No. 21-56196

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. BUGIELSKI and CHAD S. SIMECEK, individually as participants in the AT&T Retirement Savings Plan and on behalf of a class of all those similarly situated,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:17-cv-8106 (Hon. Virginia Phillips)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. The Chamber therefore regularly participates as *amicus curiae* on issues that affect benefit-plan design or administration. *See, e.g.*, *Anderson v. Intel Corp. Inv. Policy Comm.*, No. 22-16268 (9th Cir.).

SUMMARY OF THE ARGUMENT

This case concerns the scope of ERISA's prohibited-transaction and exemptive provisions in 29 U.S.C. §§ 1106(a) and 1108(b). These provisions were included in ERISA when it was enacted in 1974, before the advent of 401(k) plans—when defined-benefit plans predominated and at a time when the modern-day retirement-plan marketplace was virtually unfathomable. Today, the norm is

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

defined-contribution plans in which plan participants each have their own individual account, choose their investments, receive individualized services, and have at their disposal robust plan offerings like participant education and digital investment tools, all generally provided by third parties.

Participants demand these types of robust service offerings, but some courts and the Department of Labor (DOL) have interpreted ERISA's opaque and confusingly worded prohibited-transaction and exemptive provisions in ways that create enormous litigation risks for the employers who sponsor plans and the fiduciaries who administer them—even when the claims are ultimately meritless. Some courts and DOL have mistakenly interpreted these provisions in isolation, misplaced the burden of proof, added new substantive requirements by regulation that are not present in the statute, and construed these provisions to presumptively outlaw garden-variety necessary arrangements with third parties on market terms. In doing so, they have applied these provisions well beyond their original function in ERISA, which was to target potentially harmful commercial relationships that could "jeopardize the ability of the plan to pay promised benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (citation omitted). In this case, Plaintiffs' prohibited-transaction claim does not target that type of commercial relationship. It targets an arms'-length decision plan fiduciaries made to increase and improve the services available to plan participants from a third-party provider that makes these

services broadly available in the retirement plan marketplace—the type of decision that, if unreasonable, is already actionable as a breach of fiduciary duty under 29 U.S.C. § 1104(a). Yet the panel held that it also separately constitutes a prohibited transaction.

The practical implications of treating a run-of-the-mill decision to improve the services for participants from a third-party provider at market price as presumptively unlawful are considerable. Such a holding will encourage plaintiffs to plead garden-variety fiduciary-breach claims as prohibited-transaction claims to take advantage of the more favorable burden of proof and pleading rules that many courts have afforded them. It will discourage plan sponsors and fiduciaries from transacting with third parties to offer the beneficial services that employees overwhelmingly favor and need. For plans that nonetheless continue to offer those services, it will make the plan sponsors and service providers sitting ducks for ERISA class actions that are ultimately meritless—an outcome that will, in turn, force plan sponsors to reduce the generosity of retirement benefits (*e.g.*, employer contributions) that they *voluntarily* offer. All told, the cost and complexity of providing retirement-plan benefits to employees will increase significantly—exactly what Congress was trying to avoid in enacting ERISA. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) ("Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage

employers from offering [ERISA] plans in the first place.'" (alterations in original) (citation omitted)). An issue this important with consequences this harmful warrants rehearing.

ARGUMENT

An overly broad interpretation of ERISA's prohibited-transaction provisions creates perverse litigation incentives and leads to reduced service offerings.

When ERISA was enacted in 1974, there were no 401(k) plans. Section 401(k) was not codified in the Internal Revenue Code until 1978,[2] it did not go into effect until 1980, and it did not lead to widespread adoption of 401(k) plans until the early 1980s. Kathleen Elkins, *A brief history of the 401(k), which changed how Americans retire*, CNBC (updated Jan. 5, 2017), https://www.cnbc.com/2017/01/04/a-brief-history-of-the-401k-which-changed-how-americans-retire.html. In 1974, the market was dominated by defined-benefit plans—*i.e.*, pension plans, in which plan fiduciaries invest the plan's assets and plan participants receive a set benefit irrespective of the plan's investment earnings. Back then, defined-contribution plans were typically offered "as a supplemental way for employees to save for retirement in addition to their primary [defined-benefit] plan." U.S. Gov. Accountability Office, *The Nation's Retirement System* 9 (2017), https://www.gao.gov/assets/gao-18-111sp.pdf; *see also* U.S. Dep't of Labor, *Private*

[2] Pub. L. No. 95-600, § 135(a), 92 Stat. 2763, 2785 (1978) (codified as amended at 26 U.S.C. § 401(k)).

Pension Plan Bulletin Historical Tables and Graphs: 1975-2020, at 25 (Oct. 2022), https://tinyurl.com/2p9h793d.

Unsurprisingly, then, Congress enacted ERISA in 1974 with an eye toward remedying weaknesses in private pension plans—things like overly restrictive vesting rules, employers' failures to fund pension plans as they had promised, etc.—that left "long-time employees totally bereft of pension protection in their final years." *Page v. Pension Ben. Guar. Corp.*, 968 F.2d 1310, 1316 (D.C. Cir. 1992) (citation omitted); *see also H.C. Elliott, Inc. v. Carpenters Pension Tr. Fund for N. Cal.*, 859 F.2d 808, 810 (9th Cir. 1988) ("ERISA was enacted in 1974 because Congress was concerned that employees covered by pension plans were being deprived of anticipated benefits because of employer underfunding of those plans.").

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). And Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Consequently, it crafted ERISA in a way that would *encourage* employers to sponsor plans and that would ensure that participants in those plans received the benefits they were promised—avoiding the problems that had plagued pension plans in the past.

ERISA's prohibited-transaction provisions reflect this objective. Section 1106(b) prohibits fiduciaries from engaging in self-dealing transactions, *see In re Fidelity ERISA Float Litig.*, 829 F.3d 55, 58 (1st Cir. 2016); *Reich v. Compton*, 57 F.3d 270, 287 (3d Cir. 1995) (Alito, J.), *amended* (Sept. 8, 1995), while § 1106(a) targets "uses of plan assets that are potentially harmful to the plan" and "could 'jeopardize the ability of the plan to pay promised benefits.'" *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (citation omitted). Neither provision is intended to prevent fiduciaries from procuring services or enhancing service offerings on market terms through arms'-length negotiations—something that does not present the types of risks that Congress was concerned about—nor are these provisions intended to expose fiduciaries to liability for common transactions that fiduciaries across the country are required to engage in every day to run a plan.

Indeed, the modern-day marketplace of retirement-plan service offerings did not exist when these prohibited-transaction provisions were enacted because 401(k) plans did not exist. The need for third-party recordkeepers and service providers to maintain complicated plan line-ups, effectuate participant transactions, keep meticulous records of constantly changing individual participant account balances and choices, offer financial education and comprehensive managed-account options, make available investment-advice services, and provide comprehensive participant assistance by phone and through online platforms was not part of the landscape.

Today, however, third-party service providers have become indispensable for fiduciaries who must navigate their comprehensive duties—as well as frequently the most cost-effective option. *See The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2018*, 25 ICI Research Perspective, no. 4, at 3 (July 2019), https://www.ici.org/doc-server/pdf%3Aper25-04.pdf ("The plan fiduciaries must arrange for the provision of the many services required to create and maintain a 401(k) plan."); *id.* at 4-7 (describing kinds of services and fee arrangements provided to 401(k) plans). Given the increasing size and complexity of retirement plans and participant populations, plan sponsors and fiduciaries heavily rely on third parties to provide a wide array of services, including "legal, accounting, trustee/custodial, recordkeeping, investment management, [and] investment education or advice" services. U.S. Dep't of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, https://bit.ly/3oDuI7i ("Many businesses rely on other professionals to advise them and assist them with their employee benefit plan duties."); *see* S. Rep. No. 93-383, at 103 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4986 ("It is intended that 'benefit plan services' include investment advisory, actuarial, legal, accounting, computer and bookkeeping, and other similar services necessary for plan operations."). Without service providers, plan sponsors simply would not be able to effectively maintain retirement plans—something that is, again, an entirely voluntary decision.

The ubiquity of service providers counsels strongly against a reading of ERISA that would make arms'-length transactions a magnet for meritless lawsuits. In the past 20 years, however, as defined-contribution plans and the retirement-plan marketplace have expanded, some courts and the DOL have interpreted ERISA's prohibited-transaction and exemptive provisions in ways that reach far beyond their original objective. For example, § 1106 defines the "prohibited transactions" by reference to exemptions (in § 1108) so that the transactions listed in 1106(a) are *not* prohibited transactions if specified conditions are met. See 29 U.S.C. § 1106(a) ("Except as provided in section 1108 of this title ….") Nonetheless, some courts have deemed the exemptions to be affirmative defenses for which the burden of proof lies with the defendant. *See Donovan v. Cunningham*, 716 F.2d 1455, 1467-1468 (5th Cir. 1983); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 677 (7th Cir. 2016).

Under this interpretation, if *every* arms'-length transaction with a service provider or enhancement of services offered by the service provider is a prohibited transaction, then all a plaintiff must do to open the doors to discovery is allege that a plan hired a service provider, something that essentially every plan *must* do and that they do every day to run a plan. Then, plaintiffs can avoid pleading any allegations related to the elements of ERISA's exemptions—*e.g.*, the "necess[ity]" of the services or "reasonable[ness]" of the service provider's compensation, 29 U.S.C. § 1108(b)(2)—and may well fend off a motion to dismiss because the

applicability of the exemption is not clear on the face of the complaint. In other words, plaintiffs would often have an easy path to drag their adversary into discovery, even if the lawsuit lacks merit.

Given the "ominous" prospect of discovery in ERISA actions and the "probing and costly inquiries" that discovery entails, *PBGC v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013), this type of interpretation will "push cost-conscious defendants to settle even anemic cases," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007), if not lead to outright "settlement extortion," *PBGC*, 712 F.3d at 719 (citation omitted). Under the correct interpretation of the statute, ERISA plaintiffs should at the very least be required to "plead something to show why the [relevant] exemption would not apply." *Turner v. Schneider Elec. Holdings, Inc.*, 530 F. Supp. 3d 127, 138 (D. Mass. 2021) (citation omitted).

Furthermore, ERISA's general fiduciary provisions already provide a cause of action for fiduciary decisions and transactions that are unreasonable—29 U.S.C. § 1104(a). But, of course, ERISA plaintiffs bear the burden of proving the unreasonableness of those decisions. If every service-provider arrangement or enhancement is deemed to fall within ERISA's prohibited-transaction provision, and ERISA defendants are deemed to have the burden of proof regarding the application of ERISA's exemptive provisions, then every plaintiff will be incentivized to plead garden-variety fiduciary-breach claims as prohibited-transaction claims to take

advantage of the favorable pleading rules and burdens of proof to defeat dismissal and summary judgment and impose enormous settlement pressure.

DOL regulations have exacerbated these problems as well. Through regulations purporting to construe the meaning of the term "reasonable arrangements" in one of ERISA's exemptive provisions, 29 U.S.C. § 1108(b)(2), DOL actually created brand-new disclosure requirements that are not present in the statute itself. *See Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 77 Fed. Reg. 5,632 (Feb. 3, 2012); 29 C.F.R. § 2550.408b-2(c)(1)(i) ("[n]o contract or arrangement for services … is reasonable within the meaning of [§ 1108(b)(2)] … unless" disclosure requirements are satisfied). Moreover, the regulation includes requirements that particular disclosures be made not *by* fiduciaries but *to* them, *see id.* § 2550.408b-2(c)(1)(iv), which means that a compensation arrangement struck by a plan fiduciary could be deemed not "reasonable" (and therefore not exempt) based on an alleged error in a disclosure that was not even the fiduciary's responsibility. DOL's purported interpretation of the term "reasonable arrangements" therefore creates enormous prohibited-transaction liability risk for fiduciaries and non-fiduciaries alike as a result of any technical noncompliance with the thicket of requirements that DOL has created.

The panel opinion holds that simply expanding the service offerings to be made available to participants from a third-party provider at market price falls within

ERISA's prohibited-transaction provisions. That holding is of a piece with the above examples—it interprets ERISA's prohibited-transaction and exemptive provisions without regard to the problems that these provisions were enacted to solve. And when combined with the interpretations described above, this type of holding would make virtually every plan sponsor nationwide a ready target for a class-action lawsuit that may well involve exorbitant litigation costs even if the claims are meritless.

Such a regime would lead to plans that cost more to sponsor and that offer fewer services—in both situations undermining a primary purpose of ERISA, which is to *encourage* employers to voluntarily offer retirement benefits to their employees.[3] Plan sponsors may very well decline to outsource the provision of services to third parties because of the massive litigation risk that doing so would entail—leaving participants with only the minimal services that can be provided in

[3] Recent legislation reflects Congress's ongoing efforts to facilitate employer-sponsored retirement plans. The Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE") increases tax incentives for small employers that sponsor eligible plans and creates a structure for pooled employer plans, allowing unrelated employees to join together to participate in a single defined contribution plan. *See* Pub. L. No. 116-94, Div. O, §§ 101, 104-105, 133 Stat. 3137-3145, 3147-3148 (2019). Likewise, SECURE 2.0, enacted as part of the 2023 Consolidated Appropriations Act, increases the credits available to small employers and eases administrative burdens. *See, e.g.*, Pub. L. No. 117-328, Div. T, § 102, 136 Stat. 5277 (2022) ("Modification of credit for small employer pension plan start-up costs"); *id.* § 320, 136 Stat. 5354 ("Eliminating unnecessary plan requirements related to unenrolled participants"); *id.* § 341, 136 Stat. 5375 ("Consolidation of defined contribution plan notices").

house. Or, they may limit the third-party offerings to the absolute barebones services required to run a plan at the lowest cost possible in order to minimize the litigation risk. That would discourage plans from contracting with third parties to provide services that employees increasingly ask for—*e.g.*, financial-wellness education, brokerage windows, financial-advice tools and services, and managed-account services, which plan sponsors generally cannot themselves provide. *See* Ted Godbout, *Demand for Employer Financial Wellness Benefits Remains Strong*, NAPA (Dec. 15, 2022), https://tinyurl.com/mr339j6k; Noah Zuss, *Employees' Improved Finances Mean More Demand for Financial Wellness Tools*, PlanSponsor (Jan. 11, 2022), https://tinyurl.com/3bdvnutc. And plan sponsors that decide to continue to offer robust third-party service offerings may be forced to account for how the increased litigation risk could impact the financial resources they have available to voluntarily provide plan benefits that benefit employees, such as matching contributions.

Any of these outcomes causes harm all around—employees lose out on sought-after services, employers become less attractive workplaces, and third-party providers lose clients and are discouraged from innovating new service offerings. Nothing in ERISA compels that result.

CONCLUSION

This Court should grant rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Circuit Rule 29-2 and Federal Rule of Appellate Procedure 29 because it contains 2,732 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 8, 2023

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