SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

CASEY CUNNINGHAM, ET AL.,)

Petitioners,)

v.) No. 23-1007

CORNELL UNIVERSITY, ET AL.,)

Respondents.)

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 106

Place: Washington, D.C.

Date: January 22, 2025

HERITAGE REPORTING CORPORATION
Official Reporters
1150 Connecticut Avenue, N.W., Suite 305
Washington, D.C. 20036
(202) 628-4888
www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

CASEY CUNNINGHAM, ET AL.,)
Petitioners,)
v.) No. 23-1007
CORNELL UNIVERSITY, ET AL.,)
Respondents.)

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Wednesday, January 22, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:22 a.m.

APPEARANCES:

XIAO WANG, ESQUIRE, Charlottesville, Virginia; on behalf of the Petitioners.

YAIRA DUBIN, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioners.

NICOLE A. SAHARSKY, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1007, Cunningham versus Cornell University.

Mr. Wang.

ORAL ARGUMENT OF XIAO WANG

ON BEHALF OF THE PETITIONERS

MR. WANG: Mr. Chief Justice, and may it please the Court:

When Congress enacted ERISA, it identified a number of prohibited transactions and codified that understanding in 29 U.S.C. Section 1106. In Congress's view, these transactions posed a special risk of being potentially harmful to the plan, generally because they involved a party in interest, which includes a fiduciary's relative or an officer or an owner of the plan or a person providing services to the plan.

Petitioners here have identified a transaction that falls within the text of Section 1106, and the Second Circuit's decision to dismiss that claim prior to discovery was incorrect for three reasons.

First, text and structure. Congress frequently writes laws where it puts liability in one part of the statute and exceptions to liability in another, and when it does so, this Court has time and again held that plaintiffs plead and prove liability and defendants plead and prove exceptions to liability.

Second, precedent. In Keystone Consolidated and Harris Trust, this Court made clear that the prohibited transaction provisions provide for categorical rules. But what the Second Circuit's approach does is it converts those categorical rules into qualified ones.

And that brings me to the final reason for reversal, which is that they're not just qualified prohibitions, but they're qualified based on exemptions that involve information that plaintiffs cannot know and do not know prior to discovery, information like who the counterparties are in a cross-trade or how large a block trade are -- is or what asset classes are in a block trade, which is exactly why, when Congress wrote these provisions, it intended for petitioners to plead and prove under Section 1106 and for defendants to plead and prove under

Section 1108.

For these reasons, Your Honor, we ask this Court to reverse the judgment of the Second Circuit.

I welcome the Court's questions.

JUSTICE THOMAS: What -- if you were -- if we were to read your complaint as it is, what exactly is the injury?

MR. WANG: The injury is that the -- with regard to the prohibited transaction provisions, Your Honor, the injury is that the plans here engaged Fidelity and TIAA, who are parties in interest, and that violates Section 1106(a)(1)(C).

JUSTICE THOMAS: So how did that harm the plan?

MR. WANG: It harmed the plan because Fidelity and TIAA didn't simply just provide recordkeeping services to the plan. They bundled them with investment products, and those investment products, in turn, had operating expenses, and those operating expenses were then shared via revenue sharing to the plan to pay for recordkeeping.

Now that bundling resulted in Fidelity

and TIAA pushing -- this is on page 22 of the Joint Appendix -- pushing its own products, its own actively managed products, leading to higher expense ratios and, therefore, greater recordkeeping fees in the -- in the result.

JUSTICE KAVANAUGH: Your theory means, I think, or at least the other side says that it's a prohibited track -- transaction just to have recordkeeping services.

MR. WANG: Correct, Justice Kavanaugh. I think our theory --

JUSTICE KAVANAUGH: And that seems nuts, right? That's what they say. And it does to me seem nuts too. So what do we do with that?

MR. WANG: Well, Justice Kavanaugh, let me try to unpack that. I think the starting point would be to look at the text of the statute in this, and I think, for outside service providers, that would fall under 1106(a)(1)(C), something that the fiduciary shall not do.

Now that doesn't sort of provide a per se bar, and we don't think it provides a per se bar. Instead, it says, look, that gives

plaintiffs an opening to open the door to plead a claim. That doesn't mean that they'll succeed on liability. 1108, that's the purpose of 1108.

JUSTICE KAVANAUGH: Of course, but just to state what's obvious from the amicus briefs and we've heard before in other contexts, they're worried about the expense of litigating this past the motion to dismiss. So it's not enough, they say, at the motion to dismiss to say you're not alleging -- to Justice Thomas's question, you're not alleging excessive or unreasonable amounts paid for these recordkeeping services; you're just alleging that we had them. Well, of course, we have them, right? Everyone has them. You have to have them.

So it's -- it's an automatic ticket, pass go, go immediately to discovery, summary judgment, huge expense. These universities, other defendants are saying that's just completely absurd and ridiculous, which is -- you know, the starting point of Judge Livingston's analysis was -- was looking at trying to make sense of all this in context, I think.

Now maybe there's a good answer to that, but is it kind of an automatic ticket when you assert that a plan has recordkeeping services to get past the motion to dismiss?

MR. WANG: Well, Your Honor, maybe I can back up on that, Justice Kavanaugh, and sort of answer it in two ways.

The first way is to say that I -- I think, as we recognize on page 19 of the Joint Appendix, recordkeeping is a necessary service. And there may be certain moments where you want to outsource that to an outside service provider. You don't have to, but you might want to.

But, if you do that, if the fiduciary does that, then the fiduciary -- then it's not a blank check. What 1106 and 1108 say is it's not a blank check. And if that -- and if that transaction is subject to challenge, then 1108 provides the necessary exemption for you to marshal.

Now I think the sort of policy --

JUSTICE KAVANAUGH: But you can't -- you can't just say -- sorry to interrupt and I want you to continue, but just to get this

point, you can't just say and you're -- you're not alleging that the fees were excessive at this point on this claim? That's not going to be enough for you to get it dismissed, correct?

MR. WANG: Well, I -- I think that, as we note in our --

JUSTICE KAVANAUGH: And -- and you've really suffered no harm, to Justice Thomas's point, either.

MR. WANG: Well -- what, Justice Kavanaugh, and -- and I think this is consistent with Justice Thomas's point as well, that there are other guardrails that we point to, things like fee shifting and standing and the enormous expense of even bringing a case that would deter this.

And I think the best practical proof of this is that the Eighth Circuit has embraced this rule for 15 years. And we don't see any evidence of it -- of it happening. Respondents and their amici provide no --

JUSTICE KAVANAUGH: But, in the amicus briefs, maybe -- you know, amicus briefs might engage in puffery, understandably. I mean, I understand that. I'm not saying understandably.

(Laughter.)

JUSTICE KAVANAUGH: But they're painting a pretty bleak picture, the American Benefits Council, the universities who are saying this is a huge problem for the universities. This expanded litigation threat would be near limitless because every college and university relies on third-party service providers. And because the contract's mere existence, mere existence, would be enough to force these defendants to proceed through expensive discovery, it risks opening the floodgates to burdensome -- right?

And then they say, rightly, the burden of these suits takes away money from -- you know, it's tuition, it's faculty, et cetera. The money comes from somewhere.

So that's just in one context. It's other contexts according to the benefits council.

MR. WANG: Well --

JUSTICE KAVANAUGH: And maybe they're all wrong, but, you know, I take it seriously. I listened to what they say and want to at least get your response.

MR. WANG: Certainly, Justice Kavanaugh, and two responses to that.

The first is I think the Court has, in fact, dealt with a similar issue in Harris Trust. In Harris Trust, that was a case about whether, for a prohibited transaction claim, one could hold not simply just the fiduciary liable but also the party in interest. And many amicus briefs were filed in that case, and the respondents themselves made the point that, look, if you can hold us liable, hold parties in interest liable, then that's going to create these devastating policy consequences.

And the Court rejected that. The Court said on page 2 -- 254 that Salomon, the defendant, submits that the policy consequences could be devastating. Faced with the prospect of liability for dealing with the plan, parties in interest could refuse altogether to transact with plans.

But we know that that hasn't happened. Since 2000, when Harris Trust was decided, we've seen Respondents themselves agree on this point, that there are, in fact, more ERISA plans being offered, there are more -- Your Honor?

JUSTICE ALITO: But --

JUSTICE JACKSON: Mr. Wang --

JUSTICE ALITO: -- you have a -- you have a formal argument, all right, and maybe you're going to win on your formal argument. These are exceptions, and exceptions are usually affirmative defenses. And, you know, we could write an opinion that says that, end of case. It could be a nice, short opinion. But it really does seem to close its eyes to the reality of what's going on, and that's what I'd really like you to address.

Every -- every -- I don't know why this would be confined to universities, but all sorts of employee -- employers with defined contribution plans offer the employees a menu of funds in which they can invest. And so every -- every employer who does -- and -- and there's -- there are always going to be recordkeeping expenses relating to these funds. And I don't know -- know whether it would be possible, realistic, reasonable for Cornell or any other employer to do the recordkeeping for -- for Fidelity and for TIAA. They have their -- these are their funds. They're going to do the

recordkeeping for it.

So all you need to do in your submission is plead something that is perfectly innocuous in and of itself. Now maybe the fees are too high. Maybe they're not. That's a different question. But all you need to do is plead something that seems to be on the surface completely innocuous. That's enough to get you beyond the motion to dismiss.

And then, you know, how many -- how many lawsuits just like this one did the Schlichter Bogard law firm in St. Louis file against universities?

MR. WANG: Well -- well, Justice Alito, let me try to unpack that.

JUSTICE ALITO: Well, answer the second question first.

MR. WANG: As to how many lawsuits were filed?

JUSTICE ALITO: Yeah. How many lawsuits just like this did that law firm file against different universities?

MR. WANG: I -- I think it's filed a significant number. I don't have the specific number off the top of my head, but I would say

that -- 12, excuse me, and -- but I -- I would say, in the complaint itself --

JUSTICE ALITO: Alright, I thought it was 20, but it doesn't matter.

So, you know, you file all these lawsuits, and maybe the universities are going to say: Look, it's going to cost us a lot of money to go through the discovery, we're just going to settle. And so there's a payday for the law firm.

Now maybe this is not something that we should worry about, but --

MR. WANG: Certainly, Justice Alito. Well, I -- I think, first of all, in the amended complaint, we point out that not every university is subject to suit. There are examples, such as Loyola Marymount, California Institute of Technology, Purdue, that have, in fact, I think, consolidated to a single recordkeeper of -- had the recordkeeping fees below or at the industry benchmark. That's not the case here.

JUSTICE JACKSON: Mr. -- Mr. Wang --

JUSTICE GORSUCH: Let me ask you this, counsel. So you have a complaint. You've got

to file it. And my colleagues make a very good point about how it can be easy to overcome a motion to dismiss.

But, if you're -- if you're referencing a contract in a complaint, there's a lot of case law out there that allows district courts to review the contract, and perhaps, with the full contract before it, it could as a matter of law find that the affirmative defenses apply.

Would you agree with that?

MR. WANG: I think so, Your Honor. And I think this is --

JUSTICE GORSUCH: Okay. And then there's also a lot of case law that says that a -- a -- a -- a district court can convert a -- a -- a 12(b)(6) into a summary judgment when defendants request it at the outset of a case in appropriate circumstances.

Would you agree that that would be appropriate in some cases too?

MR. WANG: I think that would be appropriate. That's within a district court's discretion.

JUSTICE GORSUCH: Thank you.

MR. WANG: And --

JUSTICE BARRETT: Oh. I -- I just wanted to ask you: So, you know, obviously, there's some concern about why on earth Congress would have structured it that way. Do you want to address that?

MR. WANG: Yes, certainly, Justice Barrett. I think it was because pre-ERISA -- as Keystone Consolidated points out, pre-ERISA, the standard was the arm's-length standard of conduct. But that proved difficult to police. It led to a rife of abuses. Abuses were pervasive.

And so I think Congress wanted to prescribe these simple and categorical and straightforward rules and prohibitions that provide plaintiffs a cause of action and recognize the information asymmetry between the fiduciary and their beneficiary.

JUSTICE JACKSON: And -- and --

MR. WANG: I think this is a --

JUSTICE JACKSON: Sorry. Keep going.

MR. WANG: Sorry. I -- I think this is just one example of that.

As we point out, even with respect to

the specific exemption at issue here, 1108(b)(2), (b)(2) includes another provision, (b)(2)(B), which specifically says and contemplates that information regarding compensation regarding a necessary arrangement goes from the party in interest to the fiduciary. It never goes to the beneficiary.

JUSTICE JACKSON: Mr. Wang, following up on Justice Gorsuch's points, is there anything in this statute or in the rules that would prevent a defendant in one of these cases from seeking an expedited summary judgment ruling from the court?

MR. WANG: No, there would -- there -- there would not be, Justice Jackson.

JUSTICE JACKSON: So the -- so the university or whoever could simply respond: No, we really do have reasonable fees, attach some documents, and that could be the end of the case. We're not necessarily talking about the kind of case that would go on and on and be a big expense like that.

MR. WANG: Certainly, certainly, that's -- that's correct, Justice Jackson. I think district courts have the discretion to

have limited discovery, to order an expedited motion for summary judgment.

JUSTICE KAVANAUGH: Could they do that with no discovery?

MR. WANG: Pardon me? Can you --

JUSTICE KAVANAUGH: Could they do that with no discovery?

MR. WANG: I think that would be a harder call, Justice Kavanaugh.

JUSTICE JACKSON: But they could do limited discovery --

MR. WANG: Correct.

JUSTICE JACKSON: -- that's just targeted to that issue, and the defendant can start the ball rolling by moving for summary judgment to include documents that would prove that it's reasonable and necessary, correct?

MR. WANG: Entirely correct.

And, Justice Kavanaugh, if I can just respond to your question about why doing it with no discovery may not be appropriate in this particular case. Because, in this particular case, what the Second Circuit faulted Petitioners for being unable to do was to show how services rendered corresponded with fees and

how -- how you could benchmark one with the other.

And I think that it's reasonable to say: Well, if you're going to ask that question, at least give us the contract. Give us the contract so we can understand what -- what fees and what services were available.

And that's not turned over prior to discovery. That's something the defendants routinely do not turn over.

JUSTICE KAVANAUGH: Following up --

JUSTICE JACKSON: Can't --

JUSTICE KAVANAUGH: Oh, go ahead.

JUSTICE JACKSON: Sorry.

JUSTICE KAVANAUGH: Keep going.

JUSTICE JACKSON: No, I was just going to ask about the information asymmetry and those concerns and also the sort of bigger structural concern. We're focusing here on one type of transaction and one exemption, but, as I look at this statute, there are 21 separate exemptions in 1108(b).

And I guess I'm trying to figure out if there's any principled basis for saying the burdens are different here in this kind of

service-provider contract, but they would be -- than they would be in -- with respect to other exemptions.

Do you understand what I'm saying?

MR. WANG: Yes, yes, Justice.

JUSTICE JACKSON: Wouldn't we have to -- wouldn't we have to have a consistent rule about whether the plaintiffs bear the burden or the defendants bear the burden of proving exemptions?

MR. WANG: Entirely so, Justice Jackson. I -- I entirely agree. And I think that this statute provides the reason why, which is to say: Look, there is an a -- information asymmetry. The information asymmetry might be lessened as to some exemptions, maybe (b)(2), maybe (b)(1), but there -- it -- it does exist. And given the text and structure --

JUSTICE JACKSON: And some of the exemptions, I mean, it would be really, really hard for us to determine that the plaintiff has to plead them because they don't have the information, correct?

MR. WANG: Correct. Exactly so. Correct.

JUSTICE KAVANAUGH: What do you think of the government's point about -- and this is following up on Justice Gorsuch's suggestions -- the government's point about Rule 7(a)(7) and that use? The Chamber's amicus brief says even the most ardent scholar of civil -- civil procedure has likely never heard of that, but the -- it is cited in the government's brief as a -- as a tool to mitigate the problems that have been identified.

What do you think?

MR. WANG: Certainly, Justice Kavanaugh. I think this goes to Justice Gorsuch's -- Gorsuch's understanding that the district courts can do a wide -- can have a wide variety of tools at their disposal.

And I think Justice Jackson as well said perhaps it's limited discovery, perhaps it's an expedited motion for summary judgment, perhaps it is this, according to the Chamber, arcane rule of civil procedure, or perhaps it is additional -- an additional sort of pleading.

But I think that these are all sorts of tools that are within a district court's discretion given the complaint and the specific

pleadings at issue and the circumstances between the parties.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: Before Varity, were there any suits like this?

MR. WANG: I am not aware of that -- of -- of any suits like this.

CHIEF JUSTICE ROBERTS: How -- how do the factors the Court emphasized in cases like Twombly and Iqbal come into play here?

We seem -- we were interested and did seriously tighten up the pleading standards there, and I wonder if that's something we should take into account in deciding how to allocate the -- the burden of going forward here.

MR. WANG: Certainly, Justice -- Chief Justice Roberts. I think that the way that we would see it, if -- if you will, is to imagine if you have sort of three boxes of types of complaints.

Box 1 is the bare-bones complaint that says: I'm going to sue you because you did

recordkeeping.

And Box 2 is, I think, something more like what we see here, is to say: Look, I'm going to bring a suit because I see that recordkeeping is tied to revenue sharing, and revenue sharing is itself tied to the investment management products that you offer, and you happen to offer products that -- that promote your own services. That -- that's Box 2.

And then Box 3 is everything in Box 2, plus give us allegations as to the services and the fees and benchmark them based on information you don't know.

I think what we would say -- and I think this is -- this comes through in the government's brief -- is that we would say that we don't see any in Box 1. We don't see any cases in the Eighth and Ninth Circuit, and that is because of the guardrails that we talk about. But, if we were to start seeing them, I think, within the many tools in a district court's discretion, whether it's limited discovery, Iqbal and Twombly, Rule 7, there's a number of ways to manage that litigation to make sure that Box 1 does not get out of hand.

And -- and if I could -- I could briefly sort of respond to -- to one point that you made in your -- in your question, Justice Thomas. I would say that before Varity, I think Congress was nonetheless concerned with these types of transactions and not simply the -- necessarily just a service provider transaction but I think more broadly as to regarding the parties in interest, which is a fiduciary's relative, a officer, an owner, and it combined this corpus and said, look, these are prohibited.

And I think those types of lawsuits -- I don't have a specific number off my top of my head -- but could have happened pre- and post-Varity.

CHIEF JUSTICE ROBERTS: Justice Alito, anything further?

JUSTICE ALITO: Yeah. What are the guardrails that you think are in play here?

MR. WANG: Certainly. As we point out, I think there are a few. One -- one is simply the expense of litigating one of these and bringing one of these cases. Some more formal guardrails include fee shifting,

standing, sanctions. So -- so those that we outline in our -- in our briefing all provide, I believe, a -- various deterrent mechanisms to the bare-bones allegation that -- that I think the Court has expressed some concerns about.

JUSTICE ALITO: So you -- Rule 11 is one. Standing is another one. What do you think you have to plead to establish standing? Do you have to plead anything more than that I am -- I -- I'm being charged for recordkeeping services? Do you think you have to prove that the charge is excessive or do you -- in order to have standing at the pleading stage?

MR. WANG: Well, Justice Alito, I think that that's a little bit of an open question after this Court's decision in Thole. Certainly, I think, with Thole, perhaps one take-away is that, yes, you would have to show, because simply showing record -- simply alleging recordkeeping would be pleading an injury at law and rather than injury at fact.

So I think that that is a possibility. I'm not --

JUSTICE ALITO: So all you have to plead -- you have to plead I -- I was charged

too much, and that's -- that's enough to establish standing?

MR. WANG: I think, in the appropriate case, yes. However, I think that, again, this goes back to -- to -- to the other guardrails that might be there, which are fee shifting and -- and -- and -- questions about the -- the -- sort of the expense of even bringing one of these cases.

So -- so I think these all work together to explain why, in the Eighth Circuit and the Ninth Circuit, we don't see cases that have these sort of bare-bones threshold complaints.

JUSTICE ALITO: And what do you think about the procedure that the Solicitor General recommended involving Civil -- Rule of Civil Procedure 7?

MR. WANG: I think --

JUSTICE ALITO: Is that -- do you think that's a possible -- that that is something we should say is a -- is a good practice?

MR. WANG: I think that that is one of several options that would be available to a

district court to address perhaps these concerns over a bare-bones complaint. But it is --

JUSTICE ALITO: A district court could do that? A district court could say, after the answer is filed, I want a reply, and then rule on whether it can be determined based on the pleadings if the defendant is entitled to judgment on the pleadings?

MR. WANG: Certainly, Your Honor. I think that's how we would see it. Of course, a district court could have other options available to it, such as limited discovery or an expedited summary judgment motion, as well.

JUSTICE ALITO: Do you think that that's -- that should be mandatory for the district court to go through that -- well, I'll ask the Solicitor General that. I have no -- no more questions. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I do. I'm -- this isn't that easy a case in my mind. You're right about the general rules we've set, but this statute is slightly different because many of the cases that we've seen before, the

prohibitions were on one page and the exemptions were in a different section, but the prohibition didn't reference the -- exceptions the way this statute does. It says, except for the exemptions in 1108, you can't do the following.

On the other hand, there's 21 exemptions within 1108, but I also understand there's dozens, if not a hundred more, that have been passed by the Department of Labor. And if we accept the other side's position that you have to prove the case and say there's no exemption, I don't know how you'd know that.

You're right, how will you know which exemptions are pertinent or not, correct?

MR. WANG: Correct. Correct.

JUSTICE SOTOMAYOR: And so that's really the problem in this case, which is either -- whatever we decide, someone's going to be potentially unfairly treated because you have -- no plaintiff has a way of knowing what all the exemptions are and what potential exemptions the other side could pick.

MR. WANG: Certainly, Justice Sotomayor. And I think that we --

JUSTICE SOTOMAYOR: The -- let me go

on --

MR. WANG: Sorry.

JUSTICE SOTOMAYOR: -- okay? Yeah. I'm --

MR. WANG: Apologies.

JUSTICE SOTOMAYOR: Okay. That's a given. But, here, it's pretty clear that you alleged and you thought you had some sort of burden because I read your very extensive complaint, and you basically point to a lot of other industry --

MR. WANG: Correct.

JUSTICE SOTOMAYOR: -- fees and that the fees were unreasonable. You allege it's unreasonable. You show a lot of other fees. I'm not quite sure still, and I will ask the government this, I -- under normal pleading standards, I would have thought this was enough.

I think that the Second Circuit was thinking that it has to be pled with Twombly and Iqbal as a fraud and that you needed more particularized information relating to the nature of the services in total, some information that you say you couldn't have known.

MR. WANG: Yes.

JUSTICE SOTOMAYOR: You just knew how much was being paid and you compared it to what other people were paying.

MR. WANG: Comparable plans, yes.

JUSTICE SOTOMAYOR: Exactly. So, if I have a problem with that part of it, that the Second Circuit may have asked for more than you needed to plead, what do I do?

MR. WANG: Well, I think you would --

JUSTICE SOTOMAYOR: Even if I accepted their proposition that you need to allege for whatever reason a pleading standard, injury standard, that you have to allege something more than that they have a transaction, do I get to address that or I don't, or what am I doing here?

MR. WANG: Certainly, Justice Sotomayor. I think that what you're doing here is -- is, first, I -- I think you would reverse. We -- we would ask this Court to reverse the judgment of the Second Circuit. And it would reverse by saying, look, you -- if these are enough under Iqbal and Twombly and it involves unreasonableness, then whatever you -- rule you

apply, we would still say that there was a legal error here.

But, if I can get back to what I think may be the first part of your question, which is perhaps the relative weakness of our -- of our decision about the "except as otherwise provided" language at the top, well, first, I think that precedent answers this point, and precedent answers this point in a couple different ways.

One is Respondents have provided no cases where that that actually changes the calculus. It turns except -- the words "except as otherwise provided" magically turns the word -- the exempt -- exemptions into elements. There's no case on that point. In fact, the cases like Atlantic Richfield and Schlemmer make fairly clear that all that's doing is saying what happens when things clash. It doesn't expand or contract the liability provisions at all.

And I think, sort of maybe as a concluding point on this point, that is reinforced by the structure and the complexity and the nuance that's provided in 1108 that

involves an information asymmetry that -- that, again, cannot be addressed prior to discovery.

JUSTICE SOTOMAYOR: I'm going to ask the other two about the Second Circuit's factual ruling, which was that with respect to this provision, you have the burden of showing unreasonableness, but it reserved consideration of whether there were other exemptions that you didn't bear the burden about proving. I don't know how it got there at all.

MR. WANG: Right.

JUSTICE SOTOMAYOR: And I'll ask the government and your adversary how we do that. But Cook did say that -- established a narrow ruling for criminal pleadings. I don't think there's any case that ever has applied it to civil exemptions, correct?

MR. WANG: Correct.

JUSTICE SOTOMAYOR: So it's hard to rely on Cook, but the essence of its thinking was, if a prohibition looks like -- if a prohibition looks like it's -- you can't really tell it's illegal or not because it -- the exemption here says you can have these relationships, you can just have them with

reasonable fees, then you need for the -- for the -- for the government to prove they were unreasonable.

MR. WANG: I -- I --

JUSTICE SOTOMAYOR: Why wouldn't that apply here, that concept?

MR. WANG: Why wouldn't Cook's apply here?

JUSTICE SOTOMAYOR: Observation.

MR. WANG: Yeah. I -- I -- I think it wouldn't apply not simply just because of the criminal/civil distinction that we talked about but also for the information asymmetries that you mention. And it doesn't sort of it -- really, I think the Respondents are asking this Court to sort of carve out the statute in a few different ways, to -- to try to gerrymander it by saying: Look, we'll put the (b)(2) exemption, we'll treat that as an element and we'll try to carve out service providers, and then we'll stitch together 1106 and 1108. But that's not how the statute is written.

And, certainly, that might lead to some results. We don't see that happening in the Eighth or Ninth Circuits, but, if it does, I

think that's in Congress's province to address.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch, anything?

JUSTICE KAVANAUGH: Just in terms of the litigation in the Second Circuit and the district court, there were other counts, right, so the complaint -- and correct me if I'm wrong, I might be mistaken on this -- there are other counts about unreasonable or excessive fees, but this count, Count IV, was just prohibited transactions, and that's the only issue we are addressing here, correct?

MR. WANG: Correct, Justice Kavanaugh.

JUSTICE KAVANAUGH: Okay. Thanks.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Barrett?

Justice Jackson?

JUSTICE JACKSON: You've been asked a few questions that indicate concerns about the expanded litigation threat in this circumstance, and I guess I'm wondering whether those concerns are really consistent with what Congress itself was thinking in the context of this ERISA

statute.

You know, Congress set up fiduciary duties. It created a series of remedies for plan participants to enforce those obligations. And at the beginning of the statute, it says that it was "providing for appropriate remedies, sanctions, and ready access to the federal courts."

So it appears that Congress did not really share the concern about the litigation in this area that the amici in this case have raised.

MR. WANG: That's right, Justice Jackson. I think that with respect to Congress and this Court's understanding of Congress's intent in ERISA, it's to provide a broadly protective and remedial statute and provide an avenue for plaintiffs to -- to enforce ERISA's terms and conditions.

And I think it's telling that simply that Respondents and their amici, especially their amici, have, in fact, advocated for changes to 1106 several times in the halls of Congress. Congress has declined to do that. It's kept the scheme as it is.

And I think applying the text as written is appropriate in this instance.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Dubin.

ORAL ARGUMENT OF YAIRA DUBIN

FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MS. DUBIN: Mr. Chief Justice, and may it please the Court:

The text and structure of this statute demonstrate that the 21 exemptions in 1108(b) are the fiduciary's responsibility to plead and prove, but, as already discussed this morning, that straightforward reading raises a practical concern for the subset of claims that are at issue here, that plaintiffs could obtain discovery simply by alleging a routine service provider transaction.

Importantly, that theoretical concern has not materialized in the real world, likely because courts have the necessary tools to weed out and deter bare-bones complaints. And in all events, we don't think that concern justifies

adopting Respondents' strange reading.

Critically, service providers are just one of the nine categories of parties in interest. The rest are plan insiders with whom transactions carry obvious risks of favoritism and abuse.

All the usual interpretive rules indicate that Congress intended the fiduciary to justify such transactions. Respondents' elements-based approach would thus undermine the prohibited transaction provisions as a whole based on pragmatic concerns about one sliver of party-in-interest transactions. That approach is fundamentally unsound.

I welcome the Court's questions.

JUSTICE THOMAS: Why would Congress find -- say it's unlawful for existing service providers to be employed in this way?

MS. DUBIN: Sure. I don't think Congress was saying it's unlawful for service providers to be employed in this way. What Congress set up is a scheme, and this Court has recognized that several times, including in your decision in Harris Trust, that these types of transactions have a potential of injuring the

plan.

It's very easy to see that with respect to insiders, as I just mentioned, but it's also true with respect to service providers. You can pay service providers excessive fees with people's retirements money.

So the scheme Congress set up set out specific transactions that are prohibited and then exemptions from those transactions that you can show that a particular transaction was reasonable and necessary.

And, in that context, it makes perfect sense to put the burden on the fiduciary to show that the transaction was justified and reasonable. The fiduciary is the one who enters into the transaction. The fiduciary is the one who has the information about the transaction. And the fiduciary is the one who's charged under trust law with ensuring that these transactions are an appropriate use of people's retirement money.

JUSTICE KAGAN: So do you think this is just a mistake on Congress's part? In other words, you're saying this scheme makes perfect sense with respect to insiders.

But, when you apply it with respect to these third-party providers, service providers, you know, all of a sudden you're potentially making libel of -- a really big category of innocuous conduct. Is this something Congress just didn't understand it was doing, or, you know, do you have a theory for why Congress wanted to go that far?

MS. DUBIN: We don't think it was a mistake. We think it was entirely deliberate. And that's because, at trust law, the fiduciary had the burden to justify delegations to a third party. The fiduciary was hired for his skill and for his ability to manage resources appropriately.

He is allowed to delegate. That's consistent with the Restatement (Second) of Trusts. But, when he does so, he's the one who has the burden to justify it. And that's all 1106 and 1108 do, which is you can engage in this transaction, but it's the fiduciary who carries the burden to justify it.

So I don't think it's a mistake at all that these service providers were included among the other parties in interest, who are all

obvious insiders to the plan.

JUSTICE JACKSON: Your broader argument or the sort of remarks that you made initially seemed to suggest or assume that there has to be consistency in the rules about burdens across the different kinds of parties in interest and across the different exemptions.

Can you say more about why you think that's the case?

MS. DUBIN: Absolutely. I don't see any textual basis here to slice and dice the way the Second Circuit suggested where it just focused on this one particular sliver of transactions. The textual hook that they're using, except as provided in 1108, equally applies to all the exemptions, so I don't see how you would single out one exemption.

That said, we are very concerned with the effect on the other types of parties in interest. And we do think that's a useful tool for interpreting all of the exemptions as a whole.

So the bottom line on that is I don't see a basis for why the Second Circuit did what it did, but it is really important that if the

Court is inclined to do something more similar to the Second Circuit, even though I -- I can't see exactly a doctrinal basis, it wouldn't let that expand to other parties in interest.

JUSTICE SOTOMAYOR: So how -- how do we write this opinion? Let's assume -- we start with, as you want us to, it is the fiduciary's responsibility to -- to prove the reasonableness of their fee. That -- that's their burden, okay?

But what do we say about the plaintiffs' pleading, and -- and how do we say it? Meaning, is it enough just to say it violated 1106? You seem to suggest not. And then how do I explain why not?

MS. DUBIN: Sure. Absolutely.

JUSTICE SOTOMAYOR: And then my last question, and you heard it before, it -- was this pleading enough?

MS. DUBIN: Sure. Absolutely. Let me address both pieces, and if I -- if I don't get to the second -- if I -- if I don't get to the second piece, just let me know.

We think that this is a straightforward opinion to write, along the

lines Justice Alito was suggesting. This is a straightforward prohibition and exemption structure, and these are affirmative defenses.

We think that district courts already have the tools to deal with bare-bones allegations in Category 1 that we were talking before that just suggest a routine service provider transaction. They already have the tools.

And if the Court wanted, it could just leave them to continue doing and applying the plausibility framework that they're already applying. But, if the Court did want to say something about it --

JUSTICE SOTOMAYOR: I -- I will say the following. They may get it. But I also know plaintiffs' counsel often will come in with the minimum, and if the minimum is just these -- they have this prohibition, how do we avoid that?

MS. DUBIN: Sure. If the Court wants to --

JUSTICE SOTOMAYOR: What do we have to say to avoid that?

MS. DUBIN: Yeah. If the Court were

to say something about it to address the "that's nuts" example from Justice Kavanaugh, I think the way to -- to address it would be to explain that the plausibility framework precludes such complaints, and I think that's because that complaint on its face obviously implicates an affirmative defense.

And the plaintiffs haven't said anything to suggest why the underlying conduct will ultimately be found unlawful. This isn't treading or breaking new ground. This is already done in various cases and various statutory schemes involving affirmative defense where a petitioner or a plaintiff fails to give any -- any explanation of what's going on.

JUSTICE SOTOMAYOR: Give me -- give -- give me some examples.

MS. DUBIN: Sure. So I think Nayab versus Capital One, which I'll give you the cite, is 942 F.3d 480, is a great example. It's dealing with an analogous structure in the Fair Credit Reporting Act where the exemptions are affirmative defenses, but a plaintiff still has the burden to say something about their theory of why it doesn't apply.

I think another helpful context is that in the sanctions context, courts already, many, many circuits look to whether a plaintiff failed to investigate an obvious alternative explanation, including an affirmative defense.

JUSTICE KAGAN: Well, to the extent that you're saying that the plaintiff is going to need to present an alternate -- an affirmative defense and say something about why it doesn't apply, it seems to me that you're three-quarters of the way to Ms. Saharsky's position. So I -- I guess I don't see that as a typical Iqbal maneuver.

MS. DUBIN: So this is absolutely critical. Our position is not three-quarters of the way to my friend on the other side's position, and there are two big reasons why.

The first big reason is that my friend's position makes these exemptions into elements. That turns them into the plaintiff's burden to plead and prove all the way through, and they forthrightly admit that.

That would be a sea change in the way that these provisions are applied. No court of appeals, including the Second Circuit below, has

adopted that approach, and we think it would strongly undermine these provisions.

But, even as to the pleading standard even as to these service provider transactions, our approaches are meaningfully different. And I think, here, it's very helpful to think about the complaint at issue in this case, which, as we were talking about earlier, does allege excessive fees that were far above the industry benchmark and gives reasons to think that those fees were excessive, including that the plaintiff -- that the defendants used multiple service providers when they could have used one.

We think that's sufficient to say that this explanation is not obvious. However, what Respondents think and what the Second Circuit held below is that this complaint failed because they didn't go on to explain why that excessive fees charge weren't justified by the quality of the services provided. And the theory is something like, if the recordkeeper is providing the Cadillac of services, maybe these excessive fees are justified.

We don't think that plaintiffs carry that burden. We don't think they carry the

burden to negate the exemption in that fulsome way.

JUSTICE ALITO: I -- I -- I don't --

JUSTICE GORSUCH: Well, I -- I -- I -- please go ahead.

JUSTICE ALITO: I'm a little puzzled by what I've understood you to say, but maybe I don't understand it. Why should the plaintiff have to do anything more than plead the elements of 1106? So, in a case like this, the plaintiff simply has to plead that the fiduciary with respect to the plan shall not cause the plan -- cause the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and the party in interest.

So all they have to plead is that -- that the fiduciary here caused the plan to engage in the furnacing -- the furnishing of goods, services, or facilities by TIAA and Fidelity, end -- end of the elements. That's all you have to plead.

Why would anything more be required?

MS. DUBIN: Sure. It's because I

don't think that complaint plausibly alleges entitlement to relief. I think the problem with that complaint is that you're alleging a routine transaction with a service provider for services that they provide on the market.

JUSTICE GORSUCH: See, that's the problem I have too, which is, in Twiqbal, there was an obvious explanation that would negate the existence of a cause of action with -- forget about affirmative defenses. You didn't even get out of the gate. You know, was there a contract combination conspiracy under the Sherman Act or was it unilateral action in parallel?

Okay. That's one thing. Here, you're asking for somebody to plead essentially away an affirmative -- what you're calling an affirmative defense, not its elements. And I think that's what Justice Alito and Justice Kagan are getting at.

And I'm unaware of this Court having endorsed that move before, and it seems to me doing so would have ripple effects we cannot presently anticipate across -- trans-substantively across the law with respect to affirmative defenses. Thoughts?

MS. DUBIN: Sure. I appreciate the Court's concerns, and, of course, we're cautious about spillover consequences in other areas. Again, I think this is already what district courts are doing on the ground when they encounter a complaint that is just bare bones.

JUSTICE GORSUCH: That's -- that -- that's one thing. Leaving it alone is one thing. Saying something about it is another.

MS. DUBIN: I completely agree it's different when things are happening sub rosa rather than announced by this Court.

JUSTICE GORSUCH: Not sub rosa, no. In the normal course, lower courts developing the law, and when splits arise or a occasion arises, we address it. But we don't first view, review. Come on, right?

MS. DUBIN: Let -- let me just try to situate this entire line of questioning within our case, which is we are not urging the Court to say anything about this. We don't think the Court needs to. We think the statutory answer is clear. And for the reasons Petitioners' already given, these are affirmative defenses, these exemptions.

We heard four justices who are concerned with this and do think it's appropriate to say something. We do think this is the right answer that's happening on the ground, but I absolutely appreciate the concerns you're articulating.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Well, which is it? I mean, earlier you said that it has to -- you have to say enough to make it plausible. And that suggests to me that that's a judicial require -- that the court has to -- if that -- if we say that's the standard, the court has to look at it and determine whether it's plausible. I mean, is that -- is that your answer, or is it you -- you -- we don't have to say anything?

MS. DUBIN: I was differentiating between what this Court says in an opinion resolving this case and what district courts do on the ground. I agree as to the first response that I gave, which is that district courts on the ground should be evaluating plausibility. And I do think, if you failed at all to respond

to an obvious explanation for the conduct that would render it unlawful, that is a problem for a plaintiff. And I think that's perfectly within the judicial role to recognize that. And I think district courts and lower courts on the ground are doing this already.

As to what this Court says in an opinion, I think it depends on how the Court is weighing the various spillover consequences at issue here. But this is all after you've gotten to the point, I think, where you've already rejected Respondents' approach, which I think simply doesn't work as a matter of the statutory scheme and has its own pragmatic consequences. This is simply whether you want to address the "this would produce nuts results" for these bare-bones complaints, and I think this is the right answer.

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

JUSTICE ALITO: Well, I'm still puzzled by your -- by your argument because a lot of your answer is, well, the district -- look at what the district courts are doing on the ground.

But is what the district courts are doing on the ground correct? That's what I'm interested in. And I understand that the argument that all that's necessary to be pled are the elements of the -- the -- the -- the provision that creates liability. And those are the ones that I set out. And they -- they say nothing about the reasonableness of the fees.

I don't know how the reasonableness of the fees gets into the pleading requirement if that's the way we go about it.

MS. DUBIN: Sure. So I think looking at this Court's decision in Iqbal, the language used there was a claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

I think that's the standard the lower courts are looking to --

JUSTICE ALITO: It's reasonable liability as to the elements, not reasonable liability as to affirmative defenses that may or may not exist and may or may not be asserted. Anyway, I'll -- I'll leave that there.

There's been talk about the fact that there are ways -- I mean, maybe those who have concerns about the practical implications of deciding the case -- of reversing the -- the Second Circuit's rule are -- are -- those concerns are -- are unfounded. Let's -- maybe they are. Okay. Let's assuming that there -- they are, there's some basis to it.

And what you propose with Rule 7 does suggest that the government thinks there's a basis to it. So, if all you have to do is plead what I've just outlined, what are the things that district courts can permissibly do that would alleviate these concerns?

MS. DUBIN: So, in addition to applying what we think is the rule of Iqbal and Twombly in this context, I would say that they could also, obviously, engage in fee shifting; they can sanction attorneys who bring meritless lawsuits. I think both of those are very much deterrents to these types of bare-bones suits being brought on the ground.

I think it's very --

JUSTICE ALITO: Do you think Rule -- do you think Rule 11 sanctions are really --

that's going to do the job here?

MS. DUBIN: I do if plaintiffs are bringing -- begin to bring bare-bones complaints. I'll -- I'll point you to the Tenth Circuit, which said, you know, part of a reasonable attorney's pre-filing investigation must include determining whether any obvious affirmative defense bars the case. The Seventh Circuit, the Fifth Circuit, and the Sixth Circuit have all said the same. I do think a failure to investigate an obvious affirmative defense is a problem for a plaintiff's case.

And I think, you know, going back to what you were asking me, I do think it's relevant that -- that -- sorry, that Twombly and Iqbal were about the elements, that was what was going on in those cases, but the thing that was motivating the Court, the thing the Court was concerned about, was that you're coming into a complaint without a plausible case against someone, that you have no theory of wrongfulness. And I think these bare-bones complaints share the same problem.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Earlier, Petitioners' counsel said that maybe the unreasonableness of the fee has to be pled because you have to plead an injury-in-fact.

Do you accept that?

MS. DUBIN: I think there's a fairly -- this goes also to Justice Thomas's question earlier. I think theres a pretty obvious injury-in-fact from claims like this, which is, if you're charging excessive recordkeeping, that's coming from the plan assets.

JUSTICE SOTOMAYOR: But you --

MS. DUBIN: It's coming from retirement funds.

JUSTICE SOTOMAYOR: No, no, no. You misunderstand. You say to us that the only pleading standard is the 1106 violation. The 1106 violation does not talk about the reasonableness or excessiveness of the fees.

So the elements will not address that. So, if that's all you plead, that's a bare-bone complaint which I think meets the Eighth Circuit standard, correct?

MS. DUBIN: Yes.

JUSTICE SOTOMAYOR: All right. If we are concerned about the consequences of that, that we're going to have an explosion of bare-bone complaints, do we say something like what your colleague is saying, that that's not enough because you also have to plead injury-in-fact, and that obviously will take you to the unreasonableness or excessiveness of the fees?

MS. DUBIN: I think that is one option available to the Court here.

JUSTICE SOTOMAYOR: And what would be the collateral consequences of that option?

MS. DUBIN: So I think some of these claims -- like, these claims are about excessive fees coming from the plan, and I think, you know, that obviously applies in this sort of defined contribution plan.

You look at a defined benefit plan, like what was going on in Thole, you could still have someone engaging in excessive recordkeeping fees and the fiduciary is not being careful with plan assets. And that might mean the fiduciary is the wrong person to be in charge of this plan, that they're not being careful with plan assets. And one of the equitable remedies is

replacing the fiduciary.

I think that's a harder case for how you think about the injury-in-fact construct playing out there.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: And when you say "these bare-bones complaints," are you talking about the same complaints that Mr. Wang said was in Box 1? And what are those complaints exactly, and what takes you out of that category?

MS. DUBIN: Sure. And let me be very clear about this. I think Box 1 is a complaint that just alleges a service provider transaction for routine services. That's Box 1.

Box 2 is a complaint that includes allegations like the ones we see here: that the fees are excessive, four to five times the industry benchmark, that there's a reason to think the plan is paying excessive fees, that they're using multiple recordkeepers when they could have used one, that he didn't engage in a competitive process for these recordkeeping services.

Box 3 --

JUSTICE KAGAN: To me, that doesn't sound like a bare-bones complaint. Are you suggesting otherwise?

MS. DUBIN: No. That's exactly our position here, which is that Box 2 is where the complaint should be. And, in fact, that is where the complaints that we're seeing on the ground are, that suits being brought under this allege that there are excessive fees and that there are reasons to think the fees are excessive.

That's actually what the practice is playing out on the ground, and I think the practice is playing out on the ground that way because of the constraints we've been talking about today.

JUSTICE KAGAN: So those are not ones that in any circumstance would raise the necessity of talking about affirmative defenses?

MS. DUBIN: That is our view. Obviously, the Second Circuit disagreed with us. That was exactly the complaint they had.

JUSTICE KAGAN: Yes, yes, yes, but -- right.

MS. DUBIN: Yes. That's exactly our

view.

JUSTICE KAGAN: Okay. You were going to go on and tell me about Box 3? Maybe not.

MS. DUBIN: I -- I'm happy to.

Box 3 relates to the quality of the services. That's what the Second Circuit held. The Second Circuit held that it doesn't matter all this information that you've included about how excessive these fees are. This might be the Cadillac of recordkeeping plans. And if it's the Cadillac of recordkeeping plans, then those fees were justified.

And the problem is that Petitioners have no way of knowing if it's the Cadillac of recordkeeping plans.

JUSTICE KAGAN: But I take it that as you survey the litigation here, you're -- you're saying that most of these complaints or all of these complaints are Box 2 complaints, not the kind of bare-bones complaints that would suggest some special need to do Iqbal maneuvers?

MS. DUBIN: That's right. Those are the ones we're seeing.

And we haven't seen Respondents identify any bare-bones complaints, including in

the Eighth Circuit, which has been applying this rule that Petitioners are advocating for for 15 years, and we think that's because of the constraints that are already operating.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Ms. Dubin, very briefly. We got cut off because of the red light, but I -- I didn't -- I didn't want to rain on your Iqbal parade too much.

It -- it -- it does seem to me the 7(a) argument's not completely out of left field here. They're generally disfavored, as I remember from practice, but the exception -- one of the exceptions is, when you're -- when you have an affirmative defense that's pled in the answer, sometimes the -- the district judge will say: I want to -- I want to see the reply. And it happens a lot in qualified immunity, I believe, in particular.

And then, once you have a pleaded -- pled affirmative defense, a particular one, not just a laundry list, as Justice Alito said, then you might be able to Twiqbal it, it seems to me.

What do you think of that?

MS. DUBIN: I agree with you. And I think you're -- you're right to recognize that this is not some arcane rule of procedure. It does come up.

JUSTICE GORSUCH: It's pretty arcane, but it's -- it's -- it's -- it's not wholly unknown in civil practice when there's an affirmative defense. I had -- I had to do it. I remember it.

And you've got to plead facts. And then you have something to assess, a -- a -- a real Twiqbal question to answer, I think.

MS. DUBIN: Yes, absolutely. I don't want to rain on the parade we're having here, but I will say that the -- the one thing I want -- I do want to make clear is, at that point, you still don't have the burden to do what the Second Circuit held the plaintiffs to here, which is to -- because they treated the defense as an element of the plaintiffs' case.

JUSTICE GORSUCH: Sure. Sure. But you could say, as a matter of law, based on the facts pled, no reasonable juror could doubt that this affirmative offense -- affirmative defense

applied?

MS. DUBIN: That's right.

JUSTICE GORSUCH: Okay.

JUSTICE KAVANAUGH: A couple questions.

On -- a bare-bones complaint, Category 1, the pure prohibited transaction, I think you don't have standing.

MS. DUBIN: I -- I think that's a problem with that complaint, as we've been talking about, as I was just talking about with Justice Sotomayor.

But I think, before getting to sort of the standing concerns and how it would play out in various contexts, I really just think the most obvious answer is plausibility. But yes.

JUSTICE KAVANAUGH: Okay. And then I think most of the cases in response to your discussion with Justice Kagan are going to involve the claim like that, which is Count IV here, and other claims that are excessive fees claims, different counts, right?

But we still have to analyze the other counts may not go forward, the prohibited transaction count. In other words, I don't know

that it's enough to take care of the prohibited transaction count that the -- that you're alleging excessive fees in the other counts. Or is it enough?

MS. DUBIN: It --

JUSTICE KAVANAUGH: Do you understand the question?

MS. DUBIN: Let me try. And if I haven't correct --

JUSTICE KAVANAUGH: Yeah.

MS. DUBIN: -- correctly understood you, please correct me.

If you're asking if the complaint here was done entirely properly, I don't think it was. The allegations I'm talking about really weren't in the right place in my view.

JUSTICE KAVANAUGH: They weren't related to Count IV, correct?

MS. DUBIN: To the prohibited transactions claims.

JUSTICE KAVANAUGH: Yeah.

MS. DUBIN: However, the Second Circuit did consider them in its analysis because it didn't apply that sort of level of formalism and still found that they were not

enough. And I think that's a critical piece where we diverge from the Second Circuit. We absolutely do think it was enough here.

JUSTICE KAVANAUGH: The -- let me make sure I have that. That sounded important.

The -- you think what was enough?

MS. DUBIN: The Second Circuit said: Even if you consider all of the allegations in the complaint here --

JUSTICE KAVANAUGH: Yes. At the end of the analysis of Count IV, it had a little tack-on, right?

MS. DUBIN: Yes.

Even if you consider all of the allegations plaintiffs made here about the fees being far above the benchmark, about the fact that the plan didn't engage in a competitive bid process, and about the fact that they used two recordkeepers when they could have used more, that would not be enough because the Petitioners haven't shown that those excessive fees weren't justified by the quality of the services provided.

And that part of the analysis, we strongly disagree.

JUSTICE KAVANAUGH: To get past a motion to dismiss?

MS. DUBIN: Exactly.

JUSTICE KAVANAUGH: Right. So the -- the point -- and this is where -- to Justice Kagan's point earlier about three-quarters of the way, at least on the pleadings standard, I think you're 99 percent of the way, but Respondent will obviously address that, which is you have to allege something suggesting unreasonableness of the fees, somehow get that in, at least if, as Justice Gorsuch says, it's been put into play at the motion -- at the pleading stage, correct?

MS. DUBIN: Right. Another way of looking at this is sort of, on the face of the complaint, have you pled yourself out of court? That's another way of thinking about it. And I think, if you just aren't doing anything to show that these fees are not obviously reasonable, you may be in that category of claims.

JUSTICE KAVANAUGH: Good. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

JUSTICE JACKSON: I guess I'm wondering, is this case really about what needs to be pled, and do we need to say that?

I -- I thought the government's basic position or at least Petitioners' was the -- that the problem with the Second Circuit's view was that it didn't recognize that the exemptions are, in fact, affirmative defenses and, instead, treated them as elements and that it would be enough -- and maybe I'm wrong about this now given all the conversation that we had -- we've had, but that it would be enough for the court to say: These are affirmative defenses, they are not elements; therefore, the burden is, you know, on the defendant to establish them.

I didn't know that this was an Iqbal/Twombly case, where the Court was being called upon to determine what the plaintiff -- the plaintiff had to do, as opposed to determining that defendant bore the burden of establishing these exemptions.

MS. DUBIN: I entirely understand where you're coming from. I think, to resolve the elements question, all you would need to hold is that these exemptions are, in fact,

affirmative defenses and not elements of the prohibitions for all the reason you heard already this morning.

However, I do think a real practical concern has been raised by the bench. It hasn't materialized yet. We haven't seen it in the Eighth Circuit. And I think that the government has offered an option for thinking about how district courts will be dealing with complaints that raise those concerns if they were to materialize in the future.

Whether the Court decides to write that in an opinion and offer that guidance to the lower courts obviously I leave to the Court, but it is an option available to ensure against this concern that Respondents have raised.

But, even if you disagree with the government on that, even if you don't think that that's an appropriate use of Iqbal and Twombly, it still wouldn't counsel in favor of adopting Respondents' approach, which is a misreading of the statutory text. It doesn't account for the other party-in-interest transactions, it doesn't account for the other exemptions, and it raises its own pragmatic concerns.

JUSTICE JACKSON: And -- and we wouldn't have to say those other things to resolve the exemptions question that was presented in this case?

MS. DUBIN: Yes. The other things that you referred to are really only in response to Respondents' pragmatic concerns. Respondents are saying: Don't do what you just said. Don't resolve the case along the, you know, straightforward Meacham, ADA, Corning Glass, don't resolve this case along those lines because of these pragmatic concerns.

And to the extent the Court shares those concerns, we have offered that framework as a helpful tool.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY

ON BEHALF OF THE RESPONDENTS

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

Petitioners' view is that pleading the mere fact of a service provider transaction

defeats a motion to dismiss and a case could go forward.

That can't possibly be right. If we look at this statute, it is unique, Section 1106(a), because it covers an incredibly broad array of innocent beneficial conduct.

In fact, ERISA separately requires and encourages hiring service protect -- service providers. Section 1106(a) thus has to be read together with Section 1108 to limit this cause of action to culpable conduct. And we know that in part because Section 1106(a) has this cross-reference to Section 1106 -- 1108, which says "except as provided in Section 1108."

You know, tellingly, there are two different parts of 1106 here. There's (a), which includes all of this innocent conduct, and (b), which includes only self-dealing conduct, and that cross-reference isn't in Section 1106(b). It has to be doing some work textually, and it doesn't under Petitioners' provision.

If you look at all of this together, it shows that Congress's intent was to define the cause of action as not just a service

provider transaction but one where there's some wrongful conduct, where the services are unnecessary or the fees are unreasonable.

And under Petitioners' view, all a plaintiff has to do is plead the mere fact of a transaction, no allegation of wrongful conduct. It automatically opens the door to expansive discovery. The cost is disproportionately borne by defendants. It would force settlements of meritless litigation. It has in some of these university cases. The ultimate result would be to hurt plan participants and beneficiaries. The government recognizes that that is an intolerable result, and I'm happy to discuss why its proposed solutions don't make sense.

But the bottom line is the Second Circuit got it right, and this Court should affirm.

I welcome the Court's questions.

JUSTICE THOMAS: What should be pled?

MS. SAHARSKY: So, here, it's the -- that the fiduciary caused the plan to enter into a transaction with a party in interest, which a service provider is, and either that the services were unnecessary or that the fees are

unreasonable.

I mean, there was never any question in this case about what exemption might apply, this idea that Petitioners say, oh, we don't know what exemption might apply. I think everyone thought that was obvious, and the government seems to agree because they say that they have to plead unreasonable fees too.

So, you know, it's just a question of can they just come to court and say service provider transaction with nothing wrong with it, as opposed to service provider transaction with some kind of wrongdoing that's in Section 1108. And we think, you know, this Court's -- this Court's decisions in Iqbal and Twombly, you know, make clear, if you come to court, you've got to have done some investigation and have done some -- you know, have some plausible allegation of wrongdoing.

And it just doesn't make any sense to read this statute as allowing a cause of action to go forward with no allegation of wrongdoing.

JUSTICE JACKSON: What -- what is your -- what -- what is your position on who bears the burden of proving the unnecessary and

unreasonable fees?

MS. SAHARSKY: The plaintiffs because it's an element, and so they would bear the burden of fees --

JUSTICE JACKSON: So you don't -- you disagree that it's an affirmative defense, that the exemptions that -- in 1108 are affirmative defenses?

MS. SAHARSKY: For Section 1106 claims, they are elements of the claim. They are not affirmative defenses. The burden is on the plaintiff to plead them. And that's the question the Second --

JUSTICE JACKSON: What do we do about the structural clues in the statute that we -- the -- the other side explains that this is a pretty common way in which statutes are set up, that you have prohibitions and then you have exemptions and that we ordinarily say the burdens apply in the way that they are articulating. And you don't normally see elements in this way.

MS. SAHARSKY: Yeah.

JUSTICE JACKSON: What -- what's your response to that?

MS. SAHARSKY: That's right, but this Court has many cases where it said that there are exceptions that are elements, and it -- the question it asks is: Do you need the exception to define the wrongful conduct? And Cook was a case like that, but there's a series of a whole bunch of other cases --

JUSTICE JACKSON: Are all 21 exemptions elements in your view? And then what do we do about the information asymmetry, the fact that plaintiff could not possibly know many of them?

MS. SAHARSKY: Well, the plaintiff only has to plead the one that's relevant on the facts of the case. And I think it helps to think that, you know, a case comes to a court to challenge -- a plaintiff is challenging a particular transaction. Either it's a service provider contract or it's a certain type of buying of employer stock or something else. And the different exemptions apply to different factual circumstances.

And as I think was discussed --

JUSTICE JACKSON: But are -- but do they have to be consistent with respect to the

burden that you say falls on the plaintiff? Are they all elements, all 21 exceptions?

MS. SAHARSKY: With respect to 1106(a) claims, which include the exemption and otherwise would be only innocuous conduct, then, yes, the relevant exception in Section 1108 would be an affirmative defense, but not all of them would be relevant in every case on the facts.

And I think you can think about this in terms of what a plaintiff has to plead to go forward with a complaint. They have to --

JUSTICE JACKSON: I'm sorry. You said some of them are affirmative defenses? Did --

MS. SAHARSKY: I said that you would -- that a plaintiff would have to plead facts regarding the one that was the -- regarding the transaction, the type of transaction, that's applicable in their case.

So, for example, there are some that involve block trades or cross-trades or buying employer stock. And no one was doing any of those things here, so there's no requirement to plead those kind of facts.

The plaintiff's burden is not to plead

legal conclusions but to plead facts that show an entitlement to relief.

JUSTICE JACKSON: No, I understand the plaintiff's burden generally. I'm just trying to understand your theory --

MS. SAHARSKY: Yes.

JUSTICE JACKSON: -- about whether all of the 1108 exemptions, all of them, become elements in the 1106 context.

MS. SAHARSKY: In 1106(a) --

JUSTICE JACKSON: Yeah.

MS. SAHARSKY: -- which is the first part of the statute that is incredibly broad, it includes every kind of transaction you could imagine with a plan, the only thing that the Petitioners say is exempted is the thing that this Court exempted in the Lockheed versus Spink decision, which is paying benefits to a beneficiary, but it covers pretty much everything else in the world. The definition of "party in interest" is literally an "everyone and their mother" provision.

And so these -- this broad range of transactions has to be understood with respect to the exemptions in Section 1108. And, yes,

they would be elements as apply based on the facts of the case.

But you just plead the facts that are relevant to the transaction at issue. And so, for this transaction, there was never any question that what was at issue was a service provider transaction. The exception that was relevant was the one for -- for reasonable fees, necessary fees, et cetera.

And if, for some reason, there was a case in which a plaintiff pleaded and did not include a relevant exemption, well, of course, Rule 15 --

JUSTICE JACKSON: Can I just -- can -- can I -- can I ask you about potential problems for other statutes that are created in this same way? I mean, do we have to worry that if we're suddenly saying that the exemptions in this structure are elements that we're going to implicate things like the Federal Arbitration Act, which has a similar dynamic?

MS. SAHARSKY: I don't think it's a problem because this Court considers each case and each statute as it comes. That's what it has been doing since the decision in Cook, where

it said, look, if we look at something and it's called an exemption and it's in a separate provision, we probably would think it's an affirmative defense, but there are some circumstances in which we don't, say, if there's a cross-reference to the provision or it's direct -- it's -- there's some other way that it's directly incorporated or, for example, if the conduct that is in the initial prohibition covers so much beneficial innocuous conduct that you think we can't define the wrongful thing that Congress was trying to get at without -- without using the exemption. And that's the inquiry that this Court has done, and that's the inquiry I think should be --

JUSTICE KAGAN: Do you think this is a class of one, you know, that this is the only statute we're going to find where it's going to satisfy your requirements? As I understood it, you said you need the cross-reference and you need the fact -- and it's a fair point that this statute -- that, the 1106, covers a -- a vast amount of -- of conduct and a significant amount of beneficial conduct. Is this a -- a -- a category of one are you basically saying that we

should create?

MS. SAHARSKY: Well, I think the Court has already found categories or found circumstances like this, not a lot, not a lot, but, in the history of the Court's opinion, there have been other times the Court has found exemptions to be elements. The Vuitch case, Behrman, Ruan, Ledbetter, Britton, a number of cases. The Second Circuit also relied on a Fair Debt Collections Practices Act case, Roth, so --

JUSTICE KAGAN: See, I think I might be -- I might find it sort of a happier rule if you had just said it's a category of one.

(Laughter.)

MS. SAHARSKY: Right, but what I'm saying --

JUSTICE KAGAN: Because what you're saying is -- I mean, the cross-reference, yeah, there are cross-references like this all the time which you wouldn't think preclude the typical rule affirmative defense structure.

MS. SAHARSKY: Mm-hmm. Mm-hmm.

JUSTICE KAGAN: And then you're saying, well, we should consider how much legitimate conduct a particular provision

incorporates. That seems like a very loosey-goosey inquiry to me. You know, how much do you need? At what point do you get over the line? It seems as though you're asking us to distinguish among statutes in -- in -- in ways we shouldn't be doing.

MS. SAHARSKY: Well, what I was suggesting and hoping to give you comfort, Justice Kagan, was that this Court has already -- already has this method of statutory interpretation where it looks at these factors and comes to the right answer, and there have not been, you know, a lot of cases where there -- there are exemptions that have been found to -- to be elements.

And so I -- I thought that it might give the Court comfort to know that this is something that the Court --

JUSTICE KAVANAUGH: So -- and --

MS. SAHARSKY: -- has been doing for decades and decades and centuries and it hasn't been a problem. It's just, in this particular context, the statute really can't be understood without reference to the exemptions.

JUSTICE KAVANAUGH: Good -- good word,

"context." So you're saying a statute like this, structured like this, can sometimes be read to mean elements, sometimes be read, more often be read, to be affirmative defenses.

And how do we tell?

MS. SAHARSKY: Right.

JUSTICE KAVANAUGH: And -- and the context would seem to be key on that. And some of the concerns that we've been discussing or I've been raising and the amicus briefs raise, others have raised, would suggest that this -- the context here suggests it doesn't make much sense to read this 1106(a) that way.

MS. SAHARSKY: Right. So I'd point the Court to four factors. One, the incredible breadth of Section 1106(a), which reaches so much innocent conduct, nothing wrongful, not limited to wrongful conduct by itself.

Then you have the cross-reference, which says: Okay, we don't have to read it by itself. We're being told that we should read it with Section 1108, which is what limits it to the wrongful conduct. And then you don't see that cross-reference in Section 1106(b), which is the one that defines only wrongful conduct,

only transactions that involve self-interest in conduct.

So you think I've got to give some meaning to that language that's in 1106(a), the cross-reference, but not in 1106(b). Petitioners' view does not give any meaning to that language. It is superfluous.

And then the fourth think I think about is that there are other parts of ERISA where Congress either encouraged or expressly required the use of service providers. And I think to myself: Well, Congress said that plans have to do this and every plan does it, so it would make no sense at all to say that Congress just defined the cause of action as using a service provider.

JUSTICE KAVANAUGH: So --

MS. SAHARSKY: If I put that all together, I'd have to come out that this would be part of the --

JUSTICE KAVANAUGH: So, on the context, you're pulling in the other statutory provisions too. I think that fourth point's pretty important.

And then another point, I just want to

be crystal-clear on this because the other side says: Well, what about the insider transactions? And those are 1106(b), correct?

MS. SAHARSKY: So 1106(b) are when the fiduciary -- the fiduciary has conflicts of interest, self-dealing. Those are all on their face bad transactions.

I understand the argument that the other side of the government is to be making is: Well, maybe 1106(a) is also like that because parties in interest include insiders. But they include a lot of people who aren't -- aren't involved in conflicted transactions. They include service providers. I mean, it is an -- the immense breadth of the party-in-interest definition is -- is hard to describe.

But I think the point of that is is that you need a way to limit the 1106(a) provision, and the cross-reference tells you to do it using the exemptions.

Another thing that I just might say --

JUSTICE SOTOMAYOR: I'm sorry. Just to answer Justice Kavanaugh's question more directly --

MS. SAHARSKY: Sure.

JUSTICE SOTOMAYOR: -- 1106(b) does not prohibit a plan from leasing or -- or from accepting services from an insider. It -- it -- that's only prohibited by (a).

MS. SAHARSKY: Correct. I'm sorry, the -- Section 1106 --

JUSTICE SOTOMAYOR: I thought that's what Justice Kavanaugh was asking.

JUSTICE KAVANAUGH: Yeah. No, that's -- that's -- 1106(a) covers insiders --

MS. SAHARSKY: And outsiders.

JUSTICE KAVANAUGH: -- and 11 -- right. And 1106(b) covers -- can you repeat that?

MS. SAHARSKY: Sure.

JUSTICE KAVANAUGH: I'm sorry to interrupt.

MS. SAHARSKY: So 1106(a) --

JUSTICE KAVANAUGH: Yeah. You're clarifying it.

JUSTICE SOTOMAYOR: I -- I -- I think 1106(a) does -- 11 -- let's do it in the negative. 1106(b) does not include an insider doing services at a reasonable price?

MS. SAHARSKY: 1106(b) does not

directly address service provider transactions. And so, if I might just back up, 1106 --

JUSTICE SOTOMAYOR: So -- so it doesn't include -- you are only cover an insider service provider by 1106(a).

MS. SAHARSKY: Well, it could. It's just that (b) is written in broader terms. So, if the (b) -- just if I could back up, (a) involves a transaction between the fiduciary or the plan and a party in interest; (b) involves the fiduciary himself or herself doing something with respect to a plan.

And so (b) is focused on the fiduciary's conduct, and it could involve dealing with the assets of a plan for his own benefit in his own account, it could be in -- being on both sides of a transaction or on the side of a transaction that's opposite to the plan, or it could involve receiving a kickback.

So those things could happen in the context of a service provider transaction. It's just that service provider transactions aren't directly addressed, aren't -- aren't specifically addressed in Section (b). They are addressed in Section (a), but they're not just

service provider transactions with insiders. They're transactions with any -- any service provider. It's -- it's, you know, any -- any service provider is defined --

JUSTICE JACKSON: So what is your --

MS. SAHARSKY: -- as a party in interest.

JUSTICE JACKSON: -- cross-reference argument? I mean, why isn't -- why isn't the conclusion that the cross-reference in (a) is just saying that the exemptions can apply in this world of service providers, and it can't when a fiduciary is dealing, self-dealing, the -- this is like a more significant thing, and we're not going to allow it?

MS. SAHARSKY: Because Section 1108 already says that it exempts -- its exemptions apply to all of 1106. It says that in four, five, or six different places that are cited in the brief. So 1108 by itself says that its exemptions apply to all of 1106.

And so you have this extra language in 1106(a) --

JUSTICE JACKSON: Yeah. But we don't know which language is extra, right? We don't

know whether it was just sort of a drafting mistake on Congress's part with respect to 1108 to say that all of it applies when they really were not applying it to (b), 1106(b).

I mean, I -- I just don't know that we can draw the conclusion that the cross -- that something is -- work with a cross-reference that leads to the conclusion that you want us to draw.

MS. SAHARSKY: Well, it's not just the cross-reference. It's the structure of the statute and the rest of ERISA and the other factors that I was discussing with Justice Kavanaugh, but I do think that it's telling that the cross-reference is in 1106(a). It is not in 1106(b).

The Court, of course, looks at the text very carefully and tries to give meaning to the text. And the only -- the only party here that's giving meaning to that text in 1106(a) is us. If you want to disregard that text, you know, we wouldn't advise that, particularly because there are other parts of ERISA like the parts that require the use of service providers that make --

JUSTICE JACKSON: What do you say about the principle that the Solicitor General put forward that the fiduciary generally carries the burden to plead and prove the reasonableness of their actions and that that's really what is underlying the structure of this?

MS. SAHARSKY: I don't think that that's true. I don't think that the law of trusts said that. And I don't think that that's -- that's something that ERISA says, particularly in the context of service provider transactions.

Now this case is not about the burden of proof. This complaint got dismissed at the pleading stage. So the question the -- the Second Circuit had to decide was, you know, who has the burden and -- and -- and what is it at the pleading stage, what does a plaintiff have to plead to go forward past a motion to dismiss and into discovery to allow a case to go forward.

JUSTICE ALITO: It's been suggested that the concerns that seem to have animated the Second Circuit were unfounded or at least overblown for, I count, six reasons. And it

would be helpful if you could explain why you think they are insufficient.

So one is Rule 7 of the Rules of Civil Procedure. The other, which I really don't exactly understand, is the idea that Box B complaints are required but would be sufficient. Another one is standing, expedited discovery, coupled with a motion for summary judgment, fee shifting, sanctions. Why are -- are they not sufficient?

MS. SAHARSKY: Right. Because the -- the rule is that a plaintiff has to come to court and plead the elements and doesn't have to plead affirmative defenses.

Now, if the Court -- and that's -- that's how Iqbal and Twombly are understood. That's what it means to bring a claim to court and plead facts to show an entitlement to relief. It's entitlement to relief on -- on the elements. And so --

JUSTICE ALITO: Okay. What about the Rule 7 workround?

MS. SAHARSKY: So we think that that is kind of convoluted and discretionary and that's the problem with it.

First of all, the -- there would not be an opportunity to evaluate or dismiss the case on motion to dismiss because Section -- the Rule 11 -- Rule 7 just applies to an answer.

So the Court has discretion about whether the Court can -- whether it can -- it asks for a reply brief or not. So I guess what the government is thinking is the plaintiff pleads the mere fact of a service provider transaction. The defendant says no, this -- it is a -- for reasonable fees and necessary services.

And then, at that point, the Court should exercise its discretion to require the plaintiff to plead additional facts to show that the fees are unreasonable or the service is unnecessary.

The problem with that is that it's discretionary. A plaintiff could go to a district court that's favorable, not -- the district court would say: I -- I don't want to do that. And then it's off to discovery and off to summary judgment.

If this Court --

JUSTICE ALITO: Well, could we say

that in the -- in the particular circumstances here, it would be an abuse of discretion for the district court not to follow that procedure?

MS. SAHARSKY: The Court absolutely could say that. I guess my suggestion would be is that the Court should be very clear if that's what the Court wants, because that's not the way that things happen now with respect to Rule 7. And so the Court would -- would hopefully say that in those circumstances, in -- in the case of a service provider transaction, that if the defendant alleges that the fees were reasonable, the services were necessary, something in Section 1108, that then the district court absolutely should require the plaintiff to respond and plead facts to show, plausibly show, that the fees were unreasonable.

I mean, our bottom line, which I understand to be the same as the government's bottom line, although I'm not entirely sure, is that the plaintiff should not be able to just come to court and say there was a service provider transaction, that's bad, we're off to the races with a lawsuit.

JUSTICE ALITO: Okay. What about --

MS. SAHARSKY: They should have to say --

JUSTICE ALITO: -- what about standing and expedited discovery, coupled with a summary judgment motion?

MS. SAHARSKY: So I -- I will address each of those, but let me just say none of these supposed solutions or guardrails are working now in the district courts, and that would be before the Court announced a rule that you could perhaps just go in with a service provider transaction.

And just to -- one point on that. You know, there have been two dozens lawsuits that have been filed against university plans. In none of them has a court found that the plaintiff succeeded on the merits. This has been, like, millions of dollars that these universities have spent on discovery and individuals who have been named personally and had to live under a cloud for years and years.

So this idea that there are these great guardrails that are going to solve that problem, that's not happening now, and that's before Petitioners' position gets accepted.

But, to -- to specifically answer your question, I don't know that standing is a solution because standing, establishing an -- an -- an injury for standing is different from establishing an entitlement to relief under a cause of action.

I don't know what injury a plaintiff might claim. I mean, I think Petitioners' theory is that the mere fact of paying money to a service provider is an injury because Congress decided that that was bad or at least presumptively bad.

So now there's been a suggestion that the injury would be unreasonable fees, but I -- that -- that, to me, gets us back to, well, aren't the unreasonable fees part of the elements, so the cause of action. So I -- there's also the possibility of jurisdictional discovery and standing, which, you know, makes it seem to me like not a very great solution.

And I guess the last thing I would say on that is, you know, if -- if -- if there is a standing problem or a -- some other constitutional problem with the statutory interpretation the Petitioners are suggesting,

that would be a good reason not to do that thing and to take the other reading of the statute, which is much more reasonable.

I mean, nearly every court that's looked at this and, you know, apparently, the Solicitor General say Petitioners' position just can't be right, that just cannot be right. And there has to be a way to make sure that the plaintiffs have some burden to plead something more.

And there's a really obvious way to do that, which is to say, well, in this circumstance, we understand that Section 1108 helps to define the cause of action, to say that this is actually something that the plaintiffs have to plead.

And I -- just to get back to a -- a point Justice Kagan made, I -- I don't think it would be a big deal or weird to do that because, you know, this Court takes each case as it comes to it. It's not like it has had a lot of interpretive questions about Section 1106(a), but the last time it did, in Lockheed versus Spink, there was another plaintiff that came in and was suggesting a reading of Section 1106(a)

that seemed kind of facially just crazy, you can't do this, you can't say 1106(a) prohibits a plan from paying benefits to beneficiaries.

But the language of Section 1106(a) was so broad that it seemed like it could cover it. And the Court said: We're not going to do that. We're going to read the particular provision at issue in 1106(a) to not allow that result. And that's -- that's exactly what we're asking here.

And just in terms of the experience in terms of the lower courts, these prohibited transaction cases do not come up very often now. There's maybe a handful of factual circumstances where -- that have been litigated in the courts of appeals that involve fees for services, participant loans, some cases with buying employer stock or property, like employee stock ownership cases, things like that. There's kind of a handful of these. I don't think any of them have led to circuit splits. I don't think that there's -- there should be much concern about the Court, you know, adopting a rule that's going to have spillover effects for any of those.

And so I guess, you know, what we would say is that the Court should decide this case just as it decides, you know, all of the cases that come to it, which is on the language of this particular provision.

And we appreciate that the government is, you know, trying to help find these solutions to the problems with Petitioners' position, but I think, at the end of the day, they're not happening. They're not working now. I think they're discretionary. I -- I -- I -- the suggestion about, like, well, maybe there could be expedited discovery or not much discovery because you could just look at the face of the service provider -- the contract and see if it's good or not good, well, that hasn't been happening in these cases.

I mean, the -- the -- there have been experts on both sides to discuss whether the fees are reasonable or not. You know, discovery has gone on for years and years. These university cases started in 2016, and they're still going on now.

So I just would caution the Court before thinking that any of those suggested

solutions would be real solutions.

JUSTICE KAGAN: Could you just go back to the suggested solution of the government? I think you said to Justice Alito it just doesn't make any sense, but I wasn't quite sure I understood why you thought that.

MS. SAHARSKY: Sure. So, if the solution is that a plaintiff has to plead unreasonable fees or unnecessary services, then that is a great result, but we just want that to be clear, that that is the obligation that the district courts would enforce.

So there are two ways that the government suggests getting there, and they both seem kind of convoluted to us and also have this discretionary aspect that we're concerned about.

The first way that the government suggests is on motion to dismiss. The idea would be that in response to a motion to dismiss, that a plaintiff would have to plead additional facts to show that the fees were unreasonable or the service is unnecessary. But, like, why would the plaintiff have to plead that, because it's not an element? The government says it's an obvious alternative

explanation.

Well, we think that that misunderstands, for the reasons Justice Gorsuch gave, what the obvious alternative explanation doctrine is. It's like a reason that the element isn't met. Like, in an antitrust complaint, the allegation could be, well, a whole bunch of companies did the same thing. But an obvious alternative explanation is, well, they -- they all did the same thing because of market forces. So it wasn't that they did, you know, the bad thing, which was a conspiracy.

Here, what Petitioners define as, you know, the bad thing is just the service provider transaction. And the fees being reasonable isn't an alternative explanation for whether there was a service provider transaction or not. It's like an extra fact.

Now, if the Court wanted to revisit Iqbal and Twombly and say that it also imposes a burden on plaintiffs to negate affirmative defenses, that would be terrific.

(Laughter.)

MS. SAHARSKY: But it would be, I think, a -- a sea change in the law that would

have effects well -- well past this case.

So that's their Option 1. And then I think we've discussed a little bit more their Option 2, which was Rule 7. So the -- Option 1 was for the motion-to-dismiss stage.

JUSTICE KAGAN: Right. I was --

MS. SAHARSKY: Right.

JUSTICE KAGAN: -- asking about Option 1.

MS. SAHARSKY: Oh.

JUSTICE KAGAN: If you feel like you have more to say on Rule 7, go ahead, but -- but that was what I wanted to know about.

MS. SAHARSKY: I -- I just think, if the -- if the Court wanted to pursue a Rule 7 solution, it should, please, make clear that that is something that district courts have to do because it is discretionary and there's not judicial review of it, and these cases could go on and on and on.

I -- I would like to say one other thing, though, about Rule 7 and -- and this particular case, which is, so assuming that the plaintiffs do have some burden to plead unreasonable fees, we think the Second Circuit

correctly found that they didn't plead it here and that this Court, you know, ordinarily doesn't review that kind of holding, like the application of a legal principle to particular facts, but, if it did, you know, it would be clear here that there's, like, no reason for a remand.

So just to -- just to explain what the Second Circuit did, you know, pleading that fees are unreasonable, of course, is just a -- a legal conclusion, so you need some plausible facts to show why they're unreasonable. Here, you know, there was an allegation that the fees were too high, but there wasn't any allegation of what the services were for or that there were other university plans that had comparable services that had much lower fees.

And that's all the Second Circuit was saying. It didn't say anything about Cadillac plans. It just said, like, we don't know if something is too high unless we know what it's for. We don't know -- we need to know, you know, what services it's for. Is it more services? Is it fewer services? Is it better services?

And that's not a weird rule in the Second Circuit. That's actually the same thing that, like, the Sixth, Seventh, Eighth, Tenth Circuits have said in these unreasonable fee cases, which is you can't just plead, like, high fees in the abstract and say they're too high. You have to give us some plausible facts as to why they're too high, which are, you know, compare them to something else that's like your plan where they didn't pay those kinds of fees. And so, you know, we think the Second Circuit was exactly right to say that.

The only other thing I'll say just because the government put this in issue is that, you know, there's no point in a remand in this case because the plaintiffs actually had the opportunity to try to adduce -- you know, evidence through years and years of discovery to try to show that the fees were unreasonable.

That was, I think, as Justice Kavanaugh was suggesting, not on their prohibited transaction claim but on their -- their claim for breach of the duty of prudence. And so they went through all this discovery and they were supposed to put forward their best

evidence of the fees being unreasonable, and they couldn't do it. They had two experts, but they didn't -- those experts didn't actually compare the fees to -- to the services or to any other plans.

And so the district court and then the Second Circuit said, well, like, you've got -- you've got no evidence of this. So, I mean, it's not only that they -- we don't think that they properly pleaded it; it's that, like, they've already lost on the merits. And so, even if the Court decides to do something different from the Second Circuit, you know, the -- we think the rule should be that they have to plead the unreasonable fees. And, here, you know, they just didn't. The Second Circuit found they didn't. And it's just not going to matter at the end of the day.

So, you know, the bottom line is Petitioners' position is intolerable. Nearly everyone recognizes that. The Second Circuit gave you a sensible solution that's very careful reading of the statutory text and doesn't create superfluous language, accounts for all the other provisions of ERISA. And, you know, we think

that you should adopt that approach and we think you should affirm.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: On that last point you raised previously, the trial, did you have experts who said why your fees were reasonable?

MS. SAHARSKY: Yes. So it was summary judgment. We had an expert; they had two experts. Both of their experts were found to be unreliable under Daubert. And then we also had our own expert that explained that Cornell's fees were entirely in line with the other fees charged by other universities.

JUSTICE SOTOMAYOR: So you may be right on that bottom line, so even if we vacated and remanded and -- and encouraged a -- a Rule 7 or whatever, you would still win downstairs?

MS. SAHARSKY: Correct, but we're suggesting that you shouldn't vacate and remand.

JUSTICE SOTOMAYOR: No. I know what you want. I'm just saying --

(Laughter.)

MS. SAHARSKY: Well, I mean, just as a --

JUSTICE SOTOMAYOR: Thank you, counsel.

MS. SAHARSKY: Yes. As a practical matter, this case has been going on since 2016, just like these other university cases, and it's time for it to end.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Barrett?

Justice Jackson?

Thank you, counsel.

MS. SAHARSKY: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Wang?

REBUTTAL ARGUMENT OF XIAO WANG
ON BEHALF OF THE PETITIONERS

MR. WANG: I just have two brief points. The first point was in response to some questions to my friend on the other side about the super -- super -- superfluity of 1106 -- I apologize -- about 1106(a) and 1106(b). Why does it have one and -- and -- and not the

other?

And I think this Court's opinion in Barton versus Barr is -- is quite instructive on that. It says at page 239 redundancies are common in statutory drafting, sometimes in a congressional effort to be doubly sure. And why would Congress want to be doubly sure here? Because, in fact, Respondents' brief concedes this point. On 2 -- on page 27 of their brief, they say: As a practical matter, Section 1108's exemptions may apply less often to Section 1106(b) than to Section 1106(a).

And I think, in response to, Justice Kagan, some of your questions about is this a class of one or -- and or -- or not, I think it's pretty clear it's not a class of one, and maybe one analogy can -- can help crystallize this point.

Imagine you're going to the airport and you see a sign that says: Except as otherwise provided, no liquids, gels, or aerosols. Then you see another sign that says: No firearms on the plane. And then the third sign says: Here are the exceptions.

I think the "except as otherwise

provided" is just telling the common traveler, well, certainly, you know, we don't want most liquids, gels, or aerosols in, but, if you have a medical reason, a dietary reason to bring them in, go ahead. Make sure you take a look at those exceptions. But there are far fewer exceptions for firearms, and if they do exist, take a look at that, but it's -- we -- we don't want to direct you to that list of exemptions. And I think that's just one common instance of the fact that it's not a class of one.

I think this leads me to the second and sort of final point I'd like to make, which is, you know, Justice Gorsuch asked quite a bit about ripple effects and -- and what -- what are the ripple effects of ruling in our favor versus ruling in Respondents' favor. And I think that crystallizes the daylight between our positions.

Our position is to ask this Court to read the statutory text as written and to apply the text as written using common tools that it sees in terms of the structure of the text, the information and symmetries, common law trust rules. Respondents' position is not simply to sidestep the text but to contort it and to

distort it in two different ways.

The first is to sort of try to stitch together 1106 and 1108. Some of 1108's exceptions actually become elements and then you have to plead and prove beyond that.

And the second way, second more important way, I think -- or second and equally important way that Respondents ask you to distort the text is to say: Look, we know Congress defined parties in interest. It has all of these categories. And we want a little bit of a special carveout for outside service providers, persons providing services to the plan.

But the text doesn't countenance that. And, as a practical matter, the Eighth Circuit, the Ninth Circuit, these other courts that have adopted the standard that we advocate, we don't see cases on the ground that suggest that any such solution is needed.

So, for those reasons, Your Honor, we ask this Court to apply the text as written and to reverse the judgment of the Second Circuit.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:54 p.m., the case was submitted.)