No. 23-1007

IN THE

Supreme Court of the United States

CASEY CUNNINGHAM, *et al.*, *Petitioners,*

v.

CORNELL UNIVERSITY, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

JANET GALERIA
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

January 3, 2025

JAIME A. SANTOS
Counsel of Record
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
jsantos@goodwinlaw.com
(202) 346-4000

JAMES O. FLECKNER
JOHN J. CLEARY
JORDAN BOCK
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Counsel for Amici Curiae

(*Additional counsel listed on inside cover*)

ERICA T. KLENICKI
MICHAEL A. TILGHMAN II
NAM LEGAL CENTER
733 10th Street, NW
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The National Association of Manufacturers is the voice of the manufacturing community and the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and all 50 States.

Many of the *amici*'s members maintain, administer, or provide services to employee-benefit plans governed by the ERISA. Accordingly, *amici* have a strong interest in the proper interpretation of ERISA and frequently participate as *amici curiae* in ERISA cases. *See, e.g.*, *Hughes v. Nw. Univ.*, 595 U.S. 170, 174 (2022); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents a turning point in ERISA litigation. At issue is whether a plaintiff can survive a motion to dismiss and proceed to discovery merely by pleading the *occurrence* of any number of common, everyday transactions that ERISA expressly makes lawful. Among those transactions: a plan's engagement of a recordkeeper or accountant for any compensation (regardless of amount), a plan's adoption of a participant-loan program, and the purchase of stock by employee stock ownership plans (ESOPs). If the mere *existence* of one of these transactions—which, to be clear, ERISA plans engage in millions of times each year—is sufficient to plead a violation of ERISA, then ERISA class actions could easily skyrocket, allowing plaintiffs to skate past the pleading stage and open the door to discovery against any defendant, regardless of the broader context or factual circumstances of their claim. If not, then district courts will have the opportunity to rein in the recent rash of ERISA class-action litigation by applying the customary standards that require plaintiffs to plausibly allege *unlawful* activity.

ERISA's prohibited-transaction provisions forbid fiduciaries from causing their plan to engage in specified transactions, including the "lending of money … between the plan and a party in interest," 29 U.S.C.§ 1106(a)(1)(B), and the "furnishing of goods, services, or facilities between the plan and a party in interest," *id.* § 1106(a)(1)(C). Congress worded these provisions broadly—on their face covering broad swaths of transactions that employer-sponsored benefit plans engage in every day, including *all* plan transactions with service providers (who fall within the category of "parties in interest"). *See id.* § 1002(14)(B).

But because these provisions cover transactions that are necessary and appropriate for plans to function, Congress cabined their breadth by simultaneously creating exemptions that permit those very transactions as long as certain elements are present—for example, as long as a transaction with a service provider involves "reasonable compensation." *See id.* § 1108(b)(2).

Petitioners argue that to state a viable claim under § 1106(a), all ERISA plaintiffs must do is plead the bare existence of an enumerated transaction, and courts must ignore whether the plaintiffs have plausibly alleged that the transaction *actually violates* ERISA taking into account the exemptions that § 1106(a) expressly incorporates by reference. According to petitioners, alleging any facts and circumstances relevant to the availability of an exemption is unnecessary because that should play no role at the pleading stage—instead, that should be litigated only at summary judgment or trial, after a plan sponsor has been forced to expend millions of dollars in asymmetrical discovery irrespective of whether the fiduciary has plausibly been accused of engaging in unlawful conduct at all. That is wrong as a matter of text, as respondents' brief ably explains, and also as a matter of logic, policy, and statutory purpose.

Put simply, petitioners' arguments are divorced from reality. Starting with the facts here, third-party service providers are absolutely critical to the operation of all employer-sponsored benefit plans, and have been since before ERISA was enacted. It would upend benefit plans if plan fiduciaries faced the daunting prospect of expensive and asymmetrical discovery merely because they contracted with a service provider—

which the nation's millions of benefit plans do every day.

On the flip side, petitioners' administrability concerns are wholly unpersuasive. Petitioners suggest that there is "an information asymmetry" between plan sponsors and plan participants that justifies allowing plan participants to sue based solely on the occurrence of a specified transaction. But the governing pleading standard already accounts for petitioners' concern by allowing ERISA plaintiffs to proceed with well-pleaded facts supporting a reasonable *inference* of culpability. If anything, ERISA plaintiffs have access to far more information than plaintiffs in countless civil contexts (including antitrust plaintiffs) given the myriad statutory and regulatory disclosure requirements that plan administrators must satisfy.

Nor is it the case that plaintiffs will have to participate in some opaque game of "guess the exemption." It is abundantly clear which exemptions are at issue because they generally correspond to a particular prohibited-transaction claim. And given the explosion of "excessive-fee litigation" in recent years, the lion's share of prohibited-transaction cases involve the very service-provider provision (§ 1106(a)(1)(A)) and reasonable-compensation exemption (§ 1108(b)(2)) at issue in this case. In short, petitioners' administrability objection is wholly feigned, particularly in light of the liberal standards for amending complaints: petitioners have provided *no* example of a case in which a plaintiff lost her case because her lawyers failed to anticipate the relevant exemption.

Petitioners' contrived concerns should not distract from the significant harm that their approach would cause to Congress's carefully balanced framework.

While the last 15 years have already seen a surge of ERISA litigation, petitioners' interpretation would open the door far wider to suits challenging countless lawful and routine plan transactions. Petitioners and the government do not even meaningfully dispute this. Instead, they advocate a series of mechanisms that might slow the bleeding—like the illusive possibility of sanctions or attorney's fees for meritless lawsuits, and courts' potential invocation of a federal procedural rule, Fed. R. Civ. P. 7(a)(7), that even the most ardent scholar of civil procedure has likely never heard of.

Those solutions would be like using a band-aid to treat a shark bite. While petitioners maintain that the expense and time associated with bringing an ERISA class action will deter plaintiffs from filing frivolous suits, it is neither expensive nor time-consuming for a single firm to file a dozen cookie-cutter complaints asserting the same theory and conclusory allegations against plans across the country—a tactic with which *amici*'s members are very familiar. Nor will the possibility of attorney's fees make a difference. As this case reveals, ERISA plaintiffs (typically individual employees) are virtually never ordered to pay attorney's fees to the ERISA plan sponsor or service provider that they sued, and certainly not in any amount that would even approach actual defense costs.

Ultimately, petitioners ask the Court to trust them, along with any attorney contemplating an ERISA class action. But trust is not an aspect of the pleading framework, and petitioners have provided no justification for their request to sue any time a plan sponsor outsources any services, with no hint of wrongdoing or breach. Plaintiffs risk being shut out at the motion-to-

dismiss stage only if they lack facts supporting a plausible inference of wrongdoing—in which case courts should query why they are bringing the suit in the first place. Under a proper application of § 1106 and § 1108, these cases should not proceed past the pleading stage. This Court should affirm the judgment below.

ARGUMENT

I. Service providers have always played a critical role in employer-sponsored benefit plans.

The overriding flaw in petitioners' argument is their failure to account for the landscape Congress faced when enacting ERISA and how employer-sponsored benefit plans actually operate, in particular with respect to third-party service providers. Third-party providers are, and have always been, indispensable to the operation of ERISA plans. That much is clear from the statutory text. Congress defined "party in interest" to include "a person providing services to such plan," 29 U.S.C. § 1002(14), and expressly permitted plans to contract with a "party in interest" for "legal, accounting, or other services necessary for the establishment or operation of the plan," *id.* § 1108(b)(2). Indeed, Congress even *required* plan administrators to "engage, on behalf of all plan participants, an independent qualified public accountant" to examine the plan's books and records each year. 29 U.S.C. § 1023(a)(3)(A). This language has remain unchanged since ERISA's enactment a half century ago. Pub. L. 93-406, 88 Stat. 829, 834, 842, 883 (Sept. 2, 1974). Congress clearly understood in 1974 the central role that service providers played for employer-sponsored benefit plans, which explains why Congress *wrote into*

ERISA that retaining necessary service providers was fully above board, even if "outsourcing" services to third parties was uncommon for common-law trustees. U.S. Br. 19.

Today, service providers continue to be absolutely essential to plan administration. Given the size and complexity of retirement plans and participant populations, plan sponsors and fiduciaries rely heavily on third parties to provide a wide array of services, including "legal, accounting, trustee/custodial, recordkeeping, investment management, and investment education or advice" services. Gov't Accountability Office, *Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship* (Mar. 2012), https://bit.ly/3BTaU6E; *see also* Elena Barone Chism, et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2018*, 25 ICI Research Perspective, No. 4, at 3 (July 2019), https://bit.ly/41Ig9R9 ("plan fiduciaries must arrange for the provision of the many services required to create and maintain a 401(k) plan"); *id.* at 4-7 (describing the types of services and fee arrangements provided to retirement plans). The same is true for group health plans governed by ERISA. *See* DOL, *Understanding Your Fiduciary Responsibilities Under a Group Health Plan*, https://bit.ly/3W59Ovr.

And even aside from core services necessary to run *all* plans, like recordkeeping services that help "track the balances of individual accounts, provide regular account statements, and offer information and accessibility services to participants," *Hughes v. Nw. Univ.*, 595 U.S. 170, 174 (2022), plan sponsors and fiduciaries also rely on outside service providers to provide other services that employees want—including financial

counseling and education services. *See generally* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 Cornell L. Rev. 741 (2020); *see also* Vestwell, *2023 Retirement Trends Report*, https://bit.ly/3UXk7Qq ("The vast majority of employees surveyed believe companies that offer a retirement plan should also provide education about it."). A Deloitte survey found that 76% of plans offer "individual financial counseling/investment advice," and that number "is expected to rise." Deloitte, *2019 Defined Contribution Benchmarking Survey Report*, at 18, App'x at 29, https://bit.ly/41xQuYG.[2]

To provide employees with these important services, plan sponsors or fiduciaries typically contract with outside service providers, who are generally far better equipped than the employer itself to offer these specialized services to the thousands or tens of thousands of participants in any given plan. In other words, plan sponsors would not be able to effectively maintain benefit plans for their dozens, hundreds, thousands, or even tens of thousands of employees without the use of service providers.

The size, complexity, and patent need for service providers is unique to ERISA-governed benefit plans. Under the common law, trustees were typically safeguarding the property of a single beneficiary or perhaps a small group of beneficiaries, they were hired because of their unique skill, and retaining the services of another was very much side-eyed. U.S. Br. 19-20. The administration of modern employer-sponsored

---

[2] Congress has encouraged these types of services, even amending ERISA in 2006 to provide a specific exemption for investment-advice arrangements. *See* 29 U.S.C. § 1108(g).

benefit plans, in contrast, does not involve a third-party skilled trustee performing all tasks necessary to safeguard the interests of a particular beneficiary. To the contrary, Congress knew that managing and administering plans for thousands of participants and beneficiaries would involve different needs, and expressly permitted a plan sponsor's officer or employee to serve as a benefit plan fiduciary. *See* 29 U.S.C. § 1108(c)(3). And far from looking askance at plan outsourcing, Congress expressly permitted—in some instances, *required*—the use of third-party service providers to ensure that plans could function. *See supra* pp. 6-7. Given this reality—of which Congress was well-aware when legislating—trust law is an odd starting point in interpreting prohibited-transaction rules *that did not exist at common law*. *Contra* Pet. Br 35-36; Govt. Br. 19-20; *see* Resps. Br. 45-47.

More broadly, "ERISA is not the common law." *Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1175 (11th Cir. 2024), *petition for cert. pending*, No. 24-620 (filed Dec. 6, 2024). Rather, it "is a complex statutory scheme," and courts have therefore "long 'reject[ed] the unselective incorporation of trust law rules into ERISA.'" *Id.* (quoting *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1981)). That should be particularly true in this context given the immense complexity of modern retirement plans as compared to the standard common-law trust. As DOL recognizes, managing a retirement plan "requires expertise in a variety of areas." DOL, *Meeting Your Fiduciary Responsibilities* (Sept. 2021) 2, https://bit.ly/3VXQYXf. "Lacking that expertise, a fiduciary will want to hire someone" with the requisite "professional knowledge" to fill in any holes in the plan sponsor's expertise. *Id.* (further dis-

cussing guidelines for hiring service providers). To understand Congress's objective in enacting the prohibited-transaction scheme—and the practical ramifications of petitioners' position—this context is critical.

II. Petitioners' contrived objections do not justify an atextual reading of the statute.

Petitioners and the government advocate for an interpretation of § 1106(a) that is wrong as a matter of both text and precedent. As the Second Circuit recognized—and as respondents' brief explains at length—§ 1106(a) "begins with [a] carveout" for transactions that fall within an exemption under § 1108, meaning that § 1106(a) "incorporate[s]" the enumerated exemptions "directly into [the] definition of prohibited transactions." Pet. App. 19a; Resps. Br. 13-20. In other words, § 1106(a) must incorporate the exemptions in § 1108 as "ingredients of the offense" in order for the statute to "accurately and clearly describe[]" the conduct Congress intended to prohibit. Pet. App. 21a; *see also* Resps. Br. 14.

Respondents' discussion of text and precedent is sufficient to resolve this case, but the Court should also reject petitioners' deeply misguided policy-based justifications for their rule. Petitioners' arguments about the difficulties created by respondents' approach are entirely divorced from reality and would be unrecognizable to anyone who has litigated an ERISA class action or managed an ERISA plan.

A. The pleading framework already accounts for any information asymmetry.

Petitioners first trot out a familiar refrain—that there is "an information asymmetry" between plan sponsors and plan participants, because "the fiduciary

knows things the beneficiary does not." Pet. Br. 17, 36. According to petitioners, a "beneficiary would have little reason to know whether" a particular transaction with a service provider "was reasonable, necessary, and for reasonable compensation," Pet. Br. 36—meaning, in petitioners' view, that plaintiffs should be able to move into discovery based solely on the assertion of a run-of-the-mill transaction between a plan and one of its service providers.

Petitioners' argument does not square either with *Twombly*'s well-established pleading standard or with ERISA. To start, the pleading regime already accounts for any information imbalance by permitting ERISA plaintiffs to plead by inference. A plaintiff is not obligated to provide direct allegations of wrongdoing, but can instead allege facts "allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 678 (2007). This framework accounts for the risk in any number of areas of the law—antitrust, securities, and RICO among them—that the plaintiff will be at some informational disadvantage. The plaintiff can therefore proceed based on well-pleaded *facts* plausibly suggesting unlawful conduct even absent direct allegations of a foundational element of a claim.

This pleading framework—which this Court has already held applies to ERISA cases just like any other civil case[3]—fully accounts for any potential information asymmetry. Take an ERISA claim for breach of fiduciary duty, for example: ERISA's fiduciary-breach provisions (found in 29 U.S.C. § 1104) require

[3] *Hughes*, 595 U.S. at 176.

a prudent process, not a particular outcome. *See, e.g.*, *Pension Benefit Guarantee Corp. ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt. Inc.* ("*St. Vincent*"), 712 F.3d 705, 716 (2d Cir. 2013). A fiduciary's mandate is not to secure a certain result, but to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). This inquiry "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *St. Vincent*, 712 F.3d at 716 (brackets omitted).

Notwithstanding this overriding focus on process, ERISA plaintiffs can proceed past a motion to dismiss without any direct allegations of a deficient process. Specifically, "[e]ven when the alleged facts do not 'directly address[] the process by which the Plan was managed,' a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably 'infer from what is alleged that the process was flawed.'" *Id.* at 718 (citation omitted). That structure is in place precisely because courts already recognize that plaintiffs may not have information about a sponsor's process "unless and until discovery commences." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). There is no justification for the Court to go further still and effectively release plaintiffs from any pleading requirements at all.

Moreover, the information-asymmetry argument is *particularly* weak in ERISA cases. According to petitioners, ERISA requires disclosure of relevant details regarding fees and services to plan fiduciaries but not to plan participants. Pets. Br. 33-34, 38. But, petitioners say, "[a]t no point does § 1108(b)(2)(B) or § 2550.408b-2 contemplate this exchange of information to the beneficiary," and so participants should not be expected to plead any of those types of facts when asserting violations of ERISA's prohibited-transaction provisions.

This argument completely ignores that ERISA and Department of Labor (DOL) regulations require extensive disclosures of information from plan administrators to plan participants. To start, Congress wrote into ERISA numerous disclosure requirements, including the requirement that plan administrators provide participants and beneficiaries with plan documents, summary plan descriptions, trust agreements, and more. *See, e.g.*, 29 U.S.C. § 1024. And they are privately enforceable by civil penalties that rack up each *day* of noncompliance. *See id.* § 1132(c). Even outside of those general provisions, Congress has required information to be disclosed to participants regarding, for example, the details of participant-loan programs, 29 U.S.C. § 1108(b)(1); 29 C.F.R. § 2550.408b-1(d), belying petitioners' suggestion that "[i]t is implausible" that they could obtain relevant information regarding participant loans. Pet. Br. 37 (citation omitted).

It further ignores that ERISA requires plans to file annual reports (the Form 5500) with DOL detailing information about, for example, its contracts with service providers. 29 U.S.C. § 1024(a). DOL makes those

reports publicly available on an easy-to-navigate website,[4] and they frequently play a starring role in ERISA class action complaints.

DOL has also used ERISA's fiduciary-duty provisions as a launching pad for additional participant-disclosure requirements, including an entire regulation that details the extensive "requirements for disclosure in participant-directed individual account plans," including that fiduciaries must provide participants or beneficiaries with "an explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping)" that may be charged against the individual's account. 29 C.F.R. § 2550.404a-5(c)(2)(i)(A). DOL thus directs plan sponsors to include in their disclosures "a comparative chart with information about the plan's investment options, including investment fees and expenses." DOL, *Reporting and Disclosure Guide for Employee Benefit Plans* (Dec. 2022) 16, https://bit.ly/4gohroX.

Indeed, the "participant-level disclosure regulation" (29 C.F.R. § 2550.404a-5) is closely tied to the service-provider regulation (known as the "408(b)(2) regulation") that petitioners point to in their brief (at 33-34). As DOL has explained, the "408(b)(2) regulation, in relevant part, requires certain covered service providers to furnish specified information to plan administrators *so that they may comply with their disclosure obligations* in the participant-level disclosure regulation." DOL, Field Assistance Bulletin No. 2012-02 1, https://bit.ly/3ZMjUCK (emphasis added). In other

[4] https://www.efast.dol.gov/5500Search/.

words, DOL requires the very "exchange of information to the beneficiary" that petitioners suggest (at 34) does not occur.

At the end of the day, petitioners ask the Court to greenlight a fishing expedition any time a plan outsources any services, no matter the underlying facts. Under petitioners' approach, a plaintiff need not have any suspicion or hint of wrongdoing, but instead can merely point to the retention of a service provider to open the door to discovery. The text of the statute does not support that result, *see supra*, p. 10, and it is precisely what *Twombly* and *Iqbal* were intended to avoid. *See Twombly*, 550 U.S. at 557. If a plaintiff can plead no facts from which a court could infer wrongdoing—and the simple act of hiring a service provider cannot plausibly suggest as much—then there is no reason for the plaintiff to sue, and certainly no reason to allow the action to proceed.

B. Petitioners' concerns about "predicting" exemptions are entirely unfounded.

Petitioners object that "plaintiffs must correctly predict *every* exemption that could apply … and then plead plausible allegations negating *each* such exemption." Pet. Br. 43. And, they say, if plaintiffs "fail at any junction, they have no claim, and defendants need not turn over anything in discovery." *Id.* Petitioners' hyperbolic forecast would be unrecognizable to anyone who has litigated a prohibited-transaction claim.

It is generally quite clear which exemptions are at issue because they correspond to the plaintiffs' claims. That is all the more true because the vast majority of prohibited-transaction claims involve a discrete set of

prohibited transactions and a discrete (and corresponding) set of exemptions. If, as here, the plaintiff challenges a transaction with a service provider under § 1106(a)(1)(C), the exemption for contracting with a party in interest (§ 1108(b)(2)) will be at issue. If a plaintiff challenges the purchase of a health insurance contract from the employer or a party in interest, then no great acumen is needed to identify the exemption for the purchase of health insurance contracts, 29 U.S.C. § 1108(b)(5). If a plaintiff challenges a participant loan under § 1106(a)(1)(B), then the exemption for participant loans (§ 1108(b)(1)) will be relevant. Indeed, plaintiffs often preemptively allege that certain prohibited transactions fall outside the relevant § 1108(b) exemptions—even under the more lenient pleading standard adopted by petitioners' preferred circuits. *See, e.g.*, *Davis v. Wash. Univ. in St. Louis*, 2018 WL 4684244, at *5 (E.D. Mo. Sept. 28, 2018) (relevant exemption was "referenced in Plaintiffs' Consolidated Complaint"), *rev'd in part on other grounds*, 960 F.3d 478 (8th Cir. 2020); *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *17 (D. Minn. Nov. 20, 2012) (plaintiffs "pled in their Amended Complaint that the exceptions in § 408(b)(8) and PTE 77-3 do not apply in this action"). All plaintiffs must do to identify the relevant exemption(s) is examine their own claims.[5]

---

[5] This is true for statutory and regulatory exemptions alike. For regulatory exemptions, a plaintiff need only consider the small number of class exemptions. *See* Department of Labor, Employee Benefits Security Administration, *Class Exemptions*, https://perma.cc/TV5M-YPSA; Resps. Br. 39 n.8. As with statutory exemptions, their application is well-understood by anyone with a passing familiarity with ERISA. If plaintiffs are suing, for example, because a plan included an affiliated mutual fund, then

Citing a handful of scattered examples from the last fifty years, petitioners next complain that defendants often "invoke more than one get-out-of-jail-free card." Pet. Br. 43. To start, the statutory exemptions are hardly "get-out-of-jail-free cards"; they define the transactions that Congress has recognized are not actually prohibited—transactions as ubiquitous (and critical) as the provision of recordkeeping or accounting services, or an ESOP's purchase of employer stock. *See supra*, pp. 7-9. Even putting aside petitioners' misguided description, it is hardly surprising—or troubling—that defendants invoke multiple exemptions when faced with multiple prohibited-transaction claims.

Take *Haley v. Teachers Ins. And Annuity Association of America*, 54 F.4th 115 (2d Cir. 2022), in which plaintiffs challenged a plan's participant-loan program. Petitioners complain that TIAA took a "kitchen-sink approach" by raising *two* separate exemptions in response to allegations regarding its offer of "collateralized loan products" to beneficiaries. Pet. Br. 37; *see* 54 F.4th at 118, 120. If petitioners' parade of horribles ends in a defendant raising two statutory exemptions, then it is a short parade indeed. In any event, it was hardly a surprise that TIAA raised more than one exemption, because the plaintiff alleged more than one prohibited transaction; each exemption asserted by TIAA corresponded to the prohibited-transaction provision asserted by the plaintiff. *See Haley v. Tchrs. Ins. & Annuity Ass'n of Am.*, 2021 WL 4481598, at *2 (S.D.N.Y. Sept. 30, 2021).

---

they *should* have to plead that the exemption for affiliated mutual funds (PTE 77-3) does not apply. Otherwise, they are not alleging unlawful conduct. *See supra*, p. 15.

Petitioners' remaining cases are no more helpful. In each, the prohibited-transaction claims proceeded to trial, after which the court entered findings of fact and conclusions of law on the applicability of the exemptions at play. *See Dupree v. Prudential Insurance*, 2007 WL 2263892, at *39 (S.D. Fla. Aug. 7, 2007); *McLaughlin v. Rowley*, 698 F. Supp. 1333, 1339-40 (N.D. Tex. 1988); *Marshall v. Kelly*, 465 F. Supp. 341, 351-52 (W.D. Okla. 1978). Given that the cases proceeded to trial, the plaintiffs had a full opportunity to address the relevant exemptions. If anything, these decisions disprove petitioners' argument that the possibility a defendant might raise multiple exemptions would defeat valid claims right out of the gate. Pet. Br. 42-43.

Even assuming the plaintiffs in a particular suit might fail to anticipate an exemption raised in a motion to dismiss, that is hardly the end of the case. They can amend their complaint as of right *after* having an opportunity to review the defendants' motion to dismiss. *See* Fed. R. Civ. P. 15(a)(1)(B). Even if the plaintiffs amended their complaint prior to the defendants' filing a motion to dismiss, the plaintiffs would almost certainly be provided an opportunity to amend to address the purported "surprise" exemption. *See* Fed. R. Civ. P. 15(a)(2).

Finally, the opportunity for actual confusion is exceedingly unlikely. The lion's share of prohibited-transaction claims are just like petitioners' here—they challenge arrangements with service providers that, plaintiffs say, involve the payment of "excessive" fees. *See, e.g.*, Pet. App. 5, 6, 7. These claims have historically been asserted, as they were here, alongside claims that plan fiduciaries breached ERISA's duties

of prudence and loyalty by failing to monitor service-provider fees—claims in which ERISA plaintiffs unequivocally have the burden of alleging that the fees paid were excessive in comparison to the services rendered. Pet. App. 142-145 (fiduciary breach claim based on "Unreasonable Administrative Fees"); Pet. App. 145-146 (prohibited-transaction claim based on "Administrative Services and Fees").

Moreover, the ERISA class-action plaintiffs' bar is highly specialized, dominated by a small number of highly knowledgeable firms. Accordingly, petitioners have unsurprisingly identified no case in which the plaintiffs lost a motion to dismiss because they failed to anticipate the exemption the defendants would raise. This feigned administrability concern does not support a countertextual reading of the statute.

III. Petitioners' approach will throw a wrench in Congress's carefully balanced framework.

This Court has "observed repeatedly that ERISA is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002). The Court has therefore "been especially reluctant" to disturb the statute's "carefully crafted and detailed enforcement scheme." *Id.* But petitioners' approach would do precisely that, opening the door to a swell of lawsuits—many of them challenging entirely lawful, everyday transactions. The ultimate result would be very real harm to plan sponsors and participants alike.

A. Petitioners' approach will encourage meritless ERISA lawsuits.

ERISA class-action litigation has exploded in the

last 15 years—even before widespread adoption of petitioners' breathtakingly broad theory. *See, e.g.*, George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDr1. While the precise number of complaints naturally varies from year to year, there has been an undeniable surge in these actions. "Regardless of plan type, plan size or jurisdiction, no retirement plan or plan fiduciary is immune." *Understanding the Rapid Rise in Excessive Fee Claims* 2, AIG, https://bit.ly/3k43kt8 (describing that the number of "claims has jumped to unprecedented levels").

These numbers "should sound alarms." *Contra* AAJ Br. 26. While the duties of prudence and loyalty are critical safeguards for management of retirement plans, ERISA also prioritizes fiduciary discretion, recognizing it as "essential" given variations in the "individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972).

In light of the vast array of options that exist for investment products and services, the need for fiduciaries to tailor solutions to their participants, and the widely diverse nature of those participants, fiduciaries are best positioned to evaluate different choices and the "difficult tradeoffs" involved. *Hughes*, 595 U.S. at 177. If a fiduciary is subjected in litigation to constant Monday morning quarterbacking, that would eviscerate the discretion at the core of the statutory framework. ERISA class actions should be limited to situations where a fiduciary truly does stray outside his fiduciary obligations, rather than the routine filings they have become.

Petitioners' approach moves in the exact opposite direction. While ERISA lawsuits plague the retirement-plan industry already, petitioners' interpretation will lead to exponentially more. ERISA filings could easily skyrocket as countless *lawful* practices and everyday transactions will be actionable in a class-action lawsuit, leading to asymmetrical and extraordinarily expensive discovery. *See St. Vincent*, 712 F.3d at 719. Plan sponsors will have to litigate claims for years based solely on their participation in garden-variety transactions that everyone agrees are entirely permissible—indeed, expressly contemplated by Congress.

This case provides perhaps the best example. ERISA plans cannot function without service providers—but, under petitioners' approach, merely alleging that a plan contracts for the provision of services would be sufficient to state a claim. Plaintiffs will therefore be able to select any employer they choose and proceed into discovery.

And the consequences are hardly limited to service providers. Take participant loans: incredibly common and popular transactions that help many young participants purchase their first home. Because every employee of the plan sponsor is a party in interest, participant loans are "prohibited" under § 1106(a)(1)(B), "[e]xcept as provided in section 1108." And indeed, the very first statutory exemption expressly permits participant loans. 29 U.S.C. § 1108(b)(1). Nevertheless, under petitioners' rule, plan sponsors sued for doing what ERISA expressly permits will have no ability to litigate these exemptions until after years (and millions of dollars) mired in discovery.

The same is true for ESOPs. This Court has previously addressed the pleading standard for alleging a violation of the duty of prudence with respect to an ESOP fiduciary. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412 (2014). As *Dudenhoeffer* makes clear, whether an ESOP fiduciary has violated the duty of prudence requires—at the pleading stage—a "careful, context-sensitive scrutiny of a complaint's allegations." *Id.* at 425. Indeed, the Court specifically identified "the motion to dismiss for failure to state a claim" as "one important mechanism for weeding out meritless claims." *Id.*

Petitioners' approach will supplant this analysis through a prohibited-transaction claim. When an ESOP buys employer stock—which is its *raison d'etre*—the transaction is prohibited under § 1106(a)(1)(A) "[e]xcept as provided in section 1108." That transaction is expressly permitted, however, under § 1108(e)(1) so long as the purchase was for "adequate consideration." But under petitioners' approach, the plaintiff need only plead the purchase of stock—effectively, the existence of an ESOP—to survive a motion to dismiss. *See Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 676 (7th Cir. 2016). As a result, ESOP fiduciaries will be precluded from raising any successful defense for even clearly lawful conduct at the motion-to-dismiss stage.

Enshrining petitioners' view of the pleading standard will be particularly tectonic because plaintiffs can easily recast breach-of-fiduciary-duty claims as prohibited-transaction claims. For a claim challenging a service-provider transaction, for example, a plaintiff pleading the claim as a prohibited-transaction claim rather than a fiduciary-breach claim will have no need

to allege that the plan's fees were excessive in comparison to the services rendered (to that plan or others). *E.g.*, *Singh v. Deloitte LLP*, 123 F.4th 88, 94 (2d Cir. Dec. 10, 2024) (affirming dismissal of an excessive-recordkeeping claim where the plaintiff "allege[d] next to nothing about the recordkeeping services provided by the Plan or by the six other large plans that the [First Amended Complaint] cite[d] as allegedly lower-priced").Rather, the plaintiff can simply allege that the plan hired a service provider to manage the plan's administrative tasks and sail through to discovery. The same is true with ESOPs. Plaintiffs who plan to challenge a stock purchase by an ESOP need not satisfy the standard outlined in *Dudenhoeffer*; they can file a prohibited-transaction claim instead, and proceed to discovery regardless of the underlying facts or context.[6]

B. Petitioners' proffered guardrails are illusory.

Petitioners point to a handful of mechanisms they contend will ensure that plan sponsors are not targeted with meritless lawsuits, but none is persuasive.

1. Petitioners first suggest that the ERISA plaintiffs' bar can police themselves—they say it is "expensive and time-consuming" to bring an ERISA case, and that allegations that "might formally satisfy § 1106(a)" would nevertheless "get a plaintiff nowhere in practice." Pet. Br. 47. But it is in fact not particularly "expensive" or "time-consuming" for a single firm to bring

[6] Of course, to the extent there is a basis for a plaintiff's concern about a particular transaction, the plaintiff need only provide those allegations in the complaint in order to plead a transaction that falls outside the scope of an exemption.

dozens of cookie-cutter lawsuits, as has become a common occurrence. An attorney need only identify a theory that applies to any number of plans around the country (for example, all of the plans that contract with the same recordkeeper). The plaintiff's attorney can then blanket the country with a series of materially identical complaints and see which ones stick.

That is exactly the dynamic *amici*'s members are experiencing: a swarm of complaints with almost identical claims and allegations. To take just one example, in the span of a month a single firm filed eleven nearly identical class-action complaints alleging that various plan fiduciaries violated ERISA by including in their investment line-up a popular, high-performing, and highly rated suite of target date funds (TDFs). *See Hall v. Capital One Fin. Corp.*, 2023 WL 2333304, at *2 n.2 (E.D. Va. March 1, 2023) (identifying the lawsuit as "one of eleven lawsuits brought by Plaintiffs' counsel alleging the same claims against other large-employer-sponsored retirement plans offering the BlackRock TDFs"). The fiduciaries' alleged offense? They chose a TDF suite that did not consistently outperform other TDF suites on the market in the late 2010s. The *Twombly* and *Iqbal* pleading standards allowed plan sponsors to largely avoid the expense of discovery for such a weak set of cases,[7] but that safeguard would not exist for prohibited-transaction claims under petitioners' rule.

These suits are even easier to manufacture when

[7] *See* Joseph Clark et al., *Dismissal Streak Continues in BlackRock Target Date Fund Litigation*, Employee Benefits & Executive Compensation Blog (May 4, 2023), https://www.erisapracticecenter.com/2023/05/dismissal-streak-continues-in-blackrock-target-date-fund-litigation/.

they are based on demonstrably inaccurate premises, conclusory allegations, or theories that ignore how ERISA operates. This case is a perfect example: It takes no research or analysis to nakedly assert—regardless of the context of any particular plan—that a reasonable recordkeeping fee is "$35 per participant." Pet. App. 25a; *see also* Pet. Br. 10. Indeed, for years ERISA complaints have alleged that plan fiduciaries violated the duty of prudence by failing to negotiate a "reasonable" fee pegged to an arbitrary figure. *See, e.g.*, Pet. Br. 9, *Hughes v. Nw. Univ.*, No. 19-1401 (U.S. Sept. 3, 2021), https://bit.ly/3HSTq85; Compl. ¶ 54, *Sweda v. Univ. of Pa.*, 2016 WL 11723831 (E.D. Pa.) (Aug. 10, 2016); Compl. ¶ 76, *Fritton v. Taylor Corp.*, No. 22-415 (D. Minn.) (Feb. 14, 2022), ECF No. 1; Compl. ¶ 69, *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Oct. 13, 2021), ECF No. 1.

Nor is it the case that groundless lawsuits will "get a plaintiff nowhere in practice." Pet. Br. 47. As this Court has recognized, absent a meaningful pleading standard, "cost-conscious defendants" may be "push[ed] … to settle even anemic cases." *Twombly*, 550 U.S. at 558-59. In ERISA cases in particular, discovery is entirely "asymmetric" and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *St. Vincent*, 712 F.3d at 719. While discovery is sometimes appropriate, the price of discovery (financial and otherwise) "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, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *Id.* (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). In many

cases, the motion to dismiss is the name of the game, and plan sponsors are under significant pressure to settle any suit that survives that stage—meaning there is in fact significant value in filing a lawsuit that will survive a motion to dismiss, regardless of the ultimate merits of the claims.[8]

2. Petitioners next pivot to sanctions and attorney's fees, which, they say, "discourage plaintiffs from bringing lawsuits just to bring lawsuits." Pet. Br. 48. Again, petitioners' argument does not accord with reality. While ERISA's fee-shifting provision nominally allows for recovery by both plaintiffs and defendants, that is not how it is either invoked or applied. To start, courts have held that "ERISA's fee-shifting provision in Section 1132(g)(1) cannot support a fee award against counsel," but instead can be used only to award fees against the plaintiff individually. *Peer v. Liberty Life Ass. Co. of Boston*, 992 F.3d 1258, 1260 (11th Cir. 2021). And plan sponsors are neither foolish nor heartless—they are understandably hesitant to pursue millions in fees against *their own employees*. Therefore they are far more likely not to seek fees even after they prevail.

That hesitation is only bolstered by courts' interpretation of ERISA's nominally party-agnostic fee-shifting provision. Courts have held over and over again that plaintiffs are far more appropriate recipients of fee awards than defendants. *See Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011) (adopting a "favorable slant toward ERISA plaintiffs"

---

[8] In 2023, for example, there were 36 settlements in ERISA class actions totaling more than $219 million. *ERISA Litigation Update*, Goodwin Procter (Jan. 18, 2024), https://bit.ly/3ZRXL70. The average settlement was $5.9 million. *Id.*

as "necessary to prevent the chilling of suits brought in good faith"); *Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust*, 3 F.3d 1246, 1253 (9th Cir. 1993) ("We reject the defendant's fee request because we see no justification, on this record, to displace our common perception that attorney's fees should not be charged against ERISA plaintiffs."). This outcome is built into the factors courts consider when evaluating fees, which "very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs." *Toussaint*, 648 F.3d at 111 (citation omitted); *accord, e.g.*, *West v. Greyhound Corp.*, 813 F.2d 951, 956 (9th Cir. 1987).

And even when a defendant does obtain a fee award, the amount tends to be far less than the amount awarded to plaintiffs—and far, far less than the amount that ERISA defendants actually spend litigating meritless lawsuits. *See, e.g.*, *Thigpen v. Bd. of Trustees of Local 807 Labor-Mgmt. Pension Fund*, 2019 WL 4756029, at *9 (E.D.N.Y. Sept. 29, 2019) (granting defendant's request for attorney's fees, but awarding only $100 to "deter Plaintiff from ill-advisedly continuing or bringing future litigation of this nature"); *Spath v. Standard Ins. Co.*, 151 F. Supp. 3d 973, 978 (W.D. Mo. 2016) (ordering plaintiff to pay $500 in fees given his "minimal financial capabilities"). By contrast, ERISA defendants are forced to pay plaintiffs' lawyers millions in fees if they lose or settle. *See, e.g.*, *Brundle on behalf of Constellis Employee Stock Ownership Plan v. Wilmington Trust, N.A.*, 919 F.3d 763, 784 (4th Cir. 2019) ($1.8 million statutory fee award); ECF No. 384, *Munro v. Univ. of S. Cal.*, 2:16-cv-06191-VAP (Aug. 24, 2023) (approving $4.4 million in attorneys' fees as part of class action settlement).

Once again, petitioners' own case undermines their argument. Petitioners point to the district court's award of $25,000 in *costs* to Cornell and its co-defendant investment advisor. Pet. Br. 48 (citing D. Ct. Dkt. 471 at 7). But as the cited order explains, the district court awarded *costs* under Rule 54(d)(1), which unlike ERISA's fee-shifting provision is not discretionary. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 377 (2013). Put simply: the district court did *not* award attorney's fees to respondents. To the contrary, "*Plaintiffs* were awarded attorney's fees and costs on the settlement of the remaining portion of Count V"—the only claim (out of seven originally pleaded) that "survived summary judgment." Dkt. No. 471 at 2, 6 (emphasis added). As this case demonstrates, then, fees are hardly an effective deterrent.

The pleading standard should not rest on assurances of self-restraint by the plaintiffs' bar. In ERISA especially, the pleading standard is critical to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp*, 573 U.S. at 425. "That important task" must be "accomplished through careful, context-sensitive scrutiny of a complaint's allegations," *id.*, and not through a mere checkbox. If courts leave the initial screening task to the discretion of the plaintiffs' bar, all of the incentives are aligned to push plaintiffs to bring claims that will survive to discovery, regardless of their ultimate outcome. *See supra*, pp. 25-26.

Here, past is prologue: ERISA defendants are frequently targeted with meritless, and even demonstrably unfounded, claims. In *Ravarino v. Voya Financial, Inc.*, for example, plan participants received disclo-

sures that the plan sponsor paid *all* standard recordkeeping fees.[9] Voya nonetheless was targeted with a class-action complaint that conspicuously avoided alleging what fees the plaintiffs paid and instead opted to assert, "[o]n information and belief," that whatever their fees were, they "would have paid much less" but for the plan fiduciaries' imprudent process. No. 21-1658 (D. Conn.), ECF No. 1 (Compl.) ¶¶ 107-109; *see also Ravarino v. Voya Fin., Inc.*, 2023 WL 3981280, at *7-8 (D. Conn. June 13, 2023). The district court granted the defendant's motion to dismiss, explaining that the court could not "permit a claim to go forward based upon bald speculation." *Id.* at *8. Under petitioners' approach, however, as long as the claim is alleged as a prohibited-transaction claim rather than a failure-to-monitor claim under ERISA's fiduciary-breach provisions, not even such "bald speculation" would be necessary—plaintiffs would need to allege only that the plan retained and paid a recordkeeper.

The same was true in *Sigetich v. Kroger Co.*, 2023 WL 2431667, at *3 (S.D. Ohio March 9, 2023), in which the plan sponsor subsidized the recordkeeping fee so that participants themselves paid only $5-$6. Given the plaintiff's allegation that a "reasonable" annual recordkeeping fee was $17 per participant, *id.* at *7, the plaintiff should never have filed her case—or at the very least, she should have dismissed it upon being informed of the employer subsidy. She pressed forward nonetheless, arguing that had Kroger more prudently negotiated, then she might have paid *$0* in recordkeeping fees. *Id.* at *7. While the district court dismissed the claim because the plaintiff failed to allege facts

[9] ECF No. 20-6, at 10, *Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn. Feb. 28, 2022).

plausibly suggesting that the recordkeeping fees were excessive in relation to the services rendered, *id.* at *10, it would have had no choice but to allow the plaintiff's claim to proceed under petitioners' approach.

C. Petitioners' position will harm plan participants.

As this Court has recognized, in interpreting ERISA's provisions, courts should "take account" of Congress's "desire not to create a system" in which "litigation expenses" and other costs would "unduly discourage employers from offering … plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see also Dudenhoeffer*, 573 U.S. at 424-25 (recognizing the "important task" of shielding fiduciaries from "meritless, economically burdensome lawsuits"). But that is precisely what petitioners' rule would do. Drawing a massive litigation target on the backs of employers who sponsor plans that contract with service providers (which virtually all plans do) would likely have a dramatic adverse effect on the content, cost, and quality of services offered in employee benefit plans.

"If routine payments by [plans] to third parties in exchange for plan services are prohibited, that would seem to put plan participants and beneficiaries in a worse position: Employee benefit plans would no longer be able to outsource tasks like recordkeeping, investment management, or investment advising, which in all likelihood would result in lower returns for employees and higher costs for plan administration." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585-586 (7th Cir. 2022). Even if they continue to outsource these tasks, plan fiduciaries will be under immense

pressure to contract only for bare-bones services, unadorned by the enhanced services that participants increasingly expect and desire—at least unless they want to find themselves the target of a class-action lawsuit. *See, e.g.*, Tom Greshman, *Employees expect retirement benefits and education (even from small businesses*), Benefits Pro (Feb. 15, 2023), https://bit.ly/3W1hnTO; *Employers Want More Financial Wellness Benefits at Work, Survey Finds*, CPA Practice Advisor (Nov. 15, 2022), https://bit.ly/4h1wdlh.

At the end of the day, the result will be harm all around. Employers will be pushed to offer fewer services, both to avoid liability and because, given the cost of higher insurance premiums and higher deductibles, they may also need to cut costs. Indeed, for smaller employers that are unable to weather multi-million-dollar ERISA class actions, such a rule may even "discourage employers from offering ERISA plans altogether," because the complexity of the modern retirement plan requires outsourcing to service providers with unique skills. *Ramos v. Banner Health*, 1 F.4th 769, 786 (10th Cir. 2021). These changes will, in turn, harm employees. They will lose out, at a minimum, on desired services like financial education, and technological advances that only specialized service providers could practically provide—and potentially on employer-sponsored retirement plans altogether.

In short, the Court should reject the interpretation of ERISA that will make it far more burdensome to accomplish one of ERISA's fundamental objectives: to *encourage* employers to voluntarily offer retirement plans, and specifically retirement plans that are responsive to the needs and desires of plan participants. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JANET GALERIA
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

ERICA T. KLENICKI
MICHAEL A. TILGHMAN II
NAM Legal Center
733 10th Street, NW
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

JAIME A. SANTOS
Counsel of Record
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
jsantos@goodwinlaw.com
(202) 346-4000

JAMES O. FLECKNER
JOHN J. CLEARY
JORDAN BOCK
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Counsel for Amici Curiae

January 3, 2025