

**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

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10 Washington, D.C.

11 Wednesday, January 22, 2025

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:22 a.m.
16
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1 P R O C E E D I N G S

2 (11:22 a.m.)

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

6 Mr. Wang.

7 ORAL ARGUMENT OF XIAO WANG

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

14 And that brings me to the final reason
15 for reversal, which is that they're not just
16 qualified prohibitions, but they're qualified
17 based on exemptions that involve information
18 that plaintiffs cannot know and do not know
19 prior to discovery, information like who the
20 counterparties are in a cross-trade or how large
21 a block trade are -- is or what asset classes
22 are in a block trade, which is exactly why, when
23 Congress wrote these provisions, it intended for
24 petitioners to plead and prove under Section
25 1106 and for defendants to plead and prove under

1 Section 1108.

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

5 I welcome the Court's questions.

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

9 MR. WANG: The injury is that the --
10 with regard to the prohibited transaction
11 provisions, Your Honor, the injury is that the
12 plans here engaged Fidelity and TIAA, who are
13 parties in interest, and that violates Section
14 1106(a)(1)(C).

15 JUSTICE THOMAS: So how did that harm
16 the plan?

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

25 Now that bundling resulted in Fidelity

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

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

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

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

16 MR. WANG: Well, Justice Kavanaugh,
17 let me try to unpack that. I think the starting
18 point would be to look at the text of the
19 statute in this, and I think, for outside
20 service providers, that would fall under
21 1106(a)(1)(C), something that the fiduciary
22 shall not do.

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

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

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

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

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

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

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

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

22 Now I think the sort of policy --

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

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

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

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

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

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

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

1 (Laughter.)

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

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

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

21 MR. WANG: Well --

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

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

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

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

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

1 JUSTICE ALITO: But --

2 JUSTICE JACKSON: Mr. Wang --

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

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

1 recordkeeping for it.

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

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

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

16 JUSTICE ALITO: Well, answer the
17 second question first.

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

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

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

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

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

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

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

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

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

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

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

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

11 Would you agree with that?

12 MR. WANG: I think so, Your Honor.

13 And I think this is --

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

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

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

25 JUSTICE GORSUCH: Thank you.

1 MR. WANG: And --

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

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

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

20 JUSTICE JACKSON: And -- and --

21 MR. WANG: I think this is a --

22 JUSTICE JACKSON: Sorry. Keep going.

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

25 As we point out, even with respect to

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

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

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

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

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

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

3 JUSTICE KAVANAUGH: Could they do that
4 with no discovery?

5 MR. WANG: Pardon me? Can you --

6 JUSTICE KAVANAUGH: Could they do that
7 with no discovery?

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

10 JUSTICE JACKSON: But they could do
11 limited discovery --

12 MR. WANG: Correct.

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

18 MR. WANG: Entirely correct.

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

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

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

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

11 JUSTICE KAVANAUGH: Following up --

12 JUSTICE JACKSON: Can't --

13 JUSTICE KAVANAUGH: Oh, go ahead.

14 JUSTICE JACKSON: Sorry.

15 JUSTICE KAVANAUGH: Keep going.

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

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

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

4 Do you understand what I'm saying?

5 MR. WANG: Yes, yes, Justice.

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

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

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

24 MR. WANG: Correct. Exactly so.
25 Correct.

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

11 What do you think?

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

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

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

1 pleadings at issue and the circumstances between
2 the parties.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 JUSTICE THOMAS: Before Varsity, were
7 there any suits like this?

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

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

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

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

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

1 recordkeeping.

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Justice Alito,
18 anything further?

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

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

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

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

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

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

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

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

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

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

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

19 MR. WANG: I think --

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

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

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

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

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

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

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

15 MR. WANG: Correct. Correct.

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

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

25 JUSTICE SOTOMAYOR: The -- let me go

1 on --

2 MR. WANG: Sorry.

3 JUSTICE SOTOMAYOR: -- okay? Yeah.

4 I'm --

5 MR. WANG: Apologies.

6 JUSTICE SOTOMAYOR: Okay. That's a

7 given. But, here, it's pretty clear that you

8 alleged and you thought you had some sort of

9 burden because I read your very extensive

10 complaint, and you basically point to a lot of

11 other industry --

12 MR. WANG: Correct.

13 JUSTICE SOTOMAYOR: -- fees and that

14 the fees were unreasonable. You allege it's

15 unreasonable. You show a lot of other fees.

16 I'm not quite sure still, and I will ask the

17 government this, I -- under normal pleading

18 standards, I would have thought this was enough.

19 I think that the Second Circuit was

20 thinking that it has to be pled with Twombly and

21 Iqbal as a fraud and that you needed more

22 particularized information relating to the

23 nature of the services in total, some

24 information that you say you couldn't have

25 known.

1 MR. WANG: Yes.

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

5 MR. WANG: Comparable plans, yes.

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

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

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

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

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

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

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

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

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

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

11 MR. WANG: Right.

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

18 MR. WANG: Correct.

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

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

4 MR. WANG: I -- I --

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

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

9 JUSTICE SOTOMAYOR: Observation.

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

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

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

2 JUSTICE SOTOMAYOR: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Gorsuch, anything?

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

14 MR. WANG: Correct, Justice Kavanaugh.

15 JUSTICE KAVANAUGH: Okay. Thanks.

16 CHIEF JUSTICE ROBERTS: Justice

17 Gorsuch?

18 Justice Barrett?

19 Justice Jackson?

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

1 statute.

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

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

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

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

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

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Dubin.

7 ORAL ARGUMENT OF YAIRA DUBIN

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

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

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

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

1 adopting Respondents' strange reading.

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

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

15 I welcome the Court's questions.

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

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

1 plan.

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

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

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

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

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

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

16 He is allowed to delegate. That's
17 consistent with the Restatement (Second) of
18 Trusts. But, when he does so, he's the one who
19 has the burden to justify it. And that's all
20 1106 and 1108 do, which is you can engage in
21 this transaction, but it's the fiduciary who
22 carries the burden to justify it.

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

1 obvious insiders to the plan.

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

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

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

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

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

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

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

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

16 MS. DUBIN: Sure. Absolutely.

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

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

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

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

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

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

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

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

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

25 MS. DUBIN: Yeah. If the Court were

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

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

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

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

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

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

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

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

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

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

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

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

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

1 burden to negate the exemption in that fulsome
2 way.

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

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

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

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

24 Why would anything more be required?

25 MS. DUBIN: Sure. It's because I

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

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

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

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

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

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

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

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

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

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

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Justice Thomas?

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

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

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

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

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

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

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

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

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

23 I think it's very --

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

1 that's going to do the job here?

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

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

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

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

5 Do you accept that?

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

13 JUSTICE SOTOMAYOR: But you --

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

16 JUSTICE SOTOMAYOR: No, no, no. You
17 misunderstand. You say to us that the only
18 pleading standard is the 1106 violation. The
19 1106 violation does not talk about the
20 reasonableness or excessiveness of the fees.

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

25 MS. DUBIN: Yes.

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

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

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

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

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

1 replacing the fiduciary.

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

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

25 Box 3 --

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

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

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

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

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

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

25 MS. DUBIN: Yes. That's exactly our

1 view.

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

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

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

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

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

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

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

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

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

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

12 It -- it -- it does seem to me the
13 7(a) argument's not completely out of left field
14 here. They're generally disfavored, as I
15 remember from practice, but the exception -- one
16 of the exceptions is, when you're -- when you
17 have an affirmative defense that's pled in the
18 answer, sometimes the -- the district judge will
19 say: I want to -- I want to see the reply. And
20 it happens a lot in qualified immunity, I
21 believe, in particular.

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

1 What do you think of that?

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

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

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

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

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

1 applied?

2 MS. DUBIN: That's right.

3 JUSTICE GORSUCH: Okay.

4 JUSTICE KAVANAUGH: A couple
5 questions.

6 On -- a bare-bones complaint, Category
7 1, the pure prohibited transaction, I think you
8 don't have standing.

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

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

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

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

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

5 MS. DUBIN: It --

6 JUSTICE KAVANAUGH: Do you understand
7 the question?

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

10 JUSTICE KAVANAUGH: Yeah.

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

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

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

19 MS. DUBIN: To the prohibited
20 transactions claims.

21 JUSTICE KAVANAUGH: Yeah.

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

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

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

6 The -- you think what was enough?

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

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

13 MS. DUBIN: Yes.

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

24 And that part of the analysis, we
25 strongly disagree.

1 JUSTICE KAVANAUGH: To get past a
2 motion to dismiss?

3 MS. DUBIN: Exactly.

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

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

22 JUSTICE KAVANAUGH: Good. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

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

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

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

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

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

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

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

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

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

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

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

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Ms. Saharsky.

20 ORAL ARGUMENT OF NICOLE A. SAHARSKY

21 ON BEHALF OF THE RESPONDENTS

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

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

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

3 That can't possibly be right. If we
4 look at this statute, it is unique, Section
5 1106(a), because it covers an incredibly broad
6 array of innocent beneficial conduct.

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

15 You know, tellingly, there are two
16 different parts of 1106 here. There's (a),
17 which includes all of this innocent conduct, and
18 (b), which includes only self-dealing conduct,
19 and that cross-reference isn't in Section
20 1106(b). It has to be doing some work
21 textually, and it doesn't under Petitioners'
22 provision.

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

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

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

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

19 I welcome the Court's questions.

20 JUSTICE THOMAS: What should be pled?

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

1 unreasonable.

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

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

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

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

1 unreasonable fees?

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

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

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

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

23 MS. SAHARSKY: Yeah.

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

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

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

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

23 And as I think was discussed --

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

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

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

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

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

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

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

25 The plaintiff's burden is not to plead

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

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

6 MS. SAHARSKY: Yes.

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

10 MS. SAHARSKY: In 1106(a) --

11 JUSTICE JACKSON: Yeah.

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

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

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

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

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

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

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

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

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

1 should create?

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

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

14 (Laughter.)

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

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

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

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

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

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

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

19 JUSTICE KAVANAUGH: So -- and --

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

25 JUSTICE KAVANAUGH: Good -- good word,

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

5 And how do we tell?

6 MS. SAHARSKY: Right.

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

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

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

1 only transactions that involve self-interest in
2 conduct.

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

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

17 JUSTICE KAVANAUGH: So --

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

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

25 And then another point, I just want to

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

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

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

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

21 Another thing that I just might say --

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

25 MS. SAHARSKY: Sure.

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

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

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

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

11 MS. SAHARSKY: And outsiders.

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

15 MS. SAHARSKY: Sure.

16 JUSTICE KAVANAUGH: I'm sorry to
17 interrupt.

18 MS. SAHARSKY: So 1106(a) --

19 JUSTICE KAVANAUGH: Yeah. You're
20 clarifying it.

21 JUSTICE SOTOMAYOR: I -- I -- I think
22 1106(a) does -- 11 -- let's do it in the
23 negative. 1106(b) does not include an insider
24 doing services at a reasonable price?

25 MS. SAHARSKY: 1106(b) does not

1 directly address service provider transactions.

2 And so, if I might just back up, 1106 --

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

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

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

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

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

5 JUSTICE JACKSON: So what is your --

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

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

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

22 And so you have this extra language in
23 1106(a) --

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

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

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

10 MS. SAHARSKY: Well, it's not just the
11 cross-reference. It's the structure of the
12 statute and the rest of ERISA and the other
13 factors that I was discussing with Justice
14 Kavanaugh, but I do think that it's telling that
15 the cross-reference is in 1106(a). It is not in
16 1106(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 If this Court --

25 JUSTICE ALITO: Well, could we say

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

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

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

25 JUSTICE ALITO: Okay. What about --

1 MS. SAHARSKY: They should have to
2 say --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 solutions would be real solutions.

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

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

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

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

1 explanation.

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

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

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

23 (Laughter.)

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

1 have effects well -- well past this case.

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

6 JUSTICE KAGAN: Right. I was --

7 MS. SAHARSKY: Right.

8 JUSTICE KAGAN: -- asking about Option
9 1.

10 MS. SAHARSKY: Oh.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

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

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

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

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

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

1 (Laughter.)

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

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

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

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?
12 Justice Barrett?
13 Justice Jackson?
14 Thank you, counsel.

15 MS. SAHARSKY: Thank you.

16 CHIEF JUSTICE ROBERTS: Rebuttal,
17 Mr. Wang?

18 REBUTTAL ARGUMENT OF XIAO WANG
19 ON BEHALF OF THE PETITIONERS

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

1 other?

2 And I think this Court's opinion in
3 Barton versus Barr is -- is quite instructive on
4 that. It says at page 239 redundancies are
5 common in statutory drafting, sometimes in a
6 congressional effort to be doubly sure. And why
7 would Congress want to be doubly sure here?
8 Because, in fact, Respondents' brief concedes
9 this point. On 2 -- on page 27 of their brief,
10 they say: As a practical matter, Section 1108's
11 exemptions may apply less often to Section
12 1106(b) than to Section 1106(a).

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

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

25 I think the "except as otherwise

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

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

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

1 distort it in two different ways.

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.
2 (Whereupon, at 12:54 p.m., the case
3 was submitted.)
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