No. 23-1007

IN THE

Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,
Petitioners,

v.

CORNELL UNIVERSITY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Second Circuit

BRIEF OF AMERICAN COUNCIL ON EDUCATION AND 13 OTHER HIGHER EDUCATION ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are the American Council on Education and 13 other organizations that represent the higher education community in the United States. Amici represent independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. For decades, *amici* have supported the educational missions and goals advanced by their member institutions. Many of *amici*'s members offer retirement plans governed by ERISA, giving *amici* a particularized interest in this case generally and in the standard for pleading a violation specifically.

The **American Council on Education (ACE)** is a membership organization that leads higher education with a united vision for the future, galvanizing its members to make change and collaborating across the sector to design solutions for today's challenges, serve the needs of a diverse student population, and shape effective public policy. As the major coordinating body for the nation's colleges and universities, its strength lies in its diverse membership of more than 1,600 colleges and universities, related associations, and other organizations in America and abroad. ACE is the only major higher education association to represent all types of U.S. accredited, degree-granting colleges and universities.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The **American Dental Education Association (ADEA)** is The Voice of Dental Education. Its mission is to lead and support the health professions community in preparing future-ready oral health professionals. ADEA's members include all 79 U.S. and Canadian dental schools, more than 800 allied and advanced dental education programs, more than 50 corporations and approximately 15,000 individuals. Its activities encompass a wide range of research, advocacy, faculty development, meetings and communications.

APPA (formerly the Association of Physical Plant Administrators) recognizes that the quality of academic programming is directly related to the quality of the educational facility, and enables educational institutions to share, elevate, and transform the learning environment. APPA provides training and professional development, performance measurement, and evaluation tools, standards, best practices, research, credentialing, and thought leadership to more than 17,000 educational facilities professionals from more than 1,200 learning institutions.

The **Association of American Universities (AAU)** was founded in 1900 and is composed of America's leading research universities. AAU's member universities earn the majority of competitively awarded federal funding for research that improves public health, seeks to address national challenges, and contributes significantly to our economic strength, while educating and training tomorrow's visionary leaders and innovators. Its members include 69 public and private research universities in the United States.

The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The **Association of Jesuit Colleges and Universities (AJCU)** represents all 27 Jesuit institutions in the U.S. (and one in Belize) and is affiliated with over 180 Jesuit institutions worldwide.

Career Education Colleges and Universities (CECU) is the national association representing private, postsecondary career schools. With more than 800 member campuses across America, CECU's member schools train students in fields such as nursing and allied health professions, truck driving and the skilled trades, and service industries like cosmetology and the culinary arts. CECU member schools offer everything from certificates and associate degrees, all the way up to doctorates in nursing and other fields.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 34,000 human resources professionals at more than 1,800 colleges and universities. Its membership includes 89 percent of all United States doctoral institutions, 70 percent of all master's institutions, 49 percent of all bachelor's institutions, and over 520 two-year and specialized institutions.

The **Council for Christian Colleges & Universities (CCCU)** is a higher education association of more than 185 institutions around the world, including

more than 140 in the United States. Together, they enroll approximately 605,000 students annually and comprise a vibrant network of more than 10 million alumni. As the leading voice of Christian higher education, the CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU schools contribute to the common good by graduating students who are equipped with wisdom, critical thinking, and a desire to love and serve their communities.

The **Council of Independent Colleges (CIC)** is the national organization for small and mid-sized independent colleges and universities, serving more than 650 private, nonprofit institutions and more than 75 higher education organizations with programs and services to support leadership, advance excellence, and enhance public understanding of independent higher education.

NASPA: Student Affairs Administrators in Higher Education (NASPA) is the leading voice of student affairs, driving innovation and evidence-based, student-centered practice throughout higher education, nationally and globally.

The **National Association of College and University Business Officers (NACUBO)**, founded in 1962, is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities across the country. NACUBO works to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions.

The **National Association of Independent Colleges and Universities (NAICU)** serves as the

unified national voice of private, non-profit higher education in the United States. With more than 5 million students attending 1,700 independent colleges and universities in all 50 states, the private sector of American higher education has a dramatic impact on our nation's larger public interests.

University Risk Management and Insurance Association (URMIA) promotes the advancement and application of effective risk management principles and practices in institutions of higher education.

Amici submit this brief to share their perspective on the question presented, which is based on their members' firsthand experience operating retirement plans and defending against ERISA litigation. *Amici* urge the Court to affirm the judgment of the Second Circuit.

SUMMARY OF ARGUMENT

For over a century, colleges and universities have helped their employees build retirement security for the next phase of their lives. In 1974, Congress enacted ERISA and applied that landmark regulatory scheme to the 403(b) retirement plans offered by private universities, which also expanded the scope of investment options that universities could offer their employees. In the "careful balancing" that produced ERISA, Congress consciously imposed additional administrative costs and complex regulatory requirements onto higher educational institutions but reduced the potential range of legal "liabilities" those institutions could face. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010).

Petitioners urge the Court to adopt a pleading standard that would do away with Congress's "careful

balancing" and instead transform universities into perpetual targets of ERISA litigation. According to petitioners, a plaintiff must be permitted to turn any college or university, as well as the individuals involved in administering the plan, into defendants in a lawsuit due to nothing more than offering an ERISA-covered retirement plan and engaging in the routine and unavoidable practice of contracting with third-party service providers for that plan. Moreover, according to petitioners, these defendants cannot defeat meritless cases until summary judgment, even if there is absolutely no allegation the defendants did anything improper.

This expanded litigation threat would be near-limitless, because *every* college and university relies on third-party service providers to meet ERISA's complex regulatory requirements. And because the contract's mere existence would be enough to force these defendants to proceed through expensive discovery, it risks opening the floodgates to burdensome and largely meritless challenges—thus draining university resources that would otherwise go towards educating students and advancing research.

The burden of such suits would fall on not only the institutions, but also on faculty and staff who have agreed to serve on plan committees as fiduciaries—a common practice among higher education institutions. ERISA permits each individual fiduciary to be personally named in a suit—and plaintiffs often do so. Once past the motion to dismiss phase, such litigation can stretch for years, increasing the burden on past committee members and making it more difficult to recruit future committee members.

Further, if the expanded litigation risks of petitioners' proposed approach become reality, plan participants and beneficiaries themselves are likely to pay the price—directly in the form of less efficient inhouse services, or indirectly as universities move away from the diverse retirement investment options and high-touch services that their plan participants prefer.

Finally, petitioners try to distract from the unworkability of their view for defendants by alleging that the Second Circuit's pleading standard is too burdensome for plaintiffs. But the theoretical problems they highlight disappear in practice—it is the plaintiff's own theory of why a specific transaction is forbidden that defines what facts they must plead. The Second Circuit's standard both allows potentially meritorious claims to proceed, while protecting colleges and universities, their employees, and their plan participants from the undue harm of meritless litigation.

ARGUMENT

I. ACCEPTING PETITIONERS' VIEW WOULD HARM COLLEGES AND UNIVERSITIES, THEIR FACULTY, AND THEIR PLAN PARTICIPANTS.

A. Colleges and universities regularly use and depend on service providers in connection with their ERISA 403(b) retirement plans.

When an employer chooses to offer employees a retirement plan under ERISA, it is not a simple matter. The ERISA statutory and regulatory regime is infamous for its complexity. The plan sponsors (*i.e.*, the employers) are required to make important

investment decisions in the best interests of their participants; follow complex regulatory accounting procedures; comply with detailed recordkeeping requirements; complete and file an Annual Returns/Reports of Employee Benefit Plan (Form 5500) with three federal agencies; and conduct periodic auditing of their plan.[2] In all of these activities, ERISA subjects the sponsors—who act as the plan's fiduciaries—to enhanced duties of loyalty and prudence. 29 U.S.C. § 1104(a)(1)(B).

Because of this complexity, ERISA plans regularly contract with one or more third-party service providers. Indeed, *amici* are unaware of any college or university ERISA plan that does not have at least one such contract. These plans select from a robust market for service providers offering a spectrum of services—including investment management, recordkeeping, accounting, and auditing. These service provider markets have grown up because it is simply infeasible for employers to build all required service capabilities in-house. So long as the plan uses these third-party providers for services that are "necessary" and compensation is "reasonable," § 1108(b)(2)(A), ERISA authorizes this delegation.

Even more than most employers, institutions of higher education are particularly dependent on third-party services, given the additional administrative and contractual complexity of Section 403(b) plans.[3]

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[2] Internal Revenue Service, *A plan sponsor's responsibilities*, https://perma.cc/5LC3-FRW6.

[3] U.S. Dep't of Labor, Adv. Council on Empl. Welfare & Pension Benefit Plans, *Current Challenges and Best Practices for ERISA Compliance for 403(b) Plan Sponsors* 17, 20, 22 (2011), https://perma.cc/6RLF-YK3R.

Take, for example, annuities and ERISA recordkeeping requirements, the subject of petitioners' remaining claim before the Court. Annuities have been at the core of university retirement offerings since the early twentieth century, as their easy transferability supports the "free interchange of professors" that is so critical to the vibrancy of academic life across campuses.[4] Even after 403(b) plans were brought under ERISA's regulatory umbrella, annuities have remained very popular with college and university plan participants. As of 2019, over 80% of large 403(b) retirement plans offered annuities as investment options, a number that may be even higher in the university context.[5] This share dwarfs the only 12% of corporate 401(k) plans that offer annuities.[6]

Recordkeeping for annuity offerings, however, is inherently more complex than for investment products like mutual funds. Annuities are a form of insurance, and tracking their value requires keeping track of deposit amounts, dates, and the terms of the annuity's future returns at that given point—all information that might be stored in nonstandard ways across

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[4] William C. Greenough, COLLEGE RETIREMENT AND INSURANCE PLANS 9 (1948). *See also* Teachers Insurance and Annuity Association (TIAA), *Our story,* https://perma.cc/E6U7-UCZ2 (describing TIAA's founding in 1918 by the Carnegie Foundation to provide financial security for university faculty, which provided annuities).

[5] BrightScope and Investment Company Institute, *BrightScope /ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans, 2019* 2 (April 2023), https://perma.cc/5NV5-S64R.

[6] Deloitte, *Defined Contribution Benchmarking Survey Report* 16 (2019) (Deloitte 401(k) Survey), https://perma.cc/5HAN-2CR7.

offerings, making recordkeeping consolidation difficult.[7] Even petitioners' complaint below takes for granted that Cornell University's provision of annuities in its 403(b) plan will require the plan sponsor to "hir[e] administrative service providers for the plan, such as a recordkeeper," JA 17 (¶34), rather than attempting to bring the services in-house.

Moreover, having service providers perform these functions *benefits* participants. Because the market for service providers is highly competitive, colleges and universities can access best-in-class services at lower price points than if schools took on the task themselves. Indeed, petitioners' complaint states that that "[t]here are numerous recordkeepers in the marketplace" for recordkeeping, that these third parties provide "a high level of service," and that they "will vigorously compete to win a recordkeeping contract." JA 19 (¶39). Contracting in this efficient market works to participants' direct benefit.

B. Adopting petitioners' view would spur more litigation against university retirement plans.

Colleges and universities have become a favorite target of ERISA litigation in the past decade. As one plaintiffs' lawyer explained, there was a "realiz[ation] there's a whole additional universe of plans that may have gotten less attention" and now was the time to

[7] U.S. Dep't of Labor, Adv. Council on Empl. Welfare & Pension Benefit Plans, *Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers* 8, 14-15, 18 (2018), https://perma.cc/C5G3-74YQ.

sue.[8] Indeed, this is the second time in four years that this Court has considered an ERISA case involving a challenge to a university 403(b) plan that arose in this litigation wave.

These lawsuits have proven burdensome and expensive, yet no court has found a university plan liable. Many claims against colleges and universities have failed at the motion-to-dismiss phase, and even amongst those that proceeded, not one case has ultimately succeeded on the merits. But even when the ERISA claims are meritless, universities are forced to expend significant time and resources defending themselves, with every dollar spent on litigation diverted from education, research, and student support.

If the Court accepts petitioners' view, it would throw open the floodgates and give every case a clear route to burdensome discovery. According to petitioners, the mere *existence* of any contract between a 403(b) plan and a third-party service provider—of the sort that *every* university's 403(b) plan has—would be enough to survive a motion to dismiss. Petitioners try to obscure how little their pleading standard requires by describing it as containing three parts. Pet. Br. 41. But pointing to just one third-party contract for services satisfies all three elements of petitioners' so-called standard: The existence of a contract "allege[s] a transaction"; it "identif[ies] a party in interest" because it names the third-party provider; and it "show[s] how that transaction constituted a furnishing of goods, *services*, or facilities between the plan

[8] Mark Hablett, *Why College 403(b) Plans Are Such a Juicy Target for Lawsuits*, ALM ThinkAdvisor, Aug. 31, 2016, https://perma.cc/GXB8-S5YB.

and that party in interest." *Id.* (emphasis added) (internal quotation marks omitted).

Note what is *not* required in this "[t]hreadbare recital." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Under petitioners' standard, a plaintiff need not plead even basic factual content suggesting something is improper about the service contract. The university is afforded no notice of what the plaintiff's theory of wrongdoing even is. Still, petitioners argue that "[o]nce those boxes are checked," the complaint must be permitted to proceed to discovery, Pet. Br. 41—the stage of litigation where "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007).

Indeed, colleges and universities *must* be conscious of the costs of litigation. Private institutions of higher education fund operations from sundry revenue sources, including significant taxpayer funding through research grants, student aid, and other federal and state initiatives. These resources are allocated to advance education, research, and innovation. To be good stewards of this investment, colleges and universities have an obligation to minimize the funding frittered away by defending against meritless litigation. Yet petitioners' view leaves universities with no meaningful ability to protect themselves from ERISA litigation, in an impossible lose-lose position. Use of a third-party service provider places the university at risk of being dragged into discovery based on prohibited transactions claims—no matter how diligent the university in its contracting, and no matter how essential or ordinary the contract. But if a university seeks to bring some services in-house to at

least reduce their exposure to prohibited transactions claims, they increase their vulnerability to suits for breaching their duty of prudence, which requires plan sponsors to choose the most cost-effective service providers and to act in the best interests of their beneficiaries. *See, e.g.,* J.A. 143 (¶222) (complaint alleging that the "fiduciaries have breached their duty of prudence" by their "failure to solicit bids" from additional third-party recordkeeping service providers).

Petitioners advocate for a standard that makes zero attempt to "divide the plausible sheep from the meritless goats" of ERISA litigation. *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014). Accepting such a view is sure to multiply the current wave of litigation against universities. All plan participants could sue their university 403(b) plan sponsor over a third-party service contract—even if there is no sponsor misconduct to be corrected or improved outcomes to be had. Plaintiffs would have a guaranteed pathway to discovery in every single case.

That is often the ballgame: Given the risk aversion of private universities that offer ERISA-compliant 403(b) plans, "universities face enormous pressure to settle claims that survive an early dismissal attempt," because "ERISA class actions are high-stakes, expensive litigation matters."[9] And petitioners offer nothing to suggest that this new wave of litigation would include more meritorious litigation than the first one. Given the ubiquity of third-party service contracts, the mere existence of one cannot—standing alone—create more than the "sheer possibility that a

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[9] Ivan Resendiz Gutierrez, *Recent wave of 403(b) litigation offers insight for educational institutions and fiduciaries*, 20 Campus Legal Advisor 1, 2 (2020), https://doi.org/10.1002/cala.40231.

defendant has acted unlawfully" that *Iqbal* requires. 556 U.S. at 678. If anything, the guaranteed path to discovery creates incentives for unscrupulous actors, rather than sponsor wrongdoing or poor plan participant outcomes.

C. Because plan fiduciaries face personal liability and are personally named as defendants, petitioners' view will also impede finding members who agree to serve on plan committees.

In the university context, the burden of ERISA litigation falls on not just a faceless institution, but directly on the faculty and staff members who agree to serve on plan investment and oversight committees.

Under ERISA, any individual that exercises discretionary authority or discretionary control in a plan becomes a fiduciary. 29 U.S.C. §1002(21)(A)(i)-(ii). In the university setting, this discretion is usually not concentrated in one person, but is vested in a committee—making every single member a fiduciary. These committees are comprised of individuals who are *themselves* plan participants and agree to represent their campus cohort—be it professors, faculty members, administrators, or staff—to ensure that the plans remain focused on the evolving needs of all participants.[10] For most of these members, the position

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[10] *See, e.g.,* John Hopkins University, *JHU conducting a review of its 403(b) retirement plans*, (Jan. 13, 2020), https://perma.cc/9KK8-HTEU, (Retirement Plans Investment Committee is "made up of administrators, staff, and faculty"); Lebanon Valley College, *403(b) Oversight Committee*, https://perma.cc/QTH7-Z52S (403(b) Oversight Committee "strives to make certain that all areas of campus personnel are

is not part of their job description, but is layered on top of their existing workload.

Still, under ERISA, every committee member is a fiduciary, and as such, may be individually named as a codefendant in a class action suit. 29 U.S.C. § 1105. It does not matter that the position is purely voluntary—for example, a faculty member having agreed to serve—or if the individual member had little role in the challenged decision. The individual still faces personal liability in cases where the settlements are regularly in the tens of millions.[11]

The harms of being personally named in these cases are not swept away because employers can and do indemnify their employees against this type of litigation. "Even though indemnification agreements exist for these individual members, as long as they are party to the suit they will be required to disclose this litigation in personal financial transactions." *Sweda* v. *Univ. of Pennsylvania*, 923 F.3d 320, 341 (3d Cir. 2019) (Roth, J., dissenting in part). Nor does indemnity do anything to mitigate the embarrassment or

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represented," with two faculty members, one representative each from finance, administration, and human resources, one staff member, and one Board member); Georgetown University, *Announcing the Georgetown University 403(b) Plan Investment Advisory Committee*, https://perma.cc/RZ35-37WT (Advisory Committee includes two professors and two members of the executive team).

[11] *See, e.g.,* Robert Steyer, *Columbia University to pay $13 million to settle ERISA claims*, Pensions & Inv., May 25, 2021, https://www.pionline.com/courts/columbia-university-pay-13-million-settle-erisa-claims; Jeff Mamorsky, *$13 Million Settlement By USC Shows That ERISA Litigation Continues to Be Costly-Good Governance Helps*, Cohen & Buckmann, LLC. (Aug. 10, 2023), https://perma.cc/7AKT-H4W5.

shame that accompanies the public accusation of misusing and squandering the retirement accounts of one's colleagues. Further, the toll of petitioners' fast track to discovery would have to take into account not just the extraordinary cost of discovery, but the cost of its forced diversion of committee members' time and attention. *See Iqbal*, 556 U.S. at 685 (explaining that litigation "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources").

These concerns underscore another important consequence of accepting petitioners' view: It would make it harder for universities to recruit qualified committee members, thereby undermining basic principles of good governance. Indeed, petitioners' view puts not just every university 403(b) plan, but every single university staff member that has served on a plan committee, at risk of being personally named in lawsuit that could stretch on for years as it proceeds to summary judgment.

The risk of being named in prohibited transaction litigation is not hypothetical. Rather, as this case exemplifies, it is an attractive strategy for plaintiffs to name as many individual faculty and staff as possible in an ERISA lawsuit targeting a higher education institution's plan; doing so is helpful leverage in pursuing a settlement. While in the district court, petitioners received minutes from six years of Cornell's Plan Oversight Committee meetings, which contained the names of twenty-nine employees who had served on the committee at some point. Mot. at 1, *Cunningham* v. *Cornell Univ.*, No. 1:16-cv-06525, Doc. 117 (S.D.N.Y. Jan. 3, 2018). Petitioners moved to amend the complaint to add *all* twenty-nine as codefendants. *Id.* The new complaint did not offer any factual

pleadings that tied a single new codefendant to any specific allegation of wrongdoing; their only link to the complaint was their service on the committee. Second Am. Compl. at 13-15 (¶¶ 28-55), *Cunningham* v. *Cornell Univ.*, No. 1:16-cv-06525, Doc. 121-1 (S.D.N.Y. Jan. 18, 2018).

The district court granted permission to file a motion to amend, but required petitioners make a showing that there was "meaningful relief that could not be obtained without naming these individuals." Mem. and Order at 1, *Cunningham* v. *Cornell Univ.*, No. 1:16-cv-06525, Doc. 122 (S.D.N.Y. Jan. 19, 2018). Indeed, the court questioned whether petitioners' motivation had anything to do with the availability of relief, or whether they sought to add the additional defendants because "(a) they think they can and (b) the assertion of multi-million dollar claims against these individuals who served on a committee at their employer's request has the tremendous power to harass these individuals because they will be required to list the lawsuit on every auto, mortgage or student financial aid application they file." *Id.*

The district court was right to express concern over petitioners' desire to name—and disrupt the lives of—twenty-nine individual employees. But a different judge might not have had such solicitude. And nothing in the statute stops plaintiffs from naming all fiduciaries in their suit, even if harassment is part of their objective—ERISA imposes fiduciary duties and corresponding personal liability broadly. Indeed, many courts permit plaintiffs to name numerous individuals as codefendants, just as petitioners sought to do below. *See, e.g., Cates* v. *Trustees of Columbia Univ. in City of New York*, 330 F.R.D. 369 (S.D.N.Y.

2019) (codefendants included six named individuals who had held the role of Columbia's Vice President for Human Resources; prohibited transaction claim failed on pleadings); *Tracey* v. *Mass. Inst. of Tech.,* No. 16-11620, 2018 WL 5114167 (D. Mass. Oct. 19, 2018) (codefendants included ten named members of the investment committee; prohibited transactions claims failed at summary judgment and on pleadings); *Cassell* v. *Vanderbilt Univ.*, 285 F. Supp. 3d 1056 (M.D. Tenn. 2018) (codefendants included seven named members of the investment committee; prohibited transactions claims failed on pleadings or settled).

The more widespread these prohibited transaction litigation efforts become, the higher the risk to committee members—and the more difficult it will become for colleges and universities to find staff willing to serve.

D. Increased litigation would harm participants and beneficiaries.

Accepting petitioners' view and massively expanding the litigation risk associated with third-party service contracts would push universities to take steps to minimize that risk—and the plan participants and beneficiaries that petitioners formally represent would bear some of the heaviest costs. Most obviously, universities could attempt to bring services like "recordkeeping, investment management, or investment advising" in-house—a move that "in all likelihood would result in lower returns for employees and higher costs for plan administration." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 586 (7th Cir. 2022), *reh'g denied*, No. 21-2789, 2022 WL 4372363 (7th Cir. Sept. 21, 2022). Even if universities only bring some services in-house, or the costs are only slightly higher,

those differences will be magnified over the course of a career to put plan participants in an objectively worse position. Petitioners themselves alleged that "a 1% difference in fees over the course of a 35-year career" can result in "a difference of 28% in savings at retirement." JA 17 (¶ 35).

More foundationally, petitioners' rule will make it more difficult for universities to provide the very type of retirement plans that have proved extremely popular amongst their employees for decades: a wide range of investment options, supported by high-touch advisory and financial planning services. Unlike the 401(k) plans offered by the private sector, "it's not uncommon for a 403(b) plan to offer dozens, if not hundreds, of investment options."[12] In *amici*'s experience, the more sophisticated 403(b) plan offerings are an influential retention tool for leading scholars and researchers. When they choose academia over industry, the benefits flow to the public—including both today's scientific, medical, and technological advances that emerge from their research, as well as the greater breakthroughs that will emerge from their students' research tomorrow. Conversely, should petitioners' standard force universities to abandon robust 403(b) offerings and hamper faculty retention, the harm will also spill over and impact the public interest.

Further, the consequences of ruling for petitioners would likely include cuts to advisory and financial services that participants dearly want. Such high-touch services are standard—and expected—in the

[12] Anne Tergesen, *Why Some 403(b) Plans Have So Many Investment Options*, The Wall Street Journal, Aug. 19, 2016, https://www.wsj.com/articles/why-some-403-b-plans-have-so-many-investment-options-1471647881.

university context. Just look to the Statement of Principles on Academic Retirement and Insurance Plans, which is authored and periodically updated by two bodies representing higher education institutes.[13] Institutions of higher education are expected to offer their plan participants "as *a matter of course* * * * a program of pre-retirement counseling," including "[a]t the time of initial appointment and *periodically thereafter*."[14] These services are not required by ERISA, meaning that no matter how much faculty and staff value these services—which, in *amici*'s experience, is highly—these are perhaps the first service provider contracts that universities will eliminate to reduce their litigation risk. Instead, universities may join the ranks of employers offering 401(k) plans without such services, with their most common reason being to reduce "[p]otential fiduciary liability."[15]

Worse, the increased litigation risk under petitioners' rule could push some universities to stop providing an ERISA retirement plan altogether. ERISA's "careful balancing" seeks to "induce[] employers to offer benefits by assuring a predictable set of liabilities." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted). But if "predictable" means a constant, undeterrable threat of litigation from routine use of service providers, for some colleges and universities—particularly smaller private universities and those already operating on narrow margins—it may simply

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[13] American Association of University Professors and the Association of American Colleges, *Statement of Principles on Academic Retirement and Insurance Plans*, https://perma.cc/4246-XJKZ.

[14] *Id.* (emphasis added).

[15] Deloitte 401(k) Survey, *supra* note 6, at 19.

prove too much to continue offering an ERISA plan. Neither the individual employees who are denied the opportunity to build retirement security, nor the general public interest, would be served by this predictable consequence of accepting petitioners' view.

II. THE SECOND CIRCUIT'S APPROACH IS ADMINISTRABLE AND ALLOWS POTENTIALLY MERITORIOUS CLAIMS TO PROCEED WHILE PROTECTING AGAINST PERPETUAL, MERITLESS LITIGATION.

ERISA § 1106(a) only "seeks to prohibit transactions that involve uses of plan assets that are *potentially harmful* to the plan." *Cunningham* v. *Cornell Univ.*, 86 F.4th 961, 976 (2d Cir. 2023) (emphasis added) (internal quotation marks omitted). Fittingly, then, the pleading standard articulated by the Second Circuit requires plaintiffs to allege more than the mere existence of a third-party contract—they must give some reason why that transaction was potentially harmful to the plan, is not covered by a relevant § 1108(b) exemption, and is thus prohibited by ERISA.

Contrary to petitioners' characterization, this standard is not at all difficult to meet for a plaintiff with a real claim. In practice, the plaintiffs' theory of legal wrongdoing itself makes obvious which exemptions in § 1108(b) could be applicable. If a plaintiff is making a prohibited transaction claim, for example, their theory of legal wrongdoing must include why the transaction fell outside of the § 1108(b)(2)(A) exemption—either that the services were unnecessary or the fees were unreasonable. The Second Circuit standard simply asks the plaintiffs to plead the facts supporting *their own theory* of wrongdoing—facts that should be what led them to sue in the first place.

Plaintiffs, as the masters of their complaint, are also the masters of relevant exemptions. Even the cases petitioners cite to show the supposed difficulty of anticipating relevant § 1108(b) exemptions in fact prove the opposite: in the real world, the plaintiffs' complaint makes perfectly clear what exemptions are in play. Pet. Br. 42. In *McLaughlin* v. *Rowley*, for example, one of the plaintiffs' prohibited transactions claims concerned the loans made from the plan to participants. 698 F. Supp. 1333, 1339-40 (N.D. Tex. 1988). It is hardly a high bar to ask plaintiffs to "correctly predict," Pet. Br. 42, that defendants would argue that their loans fall into the § 1108(b)(1) exemption specifically for such loans—for plaintiffs' theory of legal wrongdoing to be plausible, plaintiffs had to know some reason why that exemption didn't apply. *McLaughlin*, 698 F. Supp at 1339.

Petitioners are simply wrong to argue that overcoming the Second Circuit's standard would require plaintiffs to "marshal and plead evidence to negate every conceivable exemption." Pet. Br. 42. That allegation is not even accurate in their case. A successful pleading against respondents would not require petitioners to "negate an exemption under [§ 1108](b)(1) (for loans)," *id.* at 43—because nothing in petitioners' complaint concerns any transactions that are "loans made by the plan to parties in interest who are participants or beneficiaries of the plan." 29 U.S.C. § 1108(b)(1). Equally unfounded are petitioners' allegations that plaintiffs would have to negate "[§ 1108](b)(3) (for stock ownership plans); [§ 1108] (b)(15) (for block trades); and [§ 1108] (b)(17) (for investment advice)," Pet. Br. 43—nothing in those § 1108(b) exemptions could offer relief for Cornell, because petitioners' theory of Cornell's legal wrongdoing did not concern a

"loan to an employee stock ownership plan," § 1108(b)(3), nor a "block trade" "involving the purchase or sale of securities" § 1108(b)(15)(A), nor a challenge to a transaction that "renders investment advice," § 1108(b)(17)(A). Indeed, the only case where explaining the inapplicability of relevant § 1108(b) exemptions would require facts "outside a plaintiff's knowledge," Pet. Br. 43, are cases where the plaintiffs lacks a specific theory of legal wrongdoing, or the factual allegations to make that theory plausible in the first place.

In reality, it is petitioners' standard that is deeply unworkable and unduly harmful to the colleges and universities represented by *amici*. If the Court accepts it, every university that offers an ERISA-covered 403(b) plan would be at risk, at all times, of being sued by a plan participant because of their routine third-party service contracts. Each suit could advance to costly and burdensome discovery, pushing universities "to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559. And all university faculty and staff that agree to serve on plan oversight committees would be threatened with personal liability. The Court should reject it.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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JANUARY 2025