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
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE SPARK INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering employer-sponsored benefit plans. The Council's members are primarily large, multistate U.S. employers that sponsor benefit plans for active and retired workers and their families. The Council's membership also includes organizations that offer services to benefit plans of all sizes. Collectively, the Council's more than 430 members either sponsor or provide services to plans covering virtually all Americans who participate in employer-sponsored benefit programs.

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

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

The Council, ERIC, and the SPARK Institute frequently participate as *amici curiae* in cases that, like

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[1] Pursuant to Supreme Court Rule 37.6, 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.

this one, will have far-reaching effects on employee benefit plan design or administration. In this case, petitioners advance a rule for pleading prohibited transaction claims under the Employee Retirement Income Security Act of 1974 ("ERISA") that would jeopardize the ability of employee benefit plan sponsors and fiduciaries to obtain necessary, beneficial services for their plans. Petitioners' proposed interpretation would leave essentially every retirement plan vulnerable to prohibited transaction claims guaranteed to survive a motion to dismiss, based on nothing more than the fact that the plan receives commonplace services essential to its operation. That rule cannot be squared with ERISA's purpose of fostering the creation and orderly administration of employee benefit plans, or with its provisions expressly permitting plans to obtain necessary services for reasonable compensation. *Amici* urge the Court to affirm the Second Circuit's decision below.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The administration of retirement plans inherently requires the provision of services to the plan. From recordkeepers to investment consultants to investment managers and beyond, most ERISA benefit plans are supported by multiple service providers who fulfill discrete, specialized roles in keeping the trains of plan administration on track. ERISA accounts for this practical reality. While the statute proscribes service provider arrangements that are unreasonable or unnecessary, the statute unsurprisingly permits

plans to receive necessary services if the compensation paid for those services is reasonable. *See* 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2).

The Second Circuit's standard for pleading a claim under 29 U.S.C. § 1106(a)(1)(C) is consistent not only with ERISA's text, but also with its purposes. ERISA reflects a balance of dual Congressional objectives: to enhance protections for employee benefits, and to encourage the creation and efficient administration of employer-sponsored benefit plans. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). To that end, Congress deliberately structured ERISA to avoid creating administrative complications and litigation exposure that would "unduly discourage employers from offering welfare benefit plans in the first place." *Id.*

The Second Circuit's rule requiring plaintiffs to allege that the "prohibited transactions" they claim are not, in fact, explicitly *permitted* under ERISA accomplishes those goals. *See* 29 U.S.C. § 1108(b). The Second Circuit correctly rejected petitioners' proposed approach, which would require plaintiffs to allege only the fact that a fiduciary procured services for the plan in order to state a claim for violation of 29 U.S.C. § 1106(a)(1)(C). Like the Third, Seventh, and Tenth Circuits, the Second Circuit held that pleading a violation of § 1106(a)(1)(C) requires something more: To state a viable claim under § 1106(a)(1)(C), a complaint must also plausibly allege that the services provided to the plan were unnecessary or involved unreasonable compensation. A plaintiff, in other words, must plausibly allege that the "prohibited transac-

tion" at issue is not the type of reasonable service-provider arrangement that Congress specifically carved out from ERISA's prohibited transaction rules.

The Second Circuit's rule faithfully implements ERISA's provisions based on both their text and Congress's stated purposes for them. Service provider arrangements are ubiquitous—and typically indispensable—across the benefit plan landscape. Few if any retirement plans could function without the assistance of a recordkeeper, an investment consultant, investment managers, and more. Adoption of the bare-bones pleading rule urged by petitioners would therefore make it practically impossible for the vast majority of plan fiduciaries to avoid exposure to a lawsuit that is all but guaranteed to proceed to costly and burdensome discovery. Any potential plaintiff (or lawyer) can easily identify a plan's service providers, which are disclosed in regulatory filings publicly available on the Department of Labor's website. Under petitioners' proposed rule, the mere existence of a plan-service provider relationship is sufficient to plausibly state a claim that the fiduciaries who caused that transaction violated 29 U.S.C. § 1106(a)(1)(C). That cannot be.

Petitioner's rule would wreak havoc on ordinary plan operations. The threat of baseless litigation immune from dismissal would make some qualified individuals reluctant to serve as fiduciaries altogether. Those who remained in their roles would be placed in an impossible position. Fiduciaries would face tremendous pressure to minimize the extent of a plan's service arrangements whenever possible, potentially prompting them to forgo services that would benefit

the plan and its participants, such as investment consulting or participant education services. Plans have little choice but to secure core services like recordkeeping, and in a world where the mere provision of services to the plan opened the door to discovery, litigation would distract fiduciaries from their important duties to the plan. Sponsors that offer benefit plans would find themselves the target of meritless lawsuits that draw attention and dollars away from employees' actual benefits. Faced with the threat of litigation they have no hope of dismissing on the pleadings, some employers may simply decide to scrap their benefit plans altogether. Nobody profits from this type of system—except the lawyers, of course.

Recognizing the detrimental effects of unchecked retirement plan litigation, this Court has advised lower courts to engage in "careful, context-sensitive scrutiny" when evaluating motions to dismiss ERISA fiduciary breach claims, to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). While many fiduciary breach suits still survive dismissal under that standard, the pleading rule in fiduciary breach cases at least provides defendants and courts with a framework for "weeding out meritless claims" before the costs of discovery pile up. *Id.* Adoption of petitioners' toothless § 1106(a)(1)(C) pleading rule would create the opposite force, allowing plaintiffs to bypass dismissal based on allegations that are insufficient to state a plausible claim for fiduciary breach—opening up an easy line of attack against plan sponsors and fiduciaries simply for administering their plans the way Congress intended. This Court should affirm the

sensible structure that Congress actually adopted, which prohibits *wrongful* conduct, not the procurement of necessary plan services at a reasonable cost.

ARGUMENT

I. FIDUCIARIES COMMONLY RELY ON A RANGE OF SPECIALIZED OUTSIDE SERVICE PROVIDERS TO ADMINISTER RETIREMENT PLANS IN THE BEST INTERESTS OF PARTICIPANTS

The inherent complexities of administering employee benefit plans make it virtually impossible for plan fiduciaries to avoid engaging specialists to provide services to the plan. Essential retirement plan services often include recordkeeping, investment management, consulting, financial advice, accounting and auditing, and trustee services. Sarah Holden, et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, 27 ICI Research Perspective, at 4 (June 2021), https://bit.ly/3IwR5Av. Yet there is no one-size-fits-all service arrangement. While some providers offer multiple services, including through bundled arrangements, plans often engage separate providers for individual services. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* at 3 (Sept. 2019), https://bit.ly/3fP8vuH. Like any other fiduciary act, the decision to engage (or retain) a service provider and the services to purchase are complicated choices "implicat[ing] difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).

All defined contribution plans require at a minimum certain basic recordkeeping and administrative services. *See id.* at 174. Recordkeepers currently oversee nearly $11 trillion in defined contribution plan assets for more than 129 million participants. *2024 Recordkeeping Survey*, PlanSponsor (June 3, 2024), https://bit.ly/3VNI12n. Core recordkeeping services include preserving plan records and data, processing participant contributions and investment allocations, generating and distributing account statements, and maintaining an online platform for participants to manage their individual accounts. *See* Holden, *supra*, at 4–5. Recordkeepers are so integral to retirement plan administration that, from a participant's perspective, the identity of the recordkeeper whose platform participants use to manage their accounts may be synonymous with the plan itself. Over 95% of plans have used the same recordkeeper for five or more years, while over 60% of plans have stuck with the same recordkeeper for more than eight years. *2024 Recordkeeping Survey*, *supra*.[2]

Fiduciaries may contract with the plan's recordkeeper, or another vendor, to provide a-la-carte participant-focused services in addition to core recordkeeping services, depending on the makeup of the

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[2] While circumstances sometimes may warrant a change, where an arrangement is serving a plan and its participants well, continuity in service providers benefits both plan sponsors and participants alike. *See* Nevin E. Adams, *Five Things You Need to Know When Switching Recordkeepers*, PenChecks Trust (Feb. 21, 2023), https://bit.ly/3PilYgU ("There are few things more disruptive to the peace or clarity of a 401(k) plan than a switch in recordkeepers, even when the change is instigated by a regular, thoughtful, focused evaluation of the alternatives.").

participant base and other factors. For example, many plans engage their recordkeepers to provide participant communication, education, and advisory services (including call centers, online calculators, and face-to-face investment advice); offer participants exposure to a broader array of investments through a recordkeeper's brokerage window; and make available loan processing, distribution, and insurance and annuity services. Holden, *supra*, at 4–5. Recordkeepers may also support regulatory obligations for the plan, including generating and distributing Department of Labor-mandated participant disclosures. *Id.*; *see* 29 C.F.R. § 2550.404a-5 (fiduciary requirements for disclosure in participant-directed individual account plans).

Fiduciaries also typically rely on other specialized service providers to support plan administration. *See* Robert Steyer, *How retirement security litigation has impacted the defined contribution landscape*, Pensions & Investments (Oct. 23, 2023), https://bit.ly/3VSNFR2. For example, in one recent survey, 94% of plan sponsors reported that they work with an outside investment advisor or consultant. Fidelity, 2023 Plan Sponsor Attitudes Survey, at 6 (Mar. 2023), https://bit.ly/41NyH2j. Consultants lend fiduciaries critical expertise in market research and analysis, investment manager searches, plan investment policies, investment menu structure, and fee and performance benchmarking, among other things, *id.* at 7—services designed to optimize the catalog of investment options available to participants. The value of outside investment consultants is so well-established that courts have specifically endorsed the

practice as a sign of prudent plan management. *See, e.g.*, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996) ("[W]e would encourage fiduciaries to retain the services of consultants when they need outside assistance to make prudent investments … ."); *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 799 (7th Cir. 2011) ("[T]he fact that defendants engaged consultants and relied on their advice with respect to the [decision at issue] is certainly evidence of prudence … .").

Outside lawyers and accountants are also critical to the proper functioning of retirement plans. Outside counsel's support may include assisting fiduciaries with interpreting plan documents and investment policies, training fiduciaries on their ERISA duties, helping negotiate contracts with other plan service providers, and generally advising on the plan's compliance with ERISA and other statutes and regulations. And ERISA *mandates* that plan sponsors engage a qualified public accountant to audit the plan's financial statements (and other books and records) before they are published to participants. 29 U.S.C. § 1023(a)(3).

These types of service provider arrangements are ubiquitous among benefit plans, and few if any plans could function efficiently—or at all—without them. While providers lend critical administrative support to plan sponsors and fiduciaries, the benefits of necessary, reasonably priced services ultimately flow to plan participants through an optimized employer-sponsored benefit plan offering.

II. THE SECOND CIRCUIT'S COMMONSENSE PLEADING RULE FURTHERS CONGRESS'S AIM OF SUPPORTING THE CREATION AND EFFICIENT ADMINISTRATION OF RETIREMENT PLANS

The pleading rule adopted by the Second Circuit acknowledges the practical realities of retirement plan administration—including the near-impossibility of administering a plan without obtaining any services for it—and reads ERISA's prohibited transaction provisions in a manner that is faithful not only to the statutory text, but also to Congress's core aims in enacting ERISA.

Congress enacted ERISA 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); *see* 29 U.S.C. § 1001. While nothing in ERISA mandates that an employer establish an employee benefit plan or dictates the particular benefits the employer must offer if it does, *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 (1996), ERISA seeks to ensure that plan sponsors are "subject to a uniform body of benefits law" so as to "minimize the administrative and financial burden" of creating and maintaining such a plan, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

In this way, ERISA encourages the creation of benefit plans while providing valuable protections for the American workforce. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). ERISA reflects a balance between Congress's "desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so

complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see also Conkright v. Frommert*, 559 U.S. 506, 507 (2010).

The Second Circuit's interpretation of ERISA's prohibited transaction rules aligns with ERISA's dual purposes. Like the Third, Seventh, and Tenth Circuits, the Second Circuit recognized that pleading a plausible violation of 29 U.S.C. § 1106(a)(1)(C) requires more than merely alleging a plan received services from a "party in interest"—defined to include anyone who provides services to a plan—because a contrary rule would expose fiduciaries to burdensome litigation for all sorts of ordinary transactions that are necessary for administering employee benefit plans. Pet. App. 18a–21a; *see Albert v. Oshkosh Corp.*, 47 F.4th 570, 585–86 (7th Cir. 2022) ("If routine payments by plan fiduciaries to third parties in exchange for plan services are prohibited, that would seem to put plan participants and beneficiaries in a worse position … ."), *reh'g denied*, No. 21-2789, 2022 WL 4372363 (7th Cir. Sept. 21, 2022); *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021) ("ERISA cannot be used to put an end to run-of-the-mill service agreements, opening plan fiduciaries up to litigation merely because they engaged in an arm's length deal with a service provider."); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 337 (3d Cir. 2019) ("Reading § 1106(a)(1) as a per se rule barring all transactions between a plan and party in interest would miss the balance that Congress struck in ERISA, because it would expose

fiduciaries to liability for every transaction whereby services are rendered to the plan.").

The Second Circuit adopted a commonsense pleading rule—one that "flows directly from the text and structure of the statute," Pet. App. 19a—that requires plaintiffs asserting claims under § 1106(a)(1)(C) to plausibly allege that the fiduciary "caused the plan to engage in a transaction that constitutes the furnishing of services between the plan and a party in interest *where that transaction was unnecessary or involved unreasonable compensation*." Pet. App. 18a–19a (alterations and quotations omitted). In other words, the Second Circuit's rule requires plaintiffs to plead a colorable claim that the allegedly prohibited transaction is not, in fact, a transaction that is expressly *permitted* by ERISA. *See* 29 U.S.C. § 1108(b)(2)(A) (exempting "reasonable compensation" paid for "necessary" plan services from § 1106's prohibitions). That rule makes intuitive sense, and it avoids subjecting fiduciaries to suit for entering the specific types of reasonable and necessary service arrangements Congress decided to carve out from § 1106(a)'s categorical bar.

The Second Circuit's pleading rule also harmonizes ERISA's prohibited transaction rules with its more general fiduciary duty provisions, which in some circumstances effectively compel fiduciaries to engage service providers to assist them in performing their duties. To protect participants, ERISA imposes twin fiduciary duties of prudence and loyalty. 29 U.S.C. § 1104(a)(1)(A)–(B). Fiduciaries are thus duty-bound to act in the best interest of plan participants, for the exclusive purpose of providing benefits and defraying

plan administrative costs, and with care, skill, prudence, and diligence of a prudent person in similar circumstances. *Id.* In many instances, relying on service providers is an important component of a prudent fiduciary process under 29 U.S.C. § 1104(1)(B).

For example, recognizing that professional service providers sometimes have greater expertise than in-house plan fiduciaries, courts have "encourage[d] fiduciaries to retain the services of consultants when they need outside assistance to make prudent investments." *In re Unisys Sav. Plan Litig.*, 74 F.3d at 435. The notion that ERISA categorically bans certain transactions under § 1106(a)(1)(C)—even those that are expressly permitted under § 1108(b)(2)—while simultaneously encouraging fiduciaries to engage in those same transactions to meet their duties under § 1104(a)(1) misinterprets Congress's carefully crafted framework.

The Second Circuit's rule is faithful to the statutory text and Congress's dual purposes when enacting ERISA, while at the same time accommodating the practical realities facing fiduciaries charged with prudently and loyally administering employee benefit plans for their participants. Congress could not have intended to give plaintiffs a free pass to discovery whenever a plan enters a reasonable service agreement necessary to ensure the efficient operation of the plan. That is why the preamble to § 1106(a) expressly incorporates the § 1108 exemptions, as the Second Circuit correctly concluded. Pet. App. 18a.

III. PETITIONERS' PROPOSED RULE WOULD IMPAIR EFFICIENT PLAN ADMINISTRATION AND IMPOSE UNNECESSARY COSTS ULTIMATELY BORNE BY PLAN PARTICIPANTS

This Court has recognized that Rule 12(b)(6) motions to dismiss are an "important mechanism for weeding out meritless claims" brought under ERISA. *Fifth-Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). The extraordinarily liberal rule petitioners advocate, under which a plaintiff need only allege a transaction involving the provision of services to a plan to state a plausible claim under 29 U.S.C. § 1106(a)(1)(C), would all but eliminate dismissal motions as a tool for disposing of such suits at the threshold.

The practical consequences of such a rule would be severe. Virtually every retirement plan fiduciary would be exposed to "economically burdensome lawsuits" that would proceed to discovery regardless of whether they are "plausible sheep [or] meritless goats." *Dudenhoeffer*, 573 U.S. at 424–25. After all, plaintiffs' reading of 29 U.S.C. § 1106(a)(1)(C) makes procuring services on behalf of the plan a presumptively unlawful transaction that opens the doors to discovery, notwithstanding Congress's express recognition in 29 U.S.C. § 1108(b)(2) that there is no reason to bar such transactions when the services are necessary and fees are reasonable, as they most often are.

Petitioners' proposed alternative to the Second Circuit's pleading rule would not merely lower the barriers to suit; it would essentially remove *all* barriers to suit. Plan service providers are disclosed in

plans' mandatory annual regulatory filings with the Department of Labor, which are publicly available through a searchable online database. U.S. Dep't of Labor, *Form 5500 Search*, bit.ly/40jx6QQ; *see* U.S. Dep't of Labor, *Form 5500 Series*, https://bit.ly/3ZKqzNA ("Schedule C - Service Provider Information"); 29 U.S.C. §§ 1024, 1365 (annual reporting requirements). Under petitioner's pleading rule, a plaintiff would need nothing more than an internet connection to plead a viable prohibited transaction claim and gain access to the discovery process.

Discovery in an ERISA case can cost the plan sponsor many millions of dollars. This creates enormous pressure to settle even meritless claims for significant amounts, simply to avoid the greater cost and burden of discovery. *See Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). No one but litigators—not plan participants, fiduciaries, or sponsors—benefits from such a state of affairs. A 2016 analysis found that attorneys representing plaintiffs in ERISA fiduciary breach lawsuits had collected roughly $204 million for themselves through settlements over the prior few years, while securing an average per-participant award of only $116. *See* Thomas R. Kmak, *Protect Yourself at All Times – Emphasize Quality, Service and Value Before Fees,* National Institute of Pension Administrators (Apr. 11, 2016), bit.ly/4fBvzdi. From 2015 to 2020, settlements for excessive fee claims alone—a subset of ERISA fiduciary breach cases—exceeded $1 billion, including $330 million in legal fees. Allison Barrett and Joel Townsend, *Understanding the rapid rise in excessive*

fee claims, AIG Whitepaper, at 2, https://bit.ly/49QvG3m. Relaxing the requirements for pleading a prohibited transaction claim will only make this dynamic worse.

The negative effects of petitioners' pleading rule won't stop there. The threat of litigation involving expensive and burdensome discovery may well lead some employers to reconsider the feasibility of sponsoring an employee benefit plan in the first place. *See Varity Corp.*, 516 U.S. at 497 (ERISA is designed to avoid imposition of "administrative costs" and "litigation expenses" that would "unduly discourage employer[s]" from offering benefit plans). And those sponsors who continue to offer retirement plans would face strong incentives to limit the range of services provided to the plan in order to reduce the risk of prohibited transaction litigation. *See Albert*, 47 F.4th 570 at 585–86 (discussing negative impact on participants "[i]f routine payments by plan fiduciaries to third parties in exchange for plan services are prohibited"). Many services exist to help provide better outcomes for retirement plan participants—services such as financial education and advice, retirement income tools, and financial wellness products. *See* Fidelity, 2023 Plan Sponsor Attitudes Survey, *supra* at 22, 40; Bailey McCann, *Financial Wellness Moves From "Nice to Have" to Table Stakes*, planadviser (May 23, 2024), https://bit.ly/4gZqI6D; Noah Zuss, *Plan Sponsors, Participants Want Retirement Income Education*, PlanSponsor (Dec. 4, 2023), https://bit.ly/4fF7yC3. But in a world where any arrangement with a service provider exposed plan fiduciaries to suit under § 1106(a)(1)(C), fiduciaries would be forced to

choose between forgoing the potential benefits of those additional services or exposing themselves to a lawsuit that is certain to survive dismissal.

Reducing the range of services provided to the plan still would be far from a foolproof plan for limiting litigation risk. Some services—like basic recordkeeping services—are impossible for plans to eliminate entirely and difficult for most plans to handle in-house, meaning there will nearly always be at least some plan services that could form the basis for a prohibited transaction claim under petitioners' pleading rule. And fiduciaries who choose to go without other services—such as consulting or participant education services—would likely face increased exposure to suits for breach of fiduciary duty under 29 U.S.C. § 1104(a)(1), on the theory that a prudent fiduciary would have secured the benefits of those services for the plan and its participants. Every forgone service transaction might be challenged as imprudent, leaving fiduciaries in an impossible position.

ERISA fiduciary breach litigation, and particularly cases alleging breaches of duty based on purportedly excessive plan fees, has proven to be a magnet for the plaintiffs' bar. *See* Alex Ortolani, *401(k) World: The Litigators*, planadviser (Mar. 15, 2024), https://bit.ly/3P8HHHM; Daniel Aronowitz, *401(k) Litigation Continues At 'Fever Pitch'*, planadviser (Jan. 9, 2024), https://bit.ly/49QvhxS. This Court has made clear that to survive a motion to dismiss, plaintiffs asserting such claims must show it is plausible—not merely possible—that the fiduciaries acted imprudently, and has directed lower courts to engage in a "context specific" inquiry to weed out claims that do not clear that

bar. *See Hughes*, 595 U.S. at 177 (applying pleading standard in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to breach of fiduciary duty lawsuits under ERISA). While many fiduciary breach claims nonetheless survive dismissal, courts have recognized that a claim for breach of fiduciary duty with respect to recordkeeping fees, for example, may be dismissed if the plaintiff fails to plausibly allege the fees were "excessive relative to the services rendered." *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (Sotomayor, J.) (quotation omitted); *see, e.g.*, *Albert*, 47 F.4th at 579-80 (dismissing fiduciary breach claim premised on allegations of excessive recordkeeping fees that lacked adequate "context" to establish plausibility); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022) (same). Petitioners' proposed rule for pleading a claim under § 1106(a)(1)(C) would create an end-run around the already imperfect screening mechanism for fiduciary-breach claims, permitting plaintiffs to move ahead with prohibited transaction suits where they could not state a plausible claim for fiduciary breach based on precisely the same conduct.[3]

[3] Petitioners and their *amici* suggest existing litigation guardrails would be sufficient to protect against a new wave of meritless claims if the Court adopted a relaxed pleading rule for § 1106(a)(1)(C) claims. *See* Pet'rs' Br. at 6; Br. for United States as *Amicus Curiae* Supporting Pet'rs at 10. But a world in which plaintiffs need allege only a service provider relationship to state a claim gives those guardrails nothing to work with—the elements of the claim could be pleaded based on the mere fact that the fiduciaries have procured services for the plan.

If adopted, petitioners' pleading rule thus would further fan the flames of abusive 401(k) litigation, which ultimately harms plan participants. Exposing fiduciaries to the threat of litigation guaranteed to survive dismissal whenever they enter routine service arrangements will inevitably make qualified individuals reluctant to serve as plan fiduciaries, and reasonably so: Hire a best-in-class consultant to advise on the investment options made available to plan participants? Presumptively unlawful, with no adequate dismissal mechanism to weed out meritless claims. *See Dudenhoeffer*, 573 U.S. at 425. Select and monitor the plan's investment options and potential alternatives yourself, without the expertise and support of a dedicated consultant? Risk being accused of imprudent plan management resulting in participant investment losses or excessive fees. For many, this Catch-22 would render fiduciary service untenable, leaving fewer qualified individuals to administer employee benefit plans.

The increased likelihood of litigation and its corresponding costs may also prompt some employers to make plan design decisions that ultimately leave participants worse off. Plan design is a non-fiduciary or "settlor" function, meaning the sponsor may act in its own best interests when making decisions about how to structure benefits. *Lockheed Corp.*, 517 U.S. at 890. Plan sponsors with limited resources to devote to employee benefits may opt to reduce matching contributions or decline to pay plan administrative costs they would otherwise cover to ensure an adequate re-

serve to pay the costs of litigation that is all but inevitable—and virtually guaranteed to progress into discovery, where defense costs tend to skyrocket.[4]

The end result would be a transfer of wealth from plan participants to the lawyers pursuing (and defending) a rising tide of prohibited transaction claims. Petitioners' proposed pleading rule would thus weaken employee benefit plan offerings and result in less money in participants' pockets, not more. That is antithetical to ERISA's dual purposes of protecting plan participants and supporting the creation and orderly administration of employee benefit plans. *See Varity Corp.*, 516 U.S. at 497.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

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[4] While the case at hand involves the use of service providers by retirement plans, the prohibitions in § 1106(a) apply to all ERISA plans, including health and welfare plans. Loosening the pleading rules for § 1106(a) claims thus has the potential to cumulate the costs of plan sponsorship in that context, too.

Respectfully submitted.

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