No. 23-1007

In the Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,
PETITIONERS,
v.
CORNELL UNIVERSITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

JEROME J. SCHLICHTER
SEAN E. SOYARS
SCHLICHTER BOGARD LLP
100 South Fourth Street
Suite 1200
St. Louis, MO 63102

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-8956
x.wang@law.virginia.edu

Counsel for Petitioners

TABLE OF CONTENTS

Table of authorities ii
Reply brief 1
I. The courts of appeals are deeply split on ERISA's prohibited-transaction provisions. 2
II. The Second Circuit's decision is incorrect. 5
III. This case is an excellent vehicle. 9
Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases

Albert v. Oshkosh Corp.,
47 F.4th 570 (7th Cir. 2022) 4

Allen v. GreatBanc Tr. Co.,
835 F.3d 670 (7th Cir. 2016)..............................5, 9, 10

Atl. Richfield Co. v. Christian,
590 U.S. 1 (2020) 6

In re Bernard L. Madoff Inv. Sec. LLC,
12 F.4th 171 (2d Cir. 2021).......................................6, 7

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009)................................1, 2, 3

Bugielski v. AT&T Servs., Inc.,
76 F.4th 894 (9th Cir. 2023) 1, 4, 10

Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.,
508 U.S. 152 (1993).. 2

Conkright v. Frommert, 559 U.S. 506, 517 (2010) 8

Dixon v. United States,
548 U.S. 1 (2006) 6

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

Evankavitch v. Green Tree Servicing, LLC, 793 F.3d 355 (3d Cir. 2015) 6

FTC v. Morton Salt Co., 334 U.S. 37 (1948)...7, 8

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

Henderson v. Emory Univ., 252 F. Supp. 3d 1344 (N.D. Ga. 2017) 3, 4

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan, 751 F.3d 740 (6th Cir. 2014)....................................... 7

Krueger v. Ameriprise Fin., Inc., 2012 WL 5873825 (D. Minn. Nov. 20, 2012) 3

LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008)... 7

Lavine v. Milne, 424 U.S. 577 (1976).. 10

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984)....................................... 9

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980).. 1

Nat'l Sec. Sys., Inc. v. Iola,
700 F.3d 65 (3d Cir. 2012) 7, 9

Pension Benefit Guar. Corp. as Tr. of Reservis Inc. Defined Benefit Plan v. Hatle,
2023 WL 3559547 (D. Colo. Feb. 21, 2023)............. 10

Peters v. Aetna Inc.,
2 F.4th 199 (4th Cir. 2021) 5, 11

Ramos v. Banner Health,
1 F.4th 769 (10th Cir. 2021) 4, 5

Rozo v. Principal Life Ins.,
48 F.4th 589 (8th Cir. 2022) 4

Ruan v. United States,
597 U.S. 450 (2022).. 6

Rutledge v. Pharm. Care Mgmt. Ass'n,
592 U.S. 80 (2020).. 5

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983).. 8

Sweda v. University of Pennsylvania,
923 F.3d 320 (3d Cir. 2019) 4, 9

United States v. New York, N.H. & H.R. Co.,
355 U.S. 253 (1957).. 8

Wildman v. Am. Century Servs., LLC,
237 F. Supp. 3d 902 (W.D. Mo. 2017)........................ 3

Page(s)

Rules, Statuory, and Regulatory Provisions

29 U.S.C.
§ 1106..1, 3, 4
§ 1108..2, 3, 5

77 Fed. Reg. 5632, 5632 (Feb. 3, 2012) 7

Other Authorities

Goodwin, *ERISA Litigation Update*,
https://perma.cc/KBF4-C7VD (Jan. 18, 2024) 8

REPLY BRIEF

Under 29 U.S.C. § 1106(a)(1)(C), an ERISA "fiduciary" may not "cause the plan to engage in a transaction" that "constitutes" a "furnishing of goods, services, or facilities between the plan and a party in interest." In pursuing their § 1106(a)(1)(C) claim, Petitioners satisfied every part of that provision. The Second Circuit dismissed Petitioner's claim anyway. In so doing, it acknowledged that Petitioners could have proceeded on their § 1106(a)(1)(C) claim had they brought their case in the Eighth or Ninth Circuits. App. 18a. And the court added that, had Petitioners sought relief in the Third, Seventh, or Tenth Circuits, their claim would have faced a different legal analysis, separate and distinct from the approaches taken by the Second Circuit and the Eighth and Ninth Circuits. App. 16a. Such circumstances—a clear split over a purely legal issue on a "comprehensive" federal statute—more than clear the bar for certiorari. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

The question's importance only underscores the case for review. The plans here cover thousands of employees and billions in assets. App. 46a. The cases on the other side of the split feature equally substantial stakes. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 589 (8th Cir. 2009) (plan "had over one million participants and nearly $10 billion in assets"); *Bugielski v. AT&T Servs., Inc.*, 76 F.4th 894, 898 (9th Cir. 2023). If Petitioners are correct, then § 1106(a)(1)(C) offers plaintiffs a path to challenge various transactions as presumptively prohibited—a result consistent with Congress's intent to give plan beneficiaries a means to

close the "open door for abuses" between plan administrators and service providers in the pre-ERISA era. *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). On the other hand, if Petitioners are wrong, then the Eighth and Ninth Circuit standard unnecessarily exposes employers to liability for "routine service provider contract[s]." BIO at 11. The difference between these approaches is vast and consequential. The Court should grant review.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT ON ERISA'S PROHIBITED-TRANSACTION PROVISIONS.

Respondents hardly deny the existence of a split, instead devoting much of their brief to rehashing the merits of the Second Circuit's decision. BIO at 8–15. Buried behind these arguments—which are unavailing, *see infra* at 5–8—Respondents admit there is "significant tension" between the circuits, BIO at 18, and that "other courts of appeals have articulated different standards for what more must be pleaded for a prohibited-transaction claim," *id.* at 8. Still, Respondents try to downplay the difference by asserting that *Braden* and *Bugielski*, the Eighth and Ninth Circuit cases, involved "a very different claim." *Id.* at 18. They did not. The Second Circuit left no doubt on this point. After summarizing *Braden*, the panel stated that "[w]e do not agree with the Eighth Circuit," and instead endorsed a different understanding of § 1106(a)(1)(C) and its relationship to 29 U.S.C. § 1108, which provides exceptions to § 1106(a) liability. App. 18a.

In their opposition, Respondents make much of the nature of the transaction in *Braden*—i.e., that the

contract "required the amounts of the payments to be kept secret." 588 F.3d at 602. But that circumstance was only relevant in determining whether the defendants-appellees in *Braden* could satisfy § 1108(b)(2), which provides an exemption to § 1106(a)(1)(C) when a plan makes "reasonable arrangements with a party in interest" for "services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid." Whether any such payment is disclosed has no bearing on the antecedent question of whether plaintiffs have pleaded a claim under § 1106(a)(1)(C). On that point, the Eighth Circuit's ruling was unambiguous: Braden "ha[d] stated a claim" because his complaint alleged that the Plan had "enter[ed] into an arrangement" with "a party in interest" in "exchange for services rendered to the Plan." 588 F.3d at 601. Such allegations track § 1106(a)(1)(C)'s text. And when those requirements are satisfied, "the burden properly lies with appellees to show that the revenue sharing payments were reasonable under § 1108" (which they could not do in *Braden* because they had not disclosed how much had been paid). *Id.*

Moreover, contrary to Respondents' assertions, BIO at 18–19, the Eighth Circuit did examine whether such a rule would "force[]" fiduciaries "to defend the reasonableness of every service provider transaction," 588 F.3d at 601. It rejected the argument, referencing the statutory text and trust law principles. *Id.* at 601–02. Many courts have since applied *Braden*'s holding to allow plaintiffs to proceed with the sort of prohibited-transaction claim the Second Circuit dismissed. *See, e.g.*, *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *16–17 (D. Minn. Nov. 20, 2012); *Wildman v. Am. Century Servs., LLC*, 237 F. Supp. 3d 902, 916 (W.D. Mo. 2017); *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1355–

56 (N.D. Ga. 2017). The Eighth Circuit itself reaffirmed *Braden* just two years ago. *Rozo v. Principal Life Ins.*, 48 F.4th 589, 599 (8th Cir. 2022) ("[A] defendant has [the] burden to prove 'statutory exemptions established by § 1108.'"). Respondents' calls for further percolation and for the Eighth Circuit to reconsider *Braden* are meritless.

Respondents similarly mischaracterize *Bugielski*, claiming it "does not conflict with the decision below" because the Ninth Circuit only "held that there [was] no categorical exception to Section 1106(a) for all arm's-length transactions." BIO at 21. Not so. Rather, the Ninth Circuit ruled that Fidelity, as AT&T's recordkeeper (and, incidentally, a recordkeeper for Respondents here) was "a party in interest," and that a contract amendment between Fidelity and AT&T constituted "a prohibited transaction." *Bugielski*, 76 F.4th at 901. That decision contravenes the Second Circuit's holding, which is why, in deciding Petitioners' § 1106(a) claim, the panel declined to fully endorse the Ninth Circuit's "literal reading" of the statute. App. 17a–18a.

Finally, cases from the Third, Seventh, and Tenth Circuits further underscore the case for review. By Respondents' own admission, these circuits examined "materially identical" claims to the ones presented here. BIO at 16–17. And yet each of these courts "addressed the issue in a different way," *id.* at 17, with the Third Circuit requiring § 1106(a)(1)(C) plaintiffs to allege "impermissible intent," the Seventh Circuit demanding evidence of "self-dealing," and the Tenth Circuit requiring some "prior relationship" between the plan and service provider. *Sweda v. University of Pennsylvania*, 923 F.3d 320, 338 (3d Cir. 2019); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022); *Ramos v. Banner Health*, 1 F.4th

769, 787 (10th Cir. 2021).[1] That array of approaches, with plaintiffs shouldering different burdens based on whether they sue in New York, Pennsylvania, or California, cannot be what Congress intended when it sought to establish a "uniform body of benefits law" through ERISA. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020).

II. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

Echoing the Second Circuit, Respondents lean on purported policy concerns to justify requiring plaintiffs to satisfy the requirements of § 1106(a) and to negate the exceptions in § 1108 when pleading a § 1106(a) claim. BIO at 9. But that "fix," as Petitioners have noted, raises significant workability problems. On top of the exception for reasonable and necessary transactions, § 1108(b)(2), for instance, must a plaintiff also plead that a transaction is not a "block trade," § 1108(b)(15); or does not involve "the provision of investment advice," § 1108(b)(14)? And how could a plaintiff without discovery uncover the facts necessary to plead the absence of many of these exceptions? *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 677 (7th Cir. 2016) ("If there is an administrative problem to be worried about, it is the chance that courts would start requiring plaintiffs to negate all section 408 exemptions in their complaints."). Neither the Second

---

[1] The Fourth and Fifth Circuits have also held or suggested that a service provider must have a prior relationship with the plan to be a "party in interest," albeit in circumstances different from those here and in *Braden*. *See D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins.*, 88 F.4th 602, 609–12 (5th Cir. 2023); *Peters v. Aetna Inc.*, 2 F.4th 199, 240 (4th Cir. 2021).

Circuit nor Respondents try to answer these concerns. Respondents instead emphasize three other arguments to defend the decision below. None are persuasive.

First, they make much of the "textual difference between Sections 1106(a) and 1106(b)," with § 1106(a) stating "at the outset that its provisions apply except as provided in section 1108," and no such language preceding § 1106(b). BIO at 9, 11 (cleaned up). But there is nothing remarkable about § 1106's text or structure. Indeed, "[t]housands of statutory provisions use the phrase 'except as provided in . . .' followed by a cross-reference" without "otherwise expand[ing] or contract[ing] the scope" of the section. *Atl. Richfield Co. v. Christian*, 590 U.S. 1, 16 (2020) (internal quotation marks omitted). And as the Court has "long held, the default rule for interpreting" statutes such as this with "two main parts: a principal clause generally prohibiting . . . doing certain things . . . and a proviso indicating these acts are unlawful 'except as authorized,'" is that the exception "designates an affirmative defense" which need not be negated at pleading. *Ruan v. United States*, 597 U.S. 450, 472–73 (2022) (Alito, J., concurring) (quoting *Dixon v. United States*, 548 U.S. 1, 13 (2006)).

The courts of appeals have routinely applied this rule to interpret laws written similarly to the one here, *see Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 362 (3d Cir. 2015) (§ 1692c(b) of the Fair Debt Collection Practices Act prohibiting behavior "[e]xcept as provided in section 1692b" represented an affirmative defense), including in cases involving trusts and trustees, *see, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 197 (2d Cir. 2021) (finding the "'[e]xcept as otherwise provided' clause in § 550(a)" of the Bankruptcy Code does

not "require[] the trustee to negate that exception" in pleadings) (internal quotation marks omitted); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008) (the "law of trusts" "informs our interpretation of ERISA[]").

Nor does the presence of the "except as provided" language in § 1106(a) but its absence in § 1106(b) do the work Respondents claim. Instead, "the majority of courts that have examined this statutory interpretation issue have held that § 1108 applies only to transactions under § 1106(a), not § 1106(b)." *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 750 (6th Cir. 2014) (citing cases). That reading properly "give[s] meaning to this discrepancy in the § 406 subsections." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 95 (3d Cir. 2012). The Second Circuit's decision to flip a standard rule of statutory interpretation on its head does not.

Next, Respondents try to sidestep the adverse administrative guidance by describing a Department of Labor regulation cited in the petition as being merely about "disclosure obligations." BIO at 14 n.4. But these obligations in fact outline what parties in interest must do to "qualify for the statutory exemption for services under ERISA section 408(b)(2)." Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012). The guidance, in other words, expressly recognizes that the responsibility falls not on plaintiffs, but on fiduciaries and parties in interest to show they qualify for § 1108(b)'s exceptions to § 1106(a) liability. Such a framework maps precisely onto the well-established understanding that "the burden of proving . . . a special exception to the prohibitions of a statute generally rests on one who claims its benefits."

FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948); *see also United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.").

Absent other arguments, Respondents resort finally to scaremongering, invoking the specter of an unmanageable rise in litigation if the Court endorses Petitioners' reading of the statute. BIO at 14–15. But striking the balance between the "fair and prompt enforcement of rights" and the provision of welfare plans is a policy call that Congress makes—and enacts through statutory text. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). And in any event Respondents' fears have not come to fruition. ERISA administration has not collapsed in the Eighth Circuit or in other jurisdictions that have followed *Braden*. Courts have, to the contrary, proven more than capable of applying *Braden* in a workable manner. *Supra* at 3–4. And there is little evidence more generally that ERISA cases are overwhelming the federal docket. Just forty-four were filed last year, with a fraction involving plans of Respondents' size or larger. Goodwin, *ERISA Litigation Update*, https://perma.cc/KBF4-C7VD (Jan. 18, 2024). Holding fiduciaries to § 1106(a)(1)(C)'s text as written will not, in short, create a flood of litigation. It will instead "promote the interests of employees and their beneficiaries" by barring certain transactions, just as Congress intended. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

III. THIS CASE IS AN EXCELLENT VEHICLE.

The petition addressed (1) why this case is an ideal vehicle for review and, relatedly, (2) why it is a superior vehicle vis-a-vis *Bugielski*.

On the latter point, Respondents agree: *Bugielski*, they note, "is in an interlocutory posture," "arose on summary judgment," and presents facts which could "on remand [] obviate any need for this Court['s]" review. BIO at 21–22 n.6. That the petitioners in *Bugielski* asked this Court to adopt the Second Circuit's reading of §§ 1106 and 1108 only underscores why this case is the more appropriate vehicle for reviewing and resolving any circuit split. *See* Pet. at 24–25, *Bugielski v. AT&T Servs., Inc.* (23-1094).

As to the former, Respondents marshal a single counterargument: that the Court should decline review because Petitioners "would lose" on their prohibited-transaction claim on remand because their fiduciary duty claims have already "failed on the merits." BIO at 24. That assertion falls flat for several reasons.

To start, though "the standards for fiduciary conduct in §§ 1104 and 1106 may overlap, breaching one of these provisions does not necessarily imply that the other has been violated as well." App. 10a (citing *Sweda*, 923 F.3d at 327) (cleaned up). That is because "the provisions safeguard the rights of plan participants and beneficiaries in distinct ways." *Nat'l Sec. Sys.*, 700 F.3d at 92. Notably, "[t]he *per se* rules of section 406 make much simpler the enforcement of ERISA's more general fiduciary obligations." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). Consequently, "a complaint may fail to state sufficient facts to support a breach of fiduciary duty claim, yet survive a motion to dismiss as to a companion

prohibited transaction claim notwithstanding those same deficient facts." *Allen*, 835 F.3d at 676; *see, e.g.*, *Pension Benefit Guar. Corp. as Tr. of Reservis Inc. Defined Benefit Plan v. Hatle*, 2023 WL 3559547, at *6 (D. Colo. Feb. 21, 2023) (granting judgment on prohibited-transaction claim but denying judgment on fiduciary duty claims); *Bugielski*, 76 F.4th at 914–17 (reversing judgment on prohibited-transaction claim but affirming judgment on disclosure claim). That result is by design. Congress enacted § 1106 to address "deficiencies in prior law regulating transactions by plan fiduciaries." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000). And it did so by drafting § 1106 to "*supplement*[]" ERISA's other "fiduciary[]" duties. *Id.* (emphasis added). Respondents' alternative proposal—to tether the fate of a plaintiff's prohibited-transaction claim to their fiduciary duty claims—would render § 1106 mere surplusage.

Next, resolving the circuit split in Petitioners' favor would likely change the outcome of this case on remand. That is because "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). As relevant here, for Petitioners' breach of fiduciary duty claims, Petitioners needed to show that they suffered losses which "were the result of the fiduciary's imprudent actions," and that there existed "a prudent alternative." App. 31a. Such determinations are both demanding and highly-context specific. On the other hand, Petitioners would not have needed to allege any such facts to proceed with a § 1106(a)(1)(C) cause of action under a plain reading of that provision. They could,

indeed, obtain equitable relief without showing loss.[2] *See Peters*, 2 F.4th at 244. Nor would Petitioners need to question the prudency of a transaction; the burden of establishing necessity and reasonableness (or any of § 1108's other exemptions) would fall to Respondents—an onus they have not yet had to bear in this litigation.

There is, in short, little merit to the argument that Petitioners' prohibited-transaction claims must fail at the pleading stage because their other claims—which were based on a different statutory provision, involved a different set of allegations, and were subject to a different pleading burden—lacked sufficient support at summary judgment. This matter cleanly presents a legal issue where there is a square circuit conflict. Resolving that split can and does bear on whether Petitioners can obtain relief. The case is ripe for the Court's review.

[2] Petitioners sought equitable relief in their complaint, but the district court found that petitioners had not sufficiently raised equitable relief as a basis to deny summary judgment on their fiduciary duty claims. Petitioners intend to request such relief on their prohibited-transaction claims if the case is remanded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME J. SCHLICHTER
SEAN E. SOYARS
SCHLICHTER BOGARD LLP
100 South Fourth Street
Suite 1200
St. Louis, MO 63102

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-8956
x.wang@law.virginia.edu

Counsel for Petitioners

August 5, 2024