No.

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. BATISTA
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ALLYSON N. HO
Counsel of Record
ASHLEY E. JOHNSON
BRADLEY G. HUBBARD
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

Whether a fiduciary to an employee benefit plan causes the plan to engage in a prohibited transaction under Section 406(a)(1)(C) of the Employee Retirement Income Security Act of 1974 by entering a routine, arm's-length agreement for plan services.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioners AT&T Services, Inc. and the AT&T Benefit Plan Investment Committee were defendants in the district court and appellees before the court of appeals.

Respondents Robert J. Bugielski and Chad S. Simecek were plaintiffs in the district court and appellants before the court of appeals. They represent members of the following class: "All persons who were participants in and beneficiaries of the AT&T Retirement Savings Plan at any time on or after November 6, 2011."

2. AT&T Services, Inc., is a wholly owned subsidiary of AT&T Inc. AT&T Inc. is publicly traded on the New York Stock Exchange. No one person or group owns 10% or more of the stock of AT&T Inc. The AT&T Benefit Plan Investment Committee is composed of individual employees of AT&T Services, Inc., or its affiliated entities.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Bugielski* v. *AT&T Servs., Inc.*, No. 21-56196 (9th Cir.) (judgment entered Aug. 4, 2023; rehearing and rehearing en banc denied Nov. 8, 2023); and
- *Alas* v. *AT&T Servs., Inc.*, No. 2:17-cv-8106-VAP-RAO (C.D. Cal.) (judgment entered Sept. 28, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners AT&T Services, Inc., and the AT&T Benefit Investment Plan Committee respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 76 F.4th 894. The opinion of the district court (Pet. App. 47a-82a) isn't reported, but is available at 2021 WL 4893372.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2023. A timely petition for rehearing or rehearing en banc was denied on November 8, 2023. (Pet. App. 84a-85a). On January 11, 2024, Justice Kagan granted petitioners' application to extend the time to file this petition to March 7, 2024. On February 28, 2024, Justice Kagan granted petitioners' application to extend the time to file this petition to April 6, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the Appendix. Pet. App. 86a-91a.

STATEMENT

Congress struck a careful balance in enacting ERISA. On one side of the scales, Congress aimed to ensure the "fair and prompt enforcement of rights" under employee benefit plans. *Aetna Health Inc.* v.

Davila, 542 U.S. 200, 215 (2004). On the other side of the scales, Congress sought to avoid "creat[ing] a system" that would "discourage employers from offering welfare benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

The need to respect the balance struck by Congress has long animated this Court's interpretation of ERISA—including the provision at issue here, Section 406(a), which bars plan fiduciaries from entering certain agreements called "prohibited transactions." In conflict with the Third and Seventh Circuits, the Ninth Circuit has now joined the Eighth Circuit to interpret Section 406(a) as categorically prohibiting routine, arm's-length agreements between plan fiduciaries and third-party service providers for necessary plan services like recordkeeping. (The Second Circuit has a foot in both camps, construing Section 406(a) to prohibit some, but not all, routine service agreements.)

The Ninth Circuit's decision openly acknowledges and deepens this entrenched split—adopting an interpretation that can't be reconciled with text, context, structure, or precedent. As this Court made clear in *Lockheed Corp.* v. *Spink*, Section 406(a) reaches only those transactions that are "likely to injure the pension plan"—and can't be construed to reach everyday service agreements of the kind at issue here. 517 U.S. 882, 888 (1996) (citation omitted). The contrary approach adopted by the Eighth and Ninth Circuits has serious practical consequences for plan administrators, who face the risk of protracted litigation merely for entering agreements with third parties for neces-

sary plan services. It also stands to harm plan beneficiaries, who may be deprived of valuable services as administrators seek to limit their litigation exposure.

This Court's review is needed to avoid those serious consequences and secure uniformity where Congress has expressly mandated it. After all, Congress enacted ERISA in the first place "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (citation omitted)—but the meaning of ERISA's key prohibited-transactions provision is in disarray from coast to coast. This Court should resolve this conflict and restore nationwide uniformity on this important, recurring issue of ERISA law.

1. After "almost a decade of studying the Nation's private pension plans," Congress adopted ERISA. *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980). "[T]his comprehensive and reticulated statute," *ibid.*, has dual aims: it's designed not only to protect employees, but also to "alleviate" burdens on employers that "discourage the maintenance and growth of * * * pension plans," 29 U.S.C. § 1001a(c)(2), including excessive and unpredictable liabilities for plan administrators.

"Nothing in ERISA *requires* employers to establish employee benefits plans." *Lockheed Corp.*, 517 U.S. at 887 (emphasis added). Instead, Congress sought a "careful balancing" by "encourag[ing] * * * the creation of such plans" while simultaneously "ensuring fair and prompt enforcement of rights under a plan." *Aetna Health*, 542 U.S. at 215 (citation omitted). Congress aimed "*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.*, 516 U.S. at 497 (emphasis added). It achieved that aim by enacting "uniform standards of primary conduct" with "predictable" rules and "liabilities" for plan administrators. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (citation omitted).

2. One ERISA provision that reflects Congress's careful balance is Section 406(a), codified at 29 U.S.C. § 1106(a), which regulates the activities of plan fiduciaries (like administrators). "Responding to deficiencies in prior law regulating transactions by plan fiduciaries," Congress in Section 406(a) "supplement[ed] the fiduciary's general duty of loyalty to the plan's beneficiaries * * * by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000) (citation omitted). Section 406(a) specifically bars plan fiduciaries from causing the plan to enter into several forms of "[p]rohibited transactions," including the sale of services, property, goods, or other "assets" "between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(A)-(E). ERISA defines "party in interest" to include plan fiduciaries themselves and "person[s] providing services" to the plan. *Id.* § 1002(14)(A)-(B). Congress's overarching goal in Section 406 was to prohibit transactions that "may jeopardize the ability of the plan to pay promised benefits." *Comm'r* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993).

As this Court explained in *Lockheed*, Section 406(a) targets "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's

length." 517 U.S. at 893. So "[w]hat the 'transactions' identified in § 406(a) * * * have in common is that they generally involve uses of plan assets that are potentially harmful to the plan." *Ibid.* But where those concerns are absent, no "transaction" has occurred "in the sense that Congress used that term in § 406(a)." *Ibid.*

3. AT&T administers a defined-contribution employee benefit plan for eligible AT&T employees. Pet. App. 5a. To administer the plan, AT&T contracts with third-party service providers to obtain services critical to the plan's operations. Pet. App. 6a-7a. One of those providers is Fidelity Workplace Services, which has served as the plan's recordkeeper since 2005. Pet. App. 6a. In that capacity, Fidelity enrolls new participants in the plan, maintains their accounts, and processes their contributions to the plan. *Ibid.*

Around 2012, AT&T amended its contract with Fidelity to provide plan participants with access to Fidelity's brokerage account platform, called BrokerageLink. Pet. App. 6a. Through BrokerageLink, participants can choose to invest in mutual funds not otherwise available through the plan. *Ibid.* BrokerageLink has facilitated billions of dollars of investment by participants. Pet. App. 7a.

BrokerageLink charges fees for those services directly to plan participants. Pet. App. 6a. Fidelity also receives fees from the mutual funds that BrokerageLink makes available to participants. *Ibid.* So if a participant chooses to invest in a mutual fund offered through BrokerageLink, the mutual fund will pay Fidelity a percentage of the amount invested by the participant. Pet. App. 6a-7a.

In 2014, AT&T contracted with another service provider, Financial Engines, to secure additional, optional investment advisory services for participants. Pet. App. 7a. To provide these services, Financial Engines needs access to participants' accounts. *Ibid.* So AT&T amended its contract with Fidelity so that Financial Engines could access the accounts, too. *Ibid*. AT&T also specified in its contract with Financial Engines that Financial Engines could contract directly with Fidelity to secure that access. *Ibid*. Financial Engines and Fidelity then entered into a separate agreement under which Fidelity received a portion of the fees that Financial Engines earned from managing participants' investments. *Ibid*.

4. Respondents are two former AT&T employees who contributed to the plan. Pet. App. 5a. On behalf of themselves and a class of plan participants, respondents sued AT&T claiming (as relevant here) that AT&T had violated ERISA by amending its recordkeeping agreement with Fidelity to permit plan participants to receive services from BrokerageLink and Financial Engines. Pet. App. 11a-12a.

Respondents didn't dispute that those services were necessary to administer the plan. Pet. App. 29a. Instead, they contended that the amendment to the recordkeeping agreement violated Section 406(a)(1)(C), which bars plan fiduciaries from causing a plan to engage in "a transaction" with "a party in interest"—defined to include service providers like Fidelity—for the "furnishing of goods, services, or facilities." 29 U.S.C. § 1106(a)(1)(C); *id.* § 1002(14)(B); Pet. App. 8a. After respondents voluntarily dismissed one claim, AT&T moved for summary judgment on the remaining claims, including the prohibited-transaction claim. Pet. App. 48a-49a.

The district court granted summary judgment to AT&T. Pet. App. 47a.[1] Relying on this Court's decision in *Lockheed*, the court noted that "to sustain an alleged transgression of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage in [an] allegedly unlawful transaction. Unless a plaintiff can make that showing, there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions." Pet. App. 68a (quoting *Lockheed*, 517 U.S. at 888-89). The court further noted that "Section 406's prohibitions are subject to both statutory and regulatory exemptions," including Section 408—which exempts transactions for "services necessary for the establishment or operation of the plan," so long as "reasonable compensation [wa]s paid therefor." Pet. App. 68a-69a (quoting *Harris Tr. & Sav. Bank*, 530 U.S. at 242, and then quoting 29 U.S.C. § 1108(b)).

Applying those principles, the court concluded there was "no factual dispute" that AT&T hadn't "engaged in prohibited transactions." Pet. App. 75a. There was "no dispute that Fidelity and Financial Engines' services to the Plan were necessary." Pet. App. 69a. And after determining that AT&T wasn't required to evaluate the reasonableness of Fidelity's compensation from BrokerageLink and Financial Engines, the court held there wasn't any "competent" or "credible" evidence suggesting that the compensation AT&T paid Fidelity for its recordkeeping services was unreasonable. Pet. App. 70a-71a.

The Ninth Circuit reversed in relevant part. It viewed "the threshold question" as whether the

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[1] The basis for the district court's jurisdiction was 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

amendment to the recordkeeping agreement constituted a prohibited transaction under Section 406(a)—separate and apart from the exemptions in Section 408. Pet. App. 11a-12a. The Ninth Circuit rejected AT&T's contention that no prohibited "transaction" had occurred "in the sense that Congress used that term in § 406(a)." Pet. App. 17a (quoting *Lockheed*, 517 U.S. at 892-93). Because Congress targeted "commercial bargains that present a special risk of plan underfunding" that occur "not at arm's length," AT&T contended, Section 406(a) shouldn't be read to proscribe arm's-length transactions for concededly necessary services vital to running the plan. Pet. App. 17a-18a (quoting *Lockheed*, 517 U.S. at 893).

The Ninth Circuit disagreed. It reasoned "that the language of § 406(a)(1)(C) is 'broad' and, if read literally, encompasses the transaction with Fidelity." Pet. App. 12a. In the Ninth Circuit's view, that "'literal reading' is correct," Pet. App. 28a—because the transaction involved a "plan," a "party in interest" (Fidelity), and "services," Section 406 prohibited it "per se," Pet. App. 12a (citations omitted). The Ninth Circuit acknowledged that its "per se" rule prohibits even arm's-length transactions for necessary services between plans and service providers. Pet. App. 18a. But it deemed that result the inevitable consequence of Section 406's "unambiguous text." Pet. App. 21a.

Having concluded that AT&T engaged in a "prohibited transaction" with Fidelity, the Ninth Circuit then disagreed with how the district court had assessed the reasonableness of the compensation AT&T paid for Fidelity's services. While the district court examined only "the recordkeeping expenses the Plan paid directly to Fidelity," the Ninth Circuit believed

the district court was also obligated to assess the reasonableness of that compensation in light of the additional money Fidelity received from BrokerageLink and Financial Engines. Pet. App. 35a. So the Ninth Circuit remanded for the district court to make those additional findings when reassessing whether any exemption under Section 408 spared AT&T from the "per se" prohibition in Section 406. *Ibid.*

The Ninth Circuit acknowledged that it was breaking from decisions of the Third and Seventh Circuits. In *Sweda* v. *University of Pennsylvania*, the Third Circuit rejected a materially identical claim that agreements with a plan's recordkeepers "constituted prohibited transactions." 923 F.3d 320, 339 (3d Cir. 2019). Looking to this Court's decision in *Lockheed*, the Third Circuit reasoned that Section 406 was "designed to prevent 'transactions deemed likely to injure the * * * plan' and 'self dealing,'" so Section 406 shouldn't be read to "prohibit ubiquitous service transactions." *Id.* at 336 (citation omitted). So too in *Albert* v. *Oshkosh Corp.*, where the Seventh Circuit concluded that "[i]t would be nonsensical to read [Section 406] to prohibit transactions for services that are essential for defined contribution plans, such as recordkeeping and administrative services." 47 F.4th 570, 585 (7th Cir. 2022). But the Ninth Circuit found these decisions "unpersuasive" and "simply disagree[d]" with their analysis, opting instead to read Section 406 as a "categorical bar." Pet. App. 21a, 27a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens an entrenched circuit split over the meaning of Section 406(a)(1)(C). While two courts of appeals (the Third and Seventh) have held that routine, arm's-length

agreements for plan services aren't prohibited transactions under that provision, two others (the Eighth and now the Ninth) have reached the opposite conclusion. Still another court of appeals (the Second) has developed its own approach, holding that Section 406(a) prohibits some, but not all, routine service agreements.

The Ninth Circuit's decision below is inconsistent with text, context, and structure—all of which establish that the "transactions" targeted by Section 406(a) aren't *any and all* service agreements—they're arrangements that pose a *special* risk of plan underfunding. While purporting to be faithful to the statute's plain language, the Ninth Circuit's reading ultimately relies on a Department of Labor regulation that tries to fill the gaps created by an illogical and wooden construction of the statute.

Consistent with the best reading of the statute, this Court's decision in *Lockheed* confirms that Section 406(a) prohibits only those transactions that are "likely to injure the pension plan." 517 U.S. at 888 (citation omitted). Section 406(a) uses the word "transaction" only in a specific "sense"—to refer to "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 893. The transaction at issue in this case—which was an arm's-length agreement for concededly necessary plan services—is nothing of the sort.

There is no need to let the circuit split continue to fester. Congress adopted ERISA to establish a "uniform body of benefits law," *Rutledge*, 592 U.S. at 86 (citation omitted)—not a patchwork quilt. Under the

decision below, however, plan administrators are faced with the unenviable choice of forgoing necessary third-party service agreements altogether or inviting meritless and protracted litigation over the reasonableness of their service agreements. And given ERISA's liberal venue provision, the fallout won't be limited to plans administered in the Eighth and Ninth Circuits.

This case is an excellent vehicle for resolving the conflict. The meaning of Section 406(a) was squarely presented and decided below as a matter of law. No factual disputes or complications will prevent the Court from resolving the conflict and ensuring the uniform application of Section 406(a) throughout the nation.

I. THE NINTH CIRCUIT'S DECISION DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT.

The courts of appeals are sharply divided over whether routine, arm's-length transactions for plan services are prohibited transactions under Section 406(a)(1)(C). While the Third and Seventh Circuits have recognized that ERISA doesn't prohibit such transactions, the Eighth and Ninth Circuits have taken the opposite position—with the Ninth Circuit expressly disagreeing with the Third and Seventh. The Second Circuit has openly broken from both camps and staked out its own approach. Under that approach, the exemptions in Section 408 are incorporated into the definition of a prohibited transaction under Section 406 (rather than treated as affirmative defenses to a Section 406 violation) such that routine, arm's-length transactions can be, but aren't necessarily, prohibited transactions.

A. Two courts of appeals have held that routine, arm's-length agreements for plan services don't constitute prohibited transactions under Section 406(a)(1)(C).

The Third Circuit rejected any "per se rule that every furnishing of goods or services between a plan and party in interest is a prohibited transaction" under Section 406(a)(1). *Sweda*, 923 F.3d at 336. The court found it "improbable" that Section 406(a)(1) "would prohibit ubiquitous service transactions and require a fiduciary to plead reasonableness as an affirmative defense under § 1108 to avoid suit." *Ibid.* A blanket rule that routine service agreements amount to prohibited transactions would "miss the balance that Congress struck in ERISA" by "expos[ing] fiduciaries to liability for every transaction whereby services are rendered to the plan." *Id.* at 337.

The Third Circuit observed that this Court had construed Section 406(a)(1) to avoid such an illogical result in *Lockheed*. *Sweda*, 923 F.3d at 337. There, as the Third Circuit explained, this Court held that the prohibited transactions in Section 406 all "follow a common thread"—they're all "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Ibid.* (quoting *Lockheed*, 517 U.S. at 893) (second quote). Following this Court's lead in construing the prohibited-transaction provision in "the context of the statute as a whole," the Third Circuit concluded that a plaintiff must allege that a fiduciary entered a service agreement with an "intent to benefit a party in interest" to state a prohibited-transaction claim under Section 406(a)(1)(C). *Id.* at 338.

The Seventh Circuit, too, has rejected the argument that "routine payments by plan fiduciaries to third parties in exchange for plan services are prohibited" by Section 406(a)(1)(C). *Oshkosh*, 47 F.4th at 585. The Seventh Circuit expressly aligned itself with the Third Circuit's approach in *Sweda*, likewise looking to this Court's decision in *Lockheed*. *Id.* at 584.

The Seventh Circuit explained that reading ERISA as "prohibit[ing] payments by a plan to an entity providing services for the plan" would be "inconsistent with the purpose of the statute as a whole," because, as this Court has explained, Section 406(a)(1) is aimed at prohibiting transactions that "generally involve uses of plan assets that are potentially harmful to the plan." *Oshkosh*, 47 F.4th at 584-85 (quoting *Lockheed*, 517 U.S. at 893) (second quote). While "self-dealing" transactions are prohibited by Section 406(a)(1)(C), the Seventh Circuit concluded, "routine payments for plan services" aren't. *Id.* at 585.[2]

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[2] The Fourth, Fifth, and Tenth Circuits have held that a fiduciary's initial agreement with a service provider isn't a prohibited transaction because a service provider isn't a "party in interest" until *after* its initial agreement, but haven't otherwise addressed Section 406(a)(1)(C)'s application to routine service agreements. See *Peters* v. *Aetna Inc.*, 2 F.4th 199, 229, 239-40 (4th Cir. 2021); *D.L. Markham DDS, MSD, Inc. 401(K) Plan* v. *Variable Annuity Life Ins. Co.*, 88 F.4th 602, 609-12 (5th Cir. 2023), *petition for cert. filed*, No. 23-1025 (Mar. 13, 2024); *Ramos* v. *Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021). The Third Circuit reached the same conclusion about initial agreements before holding in *Sweda* that routine service agreements are never prohibited transactions. See *Danza* v. *Fidelity Mgmt. Tr. Co.*, 533 F. App'x 120, 125-26 (3d Cir. 2013).

B. By contrast, two other courts of appeals—the Eighth and the Ninth below—have held that plan fiduciaries engage in prohibited transactions by entering routine, arm's-length agreements for plan services.

The Eighth Circuit has held that allegations that plan fiduciaries caused the plan to enter into an arrangement with a service provider for plan services are sufficient to state a prohibited-transaction claim under Section 406(a)(1)(C). *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 601-02 (8th Cir. 2009). The court held that such allegations "shift[ed] the burden to [defendants] to show that 'no more than reasonable compensation [was] paid'" for those services under the statutory exemptions in Section 408(b)(2). *Id.* at 601 (citation omitted). The Eighth Circuit was unmoved by the argument that its interpretation "render[ed] virtually any business between a covered plan and a service provider a prima facie 'prohibited transaction,'" and that "ERISA fiduciaries [would] be forced to defend the reasonableness of every service provider transaction." *Ibid.*

The Ninth Circuit further entrenched the conflict by taking the same tack. It, too, held that routine, arm's-length agreements for plan services are "prohibited transaction[s] under § 406(a)(1)(C)." Pet. App. 12a. The Ninth Circuit expressly "disagree[d]" with the Third Circuit's decision in *Sweda*, faulting that court for "not follow[ing] the statutory text" and for giving inadequate consideration to the Department of Labor's Employee Benefits Security Administration's "reasoning for amending § 408(b)(2)'s implementing regulation." Pet. App. 23a (citing *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee*

Disclosure, 77 Fed. Reg. 5632 (Feb. 3, 2012)). The Ninth Circuit discounted the Third Circuit's observations about the harmful effects that would be caused by "requir[ing] a fiduciary to plead reasonableness as an affirmative defense." Pet. App. 24a (quoting *Sweda*, 923 F.3d at 336).

The Ninth Circuit also expressly "disagree[d] with" the Seventh Circuit's decision in *Oshkosh*. Pet. App. 27a.[3] The Ninth Circuit criticized the Seventh Circuit for failing to adhere to "a literal reading" of Section 406, asserting that "if the court had" considered the Employee Benefits Security Administration's regulatory preamble, "it likely would have concluded that the 'literal reading' was correct." Pet. App. 27a-28a.

C. One other court of appeals—the Second Circuit—has taken yet another approach, holding that the statutory exemptions in Section 408 are incorporated into Section 406, so that some, but not all routine, arm's-length agreements are prohibited transactions.

The Second Circuit disagreed with the approach taken by the Third and Seventh Circuits, but also rejected the Eighth Circuit's view that the Section 408

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[3] The Ninth Circuit suggested *Oshkosh* might be distinguishable because "it appear[ed] the 'transaction'" in *Oshkosh* "was simply payment for the services that rendered the service provider a 'party in interest' in the first place," which "was not the situation here." Pet. App. 26a-27a. But the Ninth Circuit acknowledged that "[t]he nature of the 'transaction' in *Oshkosh* [was] not entirely clear from the opinion," and held that "[t]o the extent the [Seventh Circuit] was considering a situation similar to the one presented here, we simply disagree with its analysis." *Ibid.*

"exemptions should be understood merely as affirmative defenses to the conduct proscribed in" Section 406(a). *Cunningham* v. *Cornell Univ.*, 86 F.4th 961, 973-75 (2d Cir. 2023), *petition for cert. filed*, No. 23-1007 (Mar. 11, 2024).

Instead, the Second Circuit concluded that "at least some of those exemptions—particularly, the exemption for reasonable and necessary transactions" in Section 408(b)(2)(A) "are incorporated into" Section 406's "prohibitions." *Cunningham*, 86 F.4th at 975. The Second Circuit explained that the words "[e]xcept as provided in section 1108 of this title" in Section 406(a) indicate that Section 408's exemptions "are incorporated directly in [Section 406(a)'s] definition of prohibited transactions." *Ibid*. So the Second Circuit held that to plead a violation of Section 406(a)(1)(C), "a complaint must plausibly allege that a fiduciary has 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*." *Ibid.*

The upshot is an acknowledged 2-2-1 circuit split over the meaning of Section 406. The Third and Seventh Circuits have taken the position that routine, arm's-length transactions can't qualify as prohibited transactions. The Eighth and Ninth Circuits have reached the opposite conclusion, with the Ninth Circuit expressly disagreeing with the Third and Seventh. And the Second Circuit has staked out its own position, openly breaking from both camps and holding that a plaintiff must plead and prove the inapplicability of any Section 408 exemption to establish a prohibited transaction under Section 406. This

Court's intervention is needed to resolve this entrenched conflict.

II. THE NINTH CIRCUIT'S DECISION MISREADS ERISA AND THIS COURT'S PRECEDENT.

The best reading of Section 406(a)(1)(C) is that it doesn't prohibit routine, arm's-length transactions for plan services. In holding that Section 406(a)(1)(C) categorically bars such transactions, the Ninth Circuit elevated literalism over textualism, drew the wrong inferences from statutory context, and departed from this Court's precedent—including its interpretation of Section 406(a)(1) in *Lockheed*.

A. Section 406(a)(1)(C) prohibits a plan fiduciary from "caus[ing] the plan to engage in a transaction" that it "knows or should know * * * constitutes a direct or indirect * * * furnishing of goods, services, or facilities between the plan and" "a person providing services to such a plan." 29 U.S.C. §§ 1002(14)(B), 1106(a)(1)(C). Reading this provision to impose a per se bar on every transaction between a plan fiduciary and a service provider, even those that occur at arm's length for routine plan services, may be "literally possible." *Samantar* v. *Yousuf*, 560 U.S. 305, 315 (2010). But when "interpreting * * * any statute," this Court "do[es] not aim for 'literal' interpretations." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 168 (2021); see also Antonin Scalia, *A Matter of Interpretation* 24 (1997) ("the good textualist is not a literalist"). This Court has eschewed "uncritical literalism" in interpreting other provisions of ERISA itself. *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). A more rigorous analysis is needed to ascertain the meaning of "'transaction' in the sense that Congress used that term in § 406(a)." *Lockheed*, 517 U.S. at 892-93.

Statutory text, context, and structure make clear that "transaction" in Section 406(a) refers to a commercial arrangement that presents a special risk of underfunding the plan. Several textual clues in Section 406(a) point to this meaning. Each category of prohibited conduct concerns plan assets or other items of monetary value—"property," 29 U.S.C. § 1106(a)(1)(A); "money or other extension of credit," *id.* § 1106(a)(1)(B); "goods, services, or facilities," *id.* § 1106(a)(1)(C); "assets of the plan," *id.* § 1106(a)(1)(D); and "employer security or employer real property," *id.* § 1106(a)(1)(E). Section 406(a)'s target is an arrangement that negatively affects plan finances.

The neighboring provision, Section 406(b), reinforces this reading. It prohibits a fiduciary from engaging in self-"deal[ing]" with respect to plan assets, "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan," and engaging in other similar self-interested conduct. 29 U.S.C. § 1106(b). Once again, the target is conduct that presents a special risk of harming the plan's finances.

Broader statutory context crystallizes the type of conduct that Congress was singling out in Section 406(a). Section 406(a)'s *prohibitions* on fiduciaries "supplemen[t] the fiduciary's general duty of loyalty to the plan's beneficiaries" embodied in Section 404, and should be read in harmony with that provision. *Harris Tr. & Sav. Bank*, 530 U.S. at 241-42; see *Sweda*, 923 F.3d at 327, 335. Because Section 404 charges fiduciaries with "providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A)(i), it makes sense that Section 406(a)

prohibits fiduciaries from endangering the plan's ability to pay out benefits. In addition, because Section 404 requires fiduciaries to "defray[] reasonable expenses of administering the plan," *id.* § 1104(a)(1)(A)(ii), Section 406(a) doesn't prohibit routine transactions related to administering the plan, see *Lockheed*, 517 U.S. at 894 n.6 ("[W]e would be reluctant to infer that ERISA bars conduct affirmatively sanctioned by other federal statutes.").

The "objectives of the ERISA statute" further confirm this interpretation of Section 406(a). *Travelers*, 514 U.S. at 656. ERISA's principal aim is "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits," and "Congress incorporated several key measures into ERISA" to fulfill this goal, including Section 406 and 404. *Lockheed*, 517 U.S. at 887-88. In addition, because "[n]othing in ERISA requires employers to establish employee benefit plans" in the first place, *id.* at 887, the statute is designed to "*induc[e]* employers to offer benefits by assuring a predictable set of liabilities," *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002) (emphasis added). While Congress sought to guard against plan underfunding, it didn't intend for plan fiduciaries to be exposed to costly litigation simply for engaging in routine, arm's-length transactions for plan services.

B. Section 408, which lists transactions that are exempted from Section 406's prohibitions, reinforces this understanding. The Ninth Circuit thought that Section 408 actually supported its per se reading of Section 406 by exempting "those 'service transactions' that keep plans running smoothly." Pet. App. 13a. But the textual gaps between Section 406 and 408 make that reading untenable.

Section 408(b)(2)(A) exempts from Section 406's prohibitions "[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). But that hardly covers the waterfront of innocuous transactions that would be barred under the Ninth Circuit's reading of Section 406. Section 408 does not, for example, exempt agreements for the "furnishing of goods" or "facilities" other than "office space"—even though such agreements would be prohibited under the Ninth Circuit's per se interpretation of Section 406. Construing ERISA to categorically prohibit routine and beneficial transactions—without the possibility of an exemption—would do violence to Congress's carefully calibrated design.

In an effort to close the gap, the Department of Labor essentially rewrote the exemption—adopting a regulation that interprets the term "services" in Section 408(b)(2)(A) to include furnishing "goods" under certain circumstances, 29 C.F.R. § 2550.408b-2(b)—even though Section 406(a)(1)(C) itself carefully distinguishes between those terms. The Department's need to distort the plain meaning of the exemptions in Section 408(b)(2)(A) to make sense of the reading subsequently embraced by the Ninth Circuit only underscores the serious flaws in that reading.

C. The Ninth Circuit's interpretation also fails to account for Section 404, which imposes a fiduciary duty of prudence on plan administrators whenever they "provid[e] benefits to participants and their beneficiaries" and "defray[ ] reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A)(i)-(ii).

So Section 404 already imposes a duty of reasonableness with respect to every service contract that plans enter. See*, e.g.*, *Hughes* v. *Northwestern Univ.*, 63 F.4th 615, 630 (7th Cir. 2023) ("To plead a breach of the duty of prudence under ERISA, a plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness.").

The Ninth Circuit's interpretation of Section 406 as categorically barring every transaction between a plan fiduciary and a service provider—subject only to Section 408's reasonable-compensation exemption—would render those provisions wholly duplicative of Section 404. Having subjected every transaction to a reasonableness requirement in Section 404, Congress would have had no reason to require every transaction to satisfy the same requirement in Section 408. The better reading of the statute is that Sections 406(a) and 408 don't apply to every service transaction, but only to those that present a *special* risk to plans, and so require a unique statutory safe harbor.

The Ninth Circuit's reading also subverts Section 404's pleading standard. To adequately allege that a fiduciary violated Section 404 by entering an imprudent service agreement, a plaintiff must plead and prove that the costs of those service agreements were unreasonably high. See *Smith* v. *CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022). Under the Ninth Circuit's decision, however, by relabeling a Section 404 duty-of-prudence claim as a Section 406 prohibited-transaction claim, a plaintiff may be able to shift the burden on the reasonableness issue to the fiduciary and require it to prove the applicability of a Section 408 exemption as an affirmative defense. See *Braden*, 588 F.3d at 601 & n.10 (holding that Section 408 exemptions are affirmative defenses that need not

be addressed for a complaint to survive a motion to dismiss). There is no reason to think Congress intended to give plaintiffs that dealer's choice.

D. In addition to flouting ERISA's text, context, and structure, the Ninth Circuit's decision departs from this Court's precedents. As this Court explained in *Lockheed*, the word "transaction," as used in Section 406(a), refers to arrangements that present a special risk of plan underfunding. 517 U.S. at 887-88, 893. That holding—which built on this Court's prior explanations of ERISA's structure and purpose—can't be reconciled with the Ninth Circuit's per se rule.

In *Keystone Consolidated Industries*, this Court explained the origins of Section 406(a)(1). 508 U.S. at 160. "Before ERISA's enactment in 1974," common-law principles didn't sufficiently root out "abuses such as the [plan] sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid"—in other words, abuses that threatened plan funding. *Ibid.* Section 406(a)(1) was "Congress' response to these abuses," and "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan," by "jeopardiz[ing] the ability of the plan to pay promised benefits." *Ibid.*

This Court expanded on that reading in *Lockheed*. The Court reiterated that "§ 406" prohibits transactions that are "likely to injure the pension plan." 517 U.S. at 888 (quoting *Keystone Consol. Indus.*, 508 U.S. at 160) (second quote). After analyzing statutory context and objectives, the Court held that a transaction comes "within the meaning of § 406(a)(1)" only where it has the "characteristic" of "present[ing] a special

risk of plan underfunding." *Id.* at 893, 895. That conclusion is fatal to the Ninth Circuit's per se reading of Section 406.

In *Lockheed*, the plan administrator paid out plan benefits ("use * * * of assets of the plan") to employees in exchange for their release of employment-related claims, which was a benefit to the employer ("for the benefit of a party in interest"). *Lockheed*, 517 U.S. at 888, 892; see 29 U.S.C. § 1002(14)(C) ("party in interest" includes "employer"). Yet when "read[ing]" Section 406(a)(1)(D) "in the context of" the "surrounding" "prohibited transaction provisions"—including Section 406(a)(1)(C)—it "bec[a]me[ ] clear" to the Court that this arrangement was "not a 'transaction' within the meaning of § 406(a)(1)." 517 U.S. at 892-93, 895.

This Court explained that "Congress used th[e] term" "transaction" in Section 406(a) only in a specific "sense"—namely, to refer to "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." 517 U.S. at 893. Transactions prohibited by Section 406(a) share a "common" feature—"they generally involve uses of plan assets that are potentially harmful to the plan" because they "could 'jeopardize the ability of the plan to pay promised benefits.'" *Ibid.* (quoting *Keystone Consol. Indus., Inc.*, 508 U.S. at 160). The payment of benefits in *Lockheed*—which was neither a "sham transaction" nor a "kickback scheme"—couldn't "reasonably be said to share that characteristic" of "present[ing] a special risk of plan underfunding," so it wasn't prohibited by Section 406(a). *Id.* at 893, 895 n.8.

Construing Section 406(a) as a whole, this Court held that transactions that don't "share th[e] characteristic" of being "likely to injur[e] the pension plan" by "present[ing] a special risk of plan underfunding" aren't "'transaction[s]' within the meaning of Section 406(a)(1)." 517 U.S. at 893, 895 (citation omitted). The Ninth Circuit's decision is irreconcilable with that holding. Under *Lockheed*, AT&T's amendment to its service agreement with Fidelity cannot be a prohibited transaction. The amendment was made at arm's length. AT&T C.A. Br. 43, 51-54. There's no evidence that any party intended to advantage Fidelity at the expense of plan participants—to the contrary, the transaction was designed to benefit plan participants by giving them access to additional investment services. Pet. App. 6a-7a. This is precisely the type of service agreement that doesn't present a special risk of plan underfunding under *Lockheed* and therefore falls outside of Section 406(a)(1)(C).

E. The Second Circuit's alternative approach to Section 406(a)—while not the best reading of the statute—still adheres more closely to ERISA than the Ninth Circuit's decision below. Under the Second Circuit's interpretation, "the exemption for reasonable and necessary transactions codified by" Section 408(b)(2)(A) is "incorporated into" the prohibitions of Section 406. *Cunningham*, 86 F.4th at 975. Because "the exemptions are incorporated directly into the text of the relevant provision," they can be understood as "ingredients" of the prohibitions rather than as "affirmative defenses." *Id.* at 975-76 (citation omitted).

This distinction would at minimum place the burden on the plaintiff "in the first instance to allege—

and at the summary judgment stage, to produce evidence of—facts calling into question the fiduciary's loyalty by challenging the necessity of the transaction or the reasonableness of the compensation provided." *Cunningham*, 86 F.4th at 977-78. Plaintiffs will (rightly) have a difficult time doing that in cases, like this one, involving "routine payments made to service providers." *Id.* at 977. The Second Circuit's reading aligns with the "objectives of the ERISA statute," *Travelers*, 514 U.S. at 656, by not allowing every lawsuit over a routine, arm's-length service agreement to automatically survive the pleading stage. And had the Ninth Circuit applied the Second Circuit's test, AT&T would have been entitled to summary judgment because respondents presented no evidence that the compensation AT&T paid for Fidelity's services was unreasonable. See *Cunningham*, 86 F.4th at 978.[4]

III. THE COURT SHOULD RESOLVE THIS IMPORTANT, RECURRING QUESTION OF ERISA LAW NOW.

The question presented is indisputably important and recurring. The acknowledged conflict among the courts of appeals undermines the "uniform body of benefits law" that Congress sought to establish in ERISA, *Rutledge*, 592 U.S. at 86 (citation omitted),

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[4] The plan participants in *Cunningham* recently filed a petition for a writ of certiorari contending that the Second Circuit should have followed the literalist approach of the Eighth and Ninth Circuits. See Pet. for Cert. i, 19, *Cunningham* v. *Cornell Univ.*, No. 23-1007 (U.S. Mar. 13, 2024). Given the substantial overlap between the issues presented here and in *Cunningham*, this Court could grant both petitions and consolidate the arguments so that all views about the proper interpretation of Section 406(a) are before it.

and the reading of Section 406(a) adopted by the Eighth and Ninth Circuits threatens harm to plans and participants alike. This case presents an excellent vehicle for the Court to resolve that conflict and restore uniformity to this area of ERISA law.

A. The question whether routine, arm's-length transactions for necessary plan services are "prohibited transactions" under Section 406(a) is plainly recurring. In the last five years alone, the Second, Third, Seventh, and Ninth Circuits have all weighed in—reaching conflicting results on materially indistinguishable facts. Further percolation isn't needed or desirable given the serious practical consequences of the conflict for both plans and participants.

Indeed, transactions like the ones the Ninth Circuit condemned here are both "ubiquitous" and "essential" to plan operation. *Sweda*, 923 F.3d at 336; *Oshkosh*, 47 F.4th at 584-85. That makes the decision below "a watershed moment," "opening up for liability almost all essential service contracts" with plans. Austin R. Ramsey & Jacklyn Wille, *9th Cir. AT&T Ruling 'Watershed Moment' for Benefit Contractors*, Bloomberg Law (Aug. 8, 2023), bit.ly/3HTtTNY (citation omitted).

By treating *all* arm's-length contracts for necessary services as "prohibited transactions" as a "threshold" matter, the Ninth Circuit's decision creates a pleading standard under which even baseless claims predicated on reasonable service agreements can survive motions to dismiss. Pet. App. 11a-12a; see *Braden*, 588 F.3d at 601 & n.10. As a result, the decision below heralds "a new wave of litigation that targets plans" for obtaining the routine services they

need "to enroll participants, track records, and distribute information." Ramsey & Wille, *supra*.

The consequences of that approach are far-reaching indeed. The Ninth Circuit's decision will expose "retirement plan fiduciaries to legal attacks they have not previously experienced" merely for procuring necessary services. *Ninth Circuit Decision in AT&T Case May Expose Retirement Plan Fiduciaries to New Attacks*, Lexology (Nov. 1, 2023), bit.ly/3TzgbGI.

Plan administrators seeking to avoid the "new wave of litigation" triggered by the Ninth Circuit's decision, Ramsey & Wille, *supra*, face a profound dilemma. They can either attempt to perform all necessary plan services in-house (forgoing the comparative advantage offered by third-party service providers), or forgo offering those services altogether. The inevitable result will be "higher costs for plan administration" and "lower returns for employees." *Oshkosh*, 47 F.4th at 586.

The ultimate effect of the Ninth Circuit's decision is to drain money from employees' retirement accounts. "Plan administration fees" are "deducted" from those accounts—either as "direct charge[s] or indirectly as a reduction of the account's investment returns." *Retirement Topics—Fees*, IRS, bit.ly/3TvJKZw (last updated Aug. 29, 2023). Handicapping plans' ability to contract with service providers will either increase expenses (by impeding the most efficient service arrangements) or reduce returns (by blocking beneficial services altogether). Either way, plan participants suffer.

This case puts what's at stake in stark relief. Plan participants took full advantage of the opportunity offered by AT&T's engagement of third-party service providers by choosing to invest billions of dollars in mutual funds—enhancing their financial wellbeing and helping to safeguard their retirements. Pet. App. 7a. Depriving plan participants of that opportunity benefits no one.

Nor is there any reason to expect that the fallout will be confined to plans administered in the Eighth and Ninth Circuits. ERISA's "liberal venue provision" provides that claims "may be brought * * * where the plan is administered, where the breach took place, or where a defendant resides or may be found." *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) (citation omitted) (first quote); 29 U.S.C. § 1132(e)(2) (second quote). Many courts have interpreted "where the breach took place" to mean "where the beneficiary was supposed to receive his benefits, i.e., his residence." *Roshinsky* v. *Reynolds*, 2008 WL 2827528, at *3 (W.D.N.Y. July 21, 2008) (collecting cases). At the same time, ERISA's venue provision is designed to give the plaintiff's choice of forum "greater weight than would typically be the case," requiring a "compelling showing" to transfer venue. *Plumbing Servs.*, 791 F.3d at 444 (citation omitted). So plaintiff classes challenging plans administered anywhere in the country will often have a powerful incentive and the practical ability to channel their claims into the Eighth and Ninth Circuits. That outcome flouts this Court's traditional "discouragement of forum-shopping." *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

The “conflicting directives” that plan administrators face as a result of the per se approach adopted below also clash with Congress’s goals in enacting ERISA. *Rutledge*, 592 U.S. at 86 (citation omitted). Congress sought to “ensur[e] that plans do not have to tailor substantive benefits to the particularities of multiple jurisdictions,” given the “administrative and financial burden of complying” with opposing regimes. *Ibid.* (citation omitted). Yet the decision below imposes precisely those burdens. Only this Court’s intervention can restore the uniformity ERISA demands.

B. This case presents an excellent vehicle to resolve the circuit split, restore uniformity, and reinforce the proper application of Section 406.

The question presented was fully developed and passed on below. The Ninth Circuit unequivocally held as a matter of law that even routine, arm’s-length transactions for necessary services constitute “prohibited transactions” under Section 406. Pet. App. 18a. This case involves no factual disputes or complications that could impede this Court’s review. The services involved were concededly necessary to run the plan. Pet. App. 29a. The “purely legal question” at issue here is “appropriate” for this Court’s “immediate resolution.” *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALLYSON N. HO
Counsel of Record
ASHLEY E. JOHNSON
BRADLEY G. HUBBARD
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

ROBERT A. BATISTA
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

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