Appeal Case No. 21-56196

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. BUGIELSKI; CHAD S. SIMECEK,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Cause No. 2:17-cv-08106-VAP-RAO

BRIEF FOR THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, SOCIETY OF PROFESSIONAL ASSET MANAGERS AND RECORDKEEPERS AND COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS INC. AS *AMICI CURIAE*
IN SUPPORT OF GRANTING APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 29(b)(4), the undersigned counsel state that none of the *amici curiae* are corporations, and thus no disclosure statement is required by Rule 26.1.

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families.

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Collectively, the Council's more than 430 members either directly sponsor or provide services to retirement plans and health and welfare plans covering virtually all Americans who participate in employer-sponsored programs.

The Society of Professional Asset Managers and Recordkeepers (the "SPARK Institute") is a nonprofit association of retirement plan service providers and investment managers collectively serving approximately 110 million employer-sponsored plan participants. Its mission is to develop and advance policies to strengthen Americans' retirement security.

The Committee on Investment of Employee Benefit Assets Inc. (CIEBA) is a group of 114 of the country's leading Chief Investment Officer Fiduciaries who

[1] This brief was principally authored by Amici along with Seyfarth Shaw LLP, counsel for Amici. No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money related to the preparation or submission of this brief. No person other than Amici, their members, and their counsel contributed money related to the preparation or submission of this brief.

collectively oversee over $2.6 trillion in retirement plan assets, in plans covering approximately 17 million participants. CIEBA members are responsible for overseeing a substantial portion of the assets held in the private-sector retirement system and have a direct interest in its effective regulation.

ERIC, the Council, the SPARK Institute, and CIEBA frequently participate as *amicus curiae* in cases like this one that have the potential for far-reaching effects on employee benefit plan design or administration. Amici submit this brief in support of granting Appellees' Petition For Panel Rehearing Or Rehearing *En Banc*.

II. ARGUMENT

A. The Panel's Decision Renders Standard and Ubiquitous Contracts In American Retirement Plans Presumptively Unlawful.

Broadly speaking, there are two types of employer-sponsored retirement plans in the United States: defined contribution plans and defined benefit plans. In a defined benefit plan, "retirees receive a fixed payment each month," and those payments do not fluctuate with the value of the plan or its investments. *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1618 (2020); *see* 29 U.S.C. § 1002(35). In a defined contribution plan, however, "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 574 (7th Cir. 2022) (quoting *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015)); *see* 29 U.S.C. § 1002(34). The plan in this case is a defined contribution plan.

Approximately two-thirds of private sector employees in the United States have access to a defined contribution plan,[2] making defined contribution plans "the dominant type of retirement plan sponsored by private-sector employers in the

[2] Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Retirement plans for workers in private industry and state and local government in 2022 (Feb. 1, 2023), https://www.bls.gov/opub/ted/2023/retirement-plans-for-workers-in-private-industry-and-state-and-local-government-in-2022.htm.

United States."[3] As of the end of March 2023, private-sector defined contribution plans held $9.8 trillion—more than 27% of all retirement assets in the country.[4]

It is common for defined contribution plans to engage third-party service providers. *See Albert v. Oshkosh Corp.*, 47 F.4th 570, 574 (7th Cir. 2022).[5] Perhaps the most common, and visible, service providers are recordkeepers. Among other things, "[r]ecordkeepers help plans track the balances of individual accounts, provide regular account statements, and offer informational and accessibility services to participants." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 740 (2022).

Specific to this case, the *Bugielski* panel noted that:

> As recordkeeper, Fidelity performs various administrative functions, such as enrolling new participants in the Plan, maintaining participants' accounts, and processing participants' contributions to the Plan. . . . Fidelity also offers other services to participants on an as-needed basis, including administering loans and processing withdrawals.

Bugielski v. AT&T Servs., Inc., No. 21-56196, 2023 WL 4986499, at *2 (9th Cir. Aug. 4, 2023).

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[3] Vanguard, *How America Saves 2022*, p. 10 (June 2022), https://www.bls.gov/opub/ted/2023/retirement-plans-for-workers-in-private-industry-and-state-and-local-government-in-2022.htm.

[4] Investment Company Institute, *Release: Quarterly Retirement Market Data*, Retirement Assets Total $35.4 Trillion in First Quarter 2023 (June 14, 2023), https://www.ici.org/statistical-report/ret_23_q1#:~:text=Defined%20contribution%20(DC)%20plan%20assets,percent%20from%20December%2031%2C%202022; *see also* PLANSPONSOR, Recordkeeping Industry Snapshot, https://www.plansponsor.com/research/2023-recordkeeping-survey/?pagesec=3#Industry%20Snapshot (last visited Sept. 6, 2023) (defined contribution market currently includes $9.83 trillion).

[5] *See* Fidelity, 2023 Plan Sponsor Attitudes Survey (Mar. 2023), bit.ly/3YVoM7I (estimating 94 percent of ERISA plans retain third-party advisors or consultants).

Here, the panel's decision suggests that *any* modification or renegotiation of existing service provider agreements would be a prohibited transaction, absent a showing that the "transaction" (*i.e.*, "the amendment of the contract") fits within one of the statutory prohibited transaction exemptions. *See Bugielski*, 2023 WL 4986499, at *5.

While the panel did not believe its opinion would "frustrat[e] 'ERISA's statutory purpose,'" *see id.* at *12, making every modification of service-provider agreements a presumptively unlawful, prohibited transaction (unless an affirmative defense is established) will have significant and far-reaching impacts. Although this opinion involved reversal of summary judgment for the defendant, the practical effect is that the decision would nullify years of jurisprudence on the standards plaintiffs must meet in pleading claims related to excessive retirement plan fees.

B. The Panel's Decision Will Open The Floodgates To Speculative Recordkeeping Claims.

The Supreme Court has cautioned that, in interpreting ERISA, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits . . . and . . . its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [] benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). To that end, the

Court has emphasized that motions to dismiss are an "important mechanism for weeding out meritless [ERISA] claims . . . ." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). This is because "the prospect of discovery in a suit" challenging fiduciary decisions is "ominous," and "elevates the possibility that a plaintiff with a largely groundless claim will simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value[.]" *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013).

In the nearly fifty years since it was enacted, the importance of motions to dismiss frivolous and speculative ERISA claims has never been greater. Indeed, plan sponsors and fiduciaries have been subject to a steadily growing tide of litigation alleging breaches in their duties (primarily the duty of prudence) over the past decade.[6] More than 180 such suits were filed between the end of 2020 and May 2022, alone.[7] As noted below, this litigation has increased plan costs, and discourages plan formation and innovation.

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[6] *See* George S. Mellman & Geoffrey T. Sanzenbacher, 401(k) Lawsuits: What Are the Causes and Consequences?, Center for Retirement Research at Boston College No. 18-8, at 2 (May 2018), https://crr.bc.edu/wp-content/uploads/ 2018/04/IB_18-8.pdf (tracking suits against administrators of 401(k) plans from 2006 to 2017).

[7] *See* Austin R. Ramsey, Excessive Retirement Fees Suits Jump-Start Pooled-Plan Activity, Bloomberg Law (May 24, 2022), available at https://news. bloomberglaw.com/daily-labor- report/excessive-retirement-fees-suits-jump-start-pooled-plan-activity.

Owing in part to that tidal wave of litigation, there has been a significant amount of litigation in recent years over the pleading standard in claims alleging a breach of ERISA's duty of prudence, including as to claims that a plan's recordkeeping fees were excessive. That litigation reached its crescendo in the beginning of 2022, with the Supreme Court's opinion in *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022). There, as in *Dudenhoeffer*, the Court emphasized the importance of a "context-specific inquiry" guided by the standards set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Hughes*, 142 S.Ct. at 740, 742. In doing so, the Court made clear that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* at 742.

In the approximately twenty months since the Supreme Court decided *Hughes*, the pleading standard applicable to ERISA claims alleging fiduciaries breached the duty of prudence by allegedly allowing the plan to pay excessive fees, including for recordkeeping, has continued to be the subject of extensive litigation.

Cases on this issue have been decided by at least five Courts of Appeals (including this one),[8] and another remains pending.[9]

Together, these cases confirm the operative pleading standard for ERISA fiduciary breach claims requires plaintiffs to plead facts necessarily giving rise to the plausible inference of imprudent conduct. *Accord Iqbal*, 556 U.S. at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not shown "that the pleader is entitled to relief."). Put differently, the cases decided by the Supreme Court and Courts of Appeals over the last twenty months demonstrate that—consistent with *Twombly* and *Iqbal*—a complaint asserting excessive retirement plan fees must show not only that it is *possible* a fiduciary acted imprudently, but that it is *plausible* the fiduciary did so. Anything less fails to state a claim.

The Supreme Court's decisions in *Dudenhoeffer* and *Hughes* create a standard that cannot be satisfied by fixating on a single fact or variable among the many a fiduciary must consider in making decisions for a plan. Under that standard, "[a] complaint cannot simply make a bare allegation that costs are too

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[8] *See Matney v. Barrick Gold of N. Am.*, No. 22-4045, 2023 WL 5731996 (10th Cir. Sept. 6, 2023); *Hughes v. Nw. Univ.*, 63 F.4th 615, 632 (7th Cir. 2023); *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 279 (8th Cir. 2022); *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022); *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL 1125667, at *1 (9th Cir. Apr. 15, 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 580 (7th Cir. 2022).

[9] *See Mator v. Wesco Distribution Inc.*, Case No. 22-2552 (3d Cir. 2022).

high . . ."; the allegations must be fact-specific. *See Davis v. Wash. Univ.*, 960 F.3d 478, 484 (8th Cir. 2020).

The panel's opinion here threatens to undo the significant progress the Supreme Court and Courts of Appeals have made in providing clarity on the pleading standard for excessive fee claims. In assessing imprudence claims based on alleged excessive fees, it is universally recognized that the plaintiffs bear the burden of establishing it is plausible (rather than possible) that the challenged fees were excessive. The same cannot be said for prohibited transaction claims.

Indeed, while the panel expressed optimism that plans will be able to "'routinely enter into contracts with service providers' because of § 408(b)(2)'s exemption," *Bugielski*, 2023 WL 4986499, at *6, the litigation impact of that legal framework is severe. In theory, the panel's framework seems workable: a fiduciary who follows a process and ensures it has satisfied § 408(b)(2) can enter into routine, necessary service provider agreements without violating § 406(a).

In practice, however, the diligence of the fiduciary's process (or even the reasonableness of the service provider's compensation) would be of little value in warding off speculative litigation. Courts—including this one—have interpreted ERISA's prohibited transaction exemptions as affirmative defenses. *See Harris v. Amgen, Inc.*, 788 F.3d 916, 943 (9th Cir. 2015), *rev'd on other grounds*, 577 U.S. 308 (2016) ("[T]he existence of an exemption under § 1108(e) is an affirmative

defense[.]"). As such, "an ERISA plaintiff need not plead the absence of exemptions to prohibited transactions." *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016) ("[S]ection 408 exemptions are affirmative defenses for pleading purposes, and so the plaintiff has no duty to negate any or all of them.").

Categorizing routine arrangements with plan service providers as "prohibited transactions" under § 406(a), then, undoes all of the precedent requiring an ERISA plaintiff to set out plausible allegations that the challenged fee is excessive. Indeed, a plaintiff would need only to allege that (1) the service provider was a party-in-interest, and (2) the fiduciary caused assets to be transferred to the service provider. These allegations fall far short of the detail required to allege a breach of the duty of prudence. So long as the plaintiff remained vague enough as to the actual fees paid (thus avoiding establishing the affirmative defense on the face of the complaint), the § 408(b)(2) exemption the panel pointed to (or, indeed, any other exemption) would not allow a court to dismiss even a baseless, speculative claim regarding service provider fees. Plaintiffs should not be able to circumvent the established pleading burden for excessive fee claims by repackaging their prudence claims as ones for prohibited transactions.

In interpreting a statute, as the panel did here, it is imperative that the words of the statute be read in context. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140

S. Ct. 768, 778 (2020). The panel, however, failed to consider how the language of § 406 fits within the broader context of ERISA's remedial scheme. It makes little sense, in that context, to allow routine service provider contracts to be challenged as prohibited transactions, where the same allegations would be found insufficient to establish a claim of breach of the duty of prudence. But that is what this decision does. The panel's decision must be re-visited to avoid crippling plan sponsors' and plan administrators' ability to operate plans in an orderly and efficient manner.

C. Allowing Claims That All Re-Negotiations Of Service Provider Agreements Are Prohibited Transactions Unless Proven Otherwise Will Have Far-Reaching Negative Consequences For Plan Sponsors, Fiduciaries, And Participants.

The costs of ERISA plaintiffs' prolific class action filings in recent years have already been staggering. Since 2015, plan sponsors have paid more than $1 billion in settlements, including $330 million in legal fees that represent a direct and needless cost to plan providers, to say nothing of the costs associated with cases that did not settle.[10]

Even plans that have never been sued are suffering. For example, the costs associated with fiduciary liability insurance have skyrocketed. Almost all fiduciary liability policies covering excessive fee and underperformance claims now feature seven- and eight-figure retention numbers, meaning that plan sponsors must pay as

[10] Understanding Excessive Fee Claims at 2.

much as $15 million in legal fees before policies begin to cover defense costs.[11] Premiums associated with these policies have also risen dramatically.[12]

The central reason for the marked increase in insurance costs is insurers' inability to clearly gauge a plan's litigation risk, coupled with considerable legal and potential settlement costs. With hundreds of cookie-cutter complaints landing simultaneously in courts across the country, there is little predictability as to when a plan might be sued, or what such claims will allege. No defined contribution plan sponsor or fiduciary is safe from suit, regardless of the diligence of their actual process.

Making matters worse, the enormous discovery and defense costs mean that virtually all claims that survive a motion to dismiss end up settling. While those settlements involve significant legal fees and settlement costs for plans and insurers, they typically result in very modest payouts for class member participants. Thus, although these lawsuits are exceedingly unlikely to reach a determination of wrongdoing on the merits, unpredictable and excessive litigation and settlement costs nevertheless cause insurance prices to escalate continually for all defined contribution plans. All of this is harmful to the voluntary, employer-

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[11] Jacklyn Wille, Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market, Bloomberg Law (Oct. 18, 2021), available at https://news.bloomberglaw.com/employee-benefits/spike-in-401k-lawsuits-scrambles-fiduciary-insurance-market.

[12] *Id.*

sponsored retirement plan system; dollars spent on litigation cannot be used to pay benefits.

By opening the floodgates to prohibited transaction claims for routine service provider contracts, the panel's decision here threatens to exacerbate all of these problems. The theory blessed by the panel's opinion provides plaintiffs (and plaintiffs'-side law firms) a roadmap to surviving dismissal, by replacing prudence-based fee challenges (in which the reasonableness of fees is *plaintiffs'* burden to plausibly plead) with prohibited transaction claims (where plaintiffs need only plead a re-negotiation of a service provider contract without allowing defendants to assert an affirmative defense at the motion to dismiss stage).

Aside from the sprawling exposure and accompanying legal and insurance costs arising directly from this case, the panel's ruling will subject fiduciaries to potential liability—or at least defense costs—even where they have clear evidence of providing well-managed, prudently priced plans, aided by expert third-party service providers, providing best-in-class services to aid participants in planning for retirement. This simply cannot be what the Supreme Court envisioned when it emphasized the importance of lower courts "giv[ing] due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742.

Facing climbing costs and liability exposure, many employers may decide that a defined contribution plan is simply not worth providing—an outcome contrary to Congress' intent in passing ERISA to protect employees' retirement benefits. Those that continue to offer a plan will face not only increasing costs, but also a significantly increased litigation exposure. Plans that continue to engage with trusted service providers will have to do so knowing that any contract amendment or renewal will put them at risk of a prohibited transaction claim that, even if meritless, will likely survive a motion to dismiss and require either significant defense and discovery costs, or an expensive settlement.

Given the discovery costs and settlement dynamics in these cases, defendants cannot count on the subsequent discovery and trial practice necessary to establish the § 408 exemptions to efficiently limit the impact of the panel's holding in the manner suggested by the opinion. Luckily, nothing compels this court to bring about this parade of horribles. This Court should order rehearing of the panel's decision and should thereafter follow the framework established by *Lockheed Corporation v. Spink*, 517 U.S. 882 (1996), *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019), and *Albert*, 47 F.4th 570. Like those courts, this Court should reject a reading of the prohibited transaction rules that produces absurd or illogical outcomes, to ensure that ERISA is not interpreted to presumptively bar

plans from entering into contracts for necessary services, even where the contracts are the result of arm's-length negotiation.

D. The Panel's Interpretation of ERISA's Text Did Not Consider the Entirety of § 406.

The panel began its examination of Plaintiff's prohibited transaction claim by identifying the following portions of the statute:

> Under § 406(a)(1)(C), a fiduciary "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). A "party in interest" includes "a person providing services to such plan." *Id.* § 1002(14)(B). Thus, the threshold question is whether AT&T . . . "cause[d] the plan to engage in a transaction" that constituted a "furnishing of goods, services, or facilities between the plan and a party in interest." *Id.* § 1106(a)(1)(C).

See Bugielski, 2023 WL 4986499, at *4. The panel's framing of the "threshold question" is problematic for two primary reasons.

First, the panel's literal reading of those provisions ignores a circular effect that has been repeatedly identified and rejected by other courts.[13] Section 406(a)(1)(C), as the Court identified, prohibits fiduciaries from engaging in transactions that constitute the "furnishing of goods, services, or facilities between the plan and a *party in interest*." *See* 29 U.S.C. § 1106(a)(1)(C) (emphasis added).

[13] *See, e.g., Cunningham v. Cornell Univ.*, Case No. 16-cv-6525, 2017 WL 4358769 at *10 (S.D.N.Y. Sept. 29, 2017); *Sweda v. University of Penn.*, Case No. 16-4329, 2017 WL 4179752 at *11 (E.D. Penn. Sept. 21, 2017); *Sacerdote v. New York Univ.*, Case No. 16-cv-6284, 2017 WL 3701482 at 13–14 (S.D. N.Y. Aug. 25, 2017); *see also Patrico v. Voya Fin., Inc.*, Case No. 16-cv-7070, 2018 WL 1319028 at *6-7 (S.D.N.Y. Mar. 13, 2018).

ERISA, in turn, defines a "party in interest" as "a person providing services to such plan." *Id.* Reading those provisions together, then, § 406(a)(1)(C) prohibits the "furnishing of . . . services . . . between the plan and [a person providing services to such plan]." The language is obviously circular. *See Sacerdote*, 2017 WL 3701482 at 13 ("[I]t is circular to suggest that an entity which becomes a party in interest by providing services to the Plans has engaged in a prohibited transaction simply because the Plans have paid for those services."). "[I]t would be nonsensical to let a party state a claim for a prohibited transaction in violation of ERISA merely by alleging a plan paid a person for a service. That would be just the sort of litigation . . . that Congress worried would discourage employers from offering ERISA plans." *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *10 (N.D. Ill. May 25, 2018), *vacated and remanded sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022), *and aff'd in part, rev'd in part and remanded sub nom. Hughes v. Nw. Univ.*, 63 F.4th 615 (7th Cir. 2023).

Second, in identifying the relevant statutory provisions, the panel omitted from its analysis the first words of § 406(a): "Except as provided in section 1108 of this title." *See* 29 U.S.C. § 1106(a). Section 1108(b) says, in turn, the "prohibitions . . . in section 1106 . . . shall not apply" to "[c]ontracting . . . for . . . 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).

As the district court proposed in *Divane*, "[t]he solution . . . to eliminating nonsensical claims [under a circular reading of § 406(a)] is to require a party asserting such a claim to allege that the exception does not apply." *See* 2018 WL 2388118 at *10. That is, while courts (including this one) have generally interpreted § 408's exemptions as affirmative defenses, a plain reading of § 406(a)—taking into account its "except as provided" language—actually suggests that the absence of an exemption is an essential element of the claim itself, such that a plaintiff can only plausibly allege a prohibited transaction under § 406(a) if they *first* plausibly allege that no exemption applies.

Notably, the exclusionary language in § 406(a) does not appear anywhere else in § 406, further supporting that Congress intended that routine engagements that met § 408 criteria would be screened out *before* analyzing whether a transaction was prohibited. One of the "most basic" canons of statutory interpretation is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *See Corley v. United States*, 556 U.S. 303, 314 (2009). Section 406(a) should not be construed in a way that ascribes no meaning to its exclusionary language.

Adopting a reading of § 406(a) that construes § 408 not as an affirmative defense but as an essential element of the claim fixes the circular reading of

§ 406(a) that would render routine service provider agreements presumptively unlawful. It also aligns with the panel's suggestion that "Congress has already set the balance" as to pleading on prohibited transaction claims, as it involves interpretation of the existing statutory language, not modification of it.

Finally, as applied to this case, it more logically aligns a plaintiff's pleading burden on a prohibited transaction claim to what precedent would require for a prudence claim based on allegations of excessive fees. Requiring plausible allegations that the § 408(b) exemptions do not apply would require a plaintiff to plead more than the mere fact that a contract with a service provider existed to state a prohibited transaction claim. In short, it would require that plaintiff plead allegations making plausible the assertion that the party-in-interest received more than reasonable compensation.

In *Divane*, the district court conceded it was "not at liberty" to apply the statute according to its plain reading, because it was constrained by Seventh Circuit precedent that § 408 is an affirmative defense. *See* 2018 WL 2388118 at *10. In an *en banc* proceeding, this Court would not be so constrained.

The Court should grant the petition for rehearing *en banc*, so it can consider the full context of the statutory provisions examined by the panel. This step is necessary to avoid a circular reading of the statute that would expose functionally

every defined contribution plan to the prospect of discovery on prohibited transaction claims related to routine service provider arrangements.

III. CONCLUSION

For all the foregoing reasons, this Court should grant Appellees' petition for panel rehearing or rehearing *en banc*.

RESPECTFULLY SUBMITTED this 11th day of September, 2023.

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Date: September 11, 2023

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I hereby certify that on September 11, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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