No. 23-1094

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, THE SPARK INSTITUTE, AND COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI[1]

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans.

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Collectively, the Council's more than 430 members either sponsor or provide services to plans covering virtually all Americans who participate in employer-sponsored programs.

The SPARK Institute is a nonprofit association of retirement plan service providers and investment managers collectively serving approximately 110 million employer-sponsored plan participants. Its mission is to develop and advance policies to strengthen Americans' retirement security.

The Committee on Investment of Employee Benefit Assets Inc. ("CIEBA") is a group of 114 of the country's leading Chief Investment Officer Fiduciaries who collectively oversee over $2.6 trillion in retirement plan assets, in plans covering approximately 17 million participants. CIEBA members are responsible for overseeing a substantial portion of the assets held in the private-sector

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici and their respective members made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, amici notified counsel for the parties of their intent to file this brief.

retirement system and have a direct interest in its effective regulation.

ERIC, the Council, the SPARK Institute, and CIEBA frequently participate as *amicus curiae* in cases like this one that have the potential for far-reaching effects on employee benefit plan design or administration. Amici submit this brief in support of granting Petitioners' request for a writ of *certiorari*.

SUMMARY OF THE ARGUMENT

Left undisturbed, the Ninth Circuit's flawed interpretation of ERISA's prohibited transaction provision has the potential to impact the orderly and efficient operation of every retirement plan in the country.

The plan at issue here is a defined contribution plan—"the dominant type of retirement plan sponsored by private-sector employers in the United States."[2] Approximately two-thirds of private sector employees in the United States have access to defined contribution plans.[3] As of the end of 2023, those plans held $10.6 trillion—more than 27% of all retirement assets in the country.[4]

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[2] Vanguard, *How America Saves 2023*, p. 14 (June 2022), https://institutional.vanguard.com/content/dam/inst/iig-transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf.

[3] Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Retirement plans for workers in private industry and state and local government in 2022 (Feb. 1, 2023), https://www.bls.gov/opub/ted/2023/retirement-plans-for-workers-in-private-industry-and-state-and-local-government-in-2022.htm.

[4] Investment Company Institute, *Release: Quarterly Retirement Market Data*, Retirement Assets Total $38.4 Trillion

In recent years, defined contribution plan fiduciaries, in particular, have been subject to an onslaught of lawsuits challenging the fee arrangements their plans have made with third-party service providers. Most of the lawsuits target the plans' recordkeepers, who "help plans track the balances of individual accounts, provide regular account statements, and offer informational and accessibility services to participants." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 740 (2022). But the litigation has grown to engulf all types of service providers to retirement benefit plans. And no wonder, as 94 percent of ERISA retirement benefit plans retain third party advisors or consultants to assist in administering their plans.[5] Indeed, it has been suggested that the flood of litigation targeting defined contribution plan fiduciaries has increased the need to work with specialized advisers to address litigation concerns.[6]

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in Fourth Quarter 2023 (Mar. 4, 2024), https://www.ici.org/statistical-report/ret_23_q4; *see also* PLANSPONSOR, Recordkeeping Industry Snapshot, https://www.plansponsor.com/research/2023-recordkeeping-survey/?pagesec=3#Industry%20Snapshot (last visited Apr. 26, 2024) (defined contribution market currently includes $9.83 trillion).

[5] *See* Fidelity, 2023 Plan Sponsor Attitudes Survey (Mar. 2023), bit.ly/3YVoM7I (estimating 94 percent of ERISA plans retain third-party advisors or consultants).

[6] *See* Robert Steyer, How Retirement Security Litigation Has Impacted the Defined Contribution Landscape, Pensions $ Investments (Oct. 23, 2023), available at https://www.pionline.com/defined-contribution/how-retirement-security-litigation-has-impacted-defined-contribution-landscape.

But the potential impacts of this holding are not limited to defined contribution plans. Indeed, despite the ubiquity—and necessity—of service provider relationships in offering employer-sponsored retirement plans, the Ninth Circuit interpreted ERISA to make those relationships presumptively unlawful. More specifically, the Ninth Circuit held that *any* modification or renegotiation of existing service provider agreements would be a prohibited transaction, absent the defendant's showing that the "transaction" fits within one of the statutory prohibited transaction exemptions.[7] *See Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 901 (2023).

The Ninth Circuit's holding is based on an incorrect and incomplete reading of the statute. It also relies on interpreting DOL regulations in a manner that conflicts with clear statutory language. The result is a mistaken statutory interpretation that is out-of-line with ERISA's text, and contrary to Congress' purpose in enacting ERISA in the first place. Furthermore, the holding deepens a circuit split on the standards applicable to prohibited transaction claims, and frustrates Congress' intent that ERISA promote the creation and maintenance of

[7] In the matter below, no party disputed that amendment of the plan's recordkeeping contract involved the furnishing of services between the plan and a party in interest. *See Bugielski*, 76 F.4th at 901. The Ninth Circuit therefore assumed the fully executory service provider agreement at issue constituted a "transaction" within the meaning of that word as used in Section 1106. *Id.* Examined more closely, however, it strains the statutory text to find that those contract terms themselves—which call for future payment in exchange for future services—truly cause a plan "to engage in" a transaction within the meaning of Section 1106. Indeed, it is doubtful any prohibited transaction could occur until the services are subsequently performed, such that payments are owed.

employee benefit plans, by providing a single, uniform set of rules by which fiduciaries are to be governed.[8]

Amici here, representing hundreds of plan sponsors, plan fiduciaries, and service providers to retirement plans, believe that if this Court does not promptly intervene, the reasoning and holding in the Ninth Circuit's opinion will provide plaintiffs a path to end-run established pleading standards for duty-of-prudence claims by repackaging them as prohibited transaction claims. The Ninth Circuit's decision also threatens to further open retirement plan fiduciaries and service providers to a flood of litigation that will have far-reaching consequences that harm plan sponsors, fiduciaries, service providers, and participants.

The Court should grant the petition to correct the Ninth Circuit's interpretation of ERISA § 406(a), 29 U.S.C. § 1106(a) ("Section 1106(a)"), and to resolve the existing circuit split in a manner that provides for a uniform rule consistent with ERISA's text and purpose.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO CORRECT THE NINTH CIRCUIT'S ERRANT INTERPRETATION OF THE STATUTE.

"In ERISA cases, '[a]s in any case of statutory construction, [the] analysis begins with the language of the statute . . . . And where the statutory language

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[8] ERISA's venue provision permits suit in a variety of federal judicial districts, including any district in which a defendant resides or may be found. 29 U.S.C. § 1132(e)(2). Thus, the addition of the Ninth Circuit to the circuit split will allow an enormous expansion of the ability of plaintiffs to forum-shop.

provides a clear answer, it ends there as well.'" *See Bugielski*, 76 F.4th at 900 (citing *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000)). One of the "most basic" canons of statutory interpretation is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *See Corley v. United States*, 556 U.S. 303, 314 (2009).

Although the Ninth Circuit stated it would begin its analysis with the text of the statute, *see Bugielski*, 76 F.4th at 900, it ultimately read out of the statute the distinct phrase that begins Section 1106(a): "Except as provided in section 1108 of this title . . . ." Moreover, the Ninth Circuit ignored the context surrounding Section 1106 and adopted an interpretation that fails to give effect to all of ERISA's language.

This Court should grant the petition to correct the Ninth Circuit's fundamental misinterpretation of ERISA.

A. The Ninth Circuit's Holding Resulted From Reading a Crucial Part of Section 1106 Out of the Statute.

The Ninth Circuit identified the "threshold question" before it as "whether AT&T, by amending its contract with Fidelity . . . 'cause[d] the plan to engage in a transaction' that constituted a 'furnishing of goods, services, or facilities between the plan and a party in interest.'" *Bugielski*, 76 F.4th at 900–01. Although the Ninth Circuit arrived at this "threshold question" by ostensibly setting out the text of Section 1106, the Ninth Circuit effectively read a key portion of Section 1106 out of the statute. *Id.*

The only portion of Section 1106(a) the Ninth Circuit considered is preceded by the words: "Except as provided in section 1108 of this title." *See* 29 U.S.C. § 1106(a). In turn, Section 1108(b) says the "prohibitions . . . in section 1106 . . . shall not apply" to "[c]ontracting . . . for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b). The Ninth Circuit's opinion makes no mention of the "[e]xcept as provided" language that introduces Section 1106(a) and differentiates it from Sections 1106(b) and (c).

Because it omits the "except as provided" limitation, the Ninth Circuit's interpretation of Section 1106(a)(1)(C) violates this Court's direction that statutes must be construed to give meaning to *all* of their provisions. The Ninth Circuit ascribes no meaning to the portion of Section 1106(a) that excludes from that section's definition of prohibited transactions those items provided for in Section 1108.

In contrast, faced with the same statutory provision, the Second Circuit set out Section 1106's full text, including the limiting provision, and noted that Section 1108's exemptions are expressly referenced in the text of Section 1106(a). *See Cunningham v. Cornell Univ.*, 86 F.4th 961, 973 (2d Cir. 2023). The Second Circuit noted that "[r]eading § 1106(a)(1)(C) in isolation of the exemptions in § 1108, ERISA would appear to prohibit payments by a plan to any entity providing it with any services"—*i.e.*, precisely what the Ninth Circuit did in this case. *Id.* However, adopting an interpretation that "flows directly from the text and structure of the statute," the Second Circuit held the limiting provision of Section 1106(a) incorporates the exemptions of Section 1108 directly into Section 1106(a). *Id.* at 975.

In practice, this means—rather than prohibiting all service provider arrangements—Section 1106(a) prohibits only those arrangements alleged to be unnecessary or for which more than reasonable compensation is paid. *Id.*

The Second Circuit's interpretation is also more consistent with this Court's precedent, and precedent from the Third and Seventh Circuits. In *Lockheed Corp. v. Spink*, this Court held plaintiffs bear the burden to prove a violation of Section 1106(a) occurred. *See* 517 U.S. 882, 888-89 (1996). The Court further stressed the importance of reading Section 1106(a)'s language in context with the other prohibited transaction provisions. *Id.* at 895. The Ninth Circuit's reading does neither.

To avoid the unworkable effect of the Ninth Circuit's reading of Section 1106(a)(1)(C)—which (as discussed below) produces the "absurd" result of turning nearly every transaction with a service provider into a "per se prohibited transaction"—both the Third and Seventh Circuits have required plaintiffs to plead an intent to benefit a party in interest. *See Albert v. Oshkosh Corp.*, 47 F.4th 570, 585–86 (7th Cir. 2022); *Sweda v. Univ. of Penn.*, 923 F.3d 320, 340 (3d Cir. 2019). The *Albert* court further explained Section 1106(a)(1)(C)—when read in context with the other prohibited transaction provisions and with ERISA as a whole—should not be read to prohibit plan fiduciaries from paying third parties in exchange for plan services, because "[e]mployee benefit plans would no longer be able to outsource tasks like recordkeeping, investment management, or investment advising." *Albert*, 47

F.4th at 585–86.[9] In other words, and as the Second Circuit later held, the Third and Seventh Circuits require plaintiffs alleging violations of Section 1106(a)(1)(C) to plead something—in *Sweda* and *Albert*, an intent to benefit the party in interest—to plausibly suggest the service provider arrangements were not reasonable or necessary to operate the plan. *See Cunningham*, 86 F.4th at 975.

In addition to adhering to *Lockheed* and flowing more directly from the language of Section 1106(a), the Second Circuit's interpretation is more consistent with the broader framework of ERISA's prohibited transaction provision. That is, in contrast to Section 1106(a)'s inclusion of the limiting provision, Section 1106(b) does not expressly incorporate Section 1108's exemptions. The Ninth Circuit's interpretation failed to even note that difference. However, "[w]hen Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Cunningham*, 86 F.4th at 975 (quoting *Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020)).

Indeed, this Court's precedent supports the Second Circuit's recognition of a meaningful difference between Sections 1106(a) and 1106(b). When, as in Section 1106(b), a statute is drafted "with exemptions laid out apart from the prohibitions," the exemptions are treated as affirmative defenses. *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84,

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[9] The *Albert* court's logic is supported by many other provisions of ERISA which clearly contemplate employing a trustee and an investment manager, and hiring recordkeepers and other professionals to assist in administering the plan. *See* 29 U.S.C. §§ 1102(b)(2); 1102(c)(2) and (3); 1103(a); 1103(c)(1); 1108(b)(2)(A); 1108(b)(14); and 1108(g).

91, 128 S.Ct. 2395, 171 L.Ed.2d 283 (2008). In contrast, "[w]hen an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception." *United States v. Vuitch*, 402 U.S. 62, 70, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971). In other words, the inclusion of the limiting provision in Section 1106(a)—which, again, was not acknowledged by the Ninth Circuit—supports finding the burden with respect to the exemption lies with *plaintiff* on claims under that section, even if it should be treated as an affirmative defense as to claims under Section 1106(b).

B. Omitting the Limiting Provision from Section 1106(a) Leads to "Absurd" Results.

Combining its reading of Section 1106(a)(1)(C) with ERISA's definition of "party in interest," the Ninth Circuit essentially held that ERISA prohibits the "furnishing of . . . services . . . between the plan and [a person providing services to such plan]." *Bugielski*, 76 F.4th at 900–01; 29 U.S.C. § 1106(a)(1)(C); 29 U.S.C. § 1002(14)(B) (defining "party in interest").

The language is unworkably circular. *See Sacerdote v. N.Y. Univ.*, No. 16-cv-6284, 2017 WL 3701482, at *13 (S.D.N.Y. Aug. 25, 2017), *aff'd in part, rev'd in part on other grounds and remanded*, 9 F.4th 95 (2d Cir. 2021), *cert. denied*, 142 S.Ct. 1112 (2022) ("[I]t is circular to suggest that an entity which becomes a party in interest by providing services to the Plans has engaged in a prohibited transaction simply because the Plans have paid for those services."). Because of that circularity, other courts have repeatedly rejected the interpretation that the

Ninth Circuit now embraces.[10] As one explained, "it would be nonsensical to let a party state a claim for a prohibited transaction in violation of ERISA merely by alleging a plan paid a person for a service. That would be just the sort of litigation . . . that Congress worried would discourage employers from offering ERISA plans." *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *10 (N.D. Ill. May 25, 2018), *vacated and remanded sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022), *and aff'd in part, rev'd in part and remanded sub nom. Hughes v. Nw. Univ.*, 63 F.4th 615 (7th Cir. 2023). The expansive reading exemplified by the Ninth Circuit's decision in this case has been aptly referred to as "absurd." *See Cunningham*, 86 F.4th at 974.

As explained by the Second Circuit, the limiting provision of Section 1106(a) serves an important purpose, and the Ninth Circuit erred by reading it out of the statute. Section 1106(a) seeks to prohibit transactions that "involve uses of plan assets that are potentially harmful to the plan." *Lockheed Corp.*, 517 U.S. at 893. Despite the recognized purpose of that limiting provision, when read in isolation from its exemptions—as the Ninth Circuit did—Section 1106(a) "would encompass a vast array of routine transactions" that are in no way limited to those potentially harmful to the plan. *Cunningham*, 86 F.4th at 976. This result "cannot be consistent with th[e] statutory purpose." *Id.*

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[10] *See, e.g., Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2017 WL 4358769 at *10 (S.D.N.Y. Sept. 29, 2017); *Sweda v. University of Penn.*, No. 16-4329, 2017 WL 4179752 at *11 (E.D. Pa. Sept. 21, 2017); *Sacerdote*, 2017 WL 3701482, at *13; *see also Patrico v. Voya Fin., Inc.*, No. 16-cv-7070, 2018 WL 1319028 at *6-7 (S.D.N.Y. Mar. 13, 2018).

In contrast to the Second Circuit, the Ninth Circuit marshaled support for its position not from additional statutory text but instead from the Department of Labor's regulations implementing Section 1108(b) exemptions. *See Bugielski*, 76 F.4th at 901–02.

As an initial matter, the regulations do not provide the unequivocal support the Ninth Circuit suggests. Indeed, they say only that the exemptions serve to permit transactions that, but for their existence, would be prohibited by the statute. The regulations do not speak to the interpretive issue posed by this case, namely whether Section 1108 legitimizes certain transactions by incorporation into Section 1106(a) or only by its own force. Thus, the regulations are silent as to whether the burden to plead and prove the exemption should lie with the plaintiff or the defendant fiduciary. Regardless, to the extent the regulations conflict with the text (by, for example, failing to give meaning to the limiting language in Section 1106(a)), they are ineffectual. *See Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) ("[A] valid statute always prevails over a conflicting regulation.").

Adopting a reading of Section 1106(a) that construes Section 1108 not as an affirmative defense but as an essential element of the claim corrects the circular reading of Section 1106(a) that would absurdly render routine service provider agreements presumptively unlawful. *See Divane*, 2018 WL 2388118, at *10 ("The solution . . . to eliminating nonsensical claims [under a circular reading of Section 1106(a)] is to require a party asserting such a claim to allege that the exception does not apply."). It also aligns with the Ninth Circuit's proclamation

(albeit not followed) that "Congress has already set the balance" as to pleading prohibited transaction claims. *Bugielski*, 76 F.4th at 907.

While courts have often interpreted Section 1108's exemptions as affirmative defenses, a plain reading of Section 1106(a)—taking into account its "except as provided" language—actually indicates the absence of an exemption is an essential element of the claim itself, such that a plaintiff can only plausibly allege a prohibited transaction under Section 1106(a) if they plausibly allege that no exemption applies.

In *Divane*, the district court conceded it was "not at liberty" to apply the statute according to its plain reading, because it was constrained by Seventh Circuit precedent that Section 1108 is an affirmative defense. *See* 2018 WL 2388118, at *10. This Court is not so constrained. The Court should grant the petition, so it can consider the full context of the statutory provisions examined below. This step is necessary to avoid a circular reading of the statute that would require every ERISA plan fiduciary to prove a negative—that routine service provider arrangements are not unlawful.

II. LEFT STANDING, THE NINTH CIRCUIT'S DECISION WILL A HAVE FAR-REACHING, NEGATIVE IMPACT ON PLAN SPONSORS, FIDUCIARIES, AND PARTICIPANTS.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). It does *not* require employers to create benefit plans, or to offer any particular benefits to employees. *See Lockheed Corp.*, 517 U.S. at 887. Instead, Congress

sought to balance employees' and employers' interests, in a manner designed to "encourage[] the formation of employee benefit plans." *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

To meet that goal, Congress "sought to ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (citation omitted). This approach was necessary to resolve the patchwork quilt of inconsistent rules that had developed across the country at that time, which required plan fiduciaries to "tailor substantive benefits to the particularities of multiple jurisdictions." *Id.*

Recognizing the careful balancing act that underlies ERISA, this Court has cautioned that, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits . . . and . . . its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [] benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

As set forth in the petition, the Ninth Circuit's opinion deepens an existing circuit split as to the correct interpretation of Section 1106(a), as well as the interplay between that provision and Section 1108's exemptions. (*See* Pet. at 16–17.) That split, alone, conflicts with ERISA's purpose of creating a uniform standard by which ERISA plans can be created and operated. It sets up the even more absurd result where, for example, a routine service provider contract would be presumptively lawful if challenged in the Third or Seventh Circuits, and presumptively

unlawful if challenged in the Ninth Circuit. This result is not in keeping with ERISA's purpose and by itself provides sufficient grounds to grant this petition and resolve that split.

Beyond the problems posed by the existence of a split in authority, however, the Ninth Circuit's holding would—contrary to Congress' desire for ERISA to encourage plan formation—further amplify the ongoing threat plan sponsors and fiduciaries face from fee-based ERISA class actions. In the nearly fifty years since ERISA was enacted, the challenge posed by frivolous and speculative ERISA claims has never been greater. Plan sponsors and fiduciaries have been subject to a steadily growing tide of litigation alleging breaches of their duties (primarily the duty of prudence) over the past decade.[11] The result is a "fever pitch" of litigation, with 463 excessive fee cases filed over the last eight years, including nearly 300 from 2020 to 2023.[12] This litigation has increased plan costs, and discourages plan formation and innovation.

A central part of that "fever pitch" has been the significant litigation over the pleading standard in claims alleging a breach of ERISA's duty of prudence, including as to claims that a plan's recordkeeping fees

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[11] *See* George S. Mellman & Geoffrey T. Sanzenbacher, 401(k) Lawsuits: What Are the Causes and Consequences?, Center for Retirement Research at Boston College No. 18-8, at 2 (May 2018), https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf (tracking suits against administrators of 401(k) plans from 2006 to 2017).

[12] *See* Daniel Aronowitz, 401(k) Litigation Continues At 'Fever Pitch,' planadviser (Jan. 9, 2024), https://www.planadviser.com/401k-litigation-continues-fever-pitch/.

were excessive. That litigation reached this Court in the beginning of 2022. *See Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022). There, as in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014), the Court emphasized the importance of a "context-specific inquiry" guided by the standards set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Hughes*, 142 S.Ct. at 740, 742. In doing so, the Court made clear that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* at 742.

In the more than two years since this Court decided *Hughes*, the pleading standard applicable to ERISA claims alleging fiduciaries breached the duty of prudence by allegedly allowing the plan to pay excessive fees, including for recordkeeping, has continued to be the subject of extensive litigation. Cases on this issue have been decided by at least six Courts of Appeals (including the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth),[13] and another remains pending.[14]

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[13] *See Perkins v. United Surgical Partners Int'l, Inc.*, No. 23-10375, 2024 WL 1574342, at *1 (5th Cir. Apr. 11, 2024); *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1158 (10th Cir. 2023); *Hughes v. Nw. Univ.*, 63 F.4th 615, 632 (7th Cir. 2023); *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 279 (8th Cir. 2022); *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022); *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL 1125667, at *1 (9th Cir. Apr. 15, 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 580 (7th Cir. 2022).

[14] *See Mator v. Wesco Distribution Inc.*, No. 22-2552 (3d Cir. 2022).

Together, these cases confirm the operative pleading standard for ERISA fiduciary breach claims requires plaintiffs to plead facts necessarily giving rise to a plausible inference of imprudent conduct. *Accord Iqbal*, 556 U.S. at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not shown "that the pleader is entitled to relief."). Put differently, the cases decided by this Court and the Courts of Appeals since the beginning of 2022 demonstrate that—consistent with *Twombly* and *Iqbal*—a complaint asserting excessive retirement plan fees must show not only that it is *possible* a fiduciary acted imprudently, but that it is *plausible* the fiduciary did so. Anything less fails to state a claim.

To that end, the Court has emphasized motions to dismiss are an "important mechanism for weeding out meritless [ERISA] claims . . . ." *Dudenhoeffer*, 573 U.S. at 425. This is because "the prospect of discovery in a suit" challenging fiduciary decisions is "ominous," and "elevates the possibility that a plaintiff with a largely groundless claim will simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value[.]" *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Still, despite the recognized importance of motions to dismiss in these cases, dismissal has been difficult to achieve.[15]

[15] Allison Barrett and Joel Townsend, Understanding the rapid rise in excessive fee claims, AIG Whitepaper, at 6, https://www.aig.com/content/dam/aig/america-

The prospect of an expensive defense leading to a high rate (and cost) of settlement is also borne out in the data. The costs of ERISA plaintiffs' prolific class action filings in recent years have already been staggering. Between 2015 and 2020, plan sponsors paid more than $1 billion in settlements, including $330 million in legal fees that represent a direct cost to plan providers, to say nothing of the costs associated with cases that did not settle.[16] Since 2020, there have been more than 111 reported settlements, accounting for more than $900 million—including $353 million in settlements in 2023 alone.[17]

But, as expensive as these cases have been to settle, the alternative is often more expensive.[18] Indeed, a recent study found that at least 20% of the cases filed since 2016 cost more to defend than to settle, and cited one case that cost $5 million to defend, even though defendants ultimately won on a motion to dismiss.[19] Adding to the coercive pressure to settle even meritless claims, the proliferation of

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canada/us/documents/business/management-liability/pension-trustee-excess-fees-fiduciary-whitepaper.pdf (noting motions to dismiss are granted in only about 33% of ERISA class actions since 2015, as opposed to more than half of securities-related class actions).

[16] *Id.* at 2.

[17] *See* Aronowitz, 401(k) Litigation Continues At 'Fever Pitch,' https://www.planadviser.com/401k-litigation-continues-fever-pitch/.

[18] *See* Understanding the rapid rise in excessive fee claims at 5–6 (describing expense of litigating ERISA claims).

[19] Excessive Litigation Over Excessive Plan Fees In 2023, Chubb, at 3, https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/excessive-litigation-over-excessive-plan-fees-infographic.pdf.

lower-quality complaints, and appellate-level decisions enforcing meaningful benchmark requirements have driven down the average cost of settlement, and created the perception that certain of the more prolific plaintiff firms in the space are willing to take a cost-of-defense settlement.[20] The combined result is that less than 15% of the cases filed since 2015 have made it to a decision on summary judgment.[21]

This data makes clear that the enormous discovery and defense costs mean virtually all claims that survive a motion to dismiss end up settling. While those settlements involve significant legal fees and settlement costs for plans and insurers, they typically result in very modest payouts for class member participants. Thus, although these lawsuits are exceedingly unlikely to reach a determination of wrongdoing on the merits, unpredictable and excessive litigation costs often drive these cases to settlement. All of this is harmful to the voluntary, employer-sponsored retirement plan system; dollars spent on litigation cannot be used to pay benefits.

Even plans that have never been sued are bearing the costs of this tidal wave of litigation. For example, the costs associated with fiduciary liability insurance have skyrocketed. Almost all fiduciary liability policies covering excessive fee and underperformance claims now feature seven- and

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[20] *See* Aronowitz, 401(k) Litigation Continues At 'Fever Pitch,' https://www.planadviser.com/401k-litigation-continues-fever-pitch/.

[21] *See* Understanding the rapid rise in excessive fee claims at 6.

eight-figure retention numbers, meaning that plan sponsors must pay as much as $15 million in legal fees before policies begin to cover defense costs.[22] Premiums associated with these policies have also risen dramatically.[23]

The central reason for the marked increase in insurance costs is insurers' inability to clearly gauge a plan's litigation risk, coupled with considerable legal and potential settlement costs. With hundreds of cookie-cutter complaints landing simultaneously in courts across the country, there is little predictability as to when a plan might be sued, or what such claims will allege. No defined contribution plan sponsor or fiduciary is safe from suit, regardless of the diligence and prudence of their actual process.

The Ninth Circuit's decision in *Bugielski* further amplifies this risk, because it undoes the effect of *Hughes*, and further reduces the odds that plan sponsors and fiduciaries can secure dismissal of speculative claims at the pleading stage. In *Dudenhoeffer* and *Hughes*, this Court set out a standard for challenging the reasonableness of plan fees under ERISA's duty of prudence. That standard cannot be satisfied by fixating on a single fact or variable among the many a fiduciary must consider in making decisions for a plan. A plaintiff cannot simply assert the price is too high, and must instead make a context-specific showing through comparison to a "meaningful benchmark." *Matney*, 80 F.4th at 1148.

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[22] Jacklyn Wille, Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market, Bloomberg Law (Oct. 18, 2021), available at https://news.bloomberglaw.com/ employee-benefits/spike-in-401k-lawsuits-scrambles-fiduciary-insurance-market.

[23] *Id.*

The Ninth Circuit's opinion threatens to undo the significant progress this Court and the Courts of Appeals have made in providing clarity on the pleading standard for excessive fee claims. In assessing imprudence claims based on alleged excessive fees, it is universally recognized that the plaintiffs bear the burden of establishing it is plausible (rather than possible) that the challenged fees were excessive. Under *Bugielski*, the same cannot be said for prohibited transaction claims.

The interpretation of Section 1106(a) announced by the Ninth Circuit provides plaintiffs (and their attorneys) a roadmap to an almost effortless route for surviving dismissal, by replacing prudence-based fee challenges (in which the reasonableness of fees is *plaintiffs'* burden to plausibly plead) with prohibited transaction claims (where plaintiffs need only plead a re-negotiation of a service provider contract without regard to the reasonableness of the contract).

Indeed, a plaintiff would need only allege that (1) the service provider was a party-in-interest, and (2) the fiduciary caused assets to be transferred to the service provider. These allegations fall far short of the detail required to allege a breach of the duty of prudence. So long as the plaintiff remained vague enough as to the actual fees paid (thus avoiding establishing the affirmative defense on the face of the complaint), the exemptions provided in Section 1108 would not allow a court to dismiss even a baseless, speculative claim regarding service provider fees. Plaintiffs should not be able to circumvent the established pleading burden for excessive fee claims by repackaging their prudence claims as ones for prohibited transactions. Such a result would exacerbate the harm created by recent litigation, and

would require fiduciaries who have done nothing wrong to devote resources to proving in a lawsuit that necessary service provider fees are reasonable, even where plaintiffs offer no suggestion to the contrary.

Unlike the Ninth Circuit's interpretation of Section 1106(a), the one outlined by the Second Circuit in *Cunningham* more logically aligns a plaintiff's pleading burden on a prohibited transaction claim to what precedent would require for a prudence claim based on allegations of excessive fees. Requiring (under the Second Circuit's holding) plausible allegations that the Section 1108(b) exemptions do not apply would require plaintiffs to plead more than the mere fact that a contract with a service provider existed. In short, it would require that plaintiff plead allegations making plausible the assertion that the party-in-interest received more than reasonable compensation.

It makes little sense, in the context of ERISA's detailed remedial scheme, to allow routine service provider contracts to be challenged as prohibited transactions, where the same allegations would be found insufficient to establish a claim of breach of the duty of prudence. But that is what this decision does. This Court should reverse the Ninth Circuit's decision to avoid crippling plan sponsors' and plan fiduciaries' ability to operate plans in an orderly and efficient manner.

Aside from the sprawling exposure and accompanying legal and insurance costs arising directly from this case, the Ninth Circuit's decision in *Bugielski* will subject fiduciaries to potential liability—or at least defense costs—even where they have clear evidence of providing well-managed, prudently priced plans, aided by expert third-party

service providers, providing best-in-class services to assist participants in saving for retirement. This simply cannot be what this Court envisioned when it emphasized the importance of lower courts "giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742.

Facing climbing costs and liability exposure, many employers may decide a defined contribution plan is simply not worth providing—an outcome decidedly contrary to Congress' intent in passing ERISA to protect employees' retirement benefits. Those that continue to offer a plan will face not only increasing costs, but also a significantly increased litigation exposure. Plans that continue to engage with trusted service providers will have to do so knowing any contract amendment or renewal will put them at risk of a prohibited transaction claim that, even if meritless, will likely survive a motion to dismiss and require either significant defense and discovery costs or an expensive settlement.

Given the discovery costs and settlement dynamics in these cases, Defendants cannot count on the subsequent discovery and trial practice necessary to establish the Section 1108 exemptions to efficiently limit the impact of the Ninth Circuit's holding in the manner suggested by the opinion. Luckily, nothing compels this Court to bring about this parade of horribles. This Court should grant the petition and reject a reading of the prohibited transaction rules that produces absurd or illogical outcomes, to ensure that ERISA is not interpreted to presumptively bar plans from entering into contracts for necessary services, even where the contracts are the result of arm's-length negotiation.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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