No. 23-1094

IN THE
Supreme Court of the United States

AT&T SERVICES, INC., *ET AL.*,
Petitioners,

v.

ROBERT J. BUGIELSKI, *ET AL.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 406(a)(1) of ERISA bars fiduciaries from knowingly causing a plan to engage in certain transactions, including the "direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1). Section 408 provides various exemptions to Section 406, including an exemption for "necessary" services for which "no more than reasonable compensation" is paid. 29 U.S.C. § 1108(b)(2)(A).

The question presented is whether Section 406(a)(1) includes an additional carveout for what petitioners call "routine, arm's-length agreement[s] for plan services," Pet. i.

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INTRODUCTION

Section 406(a)(1) of the Employee Retirement Income Security Act (ERISA) covers a broad range of transactions between fiduciaries and parties in interest, including, as relevant here, the "furnishing of services." 29 U.S.C. § 1106(a)(1)(C). But though Section 406 is entitled "Prohibited transactions," none of the listed transactions are in fact prohibited just so long as they fall within the exceptions laid out in Section 408. 29 U.S.C. § 1106(a).

Section 408, in turn, lists dozens of exemptions to Section 406 and empowers the Department of Labor to create more. 29 U.S.C. § 1108. One of those statutory carveouts, Section 408(b)(2), exempts any transaction for "services necessary for the establishment or operation of the plan" just so long as fiduciaries pay "no more than reasonable compensation." 29 U.S.C. § 1108(b)(2).

Petitioners ask this Court to grant certiorari and introduce an additional carveout for so-called "routine, arm's-length transactions." Pet. 17. But Congress *already* carved out "necessary" services where "reasonable compensation is paid." 29 U.S.C. § 1108(b)(2). Petitioners don't tell us what work—if any—their atextual carveout would do that the carveout in the text of the statute doesn't. And the phrase "arm's length" does not appear once in Section 406—a conspicuous omission, given that Congress used that phrase elsewhere in ERISA.

Unsurprisingly, no circuit has adopted petitioners' proposed carveout. Indeed, no other circuit has even weighed in on whether Section 406(a)(1) prohibits "routine, arm's length transactions." And for forty years, courts across the country have enforced the plain text of Sections 406 and 408 without the parade of horribles petitioners invoke. This Court should accordingly deny the petition.

STATEMENT OF THE CASE

A. Legal background

ERISA seeks to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). To that end, this "comprehensive and reticulated" statute sets out a "number of detailed duties and responsibilities" for plan fiduciaries, including "the proper management, administration, and investment of [plan] assets" and "the disclosure of specified information." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-52 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)).

The most "general duty" comes from Section 404, which lays out a duty of prudence for fiduciaries. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 (2000); 29 U.S.C. § 1104(a). Fiduciaries must act "solely in the interest of" plan participants for the "exclusive purpose of providing benefits . . . and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1).

Section 406 then supplements those general duties by listing categories of transactions in which fiduciaries are prohibited from engaging. As relevant here, Section 406(a)(1)(C) prohibits transactions for the "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). A "party in interest" is defined by

ERISA to include nine categories of entities. *Id.* § 1002(14). As relevant here, any "person providing services" to a plan is a party in interest. *Id.* § 1002(14)(B). Other parties in interest include relatives of plan fiduciaries and employees of plan sponsors. *Id.* § 1002(14)(D), (F).

Fiduciaries are prohibited from engaging in transactions listed in Section 406(a) unless they comply with one of the exemptions "provided in [Section 408]." 29 U.S.C. § 1106(a). Section 408, in turn, outlines two kinds of exemptions. First, Section 408(a) delegates authority to the Department of Labor to issue administrative exemptions. Second, Section 408(b) creates twenty-one statutory exemptions for a range of transactions commonly engaged in by retirement plans.

One of those statutory exemptions, Section 408(b)(2), carves out transactions for "services necessary" for administering the plan (such as legal and accounting services) if "no more than reasonable compensation is paid." 29 U.S.C. § 1108(b)(2). The Employee Benefit Security Administration of the Department of Labor—the agency primarily responsible for regulating retirement plans—defines "necessary" services under Section 408(b)(2) as all those "appropriate and helpful to the plan obtaining the service in carrying out the purpose for which the plan is established and maintained." 29 C.F.R. § 2550.408b-2(b); Pet. App. 13a. The upshot is that if a fiduciary ensures that the plan pays a reasonable amount for a transaction that is useful to the operation of the plan, the transaction is allowed, even if it falls within Section 406.

Prior to the enactment of Sections 406 and 408, plan fiduciaries were governed by a common-law regime that prohibited transactions when they were not conducted at "arm's length." S. Rep. No. 93-383, at 32 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4889, 4917. The common law arm's-length standard had proven unworkable because it demanded unpredictable, fact-intensive inquiries and thus was of "sporadic and uncertain effectiveness." *Id.*; *accord* Staff of Joint Comm. on Internal Revenue Tax'n, 93d Cong., Tax Treatment of Pension Plans, Part One: Participation, Vesting, Funding, Portability, Insurance, Fiduciary Standards, Reporting, and Disclosure, and Enforcement 48 (Comm. Print 1973) (acknowledging enforcement difficulties); *Reich v. Compton*, 57 F.3d 270, 275 (3d Cir. 1995) (Alito, J.) (same). ERISA thus replaced the arm's-length standard with the more detailed rules of Sections 406 and 408. S. Rep. No. 93-383, at 32 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4889, 4979; *Reich*, 57 F.3d at 275.

B. Factual background

Petitioners AT&T Services Inc. and AT&T Benefit Plan Investment Committee (collectively, "AT&T") administer a retirement plan for their employees. AT&T is the plan fiduciary—the entity charged with running the plan for the benefit of participants.

Respondents Robert J. Bugielski and Chad S. Simecek spent decades working for AT&T—Mr. Bugielski from 1989 until 2016 and Mr. Simecek from 1997 until 2017—and are current participants in the Plan. *See* Third Am. Comp. ¶¶ 29-30, ECF No. 81. They represent a class of AT&T employees who contributed to the Plan. Participants' retirement funds are reduced by the fees that they pay for Plan services. *Id.* ¶¶ 5-7.

In 2005, AT&T contracted with Fidelity, a service provider, to become the Plan's recordkeeper. Pet. App. 6a. Fidelity became a "person providing services" to the plan and thus a "party in interest" within the meaning of ERISA. *See* 29 U.S.C. § 1002(14)(B). Fidelity performed administrative functions such as enrolling new participants and processing participants' contributions. Pet. App. 6a. Fidelity charged Plan participants a flat fee for these services. *Id.*

Several years after AT&T first contracted with Fidelity, the parties amended their contract in two ways. Collectively, those amendments meant that Fidelity was raking in millions from Plan participants for doing very little.

1. Some time prior to 2012, AT&T amended its contract with Fidelity to make BrokerageLink's services available to the Plan.[1] BrokerageLink is Fidelity's self-directed brokerage account platform—an additional service Fidelity offers that allows participants to invest in mutual funds and other securities that would not otherwise be accessible through the Plan. Pet. App. 6a-7a; Third Am. Comp. ¶ 51, ECF No. 81. When participants bought mutual fund shares through the BrokerageLink, they paid transaction fees to Fidelity. Pet. App. 6a. In addition to the transaction fees, Fidelity also collected a

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[1] Though the Ninth Circuit suggested that AT&T amended its contract with Fidelity to include BrokerageLink in 2012, Pet. App. 6a, AT&T's Form 5500s make clear that BrokerageLink was in the plan far earlier, *see* Resp. C.A. Br. 16.

percentage of the amount that participants invested in the funds. *Id.* 6-7a.

2. In 2014, AT&T again amended its contract with Fidelity, this time to enable Financial Engines Advisors, L.L.C., an investment advisory platform, to offer its services to Plan participants. Pet. App. 7a. For example, Financial Engines could take over allocating participants' monies among various Plan alternatives. *Id.* 43a. The amendment authorized Fidelity to provide Financial Engines access to the Plan participants' accounts. *See id.* 7a. This access was the only service Fidelity provided in connection with Financial Engines. When participants used Financial Engines' investment advisory services, Fidelity received a portion of the fees that Financial Engines collected from Plan participants. *Id.*

The consequence of these amendments was more money to Fidelity in return for, in some cases, virtually no additional work. In 2016, for example, Fidelity received approximately $2 million from the agreement with Financial Engines just for providing a secure communications link to participant accounts. Third Am. Comp. ¶ 92, ECF No. 81. Fidelity also received more than $1.5 million through revenue sharing from mutual funds acquired through BrokerageLink. Second Am. Comp. ¶ 93, ECF No. 68. This was on top of the roughly $7.25 million that Fidelity was already collecting from Plan participants for recordkeeping services. C.A. E.R. 256.

For its part, AT&T agreed to these amendments with little consideration of the compensation Fidelity would receive. For example, at the time AT&T approved the retention of Financial Engines, Fidelity was projected to receive approximately half of the total fees that Financial Engines charged. Third Am. Comp. ¶ 89, ECF No. 81; Pet. App. 7a. But AT&T approved Fidelity's fee-sharing arrangement in an email sent just five hours after receiving the financial analysis: "Thanks Gary. I am good with this." Resp. Br. 19.

Higher compensation for Fidelity meant less money for Plan participants in retirement. For context, even a 1% increase in fees can result in 28% smaller retirement benefits over thirty-five years. Third Am. Comp. ¶ 47, ECF No. 81. Here, Plan participants were paying Fidelity millions more for recordkeeping on top of the millions that AT&T was already forking over.

AT&T did not disclose to the Department of Labor the fees Fidelity was collecting from Financial Engines and BrokerageLink. *See* Third Am. Comp. ¶ 78, ECF No. 81. Indeed, respondents had no knowledge of Fidelity's total compensation from BrokerageLink until 2018, well into this litigation. *Id.* ¶ 106.

C. Procedural history

1. In November 2017, respondents, seeking to represent a class of Plan participants, filed suit. First. Comp. ¶ 1, ECF No. 1; Pet. App. 47a-48a. Respondents have made two claims relevant here.

First, they produced evidence that petitioners engaged in prohibited transactions under Section 406(a)(1)(C) and did not satisfy the exemption under Section 408(b)(2). Specifically, respondents argued that the amendments to the contract with Fidelity constituted "furnishing of . . . services . . . between the plan and a party in interest" under Section 406(a)(1)(C). Third Am. Comp. ¶ 143, ECF No. 81. Respondents also argued that petitioners did not satisfy the Section 408(b)(2) exemption to Section 406 because they paid more than "reasonable compensation" to Fidelity. *See* Pet. App. 8a-9a; 29 U.S.C. § 1108(b)(2). Respondents produced evidence that petitioners failed to even consider whether the compensation Fidelity earned from BrokerageLink and Financial Engines was "reasonable." Third Am. Comp. ¶ 143, ECF No. 81; Pet. App. 8a-9a.

Second, respondents claimed that amending the Fidelity contract without evaluating Fidelity's additional compensation constituted a breach of the fiduciary duty of prudence under Section 404(a). Third Am. Comp. ¶¶ 129-34, ECF No. 81.

2. The district court granted summary judgment to petitioners. Pet. App. 47a. On the Section 406 claim, it concluded that even if the transactions at issue were prohibited by Section 406, petitioners satisfied the Section 408(b)(2) exemption because the compensation they paid Fidelity was "reasonable." *Id.* 70a & n.5, 72a. In making this determination, the district court considered only the recordkeeping expenses that the Plan paid directly to Fidelity, not the additional fees Fidelity earned from BrokerageLink and Financial Engines. *Id.* 69a-70a. The court insisted that AT&T had no obligation to consider Fidelity's indirect compensation from third parties. *Id.* 70a. The district court also granted summary judgment on respondents' Section 404 breach-of-fiduciary-duty claim. *Id.* 67a.

3. On appeal, respondents challenged both holdings. As to the Section 406 claim, in addition to defending the district court's decision, petitioners argued that the service agreements at issue should not fall under Section 406 in the first instance because they were "arm's length" transactions. Petr. C.A. Br.

39. Though petitioners did not define "arm's length," they suggested that it refers to those transactions that do not "present a special risk of plan underfunding." *Id.* 42. They derived this language not from the text of Section 406, but from a passage in this Court's opinion in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), characterizing the provision's goals. *See* Petr. C.A. Br. 39.

The Ninth Circuit reversed and remanded, rejecting petitioners' proposed arm's-length carveout. Writing for a unanimous panel, Judge Bade concluded that "[u]nder the plain and unambiguous" text of Section 406(a)(1)(C), the amendment constituted a prohibited transaction. Pet. App. 12a. Observing that Section 406(a)(1)(C) contained "no language limiting its application to non-arm's-length transactions," the court concluded that such an interpretation of the statute would "undermine the scheme Congress enacted." *Id.* 12a-13a. The court saw "no reason to fashion a judge-made exemption when Congress has already provided a statutory exemption" for necessary services in Section 408(b)(2). *Id.* 13a.

Regarding the Section 408(b)(2) exception, the Ninth Circuit remanded for the district court to evaluate "in the first instance" whether Fidelity's compensation was reasonable given its fees from all sources related to the AT&T plan, including its revenue-sharing fees from Financial Engines and BrokerageLink. Pet. App. 34a-35a.

Finally, the Ninth Circuit reversed the grant of summary judgment on respondents' Section 404 duty-of-prudence claim "for similar reasons"—namely, that there was a dispute of material fact over whether, in amending the contract, AT&T "considered the compensation" Fidelity would receive from Financial Engines and BrokerageLink. Pet. App. 35a, 37a-38a.

4. The Ninth Circuit denied petitioners' request for rehearing en banc. Pet. App. 84a. Petitioners then filed a petition for a writ of certiorari, challenging the viability only of respondents' Section 406(a)(1) claim. Pet. i.

REASONS FOR DENYING THE WRIT

I. This case does not implicate a circuit split.

Petitioners ask this Court to resolve whether Section 406(a)(1)(C) prohibits "routine, arm's-length agreement[s] for plan services." Pet. i. But no circuit other than the Ninth has even addressed petitioners' question. And petitioners' case would have come out differently in exactly zero circuits. The petition instead lumps together a hodgepodge of cases addressing different questions under different portions of ERISA.

1. The Third Circuit's opinion in *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), confronts a different issue than the question presented: whether Section 406(a)(1) contains an intent element, not whether Section 406(a)(1) carves out routine, arm's-length transactions. Regardless, petitioners would lose under the Third Circuit's rule.

a. *Sweda* never held that "routine, arm's-length transactions" are carved out of Section 406(a)(1). Rather, *Sweda* added an "intent to benefit a party in interest" element onto Section 406(a)(1). 923 F.3d at 338.

Petitioners nonetheless claim that the Third Circuit thereby "held that routine, arm's-length agreements for plan services aren't prohibited transactions." Pet. 9-10, 12. But that doesn't follow. Whether a transaction was entered with "intent to benefit a party in interest" doesn't answer whether it was "routine" and "arm's length" under petitioners' rule.

Recall petitioners' definition of "routine, arm's-length transactions." They variously suggest that such transactions could be those "[un]likely to injur[e] the pension plan" or that don't "present[] a special risk of plan underfunding." Pet. 8 (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996)), 10 (quoting Pet. App. 17a). Transactions with no "intent to benefit a party in interest" under *Sweda* may nonetheless "present[] a special risk of underfunding" under petitioners' proposed rule. Imagine a fiduciary who repeatedly signs over Plan participants' life savings to a fly-by-night Bitcoin operation because he's a crypto true believer, not because he had any "intent to benefit" the Bitcoin platform. Conversely, transactions entered with an "intent to benefit a party in interest" may present no "risk of underfunding": Perhaps a plan fiduciary routinely channels business to his best friend over the competition—intending to pad the friend's pockets—but does so at market rates that present no risk of underfunding the plan.

The Third Circuit's holding on intent thus does not answer the question presented in this case. *See* Pet. App. 23a-24a.

b. To be sure, the Ninth Circuit disagreed with the Third Circuit's intent-to-benefit standard. Pet. App. 23a. But any disagreement on that score doesn't matter for this case, because petitioners would lose under the Third Circuit's test. The factors courts in the

Third Circuit consider in determining "intent to benefit a party in interest" under *Sweda* are: a pre-existing relationship, unreasonable compensation, and a lack of due diligence. *See, e.g.*, *Ahrendsen v. Prudent Fiduciary Servs., LLC*, 2022 WL 294394, at *5-6 (E.D. Pa. Feb. 1, 2022); *Berkelhammer v. Automatic Data Processing, Inc.*, 2022 WL 3593975, at *11, *14-15 (D.N.J. Aug. 23, 2022).

All of those factors were present here. AT&T had a longstanding relationship with Fidelity. Fidelity took millions of dollars from Financial Engines and BrokerageLink even though Fidelity did little more than provide access to Plan participants' accounts. *See* Resp. Br. 15-16. And the sum total of AT&T's due diligence into the Fidelity-Financial Engines transaction was an email—sent five hours after receiving word that Fidelity would be collecting 57% of Financial Engines' fees simply for giving Financial Engines access to Fidelity's system—saying: "Thanks Gary. I am good with this." *Id.* at 19.

If that were not enough, evidence that "a plan fiduciary was obscuring the relationship between itself and a party in interest" can, even standing alone, be "sufficient to establish the requisite intent" under *Sweda*. *Cho v. Prudential Ins. Co. Am.*, 2021 WL 4438186, at *12 (D.N.J. Sept. 27, 2021). In this case, the Ninth Circuit held there was credible evidence that AT&T did just that by omitting from its Department of Labor disclosure forms fees that Financial Engines and BrokerageLink mutual funds paid to Fidelity. Pet. App. 43a.

In short, petitioners try to repackage *Sweda* into a case about "routine, arm's-length transactions" to disguise that they would lose under the Third Circuit's actual test.

2. Petitioners also insist that "the Ninth Circuit expressly disagree[d] with the . . . Seventh." Pet. 11, 16. But the Seventh Circuit would not have resolved petitioners' case differently, either. *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022), held only that the *initial* agreement between a plan and a service provider—the relationship-forming contract that "render[s] the service provider a 'party in interest' in the first place"—is exempt from Section 406(a)(1). Pet. App. 26a (quoting *Oshkosh*, 47 F.4th at 583-85). The Seventh Circuit reasoned that it would be "circular" to "prohibit the very transactions that cause a person to obtain the status of a party in interest." *Oshkosh*, 47 F.4th at 576, 584 (quoting *Sellers v. Anthem Life Ins. Co.*, 316 F. Supp. 3d 25, 34 (D.D.C. 2018)).

As the Ninth Circuit explained, the Seventh Circuit's reasoning is "inapposite" when it comes to a case like this one involving contractual amendments years into a party's relationship. Pet. App. 27a. Amending AT&T's contract with Fidelity didn't "cause" Fidelity to "obtain the status of a party in interest," *see Oshkosh*, 47 F.4th at 584; Fidelity had already been a party in interest for the many years it was providing services to AT&T.

To be sure, the Ninth Circuit said that it *would have* disagreed with the Seventh Circuit had the Seventh Circuit ruled against a plaintiff in a "situation similar to the one presented here"—that is, had the Seventh Circuit confronted an amendment to an existing contract. *See* Pet. 15 n.3 (quoting Pet. App. 27a); Pet. App. 27a-28a. But the Seventh Circuit did not, in fact, confront an amendment, so there was no such disagreement. *Compare* Br. in Support of Def. Mot. to Dismiss at 23, *Albert v. Oshkosh Corp.*, 2021 WL 3932029 (E.D. Wis. Sept. 2, 2020) (No. 20-cv-00901) (ECF No. 26) (acknowledging claim in *Oshkosh* was over initial agreement), *with* Pet. App. 12a (noting claim was over amendments).

A holding about initial agreements says nothing about how the Seventh Circuit would rule on amendments. Every circuit that has agreed with the Seventh that initial agreements are exempt from Section 406(a)(1) has nonetheless found that Section 406(a)(1) applies to "entities that have already begun providing services to the plan at issue." *Markham v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 609 (5th Cir. 2023); *see also Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021); *Peters v. Aetna Inc.*, 2 F.4th 199, 239-40 (4th Cir. 2021). Indeed, a recent case recognized that *Oshkosh* simply does not extend to "transactions with parties with whom [fiduciaries] have pre-existing relationships." *Goodman v. Columbus Reg'l Healthcare Sys., Inc.*, 2023 WL 4935004, at *2 (M.D. Ga. Aug. 2, 2023) (quoting *Ramos*, 1 F.4th at 787).

Oshkosh does contain dicta suggesting that "routine payments by plan fiduciaries to third parties in exchange for plan services" should not be prohibited, without saying whether that prohibition should be limited to initial transactions. Pet. 13 (quoting *Oshkosh*, 47 F.4th at 585). But *Oshkosh*'s holding about initial agreements resolved the case. In the Seventh Circuit's words, the prohibited transaction claims "failed because they were based on circular reasoning"; idle speculation about what other kinds of claims might fail (and why) was just that—idle speculation. *Oshkosh*, 47 F.4th at 576.

3. Finally, petitioners' case would not come out differently under the Second Circuit's opinion in *Cunningham v. Cornell University,* 86 F.4th 961 (2d Cir. 2023), or the Eighth Circuit's opinion in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). Those circuits addressed which party has the burden of pleading one of the *written* exemptions under Section 408. The Second Circuit said that burden falls on plaintiffs, while the Eighth on defendants. *Cunningham*, 86 F.4th at 975; *Braden*, 588 F.3d at 601. The decision below, by contrast, did not address the Section 408 pleading burden at all, as the Second Circuit acknowledged in *Cunningham* itself. 86 F.4th at 974.

a. *Cunningham* examined Section 406(a)'s opening clause, "Except as provided in section [408] of this title," and concluded that clause placed the burden of pleading an exemption under Section 408 on plaintiffs. The decision below in this case had nothing to say about that burden; indeed, it didn't even mention the Section 406(a) opening clause because it was not relevant. *Cunningham* acknowledged as much. *Cunningham*, 86 F.4th at 974 (citing Pet. App. 24a). The *Cunningham* plaintiffs have now petitioned this Court, and even their petition, which had every incentive to make their purported split seem deeper, recognized that the Ninth Circuit "did not address" the

Section 408 pleading issue. Pet. at 15, *Cunningham*, *supra* (No. 23-1007).[2]

Petitioners' claim that *Cunningham* "openly broke[]" with the Ninth Circuit is false. Pet. 11, 16. The Second Circuit never addressed whether routine, arm's-length transactions were covered by Section 406. Indeed, in that case, "no one has argued that Section [406] is categorically inapplicable to all arm's length transactions"—an argument the *Cunningham* respondents charitably describe as "uncommon." BIO at 21 & n.6, *Cunningham*, *supra* (No. 23-1007). The closest the Second Circuit came to addressing the question presented in this case was *agreeing* with the Ninth Circuit that the word "transaction" in Section 406(a)(1) "cannot be read to demand" additional requirements. *Cunningham*, 86 F.4th at 975.

b. Petitioners make the same error with the Eighth Circuit. Petitioners claim that the Eighth Circuit's opinion in *Braden* takes "the same tack" as the decision below. Pet. 14. Not so. *Braden* dealt only with the burden of pleading a Section 408 exemption. The parties in *Braden* never raised, and the Eighth Circuit never considered, whether Section 406(a)(1) contains a carveout for arm's-length transactions. *See*

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[2] The *Cunningham* petitioners' suggestion that the Ninth Circuit's decision in this case nonetheless "contravenes the Second Circuit's holding," *Cunningham* Reply 4, is therefore baffling. The Second Circuit specifically acknowledged that this case did not "address[] whether the [Section 408] exemptions are treated as affirmative defenses at the pleading stage" because it "arose from a grant of summary judgment." *Cunningham*, 86 F.4th at 974.

Braden, 588 F.3d at 585; Br. of Appellees at 46-47, *Braden*, *supra* (No. 21-5612).

c. A petition from the Second Circuit's opinion in *Cunningham* is currently pending before this Court. Pet., *Cunningham*, *supra* (No. 23-10007). The *Cunningham* petition asks this Court to resolve whether plaintiffs "must plead and prove additional elements and facts not contained in" Section 406(a)(1). Pet. i, *Cunningham*, *supra* (No. 23-10007). But that question conflates numerous distinct issues, none relevant to this case.

It's true that there's a split over whether the burden of pleading a Section 408 exemption falls on the plaintiff or the defendant. But the split is brand new as of November 2023 and continues to develop. *See Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth*, 99 F.4th 928, 947 (7th Cir. 2024) (April 2024 opinion siding with Eighth Circuit). This Court should await further percolation.

Even if this Court were to grant certiorari in *Cunningham* on the Section 408 burden-of-pleading question, it should still deny this petition. Whichever way this Court resolves the Section 408 burden-of-pleading question won't affect the outcome here. Respondents in this case pled that Section 408(b)(2) does not apply, and they produced evidence to that effect at the summary-judgment stage. *See* Third Am. Comp. ¶ 143, ECF No. 81; Opp. to Mot. for Summ. J. at 4-5, ECF No. 185. Because respondents took on the burden of pleading an exemption under Section 408, the question of who bears that burden would not affect the outcome of this case.[3]

In addition to the cases about who has the burden of pleading a Section 408 exemption, the *Cunningham* petition also cites the same hodgepodge of cases described *supra* at 10-15, which establish various additional requirements for a Section 406 claim. Pet. 15-17, *Cunningham*, *supra* (No. 23-1007). But the *Cunningham* petitioners couldn't benefit from a ruling rejecting those other circuits' requirements, because the Second Circuit didn't impose any such requirements on them. If the Court grants certiorari in *Cunningham*, it should narrow the question to the burden of pleading Section 408's exemptions—the only issue that could change the outcome in *Cunningham*.

[3] The *Cunningham* petition purports to present not only a question about the burden of *pleading* a Section 408 exemption, on which there is a split, but also a question about the burden of *proof* for those exemption. Pet. i, *Cunningham*, *supra* (No. 23-1007). But there is no split regarding the burden of proof. The circuits uniformly hold that the defendant bears the burden of proving the reasonableness of the compensation it pays for plan services. *See, e.g.*, *Cunningham*, 86 F.4th at 978; *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983); *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 685 (7th Cir. 2014); *Braden*, 588 F.3d at 601; *Elmore v. Cone Mills Corp*, 23 F.3d 855, 864 (4th Cir. 1994). Contrary to the *Cunningham* petition's claim that the Second Circuit required plaintiffs to "plead and prove" an exemption, Pet. 18, the Second Circuit held that the defendant "fiduciary retains the ultimate burden of proving" that exemptions apply, *Cunningham*, 86 F.4th at 977-98.

II. This case is a poor vehicle to address the question presented.

Not only would every circuit resolve this case the same way, but vehicle problems would frustrate this Court's reaching the question presented.

First, petitioners have an alternative path to victory on their Section 406 claim that would obviate the need to answer the question presented. The Ninth Circuit decided only whether Section 406(a)(1) contains an atextual carveout for AT&T's activities. The Ninth Circuit left open on remand whether the transactions in this case satisfied the Section 408(b)(2) exemption. Pet. App. 35a. AT&T will have the opportunity to argue, as it did below, that it fully complied with the disclosure requirements of the exemption and that the compensation Fidelity received pursuant to the AT&T contract was reasonable. *See* Mot. for Summ. J. at 17, ECF No. 165. If the district court agrees with AT&T, Section 408(b)(2) would exempt the transactions from Section 406(a)(1), resolving this case and obviating petitioners' question.

Second, the question presented is academic with respect to these plaintiffs. Regardless how the Court answers the question presented, respondents would be entitled to the same relief under Section 404 of ERISA. Pet. App. 35a-38a. Because respondents can recover under Section 404 everything they would recover under Section 406, this Court's answer to the question presented may not affect the outcome of the case.

To spell that out: ERISA requires that fiduciaries "make good . . . any losses to the plan resulting from" a breach of duty—whether of Section 404 or 406. 29 U.S.C. § 1109(a). And here, the same breach of duty underlying the Section 406 claim also underlies one of respondents' Section 404 claims. As the Ninth Circuit put it, petitioners alleged that AT&T violated *both* Sections 404 and 406 "by failing to consider the significant compensation that Fidelity received through BrokerageLink and Financial Engines." Pet. App. 7a. Thus, petitioners will be required to "make good . . . any losses to the plan resulting from" this misconduct—regardless of whether this misconduct violated Section 404, 406, or both. 29 U.S.C. § 1109(a).

All these considerations underscore why the interlocutory posture here "furnishe[s] sufficient ground for the denial of" certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This case—which comes before this Court on partial summary judgment—embodies the risks this Court has warned of regarding grants of certiorari in interlocutory cases, which sink resources into questions that prove immaterial and "debilitat[e]" judicial administration by requiring "piecemeal appellate disposition" of a single controversy. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974); *see also Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., statement respecting the denial of certiorari). At the very least, this Court should wait until this case reaches final judgment.

III. Petitioners vastly overstate the impact of this case.

Petitioners fret that fiduciaries will be forced to "either attempt to perform all necessary plan services in-house . . . or forgo offering those services altogether" thanks to the decision below. Pet. 27. But the decision below simply reiterated what's been the rule in the Ninth Circuit for forty years, and petitioners haven't pointed to any evidence that fiduciaries have faced the "profound dilemma" they outline. *Id.*

1. The Ninth Circuit has held that Section 406(a) covers "routine, arm's length" transactions since at least the 1980s. As the court below explained, "we have previously recognized § 406's 'broad' scope, explaining that § 406 creates 'a broad per se prohibition of transactions ERISA implicitly defines as not arm's-length.'" Pet. App. 12a. (quoting *M & R Inv. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982)). The Ninth Circuit has repeatedly confirmed its rule in the intervening years. *See, e.g.*, *Waller v. Blue Cross*, 32 F.3d 1337, 1346 (9th Cir. 1994); *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1466 (9th Cir. 1995).

If petitioners were correct that covering "arm's length" transactions means endless litigation exposure for fiduciaries, *see* Pet. 26-27, one might have expected to see ERISA plaintiffs race to the Ninth Circuit in the past four decades. But the numbers show plaintiffs have done no such thing. Over the last five years, for example, the Ninth Circuit has been the median circuit in per-capita district-court Section 406 cases.[4] In fact, the three circuits with the *most* such cases per capita are the Second, Third, and Seventh Circuits—the circuits that petitioners claim for their side of the alleged split. *Id.* The Third Circuit has had 81% more cases per capita than the Ninth, the

[4] The statistics in this paragraph are based on filtering Westlaw Analytics' ERISA cases (Code 791) between 5/3/2019 (the day after *Sweda*) and 5/3/2024 for references to "Section 406" and "§ 1106." That search captures all ERISA cases where any docket entry, including party briefing, mentions Section 406 or § 1106. The search excluded the D.C. and Federal Circuits.

Seventh has had 95% more, and the Second has had 164% more. *Id.*

2. Petitioners' predictions that fiduciaries will be forced to "forgo offering" various services, Pet. 27, is wrong for another reason. Section 406(a)(1)(C) does not actually require fiduciaries to "forgo" any transactions for services. *Id.* Instead, it simply requires that fiduciaries comply with a Section 408 exemption. In turn, one of those exemptions, Section 408(b)(2), requires only that plans pay "no more than reasonable compensation" for a transaction for necessary services—sound advice for even a consumer, much less a fiduciary. 29 U.S.C. § 1108(b)(2). Indeed, every plan fiduciary should already, as a matter of trust law, statute, and ethics, ensure that "no more than reasonable compensation" is *ever* paid. *See, e.g.*, Restatement (Second) of Trusts § 174 (Am. L. Inst. 1959) (detailing a fiduciary's duty of care).

Petitioners protest that Section 408(b)(2) leaves a "waterfront of innocuous transactions" barred by Section 406. Pet. 20. But they don't point to a single case where an "innocuous transaction" was prohibited under Section 406 and did not fall within an exemption. Besides, if such a "waterfront" exists, Congress provided a mechanism to address it: The statute expressly authorizes the Department of Labor to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions" from Section 406. 29 U.S.C. § 1108(a). There's no need for this Court to grant certiorari to freelance its own such exemption.

3. Finally, petitioners argue that the Ninth Circuit has set up "a pleading standard under which

even baseless claims predicated on reasonable service agreements can survive motions to dismiss." Pet. 26. But ERISA already has a mechanism to ensure "claims predicated on reasonable service agreements," *id.*, aren't the basis of liability: Section 408(b)(2). Petitioners concede that requiring plaintiffs to plead non-compliance with Section 408(b)(2) would resolve their concerns. Pet. 25. Their amici admit the same. Br. of Amici Curiae The ERISA Industry Committee, et. al, 21-22. And in this case, respondents have already pled non-compliance with Section 408(b)(2), so there would be no opportunity to address that question. Third Am. Comp. ¶ 143, ECF No. 81; *see Cunningham v. Cornell Univ.,* 86 F.4th 961, 974 (2d Cir. 2023).

IV. The Ninth Circuit's decision is correct.

Petitioners ask this Court to inject a carveout for arm's-length transactions into Section 406(a). Pet. 8. But the plain text of Section 406(a), the corresponding exemptions in Section 408, and Congress's express rejection of an arm's-length standard all counsel against such a rule. Indeed, petitioners pull their "arm's length" standard not from anywhere in the statute, but from a misreading of prior decision *characterizing* the statute, *Lockheed v. Spink*, 517 U.S. 882 (1996).

1. As a matter of plain text, the Ninth Circuit was correct. Courts "'must enforce plain and unambiguous statutory language' in ERISA, as in any statute, 'according to its terms.'" *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 184 (2020) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). This Court has repeatedly "decline[d] . . . suggestions to depart from the text" of ERISA because

it is "an enormously complex and detailed statute" that is "the product of a decade of congressional study of the Nation's private employee benefit system." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 254 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993).

The provision relevant here, Section 406(a)(1)(C), prohibits fiduciaries from "caus[ing] 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" barring an exemption. 29 U.S.C. § 1106(a)(1). The terms make clear that it captures *every* transaction between a plan fiduciary and service provider, "[e]xcept as provided in section [408]." *Id.* § 1106(a). As the Ninth Circuit noted, even "AT&T admits that the language of § 406(a)(1)(C) is 'broad.'" Pet. App. 12a.

The word "transaction" encompasses a wide range of agreements entered into by plan fiduciaries. According to dictionaries from around the time of ERISA's passage, a transaction means "conducting any business." *Transaction*, Black's Law Dictionary (5th ed. 1979); *see also* The American Heritage Dictionary (2d ed. 1982) ("a piece of business"); The Oxford English Dictionary (2d ed. 1989) (same).

Turn to the next phrase, which singles out transactions that "constitute[] a direct or indirect . . . furnishing of . . . services." 29 U.S.C. § 1106(a)(1). Lest there be any doubt about the breadth of the provision, the statute emphasizes that it captures all "services," both "direct or indirect." *Id.*

The final clause of Section 406(a)(1)(C) reinforces that breadth. Such transactions are prohibited if they are "between the plan and a party in interest," and ERISA defines a party in interest to include every single "person providing services" to the plan. 29 U.S.C. § 1002(14)(B).

Here, as the Ninth Circuit recognized, Section 406's text plainly "encompasses [petitioners'] transaction with Fidelity." Pet. App. 12a. Fidelity has been a "person providing services" to the Plan since 2005. *Id.* (quoting 29 U.S.C. § 1002(14)(B)). Under ERISA, Fidelity is therefore a "party in interest" to the Plan. *Id.* It is also undisputed that petitioners amended their contract with Fidelity twice, both times "furnishing . . . services" from Fidelity to the Plan. *Id.* (quoting 29 U.S.C. § 1106(a)(1)(C)). Section 406(a)(1)(C) squarely prohibits the transactions here, unless an exemption applies.

2. The broad reach of Section 406(a)(1) makes sense in light of Section 408's comparably broad exemptions. Particularly sweeping is the text of Section 408(b)(2), which exempts from Section 406 transactions for "necessary" services "if no more than reasonable compensation is paid therefore." 29 U.S.C. § 1108(b)(2)(A). As the Ninth Circuit noted, "the definition of 'necessary'" is "broad": "[A] service is necessary if it 'is appropriate and helpful to the plan obtaining the service.'" Pet. App. 13a (quoting 29 C.F.R. § 2550.408b-2(b)).

Authorities agree with the Ninth Circuit that Section 406 means what it says, prohibiting all agreements between plan fiduciaries and service providers, but that "Section 408 avoids the impracticality of an absolute prohibition . . . by exempting certain transactions." Paul J. Schneider & Barbara W. Freedman, ERISA: A Comprehensive

Guide, § 7.12 (3d. ed. 2008) (previous edition cited in *Larue v. DeWolff, Boberg, & Assocs.*, 552 U.S. 248, 250 n.1 (2008)); *see* 60A Am. Jur. 2d Pensions § 376 (2024); 1 Ronald J. Cooke, ERISA Practice and Procedure § 6.48 (2024).

3. Petitioners ask this Court to inject an atextual carveout into the plain language of Section 406, rather than looking to Section 408 to temper Section 406's reach. The petition argues that "routine, arm's-length" agreements do not fall under Section 406. Pet. 17. But neither "routine" nor "arm's-length" appears in Section 406. As the Ninth Circuit recognized, the provision offers "no language limiting its application to non-arm's-length transactions." Pet. App. 12a. That alone should end the matter.

The absence of those terms is particularly conspicuous since Congress repeatedly and expressly referred to "arm's-length" transactions elsewhere in ERISA. For instance, Section 408(b)(1)(16)(C) exempts certain Section 406 securities transactions between a "plan and a party in interest" if the terms of the transaction are "at least as favorable to the plan as an arm's length transaction." 29 U.S.C. § 1108(b)(15)(A); *see also* 29 U.S.C. § 1108(b)(15)(A)(iv) (gauging compensation against that "associated with an arm's length transaction with an unrelated party"). That same "at least as favorable to the plan as an arm's length transaction" standard governs certain pre-existing transactions otherwise prohibited by Section 406 that were grandfathered in. 29 U.S.C. § 1114(c) (exempting certain loans between a plan and party in interest until June 30, 1984).

Petitioners try to make Section 406 do the same kind of work that Congress wrote Section 408 to do.

Though petitioners do not define "routine, arm's-length" transactions, they suggest that such transactions are "necessary services vital to running the plan" that do not "present[] a special risk of underfunding." Pet. 8, 18. But Section 408 already exempts those same transactions with its carveout for a "service[] necessary for the establishment or operation of the plan" but expressly demands that "no more than reasonable compensation [be] paid." 29 U.S.C. § 1108(b)(2)(A).

The congressional record shows that the omission of an arm's-length standard in Section 406 was intentional. As this Court has recognized, "[b]efore ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct." *C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). But that rule was "difficult to police" and "provided an open door for abuses," because it required a subjective, fact-intensive inquiry that often failed to identify if a transaction was truly at arm's length. *Reich v. Compton*, 57 F.3d 270, 275 (3d Cir. 1995) (Alito, J.) (quoting *id.*). Plus, it was tough on fiduciaries: How were they to know whether a transaction counted as arm's length?

As a result, when it enacted ERISA, Congress instead chose the more detailed requirements of Sections 406 and 408, which would "make it more practical to enforce the law." S. Rep. No. 93-383, at 32 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4889, 4917. Those rules "ensure[d] pension plan integrity by eliminating even the possibility" that transactions between a plan and party in interest "might not be at arm's length." *Wood v. C.I.R.*, 955 F.2d 908, 912 (4th

Cir. 1992). The beauty of Section 408 is that it provides a mechanism by which a plan fiduciary can assure that the transaction is at arm's-length: by requiring disclosure and evaluation of all compensation received in connection with the services provided.

4. Petitioners make two arguments against the decision below based on Sections 404 and 408, but they misunderstand how these provisions interact with Section 406.

a. As relevant here, Section 404 states that fiduciaries should "defray[] reasonable expenses of administering the plan," 29 U.S.C. § 1104(a)(1)(A)(ii), and use "the care, skill, prudence and diligence" that one would expect of a "prudent man," *Id.* § 1104(a)(1)(B). Petitioners protest that "[h]aving 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." Pet. 21.

But these provisions are complementary, not duplicative. Section 404 provides "general" guidance for how fiduciaries should conduct themselves, without regard to whether transactions are with parties in interest, or, indeed, whether transactions are involved at all. *Lockheed*, 517 U.S. at 891. Sections 406 and 408, meanwhile, are more specific and prohibit transactions with insiders unless they meet certain requirements necessary to protect the Plan. *Id.* at 891; *see also* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5634 (Feb. 3, 2012) (to be codified at 29 C.F.R. pt. 2550) (regulatory requirements under Section 408(b)(2) "are independent of a fiduciary's obligations under ERISA section 404"); *cf.* H.R. Rep. No. 93-1280, at 310-11 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5037, 5058-59 (Section 408 exemptions "have no effect with respect to the basic fiduciary responsibility rules" of Section 404).

b. Petitioners next argue it would be wrong to interpret Section 406 to prohibit the transactions that Section 404 requires. Petitioners reason that contracts with third parties for services may help fiduciaries comply with Section 404's requirement to "defray[] reasonable expenses," 29 U.S.C. § 1104(a), so the statute shouldn't be read to make fiduciaries forgo such contracts. But again, petitioners forget Section 408(b)(2). Petitioners may still contract with third-party services to defray reasonable expenses; they just must ensure that reasonable compensation is paid for those services. When, as alleged here, a party in interest does *not* ensure that only reasonable compensation is paid, the party violates ERISA.

5. Nor is there any basis for petitioners' claim that "[a]s this Court made clear in *Lockheed Corp. v. Spink*, Section 406(a) reaches only those transactions that are 'likely to injure the pension plan.'" Pet. 10 (citing 517 U.S. 882, 888 (1996)).

Lockheed states that the transactions listed in Section 406 "are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Lockheed*, 517 U.S. at 893. That is, the transactions covered by Section 406(a)(1) were chosen by Congress *because* they "present a special risk of plan underfunding." *Id.* And transactions with parties in interest are, by definition, "presumably not at arm's length." *Id.* *Lockheed* didn't suggest that once a particular transaction falls within the plain language of Section 406(a)(1), courts should do some further inquiry into whether the transaction "presents a special risk of plan underfunding" or is "presumably not at arm's length." *Id.* *Lockheed*'s characterization of the function of Section 406 should not be read to graft an additional element onto Section 406.

Far from supporting petitioners' position, *Lockheed* undermines it. The "transactions" at issue in *Lockheed* were payments for employee benefits, and the Court held such payments were not "transactions" within the meaning of Section 406. The employees acknowledged that not all benefits payments fell under Section 406 but argued that some payments—those featuring an "invalid quid pro quo"—did. *Lockheed*, 517 U.S. at 892. The Court rejected "[a] standard that allows some benefits agreements but not others" because it "lacks a basis in" Section 406. *Id.* at 895. And such a some-in, some-out standard "would provide little guidance to lower courts and those who must comply with ERISA." *Id.*

In this case, no one disputes that the exchange between AT&T and Fidelity constituted a "transaction." It's petitioners who are arguing for the sort of some-in, some-out standard *Lockheed* rejected: They argue some services agreements—"routine, arm's length" services contracts—are carved out of Section 406, while other services agreements are not.

Petitioners also misleadingly quote *Keystone* to say that Congress wrote Section 406 because "common-law principles didn't sufficiently root out 'abuses.'" Pet. 22 (quoting *Keystone*, 508 U.S. at 160). But they conveniently omit the part of the paragraph that says what those failed common-law principles were: "the customary arm's-length standard of conduct." *Keystone*, 508 U.S. at 160. Far from supporting the existence of an arm's-length carveout in Section 406, *Keystone* confirms that such a standard was exactly what Congress sought to avoid when it enacted ERISA.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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