No. 23-1007

In the Supreme Court of the United States

CASEY CUNNINGHAM, ET AL., PETITIONERS

v.

CORNELL UNIVERSITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*., prohibits a fiduciary of an employee benefit plan from "caus[ing] the plan to engage in" specified transactions, including transacttions for the "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. 1106(a)(1)(C). The term "party in interest" includes "person[s] providing services to the plan." 29 U.S.C. 1002(14)(B). The statute elsewhere enumerates various transactions that are "exempted from" Section 1106's "prohibitions," including "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. 1108(b)(2).

The question presented is:

Whether the reasonable-arrangements exemption in Section 1108(b)(2) is incorporated into the goods-and-services prohibition set forth in Section 1106(a)(1)(C), such that a plaintiff must plead facts negating that exemption to state a claim under Section 1106(a)(1)(C).

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INTEREST OF THE UNITED STATES

The question presented is whether petitioners have stated a claim for violation of the prohibited-transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. The Secretary of Labor has primary authority for administering ERISA, see 29 U.S.C. 1002(13), 1132-1138, and the question presented here can arise in both private suits and government enforcement actions. The United States therefore has a substantial interest in the proper interpretation of the statute.

STATEMENT

A. Legal Background

ERISA "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Every ERISA plan must have at least one named fiduciary with authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). Anyone who exercises discretionary authority or control over plan management or disposition of plan assets is also considered a fiduciary. 29 U.S.C. 1002(21)(A)(i).

ERISA subjects plan fiduciaries to certain fiduciary duties derived from the common law of trusts. See 29 U.S.C. 1104(a); *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). For example, the duty of loyalty requires plan fiduciaries to act "solely in the interest[s] of the [plan's] participants and beneficiaries." 29 U.S.C. 1104(a)(1)(A). And the duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing" that a prudent person "acting in a like capacity and familiar with such matters would use" in like circumstances. 29 U.S.C. 1104(a)(1)(B).

As particularly relevant here, ERISA "supplements the fiduciary's general duty of loyalty to the plan's beneficiaries" "by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 241-242 (2000). Specifically, Section 1106(a)(1) states that, "[e]xcept as provided in section

1108," a fiduciary "shall not cause the plan to engage" in certain transactions with a "party in interest." 29 U.S.C. 1106(a)(1). Among the "[p]rohibited transactions" is the "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. 1106(a)(1)(C). A "party in interest" is defined to include various plan insiders (such as the plan's administrator, sponsor, and its officers), as well as entities "providing services to [the] plan." 29 U.S.C. 1002(14).

Section 1108 separately enumerates 21 transactions to which "[t]he prohibitions provided in section 1106 of this title shall not apply." 29 U.S.C. 1108(b). One of the exempted transactions is "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. 1108(b)(2). Section 1108 also authorizes the Secretary of Labor to promulgate additional regulatory exemptions, 29 U.S.C. 1108(a); there are dozens of class exemptions and hundreds of individual exemptions currently in effect.[1]

B. The Present Controversy

1. Petitioners are participants in two defined-contribution retirement plans ("plans") sponsored by respondent Cornell University. Pet. App. 6a. In a defined-contribution plan, participants maintain indi-

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[1] Employee Benefits Security Administration (EBSA), U.S. Department of Labor, *Class Exemptions*, https://www.dol.gov/agencies/ebsa/ laws-and-regulations/rules-and-regulations/exemptions/class; EBSA, U.S. Department of Labor, *Employee Benefits Security Administration, Individual Exemptions*, https://www.dol.gov/agencies/ebsa/laws-and-regulations/ rules-and-regulations/exemptions/individual.

vidual investment accounts, the value of which "is determined by the market performance of employee and employer contributions, less expenses." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 525 (2015). Those expenses include fees paid to service providers.

In 2011, Cornell retained two investment providers —Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA) and Fidelity Investments Inc. (Fidelity)—to offer a menu of investments to plan participants. Pet. App. 8a. Cornell also retained both providers to serve as recordkeepers for the plans. *Ibid.* Recordkeeping services include tracking account balances and providing account statements. *Ibid.* Recordkeeping fees typically are paid either as a flat per-participant fee or through "revenue sharing," in which the recordkeepers receive fees based on a set portion of plan assets. *Ibid.* TIAA and Fidelity received recordkeeping fees through revenue sharing. *Ibid.*

2. Petitioners sued Cornell and various other plan fiduciaries in 2017, alleging (as relevant here) that the fiduciaries had violated ERISA by causing the plans to engage in prohibited transactions for recordkeeping services in violation of 29 U.S.C. 1106(a)(1)(C). Pet. App. 25a. Petitioners contended that "because TIAA and Fidelity are service providers and hence parties in interest, their furnishing of recordkeeping and administrative services to the [p]lans is a prohibited transaction unless Cornell proves an exemption." *Ibid.* (citation and internal quotation marks omitted). Petitioners alleged that the plans had "paid substantially more than * * * a reasonable recordkeeping fee"; specifically, they alleged that a reasonable recordkeeping fee would have been approximately $35 per participant per year, but

that the plans instead paid many times that amount—between $115 to $183 per participant for one plan and $145 to $200 per participant for the other. *Id.* at 25-26a (citation and internal quotation marks omitted).

The district court dismissed the prohibited-transaction claims. Pet. App. 109a-110a. It held that a plaintiff must allege "some evidence of self-dealing or other disloyal conduct" to plead a violation of Section 1106(a) in connection with the provision of services. *Id.* at 109a. And the court believed that petitioners' allegations "that the Plans paid too much for [the recordkeeping] services" did not suffice to allege such self-dealing or disloyal conduct. *Ibid.* (citation omitted).

3. The court of appeals affirmed. As relevant here, the court acknowledged that "[r]eading § 1106(a)(1)(C) in isolation," "ERISA would appear to prohibit payments by a plan to any entity providing it with any services." Pet. App. 16a. The Second Circuit noted, however, that several of its sister circuits had rejected that reading, believing it would lead to "absurd results" by "prohibit[ing] fiduciaries from paying third parties to perform essential services in support of a plan." *Ibid.* (citation omitted). Those courts—like the district court here—had endorsed "different means of narrowing the statute," including by requiring the plaintiff to allege that the fiduciary intended to benefit a party in interest or to engage in self-dealing. *Ibid.* The Second Circuit rejected those atextual limitations, explaining that "the language of § 1106(a)(1) cannot be read to demand explicit allegations of 'self-dealing or disloyal conduct.'" *Id.* at 18a.

Instead, the court of appeals adopted a different approach to narrowing Section 1106(a). The court determined that "at the pleadings stage," the Section

1108 exemptions cannot "be understood merely as affirmative defenses to the conduct proscribed in § 1106(a)." Pet. App. 17a-18a. Rather, the court continued, Section 1106(a)'s cross-reference to Section 1108 indicates that "the exemptions set out in § 1108 * * * are incorporated directly into § 1106(a)'s definition of prohibited transactions." *Id.* at 19a. The court reasoned that "read on its own," Section 1106(a)—and "in particular," the prohibition on transactions for goods and services in Section 1106(a)(1)(C)—is "missing an ingredient of the offense": namely, "the exemption for 'reasonable compensation' paid for 'necessary' services, reflected in § 1108(b)(2)(A)." *Id.* at 23a (brackets, citation, and internal quotation marks omitted). The court thus concluded that "at least some" of the Section 1108(b) "exemptions—particularly, the exemption for reasonable and necessary transactions codified by § 1108(b)(2)(A)—are incorporated into § 1106(a)'s prohibitions." *Id.* at 18a. The court believed that "[i]t is only by incorporating that exemption into the prohibition set out in § 1106(a)(1)(C), and thus limiting its reach to unnecessary or unreasonable compensation, that the offensive conduct the statute discourages can 'be accurately and clearly described.'" *Id.* at 23a (citation omitted).

The court of appeals left "undisturbed" existing Second Circuit precedent holding that "it is ultimately the defendant fiduciary that bears the burden of persuasion with regard to the applicability of [those] exemptions." Pet. App. 23a. But "while the fiduciary retains the ultimate burden of proving the appropriateness of the transaction pursuant to § 1108(b)(2)(A)," the court held that "it falls on the plaintiff in the first instance to allege—and, at the summary judgment stage, to

produce evidence of—facts * * * challenging the necessity of the transaction or the reasonableness of the compensation provided." *Id.* at 24a. The "burden of raising [the Section 1108] exemptions," the court explained, "lies, at least in part, with the plaintiff." *Id.* at 20a.

Applying that rule, the court of appeals held that petitioners' allegations that fiduciaries had caused the plan to engage in transactions that "constitute[d] a direct * * * furnishing of goods, services, or facilities" with parties in interest did not suffice to state a claim under Section 1106(a)(1)(C). Pet. App. 26a; 29 U.S.C. 1106(a)(1)(C). And although petitioners had also alleged "that the plans paid substantially more than * * * a 'reasonable recordkeeping fee,'" the court reasoned that "[w]hether fees are excessive or not is relative 'to the services rendered.'" Pet. App. 25a-26a (citation omitted). Because petitioners had not "allege[d] any facts going to the relative quality of the recordkeeping services provided," the court held that petitioners' complaint had failed to negate Section 1108(b)(2)'s reasonable-arrangements exemption. *Id.* at 26a.

SUMMARY OF ARGUMENT

I. The Second Circuit erred in holding that exemptions enumerated in 29 U.S.C. 1108 are incorporated into ERISA's prohibitions against party-in-interest transactions in 29 U.S.C. 1106(a). The exemptions in Section 1108 are defenses to liability that the defendant fiduciary must set up and prove.

A. To protect against abuse by plan fiduciaries, Section 1106(a) of ERISA prohibits a fiduciary from causing the plan to enter into specified transactions with a "party in interest." 29 U.S.C. 1106(a). A "party in interest" is defined to include plan insiders whom a fiduciary might favor over the plan's participants, as well as

entities "providing services" to a plan. 29 U.S.C. 1002(14). A separate statutory provision, Section 1108, lists 21 exemptions to which Section 1106's prohibitions "shall not apply," 29 U.S.C. 1108(b), and authorizes the Secretary to issue additional regulatory exemptions, 29 U.S.C. 1108(a).

The "general rule" is that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute" rests on the "one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). In particular, when a "statute reads[] with exemptions laid out apart from the prohibitions," and the exemptions "expressly refer[] to the prohibited conduct as such," the exemptions ordinarily constitute "affirmative defenses"—"entirely the responsibility of the party raising [them]." *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91, 95 (2008) (citation omitted). The burden of pleading, for that reason, ordinarily follows the burden of proof. See *Taylor* v. *Sturgell*, 553 U.S. 880, 907 (2008).

Consistent with those general rules, ERISA is most naturally read to place the burden of pleading and proving the Section 1108 exemptions on the defendant fiduciary. The statute repeatedly makes clear that Section 1106 articulates the relevant prohibitions, while Section 1108 sets up the exemptions from those prohibitions, enumerating "justification[s]" or "defense[s]" for "behavior that, standing alone, violates the statute's prohibition." *Meacham*, 554 U.S. at 95. The exemptions are "laid out apart" from the prohibitions, *id.* at 91; the section enumerating the exemptions "expressly refer[s] to the prohibited conduct as such," *ibid.*; and the headings of the provisions distinguish Section 1106(a), which establishes "[p]rohibited transactions," from Section 1108,

which enumerates "[e]xemptions from prohibited transactions." 29 U.S.C. 1106(a), 1108. That Section 1108 sets out 21 different exemptions—and authorizes the Secretary to issue additional regulatory exemptions—reinforces the conclusion that the defendant bears the burden of identifying, pleading, and proving the particular exemption on which it seeks to rely.

That straightforward reading of the statutory text reflects Congress's aim in enacting Section 1106(a)—namely, to "supplement[] the fiduciary's general duty of loyalty to the plan's beneficiaries" "by categorically barring certain transactions deemed 'likely to injure the pension plan'" through presumptively "*per se* prohibitions on transacting with a party in interest." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 241-242, 252 (2000). And it is further reinforced by the law of trusts, which placed the onus on the trustee who sought to outsource its work to an agent—akin to the recordkeeping arrangements at issue here—to justify doing so.

B. The Second Circuit's contrary reading lacks merit. Section 1106(a)'s cross-reference to the Section 1108 exemptions does not convert those exemptions into elements of the prohibitions stated in Section 1106(a) that the plaintiff must anticipate and negate in her pleadings. To the contrary, this Court has read similar clauses to refer to affirmative defenses—even where (unlike here) the exceptions are enumerated in the same provision as the prohibitions.

Nor are the Section 1106(a) prohibitions missing an ingredient absent incorporation of the Section 1108 exemptions, as the court of appeals thought. Notwithstanding the court of appeals' limited focus on transactions with service providers, the term "party in

interest" encompasses plan insiders "that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." *Harris Trust*, 530 U.S. at 242; see 29 U.S.C. 1002(14). The risk that a fiduciary may be affected by conflicting loyalties in transacting with an insider is clear; there is no need to refer to an exception to understand the nature of the statute's prohibition. And even as to contracts with third-party service providers, Congress had good reason—grounded in trust law's concern about fiduciary outsourcing—to presumptively prohibit such transactions, while allowing the fiduciary to justify a particular transaction by reference to an exemption.

The court of appeals failed, moreover, to supply any principled basis for the gerrymandered rule it appeared to announce: that *some*, but not *all*, of the Section 1108 exemptions are incorporated into Section 1106(a)'s prohibitions, and that undefined subset is incorporated only insofar as the plaintiff bears the burden of pleading and some burden of production, while the defendant bears the ultimate burden of persuasion.

C. Respondents defend the Second Circuit's rule on policy grounds, asserting that a plaintiff will be able to obtain discovery by pleading only a routine transaction with a third-party service provider absent incorporation of the Section 1108 exemptions into Section 1106(a). But a district court has tools at its disposal to screen out meritless claims before discovery begins. For the particular species of party-in-interest transaction at issue here, involving contracts for services with third-party providers, rather than plan insiders, a court may determine that a complaint that fails to plead facts suggesting that the transaction or its compensation may not be reasonable has failed to confront an "obvious alter-

native explanation" for the alleged conduct—that it *is* reasonable. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007). Likewise, if a fiduciary identifies and pleads facts to support the reasonable-arrangements exemption in Section 1108(b), a court may order a reply under Federal Rule of Civil Procedure 7(a) to require the plaintiff to offer additional allegations showing why those facts may not account for the challenged transaction.

Meanwhile, on the other side of the ledger, the Second Circuit's rule presents its own administrative challenges. Section 1108(b) enumerates 21 statutory exemptions, and the Secretary has adopted dozens of additional regulatory class exemptions and hundreds of individual exemptions under Section 1108(a). The Second Circuit's rule offers plaintiffs little guidance as to which of these exemptions they must negate in their complaints. Assuming the reasonable-arrangements exemption in Section 1108(b)(2) is not the *only* exemption incorporated into Section 1106(a)(1), the Second Circuit's interpretation apparently would require plaintiffs to sift through and identify potentially applicable exemptions before bringing claims under a provision Congress designed to be a "*per se*" bar. *Harris Trust*, 530 U.S. at 252. That approach is especially troubling given that the facts relevant to a Section 1108 exemption will often be largely, or even exclusively, in the defendant's possession.

II. Petitioners plausibly alleged that the fiduciaries caused the plans to enter into prohibited transactions with the plans' recordkeepers in violation of Section 1106(a)(1)(C), and likewise alleged sufficient facts—taken as true—to infer that the compensation paid was not obviously reasonable. No more was required. More-

over, as a practical matter, it is unclear how petitioners could have alleged additional relevant facts, which may well be in respondents' exclusive possession.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INCORPORATING EXEMPTIONS FROM LIABILITY INTO ERISA'S PROHIBITIONS ON CERTAIN TRANSACTIONS

Most naturally read, the exemptions in Section 1108 are defenses that the defendant must plead and prove. The court of appeals erred in concluding otherwise, and its reasoning does not justify the rule it announced, where some—but not all—of the exemptions are incorporated into Section 1106(a) for some—but not all—litigation purposes. Concerns about meritless complaints involving third-party service providers can be addressed through familiar pleading requirements and screening tools, without disarranging and undermining the statutory scheme.

A. The Exemptions Enumerated In Section 1108 Are Not Incorporated Into The Prohibited Transactions Set Out In Section 1106(a)

The text and structure of the Act, reinforced by ERISA's purpose and trust-law roots, make clear that the exemptions in Section 1108 are defenses to liability that the defendant must plead and prove.

1. ERISA's text and structure establish that the Section 1108 exemptions are defenses that need not be negated by the plaintiff as constituent elements of a Section 1106(a) claim

"In ERISA cases, as in any case of statutory construction," this Court's "analysis begins with the language of the statute"—and "where the statutory

language provides a clear answer, it ends there as well." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) (brackets, citation, and internal quotation marks omitted). ERISA's text and structure provide a clear answer here: The defendant fiduciary—not the plaintiff—bears the burden to plead and prove the exemptions enumerated in Section 1108.

a. For over a century, this Court has consistently recognized the "rule of statutory construction" that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); accord, *e.g.*, *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508 (1910); *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841). In particular, when a "statute reads[] with exemptions laid out apart from the prohibitions," and the exemptions "expressly refer[] to the prohibited conduct as such," the exemptions ordinarily constitute "affirmative defenses," "entirely the responsibility of the party raising [them]." *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91, 95 (2008) (citation omitted). This "longstanding convention is part of the backdrop against which [] Congress writes laws," which the Court "respect[s]" absent "some reason to believe that Congress intended otherwise." *Id.* at 91-92.

Likewise, the "general rule" in connection with such defenses is that the burden of pleading goes hand-in-hand with the burden of proof. See *Taylor* v. *Sturgell*, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove such [an affirmative] defense"); *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980) (The "burden of pleading" an affirmative defense, like the burden of proof, "rests with the defendant."). An

"affirmative defense," accordingly, is "not something the plaintiff must anticipate and negate in her pleading." *Perry* v. *Merit Sys. Prot. Board*, 582 U.S. 420, 435 n.9 (2017). The Federal Rules of Civil Procedure embody that well-settled principle. See Fed. R. Civ. P. 8(c) (providing that a defendant, "[i]n responding to a pleading," "must affirmatively state any avoidance or affirmative defense").

b. Consistent with the general rule, ERISA is most naturally read to place the burden of pleading and proving a Section 1108 exemption on the party claiming its benefit—here, the defendant fiduciary.

Section 1106(a) supplies the relevant prohibitions, barring a plan fiduciary from causing the plan to enter into various specified transactions with a party in interest. As relevant here, Section 1106(a)(1)(C) provides:

> **(a) Transactions between plan and party in interest**
>
> Except as provided in section 1108 of this title, * * * [a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect * * * furnishing of goods, services, or facilities between the plan and a party in interest.

29 U.S.C. 1106(a)(1)(C). Section 1106(a) also prohibits plan fiduciaries from causing the plan to engage in transactions that constitute the "sale or exchange, or leasing, of any property between the plan and a party in interest"; the "lending of money or other extension of credit between the plan and a party in interest"; and the "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. 1106(a)(1)(A)-(B), and (D).

Section 1108, in turn, separately "[e]numerat[es]" specific "transactions" that "are exempted from section 1106['s] prohibitions." 29 U.S.C. 1108(b). As Section 1108 makes clear, if a transaction satisfies any of the 21 enumerated exemptions, "[t]he prohibitions provided in section 1106 * * * shall not apply." *Ibid.* Those enumerated exemptions include the one respondents invoke here, permitting a plan to "mak[e] reasonable arrangements" with a party in interest for "office space," "legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. 1108(b)(2). Section 1108 also authorizes the Secretary to adopt additional "conditional or unconditional exemptions[]" from all or part of the "restrictions imposed" by Section 1106. 29 U.S.C. 1108.

Over and again, the two statutory sections operate in tandem to make clear that Section 1106 articulates the prohibitions—and Section 1108 sets out the exemptions from those prohibitions, enumerating "justification[s]" or "defense[s]" for "behavior that, standing alone, violates the statute's prohibition." *Meacham*, 554 U.S. at 95. Most obviously, the exemptions are "laid out apart" from the prohibitions, in separate statutory provisions, *id.* at 91: The former are set out in 29 U.S.C. 1108, the latter in 29 U.S.C. 1106. Moreover, the provision enumerating the exemptions "expressly refer[s] to the prohibited conduct as such," *Meacham*, 554 U.S. at 91: Section 1108(b) prefaces the statutory exemptions by explaining that "[t]he prohibitions provided in section 1106 of this title shall not apply to any of the following transactions." 29 U.S.C. 1108(b). The Section 1108 exemptions are thus "writ[ten] in the orthodox format of an affirmative defense," *Meacham*, 554 U.S. at 102—not

as elements that a plaintiff must negate in pleading her claim.

Other statutory features reinforce the prohibition-exemption relationship between Sections 1106 and 1108. The headings atop the provisions could not be clearer: "Prohibited transactions" for 29 U.S.C. 1106, and "Exemptions from prohibited transactions" for 29 U.S.C. 1108. The headings within Section 1108, too, confirm the same understanding: Section 1108(a), which authorizes the Secretary to establish regulatory exemptions, is captioned "Grant of exemptions," 29 U.S.C. 1108(a), and Section 1108(b), which sets forth the statutory exemptions, is captioned "Enumeration of transactions exempted from section 1106 prohibitions," 29 U.SC. 1108(b). See *Dubin* v. *United States*, 599 U.S. 110, 120-121 (2023) ("This Court has long considered that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (citation omitted).

That Section 1108 sets out not one but dozens of exemptions makes the interpretive question all the more straightforward. When statutory exceptions "are numerous," "fairness usually requires that the adversary give notice of the particular exception upon which it relies and therefore that it bear[] the burden of pleading." 2 *McCormick on Evidence* § 337 (8th ed. 2022); see, *e.g.*, *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("[I]t is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions"; "practicality therefore favors placing the burden on the party asserting supervisory status."). Here, Section 1108 enumerates 21 statutory exemptions and authorizes the Secretary to

promulgate additional regulatory exemptions—of which there are dozens of class exemptions and hundreds of individual exemptions in effect. See p. 3, *supra*. That is precisely the sort of exemption scheme for which the defendant ordinarily bears primary responsibility.[2]

2. ERISA's remedial design and its trust-law roots reinforce the straightforward reading of the statutory text

Critically, there is no reason to conclude that Congress intended Section 1108 to depart from the "longstanding convention" of imposing the responsibility to set up a statutory exemption on the party claiming its protection. *Meacham*, 554 U.S. at 91-92. To the contrary, ERISA's remedial design and trust-law roots confirm that plan fiduciaries properly bear the burden to plead and prove an exemption to the prohibition that would otherwise apply to the transaction.

"ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts* v. *Morash*, 490 U.S. 107, 112 (1989). Congress designed ERISA "to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Id.* at 115. Chief among ERISA's protections is the imposition of "a fiduciary standard of care for plan administrators," *id.* at 113, which is "derived from the common law of

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[2] The Department of Labor has long recognized that Section 1106(a) defines prohibited party-in-interest transactions, while Section 1108 separately sets out various exemptions from those prohibitions. See *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 77 Fed. Reg. 5632 (Feb. 3, 2012).

trusts" and codified at 29 U.S.C. 1104. *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

But Congress also "supplement[ed] the fiduciary's general duty of loyalty to the plan's beneficiaries," as set forth in Section 1104(a), "by categorically barring certain transactions deemed 'likely to injure the pension plan'" through "*per se* prohibitions on transacting with a party in interest" in Section 1106(a)(1). *Harris Trust*, 530 U.S. at 241-242, 252 (citation omitted); see *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993) ("Congress's goal was to bar categorically a transaction that was likely to injure the pension plan."). Incorporating dozens of Section 1108 exemptions (or hundreds, counting regulatory exemptions) into the otherwise straightforward prohibitions in Section 1106(a) would plainly frustrate Congress's intent to create a "categorical[]" bar. *Keystone*, 508 U.S. at 160; see *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126 (1953) ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.").

Moreover, because "an ERISA fiduciary's duty is 'derived from the common law of trusts,'" *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528 (2015) (citation omitted), "the law of trusts often will inform" the interpretation of ERISA's provisions, *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). At common law, the trustee was "[u]nder a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." Restatement (Second) of Trusts § 171 (1959). "The reasoning behind this rule was that the settlor of the trust had selected the

trustee to carry out the terms of the trust because of the trustee's abilities"—that is, a trustee was presumed to have been hired because of some skill or probity, so delegating her duties to an agent would deny the trust the benefit of the trustee's skill. George Gleason Bogert et al., *The Law of Trusts and Trustees* § 555 (2022). But the trustee could permissibly delegate such duties if she could show that "the agent's employment was necessary, that the trustee entered into a reasonable contract of employment with the agent, and that the agent rendered services to the trust." *Ibid.* Critically, the "non-delegation rule placed the burden squarely on the trustee" to make that showing. *Ibid.*[3]

Interpreting Section 1108's exemptions as just that—exemptions for which the defendant fiduciary bears responsibility—maps on to that common law background. Though ERISA allows fiduciaries to carry out their duties through others pursuant to specific procedures, 29 U.S.C. 1105(c)(2), ERISA's prohibited-transaction provisions reflect trust law's concern with outsourcing by "categorically prohibiting" fiduciaries from causing plans to engage in certain transactions with various parties in interest, including service providers. *Harris Trust*, 530 U.S. at 242; see 29 U.S.C. 1106(a), 1108(b)(2). But like trust law, ERISA exempts from those prohibitions those transactions that are

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[3] The Uniform Trust Code, which aims to codify the common law of trusts, likewise explains that transactions involving indirect conflicts of interest—analogous to the "party-in-interest" transactions proscribed by Section 1106(a)—are "presumptively voidable," but that presumption may be "rebutted if *the trustee* establishes that the transaction was not affected by a conflict between personal and fiduciary interests." National Conference of Commissioners, *Uniform Trust Code* § 802(c), cmt., at 128 (2003) (emphasis added).

necessary and for which the compensation paid is reasonable. See 29 U.S.C. 1108(b)(2). And consistent with trust law, the text and structure of ERISA establish that the burden to set up and prove such an exemption is on the defendant fiduciary.

B. The Court Of Appeals' Contrary Reasoning Lacks Merit

Consistent with that straightforward reading of ERISA, the Second Circuit—like many of its sister circuits—has long recognized that the defendant fiduciary bears the ultimate burden of proving the applicability of the Section 1108 exemptions. See, *e.g.*, *Lowen* v. *Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (1987); *Haley* v. *Teachers Ins. & Annuity Ass'n*, 54 F.4th 115, 121-122 (2022). The court of appeals here professed to "leave undisturbed" those prior decisions. Pet. App. 23a. Yet the court held that a plaintiff nonetheless bears the burden to allege in the first instance—and at summary judgment to produce some evidence of—facts negating "at least some of [the] exemptions" in Section 1108 because they "are incorporated into" Section 1106(a)'s prohibitions. *Id.* at 18a.

That split-the-baby approach lacks merit. As already explained, ERISA's text and structure make clear that the Section 1108 exemptions are defenses that the defendant fiduciary must plead and prove. See pp. 12-17, *supra*. In concluding otherwise, the court of appeals misread the operative provisions and misapplied settled rules of statutory construction.

1. The court of appeals principally emphasized that Section 1106(a) itself references the exemptions in Section 1108, providing that a fiduciary "shall not cause the plan to engage" in the prohibited transactions, "[e]xcept as provided in section 1108 of this title." 29 U.S.C. 1106(a). In the court's view, the latter clause indicates

that the Section 1108 exemptions "are incorporated directly into § 1106(a)'s definition of prohibited transactions." Pet. App. 19a. That is incorrect.

To start, the court of appeals' reading of Section 1106(a)(1)'s introductory clause proves too much. If correct, there would be no principled basis to conclude —as the Second Circuit seemingly did—that "at least some" but not all of the Section 1108 exemptions are incorporated directly into Section 1106(a), Pet. App. 18a; after all, all of the exemptions are equally "provided in section 1108." 29 U.S.C. 1106(a)(1); cf. *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 428 (2018) (rejecting party's attempt "to cherry pick from the material covered by the statutory cross-reference," since "the except clause points to 'section 77p' as a whole—not to paragraph 77p(f)(2)"). Likewise, there is no textual basis to incorporate the exemptions only when the relevant "party in interest" is a third-party service provider—yet the Second Circuit seemingly limited its analysis to that one kind of party-in-interest transaction. Pet. App. 21a. And if the Section 1108 exemptions are directly incorporated into the Section 1106(a) prohibitions, there would be reason to question why the defendant would nonetheless retain the ultimate burden of proof for the exemptions—yet the Second Circuit expressly declined to disturb that existing rule. See p. 20, *supra*.[4] And respondents likewise do not seem to

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[4] The Second Circuit cited *McCormick on Evidence* to justify imposing the burden on the plaintiff to plead a defense that the defendant bears the burden to prove. Pet. App. 24a n.10. But as already explained, see pp. 16-17, *supra*, *McCormick* makes clear that a defendant ordinarily bears the burden to plead exemptions like those in Section 1108. To be sure, *McCormick* observed that "[t]he

contest that they bear the burden to prove the exemptions. Br. in Opp. 8-15.

But the court of appeals' analysis also fails on its own terms. "Thousands of statutory provisions use the phrase 'except as provided in . . . ' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Atlantic Richfield Co.* v. *Christian*, 590 U.S. 1, 16 (2020) (citation omitted). Such provisions "do not otherwise expand or contract the scope of either provision by implication," *ibid.*—here, by converting the exceptions into elements that plaintiffs must anticipate to plead the prohibitions stated in Section 1106(a).

Indeed, this Court has read similar clauses to refer to affirmative defenses—even where (unlike here) the exceptions are enumerated in the same provision as the prohibitions. For example, in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), this Court considered a provision of the Equal Pay Act making it illegal for employers to "discriminate * * * on the basis of sex" by paying differential wages to employees of the opposite sex for equal work, "*except where* such payment is made

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burden[] of proof will not always follow the burden of pleading," but it illustrated that point by suggesting that a *defendant* might be required to plead even those exemptions on which it does not ultimately bear the burden of proof. *Ibid.* Nothing in *McCormick* suggests that a *plaintiff* might have the burden to identify and plead an exemption on which a defendant might rely. The Second Circuit's citation (Pet. App. 24a) to fiduciary-breach cases is likewise inapposite. At trust law, the beneficiary bore the burden to show a breach and related loss to assert a fiduciary-breach claim, Restatement (Third) of Trusts § 100 cmt. f (2012); by contrast, for an improper-delegation claim, trust law required a beneficiary to prove only that such a transaction occurred, at which point it became the trustee's obligation to justify the transaction, see pp. 18-20, *supra*.

pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. 206(d)(1) (emphasis added). The Court described this provision as having a "straightforward" "structure and operation": The plaintiff has the burden to show that the employer pays workers of one sex more than workers of the opposite sex for equal work, but the defendant employer has the burden to show "that the differential is justified under one of the Act's four exceptions." *Corning Glass*, 417 U.S at 195-196. And the courts of appeals have consistently recognized that the pleading burden follows suit. See, *e.g.*, *Gaujacq* v. *EDF, Inc.*, 601 F.3d 565, 575 (D.C. Cir. 2010).

United States v. *Vuitch*, 402 U.S. 62 (1971), on which the court of appeals relied, Pet. App. 20a, does not suggest otherwise. *Vuitch* observed, in the criminal context, that "when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception." 402 U.S. at 70. But the exception at issue in *Vuitch* was part of the provision establishing the prohibition, set forth in the same sentence. *Id.* at 67-68. *Vuitch* did not suggest that a prohibition's cross-reference to exemptions set out in a separate section (as here) should be interpreted to alter the ordinary rule that the exemptions are the defendant's responsibility to plead and prove. And since *Vuitch*, this Court has reaffirmed the "settled rule" "that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause"; instead, "it is incumbent on one who relies on such an exception to set it up and establish it." *Dixon* v. *United*

States, 548 U.S. 1, 13 (2006) (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)). That rule applies with even greater force in the civil context, see pp. 13-14, *supra*, where background principles that favor construing ambiguity in the defendant's favor have no application.

The court of appeals further believed that "the fact that Congress drafted § 1106(a)—but not § 1106(b)—to reference the § 1108 exemptions supports the view that the burden of raising those exemptions lies, at least in part, with the plaintiff" under Section 1106(a). Pet. App. 20a. But that would be an entirely roundabout way for Congress to alter the ordinary pleading rules—particularly in light of the many other textual indications that Congress intended that the defendant bear the burden of raising, producing evidence, and proving that a Section 1108 exemption applies. See pp. 12-17, *supra*.

More likely, that distinction simply reflects the lesser application of the Section 1108 exemptions to the transactions prohibited by Section 1106(b). Again, Section 1106(a) prohibits party-in-interest transactions that Congress deemed "likely to injure" ERISA plans due to the risk of favoritism. See *Keystone*, 508 U.S. at 160. But despite that risk, many party-in-interest transactions described in Section 1106(a) *can* be permissible, provided they meet the requirements of a Section 1108 exemption. In contrast, Section 1106(b) prohibits more egregious conduct like fiduciary self-dealing and receiving kickbacks, 29 U.S.C. 1106(b), which are less likely to satisfy any exemption under Section 1108. Indeed, many Section 1106(b) transactions can *never* be exempt under Section 1108, no matter their terms. See *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 336 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020).

To illustrate the difference, consider an arrangement where a fiduciary causes a plan to lease office space from the spouse of the sponsoring company's CEO. That transaction—one with a "party in interest" (the employer's spouse)—risks potential favoritism and conflicts of interest, and is on its face prohibited by Section 1106(a)(1)(A). So long as the lease is reasonable and the office space necessary, however, that transaction may be exempt under Section 1108(b)(2). But if the spouse *kicked back* a portion of the rental payments to the fiduciary—violating Section 1106(b)(3)—*that* transaction would not satisfy any Section 1108(b) exemption, no matter the terms of the kickback scheme. See 29 C.F.R. 2550.408b-2(a) ("[S]ection [1108](b)(2) does not contain an exemption from acts described in section * * * [1106](b)(3)."); *Patelco Credit Union* v. *Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) ("We conclude that the reasonable compensation provision does not apply to fiduciary self-dealing.").

Indeed, some of the statutory exemptions in Section 1108(b) expressly state that they do not apply to transactions prohibited by Section 1106(b). See, *e.g.*, 29 U.S.C. 1108(b)(17) and (20). And for many others—including the reasonable-arrangements exemption at issue here—the implementing regulations likewise make clear that those exemptions do not apply to many or all of the transactions prohibited by Section 1106(b). See, *e.g.*, 29 C.F.R. 2550.408b-1(a)(2), 2550.408b-2(a), 2550.408b-3(b), 2550.408b-4(a), 2550.408b-6(a). Moreover, Section 1108 imposes additional procedural hurdles before the Secretary can grant a regulatory exemption for a Section 1106(b) transaction that do not apply to Section 1106(a) transactions. 29 U.S.C. 1108(a).

2. The court of appeals also believed that "[t]he broad scope of § 1106(a)" counseled in favor of understanding the exemptions "as part of the definition of the prohibited conduct." Pet. App. 21a-22a. Read on its own, the court said, Section 1106(a) is "miss[ing] an 'ingredient[] of the offense.'" *Id.* at 23a (citation omitted). The court thus believed that incorporating the exemptions in Section 1108 (and particularly Section 1108(b)(2)) is necessary to "limit the scope" of Section 1106(a)(1)'s "prohibitions to only those transactions that actually present a risk of harm to the plan and raise the sort of concerns implicated by the duty of loyalty." *Id.* at 22a.[5]

Again, that reasoning proves too much; it offers no principled basis to distinguish—as the Second Circuit did—between the burden of pleading and the burden of proof. See p. 20, *supra*. But the Second Circuit also erred in limiting its focus to the particular species of party-in-interest transaction at issue here. Section 1106(a) prohibits far more than just "routine" transactions with service providers, Pet. App. 21a. The term

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[5] Other courts of appeals have couched similar concerns in even stronger terms, suggesting that reading Section 1106(a) in isolation would lead to "absurd results" by "prohibit[ing] fiduciaries from paying third parties to perform essential services in support of a plan." Pet. App. 16a (citations omitted; collecting cases). But no one disputes that the Section 1108 exemptions are, in fact, exemptions from liability that limit the substantive scope of the prohibitions in Section 1106(a). Here, for example, fiduciaries are not prohibited from paying for third-party services, so long as the arrangements satisfy Section 1108(b)(2). The question is only who bears the burden to plead (or negate) that exemption. Courts may disagree on the answer to that question, but there is no reason to think that placing the burden on the fiduciary is at all unusual, see pp. 12-20, *supra*—let alone absurd.

"party in interest" also includes plan insiders—such as the plan's sponsoring company and its executives—"that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." *Harris Trust*, 530 U.S. at 242; see 29 U.S.C. 1002(14). The risk that a fiduciary may be affected by conflicting loyalties in transacting with such a party is clear—there is no plausible need for "reference to [an] exception" to "articulate what the statute seeks to prohibit." Pet. App. 21a. But there is no textual basis to require a plaintiff to negate potentially applicable Section 1108 exemptions when she alleges some types of party-in-interest transactions but not others. Nor did the Second Circuit offer any guidance as to precisely where a line could (or should) be drawn.

And even considering only third-party service contracts—*i.e.*, the only type of prohibited transaction on which the court of appeals focused here—there is no reason to think that Congress would have viewed those transactions to be "missing an ingredient" absent incorporation of some Section 1108(b) exemptions. Pet. App. 23a (citation omitted). The court of appeals overlooked ERISA's trust-law roots; as already explained, Congress had good reasons, grounded in trust law's concern about fiduciary outsourcing, to presumptively prohibit third-party service-provider transactions, while allowing the fiduciary to justify a particular transaction by reference to an exemption. See pp. 17-20, *supra*; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989) (rejecting "reading of ERISA" that "would

afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted").[6]

C. Respondents' Appeal To Perceived Policy Concerns Does Not Justify Departing From The Most Natural Reading Of The Statutory Text

Respondents, for their part, assert that treating the Section 1108 exemptions as defenses—rather than as elements "incorporate[ed]" into a Section 1106(a) claim—would permit a plaintiff to plead a third-party service contract, without more, and "proceed to discovery." Br. in Opp. 11; see *id.* at 8, 12, 14, 16.

As a threshold matter, "reduc[ing] the availability of discovery" is not a compelling reason to depart from the most natural reading of ERISA's text. *Crawford-El* v. *Britton*, 523 U.S. 574, 595 (1998). As this Court has explained, "questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Ibid.* Where Congress has "set the balance" in "creating [an] exemption and writing it in the orthodox format of an affirmative defense," this Court "read[s] it the way Congress wrote it." *Meacham*, 554 U.S. at 101-102; *Jones* v. *Bock*, 549 U.S. 199, 212 (2007) ("[C]ourts should generally not depart from the

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[6] Several other courts of appeals have recognized that the Section 1108 exemptions are "affirmative defenses that a plaintiff need not anticipate in a complaint." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 585 (7th Cir. 2022); see, *e.g.*, *Ramos* v. *Banner Health*, 1 F.4th 769, 786 (10th Cir. 2021); *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009); *Elmore* v. *Cone Mills Corp.*, 23 F.3d 855, 864 (4th Cir. 1994). Some of these courts have nonetheless imposed various different pleading burdens on the plaintiff, but the Second Circuit correctly rejected those manufactured limits as atextual. Pet. App. 16a-18a; pp. 5-6, *supra*.

usual practice under the Federal Rules on the basis of perceived policy concerns.").

In any event, a district court has various tools to screen out implausible claims. To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). One reason a claim might be implausible is where there is an "obvious alternative explanation" for the challenged conduct," such that the reviewing court cannot plausibly "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 682. If a plaintiff does not plead "factual content" to address such an "obvious alternative explanation," she has not stated a plausible claim for relief. *Twombly*, 550 U.S. at 567. The pleading standard articulated in *Twombly* and *Iqbal* governs ERISA complaints, see *Hughes* v. *Northwestern Univ.*, 595 U.S. 170, 177 (2022), and lower courts have recognized that such complaints must address obvious alternative explanations to cross the plausibility threshold.[7]

If a plaintiff's complaint rests on the bare allegation that an ERISA plan engaged in a transaction for commonplace services with a third-party service provider, a district court may determine that there exists an

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[7] See, *e.g.*, *Hughes* v. *Northwestern University*, 63 F.4th 615, 629 (7th Cir. 2023) ("[O]n a motion to dismiss, courts must give due regard to alternative explanations for an ERISA fiduciary's conduct, but they need not be overcome conclusively by the plaintiff."); *Braden*, 588 F.3d at 597 ("An inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.").

"obvious alternative explanation" that—if true—would render the transaction exempt from Section 1106(a)'s prohibition. As respondents emphasize, this species of party-in-interest transaction is especially likely to satisfy Section 1108(b)(2)'s reasonable-arrangements exemption—particularly if a plaintiff offers no additional facts to suggest that a transaction violates ERISA. A district court thus might require a plaintiff to make a "plausible showing that such alternative explanations may not account for the defendant's conduct," *Hughes* v. *Northwestern Univ.*, 63 F.4th 615, 629 (7th Cir. 2023)—here, for instance, by alleging facts suggesting that that the compensation paid to the plan's recordkeepers was not obviously reasonable.

Importantly, the obligation to address an obvious alternative explanation is a pleading requirement; it does not substantively alter the elements of a prohibited-transaction claim or affect what a plaintiff must prove. Relatedly, any such pleading obligation is limited to Section 1106(a) claims like those at issue here, which do not involve transactions with plan insiders. In cases involving insider transactions—which pose an inherent risk of favoritism and conflicted interests—a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, without additional allegations aimed at showing that the transaction at issue is unreasonable. See *Hughes*, 63 F.4th at 629 ("Only *obvious* alternative explanations must be overcome at the pleadings stage.").

A district court also has other tools at its disposal to screen out meritless complaints before discovery. Specifically, the court may order a reply to the defendant's answer under Federal Rule of Civil Procedure 7(a) to "insist that the plaintiff 'put forward specific,

nonconclusory factual allegations.'" *Crawford-El*, 523 U.S. at 598 (citation omitted); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1185 (3d ed. 2004). If a fiduciary that entered into a transaction with a third-party service provider identifies and pleads facts to support the Section 1108(b) reasonable-arrangements exemption, a district court could insist that the plaintiff offer additional factual allegations showing why the transaction is not obviously reasonable. Cf., *e.g.*, *Cole* v. *Carson*, 935 F.3d 444, 446 (5th Cir. 2019) ("[C]ourts have developed procedures and pretrial practices, including * * * a reply to an answer under Rule 7(a) on order of the district court, particularized to address the defense of immunity."), cert. denied, 141 S. Ct. 111 (2020).

On the other side of the ledger, the Second Circuit's rule would present a host of administrative problems. To start, the court held that "at least some of [the] exemptions" in Section 1108 are incorporated into Section 1106(a)'s prohibitions. Pet. App. 18a. Section 1108 not only enumerates 21 statutory exemptions in Section 1108(b), but also authorizes additional regulatory exemptions under Section 1108(a). See 29 U.S.C. 1108(a); p. 3, *supra*. How is a plaintiff to know which exemptions are incorporated? The court never says.

And while the court of appeals focused only on transactions with service providers, again, the court did not identify any textual basis to differentiate among transactions with various "part[ies] in interest." 29 U.S.C. 1106(a). The Second Circuit's rule would thus seemingly mean that plaintiffs bringing claims for *any* violation of Section 1106(a)—including those involving transactions with plan insiders—must likewise negate all

potentially applicable Section 1108 exemptions to state a plausible claim.

The court of appeals' interpretation thus risks creating an onerous hurdle to bringing claims under a provision designed by Congress to be a presumptively "*per se*" bar on certain types of party-in-interest transactions. *Harris Trust*, 530 U.S. at 252. And the court's approach is particularly troubling given that the facts relevant to the Section 1108 exemptions will often be exclusively in the defendant's possession. *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) ("No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail."); see, *e.g.*, 29 U.S.C. 1108(b)(19) (exemption for "cross-trading" transactions listing nine separate conditions that turn on detailed information about the plan manager's dealings). As the Seventh Circuit put it, "[i]f there is an administrative problem to be worried about, it is the chance that courts would start requiring plaintiffs to negate all section [1108] exemptions in their complaints," given that plaintiffs likely "lack access" to the "information they need." *Allen* v. *GreatBanc Trust Co.*, 835 F.3d 670, 677 (7th Cir. 2016).

II. PETITIONERS PLAUSIBLY ALLEGED THAT THE PLANS' RECORDKEEPING ARRANGEMENTS VIOLATED SECTION 1106(a)

Here, petitioners plausibly alleged a prohibited transaction in violation of Section 1106(a)(1)(C), and further plausibly alleged that these transactions for recordkeeping services were not obviously reasonable.

Specifically, petitioners alleged that the plan fiduciaries caused the plan to engage in transactions for the "furnishing of goods, services, or facilities between the plan and a party in interest," 29 U.S.C. 1106(a)(1)(C), by

transacting for recordkeeping services with Fidelity and TIAA. Compl. ¶¶ 128-129. Petitioners also alleged that the plans used a revenue-sharing model, rather than a flat per-participant fee, to pay the recordkeepers, explaining that the revenue-sharing model "can lead to excessive fees if not properly monitored and capped." Compl. ¶¶ 46, 50-59. Petitioners further alleged that the plans failed to conduct a competitive bidding process for recordkeeping services, which can likewise lead to excessive fees. Compl. ¶ 126. And petitioners alleged that the plans paid excessive fees here, explaining that the plans paid between $115 and $200 per participant—many times higher than the $35 market benchmark. Compl. ¶¶ 127-141. Petitioners—who, like most ERISA plaintiffs, lack access to the actual contracts between the plans and the recordkeepers and other internal plan information—based those calculations on the plans' service-provider compensation schedules filed with the Department of Labor; the plans' features; the nature of the administrative services provided by the plans' recordkeepers; the plans' combined participant levels; and the recordkeeping-services market. Compl. ¶¶ 135-137. Petitioners also alleged that the plans could have used a single recordkeeper instead of two, further supporting the inference that the plans overpaid in recordkeeping fees, given economies of scale. Compl. ¶¶ 122-125.

The court of appeals faulted petitioners for "fail[ing] to allege any facts going to the relative quality of the recordkeeping services provided, let alone facts that would suggest the fees were 'so disproportionately large' that they 'could not have been the product of arm's-length bargaining,'" and thus failing to negate the exemption in Section 1108(b)(2). Pet. App. 26a

(citation omitted). But it was the fiduciaries' burden to plead and prove that the transactions satisfied the Section 1108(b)(2) exemption. And here, petitioners' factual allegations sufficed to plausibly allege that the challenged transactions for recordkeeping services were *not* obviously reasonable.

As a practical matter, moreover, it is not clear what additional facts petitioners could have alleged that would have satisfied the court of appeals, without the benefit of discovery. While plan participants may have access to plan disclosures that reveal the fees charged by service providers, participants would likely require discovery into additional facts in the fiduciaries' possession—such as the terms of the contract, the range of contracted services, and performance metrics that justify the fees charged—to ascertain the quality and full extent of the services provided. A plaintiff's claims should not be prematurely dismissed due to the absence of facts that it cannot obtain.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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