No. 23-1007

In the Supreme Court of the United States

CASEY CUNNINGHAM., ET AL., PETITIONERS

v.

CORNELL UNIVERSITY, ET AL.

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

BRIEF IN OPPOSITION

NICOLE A. SAHARSKY
MINH NGUYEN-DANG
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3052

NANCY G. ROSS
MICHAEL A. SCODRO
Counsel of Record
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60601
(312) 782-0600
mscodro@mayerbrown.com

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, prohibits a plan from engaging in certain transactions with a "party in interest," 29 U.S.C. 1106(a), which the statute defines to include any person that provides services to the plan, 29 U.S.C. 1002(14)(B). ERISA then specifies that a contract for "services necessary for the establishment or operation of the plan," at a "reasonable" cost, is not a prohibited transaction. 29 U.S.C. 1108(b)(2)(A).

The question is whether, to plead a prohibited-transaction claim challenging a contract for plan services, the plaintiff must allege only that the contract exists (as specified in 29 U.S.C. 1106(a)), or also that the service was unnecessary or that the compensation was unreasonable (as specified in 29 U.S.C. 1108(b)(2)(A)).

CORPORATE DISCLOSURE STATEMENT

Cornell University does not have any parent corporation, and no publicly held corporation owns more than 10 percent of its stock.

TABLE OF CONTENTS

Page

Opinions Below 1
Jurisdiction 1
Statement 1
A. Legal Background 2
B. Factual Background 3
C. District Court Proceedings 4
D. Court Of Appeals Proceedings 6
Argument 8
I. The Court Of Appeals' Decision is Correct 8
II. No Circuit Conflict Exists Warranting Review 15
III. This Case Is A Poor Vehicle For Further Review 24
Conclusion 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Albert v. *Oshkosh Corp.*,
47 F.4th 570 (2022) 17

Braden v. *Wal-Mart Stores, Inc.*,
588 F.3d 585 (8th Cir. 2009) 17, 18, 19

Bugielski v. *AT&T Servs., Inc.*,
76 F.4th 894 (9th Cir. 2023) 19, 20, 21, 22

Cantor v. *Detroit Edison Co.*,
428 U.S. 579 (1976) 10

Conkright v. *Frommert*,
559 U.S. 506 (2010) 15

D.L. Markham DDS, MSD, Inc. 401(K) Plan v. *Variable Annuity Life Ins.*,
88 F.4th 602 (5th Cir. 2023) 23

Daubert v. *Merrell Dow Pharms., Inc.*,
509 U.S. 579 (1993) 6

FTC v. *Morton Salt Co.*,
334 U.S. 37 (1948) 13

Harris Tr. & Sav. Bank v. *Salomon Smith Barney, Inc.*,
530 U.S. 238 (2000) 10

Huffman v. *Prudential Ins. Co. of Am.*,
No. 10-cv-5135, 2017 WL 6055225
(E.D. Pa. Dec. 7, 2017) 19

Hughes v. *Northwestern Univ.*,
595 U.S. 170 (2022) 24

Lockheed Corp. v. *Spink*,
517 U.S. 882 (1996) 2, 10, 16

Meacham v. *Knolls Atomic Power Lab'y*,
554 U.S. 84 (2008) 13

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

New York State Teamsters Council Health & Hosp. Fund v. *Estate of DePerno*,
18 F.3d 179 (2d Cir. 1994) 12

Peters v. *Aetna Inc.*,
2 F.4th 199 (4th Cir. 2021) 23

Ramos v. *Banner Health*,
1 F.4th 769 (10th Cir. 2021) 22, 23

Sacerdote v. *New York Univ.*,
No. 16-cv-6284, 2017 WL 3701482
(S.D.N.Y. Aug. 25, 2017) 5, 19

Sacerdote v. *New York Univ.*,
328 F. Supp. 3d 273 (S.D.N.Y. 2018) 15

SEC v. *Ralston Purina Co.*,
346 U.S. 119 (1953) 13

Sellers v. *Anthem Life Ins.*,
316 F. Supp. 3d 25 (D.D.C. 2018) 19

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004) 11

Sweda v. *University of Penn.*,
923 F.3d 320 (3d Cir. 2019) 16

Tibble v. *Edison Int'l*,
575 U.S. 523 (2016) 2, 3

United States v. *Cook*,
84 U.S. (17 Wall.) 168 (1872) 10

United States v. *Vuitch*,
402 U.S. 62 (1971) 13

TABLE OF AUTHORITIES
(continued)

Statutes **Page(s)**

Employee Retirement Income Security Act of 1974,
29 U.S.C. 1001 *et seq.* 2, 3, 4, 5, 7, 8, 11, 12, 14, 15, 16, 22

29 U.S.C. 1001(b) 2

29 U.S.C. 1002(14)(B) 2, 9

29 U.S.C. 1104(a)(1) 2

29 U.S.C. 1104(a)(1)(A)(ii) 14

29 U.S.C. 1104(a)(1)(B) 2

29 U.S.C. 1106 .... 2, 9, 12, 19

29 U.S.C. 1106(a) 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 20, 21, 22, 23

29 U.S.C. 1106(a)(1) 16, 17

29 U.S.C. 1106(a)(1)(A) 10

29 U.S.C. 1106(a)(1)(B) 10

29 U.S.C. 1106(a)(1)(C) 3, 10, 16

29 U.S.C. 1106(a)(1)(D) 10

29 U.S.C. 1106(a)(1)(E) 10

29 U.S.C. 1106(b) 11, 12

29 U.S.C. 1108 .... 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 20, 21, 22

29 U.S.C. 1108(a) 9

29 U.S.C. 1108(b) 3, 9, 11, 14, 22

29 U.S.C. 1108(b)(2)(A) 3, 9, 10, 25

15 U.S.C. 13(a) 13

15 U.S.C. 77d 13

15 U.S.C. 77e 13

26 U.S.C. 403(b) 3

TABLE OF AUTHORITIES (continued)

Statutes (continued) **Page(s)**

28 U.S.C. 1254(1) 1

29 U.S.C. 623(a) 13

29 U.S.C. 623(b) 13

29 U.S.C. 623(c) 13

29 U.S.C. 623(e) 13

29 U.S.C. 623(f) 13

Other Authorities

Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* (Dec. 2020) 15

Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 77 Fed. Reg. 5632 (Feb. 3, 2012) 14

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-41a) is reported at 86 F.4th 961. The orders of the district court (Pet. App. 43a-86a, 88a-115a) are not published in the *Federal Supplement* but are available at 2019 WL 4735876 and 2017 WL 4358769.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2023. A petition for rehearing was denied on December 20, 2023 (Pet. App. 118a). The petition for a writ of certiorari was filed on March 11, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are current and former participants in two retirement plans sponsored by Cornell Univer-

sity. The retirement plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. Petitioners sued respondents, claiming violations of ERISA. As relevant here, petitioners argued that respondents engaged in prohibited transactions under ERISA by entering into agreements with third parties to provide recordkeeping services for the plans. The district court dismissed that count for failure to state a claim, Pet. App. 106a-110a, and the court of appeals affirmed, *id.* at 14a-26a.

A. Legal Background

ERISA does not require employers to provide any particular level of benefit or even to offer benefit plans in the first place. *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Instead, it imposes duties on plan fiduciaries once an employer has decided to offer a plan, including the fiduciary duties of prudence and loyalty. 29 U.S.C. 1001(b).

ERISA's duty of prudence requires a plan fiduciary to act "'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." *Tibble* v. *Edison Int'l,* 575 U.S. 523, 528 (2016) (quoting 29 U.S.C. 1104(a)(1)(B)). Under ERISA's duty of loyalty, a plan fiduciary must act "solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1).

In addition, ERISA prohibits a plan from entering into certain transactions. 29 U.S.C. 1106, 1108. As relevant here, ERISA prohibits certain transactions between the plan and a "party in interest." 29 U.S.C. 1106(a). A "party in interest" is defined in the statute to include "a person providing services to [the] plan." 29 U.S.C. 1002(14)(B).

ERISA addresses prohibited transactions with parties in interest in two steps. First, Section 1106(a)

sets out a general rule. It states that, "[e]xcept as provided in section 1108," a plan fiduciary may not enter into certain specified transactions with a party in interest, including any transaction involving the "furnishing of goods, services, or facilities." 29 U.S.C. 1106(a)(1)(C).

Then, Section 1108 sets out the exceptions to the general rule. It specifies that "[t]he prohibitions provided in [Section] 1106 shall not apply" to 21 types of transactions, 29 U.S.C. 1108(b), including any contract "for office space, or legal, accounting, or other 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)(2)(A).

Thus, a contract for necessary plan services at a reasonable cost is not a prohibited transaction under ERISA.

B. Factual Background

Cornell University sponsors two retirement plans for eligible faculty and staff (the plans). Pet. App. 6a. Respondent Cornell University is the named administrator for the plans; it delegated administrative responsibilities for the plans to its Vice President and Chief Human Resources Officer, respondent Mary Opperman, who chaired respondent Retirement Plan Oversight Committee. *Id.* at 7a. In carrying out their respective roles, respondents (collectively, Cornell) served as fiduciaries under ERISA. *Ibid.*

The plans are tax-deferred defined-contribution plans. Pet. App. 6a; see 26 U.S.C. 403(b). In a defined-contribution plan, participants maintain individual accounts, and the value of each account depends on the amount contributed and the performance of the investments chosen. Pet. App. 6a-7a; see *Tibble*, 575 U.S. at 525.

Participants in the plans choose from a range of investment options from the Teachers Insurance and Annuity Association (TIAA) and Fidelity. Pet. App. 8a. The investment options include fixed annuities, variable annuities, and mutual funds. *Id.* at 8a-9a.

To assist plan participants, Cornell engaged TIAA and Fidelity to provide recordkeeping services for the investment options on their respective platforms. Pet. App. 9a. Recordkeeping services are "necessary administrative [services] such as tracking account balances and providing regular account statements." *Id.* at 8a.

C. District Court Proceedings

1. Petitioners are a class of current and former employees of Cornell University who were participants in the plans between August 2010 and August 2016. Pet. App. 45a. They sued Cornell, alleging a hodgepodge of ERISA violations. *Id.* at 88a-89a.[1]

Petitioners brought two claims concerning recordkeeping fees. First, they alleged that Cornell breached its duty of prudence by failing to monitor and control recordkeeping fees. Pet. App. 100a. In particular, they alleged that Cornell should have reduced recordkeeping fees by consolidating to a single recordkeeper or seeking bids from other recordkeepers. *Ibid.*

Second, petitioners alleged that Cornell engaged in prohibited transactions by entering into agreements with TIAA and Fidelity for recordkeeping services for

[1] Petitioners also sued CapFinancial Partners, LLC (CAPTRUST), the plans' investment advisor. Pet. App. 7a. CAPTRUST is not a party in this Court, Pet. 6 n.2, because the district court dismissed any recordkeeping claims against CAPTRUST, Pet. App. 110a-111a, and petitioners did not appeal that dismissal, see *id.* at 13a.

the plans. Pet. App. 106a-107a. They alleged that TIAA and Fidelity each was a "party in interest," and that the plans' contracts with TIAA and Fidelity for recordkeeping services were prohibited transactions because they involved furnishing services to the plans. Corrected Am. Compl. (Compl.) ¶¶ 230-231. Petitioners did not allege that the transactions were prohibited because the fees were unreasonable. Instead, they took the view that pleading the mere fact of the recordkeeping contracts was sufficient to plead prohibited transactions under ERISA. Pet. App. 18a.

2. Cornell moved to dismiss the complaint. Pet. App. 89a. The district court denied the motion to dismiss as to the imprudence claim. *Id.* at 100a. The court noted that petitioners' allegations were identical to claims that another district court had allowed to proceed to discovery. *Ibid.* (citing *Sacerdote* v. *New York Univ.*, No. 16-cv-6284, 2017 WL 3701482, at *8-10 (S.D.N.Y. Aug. 25, 2017), *vacated on other grounds*, 9 F.4th 95 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022)).

The district court granted the motion to dismiss as to the prohibited-transaction claim. Pet. App. 110a. The court determined that a prohibited-transaction claim requires evidence of "self-dealing or other disloyal conduct," and it noted that petitioners had not alleged that conduct. *Id.* at 109a-110a.

3. Following discovery, Cornell moved for summary judgment on the imprudence claim. Pet. App. 44a. The district court granted the motion. *Id.* at 55a-56a.

The district court explained that petitioners could not obtain damages without showing a loss to the plans – which here meant showing that Cornell could have achieved lower recordkeeping fees. Pet. App.

56a. Petitioners had relied principally on the opinions of two experts to make that showing. *Id.* at 57a. But the court excluded the experts' opinions under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because both simply asserted that lower fees were possible, without any reliable methodology to back it up – leaving petitioners with no evidence of loss. *Id.* at 62a-66a.

D. Court Of Appeals Proceedings

1. The court of appeals affirmed. See Pet. App. 1a-41a.

On the prohibited-transaction claim, the court of appeals held that the district court had applied the wrong legal standard, but determined that petitioners' claim fails under the correct standard. Pet. App. 18a, 26a. The court explained that, to plead that a fiduciary engaged in a prohibited transaction with a service provider, "it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services." *Id.* at 6a. "[R]ather, the complaint must plausibly allege that the services were unnecessary or involved unreasonable compensation, thus supporting an inference of disloyalty." *Ibid.* (internal citation omitted).

The court of appeals' holding "flow[ed] directly from the text and structure of the statute." Pet. App. 19a. As the court explained, Section 1106(a) "begins with the carveout: 'Except as provided in section 1108 of this title.'" *Id.* at 18a-19a (quoting 29 U.S.C. 1106(a)). That text specifically "incorporated" Section 1108's exemption for reasonable compensation for necessary services "directly into § 1106(a)'s definition of prohibited transactions." *Id.* at 19a-20a (internal quotation marks omitted). The fact that "the exemp-

tions are incorporated directly into the text of the relevant provision," the court concluded, shows that a plaintiff bears the "burden of raising [Section 1108's] exemptions." *Id.* at 20a.

The court of appeals explained how Section 1106(a) and Section 1108 work together to define the conduct that is wrongful under ERISA. Pet. App. 21a-22a. These provisions, the court noted, were designed to prohibit "only those transactions that actually raise a risk of harm to the plan." *Id.* at 22a. Only by incorporating the exemption for "reasonable compensation paid for necessary services" as an "ingredient of the offense" does the statute "accurately and clearly describe[]" the conduct Congress intended to prohibit. *Id.* at 23a (internal quotation marks omitted).

Petitioners' view, the court of appeals continued, would define as prohibited transactions "a vast array of routine transactions," such as contracts "to outsource tasks like recordkeeping, investment management, or investment advising." Pet. App. 21a-22a (internal quotation marks omitted). An ERISA plaintiff would be able to proceed to discovery simply by pleading the fact of a contract with a service provider – without any allegation of wrongful conduct by the service provider or fiduciary. *Id.* at 23a.

Because petitioners only alleged the fact of service provider contracts, and not that TIAA's or Fidelity's recordkeeping services were unnecessary or that the fees were unreasonable, the court of appeals affirmed dismissal of their prohibited-transaction claim. Pet. App. 25a-26a.

The court of appeals also affirmed on the imprudence claim. Pet. App. 32a-33a. It agreed that petitioners failed to adduce sufficient evidence to show that the recordkeeping fees could have been lower,

which meant their claim failed on the element of loss. *Id.* at 32a.

2. Petitioners filed a petition for rehearing, which was denied. Pet. App. 118a.

ARGUMENT

Petitioners renew their contention (Pet. 19) that, to proceed to discovery on a prohibited-transaction claim based on recordkeeping services, a plaintiff need only plead that the plan entered into a recordkeeping contract, and not that the recordkeeping services were unnecessary or that the recordkeeping fees were unreasonable. The court of appeals correctly rejected that argument. Although other courts of appeals have articulated different standards for what more must be pleaded for a prohibited-transaction claim, no court of appeals has adopted the expansive rule urged by petitioners. In any event, this case would be a poor vehicle for further review because petitioners' claim would fail even under their proposed rule. Further review is therefore unwarranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT

A. ERISA prohibits a plan from entering into certain transactions, including certain transactions with a "party in interest." 29 U.S.C. 1106(a). The statute provides, in relevant part:

> Except as provided in section 1108 of this title, * * * [a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect * * * furnishing of goods, services, or facilities between the plan and a party in interest.

Ibid. A "party in interest" is defined to include any "person providing services to [the] plan." 29 U.S.C. 1002(14)(B).

Section 1108 then explains when a transaction between a plan and party in interest is allowed. It specifies 21 types of transaction for which "[t]he prohibitions provided in section 1106 of this title shall not apply," 29 U.S.C. 1108(b), and authorizes the Secretary of Labor to supplement that list by regulation, 29 U.S.C. 1108(a). One exemption is particularly relevant here: Section 1108 allows a transaction that involves "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other 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)(2)(A).

The question in this case is whether, when a plaintiff brings a prohibited-transaction claim to challenge a plan's contract with a service provider, the plaintiff needs to allege only that the contract exists, as specified in Section 1106(a), or also that the contract was impermissible because it does not meet the exemption in Section 1108(b)(2)(A).

B. The court of appeals correctly held that petitioners had to plead both the existence of the contract and that the contract is not allowed under Section 1108. Pet. App. 24a. As the court explained, this conclusion "flows directly from the text" of Section 1106(a), which "directly incorporates" the Section 1108 exemptions in defining the prohibited conduct. *Id.* at 19a.

1. Section 1106(a) states at the outset that its provisions apply "[e]xcept as provided in section 1108." 29 U.S.C. 1106(a). That language makes clear that

"the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)" is "incorporated into § 1106(a)'s prohibitions." Pet. App. 18a. That is, Section 1108 provides "part of the definition of the prohibited conduct," *id.* at 21a (citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 173 (1872)), rather than merely providing "affirmative defense[s] to conduct which is otherwise assumed to be unlawful," *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 600 (1976).

Congress's decision to define the Section 1106(a) violation by reference to the Section 1108 exemptions makes sense. Section 1106(a) "supplements the fiduciary's general duty of loyalty" by "categorially barring" transactions that are "likely to injure" the plan. *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-242 (2000) (internal quotation marks omitted). It does that in two steps. Section 1106(a) lists common types of transactions that are not inherently wrongful. See 29 U.S.C. 1106(a). Section 1108's exemptions then furnish the missing elements needed to understand which potentially harmful transactions between a plan and a party in interest are prohibited. Pet. App. 23a.

Section 1106(a)'s cross-reference to the Section 1108 exemptions "limit[s] the scope of the statute's prohibitions to only those transactions that actually pose a risk of harm to the plan." Pet. App. 22a. Without those exemptions, Section 1106(a) would cover virtually any transaction between a plan and a party in interest, see 29 U.S.C. 1106(a)(1)(A)-(E) – including transactions for routine and essential services that are in no way harmful to the plan, Pet. App. 21a-22a. This Court already has rejected a view of Section 1106(a) that would sweep in routine fiduciary conduct. See *Lockheed*, 517 U.S. at 892-893 (holding that

"the payment of benefits" is not a "transaction" under Section 1106(a)).

Yet under petitioners' view, "[a]ll payments by plan fiduciaries to third parties in exchange for plan services would be presumptively prohibited." Pet. App. 21a. A plaintiff could plead a violation of ERISA simply by pleading the fact of a routine service provider contract, without alleging that the fees were unreasonable or that anything else was wrong with the contract. *Id.* at 19a. Petitioners candidly admit that under their rule, a plaintiff could proceed to discovery on a prohibited-transaction claim without any suspicion of wrongdoing. Pet. 20-21. Congress's incorporation of the exemptions in Section 1106(a)'s prohibition shows that it did not intend that absurd result.

2. The textual difference between Sections 1106(a) and 1106(b) confirms that understanding. Section 1106(a) addresses transactions between a plan and a party in interest, while Section 1106(b) addresses transactions between a plan and a fiduciary. Section 1106(a) includes the express reference to Section 1108 – "[e]xcept as provided in section 1108," 29 U.S.C. 1106(a) – but Section 1106(b) does not. Instead, Section 1106(b) defines three types of transactions between a plan and a fiduciary, each of which involves self-dealing, see 29 U.S.C. 1106(b), and "makes no direct reference to the [Section] 1108 exemptions in setting out the scope of the transactions it prohibits," Pet. App. 19a.

That difference in language is presumed to be intentional. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004). As a substantive matter, Section 1108's exemptions apply equally to Section 1106(b) and to Section 1106(a). See 29 U.S.C. 1108(b). But as a pleading matter, Congress's use of different language in Section 1106(a) and Section 1106(b) treats

differently the facts that must be pleaded to bring a claim. It shows Congress's intention that a plaintiff bringing a Section 1106(a) claim – but not one bringing a Section 1106(b) claim – must plead that none of the exemptions in Section 1108 applies. Pet. App. 20a.

Congress had good reason to make that distinction. Section 1106(a) covers routine transactions with service providers that are necessary for the plan's operation, and so a plaintiff should have to plead that there is something wrong with that contract to be able to proceed to discovery. Pet. App. 21a-23a. Section 1106(b), in contrast, covers transactions between the plan and a plan fiduciary that involve self-dealing and thus are suspect on their face, see 28 U.S.C. 1106(b), so the plaintiff need not also plead the absence of a Section 1108 exemption, Pet. App. 19a-20a. That approach is consistent with the law of trusts, which generally requires a beneficiary who sues a trustee to make out a *prima facie* case of wrongdoing before any burden shifts to the trustee. *Id.* at 24a (citing *New York State Teamsters Council Health & Hosp. Fund* v. *Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994)).

C. Petitioners have essentially two responses, neither of which has merit.

1. Petitioners first contend (Pet. 19-21, 24-25) that because Sections 1106 and 1108 are separate sections, the Section 1108 exemptions are affirmative defenses, and petitioners need only plead that Cornell engaged TIAA and Fidelity to recordkeep the plans to state a cognizable claim. That argument ignores Section 1106(a)'s express incorporation of Section 1108's exemptions, which signals that Section 1106(a) and Section 1108 work together to define which transactions with parties in interest are wrongful under ERISA. Pet. App. 19a-20a; see pp. 9-11, *supra*.

Petitioners cite the presumption that "when a provision carves an exception out of the body of a statute or contract, those who set up such exception must prove it." Pet. 22-23 (internal quotation marks, brackets, and ellipses omitted). But as the court of appeals correctly explained, "that presumption does not apply when the exemptions are incorporated directly into the text of the relevant provision," as they are here. Pet. App. 20a (citing *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971)).[2] The breadth of Section 1108's exemptions provides further support for the view that they are not affirmative defenses. *Ibid*. Because the exemptions are broad and in most cases "will ultimately remove the challenged conduct from the prohibition's scope," they are best understood as part of the definition of the prohibited conduct, rather than as affirmative defenses. *Ibid.*

Section 1106(a) is very different from the statutes at issue in the cases petitioners cite (Pet. 23). In each of those cases, a statutory provision set out conduct that was prohibited or required, and then another provision provided a narrow exception.[3] None of those cases involved provisions like those here, where one provision describes a broad array of conduct, including routine and necessary conduct, see 29 U.S.C. 1106(a), and another provision specifies the portion of

[2] Petitioners criticize (Pet. 23-24) the court of appeals for citing criminal cases, but they acknowledge (*id.* at 24) that the relevant principle is the same in civil and criminal cases.

[3] See *Meacham* v. *Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008) (prohibitions on age discrimination in 29 U.S.C. 623(a)-(c), (e); exceptions in 29 U.S.C. 623(f)); *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 120, 126 (1953) (registration requirement in 15 U.S.C. 77e; exception in 15 U.S.C. 77d); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 43-45 (1948) (prohibition on price discrimination in 15 U.S.C. 13(a); exception in later part of that subsection).

that conduct that is harmful and not allowed, see 29 U.S.C. 1108(b).[4]

2. Second, petitioners assert (Pet. 20) that their argument would not lead to "absurd results." Pet. App. 16a (internal quotation marks omitted). But a statutory interpretation can be wrong even if it does not cause absurd results. And petitioners' interpretation here does lead to absurd results. See *id.* at 21a.

ERISA itself acknowledges that plans require administrative services. See 29 U.S.C. 1104(a)(1)(A)(ii) (acknowledging the "reasonable expenses of administering the plan"). Petitioners admit in their complaint that "[r]ecordkeeping is a service necessary for every defined contribution plan." Compl. ¶ 38. Yet under petitioners' view, procuring those services is presumptively prohibited. Pet. 19. Any plan participant then could bring a lawsuit in federal court and proceed all the way to summary judgment on the bare allegation that the plan was using those necessary services. See *ibid.*

Petitioners acknowledge that their view would permit discovery in any case where a plaintiff pleads that the plan contracted for necessary services. See Pet. 20, 28. They say that is what Congress intended. *Id.* at 20. There is no evidence of that intent, and plenty

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[4] Petitioners also cite (Pet. 22) Department of Labor guidance stating that "a service relationship between a plan and a service provider would constitute a prohibited transaction." Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012). That guidance is about disclosure obligations; it says nothing about the pleading standard under 29 U.S.C. 1106(a). In any event, the guidance acknowledges that Section 1108 "exempts certain arrangements that otherwise would be prohibited transactions" under Section 1106(a). *Ibid.*

of evidence to the contrary. ERISA "represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans," to ensure that employers have the incentive to offer ERISA plans in the first place. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted). Petitioners' view would make it much more expensive for employers to offer plans, because they could be sued for any routine service provider contract. Those lawsuits would discourage employers from offering benefit plans, to the ultimate detriment of plan participants.

Petitioners also suggest (Pet. 28) that the plaintiffs' bar will show restraint in bringing prohibited-transaction claims. But experience shows the opposite; there has been a dramatic rise in the number of ERISA lawsuits over recordkeeping fees in recent years. *E.g.*, Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3 (Dec. 2020), https://perma.cc/S65H-K9TW. Petitioners' lawsuit is substantively similar to many lawsuits filed against other university retirement plans in recent years, Pet. App. 36a n.15, 93a, none of which has succeeded on the merits, see, *e.g.*, *Sacerdote* v. *New York Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018), aff'd, 9 F.4th 95 (2d Cir. 2021), cert. denied, 142. S. Ct. 1112 (2022).

II. NO CIRCUIT CONFLICT EXISTS WARRANTING REVIEW

Petitioners contend (Pet. 12-19) that the decision below conflicts with decisions from other courts of appeals. There is no conflict warranting this Court's review.

A. Only three of the cited decisions (from the Third, Seventh, and Eighth Circuits) concerned the

pleading standard for bringing a prohibited-transaction claim under Section 1106(a). None of those courts adopted petitioners' proposed rule – that a plaintiff challenging a routine contract for necessary plan services could proceed to discovery merely by alleging the existence of the contract. Although there are some differences in how the courts analyzed the claims, they do not warrant this Court's review.

Sweda v. *University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020), involved materially identical claims against the University of Pennsylvania. See *id.* at 324-325. The plaintiff sought to proceed to discovery on her prohibited-transaction claim on the bare allegation that the university had engaged third parties for recordkeeping services. *Id.* at 335. The Third Circuit rejected that argument, explaining that it would be "absurd" and contrary to "the balance that Congress struck in ERISA" to believe that Congress intended to "prohibit ubiquitous service transactions and require a fiduciary to plead reasonableness as an affirmative defense under [Section] 1108 to avoid suit." *Id.* at 336-337.

In terms of what more was required, the Third Circuit determined that the "common thread" among Section 1106(a)(1)'s provisions was the "element of intent to benefit a party in interest." 923 F.3d at 338. The court relied on this Court's statement that Section 1106(a)(1)'s provisions generally described "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Id.* at 337 (quoting *Lockheed*, 517 U.S. at 893). The court accordingly held that "absent factual allegations that support an element of intent to benefit a party in interest, a plaintiff does not plausibly allege" a prohibited transaction under Section 1106(a)(1)(C). *Id.* at 338.

Thus, both the Second Circuit and the Third Circuit rejected petitioners' position, although the Third Circuit addressed the issue in a different way (by requiring allegations of an impermissible intent).

The Seventh Circuit in *Albert* v. *Oshkosh Corp.*, 47 F.4th 570 (2022), likewise rejected petitioners' view. The plaintiff there alleged that his plan's fiduciaries violated Section 1106(a) simply by engaging third-party recordkeepers for the plan. *Id.* at 575-576, 583-584. Like petitioners here, he contended that he could state a claim merely by "identifying a party in interest * * * and alleging that the party in interest engaged in one of the transactions listed in [Section] 1106(a)(1)." *Id.* at 585.

Like the Second Circuit here, the Seventh Circuit rejected that argument. *Albert*, 47 F.4th at 586-587. It explained that "[i]t would be nonsensical" to read Section 1106(a)(1) to prohibit transactions for "essential" services, such as "recordkeeping and administrative services." *Id.* at 585. Because that was all that the plaintiff alleged, the court affirmed the dismissal of his claim. *Id.* at 585-586. The court did not explain what more was required at the pleading stage, although it distinguished another case that involved allegations of "self-dealing" from the present case, which involved only allegations of "routine payments for plan services." *Id.* at 585.

Braden v. *Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), was different, because the plaintiff there alleged wrongful conduct as part of his prohibited-transaction claim. Specifically, the plaintiff alleged a secret kickback scheme between a pension plan and Merrill Lynch (a party in interest), where mutual fund providers paid Merrill Lynch a share of their fees "in exchange for inclusion of their funds in the [p]lan,"

and the plan fiduciaries agreed to keep the payment amounts confidential. *Id.* at 590.

The Eighth Circuit held that the plaintiff had adequately pleaded a prohibited-transaction claim. 588 F.3d at 601. The court noted that the plaintiff plausibly alleged that Merrill Lynch's compensation was unreasonable. *Id.* at 601 n.9. But the court then stated that the plaintiff had not needed to do so. *Id.* at 601. Noting that the agreement between Wal-Mart and Merrill Lynch "required the amounts of the payments to be kept secret," the court held that "[i]t would be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing." *Id.* at 602. Instead, the court held, the plaintiff needed only to plead that the defendants "caused the Plan to enter into an arrangement with Merrill Lynch, a party in interest," and that Merrill Lynch "received undisclosed amounts of * * * payments." *Id.* at 601.

That discussion in *Braden* is in significant tension with the decision below. But it addresses a very different claim from the one here. *Braden* involved an allegation of self-dealing that was wrongful on its face, not a routine contract for recordkeeping services. See 588 F.3d at 601. The *Braden* court also placed significant weight on the secrecy provision preventing the plaintiff from uncovering the amount of fees without discovery. *Id.* at 602. There is no such provision here.

Given these differences, it is unlikely that the Eighth Circuit would allow a claim like the one here, which merely challenges a routine contract for essen-

tial plan services, to go forward. Notably, many district courts considering that type of claim have held that *Braden* would not apply in those circumstances.[5]

The tension between *Braden* and the decision below thus does not warrant this Court's review. That is particularly true given that *Braden* is a 15-year-old decision, and the Eighth Circuit (as the first court of appeals to address the issue) has not had the opportunity to consider how other courts have addressed the pleading standard for prohibited-transaction claims based on routine plan services. If the Court potentially wished to address the question presented, it should permit more time for the Eighth Circuit to consider those approaches, as well as for other courts of appeals to weigh in on the pleading standard.

B. Petitioners' remaining two cases do not address the pleading standard for a Section 1106 claim, and neither conflicts with the decision below.

Bugielski v. *AT&T Services, Inc.*, 76 F.4th 894 (9th Cir. 2023), petition for cert. pending, No. 23-1094 (filed Apr. 5, 2024), involved an idiosyncratic factual situation and an uncommon legal issue. The plan's recordkeeper gave two additional service providers (a brokerage account platform and company providing optional investment advisory services) access to participants' accounts on the recordkeeper's platform, and the service providers paid the recordkeeper for that access. *Id.* at 898. The plan amended its contract with the recordkeeper to allow the payments. *Ibid.*

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[5] See, *e.g.*, *Sellers* v. *Anthem Life Ins.*, 316 F. Supp. 3d 25, 37 & n.5 (D.D.C. 2018) (refusing to extend *Braden* to claims "based purely on [the service provider's] receipt of bargained-for consideration as a service provider"); *Huffman* v. *Prudential Ins. Co. of Am.*, No. 10-cv-5135, 2017 WL 6055225, *11 (E.D. Pa. Dec. 7, 2017) (similar); *Sacerdote*, 2017 WL 3701482, at *13-14 (similar).

The plaintiff sued the plan's fiduciary, alleging that that amendment (but not the original agreement) was a prohibited transaction because of the significant sums paid to the additional service providers. *Id.* at 899. The plaintiff expressly alleged that Section 1108's exemptions did not apply because the total compensation, including the additional revenue from the added service providers, was unreasonable. *Ibid.* The district court granted summary judgment to the fiduciary on the ground that the transaction was allowed under Section 1108. *Ibid.* The court of appeals reversed and remanded, explaining that the district court had incorrectly assessed whether the compensation was reasonable under Section 1108. *Id.* at 910-912.

The defendant made two legal arguments, neither of which is present here. First, it argued that Section 1106(a) did not apply to the amendment of the plan's contract with the recordkeeper. 76 F.4th at 901. The defendant's theory was that "Congress never intended for § [1106](a) to be so broad that it would encompass arm's-length service transactions." *Ibid.* (internal quotation marks omitted). The Ninth Circuit rejected that view, explaining that there is no basis in Section 1106(a)'s text for that exception, and that such an exception is unnecessary because Section 1108 already exempts permissible arm's-length transactions. *Id.* at 900-909.

Second, the defendant argued that the district court correctly granted summary judgment because the contract was an agreement for reasonable plan services under Section 1108. 76 F.4th at 909-910. The Ninth Circuit held that the district court erred in analyzing the Section 1108 exception, because it failed to account for the recordkeeper's revenue from the two additional service providers in deciding whether the

recordkeeper's overall compensation was reasonable. *Id.* at 910-912.

Bugielski does not conflict with the decision below. The Ninth Circuit did not address pleading standards at all. And it did not address the particular question whether a plaintiff bringing a prohibited-transaction claim based on a routine service provider contract must plead only the fact of the contract under Section 1106(a), or also that the contract fails to meet a Section 1108 exemption.

Instead, the Ninth Circuit held that there is no categorical exception to Section 1106(a) for all arm's-length transactions, 76 F.4th at 909, and that the district court erred in assessing whether a Section 1108 exception was met on the record in that case, *id.* at 912. In this case, no one has argued that Section 1106(a) is categorically inapplicable to all arm's-length transactions, Pet. App. 18a, and there is no evidence to assess because petitioners' claim failed at the motion-to-dismiss stage, *id.* at 100a. Thus, *Bugielski* does not speak to the question presented here.[6]

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[6] As noted, a certiorari petition is pending in *Bugielski*. That petition does not present any question about the pleading standard, but instead renews the argument that Section 1106(a) categorically exempts all arm's-length transactions for plan services. Pet. i, 10-11, 17-18, *AT&T Servs. Inc.* v. *Bugielski*, No. 23-1094 (filed Apr. 5, 2024) (*Bugielski* Pet.). In particular, the petitioner argues that an arm's-length transaction is not a "transaction" under Section 1106(a). *Id.* at 17-19.

As this brief explains, review is not warranted on the question presented in this case. But if the Court wished to consider that question, or a broader question about the legal standard for a prohibited-transaction claim based on a contract for plan services, it should grant review in this case rather than in *Bugielski*. *Bugielski* involves an idiosyncratic factual scenario involving an amendment to an existing contract with a recordkeeper to allow

Petitioners' final citation is to *Ramos* v. *Banner Health*, 1 F.4th 769 (10th Cir. 2021). The plaintiffs sued their employer under ERISA, alleging mismanagement of their retirement plan. *Id.* at 775-776. As relevant here, they alleged that the employer violated Section 1106(a) by engaging Fidelity to provide recordkeeping services for the plan. *Id.* at 786. Following a bench trial, the district court entered judgment for the employer. *Id.* at 786-788.

The Tenth Circuit affirmed. *Ramos*, 1 F.4th at 786-788. The court explained that "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." *Id.* at 787; see *ibid.* (explaining that under plaintiffs' view, "a plan participant could force any plan into court for doing nothing more than hiring an outside company to provide recordkeeping and administrative services"). To avoid that absurd result, the court held that a service provider is not a "party

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the recordkeeper to receive additional payments from additional service providers, rather than a routine contract for recordkeeping services. 76 F.4th at 898. The defendant in *Bugielski* also makes an uncommon argument – that an arm's-length transaction for plan services is not a "transaction" under Section 1106(a), so Section 1106(a) does not apply at all, and there is no need to consider the Section 1108 exemptions. *Bugielski* Pet. 18. Further, *Bugielski* arose on summary judgment, and thus does not present the purely legal issue about what must be pleaded to make out a prohibited-transaction claim. See 76 F.4th at 900. And *Bugielski* is in an interlocutory posture; the district court's decision on remand may obviate any need for this Court to consider the question presented in the *Bugielski* petition. See *id.* at 909-912. In particular, if the district court again grants the fiduciary summary judgment under Section 1108(b), that would moot any legal dispute about the meaning of "transaction" in Section 1106(a).

in interest" unless there is "some prior relationship" between the fiduciary and the service provider – meaning that Section 1106(a) does not apply to the initial contract between the fiduciary and the service provider. *Id.* at 787-788.[7]

Ramos is far afield from this case; it involved prohibited-transaction claims that had gone to a bench trial, and the Tenth Circuit never addressed the pleading standard for those claims. See 1 F.4th at 785-788. And its conclusion is consistent with the decision below: A plaintiff cannot proceed on a prohibited-transaction claim under Section 1106(a) just by pointing to a contract for routine plan services.

Thus, no court of appeals that has considered a prohibited-transaction claim challenging a contract for routine plan services has allowed the claim to proceed. Although the courts that have considered the pleading standard have articulated slightly different approaches, petitioners' claim would have failed no matter where it was filed. There thus is no conflict among the courts of appeals warranting this Court's review.

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[7] Two other courts of appeals similarly have held that Section 1106(a) applies only to new contracts with a pre-existing service provider, and not the initial contract between the plan and the service provider. See *D.L. Markham DDS, MSD, Inc. 401(K) Plan* v. *Variable Annuity Life Ins.*, 88 F.4th 602, 609-612 (5th Cir. 2023), cert. denied, No. 23-1025 (May 13, 2024); *Peters* v. *Aetna Inc.*, 2 F.4th 199, 229, 239-240 (4th Cir. 2021), cert. denied sub nom. *Optumhealth Care Sols., LLC* v. *Peters*, 142 S. Ct. 1227 (2022). The court of appeals in this case did not address that issue.

III. THIS CASE IS A POOR VEHICLE FOR FURTHER REVIEW

The Court should not grant review for the additional reason that petitioners would lose even under their proposed rule.

Petitioners' prohibited-transaction claim is closely related to their imprudence claim. In their imprudence claim, petitioners allege that Cornell acted imprudently by failing to monitor and control the fees the plans paid under their contracts for recordkeeping services with TIAA and Fidelity. Pet. App. 100a; see *Hughes* v. *Northwestern Univ.*, 595 U.S. 170, 177 (2022) (plan administrators have a duty to monitor fees). Then in their prohibited-transaction claim, petitioners allege that those very contracts are prohibited transactions. Pet. App. 106a-107a. So both claims target the same recordkeeping fees and seek the same recovery – the difference between the fees the plans paid and the fees petitioners contend the plans should have paid. See Compl. ¶¶ 227, 232.

The imprudence claim has failed on the merits. The district court granted summary judgment on that claim to Cornell, Pet. App. 68a; the court of appeals affirmed, *id.* at 33a-34a; and petitioners do not challenge that ruling in this Court, see Pet. 30.

If the Court were to revive petitioners' prohibited-transaction claim, it would meet the same fate as their imprudence claim. The imprudence claim failed because petitioners failed to show a loss to the plans, because they adduced no evidence that Cornell could have paid lower fees for recordkeeping services. Pet. App. 68a. Petitioners sought to rely on the opinions of two experts, who each opined that Cornell could have paid between $35 and $40 per participant per year for recordkeeping services. *Id.* at 62a, 65a.

The district court excluded those opinions because neither expert employed a reliable methodology to reach his opinion. Pet. App. 58a. The court found that the experts failed to explain why their fee estimates were "reasonable in light of any features of the Plans," *id.* at 63a; "offer[ed] no rationale for why or how" they had selected supposed comparators, *id.* at 64a; and "offer[ed] no explanation for how [they] arrived" at their $35-40 fee estimates, *ibid.* The court of appeals agreed, holding that "neither [expert] offered any cognizable methodology in support of their conclusions." *Id.* at 32a. Petitioners also attempted to rely on market data but failed to produce evidence connecting that data to the plans' fees. *Id.* at 57a. The result was that petitioners did not show that the plans could have paid less in fees than they did. *Ibid.*

That failure equally would doom petitioners' prohibited-transaction claim. Cornell's recordkeeping contracts with Fidelity and TIAA would be permissible so long as they are "reasonable arrangements" for "services necessary for the establishment or operation of the plan" where "no more than reasonable compensation is paid." 29 U.S.C. 1108(b)(2)(A). It is undisputed that recordkeeping services are necessary for the operations of the plans. Pet. App. 8a; see Compl. ¶ 38. So the only question is whether TIAA's and Fidelity's compensation was reasonable. The courts below already determined that petitioners failed to show that the compensation was unreasonable. Pet. App. 32a, 58a-64a. So even if this Court granted review and reversed with respect to the pleading standard, it would not matter at all to the outcome of this case. For that reason as well, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NICOLE A. SAHARSKY
MINH NGUYEN-DANG
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3052

NANCY G. ROSS
MICHAEL A. SCODRO
Counsel of Record
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60601
(312) 782-0600
mscodro@mayerbrown.com

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