and Justice  
14 Kagan are getting at.

15                   And I'm unaware of this Court having  
16 endorsed that move before, and it seems to me  
17 doing so would have ripple effects we cannot  
18 presently anticipate across --  
19 trans-substantively across the law with respect  
20 to affirmative defenses. Thoughts?

21                   MS. DUBIN: Sure. I appreciate the  
22 Court's concerns, and, of course, we're cautious  
23 about spillover consequences in other areas.  
24 Again, I think this is already what district  
25 courts are doing on the ground when they



1 encounter a complaint that is just bare bones.

2 JUSTICE GORSUCH: That's one thing.  
3 Leaving it alone is one thing. Saying something  
4 about it is another.

5 MS. DUBIN: I completely agree it's  
6 different when things are happening sub rosa  
7 rather than announced by this Court.

8 JUSTICE GORSUCH: Not sub rosa, no.  
9 In the normal course, lower courts developing  
10 the law, and when splits arise or a occasion  
11 arises, we address it. But we don't first view,  
12 review. Come on, right?

13 MS. DUBIN: Let me just try to situate  
14 this entire line of questioning within our case,  
15 which is we are not urging the Court to say  
16 anything about this. We don't think the Court  
17 needs to. We think the statutory answer is  
18 clear. And for the reasons Petitioners' already  
19 given, these are affirmative defenses, these  
20 exemptions.

21 We heard four justices who are  
22 concerned with this and do think it's  
23 appropriate to say something. We do think this  
24 is the right answer that's happening on the  
25 ground, but I absolutely appreciate the concerns

1 you're articulating.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Well, which is it? I mean, earlier  
6 you said that it has to -- you have to say  
7 enough to make it plausible. And that suggests  
8 to me that that's a judicial requirement -- that  
9 the court has to -- if that -- if we say that's  
10 the standard, the court has to look at it and  
11 determine whether it's plausible. I mean, is  
12 that -- is that your answer, or is it we don't  
13 have to say anything?

14 MS. DUBIN: I was differentiating  
15 between what this Court says in an opinion  
16 resolving this case and what district courts do  
17 on the ground. I agree as to the first response  
18 that I gave, which is that district courts on  
19 the ground should be evaluating plausibility.  
20 And I do think, if you failed at all to respond  
21 to an obvious explanation for the conduct that  
22 would render it unlawful, that is a problem for  
23 a plaintiff. And I think that's perfectly  
24 within the judicial role to recognize that. And  
25 I think district courts and lower courts on the

1 ground are doing this already.

2 As to what this Court says in an  
3 opinion, I think it depends on how the Court is  
4 weighing the various spillover consequences at  
5 issue here. But this is all after you've gotten  
6 to the point, I think, where you've already  
7 rejected Respondents' approach, which I think  
8 simply doesn't work as a matter of the statutory  
9 scheme and has its own pragmatic consequences.  
10 This is simply whether you want to address the  
11 "this would produce nuts results" for these  
12 bare-bones complaints, and I think this is the  
13 right answer.

14 CHIEF JUSTICE ROBERTS: Thank you.  
15 Justice Thomas?

16 JUSTICE ALITO: Well, I'm still  
17 puzzled by your -- by your argument because a  
18 lot of your answer is, well, the district --  
19 look at what the district courts are doing on  
20 the ground.

21 But is what the district courts are  
22 doing on the ground correct? That's what I'm  
23 interested in. And I understand the argument  
24 that all that's necessary to be pled are the  
25 elements of the -- the -- the -- the provision

1 that creates liability. And those are the ones  
2 that I set out. And they -- they say nothing  
3 about the reasonableness of the fees.

4 I don't know how the reasonableness of  
5 the fees gets into the pleading requirement if  
6 that's the way we go about it.

7 MS. DUBIN: Sure. So I think looking  
8 at this Court's decision in *Iqbal*, the language  
9 used there was a claim has facial plausibility  
10 when the plaintiff pleads factual content that  
11 allows a court to draw the reasonable inference  
12 that the defendant is liable for the misconduct  
13 alleged.

14 I think that's the standard the lower  
15 courts are looking to --

16 JUSTICE ALITO: It's reasonable  
17 liability as to the elements, not reasonable  
18 liability as to affirmative defenses that may or  
19 may not exist and may or may not be asserted.  
20 Anyway, I'll -- I'll leave that there.

21 There's been talk about the fact that  
22 there are ways -- I mean, maybe those who have  
23 concerns about the practical implications of  
24 deciding the case -- of reversing the -- the  
25 Second Circuit's rule are -- are -- those

1 concerns are unfounded. Let's -- maybe they  
2 are. Okay. Let's assume that there -- they  
3 are, there's some basis to it.

4 And what you propose with Rule 7 does  
5 suggest that the government thinks there's a  
6 basis to it. So, if all you have to do is plead  
7 what I've just outlined, what are the things  
8 that district courts can permissibly do that  
9 would alleviate these concerns?

10 MS. DUBIN: So, in addition to  
11 applying what we think is the rule of Iqbal and  
12 Twombly in this context, I would say that they  
13 could also, obviously, engage in fee shifting;  
14 they can sanction attorneys who bring meritless  
15 lawsuits. I think both of those are very much  
16 deterrents to these types of bare-bones suits  
17 being brought on the ground.

18 I think it's very --

19 JUSTICE ALITO: Do you think Rule --  
20 do you think Rule 11 sanctions are really --  
21 that's going to do the job here?

22 MS. DUBIN: I do if plaintiffs are  
23 bringing -- begin to bring bare-bones  
24 complaints. I'll -- I'll point you to the Tenth  
25 Circuit, which said, you know, part of a

1 reasonable attorney's pre-filing investigation  
2 must include determining whether any obvious  
3 affirmative defense bars the case. The Seventh  
4 Circuit, the Fifth Circuit, and the Sixth  
5 Circuit have all said the same. I do think a  
6 failure to investigate an obvious affirmative  
7 defense is a problem for a plaintiff's case.

8           And I think, you know, going back to  
9 what you were asking me, I do think it's  
10 relevant that -- that -- sorry, that Twombly and  
11 Iqbal were about the elements, that was what was  
12 going on in those cases, but the thing that was  
13 motivating the Court, the thing the Court was  
14 concerned about, was that you're coming into a  
15 complaint without a plausible case against  
16 someone, that you have no theory of  
17 wrongfulness. And I think these bare-bones  
18 complaints share the same problem.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21           JUSTICE SOTOMAYOR: Earlier,  
22 Petitioners' counsel said that that maybe the  
23 unreasonableness of the fee has to be pled  
24 because you have to plead an injury-in-fact.

25           Do you accept that?

1 MS. DUBIN: I think there's a  
2 fairly -- this goes also to Justice Thomas's  
3 question earlier. I think there's a pretty  
4 obvious injury-in-fact from claims like this,  
5 which is, if you're charging excessive  
6 recordkeeping, that's coming from the plan  
7 assets.

8 JUSTICE SOTOMAYOR: But you --

9 MS. DUBIN: It's coming from  
10 retirement funds.

11 JUSTICE SOTOMAYOR: No, no, no. You  
12 misunderstand. You say to us that the only  
13 pleading standard is the 1106 violation. The  
14 1106 violation does not talk about the  
15 reasonableness or excessiveness of the fees.

16 So the elements will not address that.  
17 So, if that's all you plead, that's a bare-bone  
18 complaint which I think meets the Eighth Circuit  
19 standard, correct?

20 MS. DUBIN: Yes.

21 JUSTICE SOTOMAYOR: All right. If we  
22 are concerned about the consequences of that,  
23 that we're going to have an explosion of  
24 bare-bone complaints, do we say something like  
25 what your colleague is saying, that that's not

1 enough because you also have to plead injury-in-  
2 fact, and that obviously will take you to the  
3 unreasonableness or excessiveness of the fees?

4 MS. DUBIN: I think that is one option  
5 available to the Court here.

6 JUSTICE SOTOMAYOR: And what would be  
7 the collateral consequences of that option?

8 MS. DUBIN: So I think some of these  
9 claims -- like, these claims are about excessive  
10 fees coming from the plan, and I think, you  
11 know, that obviously applies in this sort of  
12 defined contribution plan.

13 You look at a defined benefit plan,  
14 like what was going on in Thole, you could still  
15 have someone engaging in excessive recordkeeping  
16 fees and the fiduciary is not being careful with  
17 plan assets. And that might mean the fiduciary  
18 is the wrong person to be in charge of this  
19 plan, that they're not being careful with plan  
20 assets. And one of the equitable remedies is  
21 replacing the fiduciary.

22 I think that's a harder case for how  
23 you think about the injury-in-fact construct  
24 playing out there.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?



1 JUSTICE KAGAN: And when you say  
2 "these bare-bones complaints," are you talking  
3 about the same complaints that Mr. Wang said was  
4 in Box 1? And what are those complaints  
5 exactly, and what takes you out of that  
6 category?

7 MS. DUBIN: Sure. And let me be very  
8 clear about this. I think Box 1 is a complaint  
9 that just alleges a service provider transaction  
10 for routine services. That's Box 1.

11 Box 2 is a complaint that includes  
12 allegations like the ones we see here: that the  
13 fees are excessive, four to five times the  
14 industry benchmark, that there's a reason to  
15 think the plan is paying excessive fees, that  
16 they're using multiple recordkeepers when they  
17 could have used one, that he didn't engage in a  
18 competitive process for these recordkeeping  
19 services.

20 Box 3 --

21 JUSTICE KAGAN: To me, that doesn't  
22 sound like a bare-bones complaint. Are you  
23 suggesting otherwise?

24 MS. DUBIN: No. That's exactly our  
25 position here, which is that Box 2 is where the

1 complaint should be. And, in fact, that is  
2 where the complaints that we're seeing on the  
3 ground are, that suits being brought under this  
4 allege that there are excessive fees and that  
5 there are reasons to think the fees are  
6 excessive.

7 That's actually what the practice is  
8 playing out on the ground, and I think the  
9 practice is playing out on the ground that way  
10 because of the constraints we've been talking  
11 about today.

12 JUSTICE KAGAN: So those are not ones  
13 that in any circumstance would raise the  
14 necessity of talking about affirmative defenses?

15 MS. DUBIN: That is our view.  
16 Obviously, the Second Circuit disagreed with us.  
17 That was exactly the complaint they had.

18 JUSTICE KAGAN: Yes, yes, yes, but --  
19 right.

20 MS. DUBIN: Yes. That's exactly our  
21 view.

22 JUSTICE KAGAN: Okay. You were going  
23 to go on and tell me about Box 3? Maybe not.

24 MS. DUBIN: I -- I'm happy to.

25 Box 3 relates to the quality of the

1 services. That's what the Second Circuit held.  
2 The Second Circuit held that it doesn't matter  
3 all this information that you've included about  
4 how excessive these fees are. This might be the  
5 Cadillac of recordkeeping plans. And if it's  
6 the Cadillac of recordkeeping plans, then those  
7 fees were justified.

8 And the problem is that Petitioners  
9 have no way of knowing if it's the Cadillac of  
10 recordkeeping plans.

11 JUSTICE KAGAN: But I take it that as  
12 you survey the litigation here, you're -- you're  
13 saying that most of these complaints or all of  
14 these complaints are Box 2 complaints, not the  
15 kind of bare-bones complaints that would suggest  
16 some special need to do Iqbal maneuvers?

17 MS. DUBIN: That's right. Those are  
18 the ones we're seeing.

19 And we haven't seen Respondents  
20 identify any bare-bones complaints, including in  
21 the Eighth Circuit, which has been applying this  
22 rule that Petitioners are advocating for for 15  
23 years, and we think that's because of the  
24 constraints that are already operating.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

3 JUSTICE GORSUCH: Ms. Dubin, very  
4 briefly. We got cut off because of the red  
5 light, but I -- I didn't -- I didn't want to  
6 rain on your Iqbal parade too much.

7 It -- it -- it does seem to me the  
8 7(a) argument's not completely out of left field  
9 here. They're generally disfavored, as I  
10 remember from practice, but the exception -- one  
11 of the exceptions is, when you're -- when you  
12 have an affirmative defense that's pled in the  
13 answer, sometimes the -- the district judge will  
14 say: I want to -- I want to see the reply. And  
15 it happens a lot in qualified immunity, I  
16 believe, in particular.

17 And then, once you have a pled -- pled  
18 affirmative defense, a particular one, not just  
19 a laundry list, as Justice Alito said, then you  
20 might be able to Twiqbal it, it seems to me.

21 What do you think of that?

22 MS. DUBIN: I agree with you. And I  
23 think you're -- you're right to recognize that  
24 this is not some arcane rule of procedure. It  
25 does come up.

1 JUSTICE GORSUCH: It's pretty arcane,  
2 but it's -- it's -- it's -- it's not wholly  
3 unknown in civil practice when there's an  
4 affirmative defense. I had -- I had to do it.  
5 I remember it.

6 And you've got to plead facts. And  
7 then you have something to assess, a -- a -- a  
8 real Twiqbal question to answer, I think.

9 MS. DUBIN: Yes, absolutely. I don't  
10 want to rain on the parade we're having here,  
11 but I will say that the -- the one thing I  
12 want -- I do want to make clear is, at that  
13 point, you still don't have the burden to do  
14 what the Second Circuit held the plaintiffs to  
15 here, which is to -- because they treated the  
16 defense as an element of the plaintiffs' case.

17 JUSTICE GORSUCH: Sure. Sure. But  
18 you could say, as a matter of law, based on the  
19 facts pled, no reasonable juror could doubt that  
20 this affirmative offense -- affirmative defense  
21 applied?

22 MS. DUBIN: That's right.

23 JUSTICE GORSUCH: Okay.

24 JUSTICE KAVANAUGH: A couple  
25 questions.

1                   On a bare-bones complaint, Category 1,  
2                   the pure prohibited transaction, I think you  
3                   don't have standing.

4                   MS. DUBIN: I think that's a problem  
5                   with that complaint, as we've been talking  
6                   about, as I was just talking about with Justice  
7                   Sotomayor.

8                   But I think, before getting to sort of  
9                   the standing concerns and how it would play out  
10                  in various contexts, I really just think the  
11                  most obvious answer is plausibility. But yes.

12                  JUSTICE KAVANAUGH: Okay. And then I  
13                  think most of the cases in response to your  
14                  discussion with Justice Kagan are going to  
15                  involve the claim like that, which is Count IV  
16                  here, and other claims that are excessive fees  
17                  claims, different counts, right?

18                  But we still have to analyze the other  
19                  counts may not go forward, the prohibited  
20                  transaction count. In other words, I don't know  
21                  that it's enough to take care of the prohibited  
22                  transaction count that the -- that you're  
23                  alleging excessive fees in the other counts. Or  
24                  is it enough?

25                  MS. DUBIN: It --

1 JUSTICE KAVANAUGH: Do you understand  
2 the question?

3 MS. DUBIN: Let me try. And if I  
4 haven't correct --

5 JUSTICE KAVANAUGH: Yeah.

6 MS. DUBIN: -- correctly understood  
7 you, please correct me.

8 If you're asking if the complaint here  
9 was done entirely properly, I don't think it  
10 was. The allegations I'm talking about really  
11 weren't in the right place in my view.

12 JUSTICE KAVANAUGH: They weren't  
13 related to Count IV, correct?

14 MS. DUBIN: To the prohibited  
15 transactions claims.

16 JUSTICE KAVANAUGH: Yeah.

17 MS. DUBIN: However, the Second  
18 Circuit did consider them in its analysis  
19 because it didn't apply that sort of level of  
20 formalism and still found that they were not  
21 enough. And I think that's a critical piece  
22 where we diverge from the Second Circuit. We  
23 absolutely do think it was enough here.

24 JUSTICE KAVANAUGH: The -- let me make  
25 sure I have that. That sounded important.

1                   You think what was enough?

2                   MS. DUBIN:   The Second Circuit said:  
3   Even if you consider all the allegations in the  
4   complaint here --

5                   JUSTICE KAVANAUGH:  Yes.  At the end  
6   of the analysis of Count IV, it had a little  
7   tack-on, right?

8                   MS. DUBIN:  Yes.

9                   Even if you consider all of the  
10   allegations plaintiffs made here about the fees  
11   being far above the benchmark, about the fact  
12   that the plan didn't engage in a competitive bid  
13   process, and about the fact that they used two  
14   recordkeepers when they could have used more,  
15   that would not be enough because the Petitioners  
16   haven't shown that those excessive fees weren't  
17   justified by the quality of the services  
18   provided.

19                   And that part of the analysis, we  
20   strongly disagree.

21                   JUSTICE KAVANAUGH:  To get past a  
22   motion to dismiss?

23                   MS. DUBIN:  Exactly.

24                   JUSTICE KAVANAUGH:  Right.  So the --  
25   the point -- and this is where -- to Justice



1 Kagan's point earlier about three-quarters of  
2 the way, at least on the pleadings standard, I  
3 think you're 99 percent of the way, but  
4 Respondent will obviously address that, which is  
5 you have to allege something suggesting  
6 unreasonableness of the fees, somehow get that  
7 in, at least if, as Justice Gorsuch says, it's  
8 been put into play at the motion -- at the  
9 pleading stage, correct?

10 MS. DUBIN: Another way of looking at  
11 this is sort of, on the face of the complaint,  
12 have you pled yourself out of court? That's  
13 another way of thinking about it. And I think,  
14 if you just aren't doing anything to show that  
15 these fees are not obviously reasonable, you may  
16 be in that category of claims.

17 JUSTICE KAVANAUGH: Good. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: I guess I'm  
22 wondering, is this case really about what needs  
23 to be pled, and do we need to say that?

24 I thought the government's basic  
25 position or at least Petitioners' was that the

1 problem with the Second Circuit's view was that  
2 it didn't recognize that the exemptions are, in  
3 fact, affirmative defenses and, instead, treated  
4 them as elements and that it would be enough --  
5 and maybe I'm wrong about this now given all the  
6 conversation that we had -- we've had, but that  
7 it would be enough for the court to say: These  
8 are affirmative defenses, they are not elements;  
9 therefore, the burden is, you know, on the  
10 defendant to establish them.

11 I didn't know that this was an  
12 Iqbal/Twombly case, where the Court was being  
13 called upon to determine what the plaintiff --  
14 the plaintiff had to do, as opposed to  
15 determining that defendant bore the burden of  
16 establishing these exemptions.

17 MS. DUBIN: I entirely understand  
18 where you're coming from. I think, to resolve  
19 the elements question, all you would need to  
20 hold is that these exemptions are, in fact,  
21 affirmative defenses and not elements of the  
22 prohibitions for all the reason you heard  
23 already this morning.

24 However, I do think a real practical  
25 concern has been raised by the bench. It hasn't

1 materialized yet. We haven't seen it in the  
2 Eighth Circuit. And I think that the government  
3 has offered an option for thinking about how  
4 district courts will be dealing with complaints  
5 that raise those concerns if they were to  
6 materialize in the future.

7           Whether the Court decides to write  
8 that in an opinion and offer that guidance to  
9 the lower courts obviously I leave to the Court,  
10 but it is an option available to ensure against  
11 this concern that Respondents have raised.

12           But, even if you disagree with the  
13 government on that, even if you don't think that  
14 that's an appropriate use of Iqbal and Twombly,  
15 it still wouldn't counsel in favor of adopting  
16 Respondents' approach, which is a misreading of  
17 the statutory text. It doesn't account for the  
18 other party-in-interest transactions, it doesn't  
19 account for the other exemptions, and it raises  
20 its own pragmatic concerns.

21           JUSTICE JACKSON: And -- and we  
22 wouldn't have to say those other things to  
23 resolve the exemptions question that was  
24 presented in this case?

25           MS. DUBIN: Yes. The other things

1 that you referred to are really only in response  
2 to Respondents' pragmatic concerns. Respondents  
3 are saying: Don't do what you just said. Don't  
4 resolve the case along the, you know,  
5 straightforward Meacham, ADA, Corning Glass,  
6 don't resolve this case along those lines  
7 because of these pragmatic concerns.

8 And to the extent the Court shares  
9 those concerns, we have offered that framework  
10 as a helpful tool.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Ms. Saharsky.

15 ORAL ARGUMENT OF NICOLE A. SAHARSKY

16 ON BEHALF OF THE RESPONDENTS

17 MS. SAHARSKY: Mr. Chief Justice, and  
18 may it please the Court:

19 Petitioners' view is that pleading the  
20 mere fact of a service provider transaction  
21 defeats a motion to dismiss and a case could go  
22 forward.

23 That can't possibly be right. If we  
24 look at this statute, it is unique, Section  
25 1106(a), because it covers an incredibly broad

1 array of innocent beneficial conduct.

2 In fact, ERISA separately requires and  
3 encourages hiring service protect -- service  
4 providers. Section 1106(a) thus has to be read  
5 together with Section 1108 to limit this cause  
6 of action to culpable conduct. And we know that  
7 in part because Section 1106(a) has this  
8 cross-reference to Section 1106 -- 1108, which  
9 says "except as provided in Section 1108."

10 You know, tellingly, there are two  
11 different parts of 1106 here. There's (a),  
12 which includes all of this innocent conduct, and  
13 (b), which includes only self-dealing conduct,  
14 and that cross-reference isn't in Section  
15 1106(b). It has to be doing some work  
16 textually, and it doesn't under Petitioners'  
17 provision.

18 If you look at all of this together,  
19 it shows that Congress's intent was to define  
20 the cause of action as not just a service  
21 provider transaction but one where there's some  
22 wrongful conduct, where the services are  
23 unnecessary or the fees are unreasonable.

24 And under Petitioners' view, all a  
25 plaintiff has to do is plead the mere fact of a

1 transaction, no allegation of wrongful conduct.  
2 It automatically opens the door to expansive  
3 discovery. The cost is disproportionately borne  
4 by defendants. It would force settlements of  
5 meritless litigation. It has in some of these  
6 university cases. The ultimate result would be  
7 to hurt plan participants and beneficiaries.  
8 The government recognizes that that is an  
9 intolerable result, and I'm happy to discuss why  
10 its proposed solutions don't make sense.

11 But the bottom line is the Second  
12 Circuit got it right, and this Court should  
13 affirm.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: What should be pled?

16 MS. SAHARSKY: So, here, it's the --  
17 that the fiduciary caused the plan to enter into  
18 a transaction with a party in interest, which a  
19 service provider is, and either that the  
20 services were unnecessary or that the fees are  
21 unreasonable.

22 I mean, there was never any question  
23 in this case about what exemption might apply,  
24 this idea that Petitioners say, oh, we don't  
25 know what exemption might apply. I think

1 everyone thought that was obvious, and the  
2 government seems to agree because they say that  
3 they have to plead unreasonable fees too.

4           So, you know, it's just a question of  
5 can they just come to court and say service  
6 provider transaction with nothing wrong with it,  
7 as opposed to service provider transaction with  
8 some kind of wrongdoing that's in Section 1108.  
9 And we think, you know, this Court's -- this  
10 Court's decisions in Iqbal and Twombly, you  
11 know, make clear, if you come to court, you've  
12 got to have done some investigation and have  
13 done some -- you know, have some plausible  
14 allegation of wrongdoing.

15           And it just doesn't make any sense to  
16 read this statute as allowing a cause of action  
17 to go forward with no allegation of wrongdoing.

18           JUSTICE JACKSON: What -- what is  
19 your -- what -- what is your position on who  
20 bears the burden of proving the unnecessary and  
21 unreasonable fees?

22           MS. SAHARSKY: The plaintiffs because  
23 it's an element, and so they would bear the  
24 burden of fees --

25           JUSTICE JACKSON: So you don't -- you

1 disagree that it's an affirmative defense, that  
2 the exemptions in 1108 are affirmative defenses?

3 MS. SAHARSKY: For Section 1106  
4 claims, they are elements of the claim. They  
5 are not affirmative defenses. The burden is on  
6 the plaintiff to plead them. And that's the  
7 question the Second --

8 JUSTICE JACKSON: What do we do about  
9 the structural clues in the statute that we --  
10 the -- the other side explains that this is a  
11 pretty common way in which statutes are set up,  
12 that you have prohibitions and then you have  
13 exemptions and that we ordinarily say the  
14 burdens apply in the way that they are  
15 articulating. And you don't normally see  
16 elements in this way.

17 MS. SAHARSKY: Yeah.

18 JUSTICE JACKSON: What -- what's your  
19 response to that?

20 MS. SAHARSKY: That's right, but this  
21 Court has many cases where it said that there  
22 are exceptions that are elements, and it -- the  
23 question it asks is: Do you need the exception  
24 to define the wrongful conduct? And Cook was a  
25 case like that, but there's a series of a whole



1 bunch of other cases --

2 JUSTICE JACKSON: Are all 21  
3 exemptions elements in your view? And then what  
4 do we do about the information asymmetry, the  
5 fact that plaintiff could not possibly know many  
6 of them?

7 MS. SAHARSKY: Well, the plaintiff  
8 only has to plead the one that's relevant on the  
9 facts of the case. And I think it helps to  
10 think that, you know, a case comes to a court to  
11 challenge -- a plaintiff is challenging a  
12 particular transaction. Either it's a service  
13 provider contract or it's a certain type of  
14 buying of employer stock or something else. And  
15 the different exemptions apply to different  
16 factual circumstances.

17 And as I think was discussed --

18 JUSTICE JACKSON: But are -- but do  
19 they have to be consistent with respect to the  
20 burden that you say falls on the plaintiff? Are  
21 they all elements, all 21 exceptions?

22 MS. SAHARSKY: With respect to 1106(a)  
23 claims, which include the exemption and  
24 otherwise would be only innocuous conduct, then,  
25 yes, the relevant exception in Section 1108

1 would be an affirmative defense, but not all of  
2 them would be relevant in every case on the  
3 facts.

4 And I think you can think about this  
5 in terms of what a plaintiff has to plead to go  
6 forward with a complaint. They have to --

7 JUSTICE JACKSON: I'm sorry. You said  
8 some of them are affirmative defenses? Did --

9 MS. SAHARSKY: I said that you  
10 would -- that a plaintiff would have to plead  
11 facts regarding the one that was -- regarding  
12 the transaction, the type of transaction, that's  
13 applicable in their case.

14 So, for example, there are some that  
15 involve block trades or cross-trades or buying  
16 employer stock. And no one was doing any of  
17 those things here, so there's no requirement to  
18 plead those kind of facts.

19 The plaintiff's burden is not to plead  
20 legal conclusions but to plead facts that show  
21 an entitlement to relief.

22 JUSTICE JACKSON: No, I understand the  
23 plaintiff's burden generally. I'm just trying  
24 to understand your theory --

25 MS. SAHARSKY: Yes.

1 JUSTICE JACKSON: -- about whether all  
2 of the 1108 exemptions, all of them, become  
3 elements in the 1106 context.

4 MS. SAHARSKY: In 1106(a) --

5 JUSTICE JACKSON: Yeah.

6 MS. SAHARSKY: -- which is the first  
7 part of the statute that is incredibly broad, it  
8 includes every kind of transaction you could  
9 imagine with a plan, the only thing that the  
10 Petitioners say is exempted is the thing that  
11 this Court exempted in the Lockheed versus Spink  
12 decision, which is paying benefits to a  
13 beneficiary, but it covers pretty much  
14 everything else in the world. The definition of  
15 "party in interest" is literally an "everyone  
16 and their mother" provision.

17 And so these -- this broad range of  
18 transactions has to be understood with respect  
19 to the exemptions in Section 1108. And, yes,  
20 they would be elements as applied based on the  
21 facts of the case.

22 But you just plead the facts that are  
23 relevant to the transaction at issue. And so,  
24 for this transaction, there was never any  
25 question that what was at issue was a service

1 provider transaction. The exception that was  
2 relevant was the one for -- for reasonable fees,  
3 necessary fees, et cetera.

4 And if, for some reason, there was a  
5 case in which a plaintiff pleaded and did not  
6 include a relevant exemption, well, of course,  
7 Rule 15 --

8 JUSTICE JACKSON: Can I just -- can  
9 I -- can I ask you about potential problems for  
10 other statutes that are created in this same  
11 way? I mean, do we have to worry that if we're  
12 suddenly saying that the exemptions in this  
13 structure are elements that we're going to  
14 implicate things like the Federal Arbitration  
15 Act, which has a similar dynamic?

16 MS. SAHARSKY: I don't think it's a  
17 problem because this Court considers each case  
18 and each statute as it comes. That's what it  
19 has been doing since the decision in Cook, where  
20 it said, look, if we look at something and it's  
21 called an exemption and it's in a separate  
22 provision, we probably would think it's an  
23 affirmative defense, but there are some  
24 circumstances in which we don't, say, if there's  
25 a cross-reference to the provision or it's

1 direct -- there's some other way that it's  
2 directly incorporated or, for example, if the  
3 conduct that is in the initial prohibition  
4 covers so much beneficial innocuous conduct that  
5 you think we can't define the wrongful thing  
6 that Congress was trying to get at without --  
7 without using the exemption. And that's the  
8 inquiry that this Court has done, and that's the  
9 inquiry I think should be --

10 JUSTICE KAGAN: Do you think this is a  
11 class of one, you know, that this is the only  
12 statute we're going to find where it's going to  
13 satisfy your requirements? As I understood it,  
14 you said you need the cross-reference and you  
15 need the fact -- and it's a fair point that this  
16 statute -- that, the 1106, covers a vast amount  
17 of -- of conduct and a significant amount of  
18 beneficial conduct. Is this a -- a -- a  
19 category of one are you basically saying that we  
20 should create?

21 MS. SAHARSKY: Well, I think the Court  
22 has already found categories or found  
23 circumstances like this, not a lot, not a lot,  
24 but, in the history of the Court's opinion,  
25 there have been other times the Court has found

1 exemptions to be elements. The Vuitch case,  
2 Behrman, Ruan, Ledbetter, Britton, a number of  
3 cases. The Second Circuit also relied on a Fair  
4 Debt Collections Practices Act case, Roth, so --

5 JUSTICE KAGAN: See, I think I might  
6 be -- I might find it sort of a happier rule if  
7 you had just said it's a category of one.

8 (Laughter.)

9 MS. SAHARSKY: Right, but what I'm  
10 saying --

11 JUSTICE KAGAN: Because what you're  
12 saying is -- I mean, the cross-reference, yeah,  
13 there are cross-references like this all the  
14 time which you wouldn't think preclude the  
15 typical rule affirmative defense structure.

16 MS. SAHARSKY: Mm-hmm. Mm-hmm.

17 JUSTICE KAGAN: And then you're  
18 saying, well, we should consider how much  
19 legitimate conduct a particular provision  
20 incorporates. That seems like a very  
21 loosey-goosey inquiry to me. You know, how much  
22 do you need? At what point do you get over the  
23 line? It seems as though you're asking us to  
24 distinguish among statutes in -- in -- in ways  
25 we shouldn't be doing.

1 MS. SAHARSKY: Well, what I was  
2 suggesting and hoping to give you comfort,  
3 Justice Kagan, was that this Court has  
4 already -- already has this method of statutory  
5 interpretation where it looks at these factors  
6 and comes to the right answer, and there have  
7 not been, you know, a lot of cases where the --  
8 there are exemptions that have been found to --  
9 to be elements.

10 And so I -- I thought that it might  
11 give the Court comfort to know that this is  
12 something that the Court has been doing for  
13 decades and decades and centuries and it hasn't  
14 been a problem. It's just, in this particular  
15 context, the statute really can't be understood  
16 without reference to the exemptions.

17 JUSTICE KAVANAUGH: Good -- good word,  
18 "context." So you're saying a statute like  
19 this, structured like this, can sometimes be  
20 read to mean elements, sometimes be read, more  
21 often be read, to be affirmative defenses.

22 And how do we tell?

23 MS. SAHARSKY: Right.

24 JUSTICE KAVANAUGH: And -- and the  
25 context would seem to be key on that. And some

1 of the concerns that we've been discussing or  
2 I've been raising and the amicus briefs raise,  
3 others have raised, would suggest that this --  
4 the context here suggests it doesn't make much  
5 sense to read this 1106(a) that way.

6 MS. SAHARSKY: Right. So I'd point  
7 the Court to four factors. One, the incredible  
8 breadth of Section 1106(a), which reaches so  
9 much innocent conduct, nothing wrongful, not  
10 limited to wrongful conduct by itself.

11 Then you have the cross-reference,  
12 which says: Okay, we don't have to read it by  
13 itself. We're being told that we should read it  
14 with Section 1108, which is what limits it to  
15 the wrongful conduct. And then you don't see  
16 that cross-reference in Section 1106(b), which  
17 is the one that defines only wrongful conduct,  
18 only transactions that involve self-interest in  
19 conduct.

20 So you think I've got to give some  
21 meaning to that language that's in 1106(a), the  
22 cross-reference, but not in 1106(b).  
23 Petitioners' view does not give any meaning to  
24 that language. It is superfluous.

25 And then the fourth thing I think



1 about is that there are other parts of ERISA  
2 where Congress either encouraged or expressly  
3 required the use of service providers. And I  
4 think to myself: Well, Congress said that plans  
5 have to do this and every plan does it, so it  
6 would make no sense at all to say that Congress  
7 just defined the cause of action as using a  
8 service provider.

9 JUSTICE KAVANAUGH: So --

10 MS. SAHARSKY: If I put that all  
11 together, I'd have to come out that this would  
12 be part of the --

13 JUSTICE KAVANAUGH: So, on the  
14 context, you're pulling in the other statutory  
15 provisions too. I think that fourth point's  
16 pretty important.

17 And then another point, I just want to  
18 be crystal-clear on this because the other side  
19 says: Well, what about the insider  
20 transactions? And those are 1106(b), correct?

21 MS. SAHARSKY: So 1106(b) are when the  
22 fiduciary -- the fiduciary has conflicts of  
23 interest, self-dealing. Those are all on their  
24 face bad transactions.

25 I understand the argument that the

1 other side of the government is to be making is:  
2 Well, maybe 1106(a) is also like that because  
3 parties in interest include insiders. But they  
4 include a lot of people who aren't -- aren't  
5 involved in conflicted transactions. They  
6 include service providers. I mean, it is an --  
7 the immense breadth of the party-in-interest  
8 definition is -- is hard to describe.

9 But I think the point of that is is  
10 that you need a way to limit the 1106(a)  
11 provision, and the cross-reference tells you to  
12 do it using the exemptions.

13 Another thing that I just might say --

14 JUSTICE SOTOMAYOR: I'm sorry. Just  
15 to answer Justice Kavanaugh's question more  
16 directly --

17 MS. SAHARSKY: Sure.

18 JUSTICE SOTOMAYOR: -- 1106(b) does  
19 not prohibit a plan from leasing or -- or from  
20 accepting services from an insider. It -- it --  
21 that's only prohibited by (a).

22 MS. SAHARSKY: Correct. I'm sorry,  
23 the -- Section 1106 --

24 JUSTICE SOTOMAYOR: I thought that's  
25 what Justice Kavanaugh was asking.

1 JUSTICE KAVANAUGH: Yeah. No,  
2 that's -- that's -- 1106(a) covers insiders --

3 MS. SAHARSKY: And outsiders.

4 JUSTICE KAVANAUGH: -- and 11 --  
5 right. And 1106(b) covers -- can you repeat  
6 that?

7 MS. SAHARSKY: Sure.

8 JUSTICE KAVANAUGH: I'm sorry to  
9 interrupt.

10 MS. SAHARSKY: So 1106(a) --

11 JUSTICE KAVANAUGH: Yeah. You're  
12 clarifying it.

13 JUSTICE SOTOMAYOR: I -- I -- I think  
14 1106(a) does -- 11 -- let's do it in the  
15 negative. 1106(b) does not include an insider  
16 doing services at a reasonable price?

17 MS. SAHARSKY: 1106(b) does not  
18 directly address service provider transactions.  
19 And so, if I might just back up, 1106 --

20 JUSTICE SOTOMAYOR: So -- so it  
21 doesn't include -- you only cover an insider  
22 service provider by 1106(a).

23 MS. SAHARSKY: Well, it could. It's  
24 just that (b) is written in broader terms. So,  
25 if the (b) -- just if I could back up, (a)

1 involves a transaction between the fiduciary or  
2 the plan and a party in interest; (b) involves  
3 the fiduciary himself or herself doing something  
4 with respect to a plan.

5           And so (b) is focused on the  
6 fiduciary's conduct, and it could involve  
7 dealing with the assets of a plan for his own  
8 benefit in his own account, it could be being on  
9 both sides of a transaction or on the side of a  
10 transaction that's opposite to the plan, or it  
11 could involve receiving a kickback.

12           So those things could happen in the  
13 context of a service provider transaction. It's  
14 just that service provider transactions aren't  
15 directly addressed, aren't specifically  
16 addressed in Section (b). They are addressed in  
17 Section (a), but they're not just service  
18 provider transactions with insiders. They're  
19 transactions with any -- any service provider.  
20 It's, you know, any -- any service provider is  
21 defined --

22           JUSTICE JACKSON: So what is your --

23           MS. SAHARSKY: -- as a party in  
24 interest.

25           JUSTICE JACKSON: -- cross-reference

1 argument? I mean, why isn't -- why isn't the  
2 conclusion that the cross-reference in (a) is  
3 just saying that the exemptions can apply in  
4 this world of service providers, and it can't  
5 when a fiduciary is dealing, self-dealing, this  
6 is like a more significant thing, and we're not  
7 going to allow it?

8 MS. SAHARSKY: Because Section 1108  
9 already says that it exempts -- its exemptions  
10 apply to all of 1106. It says that in four,  
11 five, or six different places that are cited in  
12 the brief. So 1108 by itself says that its  
13 exemptions apply to all of 1106.

14 And so you have this extra language in  
15 1106(a) --

16 JUSTICE JACKSON: Yeah. But we don't  
17 know which language is extra, right? We don't  
18 know whether it was just sort of a drafting  
19 mistake on Congress's part with respect to 1108  
20 to say that all of it applies when they really  
21 were not applying it to (b), 1106(b).

22 I mean, I just don't know that we can  
23 draw the conclusion that the cross -- that  
24 something is -- work with a cross-reference that  
25 leads to the conclusion that you want us to

1 draw.

2 MS. SAHARSKY: Well, it's not just the  
3 cross-reference. It's the structure of the  
4 statute and the rest of ERISA and the other  
5 factors that I was discussing with Justice  
6 Kavanaugh, but I do think that it's telling that  
7 the cross-reference is in 1106(a). It is not in  
8 1106(b).

9 The Court, of course, looks at the  
10 text very carefully and tries to give meaning to  
11 the text. And the only -- the only party here  
12 that's giving meaning to that text in 1106(a) is  
13 us. If you want to disregard that text, you  
14 know, we wouldn't advise that, particularly  
15 because there are other parts of ERISA like the  
16 parts that require the use of service providers  
17 that make --

18 JUSTICE JACKSON: What do you say  
19 about the principle that the Solicitor General  
20 put forward that the fiduciary generally carries  
21 the burden to plead and prove the reasonableness  
22 of their actions and that that's really what is  
23 underlying the structure of this?

24 MS. SAHARSKY: I don't think that  
25 that's true. I don't think that the law of

1 trusts said that. And I don't think that  
2 that's -- that's something that ERISA says,  
3 particularly in the context of service provider  
4 transactions.

5 Now this case is not about the burden  
6 of proof. This complaint got dismissed at the  
7 pleading stage. So the question the -- the  
8 Second Circuit had to decide was, you know, who  
9 has the burden and -- and -- and what is it at  
10 the pleading stage, what does a plaintiff have  
11 to plead to go forward past a motion to dismiss  
12 and into discovery to allow a case to go  
13 forward.

14 JUSTICE ALITO: It's been suggested  
15 that the concerns that seem to have animated the  
16 Second Circuit were unfounded or at least  
17 overblown for, I count, six reasons. And it  
18 would be helpful if you could explain why you  
19 think they are insufficient.

20 So one is Rule 7 of the Rules of Civil  
21 Procedure. The other, which I really don't  
22 exactly understand, is the idea that Box B  
23 complaints are required but would be sufficient.  
24 Another one is standing, expedited discovery,  
25 coupled with a motion for summary judgment, fee

1 shifting, sanctions. Why are -- are they not  
2 sufficient?

3 MS. SAHARSKY: Right. Because the  
4 rule is that a plaintiff has to come to court  
5 and plead the elements and doesn't have to plead  
6 affirmative defenses.

7 Now, if the Court -- and that's --  
8 that's how Iqbal and Twombly are understood.  
9 That's what it means to bring a claim to court  
10 and plead facts to show an entitlement to  
11 relief. It's entitlement to relief on -- on the  
12 elements. And so --

13 JUSTICE ALITO: Okay. What about the  
14 Rule 7 workround?

15 MS. SAHARSKY: So we think that that  
16 is kind of convoluted and discretionary and  
17 that's the problem with it.

18 First of all, there would not be an  
19 opportunity to evaluate or dismiss the case on  
20 motion to dismiss because Section -- Rule 11 --  
21 Rule 7 just applies to an answer.

22 So the Court has discretion about  
23 whether the Court can -- whether it can -- it  
24 asks for a reply brief or not. So I guess what  
25 the government is thinking is the plaintiff



1 pleads the mere fact of a service provider  
2 transaction. The defendant says no, this -- it  
3 is a -- for reasonable fees and necessary  
4 services.

5 And then, at that point, the court  
6 should exercise its discretion to require the  
7 plaintiff to plead additional facts to show that  
8 the fees are unreasonable or the service is  
9 unnecessary.

10 The problem with that is that it's  
11 discretionary. A plaintiff could go to a  
12 district court that's favorable, not -- the  
13 district court would say: I don't want to do  
14 that. And then it's off to discovery and off to  
15 summary judgment.

16 If this Court --

17 JUSTICE ALITO: Well, could we say  
18 that in the -- in the particular circumstances  
19 here, it would be an abuse of discretion for the  
20 district court not to follow that procedure?

21 MS. SAHARSKY: The Court absolutely  
22 could say that. I guess my suggestion would be  
23 is that the Court should be very clear if that's  
24 what the Court wants, because that's not the way  
25 that things happen now with respect to Rule 7.

1 And so the Court would -- would hopefully say  
2 that in those circumstances, in -- in the case  
3 of a service provider transaction, that if the  
4 defendant alleges that the fees were reasonable,  
5 the services were necessary, something in  
6 Section 1108, that then the district court  
7 absolutely should require the plaintiff to  
8 respond and plead facts to show, plausibly show,  
9 that the fees were unreasonable.

10 I mean, our bottom line, which I  
11 understand to be the same as the government's  
12 bottom line, although I'm not entirely sure, is  
13 that the plaintiff should not be able to just  
14 come to court and say there was a service  
15 provider transaction, that's bad, we're off to  
16 the races with a lawsuit.

17 JUSTICE ALITO: Okay. What about --

18 MS. SAHARSKY: They should have to  
19 say --

20 JUSTICE ALITO: -- what about standing  
21 and expedited discovery, coupled with a summary  
22 judgment motion?

23 MS. SAHARSKY: So I will address each  
24 of those, but let me just say none of these  
25 supposed solutions or guardrails are working now

1 in the district courts, and that would be before  
2 the Court announced a rule that you could  
3 perhaps just go in with a service provider  
4 transaction.

5 And just one point on that. You know,  
6 there have been two dozens lawsuits that have  
7 been filed against university plans. In none of  
8 them has a court found that the plaintiff  
9 succeeded on the merits. This has been, like,  
10 millions of dollars that these universities have  
11 spent on discovery and individuals who have been  
12 named personally and had to live under a cloud  
13 for years and years.

14 So this idea that there are these  
15 great guardrails that are going to solve that  
16 problem, that's not happening now, and that's  
17 before Petitioners' position gets accepted.

18 But, to -- to specifically answer your  
19 question, I don't know that standing is a  
20 solution because standing, establishing an --  
21 an -- an injury for standing is different from  
22 establishing an entitlement to relief under a  
23 cause of action.

24 I don't know what injury a plaintiff  
25 might claim. I mean, I think Petitioners'

1 theory is that the mere fact of paying money to  
2 a service provider is an injury because Congress  
3 decided that that was bad or at least  
4 presumptively bad.

5           So now there's been a suggestion that  
6 the injury would be unreasonable fees, but I --  
7 that -- that, to me, gets us back to, well,  
8 aren't the unreasonable fees part of the  
9 elements, so the cause of action. So I --  
10 there's also the possibility of jurisdictional  
11 discovery and standing, which, you know, makes  
12 it seem to me like not a very great solution.

13           And I guess the last thing I would say  
14 on that is, you know, if -- if -- if there is a  
15 standing problem or a -- some other  
16 constitutional problem with the statutory  
17 interpretation the Petitioners are suggesting,  
18 that would be a good reason not to do that thing  
19 and to take the other reading of the statute,  
20 which is much more reasonable.

21           I mean, nearly every court that's  
22 looked at this and, you know, apparently, the  
23 Solicitor General say Petitioners' position just  
24 can't be right, that just cannot be right. And  
25 there has to be a way to make sure that the

1 plaintiffs have some burden to plead something  
2 more.

3           And there's a really obvious way to do  
4 that, which is to say, well, in this  
5 circumstance, we understand that Section 1108  
6 helps to define the cause of action, to say that  
7 this is actually something that the plaintiffs  
8 have to plead.

9           And I -- just to get back to a -- a  
10 point Justice Kagan made, I -- I don't think it  
11 would be a big deal or weird to do that because,  
12 you know, this Court takes each case as it comes  
13 to it. It's not like it has had a lot of  
14 interpretive questions about Section 1106(a),  
15 but the last time it did, in Lockheed versus  
16 Spink, there was another plaintiff that came in  
17 and was suggesting a reading of Section 1106(a)  
18 that seemed kind of facially just crazy, you  
19 can't do this, you can't say 1106(a) prohibits a  
20 plan from paying benefits to beneficiaries.

21           But the language of Section 1106(a)  
22 was so broad that it seemed like it could cover  
23 it. And the Court said: We're not going to do  
24 that. We're going to read the particular  
25 provision at issue in 1106(a) to not allow that

1 result. And that's -- that's exactly what we're  
2 asking here.

3           And just in terms of the experience in  
4 terms of the lower courts, these prohibited  
5 transaction cases do not come up very often now.  
6 There's maybe a handful of factual circumstances  
7 where -- that have been litigated in the courts  
8 of appeals that involve fees for services,  
9 participant loans, some cases with buying  
10 employer stock or property, like employee stock  
11 ownership cases, things like that. There's kind  
12 of a handful of these. I don't think any of  
13 them have led to circuit splits. I don't think  
14 that there's -- there should be much concern  
15 about the Court, you know, adopting a rule  
16 that's going to have spillover effects for any  
17 of those.

18           And so I guess, you know, what we  
19 would say is that the Court should decide this  
20 case just as it decides, you know, all of the  
21 cases that come to it, which is on the language  
22 of this particular provision.

23           And we appreciate that the government  
24 is, you know, trying to help find these  
25 solutions to the problems with Petitioners'

1 position, but I think, at the end of the day,  
2 they're not happening. They're not working now.  
3 I think they're discretionary. I -- I -- I --  
4 the suggestion about, like, well, maybe there  
5 could be expedited discovery or not much  
6 discovery because you could just look at the  
7 face of the service provider -- the contract and  
8 see if it's good or not good, well, that hasn't  
9 been happening in these cases.

10 I mean, the -- the -- there have been  
11 experts on both sides to discuss whether the  
12 fees are reasonable or not. You know, discovery  
13 has gone on for years and years. These  
14 university cases started in 2016, and they're  
15 still going on now.

16 So I just would caution the Court  
17 before thinking that any of those suggested  
18 solutions would be real solutions.

19 JUSTICE KAGAN: Could you just go back  
20 to the suggested solution of the government? I  
21 think you said to Justice Alito it just doesn't  
22 make any sense, but I wasn't quite sure I  
23 understood why you thought that.

24 MS. SAHARSKY: Sure. So, if the  
25 solution is that a plaintiff has to plead

1 unreasonable fees or unnecessary services, then  
2 that is a great result, but we just want that to  
3 be clear, that that is the obligation that the  
4 district courts would enforce.

5 So there are two ways that the  
6 government suggests getting there, and they both  
7 seem kind of convoluted to us and also have this  
8 discretionary aspect that we're concerned about.

9 The first way that the government  
10 suggests is on motion to dismiss. The idea  
11 would be that in response to a motion to  
12 dismiss, that a plaintiff would have to plead  
13 additional facts to show that the fees were  
14 unreasonable or the service is unnecessary.  
15 But, like, why would the plaintiff have to plead  
16 that, because it's not an element? The  
17 government says it's an obvious alternative  
18 explanation.

19 Well, we think that that  
20 misunderstands, for the reasons Justice Gorsuch  
21 gave, what the obvious alternative explanation  
22 doctrine is. It's like a reason that the  
23 element isn't met. Like, in an antitrust  
24 complaint, the allegation could be, well, a  
25 whole bunch of companies did the same thing.



1 But an obvious alternative explanation is, well,  
2 they -- they all did the same thing because of  
3 market forces. So it wasn't that they did, you  
4 know, the bad thing, which was a conspiracy.

5 Here, what Petitioners define as, you  
6 know, the bad thing is just the service provider  
7 transaction. And the fees being reasonable  
8 isn't an alternative explanation for whether  
9 there was a service provider transaction or not.  
10 It's like an extra fact.

11 Now, if the Court wanted to revisit  
12 Iqbal and Twombly and say that it also imposes a  
13 burden on plaintiffs to negate affirmative  
14 defenses, that would be terrific.

15 (Laughter.)

16 MS. SAHARSKY: But it would be, I  
17 think, a -- a sea change in the law that would  
18 have effects well -- well past this case.

19 So that's their Option 1. And then I  
20 think we've discussed a little bit more their  
21 Option 2, which was Rule 7. So Option 1 was for  
22 the motion-to-dismiss stage.

23 JUSTICE KAGAN: Right. I was --

24 MS. SAHARSKY: Right.

25 JUSTICE KAGAN: -- asking about Option

1 1.

2 MS. SAHARSKY: Oh.

3 JUSTICE KAGAN: If you feel like you  
4 have more to say on Rule 7, go ahead, but -- but  
5 that was what I wanted to know about.

6 MS. SAHARSKY: I -- I just think, if  
7 the -- if the Court wanted to pursue a Rule 7  
8 solution, it should, please, make clear that  
9 that is something that district courts have to  
10 do because it is discretionary and there's not  
11 judicial review of it, and these cases could go  
12 on and on and on.

13 I would like to say one other thing,  
14 though, about Rule 7 and -- and this particular  
15 case, which is, so assuming that the plaintiffs  
16 do have some burden to plead unreasonable fees,  
17 we think the Second Circuit correctly found that  
18 they didn't plead it here and that this Court,  
19 you know, ordinarily doesn't review that kind of  
20 holding, like the application of a legal  
21 principle to particular facts, but, if it did,  
22 you know, it would be clear here that there's,  
23 like, no reason for a remand.

24 So just to -- just to explain what the  
25 Second Circuit did, you know, pleading that fees

1 are unreasonable, of course, is just a legal  
2 conclusion, so you need some plausible facts to  
3 show why they're unreasonable. Here, you know,  
4 there was an allegation that the fees were too  
5 high, but there wasn't any allegation of what  
6 the services were for or that there were other  
7 university plans that had comparable services  
8 that had much lower fees.

9           And that's all the Second Circuit was  
10 saying. It didn't say anything about Cadillac  
11 plans. It just said, like, we don't know if  
12 something is too high unless we know what it's  
13 for. We don't know -- we need to know, you  
14 know, what services it's for. Is it more  
15 services? Is it fewer services? Is it better  
16 services?

17           And that's not a weird rule in the  
18 Second Circuit. That's actually the same thing  
19 that, like, the Sixth, Seventh, Eighth, Tenth  
20 Circuits have said in these unreasonable fee  
21 cases, which is you can't just plead, like, high  
22 fees in the abstract and say they're too high.  
23 You have to give us some plausible facts as to  
24 why they're too high, which are, you know,  
25 compare them to something else that's like your

1 plan where they didn't pay those kinds of fees.  
2 And so, you know, we think the Second Circuit  
3 was exactly right to say that.

4 The only other thing I'll say just  
5 because the government put this in issue is  
6 that, you know, there's no point in a remand in  
7 this case because the plaintiffs actually had  
8 the opportunity to try to adduce, you know,  
9 evidence through years and years of discovery to  
10 try to show that the fees were unreasonable.

11 That was, I think, as Justice  
12 Kavanaugh was suggesting, not on their  
13 prohibited transaction claim but on their --  
14 their claim for breach of the duty of prudence.  
15 And so they went through all this discovery and  
16 they were supposed to put forward their best  
17 evidence of the fees being unreasonable, and  
18 they couldn't do it. They had two experts, but  
19 they didn't -- those experts didn't actually  
20 compare the fees to -- to the services or to any  
21 other plans.

22 And so the district court and then the  
23 Second Circuit said, well, like, you've got --  
24 you've got no evidence of this. So, I mean,  
25 it's not only that they -- we don't think that

1 they properly pleaded it; it's that, like,  
2 they've already lost on the merits. And so,  
3 even if the Court decides to do something  
4 different from the Second Circuit, you know, we  
5 think the rule should be that they have to plead  
6 the unreasonable fees. And, here, you know,  
7 they just didn't. The Second Circuit found they  
8 didn't. And it's just not going to matter at  
9 the end of the day.

10 So, you know, the bottom line is  
11 Petitioners' position is intolerable. Nearly  
12 everyone recognizes that. The Second Circuit  
13 gave you a sensible solution that's very careful  
14 reading of the statutory text and doesn't create  
15 superfluous language, accounts for all the other  
16 provisions of ERISA. And, you know, we think  
17 that you should adopt that approach and we think  
18 you should affirm.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: On that last point  
25 you raised previously, the trial, did you have

1 experts who said why your fees were reasonable?

2 MS. SAHARSKY: Yes. So it was summary  
3 judgment. We had an expert; they had two  
4 experts. Both of their experts were found to be  
5 unreliable under Daubert. And then we also had  
6 our own expert that explained that Cornell's  
7 fees were entirely in line with the other fees  
8 charged by other universities.

9 JUSTICE SOTOMAYOR: So you may be  
10 right on that bottom line, so even if we vacated  
11 and remanded and -- and encouraged a -- a Rule 7  
12 or whatever, you would still win downstairs?

13 MS. SAHARSKY: Correct, but we're  
14 suggesting that you shouldn't vacate and remand.

15 JUSTICE SOTOMAYOR: No. I know what  
16 you want. I'm just saying --

17 (Laughter.)

18 MS. SAHARSKY: Well, I mean, just as  
19 a --

20 JUSTICE SOTOMAYOR: Thank you,  
21 counsel.

22 MS. SAHARSKY: Yes. As a practical  
23 matter, this case has been going on since 2016,  
24 just like these other university cases, and it's  
25 time for it to end.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?  
2 Justice Gorsuch?  
3 Justice Barrett?  
4 Justice Jackson?  
5 Thank you, counsel.

6 MS. SAHARSKY: Thank you.

7 CHIEF JUSTICE ROBERTS: Rebuttal,  
8 Mr. Wang?

9 REBUTTAL ARGUMENT OF XIAO WANG  
10 ON BEHALF OF THE PETITIONERS

11 MR. WANG: I just have two brief  
12 points. The first point was in response to some  
13 questions to my friend on the other side about  
14 the superfluous -- superfluity of 1106 -- I  
15 apologize -- about 1106(a) and 1106(b). Why  
16 does it have one and -- and -- and not the  
17 other?

18 And I think this Court's opinion in  
19 Barton versus Barr is quite instructive on that.  
20 It says at page 239 redundancies are common in  
21 statutory drafting, sometimes in a congressional  
22 effort to be doubly sure. And why would  
23 Congress want to be doubly sure here? Because,  
24 in fact, Respondents' brief concedes this point.  
25 On 2 -- on page 27 of their brief, they say: As

1 a practical matter, Section 1108's exemptions  
2 may apply less often to Section 1106(b) than to  
3 Section 1106(a).

4 And I think, in response to, Justice  
5 Kagan, some of your questions about is this a  
6 class of one or -- or -- or not, I think it's  
7 pretty clear it's not a class of one, and maybe  
8 one analogy can -- can help crystallize this  
9 point.

10 Imagine you're going to the airport  
11 and you see a sign that says: Except as  
12 otherwise provided, no liquids, gels, or  
13 aerosols. Then you see another sign that says:  
14 No firearms on the plane. And then the third  
15 sign says: Here are the exceptions.

16 I think the "except as otherwise  
17 provided" is just telling the common traveler,  
18 well, certainly, you know, we don't want most  
19 liquids, gels, or aerosols in, but, if you have  
20 a medical reason, a dietary reason to bring them  
21 in, go ahead. Make sure you take a look at  
22 those exceptions. But there are far fewer  
23 exceptions for firearms, and if they do exist,  
24 take a look at that, but it's -- we -- we don't  
25 want to direct you to that list of exemptions.



1 And I think that's just one common instance of  
2 the fact that it's not a class of one.

3 I think this leads me to the second  
4 and sort of final point I'd like to make, which  
5 is, you know, Justice Gorsuch asked quite a bit  
6 about ripple effects and -- and what -- what are  
7 the ripple effects of ruling in our favor versus  
8 ruling in Respondents' favor. And I think that  
9 crystallizes the daylight between our positions.

10 Our position is to ask this Court to  
11 read the statutory text as written and to apply  
12 the text as written using common tools that it  
13 sees in terms of the structure of the text, the  
14 information and symmetries, common law trust  
15 rules. Respondents' position is not simply to  
16 sidestep the text but to contort it and to  
17 distort it in two different ways.

18 The first is to sort of try to stitch  
19 together 1106 and 1108. Some of 1108's  
20 exceptions actually become elements and then you  
21 have to plead and prove beyond that.

22 And the second way, second more  
23 important way, I think -- or second and equally  
24 important way that Respondents ask you to  
25 distort the text is to say: Look, we know

1 Congress defined parties in interest. It has  
2 all of these categories. And we want a little  
3 bit of a special carveout for outside service  
4 providers, persons providing services to the  
5 plan.

6 But the text doesn't countenance that.  
7 And, as a practical matter, the Eighth Circuit,  
8 the Ninth Circuit, these other courts that have  
9 adopted the standard that we advocate, we don't  
10 see cases on the ground that suggest that any  
11 such solution is needed.

12 So, for those reasons, Your Honor, we  
13 ask this Court to apply the text as written and  
14 to reverse the judgment of the Second Circuit.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 The case is submitted.

18 (Whereupon, at 12:54 p.m., the case  
19 was submitted.)

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